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January 25, 1993

Paul Curl, Secretary
Washington Utilities and
Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504

RE: WUTC v. Washington Natural Gas Company
Docket No. UG-920840

Dear Mr. Curl:

Enclosed for filing are the original and 19 copies of the Motion to Defer Consideration of Environmental Tracker filed by counsel for staff of the Commission, Public Counsel, and various intervenors.

We would like this motion considered by the Commission at the commencement of the hearing on January 25. We will make copies of this available for the Commissioners, the Administrative Law Judge, and the parties prior to the commencement of the hearing.

Very truly yours,

JEFFREY D. GOLTZ
Assistant Attorney General

JDG:rz
Enclosures
cc/enc: Parties of Record

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. WASHINGTON NATURAL GAS COMPANY, Respondent.	)	DOCKET NO. UG-920840 MOTION TO DEFER CONSIDERATION OF ENVIRONMENTAL TRACKER

The Staff of the Washington Utilities & Transportation Commission, Public Counsel, the Partnership for Equitable Rates for Commercial Customers, Seattle Steam, and Northwest Industrial Gas Users hereby move the Commission to defer consideration of the Environmental Tracker proposed by Washington Natural Gas ("WNG") for the following reasons:

(1) WNG seeks to recover remediation expenses incurred in connection with the investigation and clean-up of certain manufactured gas plants operated in the past by WNG and/or its predecessor. WNG requests authority to recover these remediation costs by means of a proposed Environmental Tracker.

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(2) In June 1991, WNG filed a complaint in the Superior Court of King County (Case No. 91-2-13506-1) against sixty-three of its historic insurance companies seeking coverage under its Comprehensive General Liability policies ("the Coverage Action"). (Testimony of T. Hogan, p. 17). The trial in the Coverage Action is scheduled for October 11, 1993 (Id.). In its statements to the financial community, WNG has stated that recovery of the remediation expenses through insurance is "probable." (See, e.g., 1992 Annual Report, p. 15, attached hereto as Exhibit A).

(3) At issue in the Coverage Action is whether WNG and/or its predecessors operated the manufactured gas plants in accordance with appropriate standards and safeguards. Evidence disclosed in response to discovery in Docket No. UG-920840 also indicates that there is a substantial question as to whether WNG and/or its predecessors operated and managed the former manufactured gas facilities in a prudent manner.

(4) Deferral of Commission review of the Environmental Tracker until after a final order has been entered by the King County Superior Court in the Coverage Action is in the best interests of the ratepayers and will not cause undue harm or prejudice to WNG. If WNG prevails in the Coverage Action, recovery of its remediation costs from the ratepayers will not be necessary. If WNG does not prevail in the Coverage Action or if the recovery is deferred pending a lengthy appeal, WNG can petition the Commission for consideration of the tracker or other rate relief.

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WNG can in addition seek interim rate relief on an expedited basis if its financial condition so requires.

(5) Consideration of the Environmental Tracker is premature because WNG's environmental clean up costs are not known and measurable at this time. Although the expenditures for the Tacoma Tide Flats site alone are expected to total $18,670,000, the vast majority of these funds have not yet been spent. (Testimony of T. Hogan, pp. 13-14.) Moreover, briefs filed by WNG in the Coverage Action assert that WNG's liability could exceed $25 million and that "WNG's ultimate liabilities with respect to the underlying environmental claims *could easily exceed current estimates*." (Response to WUTC Data Request No. 383, pp. 22, 24 of 278, a partial copy of which is attached hereto as Exhibit B. Emphasis added.)

(6) Deferral of consideration of the Environmental Tracker until after a final order has been entered by the King County Superior Court in the Coverage Action is in the best interests of all parties to the rate proceeding. Extensive evidence here on whether WNG and/or its predecessor operated the manufactured gas plants according to appropriate standards and safeguards could jeopardize WNG's chances of success in the Coverage Action. Moreover, a thorough airing of the issues surrounding the operation and management of the manufactured gas plants by WNG and/or its predecessor in the rate case will require the review of voluminous documentation (much of which WNG has not yet produced), the

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retention of experts to present testimony, and a substantial expenditure of time and money for the Commission, Staff, and intervenors. If WNG prevails in the Coverage Action, the Environmental Tracker will not be needed and this expenditure of time and money will have been wasted.

