

Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

13	UNITED STATES OF AMERICA, STATE OF)	
14	WASHINGTON, PUYALLUP TRIBE OF)	
15	INDIANS and MUCKLESHOOT INDIAN TRIBE,)	CIVIL NO.
16	Plaintiffs,)	CONSENT DECREE
17		
18	vs.)	
19	GENERAL METALS OF TACOMA, INC.)	
20	Defendant.)	
21	_____)	

I. INTRODUCTION

The United States of America (“United States”), on behalf of the National Oceanic and Atmospheric Administration (“NOAA”) and the United States Department of the Interior; the State of Washington (the “State”) through the Washington State Department of Ecology; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe (collectively, “Plaintiffs”), have filed a complaint

1 in this case against defendant General Metals of Tacoma, Inc. (“Defendant”) pursuant to Section 107
2 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended
3 (CERCLA), 42 U.S.C. § 9607; the Model Toxics Control Act (MTCA), chapter 70.105D RCW;
4 Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil
5 Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A). This Consent Decree (the “Decree”)
6 addresses the claims asserted in the Complaint against Defendant for Natural Resource Damages (as
7 defined below) in the Commencement Bay Environment (as defined below).
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9 II. RECITALS

10 A. The United States Department of Commerce, acting through NOAA; the United
11 States Department of the Interior; the Washington Department of Ecology on behalf of the State of
12 Washington; the Puyallup Tribe of Indians, and the Muckleshoot Indian Tribe (collectively, “the
13 Trustees” and, individually, a “Trustee”), under the authority of Section 107(f) of CERCLA, 42
14 U.S.C. § 9607(f), Section 1006(b) of OPA, 33 U.S.C. § 2706(b), and 40 C.F.R. Part 300, subpart
15 G, serve as trustees for natural resources for the assessment and recovery of damages for injury to,
16 destruction of, or loss of natural resources under their trusteeship.
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18 B. Investigations conducted by the United States Environmental Protection Agency
19 (“EPA”), the Trustees, and others have detected hazardous substances in the sediments, soils and
20 groundwater of the Commencement Bay Environment, including but not limited to arsenic, antimony,
21 cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2-ethylhexyl)-phthalate,
22 hexachlorobenzene, hexachlorobutadiene, polycyclic aromatic hydrocarbons (PAHs), and
23 polychlorinated biphenyls (PCBs). Overall, the Trustees have documented the presence of over 30
24 hazardous substances in the marine sediments of Commencement Bay’s Hylebos Waterway.
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1 C. The Trustees began assessing natural resource damages in the Commencement Bay
2 Environment in October 1991 by finding that hazardous substances had been released into the
3 Commencement Bay Environment; that public trust natural resources had likely been injured by the
4 releases; that data sufficient to pursue a natural resource damage assessment were available or could
5 likely be obtained at a reasonable cost; and that, without further action, implemented and planned
6 response actions would not adequately remedy the resource injuries. *See* Preassessment Screen of
7 Natural Resource Damages in the Commencement Bay Environment Due to Activities Taking Place
8 In and About the Commencement Bay/Nearshore Tidelands (CB/NT) Superfund Site (October 29,
9 1991). The Trustees notified representatives of known potentially responsible parties (“PRPs”) of
10 their intent to conduct a damage assessment. The Trustees subsequently entered into a Funding and
11 Participation Agreement for Phase 1 of the Commencement Bay-Wide Natural Resource Damage
12 Assessment, dated February 10, 1993, with several of the major PRPs. The Trustees published a
13 report on the results of Phase 1 of the damage assessment process in June 1995. The PRPs did not
14 participate in subsequent stages of the damage assessment, and the Trustees continued the process
15 independently. The Trustees have now completed a series of studies during Phase 2 of the damage
16 assessment, focusing on impacts of contaminants on marine sediments, benthic organisms, flatfish and
17 salmonids. Results of those studies were published in a series of reports, consisting of
18 Commencement Bay Natural Resource Trustees, 1996, Hylebos Waterway Data and Data Analysis
19 Report; Collier, T.K., L.L. Johnson, M.S. Myers, C.M. Stehr, M.M. Krahn, and J.E. Stein, 1998, Fish
20 injury in the Hylebos Waterway in Commencement Bay, Washington; Mary R. Arkoosh, Ed Casillas,
21 Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects of Chemical Contaminants
22 from the Hylebos Waterway on Disease Resistance of Juvenile Salmon; Ed Casillas, Bich-Thuy L.
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1 Eberhart, Frank C. Sommers, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998, Effects
2 of Chemical Contaminants from the Hylebos Waterway on Growth of Juvenile Chinook Salmon; and
3 Ed Casillas, Bich-Thuy L. Eberhart, Tracy K. Collier, Margaret M. Krahn and John E. Stein, 1998,
4 Exposure of Juvenile Chinook Salmon to Chemical Contaminants Specific to the Hylebos Waterway.
5 Based on this research, the Plaintiffs and Defendant (collectively, the “Parties” and, individually, a
6 “Party”) agree that no further natural resource damage assessment is required to effectuate the
7 purposes of this Consent Decree, with respect to Defendant.
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10 D. Plaintiffs have filed a complaint (the “Complaint”) pursuant to Section 107 of
11 CERCLA, 42 U.S.C. § 9607; MTCA, chapter 70.105D RCW; CWA, 33 U.S.C. §§ 1251 et seq.; and
12 OPA, 33 U.S.C. §§ 2701 et seq., seeking recovery from Defendant of damages for injury to,
13 destruction of, and loss of natural resources resulting from releases of hazardous substances into the
14 Commencement Bay Environment, including the costs of assessing the damages.
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16 E. Plaintiffs allege in the Complaint that Defendant owns or in the past owned and/or
17 operated real property or facilities, identified by the Trustees as the GENERAL METALS site, from
18 which storm water, surface water runoff, wastewater, other process discharges, and/or groundwater
19 have flowed to the Commencement Bay Environment. Plaintiffs also allege that investigations by
20 EPA and others have detected concentrations of hazardous substances in soils, groundwater and/or
21 sediments on or in those properties or facilities. Some of these hazardous substances are found in
22 the sediments of the Commencement Bay Environment.
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24 F. Plaintiffs further allege that hazardous substances have been or are being released to
25 the Commencement Bay Environment from properties or facilities owned and/or operated by
26 Defendant through direct discharge, surface water runoff, groundwater and/or seeps, and that those
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1 hazardous substances have caused injury to, destruction of and loss of natural resources in the
2 Commencement Bay Environment under Plaintiffs' trusteeship, including fish, shellfish, invertebrates,
3 birds, marine sediments, and resources of cultural significance. Plaintiffs further allege that each of
4 them and the public have suffered the loss of natural resource services (including ecological services
5 as well as direct and passive human use losses) as a consequence of those injuries.
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7 G. Plaintiffs allege that the Defendant is (a) the owner and/or operator of a vessel or a
8 facility; (b) a person who at the time of disposal or release of any hazardous substance owned or
9 operated any facility at which such hazardous substances were disposed of; (c) a person who by
10 contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter
11 for transport for disposal or treatment, of hazardous substances owned or possessed by such person,
12 by any other party or entity, or otherwise generated any hazardous substance disposed of or treated,
13 at any facility or incineration vessel owned or operated by another party or entity and containing such
14 hazardous substances; and/or (d) a person who accepts or accepted any hazardous substances for
15 transport to disposal or treatment facilities, incineration vessels or sites selected by such person from
16 which there is a release or a threatened release of a hazardous substance that causes the incurrence
17 of response costs within the meaning of 42 U.S.C. § 9607 and RCW 70.105D.040.
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20 H. Defendant denies all the allegations of the Complaint.
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22 I. Although the Trustees have initiated but not yet completed a natural resource damage
23 assessment for the Commencement Bay Environment, the Trustees have developed and analyzed
24 information sufficient to support a settlement that is fair, reasonable and in the public interest.
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26 J. To facilitate resolving natural resource damage claims, the Trustees developed a
27 proposed allocation of Hylebos Waterway Natural Resource Damages liability among Hylebos
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1 Waterway PRPs solely for settlement purposes. Relying upon the results of the damage-assessment
2 studies, remedial investigations, regulatory standards, and scientific literature, the Trustees first
3 developed an estimate of the amount of injury to natural resources that had occurred as a result of
4 releases of hazardous substances to the Hylebos Waterway. The Trustees quantified the effects of
5 the injuries in terms of the losses of ecological services over affected areas of the waterway and over
6 time, discounted to the current year. The Trustees used the term discounted ecological service
7 acre-years (DSAYs) to describe both the scale of the injuries, and the amount of habitat restoration
8 they are seeking to compensate for the injuries. For the Hylebos Waterway, the Trustees are seeking
9 to recover from all PRPs funds, property and/or in-kind services needed to generate habitat
10 restoration sufficient to compensate for the loss of 1526.77 DSAYs.

