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Hon. _____

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

UNITED STATES OF AMERICA, ON)	
BEHALF OF THE NATIONAL OCEANIC)	
AND ATMOSPHERIC)	
ADMINISTRATION AND THE UNITED)	
STATES DEPARTMENT OF THE)	
INTERIOR; THE STATE OF)	
WASHINGTON THROUGH THE)	Case No. CV-16-1486
WASHINGTON DEPARTMENT OF)	
ECOLOGY; MUCKLESHOOT INDIAN)	COMPLAINT
TRIBE; SUQUAMISH TRIBE,)	
)	
Plaintiffs,)	
)	
v.)	
)	
CITY OF SEATTLE,)	
)	
Defendant.)	

COMPLAINT

1 Plaintiffs United States of America, by authority of the Attorney General, on
2 behalf of the National Oceanic and Atmospheric Administration of the Department
3 of Commerce and the Department of the Interior; State of Washington through the
4 Washington Department of Ecology; Suquamish Tribe; and Muckleshoot Indian
5 Tribe, allege as follows:

6 **I. GENERAL ALLEGATIONS**

7 1. This is a civil action under Section 107(a) of the Comprehensive
8 Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.
9 § 9607(a); Section 311 of the Clean Water Act (CWA), 33 U.S.C. § 1321; Section
10 1002(b) of the Oil Pollution Act (OPA), 33 U.S.C. § 2702(b); and the Model
11 Toxics Control Act (MTCA), RCW 70.105D, for damages for injury to,
12 destruction of, or loss of natural resources resulting from the release of hazardous
13 substances and discharges of oil into the Lower Duwamish Waterway and Elliott
14 Bay in Seattle, Washington.

15 **II. BACKGROUND**

16 2. On or around December 23, 1991, this Court entered a Consent
17 Decree (the “1991 Consent Decree”) among the Trustees and Defendant, resolving
18 Defendant’s liability for certain natural resource damages through the effective
19 date of that Consent Decree as related to various sources of contamination by City-
20 controlled facilities located along the LDW (United States of America, et al v. City
21 of Seattle and Municipality of Metropolitan Seattle, Civil No. C90-395WD). The
22 1991 Consent Decree was amended on October 13, 1999. This Complaint
23 addresses Defendant’s liability for certain natural resource damages not addressed
24 by the 1991 Consent Decree, including certain natural resource damages that have
25 occurred after the effective date of the 1991 Consent Decree.

III. JURISDICTION AND VENUE

1
2 3. This Court has jurisdiction over this case pursuant to Sections 107 and
3 113(b) of CERCLA, 42 U.S.C. §§ 9607 and 9613(b); Section 311(n) of the CWA,
4 33 U.S.C. § 1321(n); Section 1017(b) of OPA, 33 U.S.C. § 2717(b); and 28 U.S.C.
5 §§ 1331, 1345 and 1367(a).

6 4. Venue is proper in this district pursuant to Section 113(b) of
7 CERCLA, 42 U.S.C. § 9613(b); Section 1017(b) of OPA, 33 U.S.C. § 2717(b); and
8 28 U.S.C. § 1391(b) and (c).

IV. THE SITE

9
10 5. The Duwamish Waterway is a highly industrialized area that flows
11 into Elliott Bay in Seattle, Washington.

12 6. The “Lower Duwamish Waterway” as used in this Complaint means
13 any portion of the Duwamish Waterway (including the shoreline, intertidal areas,
14 tributaries, estuaries and bottom sediments) in the State of Washington where
15 hazardous substances and fuel originating from the parcels identified below that
16 have been owned or operated by the Defendant have come to be located.

17 7. “Elliott Bay” as used in this Complaint means any portion of Elliott
18 Bay (including the shoreline, intertidal areas, tributaries, estuaries and bottom
19 sediments) in the State of Washington where hazardous substances and fuel
20 originating from the parcels identified below that have been owned or operated by
21 the Defendant have come to be located.

22 8. The Lower Duwamish Waterway and Elliott Bay are contaminated
23 with a variety of hazardous substances, including arsenic, antimony, cadmium,
24 chromium, copper, mercury, nickel, lead, zinc, bis(2 ethylhexyl) phthalate,
25 hexachlorobenzene, hexachlorobutadiene, polychlorinated biphenyls (PCBs), and
26 polycyclic aromatic hydrocarbons (PAHs). Overall, the Trustees have documented
27

1 the presence of over 30 hazardous substances in the marine sediments of the Lower
2 Duwamish Waterway.

