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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	CIVIL ACTION NO.
Plaintiff,)	
v.)	
ZIDELL MARINE CORPORATION,)	CONSENT DECREE
Defendant.)	HYLEBOS WATERWAY PROBLEM AREAS

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CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site

United States Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611

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9 A. BACKGROUND

10 1. As a result of the release or threatened release of hazardous substances at or from
 11 the Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce
 12 County, Washington (“CB/NT Site”), the U.S. Environmental Protection Agency ("EPA") and
 13 other governmental and private entities have undertaken response actions at or in connection
 14 with the CB/NT Site under Section 104 and Section 106 of the Comprehensive Environmental
 15 Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§
 16 9604 and 9606, and will undertake response actions in the future. In performing these response
 17 actions, EPA and other governmental and private entities have incurred and will continue to
 incur Response Costs at or in connection with the CB/NT Site.

18 2. On September 8, 1983, EPA placed the CB/NT Site on the National Priorities List
 19 pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

20 3. Under a Cooperative Agreement with EPA, the Washington Department of
 21 Ecology (Ecology) conducted a Remedial Investigation and Feasibility Study (RI/FS) of the
 22 CB/NT Site. Within the Tideflats area of the CB/NT Site, the RI/FS evaluated the nature and
 23 extent of contamination in the Sitcum, Blair, Milwaukee, Hylebos, St. Paul, Middle, Thea Foss
 24 (formerly known as City), and Wheeler-Osgood Waterways. Pursuant to Section 117 of

1 CERCLA, 42 U.S.C. § 9617, EPA published notice of completion of the Feasibility Study and of
2 the proposed plan for remedial action for the CB/NT Site in February 1989.

3 4. Because of the complexity of the CB/NT Site, Superfund response actions at the
4 CB/NT Site are currently coordinated under seven operable units managed primarily by EPA and
5 Ecology, including: (1) Operable Unit 01 - CB/NT Sediments; (2) Operable Unit 02 - ASARCO
6 Tacoma Smelter; (3) Operable Unit 03 - Tacoma Tar Pits; (4) Operable Unit 04 - ASARCO Off-
7 Property; (5) Operable Unit 05 - CB/NT Sources; (6) Operable Unit 06 - ASARCO Sediments;
8 and (7) Operable Unit 07 - ASARCO demolition.

9 5. On September 30, 1989, EPA issued a Record of Decision (ROD) that selected
10 the remedy for remediation of sediments, OU1, and sources of contamination, OU5. The ROD
11 identified eight (8) problem areas within OU1 that required sediment cleanup. The eight
12 problem areas were the Head and Mouth of the Hylebos Waterway, Sitcum Waterway, St. Paul
13 Waterway, Middle Waterway, Head and Mouth of the Thea Foss Waterway (formerly City
14 Waterway), and Wheeler-Osgood Waterway. Notice of the final plan was published in
15 accordance with Section 117(b) of CERCLA.

16 6. EPA determined in the ROD that there were five major elements of the selected
17 remedy for the CB/NT Site sediments and sources that will be applied, as appropriate, to each
18 problem area:

19 7. Site Use Restrictions - To protect human health by limiting access to edible
20 resources prior to and during implementation of source and sediment remedial activities.

21 8. Source Control - To be implemented to prevent recontamination of sediments.

22 9. Natural Recovery - Included as a preferred remediation strategy for marginally
23 contaminated sediments that are predicted to achieve acceptable sediment quality through either
24 biodegradation, or burial and mixing with naturally accumulating clean sediments within a ten
25 (10) year period.

1 10. Sediment Remedial Action - To address sediments containing contamination that
2 is not expected to naturally recover within 10 years. The ROD required active sediment cleanup
3 using one of the following four technologies: in-place capping, dredging and confined aquatic
4 disposal, dredging and nearshore disposal, or dredging and upland disposal. The disposal option
5 is to be identified during design of the remedial action.

6 11. Source and Sediment Monitoring - To refine cleanup volume estimates,
7 characterize the effectiveness of source controls, and implement long-term monitoring of the
8 remedial action(s) to ensure long-term protectiveness of the remedy.

9 12. Under a State Cooperative Agreement, EPA and the Washington Department of
10 Ecology agreed that Ecology would implement OU5 source control actions using state law
11 authorities and EPA would stay in the lead for implementing the sediment cleanup, OU1.