13 K. Plaintiffs assert that hazardous-substance releases to the Hylebos Waterway have
14 become dispersed and commingled to the extent that the effects of one PRP's releases cannot be
15 readily distinguished from another's. Plaintiffs further assert that the circumstances of the Hylebos
16 Waterway contamination make all PRPs who contributed to the contamination jointly and severally
17 liable for all injuries to natural resources that have resulted from the contamination. As a
18 consequence, Plaintiffs assert the right to recover for the loss of all 1526.77 DSAYs from any
19 Hylebos Waterway PRP. Without prejudice to their position, and solely for purposes of facilitating
20 settlement with individual PRPs, the Trustees have developed a proposal for allocating liability for
21 the 1526.77 DSAYs among the PRPs. Independent consultants hired by the Trustees reviewed
22 existing information from the files of EPA, the Washington State Department of Ecology, and local
23 public libraries to allocate liability among the various Hylebos Waterway facilities that contributed
24 to the contamination.

1 L. To insure that all PRPs had an equal opportunity to be informed of and to offer their
2 views on the Trustees' settlement proposal, in April 2002 the Trustees presented their report on the
3 proposed allocation to the public for notice and comment. The Trustees took comments for 60 days,
4 revised the report based upon the comments received, and made it available to PRPs in final form.
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6 M. The Trustees' report allocated liability for DSAY losses for settlement purposes
7 among the various industrial sites along the Hylebos Waterway. Some of the sites, such as the
8 GENERAL METALS site, have been owned or operated by different PRPs over the years, and
9 consequently more than one PRP may share responsibility for the losses allocated to such sites. The
10 Trustees' report did not include a formula for suballocating among the parties involved the DSAY
11 losses attributed to such a site. To determine an appropriate settlement with Defendant, the Trustees
12 developed an approach for dividing the DSAY losses allocated to the GENERAL METALS site
13 between Defendant and other PRPs whom the Trustees allege share responsibility for
14 hazardous-substance releases from the site. The approach employed by the Trustees resulted in
15 allocating a total of 85.895 DSAYs to Defendant. The Trustees also allocated a total of \$479,559.38
16 in damage assessment costs relating to the Hylebos Waterway to Defendants.
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19 N. In settlement of this action Defendant has agreed, in lieu of and as equivalent to
20 monetary damages a) to set aside real property for the purpose of natural resource restoration, and
21 to construct, maintain and monitor thereon the habitat restoration project described in Appendix A
22 ("West Fork Hylebos Creek Habitat Restoration Project" or "Project"), attached hereto and by this
23 reference incorporated herein, b) to contribute funds to support further project maintenance,
24 monitoring and adaptive management, c) to pay costs of oversight by the Trustees, and d) to
25 reimburse natural resource damage assessment costs incurred by the Trustees.
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1 O. The Trustees have determined that the Project will generate a gain of DSAYs that is
2 sufficient to offset the 85.895 allocated to the GENERAL METALS site. Defendant has also agreed
3 to reimburse \$479,559.38 of the Trustees' damage assessment costs associated with the Hylebos
4 Waterway.
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6 P. The Trustees have determined that the timely actions and expenditures to be
7 undertaken by Defendant under this Consent Decree are appropriate and necessary to protect and
8 restore the natural resources allegedly injured as a result of actions or omissions of Defendant that
9 are addressed herein, and that such timely actions and expenditures are adequate to redress
10 Defendant's responsibility for the Natural Resource Damages that are the subject of this proceeding.
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12 Q. Defendant does not admit any liability to Plaintiffs arising out of the transactions or
13 occurrences alleged in the Complaint.

14 R. Plaintiffs and Defendant agree, and this Court by entering this Decree finds, that this
15 Decree has been negotiated by the Parties in good faith; that settlement of this matter will avoid
16 prolonged and complicated litigation between the Parties; and that this Decree is fair, reasonable, and
17 in the public interest.
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19 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

20 **III. JURISDICTION AND VENUE**

21 1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C.
22 §§ 1331, 1345 and 1367, and 42 U.S.C. §§ 9607 and 9613(b) and 33 U.S.C. § 2717(b). The Court
23 has personal jurisdiction over the Parties. Solely for the purposes of this Decree and the underlying
24 Complaint, the Parties waive all objections and defenses that they may have to jurisdiction of the
25 Court or to venue in this District. The Parties may not challenge the terms of this Decree or this
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1 Court's jurisdiction to enter and enforce this Decree.

