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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE
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10 UNITED STATES OF AMERICA ON)
11 BEHALF OF THE NATIONAL OCEANIC) Civil No.
12 AND ATMOSPHERIC)
13 ADMINISTRATION AND THE UNITED)
14 STATES DEPARTMENT OF THE) CONSENT DECREE
15 INTERIOR; STATE OF WASHINGTON)
16 THROUGH THE WASHINGTON STATE)
17 DEPARTMENT OF ECOLOGY;)
18 SUQUAMISH TRIBE; and MUCKLESHOOT)
19 INDIAN TRIBE,)
20 Plaintiffs,)
21 vs.)
22 EARLE M. JORGENSEN COMPANY,)
23 Defendant.)
24
25
26
27
28

CONSENT DECREE

U.S. DEPARTMENT OF JUSTICE
7600 Sand Point Way, NE
Seattle, WA 98115
(206)526-6608

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I. INTRODUCTION

The United States of America ("United States"), on behalf of the United States Department of Commerce, acting through 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 Suquamish Tribe; and the Muckleshoot Indian Tribe (collectively, "Plaintiffs"), have filed a complaint in this case against Earle M. Jorgensen Company ("EMJ" or "Defendant") pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a); the Model Toxics Control Act ("MTCA"), chapter 70.105D.040(2) RCW; Section 311(f) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(f); and Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702(b)(2)(A), for Covered Natural Resource Damages as a result of releases of hazardous substances and discharges of oil into the Lower Duwamish River ("LDR") or Elliott Bay (as defined below). The Lower Duwamish River is an urban waterway in and near Seattle, Washington, which flows into Elliott Bay that has been subject to considerable levels of industrial and other use throughout its history and into the present. This Consent Decree addresses the claims asserted in the Complaint against the Defendant.

II. BACKGROUND

A. The United States Department of Commerce, acting through NOAA; the United States Department of the Interior; the Washington Department of Ecology on behalf of the State of Washington; the Suquamish Tribe; and the Muckleshoot Indian Tribe, (collectively, "the Trustees" and, individually, a "Trustee"), under the authority of Section 107(f) of CERCLA, 42 U.S.C. § 9607(f); Section 1006(b) of OPA, 33 U.S.C. § 2706(b); 40 C.F.R. Part 300, subpart G; and RCW 70.105D.040(2), serve as trustees for natural resources for the assessment and recovery of damages for injury to, destruction of, or loss of natural resources and the services provided by those injured resources under their trusteeship.

1 B. Investigations conducted by the Trustees and others have detected hazardous
2 substances in the sediments, soils and groundwater of the Lower Duwamish River, including, but
3 not limited to, arsenic, antimony, cadmium, chromium, copper, mercury, nickel, lead, zinc, bis(2
4 ethylhexyl) phthalate, hexachlorobenzene, hexachlorobutadiene, tributyltin (TBT),
5 polychlorinated biphenyls ("PCBs"), and polycyclic aromatic hydrocarbons ("PAHs"). Overall,
6 the Trustees have documented the presence of over thirty hazardous substances in the marine
7 sediments of the LDR.

8 C. The Trustees began assessing damages to natural resources in the LDR in 1990 by
9 finding that hazardous substances had been released into the LDR; that natural resources had
10 likely been injured by the releases; that data sufficient to pursue a natural resource damage
11 assessment were available or could likely be obtained at a reasonable cost; and that, without
12 further action, future response activities would not adequately remedy the resource injuries. *See,*
13 *e.g.*, NOAA, Lower Duwamish Waterway Sediment Characterization Study Report (December
14 10, 1998), Elliott Bay Trustee Council, Pre-Assessment Screen for LDR (December 2009), and
15 Final Lower Duwamish River NRDA Restoration Plan and Programmatic Environmental Impact
16 Statement (July 2013).

17 D. Although the Trustees have initiated, but not yet completed a natural resource
18 damage assessment for the LDR, the Trustees have developed and analyzed information
19 sufficient to support a settlement that is fair, reasonable and in the public interest.

20 E. From 1965 to 1992, Defendant owned and operated the approximately 21.6 acres
21 Jorgensen Forge site, located on the east bank of the Lower Duwamish River at 8531 East
22 Marginal Way, Tukwila, Washington (identified by the legal description and map attached as
23 Appendix A), on which Defendant operated a steel forge facility which involved the production
24 and storage of electric arc furnace dust, including heavy metals. Around 1991, Defendant
25 removed three leaking underground petroleum storage tanks from the property. Investigations at
26 the facility identified petroleum product atop groundwater running under the facility and indicate
27 there were petroleum leaks from various equipment used in Defendant's operations.

1 F. Plaintiffs allege in the Complaint that Defendant owned and operated real
2 property or facilities on, adjacent to, or near the LDR at the time of the disposal of hazardous
3 substances within the meaning of 42 U.S.C. § 9607(a) and RCW 70.105D.040(1)(b). Plaintiffs
4 allege that hazardous substances have been released to the LDR from the Jorgensen Forge site
5 through direct discharge or other process discharges that have flowed to the LDR. The alleged
6 discharges were to “navigable waters” or “adjoining shorelines” within the meaning of Section
7 1002(a) of OPA, 33 U.S.C. § 2702(a), and Section 311(b)(3) of the CWA, 33 U.S.C. §
8 1321(b)(3). Plaintiffs also allege that investigations have detected hazardous substances in soils,
9 groundwater and sediments on or in the property or facilities, and some of these hazardous
10 substances are found in the sediments of the LDR. Plaintiffs further allege that hazardous
11 substances released to the LDR from the Jorgensen Forge site during the time of Defendant’s
12 ownership and operation have caused injury to, destruction of and loss of Natural Resources in
13 the LDR under Plaintiffs’ trusteeship, including fish, shellfish, invertebrates, birds, marine
14 sediments, and resources of cultural significance. Plaintiffs allege that each of them and the
15 public have suffered the loss of natural resource services (including ecological services as well as
16 direct and passive human use losses) as a consequence of those injuries.

