

October 19, 1990

ENCLOSURE No. 1

FUNDING AND PARTICIPATION AGREEMENT
FOR
THE COMMENCEMENT BAY-WIDE
NATURAL RESOURCE DAMAGE ASSESSMENT

I. PARTIES

This Agreement is by and between Champion International Corporation and the Simpson Tacoma Kraft Company (the Companies); the Washington Department of Natural Resources (DNR); and the Commencement Bay Natural Resource Trustees, consisting of: the Puyallup Tribe of Indians (Puyallup Tribe); the Muckleshoot Indian Tribe (Muckleshoot Tribe); the Washington Department of Ecology (WDOE) as lead State Trustee; the Washington Department of Natural Resources (WDNR); the Washington Department of Fisheries (WDF); the Washington Department of Wildlife (WDW); the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce; and the U.S. Department of the Interior. This Agreement is intended to serve the common interests of the Trustees and the Companies and to evaluate natural resource damages (Assessment Plan) in accordance with Section IV.B of this Agreement.

II. RECITALS

A. Consent Decree

The Companies, DNR, the United States on behalf of EPA and the federal Natural Resource Trustees, and the other Natural Resource Trustees have entered into a Consent Decree in the U.S. District Court for the Western District of Washington entitled "Commencement Bay Nearshore/Tideflats Superfund Site; St. Paul Waterway Problem Area Consent Decree" (Consent Decree). This Funding and Participation Agreement is independent of the Consent Decree and is not governed by its terms and conditions except as specifically provided herein.

B. Governmental Parties

The above governmental parties are Natural Resource Trustees (Trustees) under applicable federal, state and tribal law, and the Trustees enter into this Agreement in furtherance of their responsibilities to evaluate and, if appropriate, assert claims for

damages to natural resources, including, but not limited to, the replacement and restoration of damaged resources and the recovery for lost use and nonuse values of damaged resources.

C. The Companies and DNR

The Companies are the past or present owner/operators of the paper mill on the St. Paul Waterway (Tacoma Kraft Mill). The State of Washington is the owner of tidelands which are or have been under lease to the Companies and DNR manages these tidelands on behalf of the State. DNR and the Companies are potentially responsible parties (PRPs) under CERCLA.

D. Geographic Scope

This Agreement addresses the assessment, evaluation and restoration of natural resource damages in the Commencement Bay environment, in and around the State of Washington and the Puyallup Indian Reservation. The Commencement Bay environment includes, but is not limited to, the Commencement Bay Nearshore/Tideflats National Priority List (NPL) site, and the South Tacoma Channel NPL site.

E. Purpose

1. The Trustees intend to assess damages to injured natural resources in the Commencement Bay environment as provided for by CERCLA, the National Contingency Plan (NCP), 40 C.F.R. Part 300, and other applicable federal, state and tribal laws. The Trustees have not yet determined whether or to what extent they will follow or utilize the natural resource damage assessment regulations promulgated by the U.S. Department of the Interior at 43 CFR Part 11. Each Trustee acknowledges its trust responsibility to protect, restore and enhance natural resources within its jurisdiction or control.

2. The Companies and DNR seek to settle their potential liability to the extent possible, and with respect to natural resource damages, prefer to devote financial and other resources to actions that will restore and protect the environment and help protect and restore natural resources in the Commencement Bay environment in perpetuity.

3. The Trustees, Companies and DNR (Parties) recognize the importance of integrating and coordinating the assessment of natural resource damages with ongoing studies, remedial actions, enforcement and restoration activities in the Commencement Bay environment. One purpose of this Funding and Participation Agreement is to establish a mechanism for such integration so that

the Parties may coordinate their activities as a part of this Agreement.

4. The Parties also wish to encourage other public and private entities to undertake cooperative clean up activities and habitat restoration and enhancement of the Commencement Bay environment and to contribute to the natural resource damage assessment. It is the Parties' intent to develop a framework sufficiently definite to reflect their commitment to a cooperative approach and sufficiently flexible to accommodate additional participants and experience gained in the assessment process.

