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June 19, 2006

VIA OVERNIGHT EXPRESS MAIL

Sue Ellen Wooldridge
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Lori Cohen, Deputy Director
Office of Environmental Cleanup
U.S. Environmental Protection Agency
Region 10 (ECL-117)
1200 Sixth Avenue
Seattle, Washington 98101

Re: Zidell Marine Corporation's Comments in Favor of the Proposed Consent Decree—U.S. v. Zidell Marine Corporation
Civil Action No. C06-CV-5437 RJB (W.D. WA)
DOJ Reference No. 90-11-2-726/3
Hylebos Waterway Problem Areas
Commencement Bay Nearshore/Tideflats Superfund Site

Dear Ms. Wooldridge and Ms. Cohen:

In connection with the subject matter, enclosed is Zidell Marine Corporation's comments in favor of the Proposed Zidell Marine Corporation Consent Decree referenced above, which responds to the opposition comments submitted by Occidental Chemical Corporation and the Port of Tacoma.

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Please let us know if you require any additional information from Zidell Marine Corporation.

Very truly yours,

Dean D. DeChaine

Suzanne C. Lacampagne

Attorneys for Zidell Marine Corporation

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June 19, 2006

ZIDELL MARINE CORPORATION'S COMMENTS IN FAVOR OF THE PROPOSED CONSENT DECREE

SUMMARY OF ZIDELL'S POSITION

The comments of Occidental Chemical Corporation ("Occidental") and the Port of Tacoma ("Port"), directed against the Proposed Consent Decree lodged by the United States in U.S. v. Zidell Marine Corporation ("Zidell"), Civil Action No. C06-CV-5437-RJB (W.D. Wa.); Department of Justice Reference No. 90-11-2-726/3 (the "Proposed Consent Decree"), are factually and legally inaccurate as they relate to Zidell.

The settlement allocation to Zidell is fair and reasonable because it is based on the accepted allocation formula of Matt Lowe. Mr. Lowe's allocation, which took five years to prepare (see para. 26a below) (and was made available in 2001), was used in the EPA's settlements with the parties in U.S. v. Mary Jane Andersen, No. CO3-5107-RB, and was approved by the court on September 15, 2003 (see paras. 36 and 38 below).

At no time was Zidell a recalcitrant PRP. Zidell fully and promptly cooperated with the EPA. And, as described below, counsel for the EPA, Occidental and the Port, attended and participated in a meeting with representatives of Zidell and its insurers in December 2001 and at that meeting or shortly thereafter said or concurred that if Zidell paid the 100 percent premium amount established by the Matt Lowe allocation formula—which is the amount called for in the Proposed Consent Decree—the proposed Zidell cash settlement agreement would be acceptable (see paras. 23-28 and 30-33 below).

After working with the attorneys for Occidental and the EPA in 2001, 2002, and 2003 to determine the proper amount due by Zidell at the Hylebos (see paras. 30, 31, and 32 below), and trying to work with its insurers to get approval and funding for the settlement (see paras. 32, 33, and 37), Zidell, on its own, offered the precise Matt Lowe 100 percent premium allocated sum ($3,239,973.38), which was accepted by the EPA in 2003 (see para. 38 below). It was also agreed that the Proposed Consent Decree would be consistent with the then-proposed Mary Jane Andersen decree (see paras. 36 and 38 below), which settlements were similarly based upon the Matt Lowe allocated formula.

The three-year delay in preparing and filing the Proposed Consent Decree in 2006 was not the fault of Zidell. The EPA was negotiating with other PRPs in 2003, 2004, and 2005 and expected to add other participants to the proposed consent decree with Zidell. The delay was also worsened by attorney reassignment within the EPA. Then, when one proposed settlement with another PRP did not get finalized in 2005, the EPA prepared and filed the Proposed Consent Decree with Zidell as the only participant (see para. 39 below).

THE KEY FACTS

The key facts with respect to Zidell's involvement at the Hylebos and its efforts to settle and pay its fair share at the Hylebos are as follows:

ZIDELL'S 1960-1983 ACTIVITIES AT THE HYLEBOS

1. Zidell leased certain property from the Port at the mouth of the Hylebos from 1960 to 1984.

2. Zidell dismantled and scrapped Navy and other U.S. maritime vessels from 1960 until 1976. Zidell believes that any contamination resulting from this operation was the legal responsibility of the U.S. Navy or other United States entities.

3. From 1976 until 1983, Zidell built new barges on the leased property. This was a clean operation that should not have resulted in any contamination.

1992 NOTICE FROM EPA

4. By a 16-page letter dated September 15, 1992 (received September 21, 1992), the EPA wrote to "Zidell Dismantling" that it had come to EPA's attention that "Zidell Dismantling" had "owned or conducted business at a facility or property * * * of the Hylebos Waterway," and that "Zidell Dismantling" was "requested to furnish information relating to the identification, nature, and quantity of materials which have been or are generated, treated, stored, or disposed of, and the nature or extent of any release or threatened release of a hazardous substance, pollutant or contaminant at or from facilities or properties in the [Hylebos] area."

1992 ZIDELL RESPONSE TO EPA

5. Zidell undertook an investigation relating to its 1960 to 1983 activities at the Hylebos and promptly responded to the EPA's request for information (see enclosed 11-page letter of November 18, 1992 (Para. 5 Attachment); the documents (about 1½ inch thick) that were attached to the 1992 letter are not enclosed).

6. As noted in paragraph 4 of Zidell's 1992 letter, although the Port formally retook possession of the leased property effective May 3, 1984, Zidell had actually left the Hylebos in 1983.

7. A detailed description of Zidell's operations at the Hylebos is set out in paragraphs 6(a) to 6(j) of the letter. As noted in paragraph 6(e), "Zidell dismantled ships for profit; therefore, Zidell disposed by sale of everything possible generated from ship dismantling activities." In this connection, "disposal by sale included sludge which may have been found and removed from vessels which, like oil, was sold to recyclers who were able to recover oil from the sludge."

8. As discussed in paragraph 12 of Zidell's 1992 letter, Zidell recalled an oil spill in the 1970s when Zidell was pumping oil from a ship being dismantled to a barge. But, on that occasion, booms were placed around the oil and an independent cleanup contractor cleaned up the oil spill.

9. In paragraph 13 of the 1992 letter, Zidell reported that Hooker Chemical (now Occidental) had problems with releases on its property adjacent to the Hylebos or into the Hylebos Waterway itself Zidell also reported that the Port had "sunk test pipe on the property Zidell leased from the Port adjacent to the [Occidental] property to determine if contamination was leaching onto the Port's property."

10. In summary, in November 1992, Zidell promptly provided the requested detailed information to the EPA.

1994 INVITATION TO JOIN PRP GROUP

11. In late December 1994, Zidell received a letter (copy enclosed as Para. 11 Attachment) from the "Hylebos PRP Group" inviting it to "join a group of potentially responsible parties" that were "about to embark on the process of developing an allocation of liability for cleanup of the Hylebos Waterway," provided it paid $2,000 and agreed to pay additional costs of the allocation process.

12. Zidell chose not to participate in the PRP allocation process.

2001 EPA SPECIAL NOTICE FOR REMEDIAL DESIGN/REMEDIAL ACTION AND DEMAND FOR REIMBURSEMENT/SETTLEMENT

13. On January 2, 2001, Zidell received the EPA's special notice letter dated December 28, 2000, stating that Zidell may be a PRP, and seeking reimbursement of costs incurred at the Hylebos. (Copy enclosed as Para. 13 Attachment.)

2001 NOTICE RE SETTLEMENT DISCUSSIONS FROM HYLEBOS PRP GROUP

14. The next day, January 3, 2001, Zidell received an invitation (copy enclosed as Para. 14 Attachment), from Occidental and Kaiser to engage in settlement discussions with certain Hylebos PRPs regarding the fimding and implementation of the Hylebos cleanup.

SUMMARY OF ZIDELL'S EFFORTS TO SETTLE BEGINNING IN 2001

15. **IN SUMMARY**, upon receipt of the EPA letter and the Occidental PRP letter in January 2001, Zidell **IMMEDIATELY** undertook to:

a. Work with the EPA to determine and pay its fair share of any liability it had at the Hylebos;

b. Work with the attorneys for the Port and Occidental to obtain the allocation report and determine its fair share of responsibility for the Hylebos;

c. Meet with the attorneys for the Port, Occidental, and other PRPs to determine the basis for the claims and the allocations directed at Zidell;

d. Conduct its own investigation of the alleged claims against Zidell at the Hylebos;

e. Educate and work with its insurers in an effort to obtain authority to settle the claims at the Hylebos;

f File suit in March 2003 against its ovm insurers when they refused to consent to and fund the proposed settlement with the EPA;

g. Negotiate and conclude a settlement in principle with the EPA in May 2003, which was finalized in August 2003, which called for Zidell to pay $3,239,973.38, the 100 percent premium payment called for in Matt Lowe's allocation formula;

h. The delay from 2003 to 2006 in filing the Consent Decree was not Zidell's fault; it resulted from the EPA's effort to settle with other PRPs and to include them in a joint consent decree plus attorney reassignment within the EPA; and

i. Work with numerous PRPs and the Natural Resource Trustees and conclude a settlement in principle of the NRD claims in 2005, with the Consent Decree being lodged in 2006.

SPECIFIC 2001 STEPS TO PROMPTLY SETTLE

16. After receipt of the EPA letter and the Notice from the PRPs on January 2 and 3, 2001 (see paras. 13 and 14 Attachments), as summarized in paragraph 15 above, Zidell immediately began to investigate all facts relating to its responsibility for the Hylebos cleanup, to review options for settlement, to educate and inform its insurers of Zidell's responsibilities and obligations, and to work with the attorneys for the Port, Occidental and the EPA to promptly bring the claims to a fair and reasonable conclusion. The key 2001 facts are as follows:

17. On February 23, 2001, Zidell's attorneys had an in-person conference in Seattle with the attorneys for the Port and Occidental.

18. Between February and June 2001, Zidell's attorneys and representatives conducted inspections of the mouth of the Hylebos as well as an investigation regarding Zidell's operations and claims.

19. On March 30, 2001, Zidell's attorneys worked with the attorney for Occidental and obtained the Matt Lowe allocation formula report.

