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**STATE OF WASHINGTON  
WHATCOM COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY,  
  
Plaintiff,  
  
v.  
  
WHATCOM COUNTY; WHATCOM  
COUNTY FLOOD CONTROL ZONE  
DISTRICT; GREAT WESTERN  
LUMBER COMPANY; and MILLMAN  
FAMILY LLC,  
  
Defendants.

NO. \_\_\_\_\_  
  
CONSENT DECREE  
RE: SUMAS MOUNTAIN  
LANDSLIDE

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1 **I. INTRODUCTION**

2 A. A large, naturally occurring landslide on Sumas Mountain, Whatcom County,  
3 Washington, generates sediment that, through geologic processes, is transported by Swift  
4 Creek to the populated valley below. This sediment includes naturally occurring asbestos  
5 (NOA). A significant portion of this sediment accumulates in the channels of Swift Creek and  
6 the downstream Sumas River, where it raises the channel bottoms and reduces stream capacity.  
7 Absent human intervention, these processes contribute to periodic flooding and create potential  
8 avulsion of Swift Creek and the Sumas River, whereupon the material is and/or would be  
9 further distributed to and deposited upon properties in the surrounding Swift Creek/Sumas  
10 River floodplain. When the deposited material dries, NOA in the sediment can become  
11 airborne and present a risk to human health and the environment, the severity of which may  
12 vary depending upon concentration and duration of exposure.

13 B. In order to protect public and private property and infrastructure, a number of  
14 governmental entities and private parties have historically undertaken flood management and  
15 flood control activities that involve moving and otherwise managing sediment accumulated in  
16 the channels of Swift Creek and the Sumas River.

17 C. The continued movement through geologic processes of NOA-bearing material  
18 will continue to force governmental entities and landowners to address the physical impacts of  
19 the material in order to protect public and private property and infrastructure.

20 D. The mutual objective of the Washington State Department of Ecology  
21 (Ecology) and Whatcom County under this Consent Decree (Decree) is to implement a  
22 cooperative program of actions to limit potential future impacts on human health and the  
23 environment from NOA-bearing material generated from the Sumas Mountain landslide, both  
24 as that material exists today in the Swift Creek/Sumas River floodplain and as it will continue  
25 to be generated and transported as sediment from the landslide toward the floodplain in the  
26 future. This program of actions is described in the Swift Creek Action Plan issued by Ecology

1 and attached hereto as Exhibit B to this Decree. The Swift Creek Action Plan is the equivalent  
2 of a cleanup action plan issued under WAC 173-340-380.

3 E. Because of the presence of NOA in material from the Sumas Mountain  
4 landslide, the act of moving and managing NOA-bearing material may create a “release” or  
5 “threatened release” of “hazardous substances” as those terms are defined or used under the  
6 Model Toxics Control Act (MTCA), RCW 70.105D. The mutual objective of Ecology and  
7 Whatcom County under this Decree is to prospectively resolve this potential future liability  
8 under MTCA as it relates to: (1) the ownership of real property used for, or in support of,  
9 controlling and managing NOA-bearing material; (2) the prospective future movement and  
10 management of NOA-bearing material; and (3) the provision of annual operations and  
11 maintenance funding related to the above activities. In addition, a significant portion of the real  
12 property proposed to be used for, or in support of, controlling and managing NOA-bearing  
13 material is currently owned by the Millman Family LLC. The inclusion of the Millman Family  
14 LLC and Great Western Lumber Company (collectively, “Millman entities” in this Decree  
15 resolves potential liability associated with certain past movement and management of NOA-  
16 bearing material by the Great Western Lumber Company and provides for the transfer of real  
17 property to the County so that it may be used for activities under this Decree.

18 F. Ecology and Whatcom County have determined that the actions in this Decree  
19 are necessary to protect human health and the environment.

20 G. The Complaint in this action is being filed simultaneously with this Decree. An  
21 Answer has not been filed, and there has not been a trial on any issue of fact or law in this case.  
22 However, the Parties wish to resolve the issues raised by Ecology’s Complaint. In addition, the  
23 Parties agree that settlement of these matters without litigation is reasonable and in the public  
24 interest, and that entry of this Decree is the most appropriate means of resolving these matters.

25 H. By signing this Decree, the Parties agree to its entry and agree to be bound by  
26 its terms.

1 I. By entering into this Decree, the Parties do not intend to discharge non-settling  
2 parties from any liability they may have with respect to matters alleged in the Complaint. The  
3 Parties retain the right to seek reimbursement, in whole or in part, from any liable persons for  
4 sums expended under this Decree.

5 J. This Decree shall not be construed as proof of liability or responsibility for any  
6 releases of hazardous substances or cost for remedial action nor an admission of any facts;  
7 provided, however, that Defendants shall not challenge the authority of the Attorney General  
8 and Ecology to enforce this Decree according to the terms hereby agreed and reasonably  
9 administered.

10 K. The Court is fully advised of the reasons for entry of this Decree, and good  
11 cause having been shown:

12 Now, therefore, it is HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

## 13 II. JURISDICTION

14 A. This Court has jurisdiction over the subject matter and over the Parties pursuant  
15 to the Model Toxics Control Act (MTCA), RCW 70.105D.

16 B. Authority is conferred upon the Washington State Attorney General by  
17 RCW 70.105D.040(4)(a) to agree to a settlement with any potentially liable person (PLP) if,  
18 after public notice and any required hearing, Ecology finds the proposed settlement would lead  
19 to a more expeditious cleanup of hazardous substances. RCW 70.105D.040(4)(b) requires that  
20 such a settlement be entered as a consent decree issued by a court of competent jurisdiction.

21 C. Ecology has determined that a “release” or “threatened release” of “hazardous  
22 substances,” as those terms are defined or used in MTCA, has occurred at the Site that is the  
23 subject of this Decree.

24 D. None of the Defendants has been named a PLP for the Site. This Decree settles  
25 the Millman entities’ potential liability, and the County’s potential future liability, as described  
26 in Section I.E.

1 E. The actions to be taken pursuant to this Decree are necessary to protect public  
2 health and the environment.

3 F. This Decree has been subject to public notice and comment.

4 G. Ecology finds that this Decree will, when compared with unabated natural  
5 processes and unmanaged human response, lead to a more expeditious cleanup of hazardous  
6 substances at the Site in compliance with the cleanup standards established under  
7 RCW 70.105D.030(2)(e) and WAC 173-340.

8 H. Defendants have agreed to undertake the actions specified in this Decree  
9 pursuant to the terms of this Decree, and consent to the entry of this Decree under MTCA.

### 10 III. PARTIES BOUND

11 This Decree shall apply to and be binding upon the Parties to this Decree, and their  
12 successors and assigns. The undersigned representative of each party hereby certifies that he or  
13 she is fully authorized to enter into this Decree and to execute and legally bind such party to  
14 comply with this Decree. Each Defendant agrees to undertake all actions required of that  
15 Defendant by the terms and conditions of this Decree. No change in ownership or corporate  
16 status shall alter the respective responsibilities of each Defendant under this Decree.

### 17 IV. DEFINITIONS

18 Unless otherwise specified herein, all definitions in RCW 70.105D.020 and  
19 WAC 173-340-200 shall control the meanings of the terms in this Decree.

20 A. Site: The Site is referred to as Sumas Mountain Landslide Site and is generally  
21 located at all places within and proximate to the Swift Creek alluvial fan where sediment from  
22 Swift Creek will be managed through actions taken pursuant to this Consent Decree, including  
23 without limitation the construction and operation of deflection levees, in-stream sediment  
24 traps, sediment piles, berms, levees, and similar structures. Sediments deposited beyond these  
25 locations not as a result of actions taken pursuant to this Consent Decree, either naturally  
26 during flood events, or through transport outside these areas by individuals for use as fill or

1 other uses are not included as part of the Site for purposes of this Decree. Site also includes the  
2 location of any approved repository(ies) that will be used to manage the sediment. The Site as  
3 currently understood is more particularly described in the Site Diagram (Exhibit A). The Site  
4 constitutes a Facility under RCW 70.105D.020(8).