III. AUTHORITY

This Agreement is entered into pursuant to the natural resource trustee provisions of Section 107(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. Section 9607(f); Section 311 of the Clean Water Act (CWA) as amended, 33 U.S.C. Section 1321 (except with regard to oil spill events occurring subsequent to July 1, 1990); the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), Subpart G, 40 CFR Sections 300.600-300.615 (55 Federal Register 8666, 8813, 8857, March 8, 1990); and other applicable federal, state and tribal law. The following officials and their designees act on behalf of the public as state, federal and tribal trustees for natural resources under this Agreement:

- * The Director of the Department of Ecology for the State of Washington as lead State Trustee and the Commissioner of the Department of Natural Resources, the Director of the Department of Wildlife and the Director of the Department of Fisheries;
- * The Tribal Council, or its designee, for the Puyallup Tribe of Indians;
- * The Tribal Council, or its designee, for the Muckleshoot Tribe of Indians;
- * The Secretary of the Interior; and
- * The Undersecretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce.

WHEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

IV. TERMS AND CONDITIONS

A. Commencement Bay Environment Natural Resource Trust Account

Pursuant to Section IV.A.1 below, the Trustees shall establish the Natural Resource Trust Account (NRT Account). The parties recognize that the NRT Account may consist of more than one account, in accordance with applicable law, and that the Trustees will make a determination regarding the creation and management of the NRT Account as soon as possible after the effective date of this Agreement. Pursuant to Section IV.A.2 below, the Trustees shall promptly notify the Companies with respect to the establishment of the NRT Account.

1. Establishment of Account. Within ten (10) working days of the effective date of the Consent Decree, the Trustees shall use their best efforts to establish the Commencement Bay Environmental NRT Account for the Trustees' use to fund the Commencement Bay natural resource damages assessment activities further defined by Section IV.B below, and to reimburse the Trustees' costs for such activities. The location of the account shall be established by the Trustees and identified in writing to the Companies.

2. Payments by Companies. The Companies shall make payment to the Trustees as follows:

a. Within ten (10) working days after the Trustees provide the Companies with written notice of the establishment of the NRT Account, the Companies shall deposit ONE HUNDRED THOUSAND AND NO/100S DOLLARS (\$100,000) into the NRT Account, by certified or cashiers' check or checks payable to the specific account or accounts established by the Trustees. The primary purpose of this payment is to fund a technical study related to the Bay-wide Assessment process. The Trustees agree that not more than twenty percent (20%) of this payment may be used to reimburse Trustee management costs associated with the Assessment process.

b. The Companies shall use their best efforts to assist the Trustees in obtaining broad-based PRP funding participation for the remaining costs of the Assessment. Accordingly, the Companies shall pay to the Trustees an additional TWENTY-FIVE THOUSAND AND NO/100S DOLLARS (\$25,000) for deposit in the NRT Account during their first year of participation, if additional PRP funding toward the Commencement Bay-wide Assessment in an amount of TWO HUNDRED FIFTY THOUSAND AND NO/100S DOLLARS (\$250,000) (beyond the Companies' \$100,000 payment) is not obtained within twelve (12) months of the effective date of the Consent Decree.

c. If the Companies meet the TWO HUNDRED FIFTY THOUSAND AND NO/100S DOLLARS (\$250,000) funding goal set forth in Section IV.A.2(b) above, then a nonrefundable sum of TWENTY-FIVE THOUSAND AND NO/100S DOLLARS (\$25,000) of the Companies' FIVE HUNDRED THOUSAND AND NO/100S DOLLARS (\$500,000) allocation provided for by the Settlement Agreement shall be deemed a credit toward any natural resource damage liabilities of the Companies in the event that the Companies are determined to be responsible for Bay-wide natural resource damages.

3. Use of NRT Account by Trustees

a. The Parties agree that the funds contributed by the Companies and other PRPs to the NRT Account shall be used to prepare the Assessment Plan described in Section IV.B below and to fund other costs incurred by the Trustees with regard to activities related to the preparation of the Assessment Plan.

b. All disbursements and expenditures from the NRT Account must be authorized by the Trustees. The Trustees agree to implement an accounting mechanism to track expenditures from the NRT Account using the "EPA Guidance for Federal Agencies on Superfund Financial Management Recordkeeping" (EPA/220/M-89/001, January 1989), to the extent that the EPA Guidance is consistent with the Trustees' respective accounting practices. Bimonthly accounting reports will be available for inspection by the Companies, DNR, other PRPs and members of the public.