(7) The parties therefore move the Commission to:

(a) defer resolution of the Environmental Tracker in Docket No. UG-920840;

(b) permit WNG to petition for a consideration of the Environmental Tracker either (i) upon a final order in the trial in the Coverage Action or (ii) at any time should the financial situation of WNG change to a point where WNG can demonstrate that earlier rate relief is necessary due to remedial action costs.

(8) WNG witnesses James A. Thorpe, Karl Karzmar, and Timothy Hogan have presented prefiled testimony addressing the Environmental Tracker. These witnesses are scheduled for cross-examination early in the hearings beginning on January 25, 1993. In the event the Commission denies or defers consideration of this Motion, the moving parties request leave to recall these witnesses for later cross examination.

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DATED this 25th day of January, 1993.

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION

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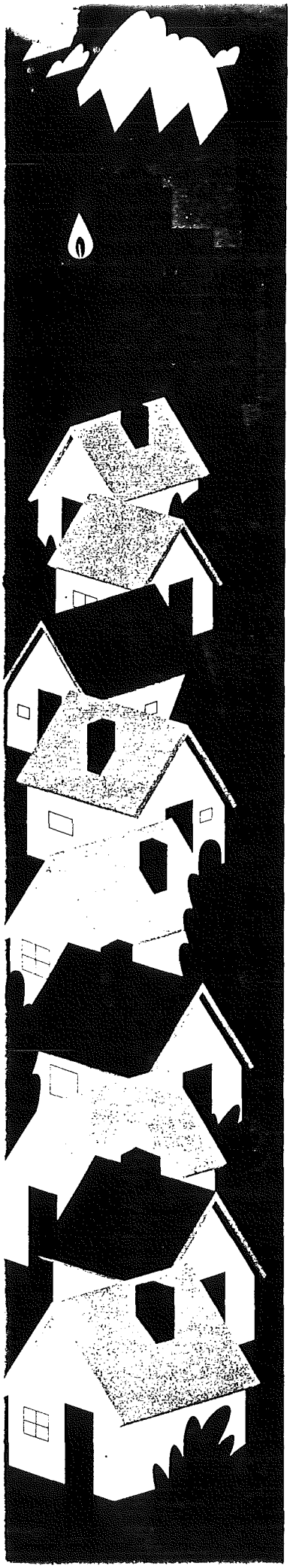

ANNUAL REPORT 1992

Washington Energy Company

Exhibit A

The Company's fiscal 1992 capital investment requirements were $120.4 million. Of these requirements, $33 million was met through cash provided from operations, net of dividends. The remaining requirements were met using both long- and short-term financing.

Washington Natural's utility construction requirements were $91.7 million in 1992 and are estimated at $85 million in 1993. Estimated expenditures for Washington Energy's gas, oil and other programs through other subsidiaries are estimated at $16 million in 1993. It is expected that these programs will be paid for with cash flow from operations, short-term borrowings and long-term financings.

In addition to its construction program, the Company has short-term borrowing requirements related to its utility operations. The operating revenues and earnings of Washington Natural vary with weather conditions because approximately 90% of its customers use natural gas for space heating. This normally produces substantially increased operating revenues and earnings during the first eight or nine months of each fiscal year and lower operating revenues and a loss in the remaining three or four months, with the 12 months as a whole being profitable. Because of this, Washington Natural must borrow on a short-term basis to meet its construction and operating needs for a portion of the year.

The Company has commercial paper programs, a short-term bank credit arrangement and an agreement to sell merchandise and gas receivables to provide short-term financing. These arrangements provide the Company with total short-term borrowing capacity and ability to sell receivables of $240 million. The total available from these sources was $22 million at September 30, 1992.

In October 1992, the Company issued 3,050,000 shares of authorized but previously unissued common shares through a public offering. The net proceeds of this offering, $61.8 million, were used to retire short-term borrowings related to Washington Natural's construction program and for other corporate purposes.