12 13. This Consent Decree involves settlement of claims for recovery of Response
13 Costs associated with the Mouth and Head of the Hylebos Waterway Problem Areas. The ROD
14 determined that natural recovery will not sufficiently reduce contaminant concentrations in some
15 areas of the Mouth and Head of the Hylebos Waterway within the ten (10) year period, so the
16 ROD required active sediment cleanup with one (1) of the four (4) technology options of the
17 remedy.

18 14. On November 29, 1993, six entities (collectively known as the Hylebos Cleanup
19 Committee or "HCC") entered into an Administrative Order on Consent ("HCC AOC") with
20 EPA for the preparation of, performance of, and reimbursement of oversight costs for Pre-
21 remedial Design Activities for the Hylebos Waterway Problem Areas. The objectives of the
22 HCC AOC were: (1) to perform pre-remedial design work for the Hylebos Waterway consistent
23 with the ROD; (2) to perform analyses and studies needed by EPA to select a Remediation Plan,
24 including an acceptable confined disposal site and any necessary mitigation which attains
25 Sediment Quality Objectives identified in the ROD, and all applicable or relevant and
appropriate requirements; and (3) provide for recovery by EPA of its response and oversight

1 costs incurred with respect to the implementation of this Order. By letter dated November 8,
2 2001, EPA confirmed that all activities required by the HCC Order were performed, except
3 remaining oversight billings, in accordance with Section XXVI of the HCC Order.

4 15. On August 3, 2000, EPA issued an Explanation of Significant Differences (ESD),
5 in compliance with Section 117(c) of CERCLA, that explains differences in the Remedial Action
6 that significantly change, but do not fundamentally alter, the remedy selected in the ROD. The
7 ESD addressed cleanup plans for two waterways within the CB/NT Site, selected disposal sites
8 for all remaining contaminated sediment to be dredged and confined from the CB/NT Site,
9 provided additional performance standards, and documented other differences from the ROD.
10 Based on the studies and analysis conducted under the HCC AOC with respect to the Hylebos
11 Waterway, the ESD provides details for: the cleanup of the areal extent of sediment
12 contamination in the Hylebos Waterway and the estimated volume of sediment that requires
13 remediation; designation of areas that are projected to naturally recover within 10 years of
14 remedial action; EPA's decision to dispose of contaminated sediments in Blair Slip 1 and an
15 upland regional landfill; performance standards for mitigation for the Remedial Action; and the
16 estimated cost of the Remedial Action at the Hylebos Waterway. Notice and public comment
17 were taken on the ESD and notice of the final ESD was published in accordance with Section
18 117(c) of CERCLA.

19 16. Some of the potentially responsible parties entered into an allocation agreement
20 which established a process by which a third-party, neutral allocator would determine shares of
21 liability for all potentially responsible parties associated with the Hylebos Waterway Problem
22 Areas. Settling Defendant did not participate in the allocation. The allocator's report, titled
23 "Hylebos Waterway-Allocator's Final Cost Allocation Formula Report, dated May 22, 2000
24 ("Allocator's Report"), assessed the Settling Defendant's share of Response Costs and formed a
25 basis for this settlement. EPA independently reviewed the Allocator's Report and other pertinent

1 information, and, as to the Settling Defendant only, accepts the allocator's numerical allocation
2 for purposes of this settlement.

3 17. Settling Defendant does not admit any liability arising out of the transactions or
4 occurrences alleged to have occurred in connection with the Hylebos Waterway Problem Areas
5 within the CB/NT Site

6 18. In a consent decree entered in the U.S. District Court for the Western District of
7 Washington on May 28, 1997 in United States, et al. v. the City of Tacoma and the Tacoma
8 Public Utility, Civil Action No. C97-5336 RJB, the City of Tacoma and Tacoma Public Utilities
9 resolved their liability for damages for injury to natural resources under federal, state and tribal
10 trusteeship resulting from the release of hazardous substances at the CB/NT Site.

11 19. In a consent decree entered in the U.S. District Court for the Western District of
12 Washington on February 26, 2003 in United States v. Mary Jane Anderson, et al., Civil Action
13 No. C03-5107-RBL, a number of potentially responsible parties identified at the Hylebos
14 Waterway Problem Areas within the CB/NT Site resolved their liability for their share of
15 investigative and remediation costs resulting from the release of hazardous substances at the
16 Hylebos Waterway Problem Areas within the CB/NT Site.