20. Zidell's attorneys had numerous telephone conferences with the attorneys for the Port, Occidental and the EPA to confirm that Zidell could settle all claims concerning the investigation and remediation of the Hylebos based on the figures set out in the allocation report, either on a cash out basis with the payment of a 100 percent premium payment, which would eliminate any future obligations, or on a cash out basis with a limited 50 percent premium payment, which would leave Zidell responsible for potential future costs.

21. In June 2001, Zidell and its attorneys prepared a detailed analysis for its insurers on Zidell's 1960-1983 activities at the Hylebos, which explained how, under the proposed settlements under the Matt Lowe allocation formula, Zidell could pay its full share of its PRP responsibility on a cash out basis with a 50 percent premium payment or a 100 percent premium payment (the 100 percent premium payment would eliminate any future payments).

22. In the fall of 2001, Zidell and its attorneys requested that Lori Cora and/or Peter Contreras of the EPA, Robert Goodstein, counsel for the Port, and Robert Bakemeier,

counsel for Occidental, each give presentations to Zidell's management and its numerous insurers at a December 2001 meeting in Tacoma. The purpose of the meeting was to discuss the Hylebos cleanup, the costs incurred, projected future costs, the EPA negotiations with parties wanting to "cash out" their liability at the Hylebos, and the claims against Zidell and others for alleged contamination at the Hylebos.

THE DECEMBER 6, 2001 MEETING IN TACOMA

23. On December 6, 2001, Lori Cora, the assistant regional counsel for the EPA, Robert Goodstein, counsel for the Port, and Robert Bakemeier, counsel for Occidental, attended the meeting at the Sheraton Hotel in Tacoma, Washington, and each gave presentations to the treasurer of Zidell, the insurance manager of Zidell, the counsel for Zidell, the insurance broker for Zidell, and to eight insurer representatives and attorneys.[1]

24. At 9:30 a.m., Lori Cora, counsel for the EPA, reviewed the history of the site, which is summarized as follows:

a. She stated that the EPA's current costs were $5.2 million, and that the remediation costs, for the purposes of settlement, were around $56 million.

b. Ms. Cora explained that cleanup would begin in 2002 and take at least two seasons to finish. Cleanup had to stop for at least four months a year for fish runs. Ms. Cora noted that there were approximately 20 acres that were to heal via natural recovery, but that would require a continued monitoring and maintenance program on a long-term basis, at least for 10 years following the cleanup.

c. She noted that the Port and other parties maintained that the remediation costs would be greater than the $56 million figure she used.

d. Ms. Cora said that the EPA wanted the PRPs to be 100 percent responsible for the cleanup, but that the EPA had obtained commitments only with respect to the head (segments 1 and 2) and the mouth (segment 5) of the Hylebos. The EPA was trying to put pressure on the Port and Occidental to also be responsible for cleaning up the middle segment as well as the mouth.

e. She noted that the U.S. Navy and 22 other PRPs had made proposals for cash out settlements and were negotiating with the EPA. Kaiser Aluminum and Asarco also made offers which were not accepted by the EPA. Earlier, there had been some de minimis settlements.

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[1] Zidell was surprised that Occidental's chronology of facts did not mention the December 6, 2001 meeting with Zidell and its insurers.

f. Ms. Cora kept all of the settlement figures confidential. She also said that, with respect to any party who did not come forward and settle, any claim the EPA had against that party would be joint and several, that the EPA may seek treble damages, and that the EPA would continue to have costs. She also noted that, based on comments from some of the parties at the head of the Hylebos, such as General Metals, those parties had claims against Zidell and others who were operating at the mouth. Presumably, the contamination by Zidell and others operating at the mouth was spread to the head. On the other hand, presumably, some of the contamination by PRPs operating at the head of the Hylebos also spread to the mouth of the Hylebos.

g. Ms. Cora indicated that, in the event Zidell did not reach a settlement with the EPA, it was enfirely possible that the EPA would file suit against Zidell and the 15 to 20 other companies who had not settled with the EPA. She also noted that in the event there was no settlement with the EPA, that the PRPs doing the cleanup would probably also file such a suit.

25. At 10:15 a.m., Robert Goodstein, representing the Port, and Robert Bakemeier, representing Occidental, jointly appeared before the group, whose comments are summarized as follows:

a. Mr. Goodstein retraced the history of the Hylebos and particularly, Zidell's operational site. He noted that the contamination found offsite in the Hylebos represented the type of activities by the various users at the various sites.

b. Mr. Goodstein said that Zidell was operating at the mouth of the Hylebos from 1960 to 1984; that its scrapping operation went from 1960 to 1976; that its barge building was from 1976 to 1983; and that Zidell had a crane which was left in place on the site for many years after 1984.

c. Mr. Goodstein noted that the Port, which was formed in 1918, purchased Zidell's operational property when the Navy declared it surplus in 1960. Prior to that time, this property had been owned by Todd Shipyard until 1948 and then by the Navy until 1960. The Port now owns the entire Hylebos Waterway, side to side, and the Hylebos Peninsula (between the Hylebos and Blair Waterways).

d. There was considerable discussion concerning the fact that the Port was going to be using dredged Hylebos material as a base to build a new facility, known as Blair No. 1 (on the adjoining Blair Waterway). Mr. Goodstein contended that, although there was a benefit to the Port, the costs of dumping at Blair No. 1 were less than what they would be elsewhere. Also, the costs of dumping was less than the actual costs and did not include any of the costs of building or finishing Blair No. 1.

e. It was reported that approximately 650,000 cubic yards of contaminated dredged sediments would go into the Blair No. 1 development. He noted, however, that there was still additional dredged contaminated sediments (the total contaminated dredged sediments was estimated to be about 1,080,000 cubic yards) that would have to be removed and that some contaminated sediments would likely end up in the Klickitat landfill.

f. Mr. Goodstein predicted that there probably would be several consent decrees by the EPA. One would be a consent decree for the parties who have negotiated a settlement with the EPA on a cash-out basis. A second one would probably be a consent decree with the Port and Occidental with respect to their cleanup of the areas for which they are responsible and/or are acting as the contractor.

g. Mr. Goodstein predicted that the third consent degree would involve General Metals and Atofina Chemicals which had offered to clean the head of the Hylebos. Asarco, which also shared responsibility for the head of the Hylebos, offered a cash settlement to the EPA which was rejected. Kaiser Aluminum, also responsible for the contamination at the head of the Hylebos, disputed its liability allocation and made a cash offer to the EPA which was also rejected.

h. Mr. Goodstein said that they expected that the overall costs of remediation would significantly exceed the $56 million estimate used by the EPA. He also stated that the EPA would have impaid costs after the cleanup was finished, and that the Port and Occidental would assert contribution claims against any responsible party who did not settle.

26. Just before 11 a.m., Robert Bakemeier, the attorney for Occidental, made his presentation, adding to the comments of Mr. Goodstein. Mr. Goodstein also made some additional comments during Mr. Bakemeier's presentation. These comments are summarized below:

a. Mr. Bakemeier said that Matt Lowe's allocation report, which took five years to prepare, was essentially "rough justice." He said that, in his opinion, the percentage given Zidell was low. However, that is the percentage the EPA and the other parties are using for cash out settlements.

b. Mr. Bakemeier also noted that the government was making a cash out offer and he indicated that the government (including the Navy) was paying the percentage allocated to the government under the allocation report, plus a 50 percent premium payment. Under this scenario, the government will still be liable in the event its ultimate share exceeds what it has paid.

c. Messrs. Bakemeier and Goodstein also said that Todd Shipyards was contending that it was not responsible because it went into bankruptcy. Nevertheless, the Port and Occidental believe that a good claim could be made that Todd is responsible for its allocated share.

d. Mr. Bakemeier said that of the approximate 20 parties who have made settlement offers to the EPA, 17 have done so in a manner that would allow them to close their files. These settlements include a 100 percent premium payment as part of their allocated payment. He said that three of the cash settling PRPs have agreed to settle at the allocated percentage, plus paying the 50 percent premium payment. The three PRPs settling with a 50 percent premium payment are subject to paying more in the future should their allocated costs of actual cleanup exceed the amount of their settlement payment.

e. Mr. Bakemeier said he believed that the ultimate costs of remediation would be about $80 million. He claimed that the EPA's number, the $56 million figure, was three years old. Mr. Bakemeier estimated that the EPA's investigative costs are between $7 million and $9 million, and the PRPs' investigative costs are somewhere between $9 million and $11 million. Mr. Bakemeier said that these investigative costs are <u>not</u> part of the estimated $80 million remediation. Thus, according to Mr. Bakemeier, the total of both the investigative costs and the cleanup costs are expected to be around $100 million.

f General Metals, according to Mr. Bakemeier, estimated that the remediation costs at the head (segments 1 and 2), would be $29.7 million.

g. He reported that the preliminary work with respect to the remediation at the mouth is about 90 percent done, and that the Port and Occidental expect to be able to start cleanup next year.

27. Mr. Goodstein then reported that the Port settled the National Resource Damage ("NRD") claim against it with the trustees in 1993. The Port did so by cleaning up, restoring, and fixing the flow of the Hylebos Creek into the Hylebos, making it attractive for fish, etc. Mr. Goodstein noted that the trustees had not yet made final demands to the parties with respect to their NRD claims at the Hylebos.

28. Both Mr. Goodstein and Mr. Bakemeier told the parties at the meeting that there had never been any formal claims made by the parties at the head of the Hylebos to the parties at the mouth of the Hylebos, or vice versa, but there has been some posturing.

FURTHER DISCUSSIONS AFTER DECEMBER 6, 2001 MEETING

29. After Ms. Cora, Mr. Goodstein, and Mr. Bakemeier left the December 6, 2001 meeting, Zidell's counsel was requested by Zidell's insurers to have a further conference with Ms Cora to obtain the lowest settlement figure acceptable to the EPA.

30. On December 17, 2001, Zidell's counsel had a lengthy telephone conference with Ms. Cora about the potential settlement of claims against Zidell, and worked with Ms. Cora in an effort to verify all elements and issues which would have to be taken into consideration in calculating and putting together a cash out settlement under the Matt Lowe allocation formula either on a 50 percent premium payment or a 100 percent premium payment.