17 G. To facilitate resolving natural resource damage claims, relying upon the results of
18 remedial investigations, regulatory standards, and scientific literature, the Trustees developed an
19 estimate of the amount of injury to Natural Resources that had occurred as a result of releases of
20 hazardous substances and discharges of oil to the LDR. The Trustees quantified the effects of
21 the injuries in terms of the losses of ecological services over affected areas of the LDR and over
22 time, discounted to a present value. Plaintiffs used the term discounted ecological service acre-
23 years (“DSAYs”) to describe both the scale of the injuries and the amount of habitat restoration
24 they are seeking to compensate for the injuries. At this time, for purposes of early settlements,
25 including this Decree, the estimated total number of DSAYs for injury to Natural Resources in
26 the LDR is 5,278.

1 H. Plaintiffs assert that hazardous substance releases and oil discharges to the LDR
2 have become dispersed and commingled to the extent that the effects of releases or discharges of
3 one Potentially Responsible Party ("PRP") cannot be readily distinguished from another's.
4 Plaintiffs further assert that the circumstances of the LDR contamination make all PRPs who
5 contributed to the contamination jointly and severally liable for all injuries to Natural Resources
6 that have resulted from the contamination. As a consequence, Plaintiffs assert the right to
7 recover for the loss of all the calculated DSAYs and associated damage assessment costs from
8 any Lower Duwamish River PRP. Without prejudice to their position and solely for purposes of
9 facilitating early settlements with individual PRPs, the Trustees developed a streamlined process
10 for allocating natural resource ecological damages liability among PRPs. The Plaintiffs have
11 determined that settling with Defendant for a portion of the natural resource damages attributable
12 to all LDR sources would result in a fair and equitable resolution of Plaintiffs' claims. Taking
13 into consideration prior settlements with other PRPs who bore some liability for hazardous
14 substance contamination of the LDR and releases of hazardous substances by non-settling
15 parties, Plaintiffs have agreed to settle their claims against Defendant for the equivalent of 10.4
16 DSAYs, less than 0.2% of the current total estimated DSAYs for the LDR, and a portion of the
17 Trustees' unreimbursed damage assessment costs. In light of on-going and anticipated
18 restoration activities, the Trustees have estimated the cash damages equivalent of the DSAYs
19 allocated to Defendant to total \$1,300,000 (at a cost of \$125,000 per DSAY).

20 I. Defendant does not admit any liability to Plaintiffs arising out of the transactions
21 or occurrences alleged in the Complaint or in this Decree. Nor does Defendant admit any of the
22 facts or legal conclusions alleged in the Complaint or in the Background section of this Decree.

23 J. Plaintiffs and Defendant agree that this Decree resolves Plaintiffs' claims for
24 Covered Natural Resource Damages as defined below, and that neither Plaintiffs nor Defendant
25 will use this settlement (including the terms of this Decree and the basis for the compromise
26 contained in other documents filed in this action in support of this Decree) in any other forum,
27 whether in litigation, administrative proceedings, formal or informal negotiations, or otherwise,
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1 to resolve, attempt to resolve, or in any way influence the resolution of, other claims between
 2 any of the Plaintiffs and Defendant in the LDR (as defined below); provided, however, that this
 3 provision does not limit Plaintiffs or Defendant from using otherwise available factual
 4 information referenced in documents filed in support of this Decree. The restriction in the
 5 preceding sentence applies to, but is not limited to, claims that the United States (on behalf of the
 6 United States Environmental Protection Agency) and the State may have against Defendant
 7 under CERCLA, the Solid Waste Disposal Act (as amended by the Resource Conservation and
 8 Recovery Act), 42 U.S.C. §§ 6901 *et seq.*, or MTCA in the LDR.

9 K. The Parties agree, and this Court by entering this Decree finds, that this Decree
 10 has been negotiated by the Parties in good faith, that settlement of this matter will avoid
 11 prolonged and complicated litigation between the Parties, that this Decree will expedite the
 12 restoration and protection of natural resources at and near the Lower Duwamish River, that the
 13 damage payments to be provided under this Decree constitute appropriate actions necessary to
 14 protect and restore the natural resources allegedly injured by releases or threatened releases of
 15 hazardous substances or discharges of oil by the Defendant, and that this Decree is fair,
 16 reasonable, and in the public interest.

17 NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed:

18 III. JURISDICTION AND VENUE

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

25 IV. PARTIES BOUND

26 2. This Decree is binding upon the United States, the State, the Suquamish Tribe, the
 27 Muckleshoot Indian Tribe, and upon the Defendant and its successors and assigns. Any change
 28

1 in ownership or corporate or other legal status, including but not limited to any transfer of assets
 2 or real or personal property, will in no way alter the status or responsibilities of Defendant under
 3 this Decree.

4 V. DEFINITIONS

5 3. Unless otherwise expressly provided, terms used in this Decree that are defined in
 6 CERCLA or in regulations promulgated under CERCLA have the meanings assigned to them in
 7 CERCLA or in such regulations. Whenever the terms listed below are used in this Decree the
 8 following definitions will apply:

9 a. "CERCLA" means the Comprehensive Environmental Response, Compensation,
 10 and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

11 b. "Covered Natural Resource Damages" means any damages recoverable by the
 12 Trustees under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D.040(2) RCW;
 13 Section 311(f) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(f); and Section
 14 1002(b)(2)(A) of the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702(b)(2)(A) and any
 15 other statutory or common law, for injury to, destruction of, loss of, loss of use of, or impairment
 16 of Natural Resources as a result of a release of hazardous substances or discharge of oil to the
 17 LDR or Elliott Bay, or adjoining shorelines, including but not limited to: (i) the costs of
 18 assessing such injury, destruction, or loss or impairment arising from or relating to such a release
 19 or discharge; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural
 20 resources or of acquisition of equivalent resources; (iii) the costs of planning such restoration
 21 activities; (iv) compensation for injury, destruction, loss, impairment, diminution in value, or
 22 loss of use of natural resources; and (v) each of the categories of recoverable damages described
 23 in 43 C.F.R. § 11.15, and applicable State or tribal law, resulting from releases of hazardous
 24 substances or discharges of oil to the LDR or Elliott Bay, or adjoining shorelines, where such
 25 release or discharge occurred on or before the Effective Date of this Consent Decree at the
 26 following location: 8531 East Marginal Way South, more particularly described and depicted on
 27 Appendix A. Damages, injury to, destruction of, loss of, loss of use of, or impairment of Natural
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1 Resources resulting from releases of hazardous substances or discharges of oil originating from
2 Defendant's operations or activities outside of the property identified in Appendix A are not
3 included in Covered Natural Resource Damages, even if those hazardous substances or
4 discharges of oil reach the LDR by flowing over, under, or through any portion of the property
5 so identified.

