



1 Notice of lodging of the Consent Decree will be published in  
2 the Federal Register. During the pendency of the 30-day public  
3 comment period required under 28 C.F.R. § 50.7 for Consent Decrees,  
4 no action is required of this Court. After the expiration of the  
5 public comment period and evaluation of the comments received, the  
6 Court will be advised whether the Consent Decree may be entered or  
7 whether further action may be required.

8  
9 Respectfully Submitted,  
10 UNITED STATES OF AMERICA:

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

11 NATURE OF ACTION

12 1. Plaintiffs bring this action seeking recovery of  
13 damages for injury to, destruction of, or loss of natural  
14 resources at and within the Commencement Bay Environment  
15 resulting from releases of hazardous substances for which the  
16 Defendant is responsible. Plaintiffs seek recovery of  
17 restoration costs and other damages for injury to natural  
18 resources in the Commencement Bay Environment for which the  
19 United States, State of Washington, Puyallup Tribe of Indians and  
20 Muckleshoot Indian Tribe are trustees or co-trustees, resulting  
21 from releases of hazardous substances into the Commencement Bay  
22 Environment; and the costs of assessing such damages and injury  
23 to, destruction of, or loss of natural resources. The claims  
24 alleged in this Complaint do not include damages with respect to  
25 the St. Paul Waterway Problem Area, a subarea within the  
26 Commencement Bay Environment, since claims by the Plaintiffs

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1 against the Defendant for that area were asserted and settled in  
2 United States, et al. v. Simpson Tacoma Kraft Company, et al.,  
3 Civil No. C91-5260T (W.D. Wash.).

4 JURISDICTION AND VENUE

5 2. This Court has jurisdiction over this matter pursuant to  
6 Sections 107(a) and 113(b) of CERCLA, 42 U.S.C.  
7 §§ 9607(a) and 9613(b); and 28 U.S.C. §§ 1331, 1345, and 1362.

8 3. Venue is proper in this district pursuant to Section  
9 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b).

10 DEFENDANT

11 4. The State of Washington owns certain areas of aquatic  
12 lands in the Commencement Bay Environment. The Washington  
13 Department of Natural Resources (WDNR) is charged by state law  
14 with primary responsibility for leasing, managing and otherwise  
15 exercising the State of Washington's proprietary interest in  
16 State-owned aquatic lands in the Commencement Bay Environment.

17 PLAINTIFFS

18 5. Pursuant to 40 C.F.R. § 300.600, as amended (59 Fed.  
19 Reg. 47416, 47451, Sept. 15, 1994), the Secretary of Commerce  
20 serves as Natural Resource Trustee for certain resources found in  
21 coastal waters, including marine fishery resources and their  
22 supporting ecosystems, anadromous fish, and certain endangered  
23 species and marine mammals. The Secretary of Commerce in his  
24 capacity as Natural Resource Trustee may assert natural resource  
25 damage claims pursuant to Section 107(f) of CERCLA. The  
26 Secretary of Commerce has delegated this authority to the Under

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1 Secretary of Commerce for Oceans and Atmosphere, the  
2 Administrator of the National Oceanic and Atmospheric  
3 Administration ("NOAA").

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

13         7. Pursuant to Section 107(f) of CERCLA, 42 U.S.C.  
14 § 9607(f), and 40 C.F.R. § 300.610 (59 Fed. Reg. 47416, 47451,  
15 Sept. 15, 1994), the Puyallup Tribe of Indians is a federally  
16 recognized Natural Resource Trustee for the land, fish, wildlife,  
17 biota, air, water, groundwater, drinking water supplies, and  
18 other such resources belonging to, managed by, held in trust for  
19 and pertaining to, or otherwise controlled by the Puyallup Tribe  
20 of Indians. In its capacity as a Natural Resource Trustee under  
21 CERCLA, the Puyallup Tribe of Indians has authority to assert  
22 natural resource damage claims and to settle such claims when it  
23 deems settlement appropriate and in the public interest.

24         8. Pursuant to Section 107(f) of CERCLA, 42 U.S.C.  
25 § 9607(f), and 40 C.F.R. § 300.610 (59 Fed. Reg. 47416, 47451,  
26 Setp. 15, 1994), the Muckleshoot Indian Tribe is a federally

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1 line drawn from Point Defiance to Dash Point, and including the  
2 Thea Foss Waterway, the Wheeler-Osgood Waterway, the Middle  
3 Waterway, the St. Paul Waterway, the Milwaukee Waterway, the  
4 Sitcum Waterway, the Blair Waterway and the Hylebos Waterway.  
5 This area includes but is not limited to the Commencement Bay  
6 Nearshore/Tideflats Superfund Site, as identified or amended by  
7 the U.S. EPA, and areas affected by releases of hazardous  
8 substances within the Commencement Bay Nearshore/Tideflats  
9 Superfund Site.

10 11. Section 107(a) of CERCLA provides in pertinent part as  
11 follows:

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

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

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

19 (3) any person who by contract, agreement, or otherwise  
20 arranged for disposal or treatment, or arranged with  
21 a transporter for transport for disposal or treatment,  
22 of hazardous substances owned or possessed by such  
23 person, by any other party or entity, at any facility  
24 or incineration vessel owned or operated by another  
25 party or entity and containing such hazardous  
26 substances, and

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

\* \* \*

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1 (C) damages for injury to, destruction of, or  
2 loss of natural resources, including the  
3 reasonable costs of assessing such injury,  
4 destruction, or loss resulting from such a  
5 release; . . .