31. At the suggestion of Ms. Cora, Zidell's counsel talked to Mr. Bakemeier, counsel for Occidental, on December 21, 26, and 27, 2001, to obtain data that Ms. Cora could not supply concerning the potential lowest settlement figure under the Matt Lowe allocation formula. Mr. Bakemeier readily provided the requested information in aid of Zidell's efforts to achieve a cash out settlement with the EPA. Mr. Bakemeier fully understood that Zidell was working with the EPA to negotiate a cash out settlement.[2]

32. As a result of those discussions with Ms. Cora and Mr. Bakemeier, Zidell told its insurers that Zidell's responsible share for investigations and remediations at the Hylebos, with a 100 percent premium payment on the open access component called for under the Matt Lowe allocation formula, would be approximately $3,240,000.

33. Accordingly, as a result of the information obtained from the EPA and Occidental, Zidell told its insurers they could close their files on the Hylebos (except for certain exceptions), by paying a 100 percent premium "cash out" payment on the estimated open access remediation costs, which would require a total payment of about $3,240,000. Ms. Cora stated that the 100 percent premium payment would result in a complete covenant in favor of Zidell.

34. Also, Zidell told its insurers that any settlement that included only a 50 percent premium payment on the open access remediation costs under the allocation report formula would require a payment of about $2,601,000. But, should the remediation costs exceed $56,056,407, then Zidell and its insurers would be called upon to pay an additional 2.65 percent of all remediation costs above that amount.

[2] Zidell notes that Occidental's chronology also does not mention Mr. Bakemeier's late December 2001 discussions with Zidell's counsel to assist Zidell in calculating and achieving a cash out settlement with the EPA.

2002-2003 TIME FRAME

35. Zidell continued negotiations with its insurers and with the EPA in 2002 and 2003 in an effort to finalize the proposed cash out settlement discussed at the end of 2001.

36. By early 2003, the EPA had negotiated cash out settlements with about 20 PRPs pursuant to the Matt Lowe allocation formula. On February 26, 2003, the U.S. v. Mary Jane Anderson consent decree, which included these cash out settlements, was lodged with the court.

37. When Zidell was unable to get its insurers to agree to timely fund the proposed settlement, on March 11, 2003, Zidell filed a declaratory judgment suit in the United States District Court for the Western District of Washington at Tacoma; entitled Zidell Marine Corporation v. Beneficial Five and Casualty Insurance Company et al., case no. C03-5131 RBL (copy enclosed as Para. 37 Attachment), seeking to have the court declare that each of its insurers had an obligation to defend and indemnify Zidell for damages that Zidell is obligated to pay as a result of the Hylebos. Due to jurisdictional and other issues, two other related cases had to be filed and are also pending against insurers in state courts. One is against the so-called London underwriters, filed in the Superior Court of the State of Washington for the County of Pierce, entitled Zidell Marine Corporation v. Certain Underwriters at Lloyd's of London and Certain London Market Insurance Companies, et al., case no. 04 2 05315 9. And, a third case is pending in the Circuit Court of the State of Oregon for the County of Multnomah, entitled Zidell Marine Corporation v. United States Fire Insurance Company, case no. 0510-11059. Zidell has vigorously, and at great expense of both funds and time, pursued it insurers to persuade them to settle each of their liability for the Hylebos with respect to both the EPA's and the Trustees' claims.

38. In May 2003, following a meeting in Seattle at the EPA with Messrs. Yackulic and Contreras, a cash out settlement in principle between the EPA and Zidell was achieved. After the 100 percent cash out calculations specified in the Matt Lowe allocation formula were calculated and agreed upon, the proposed settlement of $3,239,973.38 was finalized in August 2003. This settlement was based upon the terms of the U.S. v. Mary Jane Anderson consent decree lodged with the court in February 2003, and ultimately approved by the court on September 15, 2003.

39. The Proposed Consent Decree was not filed until 2006. Zidell was not responsible for the approximate three-year delay. Zidell believes that the primary reason for the delay resulted from the EPA's expectation that other settling PRPs would be added to the Zidell settlement and only one new consent decree would be required. Zidell also believes that EPA staff reassignments may also have contributed to the delay. When one proposed settlement with another PRP did not get finalized in 2005, the EPA then prepared and filed the Proposed Consent Decree with only Zidell as a participant.

LEGAL ISSUES

Consent decrees are favored because they encourage settlement. See US v. Cannons Engineers. Corp., 720 FSupp 1027, 1035 (D.Mass. 1989), aff'd. 899 F2d 79, 84(1st Cir 1990) (". . . it is the policy of the law to encourage settlements."). "The presumption in favor of settlement is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency 'specially equipped, trained or oriented in the tield. . . .' US v. National Broadcasting Co., 499 FSupp 1127, 1144 (CD Cal 1978). EPA is such an agency." Carmons, 720 FSupp at 1035.

The consent decree Zidell negotiated with EPA meets all of the elements for judicial approval—that is, it is: (1) fair—both procedurally and substantively, (2) reasonable, and (3) consistent with the purposes of CERCLA. See US v. Montrose Chem. Corp., 793 FSupp 237 (CD Cal 1992), rev'd 50 F3d 741, 747 (9th Cir 1995) (citing Cannons, 899 F2d at 84); see also, Dept. of Toxic Substances Control v. Witco Corp., No. 1:98-cv-6264 OWW TAG, 2005 US Dist LEXIS 29517 (ED Cal Aug. 30, 2005); US v. Wallace, 893 FSupp 627 (ND Tex 1995); and Kelley v. Thomas Solvent Co., 717 FSupp 507, 517 (WD Mich 1989).

PROCEDURAL FAIRNESS

In its examination of procedural fairness, the court considers weighing factors of candor, openness, and bargaining balance. See Cannons, 899 F2d 79, 86 (1st Cir. 1990). Procedural fairness does not require that the objecting party have the opportunity to participate in the settlement discussion. See Cannons, 899 F2d at 93; Wallace, 893 FSupp 627 (procedural fairness was found even if defendant was afforded only an opportunity to submit comments after the consent decree was lodged).

In Zidell's case, it has engaged in settlement discussions with EPA from 2001, when it received the tirst EPA demand for payment (see para. 13 above), until it reached a settlement in principle in May 2003, and then finalized it in August 2003 (see para. 38 above). The negotiations were at arms-length and took into consideration volumes of information and evidence from the EPA, the Port, Occidental, Zidell, and others.

Although there is no requirement of EPA or Zidell to engage the Port and Occidental during this process, the Port and Occidental were involved. Moreover, as noted above (see paras. 23-28), they participated at the meeting on December 6, 2001 with Zidell and its insurers, including making presentations. Further, they acknowledged that a 100 percent cash out payment pursuant to the Matt Lowe allocation formula was an acceptable settlement (see para. 26.a). In addition, subsequent to that meeting, pursuant to the EPA's suggestion, counsel for Zidell worked with counsel for Occidental so that Zidell could prepare an accurate and correct cash out settlement proposal to the EPA on either a 50 percent or 100 percent premium payment pursuant to the Matt Lowe allocation formula (see paras. 29-34).

SUBSTANTIVE FAIRNESS

A consent decree is substantively fair if it incorporates concepts of "corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." See Cannons, 899 F2d at 87. There needs to be an evaluation of the proportional relationship between the amount to be paid by the settling defendant and the government's estimate of the projected total cost of cleanup. See Montrose Chem., 50 F3d at 747.

An amount paid is fair if it roughly mirrors the settling defendant's proportional liability of the projected total costs. See Cannons, 899 F2d at 87. It is acceptable if EPA's use of available data to apportion liability for purposes of a consent decree falls along the broad spectrum of plausible approximations. See Cannons, 899 F.2d at 88.

In Zidell's case, the settlement allocation made to Zidell is fair because it is based on the accepted allocation by Matt Lowe. As described by counsel for Occidental at the December 2001 meeting with Zidell, "Matt Lowe's allocation report, which took five years to prepare, was essentially rough justice," but "that is the percentage the EPA and the other parties are using for cash out settlements." (See para. 26a above.) Mr. Lowe's allocation was the formula used in EPA's consent decree with the parties in U.S. v. Mary Jane Andersen, No. C03-5107-RB, which was lodged with the court on February 26, 2003, and approved by the court on September 15, 2003 (see paras. 36 and 38 above).

Zidell chose not to participate in Matt Lowe's allocation process (see paras. 11 and 12 above) and, as a result, had no say in Mr. Lowe's allocation to Zidell. While the attorneys for Occidental claimed that Mr. Lowe's allocated portion to Zidell was low (see para. 26a), it has always been Zidell's position that the Matt Lowe allocation to Zidell was too high (for example, see paras. 2 and 3). Therefore, one can argue that Mr. Lowe's allocation to Zidell is more than its actual share should have been.

The attorneys for Occidental and the Port also contend that Zidell's decision not to participate in the Matt Lowe allocation process makes Zidell a recalcitrant PRP. That conclusion is not supportable. Participation or nonparticipation in an allocation process by PRPs is not the defining factor of recalcitrance or of cooperation. As outlined in detail above, Zidell was very responsive to the EPA's request for information (see paras. 5-10 above). Also, Zidell was exttemely diligent in trying to determine and pay its fair and reasonable share at the Hylebos (see paras. 15, 16-22, 23-26, 29-34, 35, and 38-39 above), and even filed lawsuits against its insurers (see para. 37 above) to help fimd the settlement.

REASONABLENESS OF THE CONSENT DECREE

The reasonableness of a consent decree is dictated by several factors: (1) relative litigation risks of the parties and the time savings of settlement; (2) whether the decree is technically adequate to accomplish the goal of cleaning the environment, and (3) whether it will

sufficiently compensate the public for the costs of remedial measures. See Montrose Chem., 50 F3d at 747; Cannons, 899 F2d at 89-90; Witco Corp., No. 1:98-cv-6264 OWW TAG, 2005 US Dist LEXIS 29517. All three of these elements are met by the Proposed Consent Decree.

First, if the matter does not settle, the case may be drawn out to litigation, and the risk to EPA is the growing litigation costs. It is in both parties' interest to further the goals of CERCLA, and settle to avoid costly litigation. The second and third factors are met because EPA will require Zidell to pay $3,239,973.38 (see para. 38).