3 9. The Lower Duwamish Waterway and Elliott Bay are navigable waters
4 within the meaning of Section 1001(21) of OPA, 33 U.S.C. § 2701(21), and
5 Section 502(7) of the CWA, 33 U.S.C. § 1362(7).

6 **V. PLAINTIFFS**

7 10. Pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section
8 1006 of OPA, 33 U.S.C. § 2706, Section 311(f)(5) of the CWA, 33 U.S.C. §
9 1321(f)(5), and 40 C.F.R. § 300.600, the United States is trustee for certain natural
10 resources in the Lower Duwamish Waterway and Elliott Bay.

11 11. Pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section
12 1006 of OPA, 33 U.S.C. § 2706, Section 311(f)(5) of the CWA, 33 U.S.C. §
13 1321(f)(5), 40 C.F.R. § 300.605, RCW 43.21A, RCW 70.105D, and RCW 90.48,
14 the State of Washington is trustee for certain natural resources in the Lower
15 Duwamish Waterway and Elliott Bay.

16 12. Pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section
17 1006 of OPA, 33 U.S.C. § 2706, and 40 C.F.R. § 300.610, the Suquamish Tribe is
18 trustee for certain natural resources in the Lower Duwamish Waterway and Elliott
19 Bay.

20 13. Pursuant to Section 107(f) of CERCLA, 42 U.S.C. § 9607(f), Section
21 1006 of OPA, 33 U.S.C. § 2706, and 40 C.F.R. § 300.610, the Muckleshoot Indian
22 Tribe is trustee for certain natural resources in the Lower Duwamish Waterway
23 and Elliott Bay.

24 **VI. DEFENDANT**

25 14. Defendant City of Seattle is a municipality organized under the laws
26 of the State of Washington.

1 15. At all times relevant to this Complaint, the City of Seattle did
2 business, and continues to do business, in this district.

3 16. The City of Seattle owns or in the past owned and/or operated real
4 property, Combined Sewer Overflows (CSOs), storm drains and other facilities on,
5 adjacent to, or near the LDW, including but not limited to the Georgetown Steam
6 Plant. From each of such sites identified in Appendix A, the storm water, surface
7 water runoff, wastewater, other process discharges, and/or groundwater have
8 flowed to the LDW.

9 17. The sites identified in Appendix A are facilities within the meaning of
10 Section 101(9) of CERCLA, 42 U.S.C. § 9601(9). Investigations have detected
11 hazardous substances in soils, groundwater or sediments on or in some or all of
12 those properties and/or facilities.

13 18. Hazardous substances have been or are being released to the LDW
14 from the properties or facilities identified in Appendix A through direct discharge,
15 surface water runoff, groundwater and/or seeps, and some of these hazardous
16 substances are found in the sediments of the LDW. Hazardous substances released
17 from the properties or facilities identified in Appendix A and found in the
18 sediments of the LDW include, but are not limited to, bis(2-ethylhexyl) phthalate,
19 1,2-dichlorobenzene, chromium, mercury, PCBs, and PAHs.

20 **VII. FIRST CLAIM FOR RELIEF**

21 19. Plaintiffs reallege paragraphs 1 through 18.

22 20. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in
23 pertinent part, as follows:

24 Notwithstanding any other provision or rule of law, and
25 subject only to the defenses set forth in subsection (b) of
26 this section

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

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

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

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

* * *

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

* * *

21. Materials disposed of and released in the Lower Duwamish Waterway and Elliott Bay by the City of Seattle include, but are not limited to, bis(2-ethylhexyl) phthalate, 1,2-dichlorobenzene, chromium, mercury, PCBs, and PAHs, which are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

22. The Lower Duwamish Waterway and Elliott Bay are facilities within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

1 23. Releases of hazardous substances, including but not limited to bis(2-
2 ethylhexyl) phthalate, 1,2-dichlorobenzene, chromium, mercury, PCBs, and PAHs,
3 have occurred in the Lower Duwamish Waterway and Elliott Bay within the
4 meaning of Sections 101(22) of CERCLA, 42 U.S.C. § 9601(22). The releases of
5 these hazardous substances in the Lower Duwamish Waterway and Elliott Bay
6 from the identified facilities owned or operated by the City of Seattle have resulted
7 in injury to, destruction of, or loss of natural resources within the trusteeship of one
8 or more of the Plaintiffs.