6 c. "Day" means a calendar day. In computing any period of time under this Decree,
7 where the last day falls on a Saturday, Sunday, or federal holiday, the period of time will run
8 until the close of business of the next working day. "Working day" means a day other than a
9 Saturday, Sunday, or federal holiday.

10 d. "Decree" means this Consent Decree, including Appendix A.

11 e. "Defendant" means Earle M. Jorgensen Company.

12 f. "Discounted Service-Acre Year or DSAY" means the amount of a specific suite
13 of ecological services determined to be produced per acre of a given type of habitat over a period
14 of years, the total of which are discounted to present value.

15 g. "Elliott Bay" means any portion of Elliott Bay (including the shoreline, intertidal
16 areas, tributaries, estuaries and bottom sediments) in the State of Washington where hazardous
17 substances originating from the property identified in the definition of Covered Natural Resource
18 Damages and Appendix A have come to be located.

19 h. "Lower Duwamish River" or "LDR" means any portion of the Duwamish
20 Waterway (including the shoreline, intertidal areas, tributaries, estuaries and bottom sediments)
21 in the State of Washington where hazardous substances originating from the property identified
22 in the definition of Covered Natural Resource Damages and Appendix A have come to be
23 located. The LDR includes the in-waterway portions of three Superfund Sites: the Harbor Island
24 Superfund Site (located south of downtown Seattle, Washington, including the East Waterway
25 and West Waterway that flow from the south end of Harbor Island north to Elliott Bay), the
26 Lower Duwamish Waterway Superfund Site (approximately five miles of the Duwamish River
27 from the southern tip of Harbor Island south to the area around the Norfolk Combined Sewer
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1 Overflow/Storm Drain in Tukwila, Washington), and the Lockheed West Superfund Site (areas
 2 in and around the site formerly known as Lockheed Shipyard No. 2, located near the confluence
 3 of the West Waterway and Elliott Bay).

4 i. "MTCA" means the Model Toxics Control Act, Chapter 70.105D RCW.

5 j. "Natural Resources" shall have the same meaning as the term has in 42 U.S.C. §
 6 9601(16).

7 k. "Party" means each of the United States, the State of Washington, the Suquamish
 8 Tribe, the Muckleshoot Indian Tribe, and Defendant (collectively, the "Parties").

9 l. "Plaintiffs" means the United States, the State, the Suquamish Tribe, and the
 10 Muckleshoot Indian Tribe.

11 m. "Trustees" mean the United States Department of Commerce acting through
 12 NOAA; the United States Department of the Interior; the Washington State Department of
 13 Ecology acting on behalf of the State of Washington; the Suquamish Tribe; and the Muckleshoot
 14 Indian Tribe.

15 n. "United States" shall mean the United States of America and each department,
 16 agency, and instrumentality of the United States, including the United States Department of
 17 Commerce and the United States Department of the Interior.

18 VI. GENERAL PROVISIONS

19 4. The Complaint states claims upon which relief may be granted.

20 5. This Decree shall not be used as evidence of Defendant's alleged liability in any
 21 action or proceeding, other than an action or proceeding to enforce the terms of this Decree, an
 22 action for contribution by Defendant against other PRPs, and an action by Defendant against any
 23 of its insurers.

24 VII. PAST ASSESSMENT COST REIMBURSEMENT

25 6. Within thirty days of the Effective Date of this Decree, Defendant will pay a total
 26 of \$75,538.96 for past assessment costs as described below.

a. Payment for Assessment Costs Incurred by the United States.

(1) Within thirty days after the Effective Date, Defendant shall pay a total of \$73,696.96 to the United States for assessment costs incurred by the United States. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account, in accordance with instructions provided to Defendant by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the Western District of Washington after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions on behalf of Defendant to:

John F. Glowacki Jr.
Assistant Vice-President
Brandywine Group
510 Walnut Street
Philadelphia, PA 19106
John.GlowackiJr@brandywineholdings.com
(215) 640-2406

with copies to:

Gil Leon
Vice President, Chief Financial Officer
Earle M. Jorgensen Company
10650 Alameda Street
Lynwood, CA 90262
GLEon@emjmetals.com
(323) 923-6120

and

Scott H. Reisch
Hogan Lovells US LLP
1601 Wewatta St., Suite 900
Denver, CO 80202
scott.reisch@hoganlovells.com
(303) 899-7355

Defendant may change the individuals to receive payment instructions on their behalf by providing written notice of such change to the United States in accordance with Section XVI (Notices).

(2) Of the total amount to be paid by Defendant pursuant to this Subparagraph 6.a.(1):

(a) \$6,015.13 shall be deposited in the DOI NRDAR Fund, to be applied toward natural resource damage assessment costs incurred by DOI.

(b) \$67,681.83 shall be deposited in the NOAA DARR Fund, to be applied toward natural resource damage assessment costs incurred by NOAA.

b. Payment for Assessment Costs Incurred by the State. Within thirty days after the Effective Date, Defendant shall pay a total of \$1,842.00 to the State of Washington for assessment costs incurred by the State. Payment shall be made by certified check, bearing the notation "Earle M. Jorgensen Company – Lower Duwamish Waterway Assessment" and made payable and addressed as follows:

Payee: State of Washington/Department of Ecology
Address: State of Washington/Department of Ecology
Attention: Cashiering Unit
P.O. Box 47611
Lacey, WA 98504-7611

7. At the time of each payment pursuant to Paragraph 6, Defendant will send notice that payment has been made to the Trustees and DOJ in accordance with Section XVI (Notices). Such notice will reference Lower Duwamish River NRDA, DOJ case number 90-11-3-07227/3 and this Court's civil action number.

