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FILED ENTERED
LODGED RECEIVED

MAY 28 1997

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
ON BEHALF OF THE NATIONAL OCEANIC)
AND ATMOSPHERIC ADMINISTRATION)
AND THE UNITED STATES DEPARTMENT OF)
THE INTERIOR; STATE OF WASHINGTON)
THROUGH THE WASHINGTON DEPARTMENT)
OF ECOLOGY; PUYALLUP TRIBE OF)
INDIANS; AND MUCKLESHOOT INDIAN)
TRIBE,)

Plaintiffs,)

v.)

The City of Tacoma, and)
The Tacoma Public Utility)

Defendants.)

Civil No.

NOTICE OF LODGING
OF CONSENT DECREE

C97-5336

KJB

Pursuant to 28 C.F.R. § 50.7, the United States is lodging a Consent Decree with this Court that has been agreed to and signed by the parties to this action. The Consent Decree is being lodged simultaneously with the filing of the Complaint in this action, and the Consent Decree settles all of the claims alleged in the Complaint.

Notice of lodging of the Consent Decree will be published in the Federal Register. During the pendency of the 30-day public

1 comment period required under 28 C.F.R. § 50.7 for Consent Decrees,
2 no action is required of this Court. After the expiration of the
3 public comment period and evaluation of the comments received, the
4 Court will be advised whether the Consent Decree may be entered or
5 whether further action may be required.

6
7 Respectfully Submitted,

8 UNITED STATES OF AMERICA:

9
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12 U.S. Department of Justice
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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)
ON BEHALF OF THE NATIONAL OCEANIC)
AND ATMOSPHERIC ADMINISTRATION AND)
THE UNITED STATES DEPARTMENT OF THE)
INTERIOR; STATE OF WASHINGTON THROUGH)
THE WASHINGTON DEPARTMENT OF)
ECOLOGY; PUYALLUP TRIBE OF INDIANS; and)
MUCKLESHOOT INDIAN TRIBE)
)
Plaintiffs,)
)
v.)
)
CITY OF TACOMA AND)
THE TACOMA PUBLIC UTILITY)
)
Defendants.)

C97-5336

RJB

CIVIL NO.
COMPLAINT

The United States of America, by authority of the Attorney General through her undersigned attorneys, and at the request and on behalf of the National Oceanic and Atmospheric Administration ("NOAA") and the United States Department of the Interior ("DOI"); the State of Washington through the Washington

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1 Department of Ecology; the Puyallup Tribe of Indians; and the
2 Muckleshoot Indian Tribe assert claims arising under the
3 Comprehensive Environmental Response, Compensation, and Liability
4 Act of 1980 ("CERCLA"), as amended by the Superfund Amendments
5 and Reauthorization Act of 1986, 42 U.S.C. §§ 9601 et seq., and
6 the State of Washington through the Washington Department of
7 Ecology separately asserts claims under the Washington Model
8 Toxics Control Act (MTCA), Rev. Code Wash. 70.105D. Accordingly,
9 the Plaintiffs allege that:

10 NATURE OF ACTION

11 1. Plaintiffs bring this action seeking recovery of damages
12 for injury to, destruction of, or loss of natural resources at
13 and within the Commencement Bay Environment resulting from
14 releases of hazardous substances for which the Defendants are
15 responsible. Plaintiffs seek recovery of restoration costs and
16 other damages for injury to natural resources in the Commencement
17 Bay Environment for which the United States, State of Washington,
18 Puyallup Tribe of Indians and Muckleshoot Indian Tribe are co-
19 trustees, resulting from releases of hazardous substances into
20 the Commencement Bay Environment; and the costs of assessing
21 injury to, destruction of, or loss of natural resources resulting
22 from such releases.

23 JURISDICTION AND VENUE

24 2. This Court has jurisdiction over this matter pursuant
25 to Sections 107 and 113(b) of CERCLA, 42 U.S.C.

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1 §§ 9607 and 9613(b); and 28 U.S.C. §§ 1331, 1345, and 1362.