9 24. Defendant is a person within the meaning of Section 107 of CERCLA,
10 42 U.S.C. § 9607.

11 25. Defendant is liable to Plaintiffs for natural resource damages resulting
12 from releases of hazardous substances pursuant to Section 107(a) of CERCLA, 42
13 U.S.C. § 9607(a)

14 **VIII. SECOND CLAIM FOR RELIEF**

15 26. Plaintiffs reallege paragraphs 1 through 25.

16 27. Section 1002(a) of OPA, 33 U.S.C. § 2702(a), provides in pertinent
17 part, as follows:

18 Notwithstanding any other provision or rule of law, and
19 subject to the provisions of this Act, each responsible
20 party for a vessel or a facility from which oil is
21 discharged, or which poses the substantial threat of a
22 discharge of oil, into or upon the navigable waters or
23 adjoining shorelines or the exclusive economic zone is
24 liable for the removal costs and damages specified in
25 subsection (b) of this section that result from such
26 incident.

27 28. Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A), makes
28 responsible parties liable for:

1 Damages for injury to, destruction of, loss of, or loss of use of, natural
2 resources, including the reasonable costs of assessing the damage, which shall be
3 recoverable by a United States trustee, a State trustee, an Indian Tribe trustee, or a
4 foreign trustee.²⁹ The facilities and properties owned or operated by the City of
5 Seattle were and are facilities within the meaning of Sections 1001(9) and 1002 of
6 OPA, 33 U.S.C. §§ 2701(9) and 2702.

7 30. Section 1001(32) of OPA, 33 U.S.C. § 2701(32), makes owners and
8 operators of onshore facilities responsible parties for damages resulting from the
9 discharge of oil from those facilities.

10 31. The discharge of oil into the Lower Duwamish Waterway, Elliott Bay
11 or adjoining shorelines from the identified facilities owned or operated by the City
12 of Seattle has resulted in injury to, destruction of, or loss of natural resources
13 within the trusteeship of one or more of the Plaintiffs.

14 32. Defendant is liable to Plaintiffs for natural resource damages resulting
15 from discharges of oil pursuant to Section 1001 of OPA, 33 U.S.C. § 2701.

16 **IX. THIRD CLAIM FOR RELIEF**

17 33. Plaintiffs reallege paragraphs 1 through 32.

18 34. Section 311(b)(3) of the CWA, 33 U.S.C. § 1321(b)(3), provides in
19 pertinent part, as follows:

20
21 The discharge of oil or hazardous substances (i) into or
22 upon the navigable waters of the United States, adjoining
23 shorelines, or into or upon the waters of the contiguous
24 zone . . . or which may affect natural resources belonging
25 to, appertaining to, or under the exclusive management
26 authority of the United States . . . in such quantities as
27 may be harmful as determined by the President under
28 paragraph (4) of this subsection, is prohibited

1 35. Section 311(f)(2) of the CWA, 33 U.S.C. § 1321(f)(2), provides in
2 pertinent part, as follows:

3 Except where an owner or operator of an onshore facility
4 can prove that a discharge was caused solely by (A) an
5 act of God, (B) an act of war, (C) negligence on the part
6 of the United States Government, or (D) an act or
7 omission of a third party without regard to whether an
8 such act or omission was or was not negligent, or any
9 combination of the foregoing clauses, such owner or
10 operator of any such facility from which oil or a
11 hazardous substance is discharged in violation of
12 subsection (b)(3) of this section shall be liable to the
United States Government for the actual costs incurred
under subsection (c) of this section for the removal of
such oil or substance by the United States Government . .

13 . .