5 B. Parties: Refers to the State of Washington, Department of Ecology (Ecology),  
6 Whatcom County, the Whatcom County Flood Control Zone District, Great Western Lumber  
7 Company and Millman Family LLC.

8 C. Defendants: Refers to Whatcom County, the Whatcom County Flood Control  
9 Zone District, and the Great Western Lumber Company and Millman Family LLC.

10 D. Consent Decree or Decree: Refers to this Consent Decree and each of the  
11 exhibits to this Decree. All exhibits are integral and enforceable parts of this Consent Decree.  
12 The terms “Consent Decree” or “Decree” shall include all exhibits to this Consent Decree.

13 E. EPA: Refers to the United States Environmental Protection Agency.

14 F. County: Unless specifically stated otherwise, the term “County” includes both  
15 Whatcom County and the Whatcom County Flood Control Zone District, while the Parties  
16 recognize that they constitute two separate legal entities and that legally the actions of each are  
17 not necessarily attributable to the other.

18 G. Millman entities: Unless specifically stated otherwise, the term “Millman  
19 entities” includes both the Great Western Lumber Company and Millman Family LLC.

20 H. Great Western Lumber Company log yard: Refers to an area used for log  
21 storage adjacent to the Great Western Lumber Company mill, located at 7636 Goodwin Road,  
22 Everson, Washington 98247.

## 23 V. FINDINGS OF FACTS

24 Ecology makes the following findings of fact without any express or implied  
25 admissions of such facts by Defendants.

1           A.     Sumas Mountain is located on the western front of the Cascade Mountains, a  
2 short distance east of the towns of Nooksack and Everson, Whatcom County, Washington. Part  
3 of the west flank of Sumas Mountain is drained by, and forms the headwaters of, Swift Creek.  
4 In these upper reaches, terrain and stream gradients are steep. As the stream flows off the  
5 mountain into the Swift Creek/Sumas River Valley below, the creek forms a broad alluvial fan  
6 covering approximately 500 acres of valley floodplain. This floodplain is populated and  
7 contains agricultural, residential, and commercial uses.

8           B.     Swift Creek flows west through the valley bottom for approximately 3.5 miles  
9 before joining the Sumas River as a tributary. The Sumas River then meanders northeast  
10 through the towns of Nooksack and Sumas to the Canadian border, about seven air miles from  
11 its junction with Swift Creek. Sumas River flows into British Columbia's Fraser River  
12 approximately 10 air miles north of the border.

13          C.     Sumas Mountain is forested with steep, rugged terrain. Approximately 80 years  
14 ago, a previously dormant landslide on the west face of the mountain was reactivated. The  
15 cause is not known with certainty. Several factors may have contributed, including a reported  
16 series of rainy years in the early 1930s causing exceptionally saturated and unstable slopes. To  
17 date, there is no known, direct evidence that logging or other human activity contributed to the  
18 reactivation of the slide.

19          D.     The west slope of Sumas Mountain is underlain by a body of serpentinitized  
20 ultramafic rock. The rock is sheared, faulted, and weathered to clay, contributing to structural  
21 weakness and instability. The serpentinite contains naturally occurring asbestos (mostly as  
22 chrysotile, one of six asbestiform minerals), as well as trace metals magnesium, chromium,  
23 nickel, cobalt, and manganese in relatively high levels. These constituents are carried  
24 downstream by natural processes into the Swift Creek system. Asbestos is a Class A human  
25 carcinogen. Exposure to asbestos is associated with lung cancer, mesothelioma, asbestosis, and  
26 other health effects, with likelihood of those conditions depending upon factors that include,



1 for example, the nature and duration of exposure. Nickel, manganese, cobalt, chromium, and  
2 magnesium can be toxic to human, plant, and aquatic life. In addition, the mineral composition  
3 of serpentinite is known to inhibit plant growth.

4 E. The Sumas Mountain landslide and resulting sediment movement are natural  
5 processes, and the movement and erosion of the slide is likely to continue for centuries. The  
6 amount of sediment entering Swift Creek from the slide has been estimated to be between  
7 30,000 and 120,000 cubic yards per year. This loading is expected to continue for the  
8 foreseeable future.

9 F. Absent human intervention, an estimated 30,000 cubic yards per year of the  
10 sediment originating from the Sumas Mountain landslide becomes deposited in the valley  
11 below Sumas Mountain by settling through natural processes. This sediment deposition raises  
12 the creek bottom, reducing stream capacity and encouraging flooding, potential avulsion, and  
13 thus broader deposition beyond the stream course itself. Additional sediment is carried as fine,  
14 suspended material into the Sumas and Fraser Rivers downstream.

15 G. In the spring of 1971, after a major flood event, the United States Army Corps  
16 of Engineers conducted channel restoration work consisting of sediment removal and levee and  
17 berm construction along the banks of Swift Creek.

18 H. In order to protect public health and welfare, Whatcom County and several  
19 other governmental agencies, with financial contributions from federal and state agencies, have  
20 undertaken flood control management activities in the Swift Creek/Sumas River watershed  
21 dating back at least as far as 1957. This dredging has focused on Swift Creek from Goodwin  
22 Road west to the confluence with the Sumas River and has been performed on an as-needed  
23 basis. Dredging of the Sumas River has also been performed, though less frequently than on  
24 Swift Creek.

1 I. The various governmental agencies involved in dredging have historically  
2 stockpiled material dredged from the Swift Creek channel on property along both sides of  
3 Swift Creek. Dredged material remains in piles on both sides of Swift Creek.

4 J. The EPA sampling in 2006 and a subsequent risk evaluation confirmed that  
5 exposure to asbestos in the dredged materials, if it becomes airborne, may pose a human health  
6 risk. Further sampling following flooding of the Sumas River documented that flood deposits  
7 contain levels of asbestos that, if airborne, may pose human health risks. The degree of risk is  
8 related to the nature of human activity, in conjunction with proximity, frequency, and duration  
9 of exposure to airborne asbestos. In addition, sampling has confirmed that nickel, manganese,  
10 cobalt, chromium, and magnesium are found in the water of Swift Creek at levels above  
11 concentrations typically found in Washington State.

12 K. The EPA, Ecology, Whatcom County, and the Whatcom County Flood Control  
13 Zone District have been working together and with other agencies to address the risk presented  
14 by the dredged material along Swift Creek, the shortage of storage capacity for dredged  
15 material along Swift Creek, the cost of safe management of dredged material, and the  
16 increasing risk of flooding and avulsion in the absence of active management.

17 L. Based on current information, NOA-bearing sediment originating from the  
18 Sumas Mountain landslide will, if not intercepted, continue to accumulate within and along  
19 Swift Creek and Sumas River. This continued accumulation will greatly increase the chance  
20 for flooding and deposition of sediment on the floodplain, and avulsion of the stream and  
21 consequent deposition of sediment beyond the current flood plain, with attendant risks to  
22 human health and the environment.

23 M. Active management and containment of the sediment will significantly reduce  
24 or prevent downstream transport, aggradation of the waterways, flooding, risk of avulsion, and  
25 deposition of Sumas Mountain sediment where people may be exposed to asbestos.  
26

1 N. Sampling conducted in October 1990 by Landau Associates, on behalf of the  
2 Whatcom County Engineering Department, found 1 to 3 percent chrysotile asbestos in  
3 sediment along the bed and banks of Swift Creek. Landau concluded human exposure during  
4 excavation, transportation, and placement of the sediment may cause health problems. The  
5 consultant recommended taking certain precautions during these activities to minimize  
6 exposures.

7 O. Sampling conducted in September 1990 by the then Northwest Air Pollution  
8 Authority (now Northwest Clean Air Agency) found less than 1 percent chrysotile asbestos in  
9 sediment deposited by Swift Creek in a 1975 flood event. Air samples taken during simulated  
10 agricultural field operations concluded the air concentrations measured were below  
11 concentrations that would trigger concern for workers' health.

12 P. Sampling conducted in 1995 by Whatcom County found less than 1 percent  
13 chrysotile asbestos in bulk sediment samples. It was concluded asbestos concentrations were  
14 below the regulatory level used at that time by agencies with jurisdiction over worker health  
15 safety. However, the U.S. Army Corps of Engineers, in the Section 404 permit issued for  
16 dredging of Swift Creek that same year, required that excavated material remain as a "berm  
17 reinforcement" and not be re-used or placed anywhere other than the backsides of existing  
18 berms.