2
3 3. Venue is proper in this district pursuant to Section
4 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b).

5 DEFENDANTS

6 4. The City of Tacoma is a city of the first class of the
7 State of Washington of the same name, organized and doing
8 business pursuant to the authority granted by the Constitution
9 and Laws of the State of Washington, and the Charter of the City
10 of Tacoma. The City of Tacoma includes all departments of its
11 General Government, and the rate based storm and sewer utility
12 divisions of the Public Works Department, its officers,
13 directors, managers, employees, agents, representatives and
14 contractors.

15 5. Tacoma Public Utility ("T.P.U.") is the department of
16 Public Utilities of the City of Tacoma, including its several
17 divisions, its officers, directors, managers, employees, agents,
18 representatives and contractors.

19 PLAINTIFFS

20 6. Pursuant to 40 C.F.R. § 300.600, as amended (59 Fed.
21 Reg. 47416, 47451, Sept. 15, 1994), the Secretary of Commerce
22 serves as Natural Resource Trustee for certain resources found in
23 coastal waters, including marine fishery resources and their
24 supporting ecosystems, anadromous fish, and certain endangered
25 species and marine mammals. The Secretary of Commerce in his
26 capacity as Natural Resource Trustee may assert natural resource

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2 damage claims pursuant to Section 107(f) of CERCLA. The
3 Secretary of Commerce has delegated this authority to the Under
4 Secretary of Commerce for Oceans and Atmosphere, the
5 Administrator of the National Oceanic and Atmospheric
6 Administration ("NOAA").

7 7. Pursuant to 40 C.F.R. § 300.600, as amended (59 Fed.
8 Reg. 47416, 47451, Sept. 15, 1994), the Secretary of the Interior
9 serves as Natural Resource Trustee for certain natural resources
10 and their supporting ecosystems which include, but are not
11 limited to, migratory birds; certain anadromous fish, endangered
12 species, and marine mammals; and certain federally managed water
13 resources. The Secretary of the Interior in his capacity as
14 Natural Resource Trustee may assert natural resource damage
15 claims pursuant to Section 107(f) of CERCLA.

16 8. Pursuant to Section 107(f) of CERCLA, 42 U.S.C.
17 § 9607(f), and 40 C.F.R. § 300.610 (59 Fed. Reg. 47416, 47451
18 Sept. 15, 1994), the Puyallup Tribe of Indians is a federally
19 recognized Natural Resource Trustee for the land, fish, wildlife,
20 biota, air, water, groundwater, drinking water supplies, and
21 other such resources belonging to, managed by, held in trust for
22 and pertaining to, or otherwise controlled by the Puyallup Tribe
23 of Indians. In its capacity as a Natural Resource Trustee under
24 CERCLA, the Puyallup Tribe of Indians has authority to assert
25 natural resource damage claims and to settle such claims when it
26 deems settlement appropriate and in the public interest.

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1
2 9. Pursuant to Section 107(f) of CERCLA, 42 U.S.C.
3 § 9607(f), and 40 C.F.R. § 300.610 (59 Fed. Reg. 47416, 47451,
4 Sept. 15, 1994), the Muckleshoot Indian Tribe is a federally
5 recognized Natural Resource Trustee for the land, fish, wildlife,
6 biota, air, water, groundwater, drinking water supplies, and
7 other such resources belonging to, managed by, held in trust for
8 and pertaining to, or otherwise controlled by the Muckleshoot
9 Indian Tribe. In its capacity as a Natural Resource Trustee
10 under CERCLA, the Muckleshoot Indian Tribe has authority to
11 assert natural resource damage claims and to settle such claims
12 when it deems settlement appropriate and in the public interest.

