

September 6, 2013

Rebecca Lawson, P.E.
Toxics Cleanup program
Southwest Regional Office
Department of Ecology
PO Box 47775
Olympia, WA 98504-7775

RE: August 16, 2013 Trustee Letter

Settlement Communication/Inadmissible in Evidence

Dear Rebecca:

We are writing in response to your August 16, 2013 letters regarding natural resource damages (NRD) at Port Angeles Harbor. The Western Port Angeles Harbor Group (WPAHG) appreciates and accepts your invitation to meet with the Trustees on September 24, 2013. While the WPAHG looks forward to speaking with the Trustees and recognizes that Ecology may have claims under RCW 70.105D.040(2) for NRD at Port Angeles Harbor, in order to make the September 24 meeting as productive as possible we believe it is important to make the Trustees aware of our position regarding the viability of any CERCLA NRD claims against the WPAHG's members.

We have carefully reviewed your letter, including its statements regarding the limitations period for NRD claims at Port Angeles Harbor and descriptions of the CERCLA NRD process. While most of the individual members in our group have not previously participated in a CERCLA NRD process, our counsel have long experience in this area, representing parties in the CERCLA NRD processes at Commencement Bay, Portland Harbor and the Lower Duwamish Waterway among others. Therefore, we asked our counsel to review the viability of CERCLA NRD claims against the WPAHG.

Based on that review, we respectfully disagree with the position taken in your letter regarding the limitations period for the Trustees' claims. As explained below, we believe that the statute of limitations on CERCLA NRD claims for Port Angeles Harbor ran some time ago.

Chemical contamination and wood waste in Port Angeles Harbor have been documented through a series of studies stretching back over twenty years, including studies related to the evaluation and proposed listing of the Rayonier Site on the National Priorities List. Dioxin tissue data were

available for Port Angeles Harbor at least as early 1991¹, and in 1998 Ecology reported on sediment data collected from the harbor from 1989-1995.² Among other studies, EPA's 1998 Expanded Site Inspection (ESI) of the Rayonier Mill investigated water and sediments in the harbor and parts of the Strait of Juan de Fuca, and in 1999 Ecology issued its *Port Angeles Harbor Wood Waste Study*, providing detailed mapping of the extent of wood waste in Port Angeles Harbor sediments and assessing the sediment quality and biological impact from the wood waste. The Trustees either performed, were aware, or should have been aware of all of these studies (including many more not mentioned above).

For sites not listed on the NPL, an NRD action under CERCLA must be commenced within three (3) years after the date of discovery of the loss of a resource and its connection with the release in question. 42 U.S.C. § 9613(g)(1); *California v. Montrose Chem. Corp.*, 104 F.3d 1507 (9th Cir. 1996). This period may be extended for an additional two years for Indian tribes, making the maximum statute of limitations five (5) years from the date of discovery. 42 U.S.C. § 9626(d). The standard for what constitutes "discovery" for purposes of CERCLA NRD claims has been interpreted in both federal guidance and case law to be a constructive knowledge standard that favors the potentially liable party; discovery occurs at the time the Trustees first know or should have known about the release and its connection to the injury. *See* 51 Fed. Reg. 27,674 (Aug. 1, 1986); *Mathes v. Century Alumina Co., LLC*, 2010 U.S. Dist. LEXIS 70848, *21 (D.V.I., July 13, 2010). For instance, in *Mathes* the court concluded that a letter reporting a release, work plans describing groundwater investigations, and reports concerning the results of the investigations provided actual knowledge of an NRD injury and its connection to a release. *Id.* at *23-33.

As mentioned above, contamination of Port Angeles Harbor sediments has been the subject of a series of studies dating back over twenty years that the Trustees knew or should have known about. Ecology's 2012 *Sediment Investigation Report* (SIR) catalogued substantial data available regarding sediment contamination and elevated tissue concentrations in the harbor (including the West Harbor) starting in the early 1990's, including the following pre-2000 studies which provided the Trustees with knowledge of the natural resource injuries in the harbor as early as 1991 and no later than 1999:

- Dioxin and Furan Concentrations in Puget Sound Crabs (USEPA 1991);
- EPA Expanded Site Inspection (ESI) of Rayonier Mill (E & E 1998 and 1999);
- Ecology Marine Sediment Monitoring Program (Ecology 1998); and the

¹ EPA's Dioxin and Furan Concentrations in Puget Sound Crabs (1991).