2 IV. PARTIES BOUND

3 2. This Decree is binding upon the United States, the State, the Puyallup Tribe of
4 Indians, the Muckleshoot Indian Tribe and upon Defendant and their heirs, successors and assigns.
5 Any change in ownership or corporate or other legal status, including but not limited to any transfer
6 of assets or real or personal property, will in no way alter the status or responsibilities of Defendant
7 under this Decree.
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9 3. Defendant shall provide a copy of this Consent Decree to each contractor hired to
10 perform work required by this Consent Decree and to each person representing Defendant with
11 respect to any such work, and shall condition all contracts entered into hereunder upon performance
12 of the work in conformity with the terms of this Consent Decree. Defendant or its contractors shall
13 provide written notice of the Consent Decree to all subcontractors hired to perform any portion of
14 the work. Defendant shall nonetheless be responsible for ensuring that all such work, including that
15 performed by contractors and subcontractors, is performed in accordance with this Consent Decree.
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18 V. DEFINITIONS

19 4. Unless otherwise expressly provided, terms used in this Decree that are defined in
20 CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in
21 CERCLA or in such regulations. Whenever the terms listed below are used in this Decree or in any
22 attached appendix, the following definitions will apply:
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24 a. "Commencement Bay Environment" means the waters of Commencement Bay,
25 State of Washington -- including the shoreline, intertidal areas, tributaries, drainage areas, estuaries
26 and bottom sediments -- lying south of a line drawn from Point Defiance to Dash Point. These
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1 waters include the Thea Foss Waterway, Wheeler-Osgood Waterway, Middle Waterway, St. Paul
2 Waterway, Puyallup River from the mouth south to the present City limits, Milwaukee Waterway,
3 Sitcum Waterway, Blair Waterway, and Hylebos Waterway. This area includes but is not limited to
4 the Commencement Bay Nearshore/Tideflats Superfund Site, as identified or amended by the EPA,
5 including the B&L Landfill, and areas affected by releases of hazardous substances within the
6 Commencement Bay Nearshore/Tideflats Superfund Site.
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8 b. “Commencement Bay Restoration Account” means the Commencement Bay
9 Natural Resource Restoration Account authorized by the Order Directing the Deposit of Natural
10 Resource Damages into the Registry of the Court in United States v. Port of Tacoma, No.
11 C93-5462B (W.D. Wash. Oct. 8, 1993) (attached as Appendix B).
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13 c. “DSAYs” means discounted ecological service acre-years, the metric
14 established by the Trustees to determine the scale of Natural Resource Damages liability associated
15 with the Hylebos Waterway and the natural resource restoration efforts needed to compensate for
16 injury to, destruction or loss of natural resources giving rise to liability.
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18 d. “Defendant” means General Metals of Tacoma, Inc. and its heirs, successors
19 and assigns.
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21 e. “Natural Resource Damages” means damages, including costs of damage
22 assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607; Chapter 70.105D RCW;
23 Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; and Section 1002(b)(2)(A) of the Oil
24 Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(b)(2)(A), for injury to, destruction of, or loss of
25 Natural Resources resulting from releases of hazardous substances or discharges of oil to the
26 Commencement Bay Environment at or from sites along, adjacent to or draining to the Hylebos
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1 Waterway.

2 f. "Parties" mean the United States, the State of Washington, the Puyallup Tribe
3 of Indians, the Muckleshoot Indian Tribe and General Metals of Tacoma, Inc..
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5 g. "Plaintiffs" means the United States, the State, the Puyallup Tribe of Indians,
6 and the Muckleshoot Indian Tribe.

7 h. "Project" means the Karileen Restoration Project described in Appendix A.

8 I. "Project Site" means the approximately 10.27-acre portion of King County tax
9 parcel 3221049021 at 326 S. 376th Street, Federal Way, Washington, as indicated on Figure 1 in
10 Appendix A, that is owned by Karileen LLC, a limited liability corporation owned and controlled by
11 Defendant and on which the Project is to be developed according to the terms of this Consent Decree.
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13 j. "Trustees" mean the United States Department of Commerce, acting through
14 NOAA; the Department of the Interior; the Washington State Department of Ecology, on behalf of
15 the State of Washington; the Puyallup Tribe of Indians; and the Muckleshoot Indian Tribe.
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17 VI. GENERAL PROVISIONS

18 5. The Complaint states claims upon which relief may be granted.

19 6. Nothing in this Consent Decree shall be construed as an admission of liability by the
20 Defendant for any claims or allegations made in the Complaint or in this Consent Decree.
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23 7. All activities undertaken by Defendant pursuant to this Consent Decree shall be
24 performed in accordance with the requirements of all applicable laws and permits.

25 8. All work performed by Defendant and/or its contractors under this Consent Decree
26 shall be conducted pursuant to the design and schedule approved by the Trustees herein and shall be
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1 subject to full oversight by the Trustees. If the Trustees determine that Defendant is not complying
2 with the design and schedule set forth in Appendix A, the Trustees shall provide prompt written
3 notice to Defendant specifying the basis for their determination of noncompliance. Defendant may
4 correct the noncompliance or invoke the dispute resolution procedures set forth in Section XV below.
5 Subject to the right of Defendant to invoke the dispute resolution provisions, the Trustees may
6 require Defendant to take actions, to alter, suspend or cease ongoing activities, and to alter, postpone
7 or refrain from taking proposed actions, as the Trustees reasonably deem necessary to ensure
8 compliance with the terms of this Consent Decree and any plans or proposals adopted hereunder.
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11 9. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant
12 to any law.

13 10. Where any portion of the activities undertaken pursuant to this Consent Decree
14 requires a federal, state or local permit or approval, Defendant shall submit timely and complete
15 applications and take all other actions necessary to obtain all such permits or approvals. Defendant
16 shall use best efforts to obtain any necessary permits. The Trustees agree to provide reasonable
17 assistance to Defendant in its efforts to obtain said permits, to the extent consistent with agency
18 and/or tribal regulations and policy.
19

20 11. The Plaintiffs do not, by their consent to the entry of this Consent Decree, warrant or
21 aver in any manner that Defendant's compliance with this Consent Decree will result in compliance
22 with CERCLA or any other law. Compliance with this Consent Decree does not diminish or affect
23 Defendant's responsibility to comply with any applicable federal, state or local law or regulation. The
24 Parties agree that Defendant is responsible for achieving and maintaining complete compliance with
25 all applicable federal, state and local laws, regulations and permits.
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VII. PROJECT SITE

12. Defendant agrees to make the Project Site available in perpetuity for the purposes of developing and maintaining the Project.

13. As part of any conveyance of the Project Site Defendant shall include in the deed, lease or other instrument of conveyance the deed restriction set forth in Appendix C hereto. Defendant shall abide, and shall cause its subsidiaries and affiliates to abide, by the same restrictions so long as any of them own the Project Site.

14. Defendant shall record in the applicable real property records for the real property comprising the Project Site a notice, substantially in the form included in Appendix D hereto, which is intended to inform prospective purchasers or lessees of the existence of this Consent Decree and of the fact that the transfer and use of the parcel are subject to the requirements and restrictions of this Consent Decree, including those detailed in Paragraphs 12 and 13 above. Defendant shall ensure that such notice is recorded within sixty (60) days following the effective date of this Consent Decree.

15. Defendant shall not sell, grant, lease or otherwise transfer to any party an interest in the real property comprising the Project Site other than as specifically contemplated in this Consent Decree without the prior written consent of the Trustees, the United States Department of Justice, which consent shall not be unreasonably withheld, and the approval of the Court.

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VIII. PROJECT DEVELOPMENT

16. Defendant shall provide the funds and services and take all necessary steps to construct, maintain, monitor and evaluate the Project and to conduct adaptive management to meet Project goals in accordance with the details, specifications and project development schedule set out in Appendix A. In particular Defendant shall, in compliance with the project development schedule

1 and the details and specifications of Appendix A:

2 a. Apply for and take all other actions reasonably necessary to obtain all permits
3 required under applicable law;

4 b. Construct or have constructed the Project;

5 c. Maintain the Project;

6 d. Monitor and evaluate the Project, and take such adaptive management actions
7 as agreed to or required by the Trustees; and
8

9 e. Provide to the Trustees the Project Completion Accounting as required under
10 Paragraph 19.