17 20. In a consent decree entered in the U.S. District Court for the Western District of
18 Washington on June 2, 2004 in United States v. Atofina Chemicals, Inc. and General Metals of
19 Tacoma, Inc., Civil Action No. C04-5319-RBL, Atofina and General Metals agreed, *inter alia*, to
20 conduct and finance the Remedial Design and Remedial Actions selected by EPA for the Head
21 of the Hylebos Waterway Problem Area within the CB/NT Site.

22 21. The United States filed a complaint in this matter pursuant to Section 107 of the
23 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §
24 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be
25 incurred for response actions taken at or in connection with the release or threatened release of
hazardous substances at the Hylebos Waterway Problem Areas within the CB/NT Site. The

1 Settling Defendant that has entered into this Consent Decree does not admit any liability to
2 Plaintiff arising out of the transactions or occurrences alleged in the complaint.

3 22. The United States and Settling Defendant agree, and by entering this Consent
4 Decree, this Court finds that settlement without further litigation and without the admission or
5 adjudication of any issue of fact or law is in the public interest and is the most appropriate means
6 of resolving this action with respect to Settling Defendant, and that this Consent Decree is fair,
7 reasonable, and in the public interest.

8 THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED,
9 ADJUDGED, and DECREED:

10 **B. JURISDICTION**

11 23. This Court has jurisdiction over the subject matter of this action pursuant to 28
12 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b), and also has personal jurisdiction
13 over Settling Defendant. Settling Defendant consents to and shall not challenge the terms of this
14 Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

15 **C. PARTIES BOUND**

16 24. This Consent Decree is binding upon and inures to the benefit of the United States
17 and the Settling Defendant and its heirs, successors and assigns. Any change in ownership or
18 corporate or other legal status of Settling Defendant, including but not limited to, any transfer of
19 assets or real or personal property shall in no way alter Settling Defendant's responsibilities
20 under this Consent Decree. This Consent Decree does not bind any person or State agency that
21 is not a party to it.

22 **D. STATEMENT OF PURPOSE**

23 25. By entering into this Consent Decree, the mutual objectives of the Parties are:

24 A. to reach a final settlement among the Parties pursuant to Section 122 of
25 CERCLA, 42 U.S.C. § 9622, by allowing Settling Defendant to make a cash payment, including
a 100 percent premium, to resolve its alleged civil liability under Sections 106 and 107 of

1 CERCLA, 42 U.S.C. §§ 9606 and 9607 for injunctive relief with regard to the Hylebos
2 Waterway Problem Areas, and for Response Costs incurred and to be incurred at or in
3 connection with the Hylebos Waterway Problem Areas, and subject to the Reservation of Rights
4 by the United States in Section J; and to resolve the claims of the Settling Defendant which have
5 been or could have been asserted against the United States with regard to this Site as provided in
6 this Consent Decree, thereby reducing litigation relating to the Hylebos Waterway Problem
7 Areas;

8 B. to simplify any remaining administrative and judicial enforcement
9 activities concerning the Hylebos Waterway Problem Areas by reducing the number of
10 potentially responsible parties from further involvement at the Hylebos Waterway Problem
11 Areas with respect to Response Costs; and

12 C. to obtain settlement with Settling Defendant for reimbursement of a
13 portion of Response Costs incurred and to be incurred at or in connection with the Hylebos
14 Waterway Problem Areas by the EPA Hazardous Substance Superfund and by private parties,
15 and to provide for contribution protection for Settling Defendant with regard to the Response
16 Costs, pursuant to Sections 113(f)(2) and 122 of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622,
and as set forth in Paragraph 45 of this Consent Decree.

17 E. DEFINITIONS

18 26. Unless otherwise expressly provided herein, terms used in this Consent Decree
19 that are defined in CERCLA or in regulations promulgated under CERCLA shall have the
20 meaning assigned to them in the statute or regulations. Whenever the terms listed below are
21 used in this Consent Decree, the following definitions shall apply:

22 A. "CERCLA" shall mean the Comprehensive Environmental Response,
23 Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.

1 B. "Consent Decree" or "Decree" shall mean this Consent Decree and all
2 appendices attached hereto. In the event of conflict between this Consent Decree and any
3 appendix, the Consent Decree shall control.

4 C. "Commencement Bay Nearshore/Tideflats Superfund Site" ("CB/NT
5 Site") shall mean the entire Commencement Bay Nearshore/Tideflats Superfund Site and project
6 area, including contaminated sediments and sources of contamination within the CB/NT Site,
7 located in the City of Tacoma, Pierce County, Washington, and as defined in the CB/NT Record
8 of Decision, dated September 30, 1989.