19 Q. The issue of off-site sediment disposal was revisited in the 1998 Section 404  
20 permit process. In that process, the U.S. Army Corps of Engineers agreed to remove the  
21 restriction on off-site disposal of dredge spoils as long as clearance was obtained from the  
22 Whatcom County Health Department. On November 4, 1997, the Whatcom County Health  
23 Department chose not to regulate off-site use of dredge material as fill material, noting that the  
24 material was below the regulatory threshold of 1 percent asbestos by weight and there were  
25 thus no restrictions on its use.  
26

1 R. In March 2006, the Washington State Department of Health published a health  
2 consultation report on Swift Creek. As part of this effort, the Whatcom County Health  
3 Department sampled the fine sediment in Swift Creek and found 12 to 24 percent chrysotile  
4 asbestos with trace levels of amphibole asbestos. The sampling protocol involved sampling  
5 directly from patches of fine sediment that appeared likely to contain asbestos and did not  
6 involve sampling from grossly mixed deposits of sediment such as contained in the stockpiled  
7 material along the banks of the creek. The State Department of Health concluded that an  
8 indeterminate public health hazard exists from potential exposure to asbestos in Swift Creek  
9 sediments. It recommended that additional characterization be conducted of Swift Creek  
10 sediments, and a downstream portion of the Sumas River sediments and surface water, to  
11 determine health risks. It also recommended that removal of the sediment continue to be  
12 discouraged until adequate characterization had been completed.

13 S. In August 2006, the U.S. Environmental Protection Agency conducted bulk  
14 sampling of sediment and activity-based air sampling at Swift Creek during simulated loading  
15 and hauling of sediment, raking and spreading of sediment, and recreational activities. It found  
16 bulk sediment concentrations ranged from 0.1 to 4.4 percent asbestos, with an average  
17 concentration of 1.7 percent asbestos. The predominant form of asbestos was chrysotile with a  
18 small number of amphibole fibers. The EPA also found elevated levels of asbestos exposure  
19 during the simulated activities. It concluded that activities that cause airborne asbestos to be  
20 released from disturbed dredged material may lead to an increased level of long-term health  
21 risk and that the dredged material should no longer be removed from the Site. No public  
22 agency has removed dredged materials from the Site following that study.

23 T. In February 2008, neither the Washington State Department of Health nor the  
24 United States Agency for Toxic Substances and Disease Registry found evidence of elevated  
25 asbestos-related disease rates in the community near Swift Creek as compared to Whatcom  
26 County or the state of Washington as a whole.

1 U. Based on records kept by Great Western Lumber Company, between 1994 and  
2 2004 the Company removed a total of 91,105 cubic yards of sediment from a portion of Swift  
3 Creek located on property owned by the Millman Family LLC, which is in the transitional area  
4 between Sumas Mountain and the valley below. Additional removals of unknown quantities of  
5 sediment from Swift Creek occurred between 2005 and 2007, with the removals ceasing in  
6 2007. Some of this sediment remains stockpiled on property in the transitional area currently  
7 owned by the Millman Family LLC. Other sediment was used as foundational material at the  
8 Great Western Lumber Company log yard.

9 V. The transitional area between Sumas Mountain and the valley below, currently  
10 owned by the Millman Family LLC, is identified in the Swift Creek Action Plan as the location  
11 of the principal engineering controls described in the Plan, including sediment traps,  
12 sedimentation ponds, and setback levees within and adjacent to Swift Creek and one or more  
13 repositories for NOA-bearing material.

14 W. Numerous additional studies have been performed by federal, state, and local  
15 government agencies to date to document current site conditions and to evaluate alternatives  
16 for controlling the NOA-bearing material transported down Swift Creek. These studies have  
17 been incorporated by reference into the Swift Creek Action Plan in order to fulfill Remedial  
18 Investigation/Feasibility Study (RI/FS) requirements under WAC 173-340-350(6).

19 X. The contaminants of concern at the Site that exceed or may exceed MTCA  
20 cleanup levels are: (1) ambient air: asbestos; (2) groundwater: asbestos, chromium, and nickel;  
21 (3) surface water: asbestos, chromium, nickel; and (4) soil/dry sediment: asbestos, chromium,  
22 cobalt, and nickel. Creekbed sediment concentrations of trivalent chromium and nickel are  
23 present at naturally occurring concentrations and are not considered to be part of a “release”  
24 under MTCA. Ecology has assigned the Site an overall priority ranking of “3” pursuant to  
25 MTCA, on a scale of 1 to 5 with “1” being the highest priority.  
26

1 **VI. WORK TO BE PERFORMED**

2 This Decree contains a program designed to protect human health and the environment  
3 from the known release, or threatened release, of hazardous substances or contaminants at, on,  
4 or from the Site.

5 Except where necessary to abate an emergency situation, the Defendants shall not  
6 perform any remedial actions at the Site outside of those remedial actions required by this  
7 Decree, unless Ecology concurs, in writing, with such additional remedial actions pursuant to  
8 Section XVI (Amendment of Decree). All work conducted under this Decree shall be  
9 undertaken in accordance with WAC 173-340 unless otherwise provided herein.

10 **Obligations Unique to Millman entities:**

11 A. The Millman entities shall:

12 1. Within one hundred eighty (180) days of the effective date of this  
13 Decree, transfer to the Whatcom County Flood Control District title to the following  
14 247.75 acres of property, subject to the terms of paragraph 2 below: Whatcom County  
15 Tax Parcels 400434200165 and 400434290240 (which, after a lot line adjustment, will  
16 include a 10-acre portion currently within Parcel 400435133334).

17 2. Any compensation paid by the County to the Millman Family LLC for  
18 acquisition of the property identified in Section VI.A.1 shall be a matter of negotiation  
19 between the County and the Millman Family LLC outside the terms of this Decree;  
20 provided, that the purchase price of the property shall be reduced by \$50,000, with no  
21 off-setting adjustments made in the compensation paid for the property or the valuation  
22 of any appurtenant interests (e.g., timber value) to offset the \$50,000 reduction. This  
23 reduction is to compensate for remedial action costs incurred by Ecology in sampling  
24 and, if necessary, installing additional cover material at the Great Western Lumber  
25 Company log yard. These remedial action costs are funded from the same appropriation  
26 source used to acquire the property.

1           3.       Provide access and, in Great Western Lumber Company’s discretion, an  
2       escort, for Ecology and any Ecology-authorized representative to, at reasonable times  
3       coordinated with the Great Western Lumber Company, enter and freely move about the  
4       Great Western Lumber Company log yard for the purposes of sampling and, if  
5       necessary, installing additional cover material at the log yard. All personnel entering  
6       the log yard will be required to abide by reasonable directions from Great Western  
7       Lumber Company with regard to health and safety.

8           4.       In the event sampling confirms the presence of NOA-bearing sediment  
9       in the Great Western Lumber Company log yard, Ecology will, in consultation with the  
10      Millman entities, prepare an Environmental (Restrictive) Covenant consistent with  
11      WAC 173-340-440, RCW 64.70, and any policies or procedures specified by Ecology  
12      restricting future activities and uses of the Great Western Lumber Company log yard as  
13      agreed to by Ecology and the Millman entities. The Millman entities shall, within thirty  
14      (30) days of approval by Ecology, record the Environmental (Restrictive) Covenant  
15      with the office of the Whatcom County Auditor. The Millman entities shall provide  
16      Ecology with the original recorded Environmental (Restrictive) Covenants within thirty  
17      (30) days of the recording date.

18          5.       Once the obligations in Sections VI.A.1 and VI.A.3, and VI.A.4 have  
19      been satisfied, the Millman entities shall, upon motion to the Court, be dismissed from  
20      this Decree with no further affirmative obligations under the Decree. Upon such  
21      dismissal, the following sections of the Decree shall survive and remain as enforceable  
22      obligations between the Millman entities and Ecology: Section XIX (Covenant Not to  
23      Sue); Section XX (Contribution Protection); and Section XXIV (Claims Against the  
24      State).