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12 17. Defendant shall avoid taking any action on the Project Site property or adjacent
13 property owned or controlled by Defendant that is inconsistent with this Consent Decree and that
14 would interfere with the Project such that it would substantially decrease the likelihood of success
15 of the Project.

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17 18. Upon completion of construction of the Project, Defendant shall submit a written
18 Notice of Completion to the Trustees. The Trustees shall review the course and results of the
19 development of the Project to determine whether the Project has been completed in accordance with
20 Appendix A. Within 60 days after receiving the Notice of Completion, the Trustees shall submit to
21 Defendant either (a) a written notice identifying specific deficiencies the Trustees determine must be
22 satisfied for the Project to be completed in accordance with Appendix A (Notice of Deficiencies); or
23 (b) a written notice of the Trustees' determination that the Project has been so completed (Notice of
24 Approval of Completion). Following receipt of a Notice of Deficiencies, Defendant shall correct the
25 identified deficiencies and complete the Project in accordance with Appendix A, and submit to the
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1 Trustees an amended Notice of Completion for review and response in accordance with this
2 Paragraph. Any delay in completing Project construction as a result of the operation of this
3 Paragraph shall not in and of itself constitute grounds for relief from the requirement to pay stipulated
4 penalties under Section XVI for compliance delays.
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6 19. Within 60 days following receipt of the Trustees' Notice of Approval of Completion
7 for the Project, Defendant shall submit to the Trustees a Project Completion Accounting. The Project
8 Completion Accounting shall itemize the costs incurred by Defendant in developing the Project and
9 contain an estimate of the costs of carrying out the actions needed to comply with the Project
10 maintenance and monitoring requirements of Appendix A.
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12 IX. POST-CONSTRUCTION ALTERATIONS;
13 FURTHER RESTORATION ACTIONS

14 20. In addition to any measures undertaken in connection with the Project monitoring and
15 adaptive management plan identified in Appendix A, following construction of the Project the
16 Trustees may at any time make such post-construction alterations or implement such further
17 restoration actions on the Project site as they determine appropriate. Such post-construction
18 alterations or further restoration actions shall only be taken with the approval of Defendant, which
19 approval may be withheld only upon a showing that the proposed activity would be inconsistent with
20 the purposes of the Project as described in Appendix A, would be inconsistent with other provisions
21 of this Consent Decree or other applicable law, would impose uncompensated costs upon Defendant,
22 or would be inconsistent with other uses of the adjacent property.
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24 X. ACCESS TO INFORMATION AND PROJECT SITES

25 21. To facilitate their oversight responsibilities, the Trustees shall have full access to all
26 work in progress required under this Consent Decree.
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1 22. Commencing upon the date of lodging of this Consent Decree, Defendant agrees to
2 provide the Trustees and their contractors access at all reasonable times to the site of the Project and
3 to any non-privileged documents relating to the Project or Project Site. Where the property to which
4 access is sought is not otherwise open to public access, the Trustees shall give notice prior to access.
5 Each Trustee shall have the authority to enter freely and move about such property at all reasonable
6 times for the purposes of overseeing the requirements of this Consent Decree, including, but not
7 limited to:
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- 9 a. Monitoring and assessing progress on the planning, development, maintenance
10 and monitoring of the Projects;
- 11 b. Verifying any data or information submitted to the Trustees;
- 12 c. Inspecting and copying records, operation logs, contracts or other documents
13 maintained or generated by Defendant or its agents or contractors for the
14 work undertaken pursuant to this Consent Decree;
- 15 d. Conducting such tests, investigations or sample collections as deemed
16 necessary to monitor compliance with this Consent Decree or to assist in
17 further identifying and quantifying natural resource injuries requiring
18 restoration actions and in planning and carrying out further restoration
19 actions;
- 20 e. Using a camera, sound recording device or other type equipment to record the
21 work done under this Consent Decree or injury to natural resources;
- 22 f. Undertaking any maintenance action the Trustees determine necessary; and
- 23 g. Undertaking post-construction alterations or further restoration actions in
24 accordance with Paragraph 20.
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26 23. Defendant shall have the right to accompany any Trustee or its representative on the
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1 property. Anyone provided access through this Consent Decree shall comply with applicable health
2 and safety requirements and shall not interfere with ongoing operations.

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4 XI. SELECTION OF CONTRACTORS

5 24. The selection of any contractor retained by Defendant to perform any of the work
6 required under this Consent Decree shall be subject to Trustee approval, which shall not be
7 unreasonably withheld. The Trustees approve Windward Environmental, Inc. and Tom Smayda as
8 Defendants's contractors for the Project. Defendant shall notify the Trustees in writing of the name,
9 title and qualifications of any other proposed contractor, and of any proposed changes in the selection
10 of a contractor. The Trustees will notify Defendant in writing of the approval or disapproval of a
11 proposed contractor. Defendant shall also notify the Trustees of any proposed subcontractor and of
12 any proposed changes in the selection of a subcontractor to be retained to perform any of the work
13 required under this Consent Decree. The Trustees' assent to the proposed selection or change of a
14 subcontractor may be presumed unless the Trustees notify Defendant in writing of their objection to
15 the proposed selection or change within 45 days of Defendant's written selection notice.
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18 XII. REIMBURSEMENT OF RESTORATION OVERSIGHT COSTS

19 25. Defendant shall reimburse Trustee costs incurred in the oversight of the development
20 and maintenance of the Project in the total amount of \$50,000.00. Sums paid under this Paragraph
21 shall be deposited in the Commencement Bay Restoration Account for use as the Trustees shall
22 determine in accordance with the terms of this Consent Decree and other applicable law. Payment
23 shall be deposited within 30 days following the entry of this Consent Decree with the Registry of the
24 Court by certified check, bearing the notation "General Metals of Tacoma, Inc. - Oversight Costs"
25 and the civil action number assigned to this Consent Decree, made payable and addressed as follows:
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1 Payee: Clerk of the Court
2 Address: Clerk, U.S. District Court
3 U.S. Courthouse, Room 215
4 1010 Fifth Avenue
5 Seattle, WA 98104

6 Memo: For Deposit into the Commencement Bay Natural Resource Restoration Account
7 C93-5462 [INSERT THIS CASE DOCKET NUMBER]

8 Defendant shall send photocopies of each check and any transmittal letter to: Chief, Environmental
9 Enforcement Section, Department of Justice, P.O. Box 7611, Ben Franklin Station, Washington, D.C.
10 20044; and to Robert A. Taylor, NOAA GCNR/NW, 7600 Sand Point Way NE, Seattle, WA 98115-
11 0070. Any funds paid pursuant to this Paragraph that are not utilized by the Trustees to cover
12 oversight costs or costs of further maintenance, monitoring or adaptive management for the Project
13 may be applied by the Trustees toward one or more additional restoration projects in the
14 Commencement Bay Environment.
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16 XIII. PAST COST REIMBURSEMENT

17 26. Within 30 days of entry of this Decree, Defendant will pay to the Trustees sums
18 totaling \$479,559.38 in damage assessment costs. These sums shall be paid in the following amounts
19 and particulars:
20