9 D. "Day" shall mean a calendar day. In computing any period of time under
10 this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the
11 period shall run until the close of business of the next working day.

12 E. "EPA" shall mean the United States Environmental Protection Agency
13 and any successor departments, agencies, or instrumentalities.

14 F. "EPA Hazardous Substance Superfund" shall mean the Hazardous
15 Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

16 G. "Hylebos Waterway Problem Areas" and/or "Site" shall mean all areas in
17 which contaminated sediments are located, intertidal and subtidal, that require remedial action at
18 and adjacent to the Mouth and the Head of the Hylebos Waterway, which are two of eight
19 Problem Areas only within OU1 of the CB/NT Site. These Problem Areas are described in the
20 CB/NT Site Record of Decision, dated September 30, 1989, and are more specifically delineated
21 in the Figures 3A, 3B, and 3C in the August 3, 2000 ESD. These terms do not include Area
22 5106 which is specifically designated in an Action Memorandum dated July 6, 2001, and
23 property which is the subject of OU5, which encompasses upland properties adjacent to the
24 Hylebos Waterway that are past, present or future sources of hazardous substances to the
25 Hylebos Waterway Problem Areas.

1 H. "Hylebos Waterway Problem Areas Special Account" shall mean the
2 special account established at the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42
3 U.S.C. §9622(b)(3), and created by the Consent Decree entered in U.S. v. Bay Chemical
4 Company, et al, C99-5521 (RJB), by the U.S. District Court for the Western District of
5 Washington on June 23, 2000.

6 I. "Interest" shall mean interest at the current rate specified for interest on
7 investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507,
8 compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The
9 applicable rate of interest shall be the rate in effect at the time the interest accrues.

10 J. "Paragraph" shall mean a portion of this Consent Decree identified by an
11 Arabic numeral or an upper or lower case letter.

12 K. "Parties" shall mean the United States and the Settling Defendant.

13 L. "Section" shall mean a portion of this Consent Decree identified by a
14 roman numeral.

15 M. "Settling Defendant" shall mean Zidell Marine Corporation.

16 N. "Record of Decision" or "ROD" shall mean the EPA Record of Decision
17 relating to the Site signed on September 30, 1989, by the Regional Administrator, EPA Region
18 10, all attachments thereto and incorporating all significant differences thereto documented in the
19 ESD issued on July 28, 1997 and the ESD issued on August 3, 2000. The 2000 ESD may be
20 referred to or discussed individually or separately from the 1989 ROD in this Consent Decree
21 where appropriate.

22 O. "Response Costs" shall mean all costs of "response" as that term is
23 defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25), and incurred in connection to the
24 Hylebos Waterway Problem Areas. Response Costs shall also include any CB/NT area-wide site
25 costs billed to the CB/NT area-wide account that EPA may attribute or allocate to the Hylebos
Waterway Problem Areas. Response Costs shall not include costs related to upland hazardous

1 waste cleanups and/or source control which were incurred by any entity. The phrase “past
2 Response Costs” shall mean all costs incurred through September 30, 2001, including interest
3 thereon. The phrase “future Response Cost” shall mean all Response Costs other than past
4 Response Costs.

5 P. “United States” shall mean the United States of America, including all of
6 its departments, agencies, and instrumentalities, which includes without limitation EPA and any
7 federal natural resources trustee.

8 F. PAYMENT

9 27. Within forty-five (45) days of entry of this Consent Decree, Settling Defendant
10 shall pay \$ 3,239,973.38 in payment for Response Costs. Payment shall be made by FedWire
11 Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with
12 current EFT procedures, referencing USAO File Number ____, EPA Site/Spill ID Numbers
13 108N and 107C, and DOJ Case Number ____. Payment shall be made in accordance with
14 instructions provided to the Settling Defendant by the Financial Litigation Unit of the United
15 States Attorney’s Office for the Western District of Washington following lodging of the
16 Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern
17 Time) will be credited on the next business day. The total amount to be paid by Settling
18 Defendant pursuant to this paragraph shall be deposited in the Hylebos Waterway Problem Areas
19 Special Account within the EPA Hazardous Substance Superfund to be retained and used to
20 conduct or finance response actions at or in connection with the Hylebos Waterway Problem
21 Areas, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

22 28. Settling Defendant's payment includes an amount for:

23 A. past Response Costs incurred at or in connection with the Hylebos
24 Waterway Problem Areas; and

25 B. future Response Costs to be incurred at or in connection with the Site; and

1 C. a one hundred percent (100%) premium to cover the risks and
2 uncertainties associated with this settlement, including but not limited to, the risk that total
3 Response Costs incurred or to be incurred in connection with the Hylebos Waterway Problem
4 Areas, by any entity, will exceed the cost estimate for future Response Costs of \$56,056,407
5 million or exceed the amount other PRPs can contribute.

