

**Memorandum of Agreement  
Natural Resources Trustees  
Port Angeles Harbor (including Rayonier Mill Site)**

**I. Introduction: the Parties and the Site**

This Memorandum of Agreement (MOA) is entered into by and among the following governmental entities:

- The Lower Elwha Klallam Tribe (Lower Elwha);
- The Port Gamble S’Klallam Tribe (Port Gamble);
- The Jamestown S’Klallam Tribe (Jamestown);
- The State of Washington, as represented by the Department of Ecology (Ecology);
- The United States Department of Commerce, as represented by the National Oceanic and Atmospheric Administration (NOAA);
- The United States Department of the Interior, as represented by the U.S. Fish and Wildlife Service (USFWS).

These governmental entities are collectively referred to as the “Trustees.”

This MOA is applicable to the natural resources located at Port Angeles Harbor, Clallam County, Washington, or affected by releases of hazardous substances from facilities located on or near Port Angeles Harbor (“the Site”), including but not limited to the Rayonier Mill site.

**II. Purpose and Scope**

The purpose of this MOA is to establish a process by which the Trustees will coordinate, cooperate in, and facilitate: (1) the assessment of damages for injuries to natural resources resulting from contamination at or from facilities, including the Rayonier Mill site, at Port Angeles Harbor; (2) the planning, designing, implementing, maintaining, and monitoring of actions to restore, replace, or acquire the equivalent of those resources (collectively “restoration”); and (3) timely settlement, or prosecution if necessary, of natural resources damages claims associated with the Site against the Potentially Responsible Party or Parties (PRP, also referred to as Potentially Liable Party or Parties or PLP); (4) managing natural resource damage recoveries and avoiding the duplication of assessment or restoration costs. Trustee activities under this MOA may be referred to as natural resource damage assessment (NRDA) activities.

**III. Authority**

The Trustees enter into this MOA under the following respective authorities:

- A. For NOAA and USFWS: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(f) (CERCLA); the Oil Pollution Act of 1990, 33 U.S.C. § 2706(b) (Oil Pollution Act or OPA); the Clean Water Act,

33 U.S.C. § 1321(f) (Clean Water Act or CWA); the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Part 300, Subpart G (the National Contingency Plan or NCP); the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11 (NRDA Regulations); Executive Order 12580.

- B. For Ecology: CERCLA; the Clean Water Act; Oil Pollution Act; the National Contingency Plan; the NRDA Regulations; and the Model Toxics Control Act, RCW Chapter 70.105D (MTCA).
- C. For the Tribes: CERCLA; the Oil Pollution Act; the National Contingency Plan; and the NRDA Regulations.

Other federal, state, and tribal laws and regulations may also authorize this MOA.

#### **IV. Trustee Council Establishment, Responsibilities, and Procedures**

##### **A. Trustee Council**

The Port Angeles Harbor Trustee Council (Trustee Council or Council) is hereby established to serve as the forum through which the Trustees will coordinate and facilitate their NRDA activities in connection with the Site. The designation “Trustee Council” is not intended to establish any obligations among the Trustees beyond what is expressly set out in this MOA.

##### **B. Trustee Council Responsibilities**

The Trustee Council is responsible for the following activities:

1. Facilitating Trustee development and implementation of any NRDA activities;
2. Facilitating Trustee negotiation of funding and participation agreements with PRPs for NRDA activities;
3. Establishing a process for requesting, receiving, disbursing, and maintaining an accounting of all funds to be received from any PRP for the Trustees’ participation in NRDA activities, for carrying out damage or other assessments, or for other agreed upon Trustee activities;
4. Developing joint Trustee negotiation, settlement, litigation, and restoration positions for recommendation to authorized Trustee officials or other decision-makers; and
5. Establishing a regular meeting schedule, protocol, and procedures necessary for Trustee Council business not otherwise set out in this MOA, including procedures for special or emergency meetings.

### **C. Lead Administrative Trustee**

There shall be a Lead Administrative Trustee (LAT) responsible for managing and coordinating joint NRDA activities for the Trustee Council. Specific responsibilities of the LAT shall include:

1. Acting as the Trustee Council's central point of contact for communication with the PRP or PRPs and coordinating these communications with the Council;
2. Preparing such minutes, resolutions, and other documents as needed to record actions and decisions of the Trustee Council;
3. Maintaining the administrative record or records for any assessment and restoration activities, subject to the concurrence of the Council as to the inclusion of specific documents and provided that the Council may not withhold concurrence for inclusion of any documents required by applicable law;
4. Chairing the meetings of the Trustee Council and developing agendas therefor in consultation with the Trustees' Council representatives; and
5. Such other duties as agreed upon by the Trustee Council.