CONSISTENT WITH THE PURPOSES OF CERCLA

CERCLA's goals are (1) Congress' desire to equip the federal government with tools necessary for prompt and effective responses to hazardous waste disposal problems of national magnitude and (2) Congress' desire that those responsible for causing the problems thus idendfied bear the costs and responsibility for remedying the harmful conditions they created. See Cannons, 899 F2d at 90-91.

A consent decree is consistent with the goals of CERCLA where the government has properly identified the potentially responsible persons and apportioned liability using a method reasonably related to assuring accountability and "the technical efficacy of the selected remedial measures is not in issue." See Cannons, 899 F2d at 91.

The EPA consent decree with Zidell meet the purposes of CERCLA: it requires Zidell to pay its allocable share based on the allocation formula that the EPA, the Port, and Occidental recognized as being "essentially rough justice," and provides the "percentage the EPA and the other parties are using for cash out settlements." (See para. 26a above.) And, it is a formula that the court already approved on September 15, 2003 in the U.S. v. Mary Jane Anderson consent decree (see paras. 36 and 38 above).

REQUEST FOR ENTRY OF DECREE

For the reasons set out above, the comments of Occidental and the Port directed against the Zidell Proposed Consent Decree are not well founded. Accordingly, Zidell requests that the EPA and the U.S. Department of Justice immediately move that the Proposed Consent Decree be entered.

Very truly yours,

Dean D. DeChaine

Suzanne C. Lacampagne

Attorneys for Zidell Marine Corporation

cc: Zidell Marine Corporation,
Attn: Ms. Kathryn S. Silva

ZIDELL MARINE GROUP

ZIDELL MARINE CORPORATION

3121 S.W. Moody Avenue
Portland, Oregon 97201
(503) 228-8691/800-547-9259
FAX: (503) 228-6750/RCA Telex 283985

CONFIDENTIAL

November 18, 1992

Ms. Allison Hiltner
United States Environmental
Protection Agency
Region 10 (HW-113)
1200 Sixth Avenue
Seattle, WA 98101

Re: Commencement Bay Nearshore/Tideflats Superfund Site, Tacoma, Washington
EPA Information Request Letter
Zidell Marine Corporation

Dear Ms. Hiltner:

By your September 15, 1992 letter the EPA requested that Zidell Marine Corporation (formerly Zidell Dismantling Company) respond to several questions concerning prior activities at Tacoma, Washington. Zidell received this request on September 21, 1992 and obtained a 30 day extension of time to respond from Richard McAllister, Esquire with the EPA's Office of Regional Counsel. Our response is, thus, due by November 20, 1992. This letter is Zidell Marine Corporation's response to the EPA's CERCLA Section 104(e) Request for Information.

As Zidell Marine Corporation's following responses include descriptions of corporate methods of operations and processes, corporate history, and other proprietary information, Zidell Marine Corporation respectfully requests that this letter be treated as confidential and not made available to the public. We recognize, of course, that this information may need to be made available to your "contractors" involved with the Commencement Bay Nearshore/Tideflats superfund site and we have no objection to such release, but we ask that it be held in confidence by these parties. We do not believe the following responses fall within the exceptions which "shall not be entitled to protection...." as set forth in CERCLA §104(e), 7(F). If you have any questions regarding our request for confidentiality, please immediately contact me.

The following comments correlate with the EPA's Request for Information.

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ZIDELL MARINE GROUP

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If you have any further questions, please contact me.

Very truly yours,

ZIDELL MARINE CORPORATION

Richard J. McCain

Richard J. McCain
Corporate Secretary and
General Counsel

RJM/hn

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DEC 27 1994
ZIDELL

Hylebos PRP Group

Norman D. Webb, Chairman
c/o General Metals of Tacoma
4927 N.W. Front Avenue • Portland, Oregon 97210
Telephone (503) 227-4313 (FAX (503) 227-7925)

December 21, 1994

Hylebos Waterway Potentially Responsible Party

Re: Commencement of Hylebos Waterway Allocation Process

Dear Sir or Madam:

You are invited to join a group of potentially responsible parties ("PRPs") that are about to embark on the process of developing an allocation of liability for cleanup of the Hylebos Waterway. This invitation is extended to you because you have been identified as a party that may be liable for cleanup of the Waterway under the federal Superfund law. The allocation process will begin formally on Tuesday, January 24, 1995 at the World Trade Center in Tacoma, with a meeting chaired by Matthew A. Low, President of Technical Legal Information Systems ("TLI"), the independent consultant chosen to help the parties reach an allocation. At the meeting, Mr. Low will outline the steps necessary to develop the allocation.

The allocation developed by TLI will assign percentage shares to each and every person or company that is potentially liable for cleanup of the Waterway, regardless of who participates. Your involvement in the allocation process will ensure that your input is considered during TLI's development of allocation percentages for all Hylebos PRPs, including your own. In addition, it is likely that those who do not take part in this voluntary allocation process will be subject to litigation by participating PRPs seeking to enforce the allocation percentages assigned by TLI, together with a premium to reward those who participated. Therefore, we encourage you to become a participant in this allocation process.

Enclosed you will find a final, execution copy of the Hylebos PRP Group Allocation Participation Agreement ("Allocation Agreement"), including exhibits, as well as selected pages from the Allocation Agreement showing revisions made in response to comments raised at the last Hylebos PRP Group meeting held December 15, 1994. In brief, the Allocation Agreement establishes a series of steps for developing the allocation. First, each Participant will provide to TLI responses to the disclosure questionnaire (Exhibit A to the Allocation Agreement) no later

than April 1, 1995. TLI will compile all of the information provided and obtain additional information from a thorough review of all agency files.

After reviewing the initial information, Mr. Low may recommend that de minimis participating parties (with allocation percentages of 2% or less) receive an immediate "cash-out" settlement. Participants that receive a "cash-out" recommendation may seek to settle with members of the Hylebos Cleanup Committee ("HCC") pursuant to a "model" settlement agreement (Exhibit B to the Allocation Agreement) and may take their cash-out recommendation to EPA if not enough HCC members accept the settlement. The members or the HCC are ASARCO Incorporated, Elf Atochem of North America, Inc., General Metals of Tacoma, Inc., Kaiser Aluminum & Chemical Corporation, Occidental Chemical Corporation and the Port of Tacoma. You must execute the Allocation Agreement and be participating in the process in order to receive a cash-out recommendation from TLI.

The information gathering process also involves interviews with important witnesses, the development by TLI of operational profiles of each company or entity along the Waterway (both current and historical) and opportunities for participants to provide Mr. Low with input regarding the information and factors they believe are important in developing the allocation formula. The final allocation recommendation first will be circulated in draft form so that each participant may provide rebuttal. To help develop consensus, a brief period for mediation also is included prior to issuance of the final allocation recommendation.

The costs of the allocation process will be paid by all participants based upon a voluntarily agreed-to interim allocation which will be reallocated based on the final allocation recommendation. Initially, all participants must pay a $2,000 assessment into the PRP Group trust account. This assessment will be refunded if a participant chooses to withdraw from the process prior to February 1, 1995. In order to include as many parties as possible in the process, the members of the HCC have agreed to bear 50% of all of the costs of the allocation process until final reallocation. Any party that does not execute the Allocation Agreement on or before January 17, 1995 but later chooses to participate in the process will be required to pay its share of allocation costs incurred to date, plus a 50% premium on such costs.

The Allocation Agreement was developed through extensive negotiations with approximately 40 Hylebos PRPs over an eight month period. Although not all of the concerns of all of the various PRPs could be incorporated into the document, the enclosed agreement represents the parties' best efforts to draft a document acceptable to as many parties as possible. The Allocation Agreement is based on the premise that the Hylebos PRPs can reach agreement on an allocation without resort to the courts or involvement of EPA and that the extensive allocation process and independent analysis of Mr. Low will result in consensus and settlement. We would prefer to avoid the necessity to sue any Hylebos PRPs and we urge you to join in attempting to setde Waterway liability.

In order to participate in the allocation process, please sign the enclosed Allocation Agreement (at page 34), complete the form for designating your representative (page 35) and remm both original pages, together with a check in the amount of $2,000 made payable to the Hylebos Trust Account, to the undersigned at the above address on or before January 17, 1995. If you have any questions concerning the allocation process or the enclosed documents, please contact either Greg Jacoby in Tacoma, at (206) 627-1181, or Paul Beveridge in Seattle, at (206) 447-0900.

Very truly yours,

Norman D. Webb, Chairman
Hylebos PRP Group

cc: Lori Houck (w/out encl.)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

RECEIVED
JAN - 2 2001
ZIDELL

DEC 28 2000

Reply To
Attn Of: ECL-113

SPECIAL NOTICE LETTER FOR REMEDIAL DESIGN/REMEDIAL ACTION ("RD/RA")
URGENT LEGAL MATTER--PROMPT REPLY NECESSARY
CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Zidell Marine Corp.
Richard McCain
Zidell Dismantling
3121 S.W. Moody Avenue
Portland, OR 97201

Re: Commencement Bay Nearshore/Tideflats (CB/NT) Superfund Site;
Operable Unit 01
Hylebos Waterway Problem Areas
Tacoma, Washington (the "Site")

Dear Mr. McCain:

This letter follows one or more general notice letters that have been issued to you or your company in connection with the cleanup of the Hylebos Waterway Problem Areas at the CB/NT Superfund Site. As the listed contact person for the Potentially Responsible Party ("PRP") identified above, this letter has been sent to your attention. The enclosed list of addresses identifies approximately 56 parties who have also received this letter.

This letter serves three basic functions. First, it contains a formal demand for reimbursement of costs that have been incurred, including interest, and that are expected to be incurred, which are subject to interest, in response to the health and environmental concerns at the Site. Second, this letter notifies you that a 60-day period of formal negotiations with the United States Environmental Protection Agency ("EPA")will begin January 16, 2001 and end March 16, 2001 for performance of the remedial design and remedial action (RD/RA) at the Hylebos Waterway Problem Areas of the CB/NT Site. Third,

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this letter provides general and Site-specific information to assist you in these negotiations, including potential orphan share compensation.