6 29. At the time of payment under Paragraph 27 or, if applicable Paragraph 30 below,
7 Settling Defendant shall send notice that such payment has been made to:

8 Chief, Environmental Enforcement Section
9 United States Department of Justice
10 DOJ No. _____
11 P.O. Box 7611
12 Washington, D.C. 20044-7611

13 Dean B. Ingemansen
14 Assistant Regional Counsel
15 Office of Regional Counsel
16 United States Environmental Protection Agency, Region 10
17 ORC-158, 1200 Sixth Avenue
18 Seattle, Washington 98101

19 Jonathan Williams
20 Remedial Project Coordinator
21 United States Environmental Protection Agency, Region 10
22 ECL-113, 1200 Sixth Avenue
23 Seattle, Washington 98101

24 Diane Norton,
25 Superfund Accountant, Finance Section
United States Environmental Protection Agency, Region 10
OMP-146, 1200 Sixth Avenue
Seattle, Washington 98101

26 G. FAILURE TO COMPLY WITH CONSENT DECREE

27 30. A. If Settling Defendant fails to make full payment of its Total Payment
28 Amount specified in Paragraph 27 within the time required by Paragraph 27, Interest shall begin
29 to accrue on the effective date of this Consent Decree on Settling Defendant's unpaid balance
30

1 through the date of payment, and Settling Defendant shall pay stipulated penalties of \$1,000 per
2 day for each day such payment is late.

3 B. Stipulated penalties are due and payable within 30 days of the date of the
4 demand for payment of the penalties by EPA. All payments of stipulated penalties made under
5 this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or
6 cashier’s check made payable to “EPA Hazardous Substance Superfund” and shall be deposited
7 in the Hylebos Waterway Problem Areas Special Account within the EPA Hazardous Substance
8 Superfund to be retained and used to conduct or finance the response action at or in connection
9 with the Hylebos Waterway Problem Areas. After certification of completion of the Hylebos
10 Waterway remedial action, any balance remaining in the Hylebos Waterway Problem Areas
11 Special Account shall be transferred by EPA to the EPA Hazardous Substance Superfund. The
12 check, or the letter accompanying the check, shall reference the name and address of the party
13 making the payment, the Site name, the site/spill identification numbers 108N and 107C, and
DOJ Case Number _____ and shall be sent to:

14 Mellon Bank
15 EPA Region 10 Superfund
16 P.O. Box 371099M
Pittsburgh, PA 15251

17 31. If the United States brings an action to enforce this Consent Decree against
18 Settling Defendant, Settling Defendant shall reimburse the United States for all costs of such
19 action, including but not limited to costs of attorney time. Payments made under this Section
20 shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling
21 Defendant’s failure to comply with the requirements of this Consent Decree. Notwithstanding
22 any other provision of this Section, the United States may, in its unreviewable discretion, waive
23 payment of any portion of the stipulated penalties that have accrued pursuant to this Consent
24 Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as
25 required by Section F or from performance of any other requirements of this Consent Decree.

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H. CERTIFICATION OF SETTLING DEFENDANT

32. By signing this Consent Decree, Settling Defendant certifies that, to the best of its knowledge and belief, it has:

A. conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA all information currently in its possession, or in the possession of its officers, directors, employees, contractors, or agents, which relates in any way to identifying who owned, operated, or controlled the Site, or (2) to the ownership, possession, generation, treatment, transportation, storage, or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

B. no information that would suggest that its contributions of hazardous substances, pollutants, or contaminants to one or both of the Hylebos Waterway Problem Areas was greater than determined in the Allocator Report;

C. not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

D. fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

33. The certifications contained in Paragraph 32 inure only to the benefit of the United States and the Settling Defendant, and not to any other parties.

