

MEMORANDUM OF AGREEMENT
BETWEEN
THE SWINOMISH INDIAN TRIBAL COMMUNITY
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGARDING TRIBAL CONSULTATION DURING IMPLEMENTATION OF
THE PM NORTHWEST SITE CLEANUP ACTION

I. Parties

The parties to this Memorandum of Agreement (“MOA”) are the Swinomish Indian Tribal Community (“the Tribe”) and the U.S. Environmental Protection Agency (“EPA”) (collectively the “Parties”).

The Swinomish Indian Tribal Community (SITC) is a federally recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C. 476 *et seq.*, and derives its organization and authority from its Constitution and Bylaws, as amended, originally approved by the Secretary of Interior on January 27, 1936, which is the successor in interest to the groups known as Lower Skagit, Kikiallus, Swinamish, and Samish signatories to the Point Elliot Indian Treaty of 1855. Members of the Swinomish Indian Tribal Community are descendants of the indigenous peoples who used and occupied territories along the Skagit River and its tributaries, on the mainland north and south of the Skagit River system, and on the adjacent islands, such as Whidbey, Camano, Fidalgo, Guemes, Samish, and Cypress.

The Swinomish Indian Reservation is the permanent homeland of the Swinomish Indian Tribal Community, hereinafter referred to as the "Reservation." The Tribe has governing powers over those Reservation lands and resources reserved to themselves and the Tribal members residing thereon and their descendants and successors in interest, and has the right to full recognition of their laws, traditions and customs, for development and management of the resources. The Swinomish Indian Tribal Community has the right to protect, conserve and restore the total environment of the lands, air, waters, flora and fauna, and other resources traditional to their culture and by treaty reserved whether on the Swinomish Indian Reservation or in tribal ceded areas or usual and accustomed sites. The Tribe is also a natural resource trustee under applicable federal law.

The U.S. Environmental Protection Agency was created to provide coordinated and effective governmental action to assure the protection of the protection of the environment by abating and controlling pollution on a systematic basis. Environmental Protection Agency, Region 10, is responsible for the execution of the Agency's programs within the boundaries of Alaska, Idaho, Oregon, and Washington.

Tribal Operations Office, Region 10, is responsible for assisting the Region in meeting its commitment to work with the federally recognized Tribes of the Pacific Northwest and Alaska, on a government-to-government basis, to protect, restore and preserve the environment for present and future generations.

II. Purpose

EPA recognizes its unique legal relationship with Tribal governments as set forth in the United States Constitution, treaties, statutes, executive orders, and court decisions. Federal policies instruct EPA to have regular and meaningful consultation with Indian Tribal governments when developing policies and regulatory decisions on matters affecting their communities and resources.

This MOA is intended to provide a framework for good faith government-to-government coordination for the CERCLA response activities conducted at PM Northwest Site (the “Site”), and to ensure that EPA fulfills its responsibility to consult with the Tribe prior to taking action at the Site that may impact their reservation or treaty resources. This MOA also will establish how EPA will consult with the Tribe under the provisions of the Administrative Order on Consent, EPA Docket No. CERCLA-10-2000-0186. It is acknowledged that additional agreements, or amendments to this MOA, may be executed between the Tribe and EPA to further meet the above described purposes. This MOA identifies the respective roles and governmental responsibilities of the Tribe and EPA related to all response actions at the Site.

The Tribe is afforded substantially the same treatment as a state in accordance with Section 126 of CERCLA, 42 U.S.C. Section 9626, and 40 C.F.R. Section 300.515 of the National Contingency Plan (NCP). In entering into this MOA and consulting with the Tribe on the CERCLA activities at the Site, EPA is acting on its own behalf in accordance with its trust responsibility. EPA views this MOA as creating a consulting relationship between EPA and the Tribe for the benefit of the United States and its efforts to fulfill its trust responsibility to the Tribe while conducting CERCLA activities at the Site in a manner not inconsistent with the NCP.

EPA, under its 1984 Policy for the Administration of Environmental Programs on Indian Reservations, recognizes the Tribe as the primary party for setting standards, making environmental decisions and managing programs affecting the Reservation, treaty reserved resources, and the health and welfare of the Reservation population, pursuant to express federal law and inherent sovereignty. Under these authorities, the Tribe has an inherent right to take enforcement action here but has, instead, determined that EPA will be the lead agency for undertaking Superfund response activities at the Site.