13 10. Pursuant to Section 107(f) of CERCLA, 42 U.S.C.
14 § 9607(f), 40 C.F.R. § 300.605 (59 Fed. Reg. 47416, 47451, Sept.
15 15, 1994), Ch. 43.21A RCW, Ch. 70.105D RCW, and Ch. 90.48 RCW,
16 the Washington State Department of Ecology serves as a Natural
17 Resource Trustee for the State of Washington. In its capacity as
18 a Natural Resource Trustee, the Department of Ecology has the
19 authority to assert natural resource damage claims and to settle
20 such claims when it deems settlement is appropriate and in the
21 public interest. The Department of Ecology was designated, in a
22 May 10, 1988 letter from Governor Booth Gardner to EPA, as lead
23 Natural Resource Trustee for natural resource damages among
24 Washington State agencies.
25
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2 GENERAL ALLEGATIONS

3 11. Commencement Bay is located in and adjacent to Tacoma,
4 Washington at the southern end of the main basin of Puget Sound.
5 The "Commencement Bay Environment" as used in this Complaint
6 means the waters of Commencement Bay, Washington, including the
7 shoreline, intertidal areas and bottom sediments, lying south of
8 a line drawn from Point Defiance to Dash Point, and including the
9 Thea Foss Waterway, the Wheeler-Osgood Waterway, the Middle
10 Waterway, the St. Paul Waterway, the Puyallup River, from the
11 mouth south to the present City limits, the Milwaukee Waterway,
12 the Sitcum Waterway, the Blair Waterway and the Hylebos Waterway.
13 This area includes but is not limited to the Commencement Bay
14 Nearshore/Tideflats Superfund Site, as identified or amended by
15 the United States Environmental Protection Agency ("EPA"), and
16 areas affected by the releases of hazardous substances with in
17 the Commencement Bay Nearshore/Tideflats Superfund Site. The
18 Commencement Bay Environment encompasses an active commercial
19 seaport, shallow water, shoreline, and adjacent land, much of
20 which is highly developed and industrialized.

21 12. Section 107(a) of CERCLA provides in pertinent part as
22 follows:

23 Notwithstanding any other provision or rule of law, and subject
24 only to the defenses set forth in subsection (b) of this
25 section -

26 (1) the owner and operator of a vessel or a facility,

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2 (2) any person who at the time of disposal of any hazardous
3 substance owned or operated any facility at which such
4 hazardous substances were disposed of,

5 (3) any person who by contract, agreement, or otherwise
6 arranged for disposal or treatment, or arranged with a
7 transporter for transport for disposal or treatment, of
8 hazardous substances owned or possessed by such person, by
9 any other party or entity, at any facility or incineration
10 vessel owned or operated by another party or entity and
11 containing such hazardous substances, and

12 (4) any person who accepts or accepted any hazardous
13 substances for transport to disposal or treatment
14 facilities, incineration vessels or sites selected by such
15 person, from which there is a release, or a threatened
16 release which causes the incurrence of response costs, of a
17 hazardous substance, shall be liable for -

18 * * *

19 (C) damages for injury to, destruction of, or loss of
20 natural resources, including the reasonable costs of
21 assessing such injury, destruction, or loss resulting
22 from such a release; . . .

23 42 U.S.C. § 9607(a).

24 13. MTCA, Chapter 70.105D040 RCW, provides in pertinent
25 part as follows:

26 (1) Except as provided in subsection (3) of this
section, the following persons are liable with respect
to a facility:

(a) The owner or operator of the facility;

(b) Any person who owned or operated the facility
at the time of disposal or release of the hazardous
substances;

(c) Any person who owned or possessed a hazardous
substances and who by contract, agreement, or otherwise
arranged for disposal or treatment of the hazardous
substances at the facility, or arranged with a
transporter for transport for disposal or treatment of
the hazardous substances at the facility, or otherwise
generated hazardous wastes disposed of or treated at
the facility;

(d) Any person (i) who accepts or accepted any
hazardous substances for transport to a disposal,

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2 treatment or other facility selected by such person,
3 from which there is a release, or a threatened release
4 for which remedial action is required unless such
5 facility, at the time of disposal or treatment, could
6 legally receive such substance; or (ii) who accepts a
7 hazardous substance for transport to such a facility
8 and has reasonable grounds to believe that such
9 facility is not operated in accordance with chapter
10 70.105 RCW; and

11 (e) Any person who both sells a hazardous
12 substance and is responsible for written instructions
13 for its use if (i) the substance is used according to
14 the instructions and (ii) the use constitutes a release
15 for which remedial action is required at the facility.