I. COVENANT NOT TO SUE BY UNITED STATES

34. Covenant Not to Sue Settling Defendant by United States. In consideration of the payments and commitments that will be made by the Settling Defendant under the terms of the Consent Decree, and except as specifically provided in Paragraphs 35 and 36 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect for Settling

1 Defendant upon receipt by the Escrow Account from Settling Defendant of Settling Defendant's
2 payments required by Section F (Payment) and any amount due under Section G (Failure to
3 Comply with Consent Decree). These covenants are conditioned upon the satisfactory
4 performance by Settling Defendant of its obligations under this Consent Decree and the veracity
5 of the information provided to EPA by Settling Defendant relating to Settling Defendant's
6 involvement with the Hylebos Waterway Problem Areas. These covenants not to sue extend
7 only to the Settling Defendant and do not extend to any other person.

8 35. United States' Pre-certification Reservations. Notwithstanding any other
9 provision of this Consent Decree, the United States reserves, and this Consent Decree is without
10 prejudice to, its right to institute proceedings in this action or in a new action, or to issue an
11 administrative order seeking to compel Settling Defendant,

12 A. to perform further response actions relating to the Site or

13 B. to reimburse the United States for additional costs of response if, prior to

14 Certification of Completion of the Remedial Action:

15 1. conditions at the Site, previously unknown to EPA, are discovered, or

16 2. information, previously unknown to EPA, is received, in whole or in

17 part, and these previously unknown conditions or information together with any other relevant
18 information indicates that the Remedial Action is not protective of human health or the
19 environment.

20 36. United States' Post-certification Reservations. Notwithstanding any other
21 provision of this Consent Decree, the United States reserves, and this Consent Decree is without
22 prejudice to, its right to institute proceedings in this action or in a new action, or to issue an
23 administrative order seeking to compel Settling Defendant,

24 A. to perform further response actions relating to the Site or

25 B. to reimburse the United States for additional costs of response if,

subsequent to Certification of Completion of the Remedial Action:

1 1. conditions at the Site, previously unknown to EPA, are discovered, or
2 2. information, previously unknown to EPA, is received, in whole or in
3 part, and these previously unknown conditions or this information together with other relevant
4 information indicate that the Remedial Action is not protective of human health or the
5 environment.

6 37. For purposes of Paragraph 35, the information and the conditions known to EPA
7 shall include only that information and those conditions known to EPA as of the date of the
8 August, 2000 ESD (August 3, 2000) and set forth in the Record of Decision, as modified by the
9 July 1997 and August 2000 ESD, and the administrative records supporting the Record of
10 Decision and the ESD or contained in EPA-approved remedial design documents as of the
11 effective date of this Consent Decree. For purposes of Paragraph 36, the information and the
12 conditions known to EPA shall include only that information and those conditions known to EPA
13 as of the date of Certification of Completion of the Remedial Action and set forth in the Record
14 of Decision, the administrative records supporting the Record of Decision and July, 1997 and
15 August, 2000 ESD, the post-ROD administrative record, or in any information received by EPA
16 pursuant to the requirements of an Order or Consent Decree for Remedial Design and Remedial
17 Action with other parties prior to Certification of Completion of the Remedial Action.

18 J. RESERVATIONS OF RIGHTS BY UNITED STATES

19 38. The covenant not to sue by the United States set forth in Paragraph 34 does not
20 pertain to any claims other than those expressly specified in Paragraph 34, including but not
21 limited to any civil or criminal claims under other statutes or under other Sections of CERCLA.
22 The United States also reserves, and this Consent Decree is without prejudice to, all rights
23 against Settling Defendant with respect to the following claims under Section 106 or 107 of
24 CERCLA:
25

1 A. liability for failure to meet a requirement of this Consent Decree,
2 including, but not limited to payment of stipulated penalties or Interest pursuant to Section G of
3 this Decree;

4 B. liability arising from the past, present, or future disposal, release, or
5 potential threat of a release of a hazardous substance, pollutant, or contaminant to areas outside
6 of the Hylebos Waterway Problem Areas, including releases to upland properties adjacent to the
7 Hylebos Waterway Problem Areas that have not migrated into the Hylebos Waterway Problem
8 Areas as of the date this Consent Decree is lodged with the Court;

9 C. criminal liability;

10 D. liability for damages for injury to, destruction of, or loss of natural
11 resources, and for the costs of any natural resource damage assessments within or outside of the
12 Hylebos Waterway Problem Areas; and

13 E. liability arising from the future release or potential threat of a release of a
14 hazardous substance, pollutant, or contaminant at or in the Hylebos Waterway Problem Areas
15 after the date of lodging of this Consent Decree.

