

**MEMORANDUM OF AGREEMENT
AMONG
THE U.S. DEPARTMENT OF COMMERCE,
THE U.S. DEPARTMENT OF INTERIOR,
THE STATE OF WASHINGTON, THE LOWER ELWHA KLALLAM TRIBE,
THE PORT GAMBLE S'KLALLAM TRIBE AND THE JAMESTOWN
S'KLALLAM TRIBE,
RELATING TO PORT ANGELES HARBOR NATURAL RESOURCES
RESTORATION PLANNING & IMPLEMENTATION**

I. BACKGROUND AND PURPOSE

Port Angeles Harbor is located on the northern coast of Washington's Olympic Peninsula and along the southern shoreline of the Strait of Juan de Fuca in Port Angeles, Washington. Over the past century, the Harbor has been used by a number of industries including sawmills and plywood manufacturing, pulp and paper production, marine shipping/transportation, boat-building and refurbishing, and petroleum bulk fuel facilities.

In a 2012 Memorandum of Agreement ("2012 Trustee MOA"), the Port Angeles Harbor Trustee Council was established in order to coordinate and facilitate an assessment of damages for injuries to natural resources resulting from contamination at or from facilities in the Port Angeles Harbor.

On June 9, 2021, the Trustees entered into a final consent decree with Nippon Paper Industries USA Co., Ltd., Merrill & Ring Inc., Georgia-Pacific LLC, Owens Corning, the Port of Port Angeles, and the City of Port Angeles that provides approximately \$8.5M towards planning for and implementing natural resource restoration projects. The Trustees are also in the process of pursuing restoration for natural resource damages associated with the Rayonier Mill site.

This Memorandum of Agreement ("MOA") is entered into in order to formally recognize a framework of coordination and cooperation for the Trustees in natural resources restoration planning and implementation associated with the Port Angeles Harbor. It is intended to supplement the 2012 Trustee MOA, which remains fully in effect for the purposes for which it was entered into, including assessment of damages for injuries to natural resources resulting from contamination at or from facilities in the Port Angeles Harbor and assertion of claims against Potentially Responsible Parties.

II. PARTIES

This MOA is executed among the U.S. Department of Commerce (acting through the National Oceanic and Atmospheric Administration ("NOAA")), the U.S. Department of the Interior ("DOI") (acting through the U.S. Fish and Wildlife Service ("USFWS")), the State of Washington, through the Department of Ecology ("Ecology"), the Lower Elwha Klallam Tribe ("Lower Elwha"), the Port Gamble S'Klallam Tribe ("Port Gamble"), and the Jamestown S'Klallam Tribe ("Jamestown") (collectively referred to as the "Trustees"), which are governmental entities authorized to implement restoration activities pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607; and the Model Toxics Control Act

("MTCA"), Wash. Rev. Code § 70A.305.040(2); and Wash. Rev. Code § 90.48.142 at the Port Angeles Harbor Site ("Site").

III. AUTHORITY

The Trustees enter into this MOA pursuant to the authority provided to Natural Resource Trustees by CERCLA, 42 U.S.C. § 9607; and 43 C.F.R. Part 11; and MTCA, Wash. Rev. Code § 70A.305.040(2); and Wash. Rev. Code § 90.48.142.

IV. DEFINITIONS

Whenever the following terms are used in this MOA, they include the following meanings:

- A. "Lead Administrative Trustee" or "LAT" means the Trustee that has been agreed upon by the Parties to coordinate restoration planning and restoration implementation activities, establish and maintain the administrative record, and provide administrative support to the Trustee Council. The LAT is responsible for coordinating communication within the Trustee Council. The restoration LAT for the Port Angeles Harbor Trustee Council is NOAA.
- B. "Restoration Funds" include all restoration planning and implementation funding. Restoration funds may be used by the Trustees only to plan, implement, monitor, and oversee appropriate actions to restore, replace, rehabilitate, and/or acquire the equivalent of natural resources or resource services injured, destroyed, or lost as a result of releases of hazardous substances from Port Angeles Harbor. Such uses include the administrative, technical, and legal costs and expenses that each Party incurs to plan, implement, monitor, and oversee restoration activities under this Agreement.
- C. "Restoration Plan(s)" means the document or documents required by CERCLA and the CERCLA Natural Resource Damage Assessment Regulations (43 C.F.R. § 11.93) that evaluates a range of restoration alternatives and selects actions to restore injured natural resources and the lost services of those natural resources resulting from releases of hazardous substances from Port Angeles Harbor.
- D. "DOI NRDAR Fund" refers to the interest-bearing account managed by the DOI Office of Restoration and Damage Assessment that receives the Port Angeles Harbor restoration funds.