4. Additional Contributions to the NRT Account

a. The Parties recognize that additional funds will be necessary to complete the Assessment Plan, to fund other costs related to preparation of the Assessment Plan, to complete the damage assessment and to pay the costs incurred by the Trustees with regard to such activities. Accordingly, on an annual basis, the Trustees may request that the Companies provide additional funds to the NRT Account.

b. The Companies agree to give any such requests prompt consideration, but are not bound to act favorably upon such requests. For purposes of this Agreement, prompt consideration shall mean a written response made within thirty (30) days of the Companies' receipt of the Trustees' written request for additional funds. If the Companies do not respond within thirty (30) days of the request, they shall be deemed to have rejected the request.

c. The Companies' continued participation in this Agreement beyond the initial one year period following the effective date of the Consent Decree shall be conditioned upon each of the Companies' making annual contributions to the NRT Account in an amount to be agreed upon between the Companies and the Trustees.

5. Surplus Funds in the NRT Account

Unless otherwise agreed to between the Companies and the Trustees, within sixty (60) days of the Companies' receipt of the Trustees' approved Assessment Plan, any unobligated funds in the NRT Account provided by the Companies (except for those funds held by the United States) shall be returned to the Companies. If the Trustees and the Companies agree to implement the Assessment Plan within the sixty (60) day period, remaining unobligated funds shall be applied to the costs of implementing the Assessment Plan.

B. Administration of the Natural Resource Damage Assessment Plan

1. Coordinating Committee

a. In order to advance the purposes of this Agreement, and in exchange for the mutual considerations contained in this Agreement, the Parties agree to establish a Coordinating Committee. The Coordinating Committee shall consist of the Trustees, one PRP representative from each of the Companies, one PRP representative from DNR, and one representative from each other PRP that executes a Funding and Participation Agreement with the Trustees. Each representative may bring such advisors as they deem appropriate. Except for DNR, PRP membership on the Coordinating Committee shall be based upon their continued agreed annual contributions to the natural resource damage assessment process.

b. It is the Parties' desire to establish a functioning NRD Working Group. The PRP members of the Coordinating Committee shall select a number of their members, including representatives from the Companies and DNR, who are willing to commit their time and resources to work with the Trustees on an NRD Working Group. The PRP representatives on the NRD Working Group and the Trustees or the Trustees' designees on the NRD Working Group will work together in good faith to identify issues, develop recommendations, and facilitate coordination among the members of the Coordinating Committee in the implementation of this Funding and Participation Agreement. It is the intent of the Parties that the NRD working group be of manageable size and function in a cost-effective manner in furthering the purposes of this Agreement.

2. It is understood that the Trustees retain the right to make all final decisions with regard to the discharge of their duties under CERCLA and other applicable law. In the discharge of their fiduciary responsibilities, the Trustees shall act in good faith and as a coordinated group in working with the PRP members of the Coordinating Committee and the PRP representatives on the NRD Working Group in the Trustees' preparation (through the Trustees' own personnel and any contractors, and/or any other participant under the direction and/or control of the Trustees) of a scope of work (SOW) for the plan of study and evaluation of natural resource damages in the Commencement Bay environment (the Assessment Plan or the Plan). At a minimum, the PRP members of the Coordinating Committee and the PRP representatives on the NRD Working Group shall have an opportunity to participate in the development of the SOW and the Plan as provided for in 43 CFR Section 11.32. In addition, PRP involvement shall include but is not necessarily limited to participation in:

a. The selection of membership on any technical panel that may be established by the Trustees with respect to the SOW or the Plan.

b. The development of any request for proposals (RFP) for the SOW and the Plan that the Trustees may prepare.

c. The identification and selection of consultant(s) or contractor(s) that the Trustees may retain to develop the SOW and the Plan.

d. The review and comment upon nonconfidential or nonprivileged progress reports and other interim deliverables produced by the Trustees' consultant(s) or contractor(s).

e. The review and comment upon nonconfidential or nonprivileged data submitted to or developed by the Trustees or their consultant(s) or contractor(s) in connection with the Trustees' development of the SOW or the Plan.

f. The review and comment upon nonconfidential or nonprivileged draft and/or final reports submitted to the Trustees by their consultant(s) or contractor(s) for the SOW or the Plan.

g. The attendance at public meetings, public hearings or other public processes undertaken by the Trustees in connection with the SOW or the Plan. It is understood that members of the public retain the right to request and to have separate meetings with the Trustees.