16 39. Notwithstanding any other provision in this Consent Decree, the United States
17 reserves, and this Consent Decree is without prejudice to, the right to reopen or institute
18 proceedings against Settling Defendant in this action or in a new action, to reimburse the United
19 States for Response Costs, and/or to issue an administrative order to Settling Defendant seeking
20 to compel Settling Defendant to perform response actions relating to the Hylebos Waterway
21 Problem Areas, and/or to reimburse the United States for additional costs of response if:

22 A. the United States finds that the Settling Defendant's Certifications made in
23 Section H of this Decree are untrue or inaccurate in a material way; or

24 B. information is discovered that indicates that Settling Defendant
25 contributed hazardous substances to the Hylebos Waterway Problem Areas in such greater
amount or such greater toxic or other hazardous effects that EPA determines that the discovered

1 information materially changes the basis for entering into this settlement with Settling
2 Defendant.

3 40. Notwithstanding any other provision in this Consent Decree, the United States
4 reserves, and this Consent Decree is without prejudice to, the right to institute proceedings
5 against Settling Defendant in this action or in a new action to reimburse the United States for
6 Response Costs, and/or to issue an administrative order to Settling Defendant seeking to compel
7 Settling Defendant to perform response actions relating to any other Problem Area or portion of
8 the CB/NT Site.

9 **K. COVENANT NOT TO SUE BY SETTLING DEFENDANT**

10 41. Settling Defendant covenants not to sue and agree not to assert any claims or
11 causes of action against the United States or its contractors or employees with respect to the
12 remedial action at the Hylebos Waterway Problem Areas or this Consent Decree, including, but
13 not limited to:

14 A. any direct or indirect claim for reimbursement from the EPA Hazardous
15 Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C.
16 §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

17 B. any claim against the United States arising out of response activities at the
18 Hylebos Waterway Problem Areas, including any claim under the United States Constitution, the
19 Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended,
20 or at common law; or

21 C. any claim against the United States pursuant to Sections 107 and 113 of
22 CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Hylebos Waterway Problem Areas.

23 42. Nothing in this Consent Decree shall be deemed to constitute approval or
24 preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or
25 40 C.F.R. Part 300.700(d).

1 L. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

2 43. Nothing in this Consent Decree shall be construed to create any rights in, or grant
3 any cause of action to, any person not a Party to this Consent Decree. The United States and
4 Settling Defendant each reserve any and all rights (including, but not limited to, any right to
5 contribution), defenses, claims, demands, and causes of action which each Party may have with
6 respect to any matter, transaction, or occurrence relating in any way to the Hylebos Waterway
7 Problem Areas or the CB/NT Site against any person not a party to this Consent Decree, except
8 as provided below. If Settling Defendant seeks to bring a new action in connection with the
9 Hylebos Waterway Problem Areas, excepting an action brought by Settling Defendant against its
10 insurance carrier, Settling Defendant agrees to notify the United States at least sixty (60) days
11 prior to the commencement of the action, and concurrently to provide to EPA all information in
12 its possession relating to the person's involvement at the Hylebos Waterway Problem Areas.

13 44. In any subsequent administrative or judicial proceeding initiated by the United
14 States for injunctive relief, recovery of Response Costs, or other relief relating to the Hylebos
15 Waterway Problem Areas, Settling Defendant shall not assert, and may not maintain, any defense
16 or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion,
17 claim-splitting, or other defenses based upon any contention that the claims raised in the
18 subsequent proceeding were or should have been brought in the instant action; provided,
19 however, that nothing in this Paragraph affects the enforceability of the covenant not to sue
20 included in Paragraph 34.

21 45. The Parties agree, and by entering this Consent Decree this Court finds, that
22 Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from
23 contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C.
24 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this
25 Consent Decree are all response actions taken and to be taken by the United States or by any
other entity, and Response Costs incurred in connection with the Hylebos Waterway Problem

1 Areas, including past and future Response Costs incurred and to be incurred by the United
2 States, and past and future Response Costs incurred by any other entities in connection with the
3 Hylebos Waterway Problem Areas. “Matters addressed” does not include any claims under
4 contractual indemnities or any other private contractual obligations. The “matters addressed” in
5 this Consent Decree do not include those response costs or response actions as to which the
6 United States has reserved its rights under this Consent Decree (except for claims for failure to
7 comply with this Decree), in the event that the United States asserts rights against Settling
8 Defendant coming within the scope of such reservations.

9 M. RETENTION OF JURISDICTION

10 46. This Court shall retain jurisdiction over this matter for the purpose of interpreting
11 and enforcing the terms of this Consent Decree.