1 **Obligations Unique to the County:**

2 B. The County shall:

3 1. For each calendar year, budget and provide funding at a level sufficient  
4 to facilitate the County's scope of operations and maintenance activities for that period  
5 as required under Section VI.B.3 of this Decree; provided that this obligation shall be  
6 capped at a maximum level of \$300,000 per year as measured in 2018 dollars, adjusted  
7 annually for inflation to maintain a level equivalent to \$300,000 as measured in 2018  
8 dollars. The annual adjustment for inflation shall reflect the percentage difference in  
9 dollar amounts between annums as measured by the Consumer Price Index for urban  
10 wage earners in the Seattle, Washington area, as compiled by the Bureau of Labor  
11 Statistics, United States Department of Labor. Nothing herein shall prevent the County  
12 from funding related projects at an amount greater than the maximum level required by  
13 this Decree. Further, nothing herein shall prevent the Parties from, on a year-to-year  
14 basis, agreeing to adjust the maximum level required by this Decree to take into  
15 account special or varying circumstances that may require a greater or lesser operations  
16 and maintenance commitment in a given year. Such adjustments will, if made, be made  
17 in conjunction with annual work plan approval pursuant to Section VI.C. Such  
18 adjustments will also, if made, be made so that during the initial phase of this Decree  
19 under Section VII, the County's total expenditure required under this paragraph be  
20 equivalent to the County's maximum expenditure required without such adjustments.

21 2. Implement the program of actions generally described in the Swift Creek  
22 Action Plan issued by Ecology and attached hereto as Exhibit B to this Decree, as  
23 specified in the schedule and terms of the Scope of Work and Schedule (as amended by  
24 annual work plans), attached hereto as Exhibit C, and all other requirements of this  
25 Decree. These actions may include, but not necessarily be limited to, the following  
26 activities, as further specified in such work plans:



1 i. Abating and controlling NOA-bearing material that has  
2 previously been accumulated in sediment piles for stabilization, including  
3 removal of all or part of the material and stabilization and capping of the  
4 remaining material;

5 ii. Constructing and operating a series of sediment traps,  
6 sedimentation ponds, and setback levees within and adjacent to Swift Creek to  
7 capture and contain NOA-bearing material transported from the Sumas  
8 Mountain landslide;

9 iii. Managing material accumulated in traps and sedimentation  
10 ponds through periodic removal to a repository;

11 iv. Constructing, operating, and maintaining one or more  
12 repositories for NOA-bearing material dredged from sediment traps and  
13 sedimentation ponds, as well as NOA-bearing material consolidated from other  
14 locations, including conducting regular inspections and repairs as needed;

15 v. Through institutional controls, regular inspections, and potential  
16 acquisition of property and/or easements, controlling the future use of and  
17 access to property at which NOA-bearing material is being managed and  
18 controlled, including property containing previously accumulated sediment piles  
19 and property containing sediment traps, sedimentation ponds, and any  
20 repositories for NOA-bearing material created under this Decree;

21 vi. Conducting air, surface water, groundwater, and sediment quality  
22 monitoring; and

23 vii. Conducting dredging and levee repairs within the Swift  
24 Creek/Sumas River watershed.

25 3. Develop annual work plans, to be approved by Ecology. Such annual  
26 work plans shall be submitted to Ecology for approval by November 1 of each calendar

1 year, beginning in the year 2019 for work in the calendar year 2020, detailing the work  
2 to be performed and schedule for the next calendar year and providing a non-  
3 enforceable projection of work to be conducted in the ensuing two (2) calendar years  
4 beyond the next calendar year. Such annual work plans will, upon approval, be  
5 incorporated into the Scope of Work and Schedule, Exhibit C, without the need for  
6 additional public notice and comment under RCW 70.105D and WAC 173-340-  
7 600(10)(e), unless the plans represent a substantial change from the program of actions  
8 described in the Swift Creek Action Plan, Exhibit B.

9 C. Process for Ecology approval: Ecology will review and, as appropriate, approve  
10 work plans and other deliverables under this Decree in consultation with the County. This  
11 consultation may occur in the context of an inter-governmental “Working Group” comprised of  
12 Ecology, the County, and potentially federal officials. As used in this Decree, “approve” or  
13 “approval” means to approve as presented, approve subject to certain Ecology-specified  
14 conditions, or reject as inadequate. The use of the term “approve” does not obligate Ecology to  
15 approve a submittal. If Ecology rejects a document, or approves a document subject to certain  
16 Ecology-specified conditions, Ecology will provide the reasons for such rejection or such  
17 conditions. Ecology and the County will then establish a mutually agreed upon date for the  
18 County’s re-submittal of the document, generally not to exceed forty-five (45) days after the  
19 County’s receipt of Ecology’s comments. An Ecology decision to reject a document or approve  
20 a document subject to certain Ecology-specified conditions is subject to dispute resolution  
21 under the terms of Section XV. Once approved by Ecology, all plans or other deliverables  
22 submitted by the County for Ecology’s review and approval, and any conditions to Ecology’s  
23 approval, shall become integral and enforceable parts of this Decree.

24 D. The County’s implementation of the actions described in Section VI.B is  
25 contingent in whole or in part on the actions of outside entities over which the County has no  
26 control, including:

1           1.       The availability of capital funding appropriated by the Washington State  
2       Legislature, through Ecology;

3           2.       The transfer to the County of real property or interests in real property  
4       upon which the actions described in Section VI.B.2 above are intended to occur;  
5       and

6           3.       Certain other actions taken by the EPA and Ecology.

7       In the event such funding from and/or other actions taken by these entities are  
8       insufficient to support all or part of the County's performance under this section, the County  
9       shall have the basis to assert good cause under Section XVII.D of this Decree for its failure to  
10      perform such work; provided: (a) that good cause does not exist if the County can nevertheless  
11      meet the performance obligation by responding with reasonable diligence using available  
12      funds, with efficient management practices being an appropriate consideration in determining  
13      whether such reasonable diligence has been exercised; and (b) that notwithstanding any other  
14      provisions of this Decree, good cause shall conclusively be established if the contingent actions  
15      described in Sections VI.B.1 or VI.B.2 do not occur and preclude a performance obligation  
16      dependent on such action.

17       E.       Closure and Post-Closure Plan: Within one hundred twenty (120) days of  
18      Ecology's approval of the final design of the sediment traps and debris flow levee submitted in  
19      accordance with Exhibit C, the County shall submit to Ecology for review and approval a  
20      Closure and Post-Closure Plan for the closing of, and as applicable, providing for the post-  
21      closure care of, those engineering controls. Within one hundred twenty (120) days of  
22      Ecology's approval of the final design for any other constructed engineering controls,  
23      repositories, and other appurtenances to be used by the County in the management of NOA-  
24      bearing material, regardless of whether they are located on property owned by the County, the  
25      County shall amend the Plan to include the additional controls, repositories, or other  
26      appurtenances and submit the amended Plan to Ecology for review and approval. The Plan

1 shall address the elements and conform to the requirements specified in “Closure and Post-  
2 Closure Plan Contents and Performance Standards” attached as Exhibit D to this Decree. The  
3 Plan need not address, and shall not apply to, any scope of closure necessitated by a massive  
4 movement or release of sediment from the Sumas Mountain landslide that precludes  
5 performance in whole or in part under this Decree. Except as indicated in the foregoing  
6 sentence, the County shall implement the Plan upon termination of the program of actions  
7 under this Decree as provided for in Section VII.A, upon the cessation of active management  
8 activity involving NOA-bearing material in the Scope of Work and Schedule (as amended by  
9 annual work plans) operative under Section VI.B, and/or as otherwise specified in Exhibit D  
10 and the approved Plan.

11 F. Cost Estimate: Concurrent with the submittal of the Closure and Post-Closure  
12 Plan pursuant to Section VI.E, the County shall submit to Ecology for review and approval an  
13 estimate of the costs in carrying out the actions specified in that Plan.

14 The County shall annually, within thirty (30) days of the anniversary of the submittal of  
15 the initial cost estimate, or alternative date agreed to by Ecology, provide Ecology’s project  
16 coordinator with documentation of the updated financial assurance for the factors listed below.