3. The SOW shall include a preliminary estimate of the cost of the Assessment Plan and the Assessment.

4. The Parties acknowledge and agree that the Trustees have the final authority and discretion to establish, approve, or disapprove, direct, conduct, and implement the SOW and the Plan.

C. Content of the Assessment Plan

1. The Assessment Plan shall be designed to:

a. Determine the extent of any injury to, destruction of, or loss of natural resources resulting from the release of hazardous substances by the Companies' and/or any other facilities into the Commencement Bay environment.

b. Estimate the costs and expenses for restoration of, or loss of natural resources resulting from the release of hazardous substances by the Companies' and/or any other facilities into the Commencement Bay environment.

c. Estimate the value of any loss of use of such natural resources that have been injured, destroyed or lost.

d. Estimate any other damages for injury, destruction or loss of natural resources to the extent that damages may be recoverable by the Trustees under Section 107 of CERCLA.

e. Assess the extent to which releases of hazardous substances by the Companies' and/or any other facilities contributed to, or continue to contribute to, injury, destruction or loss of natural resources.

2. The Assessment Plan shall identify and document the scientific and economic methodologies that are intended to be used during the assessment. The Assessment Plan shall provide for full consideration of and, as appropriate, incorporation and integration of quality assured/quality controlled data developed by the Companies and accepted by the Trustees and EPA. To the extent appropriate in the judgment of EPA and the Trustees, the best scientific information available, including governmental and nongovernmental information, shall be considered in development of the SOW and the Plan.

3. When the Trustees have completed the Assessment Plan, the Plan shall be made available for public review and comment, and upon proper notice, one or more public meetings concerning the Plan shall be held in the vicinity of the Commencement Bay environment.

The Parties believe that regular, informal communication with the public is an important part of preparing the Assessment Plan. Section IX of this Agreement provides for the Parties to work together with interested members of the public to develop a plan that will encourage meaningful public involvement.

4. In the development and implementation of the Assessment Plan, the PRP members of the Coordinating Committee and the PRP representatives on the NRD Working Group shall be given reasonable notice of, and an opportunity to participate in, all nonconfidential and nonprivileged meetings of the Trustees that concern the Assessment Plan and shall be provided access to all nonconfidential, nonprivileged written communications regarding the Assessment Plan between or among the Trustees and their consultants or contractors. In general, all technical, scientific and factual information used by the Trustees in the Assessment process, regardless of its source, shall be available to the Parties. It is the position of the Trustees that the information will be withheld only where it is necessary to protect the public interest, and when materials are withheld the Parties shall be advised. The PRP members of the Coordinating Committee and the PRP representatives on the NRD Working Group shall also be given reasonable notice of and opportunity to attend public meetings sponsored by the Trustees with respect to the Assessment Plan. It is understood that members of the public retain the right to request and to have separate meetings with the Trustees.

5. Within thirty (30) days of their receipt of the Trustees' approved Assessment Plan, the NRD Working Group and other interested members of the Coordinating Committee will meet to discuss the cost, timing, and funding of implementation of the Assessment Plan by the Companies, DNR and other PRPs. The Trustees, the Companies, DNR and other PRPs that join in this Agreement shall use their best efforts to develop a cooperative process and agree on terms under which the Trustees, Companies, DNR and other PRPs may discuss and provide for implementation of the Assessment Plan consistent with the terms and conditions of this Agreement. It is the Parties' intent to initiate dialogue regarding this process as soon as practicable, and to reach agreement no later than six (6) months prior to completion of the Assessment Plan. It is the Parties' intent to include in the process an appropriate stay of enforcement similar in nature to Section VI of this Agreement to encourage cooperative efforts to implement restoration actions. Even if the Parties do not agree, the Trustees reserve the right to implement the Assessment Plan.