12 N. INTEGRATION

13 47. This Consent Decree constitutes the final, complete, and exclusive agreement and
14 understanding among the Parties with respect to the settlement embodied in this Consent Decree.
15 The Parties acknowledge that there are no representations, agreements, or understandings
16 relating to the settlement other than those expressly contained in this Consent Decree.

17 O. PUBLIC COMMENT

18 48. This Consent Decree shall be lodged with the Court for a period of not less than
19 thirty (30) days for public notice and comment. The United States shall file with the Court any
20 written comments received and the United States' response thereto. The United States reserves
21 the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose
22 facts or considerations that indicate that this Consent Decree is inappropriate, improper, or
23 inadequate. Settling Defendant consents to entry of this Consent Decree without further notice,
24 and the United States reserves the right to oppose an attempt by any person to intervene in this
25 civil action.

1 P. EFFECTIVE DATE

2 49. The effective date of this Consent Decree shall be the date of entry by this Court,
3 following public comment pursuant to Paragraph 48.

4 Q. SIGNATORIES/SERVICE

5 50. The undersigned representative of the Settling Defendant to this Consent Decree
6 and the Assistant Attorney General for the Environment and Natural Resources Division of the
7 United States Department of Justice, or her delegatee, certifies that he or she is fully authorized
8 to enter into the terms and conditions of this Consent Decree and to execute and bind legally
9 such party to this document.

10 51. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by
11 this Court or to challenge any provision of this Consent Decree, unless the United States has
12 notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

13 52. Settling Defendant shall identify, on the attached signature page, the name and
14 address of an agent who is authorized to accept service of process by mail on its behalf with
15 respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby
16 agrees to accept service including, but not limited to, service of a summons, in that manner and
17 to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil
18 Procedure and any applicable local rules of this Court.

19 SO ORDERED THIS _____ DAY OF _____, 2006.

20
21
22 UNITED STATES DISTRICT JUDGE

23
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25 CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site

Page 21 of 24

United States Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044-7611

1
2 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v.
3 Zidell Marine Corporation, relating to the Hylebos Waterway Problem Areas, within the
4 Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce County,
5 Washington:

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FOR THE UNITED STATES OF AMERICA

Date: 1/9/06


BRUCE S. GELBER
Section Chief
Environmental and Natural Resources Division
Environmental Enforcement Section
U.S. Department of Justice
Washington, D.C. 20530

Date: 1/9/06


MICHAEL J. MCNULTY
Attorney
Environmental Enforcement Section
Environmental and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044
(202) 514-1210

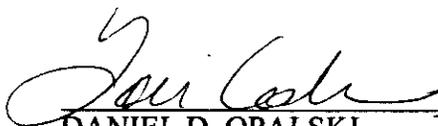
JOHN MCKAY
United States Attorney for the
Western District of Washington

BRIAN KIPNIS
Assistant United States Attorney
601 Union Street
Suite 5100
Seattle, WA 98101
(206) 553-7970

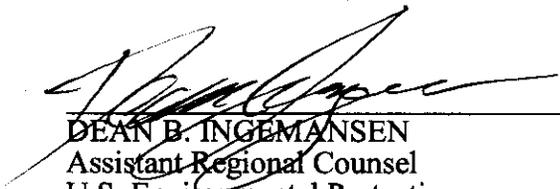
CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site

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Date: 11/30/05


DANIEL D. OPALSKI
Director, Office of Environmental Cleanup
Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101

Date: 11/30/05

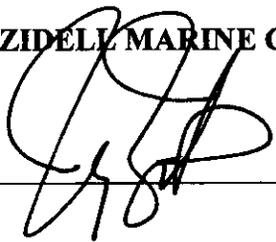

DEAN B. INGEMANSEN
Assistant Regional Counsel
U.S. Environmental Protection
Agency
1200 Sixth Avenue
Seattle, Washington 98101

ORIGINAL

1 THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v.
2 Zidell Marine Corporation, relating to the Hylebos Waterway Problem Areas within the
3 Commencement Bay Nearshore/Tideflats Superfund Site in the City of Tacoma, Pierce County,
4 Washington:

5
6 **FOR ZIDELL MARINE CORPORATION**

7
8 Date: 11/8/2005

9 
10 _____

11 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

12 CT Corporation System
13 520 Pike Street
14 Seattle, WA 98101
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CONSENT DECREE
Commencement Bay Nearshore/Tideflats
Superfund Site

United States Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
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Washington, D.C. 20044-7611