- 17 1. Inflation;
- 18 2. Changes in the scope of the operation and maintenance as capital  
19 construction funding is secured and facilities built.

20 G. Within sixty (60) days after Ecology approves the cost estimate provided  
21 pursuant to Section VI.F, provide to Ecology proof of financial assurance through one of the  
22 financial assurance mechanisms specified in WAC 173-351-600(5). The County shall  
23 thereafter, no later than the anniversary date established under Section VI.F, adjust its financial  
24 assurance coverage and provide Ecology with documentation of the updated financial  
25 assurance in conjunction with any change in estimate under Section VI.F. Nothing herein shall  
26 prevent the County from seeking grant funding from Ecology to assist in whole or in part with

1 the cost of carrying out any actions for which financial assurance is required (i.e, closure and  
2 post-closure activities), nor preclude support for such costs through funding appropriated by  
3 the Washington State Legislature.

4 H. Land Use Restrictions: The County, in consultation with Ecology, will prepare  
5 Environmental (Restrictive) Covenant(s) consistent with WAC 173-340-440 and RCW 64.70  
6 for all properties owned or otherwise controlled by the County on which NOA-bearing  
7 material is stored, disposed of, or otherwise managed, in accordance with the schedule in  
8 Exhibit C. The County shall record the Environmental (Restrictive) Covenant(s) with the office  
9 of the Whatcom County Auditor within ten (10) days of receiving approval of the  
10 Environmental (Restrictive) Covenant by Ecology. The Environmental (Restrictive)  
11 Covenant(s) shall restrict future activities and uses of the subject properties as necessary to  
12 protect human health and the environment, as agreed to by Ecology. The County shall provide  
13 Ecology with the original recorded Environmental (Restrictive) Covenant(s) within thirty (30)  
14 days of the recording date and provide a copy to the County. Within 30 days of notification to  
15 Ecology of the completion of closure activities, the County shall replace or amend the  
16 Environmental (Restrictive) Covenant(s) in accordance with the Closure and Post-Closure Plan  
17 approved under Section VI.E.

18 I. The County shall provide a copy of this Decree to all agents, contractors, and  
19 subcontractors retained to perform work required by this Decree, and shall ensure that all work  
20 undertaken by such agents, contractors, and subcontractors complies with this Decree.

## 21 VII. DURATION OF DECREE

22 This Decree shall have an indefinite term from the date of entry of this Decree, subject  
23 to the following conditions.

### 24 A. Extension of the Decree

25 No later than nine (9) years from the date of entry of this Decree, the Parties shall meet  
26 and confer in good faith as to whether to extend the program of actions described in

1 Section VI. No later than ten (10) years from the date of entry of this Decree, the Parties shall  
2 determine whether, at the end of an initial phase of fifteen (15) years, to (a) extend the program  
3 of actions described in Section VI in whole or in part, including the option of operating solely  
4 to maintain a minimum level of safety at the Site; or (b) terminate the program of actions  
5 described in Section VI above and implement the Closure and Post-Closure Plan as described  
6 in Section VI.E.

7 If the Parties elect to extend the program of actions in whole or in part, the Parties shall  
8 move to amend this Decree pursuant to Section XVI to provide the terms of such extension.

9 B. Obligations Upon Dismissal of Decree

10 If for any reason this Decree is dismissed, then upon dismissal, the following sections of  
11 this Decree shall survive and remain as enforceable obligations between the County and  
12 Ecology: Sections VI.E (closure/post-closure care), VI.F (closure/post-closure cost estimate),  
13 VI.G (financial assurance for closure/post-closure), VI.H (land use restrictions), and VI.I (notice  
14 of Decree); Section IX (Performance); Section X (Access); Section XI (Sampling, Data  
15 Submittal, and Availability); Section XIII (Retention of Records); Section XIV (Transfer of  
16 Interest in Property); Section XVIII (Endangerment) with respect to activities undertaken while  
17 the Decree was in force; Section XIX (Covenant Not to Sue); Section XX (Contribution  
18 Protection); Section XXI (Indemnification); Section XXII (Compliance with Applicable Laws);  
19 and Section XXIV (Claims Against the State). For the purposes of carrying out these obligations  
20 after dismissal, the Parties' respective designated project managers will be those persons  
21 designated in Section VIII of this Decree; provided, that the identity of these designated persons  
22 may change, in which case notice of the change shall be given to the other party.

23 **VIII. DESIGNATED PROJECT COORDINATORS**

24 The project coordinator for Ecology is:  
25  
26

1 Cris Matthews  
2 Toxics Cleanup Program  
3 Washington State Department of Ecology  
4 913 Squalicum Way, Suite 101  
5 Bellingham, WA 98225  
6 Phone: 360-255-4379  
7 Email: cris.matthews@ecy.wa.gov

8 The project coordinator for the County is:

9 Roland Middleton  
10 Special Projects Coordinator  
11 Whatcom County Public Works Department  
12 332 North Commercial Street, Suite 210  
13 Bellingham, WA 98225-4042  
14 Phone: 360-778-6212  
15 Email: RMiddleton@co.whatcom.wa.us

16 The project coordinator for the Millman entities is:

17 Gerry Millman  
18 Great Western Lumber Company  
19 7636 Goodwin Road  
20 Everson, WA 98247  
21 Phone: 360-966-3061  
22 Email:

23 Each project coordinator shall be responsible for overseeing the implementation of this  
24 Decree. Ecology's project coordinator will be Ecology's designated representative for the Site.  
25 To the maximum extent possible, communications between Ecology and the County and all  
26 documents, including reports, approvals, and other correspondence concerning the activities  
performed pursuant to the terms and conditions of this Decree shall be directed through the  
project coordinators. The project coordinators may designate, in writing, working level staff  
contacts for all or portions of the implementation of the work to be performed required by this  
Decree.

Any party may change its respective project coordinator. Written notification shall be  
given to the other party at least ten (10) calendar days prior to the change.

1 **IX. PERFORMANCE**

2 All geologic and hydrogeologic work performed pursuant to this Decree shall be under  
3 the supervision and direction of a geologist or hydrogeologist licensed by the State of  
4 Washington or under the direct supervision of an engineer registered by the State of  
5 Washington, except as otherwise provided for by RCW 18.220 and 18.43.

6 All engineering work performed pursuant to this Decree shall be under the direct  
7 supervision of a professional engineer registered by the State of Washington, except as  
8 otherwise provided for by RCW 18.43.130.

9 All construction work performed pursuant to this Decree shall be under the direct  
10 supervision of a professional engineer or a qualified technician under the direct supervision of  
11 a professional engineer. The professional engineer must be registered by the State of  
12 Washington, except as otherwise provided for by RCW 18.43.130.

13 Any documents submitted containing geologic, hydrologic, or engineering work shall  
14 be under the seal of an appropriately licensed professional as required by RCW 18.220 and  
15 18.43.

16 The County shall notify Ecology in writing of the identity of any engineer(s) and  
17 geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms  
18 of this Decree, in advance of their involvement at the Site.

19 **X. ACCESS**

20 Ecology and any Ecology-authorized representative shall have access to enter and  
21 freely move about all property at the Site that the County either owns, controls, or has access  
22 rights to, at all reasonable times for the purposes of, *inter alia*: inspecting records, operation  
23 logs, and contracts related to the work being performed pursuant to this Decree; reviewing the  
24 County's progress in carrying out the terms of this Decree; conducting such tests or collecting  
25 such samples as Ecology may deem necessary; using a camera, sound recording, or other  
26 documentary-type equipment to record work done pursuant to this Decree; and verifying the



1 data submitted to Ecology by the County. The County shall make all reasonable efforts to  
2 secure access rights for those properties within the Site not owned or controlled by the County  
3 where remedial activities or investigations will be performed pursuant to this Decree. Ecology  
4 and any Ecology authorized representative shall give reasonable notice before entering any Site  
5 property owned or controlled by the County unless an emergency prevents such notice. All  
6 Parties who access the Site pursuant to this section shall comply with any applicable health and  
7 safety plan(s). Ecology and its representatives shall not be required to sign any liability release  
8 or waiver as a condition of Site property access.