In July 1991, Washington Natural filed a Registration Statement with the Securities and Exchange Commission in connection with the sale of up to $125 million of First Mortgage Bonds, Secured Medium-Term Notes, Series A, all of which were sold by the end of fiscal 1992. To take advantage of lower interest rates, Washington Natural, in the quarter ended March 31, 1992, redeemed $37.6 million of First Mortgage Bonds outstanding with proceeds from the Medium-Term Notes. These Medium-Term Notes have maturities ranging from three years to 30 years, at a weighted average interest rate of 6.87%. The bonds redeemed had maturities ranging from 1994 to 1999 and had a weighted average interest rate of 9.4%. The remainder of the Medium-Term Notes were sold to retire short-term debt related to Washington Natural's construction program.

It is the opinion of management that the Company has adequate access to capital markets and will have sufficient capital resources, both internal and external, to meet anticipated capital requirements.

Environmental Matters

Washington Natural is one of 21 companies and municipalities responsible for environmental contamination at a former manufactured gas plant site in Tacoma, Washington. Washington Natural ceased its manufacturing operations at the site in 1956 and later sold most of the property. Based upon the best estimates available at this time, Washington Natural's share of the cost of cleanup is estimated to be approximately $18 to $21 million. A major portion of the cleanup cost is expected to be incurred by the end of calendar 1994. Washington Natural believes that recovery of these costs in all material respects from insurance carriers is probable. Based on the above, Washington Natural has, in effect, netted the liability with the probable insurance recovery. (See Note 8 of the Notes to Consolidated Financial Statements.)

Outlook

The last four years have been substantial growth years for the Company. Washington Natural has been growing two to three times faster than the national average among natural gas utilities. Washington Natural anticipates its growth will continue but not at the 7% annual rate experienced since the beginning of fiscal 1988. Washington Natural expects customer growth of about 5% for fiscal 1993, to total more than 20,000 new customers. As mentioned above, the Company anticipates capital spending to be $20 million less than it experienced in 1992.

In addition to continued growth by the utility, Washington Energy Resources is expected to grow in production and sales.

On July 27, 1992, Washington Natural filed for a general rate increase, requesting an additional 13%, or approximately $41 million, in revenues annually. The filing requested a 10.68% overall rate of return. Even with the proposed rate increase, natural gas in the Puget Sound region would cost less than competing fuels. If the full rate increase is approved, the gas utility's rates for residential customers would be about 7 cents a therm, or 10.5%, less than they were after Washington Natural's last general filing, which went into effect in January 1985. Currently, the cost of natural gas averages about half the cost of electricity in Washington Natural's service area.

In its filing, Washington Natural proposed a weather-normalization adjustment during the seven-month heating season beginning in October to moderate the impact of weather extremes upon revenues for the gas utility. If granted, this mechanism would allow the utility, on a monthly basis, to adjust heat-sensitive customers' bills to reflect deviations of actual weather from normal. If weather is warmer than normal, customers' bills would be adjusted upward to allow Washington Natural to recover its gross margin based on normal weather sales. Conversely, if weather is colder than normal, heat-sensitive customers' bills would be reduced, since Washington Natural would need to recover only the cost of gas for the additional sales above normal. This weather normalization treatment has been granted by several utility commissions in other states.

The WUTC has until October 1993 to act on the filing. New rates are expected to go into effect in early fiscal 1994.

WASHINGTON NATURAL GAS COMPANY

December 18, 1992

Docket No. UG-920840

RESPONSE TO
WUTC Data Request
Dated November 20, 1992

SHEET NO. 1 OF 278

Request No. 383 Re: Environmental Remediation Expenses

Please provide copies of any legal briefs or memoranda provided by the company or its attorneys to any court which contend that the cleanup costs at the site are covered by insurance policies of the company or its predecessors.

Response:

Attached are copies of the legal briefs and memoranda which WNG has filed in the Coverage Action.