V. TRUSTEE COUNCIL

To implement this MOA, NOAA, USFWS, Ecology, Lower Elwha, Port Gamble, and Jamestown shall each appoint one primary representative and at least one alternate representative. Trustee Council representatives shall receive and be responsible for all correspondence and communications on behalf of such Trustee. Each Trustee may change the primary and/or alternate representative by written notification to all other Trustees within twenty (20) working days of the change. The following designees shall serve as the representatives on the Trustee Council:

	<u>Primary</u>	<u>Alternate</u>
NOAA:	Paul Cereghino	Robert Neely
USFWS:	Jeff Krausmann	Michael Carlson
ECY:	Rebecca Lawson	Connie Groven/Marian Abbett
LOWER ELWHA:	Matt Beirne	Mike McHenry
PORT GAMBLE:	Roma Call	Paul McCollum
JAMESTOWN:	Hansi Hals	Robert Knapp

VI. DECISION MAKING

A. Consensus-Based Decision-making by Voting Trustee Council Members

NOAA, USFWS, Ecology, Lower Elwha, Port Gamble, and Jamestown shall each have one vote that shall be cast by the Trustee's primary Trustee representative, or in the absence of the primary representative, by an alternate Trustee representative. The Trustees agree that decisions implementing this MOA shall require consensus approval of the voting Trustee Council representatives. All votes require an expression of agreement, disagreement, or abstention from each Trustee's voting representative. A Trustee can choose to abstain from a vote by stating such intention during a vote. A proposed decision is adopted if all voting representatives, excluding abstentions, agree to the decision via a Trustee Council Resolution. Trustee Council decisions shall be recorded in writing and must be signed by all Trustee Council representatives. Trustee Council decisions to authorize expenditures must be memorialized in a Trustee Council Resolution and signed by the voting Trustee Representatives consistent with Section VI.B of this MOA. A Trustee Representative that abstains from a vote shall enter "Abstained" in the signature line on the Resolution.

Trustee Resolutions, signed by the voting representative of each Trustee, are required for the following milestone decisions:

- 1) Release of funds from the DOI NRDAR Fund;
- 2) Approval of all versions of the Restoration Plan(s) that will be made publicly available; and
- 3) Deviations from the restoration implementation activities in the final Restoration Plan(s).

The Trustees may execute Trustee Resolutions for other decisions as they agree are necessary.

B. Authorization of Expenditures

All decisions authorizing expenditures or obligations of restoration funds shall be memorialized in a Trustee Council Resolution signed by the voting members.

A Trustee may elect to receive payments of restoration funds as reimbursements after expenditures are made, rather than receive funding in advance. The Trustee Council shall evaluate requests for reimbursement using the criteria described below (Section VI.C) and may decline to reimburse

expenditures that do not meet the criteria. Reimbursements will generally be consistent with work planning and roles agreed upon by the Trustee Council in advance of work.

The Trustee Council agrees to limit administrative costs to 10% of the total program costs for Trustee-implemented restoration. Requests for obligation or reimbursement shall define the amounts requested for administration and/or for implementation. This delineation between administrative and implementation costs shall be contained in each resolution authorizing release of restoration funds. Project implementation costs will generally be limited to costs associated with: project development, feasibility, design, permitting, legal compliance associated with implementation, construction, land access, monitoring, or evaluation of specific actions that aim to restore natural resources consistent with the Restoration Plan(s). Administrative costs will generally include decision-making preparations and deliberations, management of administrative records, fiscal management, public notification, case closure, and other duties associated with the operation of the Trustee Council and not directly associated with restoration implementation.

A Trustee may request funding in advance of actual expenditures. Such requests may occur annually or incrementally as needed, or as an upfront allocation for an entire project identified within the Restoration Plan(s). Requests for advance funds shall describe anticipated costs in a work plan and be made available for Trustee Council review. The relevant portions of the Restoration Plan(s), as applicable, can represent the work plan. The Trustee Council will evaluate requests for advanced funding using the same criteria as for reimbursements (Section VI.C) and may decline to provide funds for expenditures that do not meet the criteria.

C. Criteria for Evaluation of Expenditures

The Trustee Council shall use the following criteria to evaluate and approve or deny all expenditures of restoration funds, including requests for reimbursement from those funds.

- All expenditures must be reasonable and related to activities for the development and finalization of the Restoration Plan(s) or for implementation of activities described in the Restoration Plan(s).
- Expenditures may not be for actions that a potentially responsible party has an independent legal obligation to perform.
- All expenditures must comply with relevant Trustee Council Resolutions.
- All requests for reimbursement must be supported by adequate and appropriate cost documentation that allows for an evaluation of whether costs are reasonable and appropriate.
- All requests for advance funding shall be supported with a work plan that details anticipated costs, and distinguishes between administrative costs and implementation costs.