NOTICE OF POTENTIAL LIABILITY

As indicated in the general notice letter(s) previously sent regarding this Site, EPA has information indicating that you may be a PRP as defined at Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(a), as amended ("CERCLA"), with respect to this Site.

SPECIAL NOTICE AND NEGOTIATION MORATORIUM

EPA has determined that use of the Section 122(e) special notice procedures specified in CERCLA will facilitate a settlement between EPA and PRPs for this Site. Therefore, under Section 122 of CERCLA, 42 U.S.C. § 9622, this letter triggers a 60-day moratorium on certain EPA response activities at the Site. During this 60-day period, the PRPs, including you, are invited to participate in formal negotiations with EPA. You are also encouraged to voluntarily negotiate a settlement providing for PRPs, including yourself, to conduct or finance the response activities required at the Site. The 60-day negotiation period ends on March 16, 2001. The 60-day negotiation moratorium will be extended for an additional sixty (60) days if EPA determines the PRPs have provided EPA with a good faith offer to conduct or finance the Remedial Design/Remedial Action ("RD/RA"). Should a 120-day negotiation moratorium take place, negotiations will conclude on May 15, 2001. If settlement is reached between EPA and the PRPs within the 120-day negotiation moratorium, the settlement will generally be embodied in a consent decree.

STATEMENT OF WORK AND DRAFT CONSENT DECREE

A copy of EPA's statement of work and draft consent decree are enclosed. The enclosed statement of work implements the Record of Decision issued on September 30, 1989, as modified by two Explanation of Significant Differences ("ESD"), issued in July, 1997 and August, 2000. You can get copies of these documents from any of the information repositories listed below. You can also get copies of the 2000 ESD on EPA's website at www.epa.gov/r10earth, at "index", "C" (for the Commencement Bay/Nearshore Tideflats Site), under "decision documents".

GOOD FAITH OFFER

As indicated, the 60-day negotiation moratorium that begins January 16,2000, is extended for sixty (60) days if the PRPs submit a good faith offer to EPA. A good faith offer to conduct or finance the RD/RA is a written proposal that demonstrates the

PRPs' qualifications and willingness to conduct or finance the design, implementation, and monitoring of the remedy. In order for your proposal to be considered a good faith offer, it must not be significantly different from EPA's Record of Decision and ESDs, and must include the following elements:

1. A statement of willingness by the PRPs to conduct or finance the RD/RA which is consistent with EPA's Record of Decision as well as the attached statement of work and draft consent decree, and which provides a sufficient basis for further negotiations.

2. An element-by-element response to EPA's statement of work and draft consent decree, including a response to any other component of this letter.

3. A detailed description of the proposed PRP work plan identifying how the PRPs plan to proceed with the work (e.g., overall timing, key phases, and sequencing of work).

4. A demonstration of the PRPs' technical capability to carry out the RD/RA, including the identification of the firm(s) that may actually conduct the work or a description of the process they will use to select the firm(s).

5. A demonstration of the PRPs' willingness and a statement of ability to finance the response.

6. A statement of willingness by the PRPs to reimburse EPA for costs incurred in overseeing the PRPs' conduct of the RD/RA, and a response to EPA's demand for payment of costs incurred to date.

7. The name, address, and telephone number of the party or steering committee who will represent the PRPs in negotiations.

8. A description of the PRPs' position on releases from liability and reopeners to liability.

COORDINATION WITH OTHER WORK

EPA is aware that there may be expanded cleanup or other development dredging work that parties may seek to undertake in coordination with the Superfund cleanup to maximize use of their property and cost efficiencies. Likewise, there may be other response actions in the Hylebos Waterway that parties also may wish to coordinate with the Hylebos Waterway cleanup. The good faith offer should indicate what, if any, work the parties may

wish to undertake and include in these negotiations, or which may impact implementation or scheduling for the Hylebos Problem Areas RD/RA.

EPA's August 2000 ESD discussed some work that may fall into one of these categories, including the potential disposal of Occidental Chemical "Area 5106" sediments in one of the selected disposal sites (ESD p.22); further evaluation of on-site additional work related to future use plans or navigational dredging of the waterway (ESD p.25); and potential upland disposal locations for contaminated sediments (ESD p.28 & 29).

DISBURSEMENT OF SPECIAL ACCOUNT PROCEEDS

Under Section 122(b)(3) of CERCLA, EPA has established a special account for the Hylebos Waterway from settlement proceeds previously received. Currently the special account contains $437,966 plus accrued interest received from U.S. vs. Bay Chemical et al, Civil Action No. C99-5521. Special account funds may be used to conduct or finance response actions at a site. EPA anticipates there may be special account funds available for disbursement to the PRPs at the Hylebos Waterway Problem Areas if the parties can reach a settlement to perform response actions at the Site. If a settlement is not reached, special account funds will not be available to unilateral order recipients, and the Agency may use the special account funds to address past response costs incurred by the U.S. or other response activities at the Site. The disbursement of special account proceeds is solely at the discretion of EPA. If the region receives a good faith offer, the availability of special account proceeds to settling parties will be discussed during settlement negotiations.

DEMAND FOR PAYMENT

With this letter, EPA demands reimbursement for its costs incurred to date, and encourages you to voluntarily negotiate a consent decree in which you and other PRPs agree to perform the RD/RA.

In accordance with CERCLA, EPA already has undertaken certain actions and incurred certain costs in response to conditions at the Site. These response actions include funding the Remedial Investigation and Feasibility Study that supported the Record of Decision; funding the Washington State Department of Ecology's efforts to conduct source control actions through a State Cooperative Agreement; funding support agency oversight by both Ecology and the Puyallup Tribe of Indians; as well as other response costs incurred in conducting, overseeing, and enforcing implementation of the CB/NT ROD at the Hylebos Waterway Problem Areas. The estimated costs to date of unreimbursed response actions attributable to the Hylebos Waterway Problem Areas

through EPA funding is approximately $5,842,340 ($4,794,388 in principle plus $1,947,792 in prejudgment interest, less approximately $899,840 in settlements collected to date). EPA is in the process of updating and re-certifying all unreimbursed costs and will be prepared to provide a final certified dollar amount with supporting documentation prior to payment. In accordance with Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), demand for response costs was made in the previous special notice letter issued in June 1993. All response costs have not been reimbursed, thus, demand is made again for payment of the above amount plus any and all interest recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607, or under any other provisions of law.

As indicated above, EPA anticipates expending additional funds for the RD/RA. Whether EPA funds the entire RD/RA, or simply incurs costs by overseeing the parties conducting these response activities, you are potentially liable for these expenditures plus interest.

ORPHAN SHARE COMPENSATION

In 1996, EPA issued the "Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-time Critical Removals." A complete copy of EPA's orphan share guidance can be found on EPA's website at http://es.epa.gov/oeca/osre/960603-2.html. This guidance implemented one of several administrative reforms for adding more fairness into the Superfund program. Under the guidance, EPA may provide orphan share compensation to settlors that agree to perform and finance remedial design and remedial action work. If a settlement is reached, the Hylebos Waterway Problem Areas cleanup is eligible for orphan share compensation at a level that complies with the Guidance and is supported by Hylebos Waterway-specific PRP information.

EPA's guidance defines "orphan share" as that share of responsibility which is specifically attributable to parties EPA has determined have three characteristics--the party is: 1) potentially liable, 2) insolvent or defunct, and 3) unaffiliated with any potentially liability party also liable for response costs at the Site. The orphan share does not include shares of responsibility arising from unallocable waste, the difference between a party's allocable share and its ability to pay, or parties EPA does not ordinarily pursue.

Under the Guidance, orphan share compensation cannot exceed any of the following: (1) the orphan share; (2) the sum of all unreimbursed past costs and EPA's projected costs of overseeing the design and implementation of the ROD remedy; or (3) twenty-five (25) percent of the projected ROD remedy. EPA has not quantified the orphan share for the Hylebos Waterway Problem

Areas. The estimate of unreimbursed past costs and projected oversight costs for both Problem Areas is $7,942,340, which is the past costs demanded above ($5,842,340) plus $2.1 million in estimated future EPA oversight costs. The estimated remedy costs for the Hylebos Waterway is $46,137,000 (2000 ESD, p.10). Twenty-five percent of estimated remedy costs is $11.5 Million (25% of $46.1 Million). Although EPA has not quantified the orphan share, based on existing information about insolvent or defunct PRPs for the Hylebos Waterway Problem Areas, EPA believes that the orphan share is less than either items 2 or 3 above, thus, the quantified orphan share would be the maximum amount that EPA could provide as compensation if a settlement agreement is reached. EPA is aware that certain PRPs conducted a private, third-party allocation of responsibility for response costs. PRPs can include a request for a specific orphan share compensation amount in a good faith offer. Any request should specify: the orphan PRPs; how they meet the definition of an orphan; what their share of allocable costs are believed to be; and the basis for determining their allocated share, including a summary of relevant documentation.

INFORMATION RELEASE

The parties are hereby notified that additional information has been obtained since the previous notice. You can review the additional information developed at EPA's website described on page 2 of this letter, or by reviewing the administrative record at the locations identified below.

PRP STEERING COMMITTEE

EPA recommends that all PRPs meet to select a steering committee responsible for representing the group's interests. Establishing a manageable group is critical for successful negotiations with EPA. Enclosed with this letter is an updated list of names and addresses of PRPs to whom this notification is being sent. Inclusion on, or exclusion from, the list does not constitute a final determination by EPA concerning the liability of any party for the release or threat of release of hazardous substances at the Site.

ADMINISTRATIVE RECORD

Pursuant to Section 113(k) of CERCLA, 42 U.S.C. § 9613(k), EPA must establish an administrative record that contains documents that form the basis of EPA's decision on the selection of a response action for a site. The administrative record files, which contain the documents related to the response action selected for this Site are available to the public for inspection and comment. The primary location to review the administrative record files is the EPA Regional Office:

U.S. EPA
1200 Sixth Avenue
7th Floor Records Center
Seattle, Washington
For appointments: (206) 553-4494
Hours: 8:30 am - 4:30 pm, Monday through Friday

An official information repository is also located in Tacoma:

Tacoma Main Public Library
1102 Tacoma Avenue South
Northwest Room
Tacoma, Washington

NATURAL RESOURCE DAMAGE CLAIMS AND SETTLEMENT NEGOTIATIONS

Under Section 107(a)(4)(C) of CERCLA, 42 U.S.C.§ 9607 (a)(4) (c), state and federal Natural Resource Trustee agencies and tribes may have claims against you or your company for damages for injury to, destruction of, or loss of natural resources, including damage assessment costs. The Trustees are currently developing a separate proposal for settling natural resource damage claims. The Trustees will be contacting parties directly to discuss natural resource damage settlements. If you wish further information on potential settlement of natural resource damage claims, please contact Robert Taylor, Attorney, National Oceanic and Atmospheric Administration, (206) 526-4565.