VIII. PAYMENT OF NATURAL RESOURCE DAMAGES

8. Within thirty days of the Effective Date of this Decree, Defendant will pay to the Trustees \$1,300,000 for Covered Natural Resource Damages. Payment shall be made by EFT to the U.S. Department of Justice account in accordance with Paragraph 6.a.(1). The payment shall be disbursed to a segregated sub-account within the NRDAR Fund ("Elliott Bay/Lower

Duwamish River Account”) to be managed by the U.S. Department of the Interior for the joint benefit and use of the Trustees to pay for natural resource restoration projects to be jointly selected by the Trustees.

IX. FAILURE TO MAKE TIMELY PAYMENTS

9. If Defendant fails to make any payment under Paragraphs 6 or 8 by the required due date, interest shall be assessed at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest is the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year. Interest on late payments shall accrue beginning on the date a payment is due through the date on which payment is made.

X. STIPULATED PENALTIES

10. Late Payments. Defendant shall pay a stipulated penalty of \$5,000 per day that each payment pursuant to Paragraphs 6 and 8 is not made by the required due date.

a. All penalties shall begin to accrue on the day after the payment is due, and shall continue to accrue through the final day the payment is made. Plaintiffs may give Defendant written notification of the late payment. Plaintiffs may send Defendant a written demand for the payment of stipulated penalties. However, penalties shall accrue as provided in this Paragraph regardless of whether Plaintiffs have notified Defendant of a late payment.

b. All payments for stipulated penalties for late payments to the United States under this Paragraph will be deposited by EFT to the United States Treasury in accordance with Paragraph 6.a.(1). Payments for stipulated penalties for late payments to the State or the Tribes shall be paid in accordance with the procedures set forth in Paragraph 6. At the time of each payment, Defendant will send notice that payment has been made to the Trustees and DOJ in accordance with Section XVI (Notices). This notice will reference Lower Duwamish River NRDA, DOJ Case Number 90-11-3-07227/3, and the civil action number.

1 c. All penalties accruing under this Section shall be due and payable within
2 thirty days of Defendant's receipt from Plaintiffs of a demand for payment of the penalties.

3 11. If Defendant fails to pay stipulated penalties when due, Plaintiffs may institute
4 proceedings to collect the penalties, as well as interest. Defendant shall pay Interest on the
5 unpaid balance, which shall begin to accrue on the day after payment is due.

6 12. If Plaintiffs bring a motion or a separate action in court to enforce this Decree and
7 prevail, Plaintiffs shall be entitled to recover from Defendant their reasonable costs of such
8 motion or action, including, but not limited to, costs of attorney time.

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

12 14. Notwithstanding any other provision of this Section, Plaintiffs may, in their
13 unreviewable discretion, waive payment of any portion of the stipulated penalties that have
14 accrued pursuant to this Decree. Payment of stipulated penalties does not excuse Defendant
15 from payment as required by Section VII (Past Assessment Cost Reimbursement) or Section VIII
16 (Payment of Natural Resource Damages) or from performance of any other requirement of this
17 Decree.

18 **XI. COVENANT NOT TO SUE BY PLAINTIFFS**

19 15. Except as specifically provided in Section XII (Reservations of Rights) below,
20 Plaintiffs covenant not to sue or to take administrative action against Defendant pursuant to
21 Section 107(a) of CERCLA, 42 U.S.C. § 9607(a); Chapter 70.105D RCW; Chapter 90.48 RCW;
22 Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; Section 1002(a) of the Oil
23 Pollution Act of 1990 (OPA), 33 U.S.C. § 2702(a); or any applicable tribal law, to recover
24 Covered Natural Resource Damages. This Covenant Not to Sue will take effect upon receipt of
25 Defendant's complete payments pursuant to Section VII (Past Assessment Costs
26 Reimbursement) and Section VIII (Payment of Natural Resource Damages). This Covenant Not
27 to Sue is conditioned upon the satisfactory performance by Defendant of its obligations under
28

1 this Decree. This Covenant Not to Sue extends only to Defendant and its successors and assigns,
 2 and does not extend to any other person.

3 **XII.RESERVATION OF RIGHTS**

4 16. Plaintiffs reserve, and this Decree is without prejudice to, all rights against
 5 Defendant with respect to all matters not expressly included within the Covenant Not to Sue by
 6 Plaintiffs in Paragraph 15. Notwithstanding any other provision of this Decree, Plaintiffs reserve
 7 all rights against Defendant with respect to:

8 a. liability for any other costs, including without limitation, costs of response
 9 incurred or to be incurred by the United States, the State, or the Tribes under any federal or State
 10 statute or tribal law that are not within the definition of Covered Natural Resource Damages;

11 b. liability for damages to Natural Resources (including assessment costs) as
 12 defined in 42 U.S.C. §§ 9601(6) & (16) that are not within the definition of Covered Natural
 13 Resource Damages;

14 c. liability for damages to Natural Resources (including assessment costs) as
 15 defined in 42 U.S.C. §§ 9601(6) & (16) within the Lower Duwamish River or Elliott Bay
 16 resulting from new releases of hazardous substances or discharges of oil from Defendant's
 17 former property or operations after the Effective Date of this Consent Decree;

18 d. liability for damages to Natural Resources (including assessment costs) as
 19 defined in 42 U.S.C. §§ 9601(6) & (16) based upon Defendant's transportation, treatment,
 20 storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of
 21 hazardous substances at or in connection with the Lower Duwamish River, after signature of this
 22 Decree;

23 e. liability for injunctive relief or administrative order enforcement under
 24 any federal or State statute;

25 f. liability under Section 107(a)(4)(D), 42 U.S.C. § 9607(a)(4)(D), for costs
 26 of any health assessment or health effects study carried out under 42 U.S.C. § 9604(i);
 27

g. additional claims for Covered Natural Resource Damages if conditions, factors or information in the Lower Duwamish River and/or Elliott Bay, not known to the Trustees, are discovered that, together with any other relevant information, indicate that there is a threat to the environment, or injury to, destruction of, or loss of Natural Resources of a type unknown, or of a magnitude significantly greater than was known, as of the date of lodging of this Decree (for purposes of this Subparagraph, information known to the Trustees shall consist of any information in the files of, or otherwise in the possession of, any one of the individual Trustees, or their contractors or consultants who worked on the Trustees' natural resource damages assessment and liability allocation projects);

h. criminal liability to the United States or State; and

i. liability for failure of Defendant to satisfy the requirements of this Decree.