D. Dispute Resolution

The Trustees agree that decision-making deliberations will focus on the Trustees' mutual purposes of restoring injured natural resources and diminished services. If the voting Trustee Representatives do not reach consensus approval on a decision, and the conflict cannot be resolved through informal means, the Trustees shall invoke the following dispute resolution process and shall make good-faith efforts to resolve disputes within sixty (60) business days.

1. Any unresolved dispute shall be elevated to the voting Trustee Representatives' supervisory levels or higher. This person shall be identified by each agency within five (5) days of the Trustee Representatives' decision to elevate the dispute.

2. If the Parties continue to disagree, the matter shall be elevated to the Trustee for each agency, who shall resolve the matter or decide the appropriate forum or means for ultimate resolution.

For purposes of this section, the position within each agency that operates as the Trustee for that agency is as follows:

For the U.S. Department of Commerce:

Chief, Restoration Center, National Marine Fisheries Service, Office of Habitat Conservation, NOAA

For the U.S. Department of the Interior (DOI):

USFWS Regional Director for the Northwest Region, as the DOI Authorized Official

For the State of Washington, through the Department of Ecology:

Director, Washington State Department of Ecology

For the Lower Elwha Klallam Tribe:

Tribal Attorney

For the Port Gamble S’Klallam Tribe:

Tribal Attorney

For the Jamestown S’Klallam Tribe:

Craig Jacobson, Hobbs Straus Dean & Walker, LLP

VII. POWERS, DUTIES, AND RESPONSIBILITIES

A. Trustee Council

The Trustee Council, in accordance with applicable laws and regulations, may undertake any or all of the following actions to address the Parties’ NRDA restoration responsibilities:

- Identify, evaluate, select, and oversee specific restoration projects to restore injured natural resources and lost services in Port Angeles Harbor, including the development of a Draft and Final Restoration Plan(s);
- Identify priorities for restoration projects, including for specific habitat types, and advocate for their development and implementation;
- Develop and/or approve technical specification or plans related to the implementation or monitoring of selected restoration projects;
- Ensure all Trustee Council-approved actions are compliant with federal, state, and local environmental regulations;
- Approve expenditures or transfers of funds from the restoration account and establish protocols, standards, procedures, or budgets to support the expenditure or transfer of restoration funds;
- Arrange for the letting of contracts, through one or more of the Trustees, with partners or contractors best qualified to provide services to the Trustees;
- Ensure the usage of restoration funds for oversight and administration is appropriate and will not exceed 10% of the of the total program cost for Trustee-implemented restoration;
- Provide an opportunity for public participation and involvement in a manner consistent

with the CERCLA NRDA regulations, applicable law and regulations (*e.g.*, the National Environmental Policy Act, WA State Environmental Policy Act, state/federal permit requirements, etc.);

- Oversee the management and administration of restoration planning and implementation funds; and
- Coordinate and/or carry out such other actions as may be necessary and appropriate to achieve the purposes and objectives of this Agreement.

Any Trustee or Trustee Representative may request that a Trustee Council meeting be convened. A Trustee Council meeting may be convened in-person, by telephone conference call, or by a web conference. A Trustee Council representative may participate in-person, by telephone, or by web conference and may vote in-person, by telephone, or by web conference on any issue requiring a vote by the Trustee Council.

VIII. CONFIDENTIALITY

The Trustee agencies agree that final, quality-assured, and quality-controlled scientific data arising out of the restoration process may be made public when appropriate. However, all parties to this MOA recognize that oral and written communications that are privileged attorney-client communications, pre-decisional/deliberative, or protected by other applicable exemptions or privileges (or a combination thereof) (“Privileged Document”) shall be protected from disclosure to the extent possible under applicable federal and state law. Nothing in this MOA is intended as, or shall be construed to be, a general waiver of any privilege or exemption under applicable law that has been or may be asserted in this matter. Nothing in this MOA is intended, or shall be construed, to prejudice any assertion of privilege or protection as to documents or communications concerning the same or similar subject matter(s) as covered by this MOA.

Whenever any Trustee, or any entity or contractor providing services to any Trustee in furtherance of Trustee activities under this MOA, should receive a request for production or inspection of any written record of any communications within the scope of activities covered by this MOA pursuant to any applicable federal or state law, or administrative or litigation proceeding, that Trustee shall notify the Trustee Council of the request as soon as possible, but not later than two (2) business days after the request is received, and shall forward a copy of the request to the Trustee or other entity or contractor to which any privilege or exemption may apply or whose representatives originally generated or contributed to the record requested. The Trustees shall have a reasonable opportunity to object to the release of requested documents or material prior to its being released, but nothing contained herein shall be construed as prohibiting or restraining any Trustee or entity or the Trustee Council from agreeing to release any non-privileged record or other material. Nor shall anything contained herein be construed as requiring a Trustee or the Trustee Council to release any Privileged Document. Each Trustee retains final authority to determine what information release that Trustee must make under laws applicable to that Trustee.