21 Trustee: National Oceanic and Atmospheric Administration
22 Amount: \$386,859.82

23 Trustee: U.S. Department of the Interior
24 Amount: \$64,677.52

25 Payments to NOAA and the U.S. Department of the Interior shall be made by FedWire Electronic
26 Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT
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1 procedures. Payment shall be made in accordance with instructions provided to Defendant by the
2 Financial Litigation Unit of the U.S. Attorney's Office of the Western District of Washington. Any
3 payments received by the Department of Justice after 4:00 p.m. Eastern Standard Time shall be
4 credited on the next business day. Defendant shall provide at least five days notice to the Financial
5 Litigation Unit before making the transfer.
6

7 Payments to the other Trustees shall be made by certified checks, bearing the notation
8 "General Metals of Tacoma, Inc. - Commencement Bay Assessment Costs," in the amounts indicated
9 and made payable and addressed as follows:

10 Trustee: State of Washington
11 Amount: \$7,980.72
12 Payee: State of Washington/Department of Ecology
13 Address: State of Washington
14 Department of Ecology
15 Attention: Cashiering Section
16 P.O. Box 5128
Lacey, WA 98503-0210

17 Trustee: Puyallup Tribe of Indians
18 Amount: \$18,258.55
19 Payee: Puyallup Tribe of Indians
20 Address: Mr. William Sullivan
21 Environmental Protection Department
22 Puyallup Tribe of Indians
3009 E. Portland Ave.
Tacoma, WA 98404

23 Trustee: Muckleshoot Indian Tribe
24 Amount: \$1,782.77
25 Payee: Muckleshoot Indian Tribe
26 Address: Mr. Rob Otsea
27 Office of the Tribal Attorney
Muckleshoot Indian Tribe
28

1 39015 172nd Avenue S.E.
2 Auburn, WA 98002

3 27. At the time of each payment Defendant will send notice that payment has been made
4 to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions). Such notice
5 will reference Commencement Bay NRDA, DOJ case number 90-11-2-1049, and the civil action
6 number.
7

8 XIV. FAILURE TO MAKE TIMELY PAYMENTS

9 28. If Defendant fails to make any payment under Paragraphs 25 and 26 by the required
10 due date, interest shall be assessed at the rate specified for interest on investments of the EPA
11 Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October
12 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in
13 effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each
14 year. Interest will continue to accrue on the unpaid balance through the date of payment.
15

16 XV. DISPUTE RESOLUTION

17 29. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution
18 procedures of this Section shall be the exclusive mechanism to resolve disputes arising
19 under or with respect to this Consent Decree.
20

21 30. Any dispute which arises under or with respect to this Consent Decree shall in the first
22 instance be the subject of informal negotiations between the Trustees and Defendant. The period for
23 informal negotiations shall not exceed twenty-one (21) days from the time the dispute arises, unless
24 the parties to the dispute agree otherwise in writing. The dispute shall be considered to have arisen
25 when the Trustees send and Defendant receives a written notice specifying the nature of the dispute
26 and requested relief (“Notice of Dispute”) or Defendant sends and the Trustees receive a written
27

1 Notice of Dispute.

2 31. a. If the Parties cannot resolve a dispute by informal negotiations under the
3 preceding Paragraph, then the position advanced by the Trustees shall be considered binding unless,
4 within twenty-one (21) days after the conclusion of the informal negotiation period, Defendant
5 invokes the formal dispute resolution procedures of this Section by serving on the Trustees a written
6 Statement of Position on the matter in dispute, including, but not necessarily limited to, any factual
7 data, analysis or opinion supporting that position and any supporting documentation relied upon by
8 Defendant. Defendant's Statement of Position shall include the identification of a management-level
9 representative (at least one management level above the level of the persons directly involved in the
10 dispute) who has not previously been involved in the dispute, who shall serve as Defendant's Formal
11 Dispute Resolution Representative.
12

13 b. Within twenty-one (21) days after receipt of Defendant's Statement of
14 Position, the Trustees shall serve on Defendant their written Statement of Position, including, but not
15 necessarily limited to, any factual data, analysis or opinion supporting that position and all supporting
16 documentation relied upon by the Trustees. The Trustees' Statement of Position shall include the
17 identification of one or more management-level representatives who have not previously been
18 involved in the dispute who shall serve as the Trustees' Formal Dispute Resolution Representative(s).
19

20 c. An administrative record of the dispute shall be maintained by the Trustees and
21 shall contain all Statements of Position, including supporting documentation, submitted pursuant to
22 this Section.
23

24 d. The Formal Dispute Resolution Representatives for Defendant and the
25 Trustees shall meet to discuss the matter in dispute at the earliest available opportunity and will work
26

1 in good faith to resolve the matter in dispute. If the Parties fail to resolve the dispute within twenty-
2 one (21) days after the initial meeting of the Formal Dispute Resolution Representatives, then the
3 position advanced by the Trustees in their Statement of Position shall be considered binding upon
4 Defendant, subject to any agreements the Formal Dispute Resolution Representatives may have
5 reached on one or more issues and further subject to Defendant's right to seek judicial review
6 pursuant to the following Subparagraph. In such event the Trustees shall within five (5) days of the
7 conclusion of the formal dispute resolution process notify Defendant in writing that the formal dispute
8 resolution process has concluded.

9
10 e. Any matter in dispute shall be reviewable by this Court, provided that a motion
11 for judicial review of the decision is filed by Defendant with the Court and served on all Parties within
12 twenty-one (21) days of receipt of the Trustees' letter notifying Defendant of the conclusion of the
13 formal dispute resolution process. The motion shall include a description of the matter in dispute, the
14 relief requested and the schedule, if any, within which the dispute must be resolved to ensure orderly
15 implementation of this Consent Decree. The Plaintiffs may file a response to Defendant's motion
16 within twenty-one (21) days of receipt of the motion unless otherwise provided by the Court, and
17 Defendant may file a reply brief within five (5) days of receipt of the response or such different time
18 that the local rules of court may provide.

19
20 f. The Court may rule based on the written record, with or without oral
21 argument. The burden of proving entitlement to the requested relief with respect to the matter in
22 dispute shall be on the Party requesting it.

23
24 g. The foregoing notwithstanding, the Parties acknowledge that disputes may
25 arise that require resolution on an expedited basis. In such cases, the Parties shall agree on an
26

1 expedited schedule or, absent prompt agreement, either Defendant or the Trustees may petition the
2 Court for the imposition of an expedited schedule.