6. The parties intend to identify early in the process the opportunities and priorities for natural resource restoration in the Commencement Bay environment and to encourage the implementa-

tion of restoration actions on an ongoing basis in coordination with the Assessment Plan. This includes the Trustees and DNR advising the NRD Working Group on an ongoing basis of the actions by DNR to identify state lands under Section V.A.2 of the attached Settlement Agreement. Completion of the Assessment Plan is not required before implementing restoration actions or undertaking and concluding further settlement negotiations.

V. TOLLING OF TIME LIMITATIONS

Any time limitations set forth in Section 113(g) of CERCLA, as amended, 42 U.S. Section 9613(g), respecting claims for natural resource damages against the Companies and DNR or any other time limitations for the filing of natural resource damage claims against the Companies under any other applicable federal, state or tribal law, are tolled in their entirety, until one hundred forty-five (145) days after the expiration of this Agreement. This provision does not apply to any claims for natural resource damages that are presently barred by the applicable statutes of limitations as of the effective date of this Agreement.

VI. TEMPORARY STAY ON TRUSTEE ENFORCEMENT

For a period of nine (9) months, commencing on October 1, 1990 and, except as provided for herein, the Trustees agree that they will not issue notice letters to any person or other entity with respect to natural resource damage claims of any Trustee for natural resource damages alleged to have occurred within the Commencement Bay Nearshore/Tideflats NPL site. The purpose of this temporary stay period is to allow the Companies, DNR, and any other participating PRPs an opportunity to obtain participation of additional PRPs in the funding of the Plan and Assessment. At the end of the initial nine (9) month period, if the Trustees determine that the Companies have made substantial progress in obtaining such participation and that an additional temporary stay period on notice letters, not to exceed six (6) months, may result in further participation by additional PRPs, the Trustees may in their sole discretion agree to such extension. Furthermore, the Parties shall work together to provide for such further stays as may be appropriate to further the goals and purposes of this Agreement. The Trustees reserve the right to issue notice letters in conjunction with special notice letters issued by EPA under Section 122 of CERCLA, 42 U.S.C. Section 9622, when they deem it necessary to facilitate negotiations with respect to the natural resource damage matters. Additionally, the Trustees agree subsequent to the issuance thereof to provide copies of such notice letters to the Companies.

Commencement Bay-wide NRDA
Funding and Participation Agreement
October 19, 1990
Page 11

VII. COMMUNICATIONS

Written communications among the Parties to this Agreement shall be addressed to their representatives identified below. EPA shall also be provided with all written communications required under this Agreement.

TRUSTEES

State of Washington

Fred Gardner
Department of Ecology
Rowe Six, Building 4
4224 6th Avenue S.E.
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Tom Mumford
Washington Department of Natural Resources
Division of Aquatic Lands
900 47th Avenue N.E.
Olympia, Washington 98506

John Carleton
Washington Department of Wildlife
600 Capital Way N.
Olympia, Washington 98501-1091

Thom Hooper
Washington Department of Fisheries
115 General Administration Building
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Puyallup Tribe of Indians

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Commencement Bay-wide NRDA
Funding and Participation Agreement
October 19, 1990
Page 12

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U.S. Department of the Interior

Charles Polityka
Regional Environmental Office
Department of the Interior
1002 N.E. Holladay, Suite 354
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U.S. Fish and Wildlife Service
Division of Ecological Services
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Ron Eggers
Bureau of Indian Affairs
Portland Area Office
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500 N.E. Multnomah, Suite 607
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The National Oceanic and Atmospheric Administration

Chris Mebane
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Commencement Bay-wide NRDA
Funding and Participation Agreement
October 19, 1990
Page 13

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THE COMPANIES AND DNR

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Commencement Bay-wide NRDA
Funding and Participation Agreement
October 19, 1990
Page 14

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5400 Columbia Center
Seattle, Washington 98104-7011

State of Washington
Department of Natural Resources

Ann Morgan
Manager, Division of Aquatic Lands
Washington Department of Natural Resources
John Cherberg Building, M/S QW-21
Olympia, Washington 98504

Christa L. Thompson
Office of the Attorney General
Highway License Building, 7th floor
Olympia, Washington 98504

VIII. RESERVATION OF RIGHTS

A. Except with respect to the St. Paul Waterway Problem Area as defined in the Consent Decree, and as expressly provided herein, no party to this Agreement waives or diminishes any claims or defenses it may have with regard to the Commencement Bay environment.