PRP RESPONSE AND EPA CONTACT PERSON

You are encouraged to contact EPA by February 16, 2001, to indicate your willingness to participate in negotiations at this Site. Otherwise, you have sixty (60) calendar days from January 16, 2001 to March 16, 2001 to provide EPA, in writing, with a good faith offer demonstrating your willingness to perform the RD/RA. You may respond individually or through a steering committee if such a committee has been formed. If EPA does not receive a timely response, EPA will assume that you do not wish to negotiate a resolution of your liabilities in connection with the response, and that you have declined any involvement in performing the response activities. You may be held liable by EPA under Section 107 of CERCLA, 42 U.S.C. § 9607, for the cost of the response activities EPA performs at the Site and for any damages to natural resources.

Your response to this notice letter should be sent to:

Peter Contreras, Remedial Project Manager
U.S. Environmental Protection Agency
Environmental Cleanup Office
ECL-113
1200 Sixth Avenue
Seattle, Washington 98101
(206)553-6708

The factual and legal discussions contained in this letter are intended solely for notification and information purposes. They are not intended to be and cannot be relied upon as final EPA positions on any matter set forth herein.

If you have any questions pertaining to this matter, please direct them to Peter Contreras at the number listed above or have your attorney contact Lori Houck Cora, Assistant Regional Counsel, at (206) 553-1115.

Sincerely,

Michelle L. Pirzadeh
Associate Director
Environmental Cleanup Office

Enclosures

cc: (w/enclosures)
Amy Kurtenburg, WDNR
Dave Smith, Ecology
Russ McMillan, Ecology
Robert Taylor, NOAA
Helen Hillman, NOAA CRC
Barry Stein, DOI
Jeff Kraussman, USFWS
Michelle Wilcox, Ecology Trustee
Randy Carmen, WDFW
Bill Sullivan, Puyallup Tribe
Glen St. Amant, Muckleshoot Tribe
Leslie Ann Rose, CHB (w/o enclosures)

VIA FACSIMILE AND U.S. MAIL

FOR SETTLEMENT PURPOSES

January 3, 2001

TO CERTAIN HYLEBOS WATERWAY POTENTIALLY RESPONSIBLE PARTIES ("PRPs")(see distribution)

Re: Proposed Settlement Discussions Regarding Hylebos Waterway Cleanup

Dear Hylebos Waterway PRP:

We write on behalf of Kaiser Aluminum & Chemical Corporation ("Kaiser") and Occidental Chemical Corporation ("Occidental") to propose that you engage in settlement discussions with certain other Hylebos Waterway PRPs regarding the funding and implementation of the Hylebos cleanup. This proposal is prompted by two recent events. First, the Hylebos Waterway Allocation Process (the "Process") has generated a Cost Allocation Formula Report ("Allocation Report") which the Process Participants have agreed to make available to Non-Participants, subject to certain terms described below. Second, EPA has indicated that it intends to begin Hylebos Waterway cleanup enforcement action shortly, with the transmittal of special notice letters to all Hylebos PRPs. We understand that those letters were transmitted last week and that the 60-day response period will begin to run on January 16, 2001. Thus, there is some urgency for the Hylebos PRPs to engage in settlement discussions and to move the Hylebos cleanup process forward.

We believe that the most efficient and productive approach to settlement discussions is to "phase" them. We are beginning by encouraging discussions among the parties most likely to execute an RD/RA consent decree(s) and/or to contribute the most significant funding for the cleanup. At this point, based upon the Allocation Report, we believe that those parties are the Port of Tacoma, General Metals, Elf Atochem (now Atofina), the federal PRPs (the United States Navy, et al.), Zidell Dismantling, Todd Shipyards, Weyerhaeuser, Johnson-Byers, ITT Rayonier, and Don Oline. We propose that these parties execute the enclosed "Confidentiality Agreement for Settlement Discussions Regarding Hylebos Waterway Liabilities"and

Attachment re Para. 14 - Page 1
To Zidell Marine Corp's Comments
in Favor of Consent Decree

its Addendum 1. By doing so, and complying with their terms, the parties will be provided with access to the Allocation Report and the Operation Profiles generated by TLI Systems, Inc. (the Process allocation consultant) regarding the historical operations at property parcels adjacent to the Hylebos. Once those materials are made available to the parties, we intend to convene a meeting to reach consensus regarding the path forward for settlement discussions.

The enclosed Confidentiality Agreement has been the subject of significant discussion and revision by various parties over the past months, so we do not propose to engage in further debate about its terms. The Confidentiality Agreement addresses the private PRPs somewhat differently than the federal PRPs. The primary difference appears in paragraph 14 and Addendum 1, addressing the allocation process costs. The United States has already executed the Confidentiality Agreement and has agreed that allocation process costs will be the subject of the settlement discussions.

We are optimistic that settlement discussions or facilitated negotiations (if necessary and appropriate) will move a group toward performance of the cleanup, as the first step toward "global" resolution of all Hylebos Waterway liabilities. When sufficient progress has been made with the first group of parties, we envision that other PRPs will be offered an opportunity to join in sponsoring the work and/or to fund the cleanup through cash-out settlements. At that point, we shall develop a proposed framework for such a second "phase" of settlement discussions.

We encourage you to execute the enclosed Confidentiality Agreement and Addendum I and return them to the undersigned as soon as possible. While we understand that some of you have had more advance information regarding these matters than others, we urge you not to delay. We hope to have every party's executed Confidentiality Agreement and Addendum 1 by no later than January 15th, and thereby avoid a protracted effort in which "stragglers" have to catch up with the rest of the group's progress. In any event, please provide us with the courtesy of a response to this letter by January 15th—at that time we intend to proceed forward with as many of you as possible.

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in Favor of Consent Decree

If you have any questions, please contact us.

Very truly yours,

R. Paul Beveridge by RFB

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Enclosure: Confidentiality Agreement and Addendum 1

Distribution:

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To Zidell Marine Corp's Comments
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Attachment re Para. 14 - Page 4
To Zidell Marine Corp's Comments
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#508108 5/15/04

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MAR 11 2003
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA
BY DEPUTY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ZIDELL MARINE CORPORATION, a Washington corporation,

Plaintiff,

v.

BENEFICIAL FIRE AND CASUALTY INSURANCE COMPANY, succeeded in interest by J C. PENNEY LIFE INSURANCE COMPANY, then succeeded in interest by STONEBRIDGE LIFE INSURANCE COMPANY, a Vennont corporation, GLENS FALLS INSURANCE COMPANY, a Delaware corporation, d/b/a/ CNA INSURANCE COMPANIES; CONTINENTAL INSURANCE COMPANY, a New Hampshire corporation, d/b/a CNA INSURANCE COMPANIES, MAINE BONDING AND INSURANCE COMPANY, a Maine corporation, RLI INSURANCE COMPANY, an Illinois corporation, NATIONAL UNION FIRE INSURANCE COMPANY, a Pennsylvania corporation; THE HOME INDEMNITY COMPANY, succeeded in interest by THE HOME INSURANCE COMPANY, a New Hampshire corporation; HIGHLANDS INSURANCE COMPANY, a Texas corporation, d/b/a CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY, a/k/a "CIGNA" INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation, succeeded in interest by CCI INSURANCE COMPANY, succeeded in interest by CENTURY INDEMNITY COMPANY, d/b/a CIGNA SPECIALTY INSURANCE COMPANY, a/k/a "CIGNA",

Case No C03-5131 RBL

COMPLAINT

(Declaratory Relief, Bad Faith, Consumer Protection Act)

(Jury Trial Demanded)

CV 03-5131 #1

ORIGINAL

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Attachment re Para. 37 - Page 1
To Zidell Marine Corp's Comments
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CENTURY INDEMNITY COMPANY, a Pennsylvania corporation, d/b/a CIGNA PROPERTY AND CASUALTY INSURANCE COMPANY, a/k/a "CIGNA," individually and as successor-in-interest to CCI INSURANCE COMPANY, the successor-in-interest to INSURANCE COMPANY OF NORTH AMERICA; INDUSTRIAL INDEMNITY COMPANY, succeeded in interest by UNITED STATES FIRE INSURANCE COMPANY, a New York corporation; CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON AND CERTAIN LONDON MARKET INSURANCE COMPANIES, a/k/a "LLOYD's," and/or "London Market Companies" (together hereinafter "London Underwriter" or the "London Underwriters"), including the following defendant companies: ALLIANCE ASSURANCE COMPANY, LIMITED, a corporation; ANGLO-FRENCH INSURANCE COMPANY, LIMITED, a corporation; ASSICURAZIONI GENERALI, a corporation; BALOISE MARINE INSURANCE COMPANY LIMITED, a corporation; BALTICA INSURANCE COMPANY (UK), LIMITED, a corporation; BISHOPSGATE INSURANCE COMPANY, LIMITED, a corporation, BRITISH FIRE INSURANCE COMPANY, LIMITED, a corporation; BRITISH & FOREIGN INSURANCE COMPANY, LIMITED, a corporatioo; BRITISH LAW INSURANCE COMPANY, LIMITED, a corporation, C.A. PARR AGENCIES, LIMITED, a corporation, COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, a corporation; CONTINENTAL ASSURANCE COMPANY OF LONDON, LIMITED, a corporation; CORNHILL INSURANCE COMPANY, LIMITED, a corporation; DOMINION INSURANCE COMPANY, LIMITED, a corporation; DRAKE INSURANCE COMPANY, LIMITED, a corporation, EAGLE STAR INSURANCE COMPANY, LIMITED, a corporation; ECONOMIC INSURANCE COMPANY, LIMITED, a corporation; EDINBURGH ASSURANCE COMPANY, LIMITED, a corporation; EXCESS INSURANCE COMPANY, LIMITED, a corporation; FINE ART & GENERAL INSURANCE COMPANY, LIMITED, a corporation; FIREMAN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY, a corporation, FUJI FIRE & MARINE, a corporation, GIBBON, an insurance entity; HANSA RE & MARINE INSURANCE COMPANY (UK), LIMITED, a corporation; HOME INSURANCE COMPANY, a corporation; INDEMNITY MARINE ASSURANCE COMPANY, LIMITED, a