XIII. COVENANT NOT TO SUE BY DEFENDANT

17. Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, the State, the Suquamish Tribe, and the Muckleshoot Indian Tribe, or their contractors or employees, relating to Covered Natural Resource Damages, including, but not limited to:

a. any direct or indirect claim for reimbursement of any payment for Covered Natural Resource Damages from the Hazardous Substance Superfund based on CERCLA Sections 107, 111, 112, 113, or any other provision of law; or

b. any claim against the United States, the State, or the Tribes pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Covered Natural Resource Damages.

XIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

18. Nothing in this Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Decree. Each of the Parties expressly reserves any and all rights (including but not limited to a contribution claim under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action each Party may

1 have with respect to any matter, transaction, or occurrence relating in any way to the Lower
2 Duwamish River against any person not a Party hereto. Nothing in this Decree diminishes the
3 right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C.
4 § 9613(f)(2)-(3), to pursue any such persons to obtain additional relief (including response
5 action, response costs, and natural resource damages) and to enter into settlements that give rise
6 to contribution protection pursuant to Section 113(f)(2).

7 19. The Parties agree, and by entering this Decree this Court finds, that this settlement
8 constitutes a judicially-approved settlement pursuant to which Defendant has, as of the Effective
9 Date, resolved its liability to the United States within the meaning of Section 113(f)(2) of
10 CERCLA, 42 U.S.C. § 9613(f)(2), and is entitled, as of the Effective Date, to protection from
11 contribution actions or claims as provided by CERCLA, 42 U.S.C. § 9613(f)(2), and RCW
12 70.105D.040(4)(d), or as may be otherwise provided by law, for Covered Natural Resource
13 Damages. However, if Plaintiffs exercise their rights under the reservations in Section XII
14 (Reservation of Rights), other than in Paragraphs 16(h) (criminal liability) and 16(i) (failure to
15 satisfy a requirement of this Decree), the contribution protection afforded by this Decree will no
16 longer include those natural resource damages that are within the scope of the exercised
17 reservation.

18 20. Defendant agrees that it will notify the Trustees and the United States in writing
19 no later than sixty days before bringing a suit or claim for contribution for Covered Natural
20 Resource Damages. Defendant also will notify Plaintiffs of any settlement of its claims
21 (regardless of whether the claim is filed or unfiled) for contribution for Covered Natural
22 Resource Damages. Defendant also agrees that it will notify the Trustees and the United States
23 in writing within ten days of service of a complaint or claim upon Defendant relating to a suit or
24 claim for contribution for Covered Natural Resource Damages. In addition, Defendant will
25 notify the Trustees and the United States within ten days of service or receipt of any Motion for
26 Summary Judgment and within ten days of receipt of any order from a court setting a case for
27 trial for matters related to this Decree.

21. In any subsequent administrative or judicial proceeding initiated by Plaintiffs for injunctive relief, recovery of response costs, or other appropriate relief other than Covered Natural Resource Damages, Defendant shall not assert, nor may it maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by Plaintiffs in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Paragraphs 15 and 17.

XV. RETENTION OF RECORDS

22. Until ten years after Defendant's payments to Plaintiffs pursuant to Paragraphs 6 and 8, Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control regarding its obligations under this Decree or its liability under CERCLA with respect to the Lower Duwamish River. This record retention requirement shall apply regardless of any corporate retention policy to the contrary.

23. At the conclusion of this document retention period, Defendant shall notify the Plaintiffs at least ninety days prior to the destruction of any such records or documents, and, upon written request by Plaintiffs, and except as provided in Paragraph 24 (Privileged and Protected Claims), Defendant shall deliver any such non-privileged records or documents to Plaintiffs.

24. Privileged and Protected Claims. Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege or immunity recognized by federal law. If Defendant asserts such a privilege or immunity, it shall provide Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information sufficient to

1 allow Plaintiffs to assess the claim of privilege or immunity; and (6) the privilege asserted by
 2 Defendant. However, no documents, reports or other information created or generated pursuant
 3 to the requirements of the Decree shall be withheld on the grounds that they are privileged.

4 25. Defendant hereby certifies that, to the best of its knowledge and belief, after a
 5 thorough inquiry that fully complies with the Federal Rules of Civil Procedure, it has not altered,
 6 mutilated, discarded, destroyed or otherwise disposed of any records, documents or other
 7 information (other than identical copies) relating to its potential liability regarding the Lower
 8 Duwamish River since notification of potential liability by any Trustee.