B. This Agreement in no way affects or relieves the Companies and DNR from their responsibility to comply with, nor does it impair the Trustees' ability to enforce, any applicable federal, state or tribal law, administrative order, regulation or permit.

C. Notwithstanding any other provision of this Agreement, the stay of enforcement under Section VI shall be voidable at the sole discretion of the Trustees in the event that the Trustees, or any Trustee, discover data indicating that an imminent threat to public health or the environment exists, and that such imminent threat requires prompt response action. If the Trustees discover such information and determine that an immediate threat exists that requires prompt response action, the Trustees shall immediately notify the Companies and DNR in writing of this determination. If time permits, the Trustees shall provide the Companies and DNR with an opportunity to confer to determine whether such threat can be addressed by action on the part of the Companies and DNR without litigation.

IX. PUBLIC PARTICIPATION

The parties recognize and agree that public participation in the natural resource damage assessment planning process is both desirable and necessary. At a minimum, the parties will ensure that public participation in the process meets all legal requirements, including but not limited to the types of public participation activities contained in federal regulations related to natural resource damage assessments, 43 CFR Part 11. Within six (6) months of the formation of the NRD Working Group referred to in Section IV.B.1(b) above, it is anticipated that additional PRPs will have joined the group and will have gained experience regarding how the planning process will proceed and the level of commitment members of the public wish to make to this process. The Trustees, in cooperation with the NRD Working Group, any other interested members of the Coordinating Committee, and members of the public, will formulate and implement a Public Participation Plan which will provide for early, regular and meaningful public involvement into the natural resource damage assessment process for Commencement Bay.

X. GENERAL MATTERS

A. This Agreement shall not be used in any judicial or administrative proceeding to establish the truth of any matter stated herein except in an action to enforce this Agreement.

B. It is the intent of the parties that the clauses of this Agreement are severable, and should any part of this Agreement be declared by a court of competent jurisdiction to be invalid, the other parts of this Agreement shall remain in full force and effect.

C. Any modification of this Agreement shall be in writing, executed by all the Parties.

D. This Agreement can be executed in one or more counterparts, all of which will be considered the original document.

E. The Parties shall not disclose nor seek the disclosure in any state or federal judicial proceeding, except to enforce these Agreements, of settlement and compromise negotiations leading to the Settlement Agreement among the Parties regarding St. Paul Waterway natural resource damage, and this Funding and Participation Agreement, be they between the Parties hereto or between the Trustees and other potentially responsible parties.

XI. TERM

This Agreement shall be effective on the effective date of the Consent Decree, and shall be renewable on an annual basis, subject to payment by the Companies of continued agreed annual contributions to the natural resource damage assessment process established under this Agreement and the Trustees' acceptance of same. Subject to the foregoing, this Agreement is intended to continue in full force and effect until sixty (60) days after the earlier of (a) the Companies' receipt of the Trustees' approved Natural Resource Damage Assessment Plan described in Section IV.B hereof or (b) the exhaustion of the Commencement Bay Environment Natural Resource Trust Account described in Section IV.A herein.

XII. PARTIES BOUND

The provisions of this Agreement shall apply to and be binding upon the Parties to this Agreement, their agents, successors and assigns. The undersigned representative of each party certifies that he or she is fully authorized by the party or parties whom he or she represents to enter into this Agreement and to bind that party to it.

IN WITNESS WHEREOF, the Parties have signed this Agreement on the day and year appearing opposite their signatures.

TRUSTEES

State of Washington

DATED

Puyallup Tribe of Indians

DATED

Muckleshoot Indian Tribe

DATED

Champion Energy

National Oceanic and
Atmospheric Administration

11/15/90

DATED

U.S. Department of Justice

DATED

THE COMPANIES AND DNR

Champion International

DATED

Simpson Tacoma Kraft Company

DATED

State of Washington
Department of Natural Resources

DATED