The Trustees agree that Ecology shall serve as the LAT. The Trustee Council may designate another Trustee as LAT, either on their own initiative or upon request or proposed delegation to another Trustee by the LAT.

### **D. Trustee Council Representatives and Alternates**

Not later than twenty (20) days after the effective date of this MOA, each Trustee shall notify the other Trustees of the names, addresses, email addresses, and telephone numbers of its primary and alternate voting representatives to the Trustee Council and of its legal representative. Communications regarding Trustee Council business shall be addressed to each primary representative and copied to each alternate and legal representative.

The Trustees agree to appoint Council representatives who have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. Agencies agree to appoint Council representatives who have, at a minimum, the level of authority necessary to make decisions on issues presented in the NRDA process or the ability to timely obtain authorization.

Any legal representative for a Trustee shall serve as legal counsel for that Trustee and its representative.

Primary and alternate voting representatives and legal representatives may attend or participate in any meeting of the Trustee Council, including meetings to resolve

disputes under Section V below. Each Trustee shall have only one vote on any Council decision. Governmental officials, staff, and consultants of the Trustees may also attend Trustee Council meetings and as agents of a Trustee or of the Trustees shall be subject to all provisions of this MOA.

The Trustees shall also identify Trustee Council representatives' Managers for purposes of the Dispute Resolution process as set out in Section V below.

#### **E. Trustee Council Decision-making**

1. Trustee Council decisions shall be made by unanimous approval, except for a decision to invoke the dispute resolution provisions of Section V below. Unanimous approval means an affirmative vote by each Trustee Council representative, or an affirmative vote by all but one of the Trustee Council representatives with the remaining representative abstaining. The Trustee Council will conduct good faith discussions directed toward obtaining unanimous approval for each decision. The goal of the Council shall be to resolve disputes informally. In the event unanimous approval cannot be reached, the dispute resolution procedures of Section V below shall govern.
2. Trustee Council decisions shall be recorded in writing, either by resolution signed by the voting representatives or in minutes approved as to content and form by the voting representatives, provided that all decisions authorizing the expenditure of joint funds shall be memorialized in a resolution signed by the voting representatives. Budget and other documents describing any work to be performed will be attached to the resolution and maintained in the Trustee Council's administrative record. "Joint funds" means any funds received from a PRP or PRPs and committed to the Trustee Council's joint control.
3. The Trustees anticipate that most Council decisions, including those related to expenditure of funds, will involve technical matters. Council decision-making deliberations and outcomes shall be guided by and consistent with the Trustees' mutual purpose of assessing damages for injuries to natural resources and their services, and of restoring, rehabilitating, replacing, or acquiring the equivalent of the injured natural resources and services.
4. A meeting of the Trustee Council may be convened by a telephone conference call. Should a Trustee representative be unable to travel to a meeting, that representative may participate by telephone conference as long as such facilities are available.

#### **V. Dispute Resolution**

In the event the Trustee Council does not reach unanimous approval as to a decision through the decision process set out in Section IV.E above, the Trustees shall use the dispute resolution process in paragraphs A through E below in an attempt to achieve unanimity and to

minimize delays in the NRDA process. Deliberations and resolution of disputes shall be guided by and consistent with the Trustees' mutual purpose of assessing damages for injuries to natural resources and their services, and of restoring, rehabilitating, replacing, or acquiring the equivalent of the injured natural resources and services. In order to minimize delays in the NRDA process, the dispute resolution shall take place not later than in accordance with the deadlines set out below.