9 **XI. SAMPLING, DATA SUBMITTAL, AND AVAILABILITY**

10 With respect to the implementation of this Decree, the County shall make the results of  
11 all sampling, laboratory reports, and/or test results generated by it or on its behalf available to  
12 Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in  
13 both printed and electronic formats in accordance with Section XII (Progress Reports),  
14 Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any  
15 subsequent procedures specified by Ecology for data submittal.

16 If requested by Ecology, the County shall allow Ecology and/or its authorized  
17 representatives to take split or duplicate samples of any samples collected by the County  
18 pursuant to the implementation of this Decree. The County shall notify Ecology seven (7) days  
19 in advance of any sample collection or work activity at the Site. Without limitation on  
20 Ecology's rights under Section X (Access), Ecology shall notify the County prior to any  
21 sample collection activity unless an emergency prevents such notice. Ecology shall, upon  
22 request, allow the County and/or its authorized representative(s) to take split or duplicate  
23 samples of any samples collected by Ecology pursuant to the implementation of this Decree,  
24 provided that doing so does not interfere with Ecology's sampling.

1 In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be  
2 conducted by a laboratory accredited under WAC 173-50 for the specific analyses to be  
3 conducted, unless otherwise approved by Ecology.

4 To the extent that, independent of this Decree, the County undertakes any sampling  
5 activity related to the Sumas Mountain landslide or NOA-bearing material generated from the  
6 Sumas Mountain landslide, the County shall follow the provisions of this section.

## 7 XII. PROGRESS REPORTS

8 The County shall submit to Ecology written Progress Reports on a quarterly basis, or  
9 on such other schedule as may be designated as part of the annual work program required  
10 under Section VI.B.2 of this Decree, that describe the actions taken during the previous  
11 reporting period to implement the requirements of this Decree. The Progress Reports shall  
12 include the following:

13 A. A list of on-site activities that have taken place during the reporting period;

14 B. Detailed description of any deviations from required tasks not otherwise  
15 documented in project plans or amendment requests;

16 C. Description of all deviations from the Scope of Work and Schedule (Exhibit C)  
17 during the current reporting period and any planned deviations in the upcoming reporting  
18 period;

19 D. For any deviations in schedule, a plan for recovering lost time and maintaining  
20 compliance with the schedule;

21 E. All raw data (including laboratory analyses) received by the County during the  
22 past reporting period and an identification of the source of the sample; and

23 F. A list of deliverables for the upcoming reporting period if different from the  
24 schedule.

25 All Progress Reports shall be submitted by the tenth (10th) day of the reporting period  
26 in which they are due after the effective date of this Decree. Unless otherwise specified,

1 Progress Reports and any other documents submitted pursuant to this Decree shall be sent by  
2 certified mail, return receipt requested to Ecology's project coordinator.

### 3 **XIII. RETENTION OF RECORDS**

4 During the pendency of this Decree, and for ten (10) years from the date this Decree is  
5 no longer in effect as provided in Section VII (Duration of Decree), the County shall preserve  
6 all records, reports, documents, and underlying data in its possession relevant to the  
7 implementation of this Decree and shall insert a similar record retention requirement into all  
8 contracts with project contractors and subcontractors. Upon request of Ecology, the County  
9 shall make all records available to Ecology and allow access for review within a reasonable  
10 time.

11 Nothing in this Decree is intended by the County to waive any right they may have  
12 under applicable law to limit disclosure of documents protected by the attorney work-product  
13 privilege and/or the attorney-client privilege. If the County withholds any requested records  
14 based on an assertion of privilege, the County shall provide Ecology with a privilege log  
15 specifying the records withheld and the applicable privilege. No Site-related data collected  
16 pursuant to this Decree shall be considered privileged.

### 17 **XIV. TRANSFER OF INTEREST IN PROPERTY**

18 No voluntary conveyance or relinquishment of title, easement, leasehold, or other  
19 interest in any portion of the Site shall be consummated by the County without the prior  
20 permission of the Court, which shall be obtained upon motion. In no case may any voluntary  
21 conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of  
22 the Site be consummated by the County without provision for continued operation and  
23 maintenance of any containment system, treatment system, and/or monitoring system installed  
24 or implemented pursuant to this Decree.

25 Prior to the County's voluntary transfer of any interest in all or any portion of the Site,  
26 and during the effective period of this Decree, the County shall provide a copy of this Decree

1 to any prospective purchaser, lessee, transferee, assignee, or other successor in said interest;  
2 and, at least thirty (30) days prior to any transfer, the County shall notify Ecology of said  
3 transfer. Upon transfer of any interest, the County shall notify all transferees of the restrictions  
4 on the activities and uses of the property under this Decree and incorporate any such use  
5 restrictions into the transfer documents.

## 6 **XV. RESOLUTION OF DISPUTES**

7 A. In the event a dispute arises between the County and Ecology as to an approval,  
8 disapproval, proposed change, or other decision or action by Ecology's project coordinator  
9 related to the obligations under Section VI of this Decree, the County and Ecology shall utilize  
10 the dispute resolution procedure set forth below.

11 1. Upon receipt of Ecology's project coordinator's written decision, the  
12 County has fourteen (14) days within which to notify Ecology's project coordinator in  
13 writing of its objection to the decision.

14 2. The project coordinators for the County and Ecology shall then confer in  
15 an effort to resolve the dispute. If the project coordinators cannot resolve the dispute  
16 within fourteen (14) days, Ecology's project coordinator shall issue a written decision.

17 3. The County may then request regional management review of the  
18 decision. This request shall be submitted in writing to the Northwest Region Toxics  
19 Cleanup Program Section Manager within seven (7) days of receipt of Ecology's  
20 project coordinator's written decision.

21 4. Ecology's Regional Section Manager shall conduct a review of the  
22 dispute and shall endeavor to issue a written decision regarding the dispute within  
23 thirty (30) days of the County's request for review.

24 5. If the County finds Ecology's Regional Section Manager's decision  
25 unacceptable, the County may then request final management review of the decision.  
26

1 This request shall be submitted in writing to the Toxics Cleanup Program Manager  
2 within seven (7) days of receipt of the Regional Section Manager's decision.

3 6. Ecology's Toxics Cleanup Program Manager shall conduct a review of  
4 the dispute and shall endeavor to issue a written decision regarding the dispute within  
5 thirty (30) days of the County's request for review of the Regional Section Manager's  
6 decision. The Toxics Cleanup Program Manager's decision shall be Ecology's final  
7 decision on the disputed matter.

8 B. If Ecology's final written decision is unacceptable to the County, the County  
9 has the right to submit the dispute to the Court for resolution. The County and Ecology agree  
10 that one judge should retain jurisdiction over this case and shall, as necessary, resolve any  
11 dispute arising under this Decree. In the event the County presents an issue to the Court for  
12 review, the Court shall, pursuant to RCW 70.105D.060, review any remedial decision by  
13 Ecology on the basis of whether such action or decision was arbitrary and capricious and  
14 render a decision based on such standard of review. The Court shall review any other decision  
15 by Ecology in accordance with applicable provisions of law.

16 C. The County and Ecology agree to only utilize the dispute resolution process in  
17 good faith and agree to expedite, to the extent possible, the dispute resolution process  
18 whenever it is used. Where either party utilizes the dispute resolution process in bad faith or  
19 for purposes of delay, the other party may seek sanctions.

20 D. Implementation of these dispute resolution procedures shall not provide a basis  
21 for delay of any activities required in this Decree, unless Ecology agrees in writing to a  
22 schedule extension or the Court so orders.

## 23 **XVI. AMENDMENT OF DECREE**

24 The project coordinators may agree to minor changes to the work to be performed by  
25 the County without formally amending this Decree. Minor changes will be documented in  
26 writing by Ecology.

1 Substantial changes to the work to be performed shall require formal amendment of this  
2 Decree. This Decree may only be formally amended by a written stipulation among the Parties  
3 that is entered by the Court, or by order of the Court. Any amendment shall become effective  
4 upon entry by the Court. Agreement to amend the Decree shall not be unreasonably withheld  
5 by any party.