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corporation; INSURANCE COMPANY OF NORTH AMERICA, a corporation; IRON TRADES MUTUAL INSURANCE COMPANY, LIMITED, a corporation; LA PRESERVATRICE GROUP, an msurance entity, LA REUNION FRANCAISE (UK), LIMITED, a corporation; LEADENHALL INSURANCE COMPANY, LIMITED, a corporation; LIVERPOOL MARINE & GENERAL INSURANCE COMPANY, LIMITED, a corporation; LONDON & EDINBURGH GENERAL INSURANCE COMPANY, LIMITED, a corporation; LONDON & HULL MARITIME INSURANCE COMPANY, LIMITED AND ASSOCIATED COMPANIES, a corporation; MARINE INSURANCE COMPANY, LIMITED, a corporation, MINSTER INSURANCE COMPANY, LIMITED, a corporation; NATIONAL PROVINCIAL INSURANCE COMPANY, LIMITED, a corporation, NEW ZEALAND INSURANCE COMPANY, LIMITED, a corporation, NIPPON FIRE & MARINE INSURANCE COMPANY, LIMITED, a corporation; NORWICH UNION FIRE INSURANCE SOCIETY, LIMITED, a corporation; OCEAN MARINE ASSURANCE COMPANY, LIMITED, a corporation, PHOENIX ASSURANCE COMPANY, LIMITED, a corporation; PRUDENTIAL INSURANCE COMPANY, LIMITED, a corporation; RELIANCE INSURANCE COMPANY, a corporation, RIVER THAMES INSURANCE COMPANY, LIMITED, a corporation; ROAD TRANSPORT & GENERAL INSURANCE COMPANY, LIMITED, a corporation; ROYAL INSURANCE COMPANY, LIMITED, a corporation; SCOTTISH LION INSURANCE COMPANY, LIMITED, a corporation; SIIUUS (UK) INSURANCE PLC., a corporation; SKANDIA MARINE INSURANCE COMPANY (UK), LIMITED, a corporation; SOUTH BRITISH INSURANCE COMPANY, LIMITED, a corporation, SPHERE DRAKE INSURANCE COMPANY, PLC, an msurance entity, SPHERE INSURANCE COMPANY, LIMITED, a corporation; SUMITOMO MARINE & FIRE INSURANCE COMPANY, LIMITED, a corporation, SUN INSURANCE OFFICE, an msurance entity, SWISS UNION GENERAL INSURANCE COMPANY, LIMITED, a corporation, SWITZERLAND GENERAL INSURANCE COMPANY, a corporation; SWITZERLAND GENERAL INSURANCE COMPANY (LONDON), LIMITED, a corporation; THREADNEEDLE INSURANCE COMPANY, LIMITED, a corporation; ULSTER MARINE

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To Zidell Marine Corp's Comments
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INSURANCE COMPANY, LIMITED, a corporation; THE UNITED SCOTTISH INSURANCE COMPANY, LIMITED, a corporation; WORLD AUXILIARY INSURANCE CORPORATION, LIMITED, a corporation, YASUDA FIRE & MARINE INSURANCE COMPANY, LIMITED, a corporation; and YORKSHIRE INSURANCE COMPANY, LIMITED, a corporation, EQUITAS LIMITED, a limited company registered in England and Wales, EQUITAS REINSURANCE LIMITED, a limited company registered in England and Wales; and CERTAIN JOHN DOE INSURANCE COMPANIES,

Defendants.

Plaintiff alleges as follows.

I. NATURE OF ACTION

1. In this insurance coverage lawsuit, plaintiff Zidell Marine Corporation ("Zidell") seeks a judicial declaration that certain primary and excess/umbrella insurance policies issued by the defendant insurers provide coverage for environmental liabilities associated with the Hylebos Waterway site in Tacoma, Washington, including coverage for claims asserted by the United States Environmental Protection Agency and the Washington Department of Ecology

2. Zidell further seeks a judicial declaration that the policies issued by defendants provide coverage for natural resource damages asserted by the Natural Resources Trustee with regard to the Hylebos Waterway site.

3. Finally, Zidell seeks damages against the London Underwriters based on the London Underwriters' breach of the implied covenant of good faith and fair dealing. The London Underwriters' conduct has been unreasonable, frivolous, and/or unfounded in the context of the Hylebos Waterway site, and Zidell is entitled to damages for the London Underwriters' bad faith conduct

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II. JURISDICTION AND VENUE

4 Jurisdiction is proper in this Court under 28 U S.C. Section 1332(a)(1), based on diversity of citizenship Plaintiff Zidell is a citizen of Washington As specified in paragraphs 9 through 20, below, all of the defendant insurance companies and underwriters are citizens of jurisdictions other than Washington. The amount in controversy exceeds 575,000.

5 This Court has jurisdiction over Zidell's claims for declaratory relief under 28 U S.C. Section 2201.

6. Venue is proper in this Court pursuant to 28 U.S C Section 1391(a) because the Hylebos Waterway site is located in Tacoma, Washington, in the Western District of Washington

7 This Court has personal jurisdiction over all parties.

III. PARTIES

A. Plaintiff

8. Plaintiff Zidell is a Washington corporation Zidell was previously known as "Zidell-Michaels Dismantling, Inc " and as "Zidell Dismantling, Inc."

B. Defendant Insurers

9 Defendant Beneficial Fire and Casualty Insurance Co. ("Beneficial Fire"), succeeded in interest by J.C. Penney Life Insurance Company, then succeeded in interest by Stonelindge Life Insurance Company, is a Vermont corporation with its principal place of business in Piano, Texas Beneficial Fire provided Zidell with primary liability insurance for the period from January 31, 1966 to December 31, 1967 under policy number 12620.

10 Defendant Glens Falls Insurance Company ("Glens Falls") is a Delaware corporation with its principal place of business in Chicago, Illinois Glenn Falls provided Zidell with

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primary liability insurance for the period from December 31, 1967 to January 31, 1973 under policy numbers SR7-00-45-70 and SR7-0074A-72.

11. Defendant Continental Insurance Company ("Continental") is a New Hampshire corporation with its principal place of business in Chicago, Illinois. Continental provided Zidell with primary liability insurance from June 15, 1974 to February 7, 1976 under policy numbers L637-20-52 and L4434822.

12 Defendant Maine Bonding and Casualty Company ("Maine Bonding") is a Maine corporation with its principal place of business in Schaumburg, Illinois. Maine Bonding provided Zidell with liability coverage from February 7, 1976 through February 7, 1978 under policy numbers VW001974 and VW004048. All insurance underlying the Maine Bonding coverage is either inapplicable or exhausted, and Maine Bonding therefore has a current defense obligation

13 Defendant RLI Insurance Company ("RLI") is an Illinois corporation with its principal place of business in Peoria, Illinois. RLI provided Zidell with liability insurance from February 7, 1978 through July 1, 1979 under policy numbers R10024E and R10265E. All insurance underlying the RLI coverage is either inapplicable or exhausted, and RLI therefore has a current defense obligation

14 Defendant National Union Fire Insurance ("National Union") is a Pennsylvania corporation with its principal place of business in New York, New York. National Union provided Zidell with primary liability insurance from July 1, 1979 to July 1, 1980 under policy number GLA127-0496

15. Defendant The Home Indemnity Company ("The Home"), succeeded in interest by The Home Insurance Company, is a New Hampshire corporation with its principal place of business

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m New York, New York. The Home provided Zidell with pnmary liability msurance from July 1, 1980 to July 1, 1981 under pohcy number GL1-14-50-42.

16. Defendant Highlands Insurance Company ("Highlands") is a Texas corporation with its pnncipal place ofibusmess m Houston, Texas. Highlands provided Zidell with pnmary liability insurance from July 1, 1981 through July 1, 1983 under pohcy numbers HS-9-22-51 and HS-9-22-54.

17. Defendant Century Indemnity Company ("Century Indemmty") is a Pennsylvania corporation with its pnncipal place ofibusiness in Philadelphia, Pennsylvania. Century Indemmty provided Zidell with pnmary liability insurance from July 1, 1983 to July 1, 1984 under policy number CIS 43-06-76

18 Defendant Industrial Indenmity Company ("Industrial Indemmty"), succeeded in interest by United States Fire Insurance Company, is a New York corporation with its pnncipal place of business m Morristown, New Jersey. Industrial Indemnity provided Zidell with primary hability insurance from July 1, 1984 to July 1, 1985 under pohcy number SG 849-8042.

19 Defendant London Underwriters are citizens ofithe United Kingdom, and each of the individually named London Underwriter defendants are citizens of states other than Washington State London Underwriters provided Zidell with pnmary hability insurance for the penod from November 26, 1956 to November 5, 1965 under the followmg pohcy numbers: L8717 (11/26/56-10/22/57); L8868 (10/22/57-11/05/60), LI00241 (11/05/60-11/05/61), LNW02277 (11/05/61-11/05/62); LI03700 (11/05/62-11/05/63); LR104914(11/05/63-11/05/64); and LR105992 (11/05/64-11/05/65). Only those policies covermg penods subsequent to January 1, 1960 are at issue for purposes of this current litigation.