- A. When the Trustee Council is unable to reach unanimous agreement about a matter that must be decided, or should a dispute otherwise arise amongst the Trustee Council, the Council will make a good-faith effort to resolve the dispute informally in order to achieve unanimous agreement as defined in IV.E.1 above.
- B. If the process outlined in V.A above does not achieve unanimous agreement or otherwise result in resolution of the dispute, any Trustee Council representative may initiate the formal dispute resolution process through a written notice (email is acceptable), briefly setting out the dispute, to the other Trustee Council representatives, provided that the Trustee Council will make one final attempt to achieve unanimous agreement. Not later than 10 calendar days after the written notice is transmitted to the Trustee Council representatives, the dispute will be referred to the Trustee Council representatives' Managers unless the Trustee Council has by then resolved the dispute. For the referral, the dispute shall be briefly defined in writing and transmitted to the Trustee managers; email is an acceptable form of transmission.
- C. The Trustee Council representatives' Managers shall convene in person or by phone within 10 calendar days of the referral of the dispute and shall attempt to resolve the dispute within 21 calendar days from the date of the referral. The Trustee managers (or their successors or designees) who will attempt to resolve the dispute under this paragraph are identified in Appendix A to this MOA.
- D. If a dispute remains unresolved after the procedure in paragraph V.C above, the Trustee managers may agree to extend the dispute resolution process or to pursue mediation, but are not obliged to do so.
- E. Depending on the nature of the dispute and the prospects for eventual resolution, the Trustees may consider other options, including the withdrawal of a dissenting Trustee or the termination of this MOA.

## **VI. Natural Resource Damage Recoveries**

### **A. Funding for Participation and Assessment Activities**

The Trustee Council may jointly enter into one or more funding and participation agreements with a PRP. Any such agreement will address the terms of the monetary disbursement and the level of PRP participation. The Trustees acknowledge that payments or promises of goods and services for their activities pursuant to any funding and participation

agreement, exclusive of the respective costs of each Trustee's participation, are intended for the joint and undivided use and benefit of all the Trustees acting under this MOA in planning, coordinating, and conducting joint Trustee Council NRDA activities. Prior to the receipt of any such funds, the Trustee Council shall, by resolution or comparable written decision (which may include the terms of a funding agreement between the Trustees and a PRP or PRPs), establish a process for requesting, receiving, disbursing, and maintaining an accounting of such funds, including a determination of the appropriate place for the deposit of funds and appropriate activities for the expenditure of these funds, recognizing that legal authority may restrict where such funds may be held. Any interest earned on deposits shall be credited to the Trustee Council and subject to the terms of this MOA. Any Trustee that may resign or withdraw from this MOA will provide an accounting of all such funds received and return the unexpended balance to the Trustee Council.

Any funds management process adopted by the Trustee Council pursuant to the preceding paragraph shall emphasize the Trustees' goals of transparency, accountability, and joint management and oversight of funds received from the PRP or PRPs. Accordingly, to the extent permitted by law, the Trustee Council shall seek such funding in a lump sum, to be allocated to individual Trustees in accordance with the aforementioned processes. If any Trustee is prohibited by law from receiving funds through such a lump-sum payment, the Trustees shall adopt a process by which such Trustee may seek separate direct payment from the PRP or PRPs for joint NRDA activities after providing notice and an accounting of funds sought to the Trustee Council.

Each Trustee will be responsible for maintaining an accounting for the costs of its participation. The LAT shall maintain an accounting for any agreed upon joint NRDA activities. The Trustee Council and Trustees shall make every reasonable effort to minimize administrative costs.

## **B. Settlement and Damages**

Trustee Council activities may result in recovery of funds (damages) for the purpose of restoring natural resources or natural resource services injured, destroyed, or lost as a result of releases of contamination from or at the Site. Any such damages that are recovered shall be used solely to restore, replace, or acquire the equivalent of those resources or services (hereinafter collectively referred to as "restoration") or to reimburse the Trustees' reasonable costs of assessing damages and participating in Trustee Council activities. Restoration shall have an ecosystem nexus with the injured resources and area of lost services.

Prior to the receipt of any such damages, the Trustee Council shall, by resolution or comparable written decision, determine the appropriate place for the deposit of funds, recognizing that legal authority may restrict where such funds may be held. Any interest earned on such funds shall be credited to the Trustee Council and subject to the terms of this MOA. No expenditure shall be permitted from such funds except to the extent consistent with this MOA, any consent decree that constitutes a settlement between the Trustees and the PRP, and any applicable law.