16 (2) Each person who is liable under this section is
17 strictly liable, jointly and severally, for . . . all
18 natural resource damages resulting from the releases or
19 threatened releases of hazardous substances.

20 14. The term "facility," as defined in Section 101(9) of
21 CERCLA, 42 U.S.C. § 9691(9) and MTCA, Chapter 70.105D.020(4) RCW
22 means, inter alia, "any site or area where a hazardous substance
23 . . . has been deposited, stored, disposed of, or placed, or
24 otherwise come to be located; . . . "

25 15. The term "hazardous substance", as defined in Section
26 101(14) of CERCLA, 42 U.S.C. § 9601(14), includes "(B) any
element, compound, mixture, solution, or substance designated
pursuant to section 9602 of this Title, . . ." MTCA defines a
hazardous substances as including any substance that is a
hazardous substance under CERCLA. Chapter 70.105.020(7)(c) RCW.

16. Investigations conducted by the United States
Environmental Protection Agency ("EPA"), the City of Tacoma and
others have detected hazardous substances (including polycyclic
aromatic hydrocarbons or PAHs, cadmium, mercury, nickel, zinc,

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2 copper, lead, polychlorinated biphenyls or PCBs, and bis(2-
3 ethylhexyl)-phthalate) in the sediments, soils, and groundwater
4 of the Commencement Bay Environment.

5 17. The City of Tacoma and TPU own, manage or operate, or
6 in the past have owned, managed or operated, real property or
7 facilities, including a storm water drainage system, from which
8 storm water, surface water runoff and/or groundwater have flowed
9 into the Commencement Bay Environment. Investigations by EPA,
10 the City and others have detected in soils, groundwater and
11 sediments on or in those properties or facilities concentrations
12 of hazardous substances, some of which are the same as the
13 contaminants found in the sediments of the Commencement Bay
14 Environment.

15 18. Hazardous substances have been released into the
16 Commencement Bay Environment from City and T.P.U.-owned, managed
17 or operated properties or facilities and vessels, including a
18 storm water drainage system, through direct discharge, surface
19 water runoff, groundwater and seeps. These hazardous substances
20 have caused injury to, destruction of and loss of natural
21 resources in the Commencement Bay Environment including fish,
22 shellfish, invertebrates, birds and marine sediments. Each of
23 the Trustees and the public have suffered the loss of natural
24 resource services (including ecological services as well as
25 direct and passive human use losses) as a consequence of those
26 injuries.

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2 19. On February 10, 1993, NOAA, DOI, the State of
3 Washington, the Puyallup Tribe of Indians, the Muckleshoot Indian
4 Tribe (collectively "the Trustees") and certain Potentially
5 Responsible Parties entered into a Funding and Participation
6 Agreement for Phase 1 of the Commencement Bay-Wide Natural
7 Resource Damage Assessment, which was signed by the City of
8 Tacoma on March 5 and 8, 1993. The Trustees published a report
9 on the results of Phase 1 of the damage assessment process in
10 June 1995. The Trustees have incurred costs in assessing the
11 damages to natural resources in the Commencement Bay Environment.

12 20. Under CERCLA Section 107, 42 U.S.C. § 9607, and MTCA,
13 Chapter 70.105D.040 RCW, the Trustees are entitled to recover
14 damages for injury to natural resources including 1) the cost to
15 restore, replace, or acquire the equivalent of such natural
16 resources, 2) the compensable value of lost services resulting
17 from the injury to resources, and 3) the reasonable cost of
18 assessing injury to the natural resources and the resulting
19 damages.

20 FIRST CLAIM FOR RELIEF

21 NATURAL RESOURCE DAMAGES UNDER SECTION 107 OF CERCLA

22 21. Plaintiffs reallege paragraphs 1 through 20.

23 22. The Defendants own and operate facilities and vessels
24 from which there has been a release of hazardous substances into
25 the Commencement Bay Environment within the meaning of Section
26 107(a) of CERCLA, 42 U.S.C. § 9607(a).