3 32. The invocation of formal dispute resolution procedures under this Section shall not
4 extend, postpone or affect in any way any obligation of any Party under this Consent Decree not
5 directly in dispute or contingent on issues in dispute, unless the Trustees or the Court agrees
6 otherwise. Defendant's obligations to pay stipulated penalties as provided in Section XVI with
7 respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution
8 of the dispute. Notwithstanding the stay of payment, the obligation to pay stipulated penalties shall
9 accrue from the first day of noncompliance with any applicable provision of this Consent Decree,
10 subject agreement of the Parties or to the decision of the Court on Defendant's motion. If Defendant
11 does not prevail on a disputed issue, stipulated penalties may be assessed and paid as provided in
12 Section XVI.
13
14

15 XVI. STIPULATED PENALTIES

16 33. The Parties stipulate that time is of the essence in the implementation of the
17 requirements of this Consent Decree and that delays in carrying out the activities required herein may
18 diminish the compensatory value attributable to those activities. Consequently, in the event that
19 Defendant exceeds the deadline provided for one of the activities described below (subject to any
20 modifications agreed to under Section XXVIII and such delay is not excused through operation of
21 the dispute resolution provisions (Section XV) and/or the force majeure provisions (Section XVII),
22 Defendant shall, as a stipulated penalty, increase the financial contributions it makes under this
23 Consent Decree to fund habitat restoration actions, over and above any payments required elsewhere
24 under this Consent Decree, as follows:
25
26
27
28

1 a. For each week Defendant fails to comply with a deadline provided in
2 Paragraph 25 or 26 for making any payment; in the Project Development Schedule included in
3 Appendix A for accomplishing a major milestone for the Project; under Paragraph 14 for recording
4 notice of the deed restriction; under Paragraph 18 for submitting a Notice of Completion; under
5 Paragraph 19 for submitting a Project Completion Accounting; or under Paragraph 41 for providing
6 copies of certificates of insurance and insurance policies, Defendant shall pay a stipulated penalty in
7 the amount of \$1,000. Where the delay extends beyond the second week, the stipulated penalty shall
8 apply to each additional day of delay for each such missed deadline. For purposes of this
9 Subparagraph, a week shall equal a continuous period of seven days.
10

11 b. Stipulated penalties are due and payable within 30 days of the date of the
12 demand for payment of the penalties by the Trustees. All payments to the Trustees under this
13 Paragraph will be made by a certified check made payable to the Clerk of the Court. This check will
14 be deposited in the Commencement Bay Restoration Account.
15

16 c. At the time of each payment, Defendant will send notice that payment has been
17 made to the Trustees and DOJ in accordance with Section XXIV (Notices and Submissions). This
18 notice will reference Commencement Bay NRDA, DOJ Case Number 90-11-2-1049, and the civil
19 action number.
20

21 d. Penalties will accrue as provided in this Paragraph regardless of whether the
22 Trustees have notified Defendant of the violation or made a demand for payment, but the penalties
23 need only be paid upon demand. All penalties will begin to accrue on the day after payment or
24 performance is due and will continue to accrue through the date of payment or performance. Nothing
25 in this Decree prevents the simultaneous accrual of separate penalties for separate violations of this
26
27
28

1 Decree.

2 e. Defendant may dispute the Trustees' right to the penalties identified under
3 Subparagraph a. above by invoking the dispute resolution procedures of Section XV.

4 34. If Plaintiffs bring an action to enforce this Decree, Defendant will reimburse Plaintiffs
5 for all costs of such action, including but not limited to costs of attorney time.
6

7 35. Payments made under this Section are in addition to any other remedies or sanctions
8 available to Plaintiffs by virtue of Defendant's failure to comply with the requirements of this Decree.

9 36. Notwithstanding any other provision of this Section, Plaintiffs may, in their
10 unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued
11 pursuant to this Decree. Payment of stipulated penalties does not excuse Defendant from payment
12 as required by Sections XII or XIII or from performance of any other requirement of this Consent
13 Decree.
14

15 37. The Trustees may use sums paid as stipulated penalties under Paragraph 33 to pay
16 unreimbursed damage assessment costs and/or to fund or contribute to additional actions to restore
17 Commencement Bay natural resources.
18

19 XVII. FORCE MAJEURE

20 38. "Force majeure," for purposes of this Consent Decree, is defined as any event arising
21 from causes beyond the control of Defendant that delays or prevents the performance of any
22 obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The
23 requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts
24 to anticipate any potential force majeure event and best efforts to address the effects of any potential
25 force majeure event (1) as it is occurring and (2) following the potential force majeure event, such
26
27
28

1 that the delay is minimized to the greatest extent possible. "Force majeure" does not include financial
2 inability to fulfill the obligation.

3 39. a. If any event occurs or has occurred that may delay the performance of any
4 obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant
5 shall notify the Trustees within 14 days of when Defendant first knew that the event might cause a
6 delay. Within 30 days thereafter, Defendant shall provide a written explanation and description of
7 the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to
8 prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent
9 or mitigate the delay or the effect of the delay; and the rationale for attributing such delay to a force
10 majeure event, if Defendant intends to assert such a claim. Defendant shall include with any notice
11 all available documentation supporting its claim that the delay was attributable to a force majeure
12 event. Failure to comply with the above requirements will preclude Defendant from asserting any
13 claim of force majeure for that event.

14 b. If the Trustees agree that the delay or anticipated delay is attributable to a
15 force majeure event, the time for performance of the obligations under this Consent Decree that are
16 affected by the force majeure event will be extended by the Trustees for such time as is necessary.
17 An extension of the time for performance of the obligations affected by the force majeure event shall
18 not, of itself, extend the time for performance of any other obligation. If the Trustees do not agree
19 that the delay or anticipated delay has been or will be caused by a force majeure event, the Trustees
20 will notify Defendant in writing of their decision.

21 c. If Defendant elects to invoke the dispute resolution procedures set forth in
22 Section XV, above, regarding a claimed force majeure event it shall do so no later than 30 days after
23

1 receipt of the Trustees' notice of disagreement. In any such proceeding Defendant shall have the
2 burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has
3 been or will likely be caused by a force majeure event, that the duration of the delay or the extension
4 sought was or will be warranted under the circumstances, that Defendant exercised best efforts to
5 fulfill the obligation in question, and that Defendant complied with the requirements of this Paragraph.
6 If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant
7 of the affected obligation of this Consent Decree.
8

9
10 **XVIII. INDEMNIFICATION; INSURANCE**

11 40. a. Defendant shall indemnify for and hold harmless each of the Plaintiffs and/or
12 their agents, employees and representatives from any and all damage claims or causes of action arising
13 from acts or omissions of Defendant and/or its officers, employees, agents, contractors,
14 subcontractors, representatives and any persons acting on its behalf or under its control, in carrying
15 out the requirements of this Consent Decree. Further, Defendant agrees to pay the Plaintiffs all costs
16 they incur, including but not limited to attorneys fees and other expenses of litigation and settlement,
17 arising from or on account of damage claims made against the Plaintiffs based on acts or omissions
18 of Defendant or its officers, employees, agents, contractors, subcontractors, representatives and any
19 persons acting on its behalf or under its control, in carrying out the requirements of this Consent
20 Decree. None of the Plaintiffs shall be held out as a party to any contract entered into by or on behalf
21 of Defendant in carrying out the requirements of this Consent Decree. Neither Defendant nor any
22 such contractor or representative shall be considered an agent of any Plaintiff, and Defendant shall
23 require any contractor carrying out the requirements of this Consent Decree to affirmatively
24 acknowledge that it is not acting as an agent of any Plaintiff.
25
26
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1 b. Defendant waives, and shall indemnify and hold harmless each of the Plaintiffs
2 with respect to, any claims for damages or reimbursement from the Plaintiffs or for set-off against any
3 payments made or to be made to the Plaintiffs, arising from or on account of any contract, agreement
4 or arrangement between Defendant and any person in carrying out the requirements of this Consent
5 Decree, including claims on account of construction delays.