² Marine Sediment Monitoring Program: Chemistry and Toxicity Testing 1989-1995 (August 1998) (reporting on the sampling of marine sediments in Port Angeles from 1989-1995).

- Ecology Port Angeles Harbor Wood Waste Study (SAIC 1999).

Indeed, Ecology has noted that EPA's 1998 ESI contained specific findings indicating actual knowledge of NRD. For example, the ESI found that:

... [mercury exceeded the Sediment Quality Standards at] five marine sediment stations, cadmium at two, and arsenic and zinc at one station in the Inner Harbor area on the waterfront near where the arm of Ediz Hook connects to the mainland. Marine sediment samples further showed gradients of dioxin/furan congener concentrations in relation to industrial/urban areas, with the highest levels located around the mill site and in the Inner Harbor area. Lower concentrations were found in the deeper waters toward Ediz Hook, but nearly all sediment samples had elevated concentrations of SVOCs, metals, PCBs, pesticides, and volatile organic compounds (VOCs).³

Moreover, all of the chemical concentrations in these reports were compared to (or were readily comparable to) Sediment Management Standards, and because such standards are based on effects to biota, such findings would be presumptive evidence of NRD. Furthermore, non-chemical NRD was documented in the 1999 *Ecology Port Angeles Harbor Wood Waste Study*, which reported effects from wood pulp and debris in harbor sediments, including degraded benthic habitat, anoxia, and stressed benthic communities. Again, the observation of negative impacts of effects on biota demonstrates actual knowledge of NRD. All of these reports were either performed or possessed by a trustee agency and, at the very least, were publicly available and readily accessible to all the Trustees.

Because, starting many years ago, the extensive studies of harbor sediments provided the Trustees with knowledge of injury, the WPAHG believes any CERCLA NRD claims expired long ago. As made clear in the discussion above, data and interpretation regarding alleged releases of hazardous substances from commercial, industrial and public sources to Port Angeles Harbor is and has been available in the public domain for many years. The connection to possible natural resource injury resulting from those releases was recognized as early as the early 1990's and continuously documented through the 1990's and early 2000's. The Trustees were thus on notice or should have been on notice starting at least twenty years ago that any natural resource damage claims in Port Angeles Harbor were related to those releases.

³ *Rayonier Pulp Mill Expanded Site Investigation* (Ecology & Environment, Inc., October 1998); *Rayonier Pulp Mill Expanded Site Investigation Report for Phase III Tissue Sampling* (Ecology & Environment, Inc., January 1999), as summarized in Ecology's December 2012 *Port Angeles Harbor Sediment Characterization Study*, *Port Angeles, Washington* at 10.

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However, as mentioned above, the WPAHG recognizes that Ecology may have NRD claims under MTCA. We have worked effectively with Ecology on the Western Port Angeles Harbor MTCA RI/FS to move that process forward with speed and efficiency that we believe is in all parties' interest. We believe a MTCA NRDA process that is led by Ecology and is coordinated with and builds off our current MTCA cleanup process is likewise in the best interest of all parties because of its ability to expeditiously carry both processes forward to a conclusion satisfactory to all parties and the community.

We look forward to meeting with you and the other Trustees on September 24.



For The City of Port Angeles

For The Port of Port Angeles

For Nippon Paper Industries USA Co., LTD.

For Merrill & Ring

For Georgia-Pacific LLC

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For The City of Port Angeles

Harry E. Guent

For Nippon Paper Industries USA Co., LTD.

For Georgia-Pacific LLC

Jeffery Rabb

For The Port of Port Angeles

Harry E. Guent

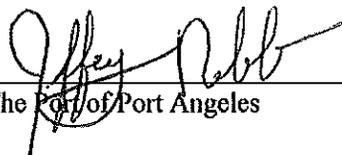
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