6 The County shall submit written requests for amendment to Ecology for approval.  
7 Ecology shall indicate its approval or disapproval in writing and in a timely manner after the  
8 written request for amendment is received. If the amendment to the Decree is a substantial  
9 change, Ecology will provide public notice and opportunity for comment. Reasons for the  
10 disapproval of a proposed amendment to the Decree shall be stated in writing. If Ecology does  
11 not agree to a proposed amendment, the disagreement may be addressed through the dispute  
12 resolution procedures described in Section XV (Resolution of Disputes).

### 13 **XVII. EXTENSION OF SCHEDULE**

14 A. An extension of schedule shall be granted only when a request for an extension  
15 is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the  
16 deadline for which the extension is requested, and good cause exists for granting the extension.  
17 All extensions shall be requested in writing. The request shall specify:

- 18 1. The deadline that is sought to be extended;
- 19 2. The length of the extension sought;
- 20 3. The reason(s) for the extension; and
- 21 4. Any related deadline or schedule that would be affected if the extension  
22 were granted.

23 B. Ecology shall act upon any written request for extension in a timely fashion.  
24 Ecology shall give the County written notification of any extensions granted pursuant to this  
25 Decree. A requested extension shall not be effective until approved by Ecology or, if required,  
26 by the Court. Unless the extension is a substantial change, it shall not be necessary to amend

1 this Decree pursuant to Section XVI (Amendment of Decree) when a schedule extension is  
2 granted.

3 C. An extension shall only be granted for such period of time as Ecology  
4 determines is reasonable under the circumstances. Ecology may grant schedule extensions  
5 exceeding ninety (90) days only as a result of:

6 1. Delays in the issuance of a necessary permit, which was applied for in a  
7 timely manner;

8 2. Other circumstances deemed exceptional or extraordinary by  
9 Ecology; or

10 3. Endangerment as described in Section XVIII (Endangerment).

11 D. The burden shall be on the County to demonstrate to the satisfaction of Ecology  
12 that the request for such extension has been submitted in a timely fashion and that good cause  
13 exists for granting the extension. Good cause may include, but may not be limited to:

14 1. The reasons stated in Sections VI.D.1–VI.D.3;

15 2. Circumstances beyond the reasonable control and despite the due  
16 diligence of the County, including delays caused by unrelated third parties or Ecology,  
17 such as (but not limited to) delays by Ecology in reviewing, approving, or modifying  
18 documents;

19 3. A massive movement or release of sediment from the Sumas Mountain  
20 landslide that precludes performance in whole or in part under this Decree;

21 4. Other acts of God, including fire, flood, blizzard, extreme temperatures,  
22 storm, or other unavoidable casualty; or

23 5. Endangerment as described in Section XVIII (Endangerment).

## 24 XVIII. ENDANGERMENT

25 In the event Ecology determines that any activity being performed at the Site under this  
26 Decree is creating or has the potential to create a danger to human health or the environment,

1 Ecology may direct the County to cease such activities for such period of time as it deems  
2 necessary to abate the danger. The County shall immediately comply with such direction.

3 In the event the County determines that any activity being performed at the Site under  
4 this Decree is creating or has the potential to create a danger to human health or the  
5 environment, the County may cease such activities. The County shall notify Ecology's project  
6 coordinator as soon as possible, but no later than twenty-four (24) hours after making such  
7 determination or ceasing such activities. Upon Ecology's direction, the County shall provide  
8 Ecology with documentation of the basis for the determination or cessation of such activities.  
9 If Ecology disagrees with the County's cessation of activities, it may direct the County to  
10 resume such activities.

11 If Ecology concurs with or orders a work stoppage pursuant to this section, the  
12 County's obligations with respect to the ceased activities shall be suspended until Ecology  
13 determines the danger is abated, and the time for performance of such activities, as well as the  
14 time for any other work dependent upon such activities, shall be extended, in accordance with  
15 Section XVII (Extension of Schedule), for such period of time as Ecology determines is  
16 reasonable under the circumstances.

17 Nothing in this Decree shall limit the authority of Ecology, its employees, agents, or  
18 contractors to take or require appropriate action in the event of an emergency.

### 19 **XIX. COVENANT NOT TO SUE**

20 A. Covenant Not to Sue: In consideration of the Defendants' compliance with the  
21 terms and conditions of this Decree, Ecology covenants not to institute legal or administrative  
22 actions against the Defendants regarding the release or threatened release of hazardous  
23 substances covered by this Decree.

24 This Covenant covers only the locations within the Site where, under the terms of this  
25 Decree, NOA-bearing material is managed through actions taken pursuant to this Consent  
26 Decree, including at any approved sediment repositories within or outside the Swift Creek



1 alluvial fan; provided, that with respect to the Millman entities, this Covenant also covers any  
2 NOA-bearing material that is located at the Great Western Lumber Company log yard. This  
3 Covenant does not cover any other hazardous substance or area, including NOA-bearing  
4 material, that may have been deposited beyond these locations, either naturally by flooding, or  
5 by persons for use as fill or for other uses. This Covenant does not cover any future  
6 management of NOA-bearing material beyond the terms of this Decree. Ecology retains all of  
7 its authority relative to any substance or area not covered by this Covenant.

8 This Covenant Not to Sue shall have no applicability whatsoever to:

- 9 1. Criminal liability;
- 10 2. Liability for damages to natural resources; and
- 11 3. Any Ecology action, including cost recovery, against PLPs not a party to  
12 this Decree.

13 If factors not known at the time of entry of this Decree are discovered and present a  
14 previously unknown threat to human health or the environment, the Court shall amend this  
15 Covenant Not to Sue.

16 B. Reopeners Unique to the County: Ecology specifically reserves the right to  
17 institute legal or administrative action against the County to require it to perform additional  
18 remedial actions at the Site and to pursue appropriate cost recovery, pursuant to  
19 RCW 70.105D.050 under the following circumstances:

- 20 1. Upon the County's failure without good cause to meet the requirements  
21 of this Decree, including, but not limited to, failure to implement the program of  
22 actions specified in the Scope of Work and Schedule (as amended by annual work  
23 plans) (Exhibit C);
- 24 2. Upon Ecology's determination that remedial action beyond the terms of  
25 this Decree is necessary to abate an imminent and substantial endangerment to human  
26 health or the environment;

1           3.     Upon the availability of new information regarding factors previously  
2 unknown to Ecology, including the nature, quantity, or migration of hazardous  
3 substances at the Site, and Ecology’s determination, in light of this information, that  
4 further remedial action is necessary at the Site to protect human health or the  
5 environment; or

6           4.     Upon Ecology’s determination that additional remedial actions are  
7 necessary to protect human health or the environment beyond those set forth in the  
8 Swift Creek Action Plan (Exhibit B).

9           C.     Reopeners Unique to Millman entities: Ecology specifically reserves the right to  
10 institute legal or administrative action against the Millman entities upon the Millman entities’  
11 failure without good cause to meet the requirements of Sections VI.A.1 and VI.A.3 of this  
12 Decree. Further, with respect to the Great Western Lumber Company log yard, Ecology  
13 specifically reserves the right to institute legal or administrative action against the Millman  
14 entities under the following circumstances:

15           1.     Upon Ecology’s determination that remedial action beyond the terms of  
16 this Decree is necessary to abate an imminent and substantial endangerment to human  
17 health or the environment;

18           2.     Upon the availability of new information regarding factors previously  
19 unknown to Ecology, including the nature, quantity, or migration of hazardous  
20 substances at the Site, and Ecology’s determination, in light of this information, that  
21 further remedial action is necessary at the Site to protect human health or the  
22 environment; or

23           3.     Upon Ecology’s determination that additional remedial actions are  
24 necessary to protect human health or the environment beyond those set forth in the  
25 Swift Creek Action Plan (Exhibit B).  
26

1 D. Except in the case of an emergency, prior to instituting legal or administrative  
2 action against Defendants pursuant to Sections XIX.B or XIX.C, Ecology shall provide  
3 Defendants with fifteen (15) calendar days notice of such action.

#### 4 **XX. CONTRIBUTION PROTECTION**

5 With regard to claims for contribution against the Defendants, the Parties agree that the  
6 Defendants are entitled to protection against claims for contribution for matters addressed in  
7 this Decree as provided by RCW 70.105D.040(4)(d). "Matters addressed" include all actions  
8 taken pursuant to this Consent Decree, including actions required by the Decree after the  
9 Decree is dismissed.