7 41. Defendant shall secure and maintain comprehensive general liability insurance and
8 automobile liability insurance with limits of \$10,000,000 (ten million dollars), combined single limit,
9 naming the United States, the State, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe
10 as additional insureds. In addition, for the duration of this Consent Decree Defendant shall satisfy,
11 or shall ensure that its contractors or subcontractors satisfy, all applicable law and regulations
12 regarding the provision of worker's compensation insurance for all persons performing any work
13 involved in implementing this Consent Decree. No later than 15 days before commencing any work
14 involved in implementing this Consent Decree, Defendant shall provide to the Trustees certificates
15 of such insurance and a copy of each insurance policy. Defendant shall resubmit such certificates and
16 copies of policies each year on the anniversary of the effective date of this Consent Decree. If
17 Defendant demonstrates by evidence satisfactory to the Trustees that any contractor or subcontractor
18 maintains insurance equivalent to that described above, or insurance covering the same risks but in
19 a lesser amount, then, with respect to that contractor or subcontractor, Defendant need provide only
20 that portion of the insurance described above that is not maintained by the contractor or
21 subcontractor.

25 42. The Trustees agree to require that any contractor who performs work for them in the
26 Project area shall agree to indemnify and hold harmless Defendant and their agents, employees and
27

1 representatives, against all claims of any nature, including, but not limited to, claims by third parties
2 for death, personal injury, or property damage, and claims for environmental liability that arise as the
3 result of negligent acts or omissions of such contractor, its employees, representatives and agents in
4 carrying out the provisions of this Consent Decree. Such indemnity shall be limited to actual damages
5 only, and shall not extend to consequential damages or any other liability except as stated herein.
6

7 **XIX. COVENANT NOT TO SUE BY PLAINTIFFS**

8 43. Except as specifically provided in Section XX (Reservations of Rights) below,
9 Plaintiffs covenant not to sue or to take administrative action against Defendant pursuant to Section
10 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Section 311 of the Clean Water
11 Act (CWA), 33 U.S.C. § 1321; or Section 1002(a) of the Oil Pollution Act of 1990 (OPA), 33 U.S.C.
12 § 2702(a), to recover Natural Resource Damages. This covenant not to sue will take effect upon
13 entry of this Consent Decree by the Court and continue in effect conditioned upon the satisfactory
14 performance by Defendant of its obligations under this Consent Decree. This covenant not to sue
15 extends only to Defendant and its heirs, successors and assigns, and does not extend to any other
16 person.
17
18

19 **XX. RESERVATIONS OF RIGHTS**

20 44. Plaintiffs reserve, and this Decree is without prejudice to, all rights against Defendant
21 with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiffs in
22 Paragraph 43. Notwithstanding any other provision of this Decree, Plaintiffs reserve, and this Decree
23 is without prejudice to, all rights against Defendant with respect to:
24

- 25 a. liability for failure of Defendant to meet a requirement of this Decree;
 - 26 b. liability for costs of response incurred or to be incurred by Plaintiffs;
- 27
28

- 1 c. liability for injunctive relief or administrative order enforcement under Section 106
2 of CERCLA, 42 U.S.C. § 9606;
3 d. criminal liability to the United States or State.
4

5 **XXI. REOPENERS**

6 45. Notwithstanding any other provision of this Consent Decree, the Plaintiffs reserve, and
7 this Consent Decree is without prejudice to, the right to institute proceedings against Defendant in
8 this action or in a new action for:

9 a. Claims based on a failure of Defendant to satisfy the requirements of this
10 Consent Decree; and

11 b. Additional claims for Natural Resource Damages if conditions, factors or
12 information in the Commencement Bay Environment, not known to the Trustees at the time of entry
13 of this Consent Decree, are discovered that, together with any other relevant information, indicates
14 that there is injury to, destruction of, or loss of natural resources of a type unknown, or of a
15 magnitude significantly greater than was known, at the time of entry of this Consent Decree, which
16 is attributable to Defendant. For purposes of this Paragraph, information known to the Trustees shall
17 consist of any information developed or acquired by any of the Trustees or their contractors as part
18 of or in connection with the Commencement Bay natural resource damage assessment process or the
19 Hylebos Waterway settlement and liability allocation process prior to the date of signing of this
20 Consent Decree.
21
22
23

24 **XXII. COVENANT NOT TO SUE BY DEFENDANT**

25 46. Defendant covenants not to sue and agrees not to assert any claims or causes of action
26 against the United States, the State, the Puyallup Tribe of Indians and the Muckleshoot Indian Tribe
27
28

1 or their contractors or employees, for any civil claims or causes of action relating to Natural Resource
2 Damages. This covenant not to sue will also take effect upon entry of this Consent Decree by the
3 Court. This covenant not to sue extends only to Plaintiffs and their heirs, successors and assigns, and
4 does not extend to any other person.
5

6 **XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

7 47. Nothing in this Consent Decree shall be construed to create any rights in, or grant any
8 cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly
9 reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims,
10 demands, and causes of action they each may have with respect to any matter, transaction, or
11 occurrence relating in any way to the Commencement Bay Environment against any person not a
12 Party hereto.
13

14 48. The Parties agree, and by entering this Consent Decree this Court finds, that
15 Defendant is entitled, as of the effective date of this Consent Decree, to protection from contribution
16 actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2), and RCW
17 70.105D.040(4)(d), for Natural Resource Damages.
18

19 49. Defendant agrees that it will notify the Trustees and the United States in writing no
20 later than 60 days before bringing a suit or claim for contribution for Natural Resource Damages.
21 Defendant also agrees that it will notify the Trustees and the United States in writing within 10 days
22 of service of a complaint or claim upon them relating to a suit or claim for contribution for Natural
23 Resource Damages. In addition, Defendant will notify the Trustees and the United States within 10
24 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any
25 order from a court setting a case for trial for matters related to this Decree.
26
27
28

1 50. In any subsequent administrative or judicial proceeding initiated by the Plaintiffs for
2 injunctive relief, recovery of response costs, or other appropriate relief other than Natural Resource
3 Damages, Defendant shall not assert, and may not maintain, any defense or claim based upon the
4 principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other
5 defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent
6 proceeding were or should have been brought in the instant case; provided, however, that nothing
7 in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraphs 43 and
8 46.
9

10 XXIV. NOTICES AND SUBMISSIONS

11
12 51. Whenever notice is required to be given or a document is required to be sent by one
13 Party to another under the terms of this Decree, it will be directed to the individuals at the addresses
14 specified below, unless those individuals or their successors give notice of a change to the other
15 Parties in writing. Written notice as specified constitutes complete satisfaction of any written notice
16 requirement of the Decree for Plaintiffs and Defendant.