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2 23. The releases of hazardous substances from facilities
3 and vessels owned or operated by Defendants have caused and
4 continue to cause injury to, destruction of, and loss of natural
5 resources in the Commencement Bay Environment, for which the
6 United States, State of Washington, Puyallup Tribe of Indians,
7 and Muckleshoot Indian Tribe are trustees or co-trustees within
8 the meaning of Section 107(a)(4)(C) of CERCLA, 42 U.S.C.
9 § 9607(a)(4)(C).

10 24. The natural resources that have been and continue
11 to be injured, destroyed, or lost as a result of the release of
12 hazardous substances from Defendants' facilities include fish,
13 shellfish, invertebrates, birds, marine sediments, resources of
14 cultural significance and other such "natural resources" as that
15 term is defined in 42 U.S.C. § 9601(16).

16 25. The United States, State of Washington, Puyallup Tribe
17 of Indians, and Muckleshoot Indian Tribe have incurred and
18 continue to incur costs related to the assessment of the loss of
19 natural resources for which Plaintiffs are co-trustees resulting
20 from releases of hazardous substances from Defendants'
21 facilities.

22 26. The United States, State of Washington, Puyallup Tribe
23 of Indians, and Muckleshoot Indian Tribe have satisfied all
24 conditions precedent to the initiation of this action.

25 27. Pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607(a),
26 Defendants are jointly and severally liable to Plaintiffs for

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1 damages for injury to, destruction of and loss of natural
2 resources in the Commencement Bay Environment for which
3 Plaintiffs are trustees or co-trustees, including loss of use of
4 such resources and costs of restoration, replacement, or
5 acquisition of equivalent resources, resulting from the release
6 of hazardous substances from Defendants' facilities, and for
7 Plaintiffs' costs of assessing such injury and damage.

8 SECOND CLAIM FOR RELIEF

9 NATURAL RESOURCE DAMAGES UNDER MTCA

10 28. Plaintiffs reallege paragraphs 1 through 27.

11 29. The Defendants own and operate facilities and vessels
12 from which there has been a release of hazardous substances into
13 the Commencement Bay Environment within the meaning of MTCA,
14 Chapters 70.105D.020 and 70.105D.040 RCW.

15 30. The natural resources that have been and continue
16 to be injured, destroyed, or lost by the release of hazardous
17 substances by Defendants include fish, shellfish, invertebrates,
18 birds, marine sediments, resources of cultural significance and
19 other such natural resources.

20 31. The State of Washington has incurred and continues to
21 incur costs related to the assessment of injury to natural
22 resources caused by the releases of hazardous substances by
23 Defendants.

24 32. Pursuant to Rev. Code Wash. Chapter 70.105D.040(2),
25 Defendants are jointly and severally liable to the State of
26

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1 Washington for all damages to natural resources in the
2 Commencement Bay Environment resulting from the release of
3 hazardous substances by Defendants.
4

5 PRAYER FOR RELIEF

6 WHEREFORE, Plaintiffs request that this Court enter judgment
7 against the Defendants and:

8 (1) order Defendants to pay to Plaintiffs damages for the
9 injury to, destruction of and loss of natural resources in the
10 Commencement Bay Environment within the trusteeship of the United
11 States, State of Washington, Puyallup Tribe of Indians, and
12 Muckleshoot Indian Tribe resulting from Defendants' releases of
13 hazardous substances;

14 (2) order Defendants to reimburse Plaintiffs for costs they
15 have incurred in their assessment of the injury to natural
16 resources and damages for such injury in the Commencement Bay
17 Environment; and
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2 (3) award the Plaintiffs such other and further relief as
3 this Court may deem appropriate.

4 Respectfully Submitted,

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1
2 (3) award the Plaintiffs such other and further relief as
3 this Court may deem appropriate.

4 Respectfully Submitted,

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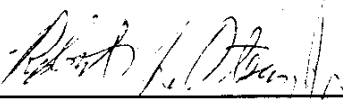
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