III. Objectives

The Parties agree on the following specific objectives for this MOA:

1. Support and satisfy the nine principles of the EPA policy for the Administration of Environmental Programs on Indian Reservations;
2. Enhance the relationship between the parties as set forth in the Tribal Environmental Agreement entered into between the Tribe and EPA on January 21, 1997;
3. Further establish and define a working “government-to-government” relationship between the Tribe and EPA and clarify such relationship with respect to all Superfund response activities and other issues concerning the Site;
4. Identify “single points of contact” for all communication between the Tribe and EPA related to the Site;
5. Establish specific procedures to enhance communication and coordination during the removal activities being conducted at the Site;
6. Establish specific communication procedures to ensure the substantial and meaningful involvement of the Tribe in discussions related to natural resource issues as they arise in the course of EPA investigations of site-related activities at the Site;
7. Facilitate the development of the Tribe’s technical capabilities to participate in Superfund response activities at the Site;
8. Establish specific goals, procedures, and reasonable time frames for the efficient exchange of technical information, reports, studies, comments on draft technical deliverables or decision documents, or other pertinent materials and documents, including the timely identification of Applicable or Relevant and Appropriate Requirements (ARARs);
9. Provide an effective means for the Tribe to participate in negotiations with potentially responsible parties (PRPs) concerning this Site.

IV. General Terms of Agreement

1. The Parties agree that the Site is located in a wooded area on Fidalgo Island near Anacortes, Washington in Skagit County approximately 5 miles south-southeast of the petroleum refineries at March Point. This approximately seven acre site, which encompasses former disposal pond locations and surrounding properties are located within the Swinomish Indian Reservation. The Swinomish Indian Tribal

Community reservation is the permanent homeland of the Swinomish Indian Tribal Community, a federally recognized sovereign Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended.

2. EPA will consult with the Tribe with respect to (1) all major decision points, broad issues, and overall results regarding the Site and (2) other matters regarding the Superfund process concerning the Site which the parties may agree are of significance to the Tribe as discussed during their periodic meetings or other communications. As used herein, “consult” means the process of seeking, discussing, and considering the views of the Tribe at the earliest time in EPA Region 10's decision-making. Consultation generally means more than simply providing information about what the agency is planning to do and allowing comment. Rather, consultation means two-way communication that works toward a consensus reflecting the concerns of the Tribe. Unresolvable disputes will be resolved pursuant to the “issue resolution” process set forth in the Tribal Environmental Agreement between the EPA and the Tribe. EPA, as the lead agency for the Site, will ensure that the Tribe has an adequate opportunity to be substantially and meaningfully involved in the development of all major documents and major decisions. In particular, the Tribe will be given an opportunity to review and propose revisions to draft EPA documents prior to release to the public or the press. The consultation requirement shall specifically apply to:
 - a. TCR Work Plan and SAP;
 - b. TCR Waste Removal Report;
 - c. NTCR Site Investigation Work Plan and SAP;
 - d. NTCR Site Investigation Report;
 - e. Agreement on ARARs, RAOs;
 - f. Identification of Potential Alternatives;
 - g. Selection and Evaluation of Response Alternatives;
 - h. NTCR Response Action, Work Plan, and SAP;
 - i. Site Completion Report;
 - j. Modifications to any plan or schedule (XIX in AOC); and
 - k. Additional Removal Actions (XX in AOC).
3. Tribes and CERCLA. Federally recognized Tribes are afforded substantially the same treatment as a State in accordance with section 126 of CERCLA, 42 U.S.C. Section 9626, and 40 C.F.R. Section 300. 515.
4. ARARs. EPA, as the lead agency, will determine ARARs and TBCs for the Site in consultation with the Tribe. EPA’s goal is for the Time Critical Removal and the Non-Time Critical Removal to attain ARARs under federal, state, and tribal environmental laws in a manner not inconsistent with NCP. EPA shall consult with

the Tribe regarding any determination whether compliance with ARARs is practicable.

In accordance with 40 CFR 300.515(d)(2) and 300.515(h)(2), EPA will request that the Tribe identify potential ARARs and TBCs no later than the time that the site characterization data are available. Identifying ARARs and TBCs is dependent upon available site characterization data, consultations and interactions between Respondents, EPA and the Tribe. The Tribe will provide written identification of Tribal ARARs and TBCs at two separate stages, for the TCR and the NTCR. The Tribe will identify its potential ARARs and TBCs within thirty working days of receipt of EPA's request. The written identification should include a citation to each ARAR or TBC, including any substantive requirement of any applicable permit, a reference to whether the requirement is applicable or relevant and appropriate, and a description of how the ARAR or TBC affects the Site. Each ARAR and TBC will be identified in as detailed and comprehensive manner as possible. If the Tribe finds that there is insufficient information about the Site to identify an ARAR or TBC at an appropriate level, it will indicate what additional information is needed and how this information will be utilized in identifying ARARs and TBCs. EPA will thereafter consult with the Tribe to ensure that identified ARARs and TBCs are updated as appropriate. EPA and the Tribe acknowledge that it is EPA policy that Tribal requirements are subject to the same criteria as states as described in 40 C.F.R. § 300.400(g)(4). See 55 Fed. Reg. 8741-8742 (Thursday, March 8, 1990). EPA will consult with the Tribe prior to any waiver of an ARAR under section 121(d)(4) of CERCLA.