6 42 U.S.C. § 9607(a).

7 12. MTCA, Chapter 70.105D.040 RCW, provides in pertinent  
8 part as follows:

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

12 (a) The owner or operator of the facility;  
13 (b) Any person who owned or operated the  
14 facility at the time of disposal or release of the  
15 hazardous substances;

16 (c) Any person who owned or possessed a  
17 hazardous substance and who by contract,  
18 agreement, or otherwise arranged for disposal or  
19 treatment of the hazardous substance at the  
20 facility, or arranged with a transporter for  
21 transport for disposal or treatment of the  
22 hazardous substances at the facility, or otherwise  
23 generated hazardous wastes disposed of or treated  
24 at the facility;

25 (d) Any person (i) who accepts or accepted  
26 any hazardous substance for transport to a  
27 disposal, treatment or other facility selected by  
28 such person, from which there is a release or a  
threatened release for which remedial action is  
required, unless such facility, at the time of  
disposal or treatment, could legally receive such  
substance; or (ii) who accepts a hazardous  
substance for transport to such a facility and has  
reasonable grounds to believe that such facility  
is not operated in accordance with chapter 70.105  
RCW; and

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

(2) Each person who is liable under this section  
is strictly liable, jointly and severally, for . .  
. all natural resource damages resulting from the

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releases or threatened releases of hazardous substances.

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

14. The term "hazardous substance", as defined in Section 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(6)(c) RCW.

15. Investigations conducted by the United States Environmental Protection Agency ("EPA") and others have detected hazardous substances (including polycyclic aromatic hydrocarbons or PAHs, cadmium, mercury, nickel, zinc, copper, lead, polychlorinated biphenyls or PCBs, and bis(2-ethylhexyl)-phthalate) in the sediments, soils, and groundwater of the Commencement Bay Environment.

16. Aquatic lands in the Commencement Bay Environment owned by the Defendant State of Washington and managed by WDNR have become contaminated by releases of hazardous substances, and those aquatic lands have subsequently re-released and continue to re-release those hazardous substances to the environment. WDNR, as the state agency responsible for managing aquatic lands in the

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1 Commencement Bay Environment, has also leased aquatic lands in  
2 the Commencement Bay Environment to persons who have released  
3 hazardous substances to the environment on the leased lands.  
4 These hazardous substances have caused injury to, destruction of  
5 and loss of natural resources in the Commencement Bay  
6 Environment, including fish, shellfish, invertebrates, birds, and  
7 marine sediments. Each of the Trustees and the public have  
8 suffered the loss of natural resource services (including  
9 ecological services as well as direct and passive human use  
10 losses) as a consequence of those injuries.

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

19 FIRST CLAIM FOR RELIEF

20 NATURAL RESOURCE DAMAGES UNDER SECTION 107 OF CERCLA

21 18. Plaintiffs reallege paragraphs 1 through 17.

22 19. The Defendant State of Washington through the  
23 Department of Natural Resources owns and operates facilities from  
24 which there has been a release of hazardous substances into the  
25 Commencement Bay Environment within the meaning of Section 107(a)  
26 of CERCLA, 42 U.S.C. § 9607(a).

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1 Plaintiffs are trustees or co-trustees, including loss of use and  
2 costs of restoration, replacement, or acquisition of equivalent  
3 resources, resulting from the release of hazardous substances at  
4 or from Defendant's facilities, and for Plaintiffs' costs of  
5 assessing such injury and damages.

6 SECOND CLAIM FOR RELIEF

7 NATURAL RESOURCE DAMAGES UNDER MTCA

8 25. Plaintiff State of Washington through the Department of  
9 Ecology separately realleges paragraphs 1 through 24.

10 26. The Defendant State of Washington through the  
11 Washington Department of Natural Resources owns and operates  
12 facilities from which there has been a release of hazardous  
13 substances into the Commencement Bay Environment within the  
14 meaning of MTCA, Chapters 70.105D.020 and 70.105D.040 RCW.

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

19 28. The State of Washington through the Department of  
20 Ecology has incurred and continues to incur response costs  
21 related to the assessment of injury to natural resources caused  
22 by the releases of hazardous substances by Defendant.

23 29. Pursuant to Rev. Code Wash. Chapter 70.105D.040(2),  
24 Defendant is jointly and severally liable to the State of  
25 Washington through the Department of Ecology for all damages to  
26 natural resources in the Commencement Bay Environment, resulting

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1 from the release of hazardous substances at or from the  
2 Defendant's facilities.

3 PRAYER FOR RELIEF

4 WHEREFORE, Plaintiffs request that this Court enter  
5 judgment against the Defendant and:

6 (1) Order Defendant to pay to Plaintiffs damages for  
7 the injury to, destruction of and loss of natural resources in  
8 the Commencement Bay Environment, not including the St. Paul  
9 Waterway Problem Area, within the trusteeship of the United  
10 States, State of Washington, Puyallup Tribe of Indians, or  
11 Muckleshoot Indian Tribe resulting from releases of hazardous  
12 substances at or from Defendant's facilities;

13 (2) Order Defendant to reimburse Plaintiffs for costs  
14 they have incurred in their assessment of such damages and the  
15 injury to natural resources in the Commencement Bay Environment,  
16 not including the St. Paul Waterway Problem Area;

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

19 Respectfully Submitted,

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1 Date: April 7, 1997

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