Response Prepared By:
Timothy J. Hogan 224-2259

Exhibit B

December 18, 1992
WUTC Data Request No. 383
Docket No [illegible]-920840
Dated Nov[illegible]er 20, 1992
Pages /// thru /37

Civil Track I
The Honorable Robert H. Alsdorf

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

WASHINGTON NATURAL GAS COMPANY, Plaintiff, v. AETNA CASUALTY AND SURETY COMPANY, et al., Defendants.	No. 91-2-13506-1 PLAINTIFF'S MEMORANDUM IN OPPOSITION TO CERTAIN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiff Washington Natural Gas Company ("WNG"), through its undersigned counsel, hereby respectfully submits this Memorandum in Opposition to Certain Defendants' Motion for Summary Judgment.[1]

[1] This Memorandum is supported by the Affidavit of Harry V. Shapiro ("Shapiro Affidavit"), the Declaration of Michael J. Lynch ("Lynch Declaration"), the Declaration of Robert C. Guile ("Guile Declaration") and exhibits appended thereto.

I. INTRODUCTION

Pending before this Court is the summary judgment motion of certain upper layer excess insurers (the "Movants"[2]). These Movants' essential claim is that no case or controversy exists between WNG and them because WNG's environmental liabilities will never reach the lower limits of Movants' policies. However, Movants assert this contention having previously rejected WNG's offer to dismiss them from this action if Movants would agree that they would not challenge, or base any defenses in a future action against WNG on, Court decisions or settlements in this case.[3] The stark internal inconsistency of Movants' positions was aptly described by another court faced with a similar motion:

> The position of the [policyholder] is somewhat well-taken because what they are saying to [the excess insurer] is "Put your money where your mouth is. If you are so confident that your limits can never be reached, then simply get out of the case with the agreement that you will be bound by the findings because they are never going to affect you anyway." And [the policyholder] is saying that [the excess insurer] wants to have it both ways. They want the chance to reargue the matter if and when those limits

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[2] Defendants American Re, Highlands and American Excess brought this motion for summary judgment. Defendants Birmingham Fire, Twin Cities, First State and ISLIC subsequently filed joinders in the motion.

[3] As discussed in detail below, WNG offered to dismiss without prejudice all of its claims against certain of the Movants and its claims concerning certain policies with respect to other Movants. For reasons set forth below, WNG did not offer to dismiss American Reinsurance Company.

are reached even though they say that they never will be.[4]

Movants' refusal to accept a dismissal agreement ensuring no relitigation between WNG and the Movants regarding the issues to be decided in this action clearly demonstrates that a case and controversy exists between the parties and that Movants' motion is unsupportable. As discussed below, the fundamental predicates of that motion are factually and legally wrong and Movants' motion must be denied.

II. PROCEDURAL AND FACTUAL HISTORY

WNG is a public utility that historically owned and/or operated several manufactured gas plants throughout the State of Washington. One of those plants, known as the Tacoma Historical Coal Gasification Plant site (the "THCGP Site"), was located near the Tacoma Tide Flats. Affidavit of Harry Shapiro ("Shapiro Affidavit"), ¶ 1. WNG also owned another parcel of property in Tacoma adjacent to A Street (the "A Street Site") on which another utility had operated a manufactured gas plant. Declaration of Robert C. Guile ("Guile Declaration"), ¶ 2. Gas manufacturing operations, like those at the

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[4] United Technologies Corp. v. Liberty Mutual Ins. Co., No. 886203 (Cal. Super. Ct. Apr. 24, 1992) transcript of proceedings, at 30-31. Copies of all unreported decisions cited herein have been assembled in an Appendix filed with the Court. Additional copies of the Appendix will be provided to counsel upon request.

THCGP and A Street sites, generated various by-products, including tar. Shapiro Affidavit, at ¶ 2.

In April 1982, the United States Environmental Protection Agency ("USEPA") informed WNG that it may be liable as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, ("CERCLA"), for the clean-up of alleged contamination at the THCGP Site. Id. at ¶ 3. The USEPA and various PRPs subsequently filed lawsuits with respect to the THCGP Site.

On February 6, 1992, a Consent Decree was entered between the USEPA and WNG with respect to the consolidated THCGP Site lawsuits. Pursuant to the Consent Decree, WNG is responsible for financing and performing the remedial environmental work at the THCGP Site. Id. at ¶ 5.[5] The Consent Decree requires that WNG retain a supervising contractor, prepare a remedial design work plan to effectuate the remediation of the THCGP Site, and implement the work plan in three phases. Id.