5. Work Schedule. EPA will inform the Tribe of significant actions pertaining to Superfund response activities and related issues concerning the Site. Additionally, EPA will consult with the Tribe regarding any proposed modifications to the Scope of Work (SOW) appended to the Administrative Order on Consent, or to any workplans or other deliverables that have been approved by EPA, in consultation with the Tribe, under the AOC.
6. Samples. EPA and the Tribe shall coordinate all requests to the Respondents to take split or duplicate samples of any samples collected by the Respondents while performing the work required under the Order. Generally, EPA and the Tribe will decide which government will take the split or duplicate sample with the goal of minimizing Respondents' costs.
7. Tribe as a Trustee. CERCLA provides that Tribes have been designated as trustees for natural resources belonging to, managed, or controlled by such Tribes.

8. Access. The Tribe acknowledges that EPA has a right of access to the Site under federal laws for CERCLA response activities. In order to facilitate Superfund response activities at any portions of the Site that are under Tribal jurisdiction, the Tribe, in recognition of federal law and not by way of permit, license, agreement, lease or other form of authorization, and solely to the extent of the Tribe's trust beneficiary or other interest in a portion of the site, agree to provide access to those portions of the Site to EPA, and to its authorized representatives and contractors, to perform CERCLA response activities authorized by EPA and to the extent required by federal law. The Tribe will be given early notice of EPA visits to the Site, and will be afforded the opportunity to accompany all visits to those portions of the Site that are under Tribal jurisdiction.

9. NPL Listing. EPA is considering whether to include the PM Northwest Site on the National Priorities List (NPL) pursuant to sec.105 of CERCLA. The Tribe has a specific interest in promoting tribal self-governance and in achieving a level of environmental protection at this Site that will enhance and support vital Tribal programs. EPA and the Tribe will consult on the effectiveness of the response actions taken under the Order to address environmental hazards posed by the Site before EPA makes any NPL decisions for the Site.

The Tribe and EPA recognize that each has and reserves all rights, powers, and remedies now or hereafter existing at law or in equity, or by statute, treaty or otherwise. This MOA does not modify, diminish, or alter the rights and entitlements of the Parties. The Tribe's joinder to this Agreement and its participation in the Superfund process shall not constitute a waiver of sovereign immunity by the Tribe. The MOA is intended solely to facilitate inter-governmental coordination between the Parties, and neither creates any rights in third parties nor gives rise to any right of judicial review.

V. Communication

1. General

EPA and the Tribe agree that Superfund program communication regarding the Site will be accomplished in accordance with the following procedures:

a. Designated key contacts. The key Tribal contact for all Tribe/EPA Superfund coordination, program communication and planning activities is:

*Lauren Rich
Swinomish Indian Tribal Community
11430 Moorage Way, P. O. Box 817
LaConner, WA 98257
Phone: (360) 466-7299
Fax: (360) 466-1615
E-mail: lrich@swinomish.nsn.us*

The key EPA contact for all Tribe/EPA Superfund coordination, program communication, and planning activities is:

*Lynda Priddy (ECL-112)
1200 6th Avenue
Seattle, WA 98101
Phone: (206) 553-1987
Fax: (206) 553-0124
E-mail: priddy.lynda@epa.gov*

Copies of correspondence to additional parties can be arranged by verbal agreement of the key contacts. The Tribe and EPA will exchange current organizational charts to facilitate communication and coordination regarding the Site. Each party will inform the other in the event that a different key contact is designated.

b. Meetings. Key contact persons from the Tribe and EPA will meet at least quarterly to keep each agency informed of ongoing and future activities, to discuss and plan for mutual goals, and to develop effective coordination between the agencies. More frequent meetings may be held as needed at the request of either party. Key contact persons from the Tribe and EPA will confer by telephone at least monthly to determine the need for a meeting. Meetings will generally be held at alternately at EPA and the SITC Headquarters in La Connor, Washington.