IX. COMMUNICATIONS

The Trustees acknowledge that external communications outside the Trustee Council will be needed to select, evaluate, and implement restoration actions associated with Port Angeles Harbor, and that there will be occasions when an individual Trustee, rather than the Trustee Council, will need to develop external communication materials. The Trustees agree, however, that any public-facing material

developed by a Trustee that relates to restoration actions associated with Port Angeles Harbor must be submitted to the Trustee Council for review at least three (3) business days prior to publication. Trustees shall have an opportunity to propose modifications and shall work in good faith to resolve any reasonable objection as quickly as possible.

X. RESERVATION OF RIGHTS

Nothing in this MOA is intended to imply that any signatory entity is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over natural resources.

XI. LIMITATION

Nothing in this MOA shall be construed as obligating the United States, the State of Washington, or any Indian Tribe or other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XII. THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOA may be the basis of any third-party challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

XIII. MODIFICATION OF AGREEMENT

Modification of this MOA must be in writing and approved by all parties to this MOA.

XIV. TERMINATION

This MOA shall be in effect from the date of execution until termination by agreement of the Trustees. At any time that the Trustees determine that the purposes set forth in this MOA have been satisfied, the MOA may be terminated. In the event any Trustee withdraws from the MOA, such withdrawal must be in writing and provided to the other Trustees to this MOA at least thirty (30) calendar days in advance of the withdrawal.

In the event the Trustees terminate this MOA, each Trustee shall provide to the other Trustees a full and complete accounting of all Restoration Funds that it has received, deposited, held, disbursed, managed, expended, or otherwise controlled in any joint or separate account, pursuant to this MOA, no later than ninety (90) calendar days from the date of termination. In the event a Trustee should withdraw from this MOA, that Trustee shall provide such an accounting no later than ninety (90) calendar days from the date of withdrawal.

Any Trustee who withdraws from this MOA while it is in effect shall continue to be bound by the confidentiality requirement of Section VIII hereof, and all Trustees shall continue to be bound by those same provisions of Section VIII after this MOA is terminated.

XV. SEVERABILITY

The terms of this MOA are severable. If any term or condition of this MOA is determined by a court of competent jurisdiction to be invalid, it shall be considered deleted and shall not invalidate any of the remaining terms and conditions.

XVI. EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA and be retained by the LAT. The date of execution shall be the date of the signature of the last Trustee to sign the MOA.

FOR THE U.S. DEPARTMENT OF COMMERCE:

Christopher Doley

Digitally signed by
DOLEY.CHRISTOPHER.D.1365844042
Date: 2021.09.17 16:53:18 -04'00'

Christopher D. Doley
Chief, Restoration Center
National Marine Fisheries Service, Office of Habitat Conservation
National Oceanic and Atmospheric Administration

Date

PENN.TONY.MARTIN. Digitally signed by
1365863640 PENN.TONY.MARTIN.1365863640
Date: 2021.09.17 18:20:38 -04'00'

Tony Penn
Chief, Assessment and Restoration Division
National Ocean Service, Office of Response and Restoration
National Oceanic and Atmospheric Administration

Date

FOR THE U.S. DEPARTMENT OF THE INTERIOR:

ROBYN THORSON

Digitally signed by ROBYN
THORSON
Date: 2021.11.05 11:46:06 -07'00'

DOI Authorized Official
Regional Director for the Columbia-Pacific Northwest
and Pacific Islands Regions
U.S. Fish and Wildlife Service

Date

FOR THE STATE OF WASHINGTON:

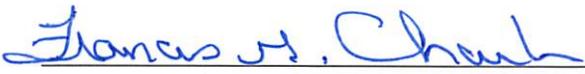
Laura Watson

Laura Watson, Director
Washington State Department of Ecology

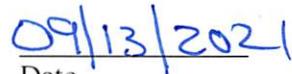
11/22/2021

Date

FOR THE LOWER ELWHA KLALLAM TRIBE:

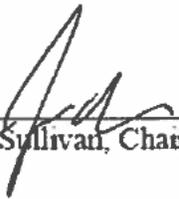


Frances G. Charles, Chairwoman



Date

FOR THE PORT GAMBLE S'KLALLAM TRIBE:



Jeromy Sullivan, Chairman

09-25-2021
Date

FOR THE JAMESTOWN S'KLALLAM TRIBE:

W. Ron Allen

Ron Allen, Chairman

9/18/2021

Date