In 1989, the Washington State Department of Transportation ("DOT") initiated an action against WNG and others, Washington State Department of Transportation v. Washington Natural Gas Company, et

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[5] Movants attempt to paint a picture of WNG as a knowing and uncaring polluter of the environment. As the evidence at trial will establish, that allegation is completely false. Under CERCLA, liability for clean up of the environment is imposed without regard to fault. See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1043 (2d Cir. 1985).

al., No. C 89-415 T (W.D. Wash.). In that action, which is scheduled for trial in November 1992, DOT alleges that in the course of building a highway through the A Street Site, it encountered various contaminants, including tar, which it had to clean up to complete its work. DOT seeks recovery of its alleged clean up costs with respect to the A Street Site. Guile Declaration, ¶ 4.

In June 1992, WNG instituted this lawsuit to obtain a declaration that it is entitled to insurance coverage for the environmental claims pending against it.[6] To protect itself against possible statute of limitations defenses and to ensure that all insurers affected by the resolution of coverage issues arising from the underlying environmental claims would be bound by the results, WNG sued all known historic liability insurers that sold WNG comprehensive and general liability policies potentially affording coverage.

Following the commencement of this action, the scope of WNG's liabilities associated with the underlying environmental claims, particularly the THCGP Site, began to crystalize somewhat further. Currently, WNG estimates that it will be required to expend between $16 million and $17 million to complete the remediation at

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[6] The fact that underlying lawsuits have been filed against WNG distinguishes this situation from a case relied upon by Movants -- Diversified Indus. Development Corp. v. Ripley, 82 Wash. 2d 811, 514 P.2d 137 (1973) (holding that a declaratory action to determine liability between lessor and lessee for injury to lessee's social guest was not justiciable when social guest had not made or threatened a claim for damages).

the THCGP Site. Shapiro Affidavit, ¶ 11. DOT's estimate of the clean up costs at the A Street Site was approximately $6 million. Guile Declaration, ¶ 5.

In March 1992, WNG offered to dismiss without prejudice certain of the Defendants, including six of the Movants. Lynch Declaration, ¶ 2. Specifically, WNG offered to dismiss without prejudice all of its claims regarding upper-layer excess level policies which provided coverage at the $25 million and above level. Thus, through this offer, WNG proposed to dismiss all of its claims against Movants Birmingham Insurance Company, American Excess Insurance Company (ERIC Re-Insurance Company), First State Insurance Company and Twin City Fire Insurance Company (collectively, the "$25 Million Movants"). Id. at ¶ 3.

In addition, pursuant to its offer, WNG proposed to dismiss without prejudice its claims relating to the policies of Highlands Insurance Company ("Highlands") and International Surplus Lines Insurance Company ("ISLIC") (collectively, the "$15 Million Movants") which began coverage at the $15 million level. Thus, WNG would proceed against Highlands and ISLIC with respect to only the policies of those Movants which provided coverage starting at the $15 million level. Id. at ¶ 4.[7]

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[7] WNG did not make an offer of dismissal to American Re-Insurance Company because its policies for the years 1977 and 1978 provided coverage starting at the $15 million level. WNG's liability at the THCGP Site is currently estimated at $16 million to $17 million. Even if that amount does not go higher, American

In exchange for this offer of dismissal, WNG requested that Movants agree to two things: (i) to waive any time-based defenses should WNG need to litigate coverage for the environmental claims in the future; and (ii) to be bound by settlements with underlying insurers and by this Court's adjudications, including the allocation of the environmental claims to particular years, so that WNG would not be required to relitigate these issues. Id. at ¶ 5.

Movants refused WNG's offer and filed this motion for summary judgment. Movants' basic theory is that their policies did not provide coverage until the $15 million level (in the case of the $15 Million Movants) or $25 million (in the case of the $25 Million Movants); that their policies cannot be accessed until the policies below them are exhausted (the limits are "used up");[8] that WNG's liabilities will not reach the $15 million to $25 million level;[9] and

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Re-Insurance's policies may very well be required to respond to WNG's THCGP Site liability. Lynch Declaration, ¶ 7.