9 XVI. NOTICES

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

15 As to the United States and as to DOJ:

16 Chief, Environmental Enforcement Section
 17 Environment and Natural Resources Division
 18 U.S. Department of Justice
 19 P.O. Box 7611
 20 Washington, D.C. 20044-7611
 DOJ# 90-11-3-07227/3

21 Erika M. Wells
 22 U.S. Department of Justice
 23 c/o NOAA/Damage Assessment
 24 7600 Sand Point Way, NE
 Seattle, WA 98115
 erika.wells@usdoj.gov

25 As to NOAA:

26 Laurie Lee
 27 NOAA Office of General Counsel
 28 501 W. Ocean Blvd., Suite 4470
 Long Beach, CA. 90802

1 laurie.lee@noaa.gov

2 Rebecca Hoff
3 NOAA Office of Response & Restoration
4 7600 Sand Point Way, NE
5 Seattle, WA 98115
6 Rebecca.hoff@noaa.gov

7 As to the United States Department of the Interior:

8 Deirdre Donahue
9 U.S. Department of the Interior
10 Office of the Solicitor
11 805 S.W. Broadway, Suite 600
12 Portland, OR 97205
13 Deirdre.donahue@sol.doi.gov

14 Jeff Krausmann
15 U.S. Fish & Wildlife Service
16 510 Desmond Dr. SE, Suite 102
17 Lacey, WA 98503-1263
18 jeff_krausmann@fws.gov

19 As to the State:

20 Donna Podger
21 Toxics Cleanup Program
22 State of Washington
23 P.O. Box 47600
24 Olympia, WA 98504-7600
25 dpod461@ECY.WA.GOV

26 As to the Suquamish Tribe:

27 Melody Allen
28 Suquamish Tribe
 Legal Department
 P.O. Box 498
 Suquamish, WA 98392-0498
 mallen@Suquamish.nsn.us

1 As to the Muckleshoot Indian Tribe:

2 Mr. Rob Otsea
3 Office of the Tribal Attorney
4 Muckleshoot Indian Tribe
5 39015 172nd Avenue S.E.
6 Auburn, WA 98002
7 rob@muckleshoot.nsn.us

8 As to Earle M. Jorgensen Company:

9 Gil Leon
10 Vice President, Chief Financial Officer
11 Earle M. Jorgensen Company
12 10650 Alameda Street
13 Lynwood, CA 90262
14 GLEon@emjmetals.com

15 Scott H. Reisch
16 Hogan Lovells US LLP
17 1601 Wewatta St., Suite 900
18 Denver, CO 80202
19 scott.reisch@hoganovells.com

20 XVII. EFFECTIVE DATE

21 27. The Effective Date of this Decree shall be the date upon which this Decree is
22 entered by the Court.

23 XVIII. RETENTION OF JURISDICTION

24 28. This Court retains jurisdiction over both the subject matter of this Decree and the
25 Parties for the duration of the performance of the terms and provisions of this Decree for the
26 purpose of enabling any of the Parties to apply to the Court at any time for such further order,
27 direction, and relief as may be necessary or appropriate for the construction of this Decree, or to
28 effectuate or enforce compliance with its terms.

29 XIX. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

30 29. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the
31 Internal Revenue Code, 26 U.S.C. §162(f)(2)(A)(ii), performance of Section VI (Past
32 Assessment Cost Reimbursement), Paragraphs 6-7; Section VIII (Payment of Natural Resource
33 CONSENT DECREE

1 Damages), Paragraph 8; and Section XV (Retention Of Records), Paragraphs 22, 23, and 25, is
 2 restitution or required to come into compliance with law.

3 **XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

4 30. This Decree will be lodged with the Court for a period of not less than thirty days
 5 for public notice and comment. Plaintiffs reserve the right to withdraw or withhold their consent
 6 if the comments regarding the Decree disclose facts or considerations that indicate this Decree is
 7 inappropriate, improper, or inadequate. Defendant consents to the entry of this Decree without
 8 further notice.

9 31. If for any reason this Court does not approve this Decree in the form presented,
 10 this Decree may be voided at the sole discretion of any Party, and the terms of the agreement
 11 may not be used as evidence in any litigation among the Parties.

12 **XXI. SIGNATORIES/SERVICE**

13 32. The Assistant Attorney General for the Environment and Natural Resources
 14 Division of the United States Department of Justice and each undersigned representative of the
 15 State, the Suquamish Tribe, the Muckleshoot Indian Tribe and Defendant certifies that he or she
 16 is fully authorized to enter into the terms and conditions of this Decree and to execute and legally
 17 bind the Party that he or she represents to this document.

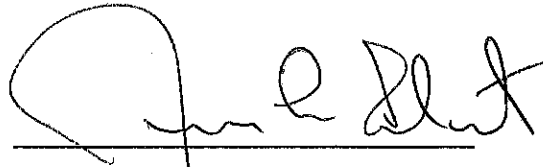
18 33. Defendant agrees not to oppose entry of this Decree by this Court or to challenge
 19 any provision of this Decree unless any Plaintiff has notified Defendant in writing that it no
 20 longer supports entry of the Decree.

21 34. Defendant will identify on the attached signature page the name and address of an
 22 agent who is authorized to accept service of process by mail on behalf of them with respect to all
 23 matters relating to this Decree. Defendant agrees to accept service in that manner and to waive
 24 the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and
 25 any applicable local rules of this Court, including but not limited to service of a summons.
 26 Defendant need not file an answer to the complaint in this action unless or until the Court
 27 expressly declines to enter this Decree.

XXII. FINAL JUDGMENT

35. Upon approval and entry of this Consent Decree by the Court, this Decree shall constitute a final judgment between and among the United States, the State, the Suquamish Tribe, the Muckleshoot Indian Tribe, and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Rules 54 and 58 of the Federal Rules of Civil Procedure.

SO ORDERED THIS 25th DAY OF October, 2019.