17 As to the United States and as to DOJ:

18 Chief, Environmental Enforcement Section
19 Environment and Natural Resources Division
20 U.S. Department of Justice
21 P.O. Box 7611
22 Washington, D.C. 20044-7611
23 (DJ # 90-11-2-1049)

24 As to NOAA:

25 Robert A. Taylor
26 NOAA Office of General Counsel GCNR/NW
27 7600 Sand Point Way NE
28

1 Seattle, WA 98115-0070

2 As to the United States Department of the Interior:

3
4 Jeff Krausmann
5 U.S. Fish & Wildlife Service
6 510 Desmond Dr. SE, Suite 102
7 Lacey, WA 98503-1263

8 As to the State:

9 Craig Thompson
10 Toxics Cleanup Program
11 State of Washington
12 P.O. Box 47600
13 Olympia, WA 98504-7600

14 As to the Puyallup Tribe of Indians:

15 Bill Sullivan
16 Environmental Department
17 Puyallup Tribe of Indians
18 3009 E. Portland Avenue
19 Tacoma, WA 98404

20 As to the Muckleshoot Indian Tribe:

21 Mr. Rob Otsea
22 Office of the Tribal Attorney
23 Muckleshoot Indian Tribe
24 39015 172nd Avenue S.E.
25 Auburn, WA 98002

26 As to Defendant:

27 Mr. Matthew Cusma
28 Environmental Administrator

1 Schnitzer Steel Industries, Inc.
2 P.O. Box 10047
3 Portland, OR 97296-0047

4 XXV. EFFECTIVE DATE

5 52. The effective date of this Consent Decree shall be the date upon which this Consent
6 Decree is entered by the Court, except as otherwise provided herein.
7

8 XXVI. RETENTION OF JURISDICTION

9 53. This Court will retain jurisdiction over this matter for the purpose of interpreting and
10 enforcing the terms of this Decree.

11 XXVII. INTEGRATION/APPENDICES

12 54. This Decree and its appendices constitute the final, complete, and exclusive agreement
13 and understanding with respect to the settlement embodied in this Decree. The Parties acknowledge
14 that there are no representations, agreements, or understandings relating to the settlement other than
15 those expressly contained in this Decree. The following appendices are attached to and incorporated
16 into this Consent Decree:
17

18 Appendix A Karileen Restoration Project: Restoration Plan and Karileen Restoration
19 Project: Post-Construction Monitoring Program and Work Plan

20 Appendix B Order Directing the Deposit of Natural Resource Damages into the
21 Registry of the Court in United States v. Port of Tacoma, No. C93-5462B
22 (W.D. Wash. Oct. 8, 1993)

23 Appendix C Form of real property use restrictions

24 Appendix D Form of real property use restrictions notice
25

26 XXVIII. MODIFICATION

27 55. No material modifications shall be made to any requirement under this Consent Decree
28

1 without written notification to and written approval of the United States Department of Justice and
2 the Trustees, Defendant and the Court. Modifications to this Consent Decree exclusive of the
3 appendices incorporated within that do not materially alter the terms of this Consent Decree may be
4 made by written agreement between the United States Department of Justice, the Trustees and
5 Defendant. Modifications to any of the appendices to this Consent Decree that do not materially alter
6 any of the terms of this Consent Decree may be made by written agreement between the Trustees and
7 Defendant. The following modifications shall be deemed not to materially alter the terms of this
8 Consent Decree or the appendices incorporated herein:
9

- 10 a. Extensions of deadlines for Project major milestones, provided that the
11 total of such extensions shall equal one year or less;
- 12 b. Project design changes that increase the Project scale, or that decrease the
13 Project scale by no more than 10% (ten percent) of the Project's area; or
14
- 15 c. Extensions of deadlines for reports, accounts, plans or proposals of 45 days
16 or less.

17 XXIX. ENFORCEMENT

18 56. The requirements of this Consent Decree, including but not limited to deadlines,
19 schedules and Project designs, are independently enforceable and the delay or failure of the Trustees
20 to enforce any requirement will not preclude or prejudice the subsequent enforcement of the same
21 or another requirement.
22

23 XXX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

24 57. This Decree will be lodged with the Court for a period of not less than 30 days for
25 public notice and comment. The Plaintiffs each reserve the right to withdraw or withhold their
26 consent if the comments regarding the Decree disclose facts or considerations that indicate this
27

1 Decree is inappropriate, improper, or inadequate. Defendant consents to the entry of this Decree
2 without further notice.

3 58. If for any reason this Court declines to approve this Decree in the form presented, this
4 agreement may be voided at the sole discretion of any Party, and the terms of the agreement may not
5 be used as evidence in any litigation between the Parties.
6

7 XXXI. SIGNATORIES/SERVICE

8 59. The Assistant Attorney General for the Environment and Natural Resources Division
9 of the United States Department of Justice and each undersigned representative of the State, the
10 Puyallup Tribe of Indians, the Muckleshoot Indian Tribe and Defendant certifies that he or she is
11 authorized to enter into the terms and conditions of this Decree and to execute and bind legally the
12 Party that he or she represents to this document.
13

14 60. Defendant agrees not to oppose entry of this Decree by this Court or to challenge any
15 provision of this Decree unless any Plaintiff has notified Defendant in writing that it no longer
16 supports entry of the Decree.
17


18 61. Defendant will identify on the attached signature page the name and address of an
19 agent who is authorized to accept service of process by mail on behalf of it with respect to all matters
20 relating to this Decree. Defendant agrees to accept service in that manner and to waive the formal
21 service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable
22 local rules of this Court, including but not limited to service of a summons.
23

24 XXXII. FINAL JUDGMENT

25 62. Upon approval and entry of this Decree by the Court, this Decree will constitute the
26 final judgment between and among the United States, the State, the Puyallup Tribe of Indians, the
27

1 Muckleshoot Indian Tribe, and Defendant. The Court finds that there is no just reason for delay and
2 therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

3
4 SO ORDERED THIS 11th DAY OF JULY, 2008.

5
6 

7
8 ROBERT J. BRYAN
9 United States District Judge

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in United States, et al. v.
2 General Metals of Tacoma, Inc.

3 FOR THE UNITED STATES OF AMERICA

4
5 Date: 3/20/08 _____

S/ _____

6 Ronald J. Tenpas
7 Assistant Attorney General
8 Environment and Natural Resources Division
9 U.S. Department of Justice
10 Washington, D.C. 20530

11 FOR THE STATE OF WASHINGTON

12
13 Date: 12/18/07 _____

/s/ _____

14 Director
15 Department of Ecology

16
17 Date : 10/19/07 _____

/s/ _____

18 Assistant Attorney General
19 State of Washington

20
21 FOR THE PUYALLUP TRIBE OF INDIANS

22
23 Date: 12/13/07 _____

/s/ _____

1 FOR THE MUCKLESHOOT INDIAN TRIBE

2
3 Date: 1/31/08 /s/ _____
4
5
6

7 FOR GENERAL METALS OF TACOMA, INC.

8
9 Date: 10/16/07 /s/ _____
10
11
12

13 Agent authorized to receive service of process by mail on behalf of General Metals of Tacoma,
14 Inc. with respect to all matters relating to this Decree:

15
16 Monica Rodal
17 Assistant General Counsel
18 Schnitzer Steel Industries, Inc.
19 P.O. Box 10047
20 Portland, OR 97296-0047
21
22
23
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