## **VII. Communications and Settlement Negotiations**

It is the goal of the Trustees to work together cooperatively and to coordinate their communications and settlement discussions with any PRP regarding matters within the scope of this MOA. The Trustees agree to inform each other within five (5) working days of any oral or written communications to or from any PRP regarding proposed settlement or other disposition of natural resource damage claims associated with the Site. The Trustee Council may enter into settlement negotiations with a PRP for the purpose of resolving any natural resource damage claims. No Trustee may conduct independent settlement negotiations with a PRP with the exception of: (a) negotiations conducted by a Trustee for reimbursement of its costs of participation in accordance with Section VI.A of this MOA, (b) negotiations pursuant to a reservation of rights in accordance with Section IX of this MOA, or (c) negotiations agreed to in writing by the Trustee Council.

## **VIII. Public Access to Information and Confidentiality**

The Trustee status of the parties and the fact that they are coordinating under this MOA with respect to legal claims against the PRP or PRPs, and are engaging in activities to settle or prosecute such claims, give rise to a common interest and warrant that they carry out NRDA activities and settlement negotiations in coordinated fashion and that they protect the integrity of the claim determination and analysis process and the confidentiality of certain information and strategies. Accordingly, the Trustees may share among one another certain information and, to the maximum extent permitted by applicable law, hold it in confidence with respect to all third parties, such confidential information to include without limitation: legal strategies and theories; draft documents; deliberations both oral and as recorded in writing; proprietary information; other confidences regarding the assessment and collection of natural resource damages associated with the Site (“Confidential Information”).

The Trustees agree that the sharing of such Confidential Information among Trustees is for the purpose of asserting common claims and asserting and protecting the rights and interests of respective clients, and any other publication or use is not authorized. The attorney-client, work-product, deliberative process, investigative, and other such privileges or exemptions are intended to remain attached to Confidential Information and the sharing and exchange of such Confidential Information among Trustees does not waive any privilege or exemption attaching thereto. A Trustee may not unilaterally release Confidential Information to any non-party to this MOA except in accordance with applicable law. If a Trustee desires, other than in response to a request under federal, state, or tribal public information law, to release to a non-party to this MOA information relative to the Trustees’ NRDA processes and activities that it believes is not Confidential Information within the meaning of this Section, it shall first notify the Trustee Council and describe the information it desires to release. The other Trustee Council representatives shall have a reasonable opportunity to object to the release of the information, and if any Trustee Council representative so objects, the information shall not be released until the matter is resolved. In instances where a Trustee receives an order from a court or other tribunal of competent jurisdiction purporting to require, or a request pursuant to an applicable public records law seeking, the release of Confidential Information (or potentially Confidential Information), that Trustee shall promptly notify the Trustee Council representatives in writing

(email is acceptable) of the order or request, so that the Trustee Council representatives may have a reasonable opportunity, consistent with applicable deadlines for release of the information, to consider the matter, including whether to object to release, provided that a Trustee shall not be prohibited from complying with a valid order or legal requirement to release Confidential Information.

Whenever a Trustee shares Confidential Information with the other Trustees, the Trustee so sharing shall clearly mark any such information to which it asserts a privilege as “Privileged and Confidential Information; Do Not Release Without Authorization.” To the extent permitted by applicable law, no Trustee shall disclose to any person or entity not a party to this MOA any Confidential Information so marked without the consent of the Trustee generating the information, provided that any failure to so mark information developed or shared under this MOA does not preclude the Trustee who shared such information, or any other Trustee, from asserting all protections from disclosure available under law. The obligation not to disclose Confidential Information shall survive termination of this MOA or withdrawal therefrom by any Trustee.

The Trustees also recognize the public’s interest in scientific data and information developed during the damage assessment process and in the effective resolution of claims for injury to the environment and to public resources. Accordingly, the Trustee Council may, as appropriate, decide to release such information after consultation with legal representatives. The LAT will compile and maintain a publicly-available Administrative Record that documents and supports the Trustee Council’s natural resource injury and restoration determinations for the Site, subject to the concurrence of the Council representatives as to the inclusion of specific documents and provided that this will be done in a manner that does not compromise the integrity of the claim determination and settlement process or result in the premature release of Confidential Information.

## **IX. Reservation of Rights**

Except for the agreements set out herein, nothing in this MOA is intended to establish any further legal rights or obligations as among the Trustees or their respective Council representatives. Nothing in this MOA is intended to establish any rights in third parties, including but not limited to judicial review of claimed acts or omissions of any Trustee.