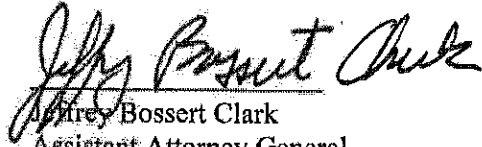
United States District Judge

Signature page for Consent Decree regarding the Lower Duwamish River

FOR THE UNITED STATES OF AMERICA:

Date:

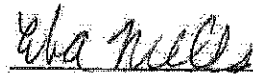
2/28/19



Jeffrey Bossert Clark
Assistant Attorney General
Environmental & Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date:

3/19/19



Erika M. Wells
Environmental Enforcement Section
Environmental & Natural Resources Division
U.S. Department of Justice
c/o NOAA Damage Assessment
7600 Sand Point Way, NE
Seattle, Washington 98115

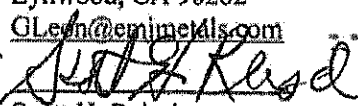
Signature page for Consent Decree regarding the Lower Duwamish River

FOR EARLE M. JORGENSEN COMPANY:

Date: JUNE 5, 2019


Gil Leon
Vice President, Chief Financial Officer
Earle M. Jorgensen Company
10650 Alameda Street
Lynwood, CA 90262
GLEon@emjmetals.com

Date: JUNE 7, 2019


Scott H. Reisch
Hogan Lovells US LLP
1601 Wewatta St., Suite 900
Denver, CO 80202
scott.reisch@hoganlovells.com
As counsel for Earle M. Jorgensen Company

CONSENT DECREE

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U. S. DEPARTMENT OF JUSTICE
7600 Sand Point Way NE
Seattle, WA 98115
(206)526-6608

Signature page for Consent Decree regarding the Lower Duwamish River

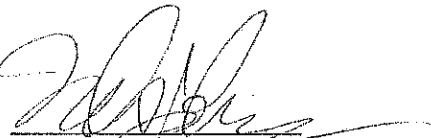
FOR THE STATE OF WASHINGTON:

Date: 11/19/2018



Maia Bellon
Director
Department of Ecology

Date: 11/20/2018

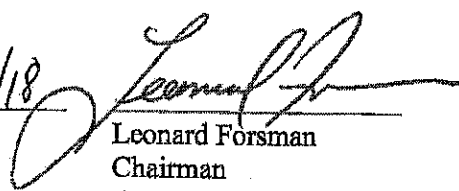


Nels Johnson
Senior Counsel
State of Washington

Signature page for Consent Decree regarding the Lower Duwamish River

FOR THE SUQUAMISH TRIBE:

Date:

11/19/18 

Leonard Forsman
Chairman
Suquamish Tribe
Post Office Box 498
Suquamish, Washington 98392

CONSENT DECREE

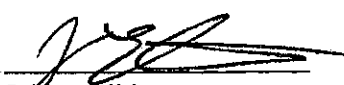
- 25 -

U. S. DEPARTMENT OF JUSTICE
7600 Sand Point Way NE
Seattle, WA 98115
(206)526-6608

Signature page for Consent Decree regarding the Lower Duwamish River

FOR THE MUCKLESHOOT INDIAN TRIBE:

Date: 5-28-19

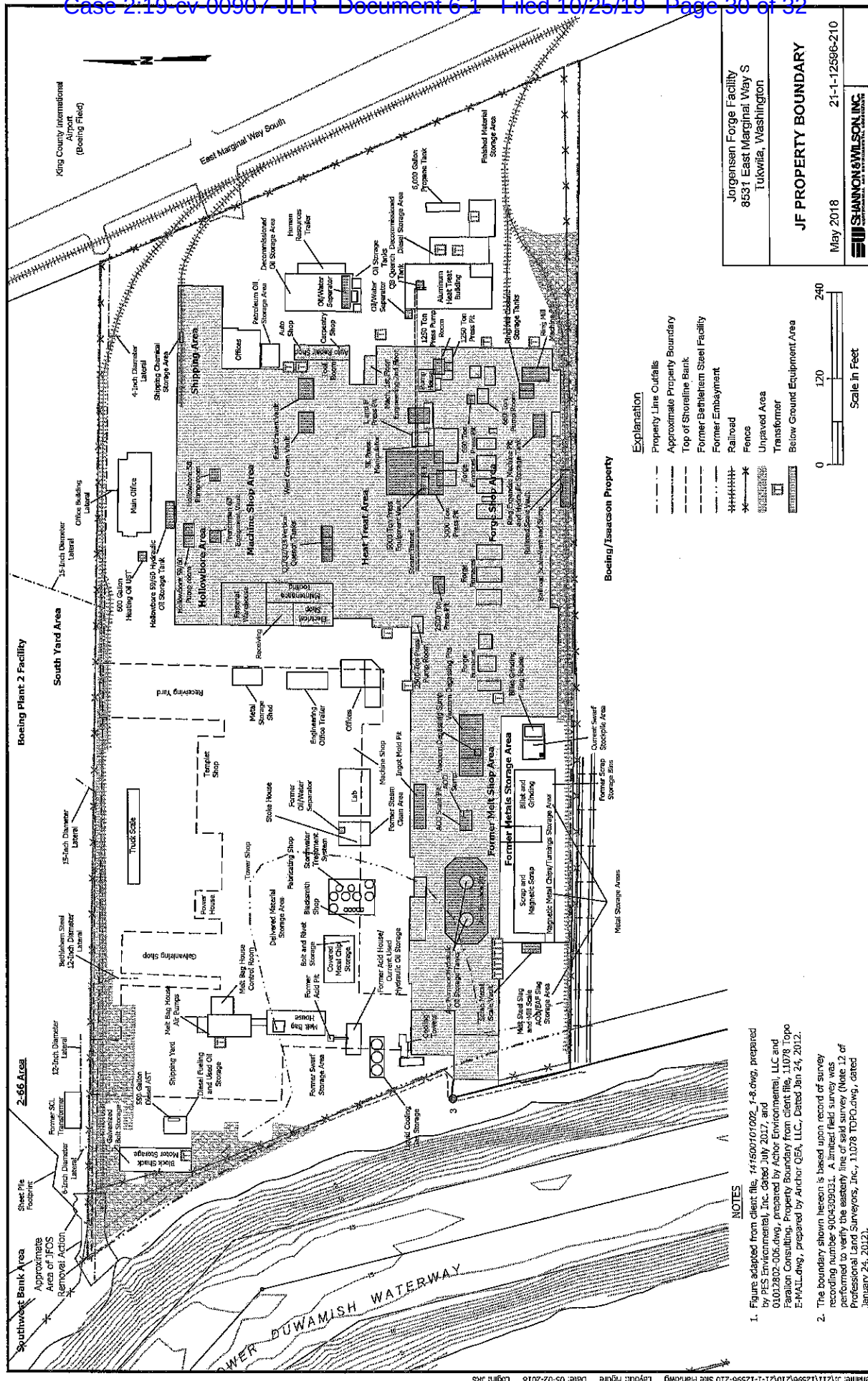

Jason Elkins
Chairperson
Muckleshoot Indian Tribe
39015 172nd Ave. S.E.
Auburn, WA 98092-9763