#### 10 **XXI. INDEMNIFICATION**

11 The County agrees to indemnify and save and hold the State of Washington, its  
12 employees, and agents harmless from any and all claims or causes of action (1) for death or  
13 injuries to persons, or (2) for loss or damage to property to the extent arising from or on  
14 account of acts or omissions of the County, its officers, employees, agents, or contractors in  
15 entering into and implementing this Decree. However, the County shall not indemnify the State  
16 of Washington nor save nor hold its employees and agents harmless from any claims or causes  
17 of action to the extent arising out of the negligent acts or omissions of the State of Washington,  
18 or the employees or agents of the State, in entering into or implementing this Decree.

19 Great Western Lumber Company agrees to indemnify and save and hold the State of  
20 Washington, its employees, and agents harmless from any and all claims or causes of action  
21 (1) for death or injuries to persons or (2) for loss or damage to property, to the extent such  
22 claims arise from or are on account of acts or omissions of Great Western Lumber Company,  
23 its officers, employees, agents, or contractors in implementing Sections VI.A.1, VI.A.3, and  
24 VI.A.4 of this Decree. However, Great Western Lumber Company shall not indemnify the  
25 State of Washington nor save nor hold its employees and agents harmless from any claims or  
26 causes of action to the extent arising out of the negligent acts or omissions of the State of

1 Washington, or the employees or agents of the State, in entering into or implementing this  
2 Decree.

### 3 **XXII. COMPLIANCE WITH APPLICABLE LAWS**

4 A. All actions carried out pursuant to this Decree shall be done in accordance with  
5 all applicable federal, state, and local requirements, including requirements to obtain necessary  
6 permits, except as provided in RCW 70.105D.090. The permits or other federal, state, or local  
7 requirements that the agency has determined are applicable and that are known at the time of  
8 entry of this Decree have been identified in Exhibit E (Permits and Applicable Requirements).

9 B. Pursuant to RCW 70.105D.090(1), the County is exempt from the procedural  
10 requirements of RCW 70.94, 70.95, 70.105, 77.55, 90.48 (as it relates to state-only permits),  
11 and 90.58 and of any laws requiring or authorizing local government permits or approvals.  
12 However, the County shall comply with the substantive requirements of such permits or  
13 approvals. The exempt permits or approvals and the applicable substantive requirements of  
14 those permits or approvals, as they are known at the time of entry of this Decree, have been  
15 identified in Exhibit E.

16 The County has a continuing obligation to determine whether additional permits or  
17 approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial  
18 action under this Decree. In the event either Ecology or the County determines that additional  
19 permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the  
20 remedial action under this Decree, it shall promptly notify the other party of this determination.  
21 Ecology shall determine whether Ecology or the County shall be responsible to contact the  
22 appropriate state and/or local agencies. If Ecology so requires, the County shall promptly  
23 consult with the appropriate state and/or local agencies and provide Ecology with written  
24 documentation from those agencies of the substantive requirements those agencies believe are  
25 applicable to the remedial action. Ecology shall make the final determination on the additional  
26 substantive requirements that must be met by the County and on how the County must meet

1 those requirements. Ecology shall inform the County in writing of these requirements. Once  
2 established by Ecology, the additional requirements shall be enforceable requirements of this  
3 Decree. The County shall not begin or continue the remedial action potentially subject to the  
4 additional requirements until Ecology makes its final determination.

5 C. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the  
6 exemption from complying with the procedural requirements of the laws referenced in  
7 RCW 70.105D.090(1) would result in the loss of approval from a federal agency that is  
8 necessary for the state to administer any federal law, the exemption shall not apply and the  
9 County shall comply with both the procedural and substantive requirements of the laws  
10 referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

### 11 **XXIII. PUBLIC PARTICIPATION**

12 Ecology shall maintain the responsibility for public participation at the Site. However,  
13 the County shall cooperate with Ecology, and shall:

14 A. If agreed to by Ecology, develop appropriate mailing lists, prepare drafts of  
15 public notices and fact sheets at important stages of the remedial action, such as the submission  
16 of work plans and engineering design reports. As appropriate, Ecology will edit, finalize, and  
17 distribute such fact sheets and prepare and distribute public notices of Ecology's presentations  
18 and meetings.

19 B. Notify Ecology's project coordinator prior to the preparation of all press  
20 releases and fact sheets, and before major meetings with the interested public and local  
21 governments. Likewise, Ecology shall notify the County prior to the issuance of all press  
22 releases and fact sheets, and before major meetings with the interested public and local  
23 governments. For all press releases, fact sheets, meetings, and other outreach efforts by the  
24 County that do not receive prior Ecology approval, the County shall clearly indicate to its  
25 audience that the press release, fact sheet, meeting, or other outreach effort was not sponsored  
26 or endorsed by Ecology.

1 C. When requested by Ecology, participate in public presentations on the progress  
2 of the remedial action at the Site. Participation may be through attendance at public meetings  
3 to assist in answering questions, or as a presenter.

4 D. When requested by Ecology, arrange and/or continue information repositories at  
5 the following locations:

- 6 1. Whatcom County Library  
7 104 Kirsch Drive  
8 Everson, WA 98247
- 9 2. Department of Ecology  
10 Bellingham Field Office  
11 913 Squalicum Way, Suite 101  
12 Bellingham, WA 98225

13 At a minimum, copies of all public notices, fact sheets, and documents relating to public  
14 comment periods shall be promptly placed in these repositories. A copy of all documents  
15 related to this Site shall be maintained in the repository at Ecology's Bellingham Field Office  
16 in Bellingham, Washington.

#### 17 **XXIV. CLAIMS AGAINST THE STATE**

18 The Defendants hereby agree that they will not seek to recover any costs incurred in  
19 implementing the remedial action required by this Decree from the State of Washington or any  
20 of its agencies; and further, that Defendants will make no claim against the State Toxics  
21 Control Account or any local Toxics Control Account for any costs incurred in implementing  
22 this Decree. Except as provided above, however, the County expressly reserves its rights to  
23 seek to recover any costs incurred in implementing this Decree from any other PLP. This  
24 section does not limit or address funding that may be provided under WAC 173-322A, other  
25 grant funding through state agencies, or monies provided through the budget appropriation  
26 process of the state Legislature.

#### **XXV. EFFECTIVE DATE**

This Decree is effective upon the date it is entered by the Court.

1 **XXVI. WITHDRAWAL OF CONSENT**

2 If the Court withholds or withdraws its consent to this Decree, it shall be null and void  
3 at the option of any party and the accompanying Complaint shall be dismissed without costs  
4 and without prejudice. In such an event, no party shall be bound by the requirements of this  
5 Decree.

6 STATE OF WASHINGTON  
7 DEPARTMENT OF ECOLOGY

ROBERT W. FERGUSON  
Attorney General

8 \_\_\_\_\_  
9 JAMES J. PENDOWSKI  
10 Program Manager  
11 Toxics Cleanup Program  
12 360-407-7177

\_\_\_\_\_   
ANDREW A. FITZ, WSBA #22169  
Senior Counsel  
360-586-6752

11 Date: \_\_\_\_\_

Date: \_\_\_\_\_

12 WHATCOM COUNTY

WHATCOM COUNTY FLOOD CONTROL  
ZONE DISTRICT

14 \_\_\_\_\_  
15 [NAME OF SIGNATORY]  
16 [Title of signatory]  
17 [Telephone]

\_\_\_\_\_   
[NAME OF SIGNATORY]  
[Title of signatory]  
[Telephone]

17 Date: \_\_\_\_\_

Date: \_\_\_\_\_

18 GREAT WESTERN LUMBER COMPANY

MILLMAN FAMILY LLC

19 \_\_\_\_\_  
20 GERARD R. MILLMAN  
21 President  
22 360-966-3061

\_\_\_\_\_   
GERARD R. MILLMAN  
Manager  
360-966-3061

22 Date: \_\_\_\_\_

Date: \_\_\_\_\_

23 ENTERED this \_\_\_\_ day of \_\_\_\_\_ 2019.

25 \_\_\_\_\_  
26 JUDGE, Whatcom County Superior Court