14 36. Section 311(f)(4) of the CWA, 33 U.S.C. § 1321(f)(4), provides in
15 pertinent part, as follows:

16 The costs of removal of oil or a hazardous substance for
17 which the owner or operator of a vessel or onshore or
18 offshore facility is liable under subsection (f) of this
19 section shall include any costs or expenses incurred by
20 the Federal Government or any State government in the
21 restoration or replacement of natural resources damaged
22 or destroyed as a result of a discharge of oil or a
hazardous substance in violation of subsection (b) of this
section.

23 37. The identified facilities owned or operated by the City of Seattle are
24 onshore facilities within the meaning of Section 311(f)(1) of the CWA, 33 U.S.C. §
25 1321(f)(1).

1 38. There have been discharges of oil or hazardous substances in harmful
2 quantities into the Lower Duwamish Waterway, Elliott Bay and adjoining
3 shorelines from the identified facilities owned or operated by the City of Seattle.

4 39. Discharges of oil or hazardous substances from the facilities owned or
5 operated by the City of Seattle into the Lower Duwamish Waterway, Elliott Bay or
6 adjoining shorelines have affected, damaged or destroyed natural resources
7 belonging to, appertaining to, or under the exclusive management authority of the
8 United States.

9 40. Defendant is liable to the United States and State of Washington for
10 natural resource damages resulting from discharges of oil or hazardous substances
11 into the Lower Duwamish Waterway, Elliott Bay, or adjoining shorelines pursuant
12 to Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

13 **X. FOURTH CLAIM FOR RELIEF**

14 41. Plaintiffs reallege paragraphs 1 through 40.

15 42. MTCA, RCW 70.105D.040, provides in pertinent part as follows:

16
17 (1) Except as provided in subsection (3) of this section,
18 the following persons are liable with respect to a facility:

19 (a) The owner or operator of the facility;

20 (b) Any person who owned or operated the facility at the
21 time of disposal or release of the hazardous substances;

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

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

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

16 (2) Each person who is liable under this section is strictly
17 liable, jointly and severally, for . . . all natural resource
18 damages resulting from the releases or threatened
19 releases of hazardous substances.

20 43. Materials disposed of and released in the Lower Duwamish Waterway
21 and Elliott Bay from the identified sites owned or operated by the City of Seattle
22 include hazardous substances within the meaning of RCW 70.105D.020(13).

23 44. The identified sites owned or operated by the City of Seattle are
24 facilities within the meaning of RCW 70.105D.020(8).

25 45. The Lower Duwamish Waterway and Elliott Bay are facilities within
26 the meaning of RCW 70.105D.020(8).

27 46. Releases or threatened releases of hazardous substances have occurred
28 in the Lower Duwamish Waterway and Elliott Bay within the meaning of RCW
70.105D.020 and RCW 70.105D.040.

1 47. The natural resources that have been and continue to be injured,
2 destroyed, or lost by the release of hazardous substances from the identified
3 facilities owned or operated by the City of Seattle include fish, shellfish,
4 invertebrates, birds, marine sediments, and other such natural resources.

5 48. The State of Washington has incurred and continues to incur response
6 costs related to the assessment of injury to natural resources caused by the releases
7 of hazardous substances from the identified facilities owned or operated by the
8 City of Seattle.

9 49. Pursuant to RCW 70.105D.040(2), Defendant is jointly and severally
10 liable to the State of Washington for all damages to natural resources in the Lower
11 Duwamish Waterway and Elliott Bay, resulting from the release of hazardous
12 substances at or from the City of Seattle's identified facilities.

13 **XI. REQUEST FOR RELIEF**

14 WHEREFORE, Plaintiffs request that this Court enter judgment against
15 Defendant:

16 (1) For damages for injury to natural resources resulting from the discharges
17 or releases of hazardous substances in the Lower Duwamish Waterway and Elliott
18 Bay, including the cost of assessing such damages; and

19 (2) Awarding Plaintiffs such other and further relief as this Court may deem
20 appropriate.