Nothing in this MOA is intended to imply that any Trustee is in any way abrogating or ceding any responsibilities or authority relative to its trusteeship over natural resources, or to restrict, enlarge, or otherwise determine the rights, interests, or jurisdiction of any Trustee.

This MOA does not waive the sovereign immunity of any signatory Trustee.

This MOA does not obligate any Trustee or its officers, agents, or employees to expend any funds in excess of appropriations authorized by law.



**X. Withdrawal, Amendment, and Termination**

- A. This MOA shall be in effect from the effective date until termination by unanimous approval of the Trustees party to this MOA. A Trustee may withdraw from the MOA, upon written notice provided to all Trustee Council representatives at least ten (10) days in advance of the effective date of the withdrawal.
- B. In the event any Trustee withdraws or resigns from this MOA, or upon termination of this MOA, there shall be a full and complete accounting of all funds received and expended pursuant to Section VI above. Any withdrawing or resigning Trustee shall provide an accounting of any joint funds received and return the unexpended balance to the Trustee Council.
- C. The provisions of this MOA regarding confidentiality shall be binding upon any party after withdrawal or termination unless all Trustees agree otherwise.
- D. This MOA will be periodically reviewed by the Trustees and may be amended or modified by unanimous agreement of the Trustees. Any amendment or modification must be in writing and signed by all Trustees who are parties to the MOA at the time of amendment or modification.

**XI. Execution and Effective Date**

This MOA may be executed in counterparts. A copy of this MOA with all original signature pages affixed shall constitute the original MOA and shall be maintained by the LAT. The LAT shall provide copies of all signature pages to each Trustee that has approved this MOA. This MOA shall be effective with respect to any Trustee upon submission of that Trustee’s executed signature page.

**XII. Signatures**

The following officials execute this MOA as representatives of their respective agencies, which act on behalf of the public as Trustees for natural resources and as representatives of tribal governments, which act as Trustees on behalf of their respective public interests.

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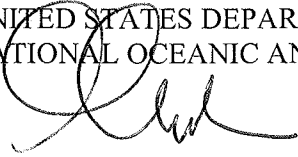
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UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION



1/13/12  
Date

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Craig R. O'Connor  
Natural Resources Section Chief and Special Counsel,  
NOAA Office of General Counsel

UNITED STATES DEPARTMENT OF THE INTERIOR  
U.S. FISH AND WILDLIFE SERVICE (AUTHORIZED OFFICIAL)

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Robyn Thorson  
Regional Director, USFWS, Region 1

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Date

STATE OF WASHINGTON  
WASHINGTON DEPARTMENT OF ECOLOGY

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Ted Sturdevant  
Director, Washington Department of Ecology

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Date

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Frances G. Charles  
Tribal Chairperson

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Tribal Chairman/CEO

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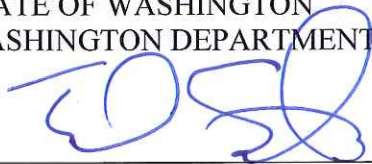
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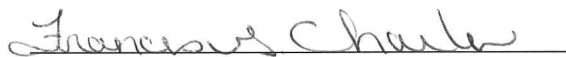
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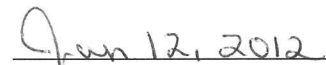
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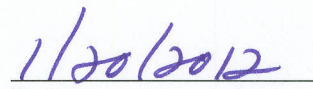
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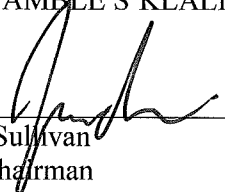
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1/24/12

## **Appendix A**

Pursuant to Section V.C of the foregoing Memorandum of Agreement (MOA), the Trustee Council representatives' Managers for dispute resolution purposes under that Section of the MOA are as follows:

Lower Elwha: Sonya Tetnowski, Chief Executive Officer

Port Gamble: Gina Stevens, Legal Counsel

Jamestown: W. Ron Allen, Tribal Chairman/CEO

Ecology: Jim Pendowski, Toxics Cleanup Program Manager

NOAA: Craig R. O'Connor, Natural Resources Section Chief and Special Counsel

USFWS: Robyn Thorson, Regional Director, Region 1

Any of the above Managers may identify a designee to serve on his or her behalf, and in the event that any of the above Managers no longer serves in his or her position when needed to carry out dispute resolution functions, his or her successor in that position shall serve instead.