c. Briefing the Tribal Council. EPA will brief the Tribal Senate, at the request of the Tribe, prior to finalizing the Engineering Evaluation and Cost Analysis.

d. Conference Calls. Key contact persons from the Tribe and EPA will participate in telephone conference calls as needed. The purpose of such calls is to keep each party informed and involved regarding ongoing and planned activities, to discuss and resolve problems between the agencies, and to facilitate effective communication.

e. Major documents and decisions. EPA and the Tribe agree that communications concerning major documents and major decisions should be in writing. Verbal communications on important matters will be immediately brought to the attention of key contact persons at EPA and the Tribe and will be followed by written notification within five days.

f. EPA documents. EPA will provide, upon the Tribe's request, copies of EPA regulations, policies, laws, and guidance directives that are relevant to Superfund activities at the Site.

g. Tribal documents. The Tribe is responsible for timely providing EPA with copies of all Tribal ordinances, regulations, policies, and guidance materials that are relevant to Superfund activities at the Site.

2. Coordination on releasing documents. EPA will notify the Tribe of significant actions in advance, to the extent practicable, and provide copies of significant documents to the Tribe prior to or at the time such documents are released to the public or to the PRPs; provided, however, EPA may decide to not provide a document to the Tribe that EPA determines is protected by a privilege claim. Further, EPA reserves the right to have privileged internal discussions and to meet with third parties on a confidential basis without the direct participation of the Tribe.

3. Training. EPA will notify the Tribe of EPA-sponsored training events relevant to the Site. Whenever possible, Tribal attendance is encouraged and such attendance will be eligible for EPA funding to the extent provided under any Cooperative Agreement between EPA and the Tribe.

4. Community Relations. EPA is responsible for undertaking community relations activities that relate to the Superfund response at the Site, in accordance with CERCLA, the NCP, and EPA policy and guidance. EPA will work closely with the Tribe in the development of a Community Relations Plan prior to the release to the public and in conducting a community relations program, and will place a special emphasis on working with the Tribal community.

5. Confidentiality. The Parties agree that sharing information related to Site will best enable EPA to satisfy its trust and legal obligations and responsibilities to the Tribe while conducting the PA. The Parties intend to exchange information as part of the process of government-to-government consultation concerning response actions at the Site and during the potential development of enforcement actions against potentially responsible parties.

In order to promote meaningful consultation, the parties intend to keep certain information shared under this Agreement confidential and will seek to protect such information from disclosure and discovery through the use of various privileges and exceptions, including but not limited, the attorney-client, deliberative process, and attorney work product privileges. To avoid interference with a potential enforcement proceeding in which the parties have a common interest, the parties will protect from disclosure any law enforcement records exchanged in anticipation of litigation. The parties agree to maintain any and all rights and privileges, to the extent permitted by law, including the Freedom of Information Act, 5 U.S.C. § 552, that may pertain to any shared information.

Whenever sharing information deemed confidential, the party shall clearly mark any information to which it asserts a privilege as “Privileged and Confidential Information Do Not Release Without Authorization.” The party receiving information so marked agrees not to release, or allow to be released, such information to a non-party, to the extent permitted by law. The parties agree that failure to so mark information developed or shared under this Agreement does not preclude the parties from asserting the protections under the Freedom of Information Act or from asserting privileges and exceptions in seeking to protect the information from discovery.

VI. Removal Alternative Selection and Implementation

EPA and the Tribe agree to negotiate provisions to supplement this MOA with respect to risk assessment issues, timing of work, and review and comment time frames that will compliment provisions in the Scope of Work and this MOA.

VII. Effect and Duration of Agreement

1. This MOA shall take effect upon signature by EPA and the SITC.
2. This MOA will remain in effect for the duration of the Superfund response activities at the Site or until terminated by mutual agreement of the Parties; provided, however, that either Party to this MOA may terminate it by providing thirty (30) days written notice to the other Party.
3. This MOA may be amended, in writing by agreement of the parties, from time to time as necessary to facilitate the goals and purposes of the MOA.

THE UNDERSIGNED PARTIES enter into this Memorandum of Agreement between the Swinomish Indian Tribal Community and the U.S. Environmental Protection Agency regarding implementation of the Superfund program.

SWINOMISH INDIAN TRIBAL COMMUNITY

BY: _____ Date _____
Brian Cladoosby
Chairman

U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: _____ Date _____
Charles A. Findley
Acting Regional Administrator

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Charles A. Findley
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