[8] For purposes of this motion, WNG has assumed arguendo that Movants' policies respond only upon the exhaustion of underlying coverages through payments to WNG. The Court should be aware, however, that Movants' policies may "drop down" to provide WNG with coverage under circumstances when WNG has not received coverage from underlying policies. See, e.g., Federal Ins. Co. v. Scarsella Bros., Inc., 931 F.2d 599, 604 (9th Cir. 1991) (holding that under Washington law, excess insurer, which agreed to provide coverage in excess of underlying insurance, was required to provide coverage in place of insolvent underlying insurer).

[9] As noted above, the policies issued by the 1977-79 Movants respond upon the exhaustion of $15 million in coverage; the policies issued by the 1979-85 Movants respond upon the exhaustion of $25 million in coverage. A chart depicting where each Movant's policies fit within WNG's historic liability insurance program is attached to the Lynch Declaration as Exhibit

that, accordingly, a case or controversy does not exist between WNG and Movants. Movants' theory suffers from fatal factual and legal defects and must be denied.[10]

III. ARGUMENT

Washington has adopted the Uniform Declaratory Judgments Act (the "Act"), R.C.W. § 7.24.010 et seq., which provides, in part: "The Act is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal relations and is to be liberally construed and administered." Id., § 7.24.120. In this regard, the Act specifically provides for the use of declaratory judgment actions to determine the rights of parties to a contract. Specifically, the Act states that:

> A person interested under a. . . written contract or other writings constituting a contract. . . may have determined any question of construction or validity arising under the instrument [or contract]. . . and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020. Moreover, the Act expressly provides that a declaratory judgment action to construe a contract may be brought even before the contract is breached: "A contract may be

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A.

[10] A chart depicting where each Movant's policies fit within WNG's historic liability insurance program is attached to the Lynch Declaration as Exhibit A.

construed either before or after there has been a breach thereof." RCW 7.24.030 (Emphasis added).

Whether to entertain a declaratory judgment action is within the sound discretion of the Washington trial judge. See King County v. Boeing Co., 18 Wash. App. 595, 570 P.2d 713 (1977). In applying the Act, Washington courts have consistently permitted a declaratory judgment action to proceed where (i) there is an actual, present, and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement; (ii) between parties having genuine and opposing interests; (iii) that involves direct and substantial interests, rather than potential, theoretical, abstract, or academic interests; and (iv) a judicial determination of the dispute would be final and conclusive. See Rouken v. Board of County Commissioners of Snohomish County, 89 Wash. 2d 304, 572 P.2d 1, 5-6 (1977).

Contrary to Movants' protestations, WNG's claims for coverage from Movants do present an "actual, present, and existing dispute, or the mature seeds of one" because (i) the underlying environmental claims may well reach Movants' policy limits; (2) exhaustion of underlying limits is not a precondition to a justiciable controversy; (3) the pleadings themselves establish a case or controversy; and (4) Movants have refused to accept WNG's proposed stipulation of dismissal.

2. WNG's Ultimate Liability Could Exceed $25 Million Dollars

Based on WNG's current estimates, the $25 Million Movants assert that WNG's liability at the THCGP Site will never reach $25 million and that, accordingly, the Movants' policy limits will never be reached. WNG certainly hopes that the $25 Million Movants' predictions regarding its ultimate clean up costs will prove correct. WNG's limited remediation experience at the THCGP Site to date, however, does not warrant such definitive optimism.

Specifically, the current remediation plan requires intensive remediation activities over much of the 30 acres of the THCGP Site. Shapiro Affidavit, ¶ 7. These activities include, among other things, excavation of a majority of the THCGP Site and the application of soil stabilization measures. Id. Under the Consent Decree and remediation plan, there is no definite or set volume of soil to be excavated. Rather, the amount of soil which WNG will have to remove and/or stabilize may increase significantly depending on the materials and conditions that WNG discovers underneath the ground surface during excavation. Id. at ¶ 11.