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20. In addition to the primary insurance identified in paragraph 19, above, Defendant London Underwriters provided Zidell with excess/umbrella coverage under the following policies. L8869 (10/22/57-11/05/60); L9152 (09/03/58-11/05/60), L100242 (11/05/60-11/05/61), L100243 (11/05/60-11/05/61), L100244 (11/05/60-11/05/61); L102278 (11/05/61-11/05/62); L102279 (11/05/61-11/05/62); L102280 (11/05/61-11/05/62), L103701 (11/05/62-11/05/63); L103702 (11/05/62-11/05/63); L104915 (11/05/63-11/05/64), L104916 (11/05/64-11/05/64); L105994 (11/05/64-11/05/65); L105993 (11/05/64-11/05/65), 10362 (01/31/66-12/31/68); 11202 (12/31/68-12/31/69); 11203 (12/31/68-12/31/71); 94195B/1499 (12/31/69-12/31/70); OC33270 (01/01/70-12/31/70); 614B967061/1775 (12/31/70-12/31/71), OC33271 (01/01/71-12/31/71), OC33272 (12/31/71-12/31/72); and B99270 (12/31/71-12/31/72)

IV. GENERAL ALLEGATIONS

21 From January 1, 1960 to May 3, 1984, Zidell leased property at the mouth of the Hylebos Waterway from the Port of Tacoma From April 1, 1960 to approximately January, 1976, Zidell dismantled vessels at the leased property. From approximately 1976 through approximately 1983, Zidell built new barges at the leased property

22 Based on Zidell's operations at the property leased by Zidell at the mouth of the Hylebos Waterway, the United States Environmental Protection Agency has identified Zidell as a potentially responsible party at the Commencement Bay Nearshore/Tideflats Superfund site, and has asserted certain claims against Zidell for investigation and/or remediation costs associated with that site ("the EPA Action") Total cleanup costs are expected to exceed $56 million. Zidell's estimated share of investigative and remediation costs is expected to exceed $8 million

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23. Zidell promptly tendered the defense of the EPA Action to the defendant insurers, who agreed to provide Zidell with a defense under the primary insurance policies.

24 In addition, the Natural Resources Trustee has exerted claims for natural resource damages for damage to the Hylebos Waterway ("the Natural Resources Claim"). Zidell's share of natural resource damages is currently unknown Zidell promptly tendered the defense of the Natural Resources Claim to the defendant insurers.

V. FIRST CLAIM FOR RELIEF (DECLARATORY RELIEF: EPA ACTION) (AGAINST ALL DEFENDANTS)

25. Plaintiff realleges and incorporates paragraphs 1 through 24, above

26 As a result of the EPA Action, Zidell has incurred, and will continue to incur, substantial costs and expenses for the defense of the EPA action and the investigation of the alleged contamination and property damage at and around the Hylebos Waterway site

27. In the EPA Action, the EPA contends that Zidell will be legally obligated to pay for a share of the costs of remediating the contamination and property damage at and around the Hylebos Waterway site.

28. Each of the liability policies issued to Zidell by the defendant insurers obligates the insurers to pay all sums that Zidell becomes legally obligated to pay as a result of third party property damage during the policy period

29. In addition, each of the primary liability insurance policies issued to Zidell by the defendant insurers obligates the insurers to defend Zidell in any claim seeking damages because of property damage during the policy period

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To Zidell Marine Corp's Comments
in Favor of Consent Decree

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30. Zidell has fully performed any and all of its obligations under the insurance policies, including any and all conditions precedent to coverage

31 The defendant insurers have contended that certain terms of the insurance policies issued to Zidell preclude any duty to indemnify Zidell from damages arising from the EPA Action and/or preclude any duty to defend Zidell with regard to the EPA Action.

32. Based on the foregoing, an actual and justiciable controversy exists between Zidell and each of the defendant insurers regarding the obligation of each defendant insurer to pay for defense, investigation, and loss mitigation costs Zidell has incurred or will incur in response to the EPA Action, and regarding the defendant insurers obligation to pay all sums that Zidell becomes legally obligated to pay as a result of the EPA Action

33. Zidell is entitled to an award of reasonable attorneys' fees for pursuing this claim for declaratory relief, pursuant to *Olympic S S Co , Inc v Centennial Ins Co.*, 117 Wn 2d 37, 53, 811 P 2d 673, (1991). Zidell is also entitled to an award of all coverage-related expenses, pursuant to *Panorama Village Condominium Owners Association Board of Directors v. Allstate Ins. Co* , 144 Wash. 2d 130, 144, 26 P.3d 910 (2001).

VI. SECOND CLAIM FOR RELIEF (DECLARATORY RELIEF: NATURAL RESOURCE DAMAGES) (AGAINST ALL DEFENDANTS)

34 Zidell realleges and incorporates paragraphs 1 through 33, above.

35. As a result of the Natural Resources Trustee's claim for natural resource damages arising from the contamination at and around the Hylebos Waterway, Zidell has incurred, and will continue to incur, substantial costs and expenses for the defense of the Natural Resources

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1 Claim and the investigation of the alleged contamination and property damage at and around the
2 Hylebos Waterway site

3 36. In the Natural Resources Claim, the Natural Resources Trustee has alleged that Zidell is
4 legally obligated to pay for natural resource damages at and around the Hylebos Waterway site.

5 37 Each of the liability policies issued to Zidell by the defendant insurers obligates the
6 insurers to pay all sums that Zidell becomes legally obligated to pay as a result of third party
7 property damage during the policy period.

8 38. In addition, each of the primary liability insurance policies issued to Zidell by the
9 defendant insurers obligates the insurers to defend Zidell in any claim seeking damages because
10 of property damage during the policy period

11 39 Zidell has fully performed any and all of its obligations under the insurance policies,
12 including any and all conditions precedent to coverage

13 40. The defendant insurers have contended that certain terms of the insurance policies
14 issued to Zidell preclude any duty to indemnify Zidell from natural resource damages arising
15 from the Hylebos Waterway site and/or preclude any duty to defend Zidell with regard to the
16 Natural Resources Claim

17 41 Based on the foregoing, an actual and justiciable controversy exists between Zidell and
18 each of the defendant insurers regarding the obligation of each defendant insurer to pay for
19 defense, investigation, and loss mitigation costs Zidell has incurred or will incur in response to
20 the Natural Resources Claim, and regarding the defendant insurers obligation to pay all sums that
21 Zidell becomes legally obligated to pay as natural resource damages

22 42. Zidell is entitled to an award of reasonable attorneys' fees for pursuing this claim for
23 declaratory relief, pursuant to *Olympic S.S. Co. Inc v Centennial Ins Co.*, 117 Wn.2d 37, 53,

24

25

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811 P 2d 673, (1991). Zidell is also entitled to an award of all coverage-related expenses, pursuant to *Panorama Village Condominium Owners Association Board of Directors v Allstate Ins. Co*, 144 Wash. 2d 130, 144, 26 P.3d 910 (2001).

VII. THIRD CLAIM FOR RELIEF (BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING) (AGAINST LONDON UNDERWRITERS)

43. Zidell realleges and incorporates paragraphs 1 through 42, above.

44. Each of the primary and excess liability insurance policies issued to Zidell by the London Underwriters includes and implied covenant of good faith and fair dealing.

45. During the course of Zidell's defense of the EPA Action, the London Underwriters have repeatedly breached the implied covenant of good faith and fair dealing. Specifically, the London Underwriters have engaged in settlement conduct that is unreasonable, frivolous, or unfounded in the context of this litigation. Despite repeated recommendations from Zidell's defense counsel to settle the EPA Action, the London Underwriters have unreasonably refused to participate in finding any settlement of the EPA Action unless Zidell agrees to a complete policy release that would compromise and/or eliminate Zidell's insurance coverage at other sites and for other claims.

46 The London Underwriters conduct is unreasonable, frivolous, or unfounded in the context of the EPA Action. As a result of the London Underwriters' breach of the implied covenant of good faith and fair dealing, Zidell may be exposed to additional damages in the EPA Action Zidell is entitled to recover any increased settlement and/or judgment costs from the London Underwriters

47. The London Underwriters' conduct in handling Zidell's claims for coverage constitutes unfair claims practices as defined in RCW 48 30, et seq., and/or WAC 284-30-930

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48. Zidell is entitled to an award of reasonable attorneys' fees for pursuing this claim for breach of the implied covenant of good faith and fair dealing pursuant to *Olympic S.S. Co., Inc v Centennial Ins Co.* 117 Wn.2d 37, 53, 811 P.2d 673, (1991). Zidell is also entitled to an award of all coverage-related expenses, pursuant to *Panorama Village Condominium Owners Association Board of Directors* v *Allstate Ins Co.*, 144 Wash 2d 130, 144. 26 P 3d 910 (2001)

VIII. FOURTH CLAIM FOR RELIEF (VIOLATION OF WASHINGTON CONSUMER PROTECTION ACT) (AGAINST LONDON UNDERWRITERS)

49 Zidell realleges and incorporates paragraphs 1 through 48, above.

50. The conduct of the London Underwriters in handling Zidell's claims for coverage with regard to the EPA claim and the Natural Resources claim constitutes unfair claims practices as defined in RCW 48.30 et seq., and/or WAC 284-30-930 Such conduct further constitutes a violation of the Washington State Consumer Protection Act, RCW 19.86 et seq

51. The London Underwriters' conduct in response to the EPA Action and the Natural Resources Claim consututes an unfair or deceptive act or practice in trade or commerce that impacts the public interest. Zidell has suffered direct injury as a result of the London Underwriters' unfair or deceptive acts

52. Zidell is entitled to recover from the London Underwriters an award of its attorneys' fees and costs incurred in prosecuting this action and treble damages in accordance with RCW 19.86.090

PRAYER

53 On Zidell's First Claim for Relief, for a judicial declaration that the defendant insurers have an obligation to defend and/or continue defending Zidell with respect to the EPA Action

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and a duty to indemnify Zidell for damages Zidell is legally obligated to pay as a result of the EPA Action.

54. On Zidell's Second Claim for Relief, for a judicial declaration that the defendant insurers have an obligation to defend and/or continue defending Zidell with respect to the Natural Resources Claim and a duty to indemnify Zidell for damages Zidell is legally obligated to pay as a result of the Natural Resources Claim.

55 On Zidell's Third Claim for Relief, for an award of consequential damages according to proof against the London Underwriters, and for an award of prejudgment interest.

56. On Zidell's Fourth Claim for Relief, for an award of attorneys' fees, costs, expenses, and treble damages pursuant to RCW 19.86.090.

57. On all of Zidell's Claims for Relief, for an award of attorneys' fees, costs, and expenses, and for such other relief as this Court deems just and proper.

DATED March 11 2003

Respectfully submitted,

By _____

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