21 UNITED STATES OF AMERICA

22 JOHN C. CRUDEN
23 Assistant Attorney General
24 Environment & Natural Resources Division
25 U.S. Department of Justice
26 Washington, D.C. 20530
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Acting United States Attorney
Western District of Washington

/s Michael J. Zevenbergen
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SUQUAMISH TRIBE

/s Melody Allen
MELODY ALLEN
Suquamish Tribe
Legal Department
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Suquamish, WA 98392-0498
(360) 394 8488

MUCKLESHOOT INDIAN TRIBE

/s Robert L. Otsea
ROBERT L. OTSEA, JR., WSBA #9367
Muckleshoot Indian Tribe
39015 172nd Avenue SE
Auburn, WA 98002
(253) 939 3311

Dated: September 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2016, I caused a true copy of the COMPLAINT, including the Civil Cover Sheet attached at Attachment 1, to be served on each of the following named persons at his or her last known addresses in the manner indicated below:

EDWARD B. MURRAY Mayor of Seattle 600 4th Ave, 7th Floor Seattle, WA 98104	<input checked="" type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input type="checkbox"/> Notice of electronic filing using CM/ECF
TAD H. SHIMAZU Assistant City Attorney Seattle City Attorney's Office 701 Fifth Avenue, Suite 2050 Seattle, WA 98104-7097 Email: tad.shimazu@seattle.gov	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input checked="" type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Notice of electronic filing using CM/ECF
NELS JOHNSON Assistant Attorney General 2425 Bristol Court S.W. Olympia, WA 98504-0117 Email: NelsJ@ATG.WA.GOV	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input checked="" type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Notice of electronic filing using CM/ECF
MELODY ALLEN Suquamish Tribe Legal Department 18490 Suquamish Way Suquamish, WA 98392 Email: mallen@Suquamish.nsn.us	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input checked="" type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Notice of electronic filing using CM/ECF

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ROBERT L. OTSEA, JR. Muckleshoot Indian Tribe 39015 172nd Avenue SE Auburn, WA 98002 Email: Rob@muckleshoot.nsn.us	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input checked="" type="checkbox"/> Via Overnight Mail <input checked="" type="checkbox"/> Notice of electronic filing using CM/ECF
KEVIN P. TIERNEY General Counsel Bluefield Holdings, Inc. 1880 West Oak Parkway, Suite 106 Marietta, GA 30062 Email: ktierney@earthcon.com	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via E-mail <input type="checkbox"/> Via First-Class mail, postage pre-paid <input checked="" type="checkbox"/> Via Overnight Mail <input type="checkbox"/> Notice of electronic filing using CM/ECF

/s Michael J. Zevenbergen
 MICHAEL J. ZEVENBERGEN

Appendix A: City of Seattle Facilities

See attached Figure A

1. SW Florida SD (36")
2. SW Graham SD (aka SW Kenny St. SD)
3. SW Idaho SD
4. 7th Ave S. SD
5. 11th SW & SW Massachusetts NPDES #77
6. Chelan Ave. SE at 16th SW (104)
7. Diagonal (111) CSO
8. Lander CSO (W030)
9. S Fox St CSO/SD (116) (Brighton)
10. S River St, SD
11. S. Spokane St. at 13th Ave. SW NPDES#103
12. SW Florida CSO/SD (098)
13. SW Florida at 16th SW CSO/SD (106)
14. SW Hinds CSO/SD (099)
15. SW Lander at 16th SW CSO/SD (105)
16. SW Michigan (Highland Park Way) SD
17. SW Spokane at 13th CSO/SD
18. 16th Ave S SD A-South
19. 16th Ave S SD B-North
20. Duwamish substation #1 SD
21. Duwamish substation #2 SD
22. Flume
23. S Garden St, SD
24. S Hinds St. CSO/SD (NPDES107)
25. S Myrtle SD
26. S Nevada SD
27. Slip 4 SD (a.k.a. North Boeing Field SD)
28. SW Dakota SD
29. West Seattle Reservoir Overflow
30. Georgetown Steam Plant (see parcels on Figure A)
31. Herrings House Park (see parcels on Figure A)

Key to Abbreviations

SD – “Storm drain”

NPDES – “National Pollutant Discharge Elimination System” (Clean Water Act permit) Refers to CSO permit outfall number

CSO – “Combined sewer overflow”

EOF – “Emergency Overflow” - Points in SPU’s separated sanitary system where a sanitary sewer overflow occurs related to a sewage pump station power outage, mechanical breakdown, broken pipe, seawater intrusion, etc.

CSO/SD or EOF/SD - Shared outfall that serves as both a combined sewer overflow or emergency overflow and storm drain system.

Figure A
City of Seattle Facilities

November 2014