CONSENT DECREE

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U. S. DEPARTMENT OF JUSTICE
7600 Sand Point Way NE
Seattle, WA 98115
(206)526-6608

ATTACHMENT A



Jorgensen Forge Facility
8531 East Marginal Way S
Tukwila, Washington

JF PROPERTY BOUNDARY

May 2018

21-1-12596-210

SHANNON & WILSON, INC.
AN ENVIRONMENTAL CONSULTING FIRM

APPENDIX A

LEGAL DESCRIPTION OF LAND

PARCEL A;

THAT PORTION OF THE JOHN BUCKLEY DONATION LAND CLAIM NO. 42 IN SECTION 33, TOWNSHIP 24 NORTH, RANGE 4 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING ON THE WEST LINE OF EAST MARGINAL WAY AT ITS POINT OF INTERSECTION WITH A LINE PARALLEL WITH AND 1,497.9 FEET SOUTH OF THE NORTH LINE OF SAID LAND CLAIM AND RUNNING THENCE ALONG THE WEST LINE OF SAID EAST LINE MARGINAL WAY NORTH 23°40'40" WEST 562.84 FEET;
THENCE NORTH 64°49'45" WEST 186.84 FEET;
THENCE SOUTH 89°39'25" WEST 434.79 FEET;
THENCE SOUTH 0°20'35" EAST 348.52 FEET;
THENCE SOUTH 89°39'25" WEST 490 FEET;
THENCE SOUTH 0°20'35" EAST 80.82 FEET;
THENCE SOUTH 89°39'25" WEST 85.43 FEET, TO A POINT IN THE EASTERLY LINE OF THE RIGHT-OF-WAY OF COMMERCIAL WATERWAY NO. 1, KNOWN AS DUWAMISH WATERWAY;
THENCE SOUTHEASTERLY ALONG SAID EASTERLY LINE ON A CURVE TO THE RIGHT WITH A RADIUS OF 1,969.12 FEET, FOR A CHORD DISTANCE SOUTH 18°21'22" EAST 174.49 FEET;
THENCE NORTH 89°45'34" EAST 558.82 FEET;
THENCE SOUTH 00°20'35" EAST 1.00 FEET;
THENCE NORTH 89°39'25" EAST 789.00 FEET, MORE OR LESS, TO THE POINT OF BEGINNING;
(BEING KNOWN AS THE "U.S.N. NOBS 88 TRACT").

PARCEL B:

THAT PORTION OF JOHN BUCKLEY DONATION CLAIM NO. 42, IN SECTION 33, TOWNSHIP 24 NORTH, RANGE 4 EAST, WILLAMETTE MERIDIAN, IN KING COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT THE INTERSECTION OF THE SOUTHWESTERLY LINE OF EAST MARGINAL WAY AND A LINE (THE SOUTHERLY LINE OF BOEING AIRPLANE COMPANY PLANT 2) WHICH IS 825 FEET SOUTHERLY OF AND PARALLEL TO THE NORTHERLY LINE OF SAID DONATION CLAIM;
THENCE ALONG SAID SOUTHWESTERLY LINE OF EAST MARGINAL WAY, SOUTH 23°40'40" EAST 170 FEET, MORE OR LESS, TO A CORNER OF THE TRACT OF LAND DESCRIBED IN AN APPENDIX TO THE COPY OF THE AMENDED CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND ISAACSON IRONWORKS, INC. DATED AUGUST 7, 1941 AND KNOWN AS CONTRACT NOBS-88 THAT IS RECORDED IN VOLUME 2392 OF DEEDS, PAGE 428, IN KING COUNTY, WASHINGTON;
THENCE ALONG THE LINE OF SAID LAST MENTIONED TRACT OF LAND, THE FOLLOWING 5 COURSES AND DISTANCES:
NORTH 64°49'45" WEST 186.84 FEET TO A POINT IN A LINE WHICH IS PARALLEL TO, AND 900.7 FEET SOUTHERLY OF SAID NORTHERLY LINE OF SAID DONATION CLAIM;

ALONG SAID LINE PARALLEL TO AND 900.7 FEET SOUTHERLY OF SAID NORTHERLY LINE OF SAID DONATION CLAIM, SOUTH $89^{\circ}39'25''$ WEST 434.79 FEET;
SOUTH $0^{\circ}20'35''$ EAST 348.52 FEET;
SOUTH $89^{\circ}39'25''$ WEST 490 FEET;
AND SOUTH $0^{\circ}20'35''$ EAST 80.82 FEET;
THENCE SOUTH $89^{\circ}39'25''$ WEST 86 FEET, MORE OR LESS, TO A POINT IN THE EASTERLY LINE OF THE RIGHT-OF-WAY OF COMMERCIAL WATERWAY NO. 1, KNOWN AS DUWAMISH WATERWAY;
THENCE NORTHWESTERLY, ALONG SAID EASTERLY LINE ON A CURVE TO THE LEFT WITH A RADIUS OF 1,969.12 FEET, 577 FEET, MORE OR LESS, TO THE INTERSECTION OF SAID EASTERLY LINE AND THE ABOVE MENTIONED LINE WHICH IS 825 FEET SOUTHERLY OR AND PARALLEL TO SAID NORTHERLY LINE OF SAID DONATION CLAIM;
THENCE ALONG SAID ABOVE MENTIONED LINE (BEING ALSO ALONG THE ABOVE MENTIONED SOUTHERLY LINE OF BOEING AIRPLANE COMPANY PLANT 2), NORTH $89^{\circ}39'25''$ EAST 1,386 FEET, MORE OR LESS, TO A POINT IN SAID SOUTHWESTERLY LINE OF EAST MARGINAL WAY AND THE POINT OF BEGINNING.