Specifically, for those areas of the THCGP Site which must be remediated under the current plan, WNG is required to dig up all of the soil in such areas to a minimum depth of three

feet. Id. at ¶ 8. If, in the course of the excavation, WNG encounters any "extremely hazardous waste" pursuant to Section 173-303 of the Washington Administrative Code ("EHW"), WNG may be required to excavate further and remove all of the EHW that it encounters. Id.

WNG has thus far performed only approximately 20 percent of the work required by the remediation plan. In the course of the work performed to date, WNG has already discovered quantities of EHW under the ground surface which were substantially greater than WNG previously anticipated. Consequently, WNG has already had to perform significantly more excavation work than was originally expected. Id. at ¶ 9. Further, because of the extent of some of the contamination it has encountered, WNG is now required to expand the scope of its excavation activities into areas of the THCGP Site not previously anticipated. Id. at ¶ 10.

As additional excavation is required, WNG's remediation costs increase. Id. at ¶ 11. Depending on the extent of concealed contamination, these costs may increase dramatically.

Further, WNG's current estimate of $16 million to $17 million is predicated on the assumption that Joseph Simon & Sons, Inc. ("Simon"), another PRP with respect to the THCGP Site, pays WNG $4.4 million toward the clean up as required by its Consent

Decree with EPA. Id. at ¶ 12. If Simon should fail to reimburse WNG, WNG's expenditures for the THCGP Site may increase to over $25 million. Id. at ¶ 12.

In addition, CERCLA is scheduled for reauthorization in 1994. Insofar as the 1986 amendments to CERCLA provide a useful guide, the 1994 reauthorization will most likely result in even more stringent, and hence more costly, environmental standards. For example, Mr. DeRoy C. Thomas, Chairman and Chief Executive Officer of The Hartford Insurance Group[11] and a director of several insurance industry trade associations, noted that in 1985 the United States Environmental Protection Agency ("EPA") estimated that it would cost on average of $9 million to cleanup each of the worst 2,500 sites, and that in 1988, after the passage of the 1986 CERCLA amendments, which imposed significantly stricter cleanup standards, the EPA estimated that cleanup costs of each of the worst 2,500 sites could range from between $30 million to $50 million.[12] With more stringent statutory standards in the offing, WNG's ultimate liabilities with respect to the underlying environmental claims could easily exceed current estimates.

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[11] Movants First State and Twin City are members of The Hartford Insurance Group.

[12] D. C. Thomas, The Tort System's Ticking Time Bomb, 2 Mealey's Lit. Reps--Ins. 24-25 (Mar. 9, 1988).

Because of the uncertainty of excavation and other costs, the uncertainty of Simon's future payments and the uncertainty of the clean up standards under the CERCLA reauthorization, the $25 Million Movants' assumption that their lower limits will never be pierced is based upon a wish and a prayer, not factual evidence.[13]

B. Exhaustion of Underlying Limits Is Not a Precondition to a Justiciable Controversy

Movants argue that there is no case or controversy because their policy limits have not been impaired.[14] Yet this argument is contrary to the purposes of a declaratory judgment and is without support in the law. Simply because the limits of Movants' policies are not presently impaired does not mean that declaratory relief is premature. Indeed, Professor Borchard, one of the drafters of the Uniform Declaratory Judgments Act, which Washington has adopted, see R.C.W. § 7.24.010 et seq., has stated

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[13] It should also be noted that the courts have recognized that the ultimate costs involved in environmental clean up are expensive and difficult to predict. See, e.g., Textron, Inc. v. Aetna Casualty and Surety Co., No. CA 87-3497, transcript at 4 (R.I. Super. Ct. Apr. 8, 1988) (relying upon "common knowledge" of environmental cleanup costs to find that potential to reach excess policies' limits was not "speculative").

[14] Significantly, Movants acknowledge that there is some risk that their policies could be reached. See, e.g., Certain Defendants' Memorandum in Support of Motion for Summary Judgment, at 13 ("Under any scenario, WNG cannot establish any reasonable likelihood that the moving insurers will be obligated to provide coverage ....") (emphasis added). Of course, WNG's assessment of that likelihood is markedly different from Movants'.