

MOTION

I hereby move that the following motion be approved:

20-07. That upon concurrence by the City Council, the Director of Utilities is authorized to approve a cost sharing arrangement and resolve issues regarding prior expenditures of the Port of Tacoma in the amount of \$661,263, through a Settlement and Cost Sharing Agreement in substantially the form as set forth in the document on file with the Clerk of the Board.

SETTLEMENT AND COST SHARE AGREEMENT

THIS SETTLEMENT AND COST SHARING AGREEMENT, dated _____, 2020 (the "Agreement") is made between the City of Tacoma and its Department of Public Utilities, Light Division (d.b.a. Tacoma Power) (collectively, "Tacoma Power"), and the Port of Tacoma (the "Port"), a duly organized Port District of Pierce County, Washington with its principal place of business at 1 Sitcum Plaza, Tacoma, Washington (collectively, the "Parties"). The Effective Date of this Agreement is the last date shown on the signature page.

RECITALS

1. The Port currently owns certain real property consisting of approximately 17.9 acres and improvements thereon located at 1101 Taylor Way, Tacoma, Pierce County, WA, 98421 (the "Property");
2. Tacoma Power formerly owned and operated Tacoma Steam Plant No. 2 on the Property between 1931 and 2007.
3. Tacoma Power conveyed the Property to the Port pursuant to a Purchase and Sale Agreement, dated August 27, 2007 (the "Purchase and Sale Agreement").
4. By letter dated July 30, 2012, the Port notified Tacoma Power that it believed Tacoma Power may be liable for pre-closing releases of hazardous substances pursuant to the Purchase and Sale Agreement and applicable environmental laws ("Claim Letter").
5. The Parties recently renewed good faith negotiations and amicably reached agreement to resolve the Port's Claims. In reaching such agreement, the Parties expressly recognize the following shared goals and interests:

- that the primary purpose of investigation work to be done pursuant to the Agreement is to characterize site for selection of a remedy appropriate for the industrial use of the Property, for which the Parties anticipate an environmental covenant will be required;
- that all investigation and cleanup work shall be conducted in an efficient, timely, and cost-effective manner;
- that openness and transparency shall mark all interactions and communications between the Parties regarding the investigation and remediation work proposed for or conducted at the Property;
- that investigation and remedial activities performed under this Agreement – including the characterization and investigation of the Property, the assessment and selection of an appropriate preferred cleanup alternative, and the implementation of the cleanup alternative – shall be conducted in accordance with the Model Toxic Control Act (MTCA) and its implementing regulations;
- that the remedial alternative selected by the Parties shall be approved by Ecology; and
- that if removal or remediation of certain hazardous substances on the Property are not required by law, such substances shall be left in place as long as the remaining materials do not unreasonably interfere with future development of the Property. All direct costs associated with placement and implementation of any MTCA restrictive covenant recorded on the

Property to achieve MTCA cleanup standards shall be considered “Future Costs” under this Agreement.

6. Tacoma Power and the Port, without admitting any fact, responsibility, fault or liability in connection with the Property, agree that it is in their mutual best interest to memorialize their mutual goals and to work together to perform and fund future agreed upon investigative and/or response activities relating to environmental conditions at or associated with the Property.

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, and intending to be legally bound hereby, Tacoma Power and the Port here by agree as follows:

AGREEMENT

SECTION 1 – DEFINITIONS

- “Future Costs” shall mean those costs incurred by the Parties in conducting the Work as defined herein after the effective date of this Agreement. “Future Costs” subject to cost allocation shall exclude costs for activities undertaken for development purposes that provide no remedial benefit or are unnecessary to carry out the remedy selected by the Parties, with all such costs to be borne entirely by the Port of Tacoma. “Future Costs” shall also exclude all internal administrative or oversight costs, which shall be borne entirely by the Party conducting such administrative or oversight activities, except as follows:
 - “Future Costs” shall include Port internal charges of \$20,000 per year (billed on a quarterly basis at \$5,000 per quarter) to compensate the Port

for the cost of project management. The charges will be discontinued after the cleanup is implemented, and the Property enters a long-term monitoring phase, if applicable. If, prior to cleanup implementation, the project is put on hold or otherwise delayed due to the lack of Ecology resources, e.g., project manager is unavailable, or if active remediation ceases for a period exceeding six months, Tacoma Power's obligation to pay Port internal charges will be paused for a commensurate timeframe, as mutually agreed by the Parties.

"Past Costs" shall mean all costs, including but not limited to direct and indirect costs, that the Port has paid or incurred in conducting investigative and/or response activities at the Property prior to the execution of this Agreement, including Port payments to dispose of hazardous materials during demolition of the former Steamplant.

"Work" shall mean the investigative and/or response activities performed at or relating to the Property pursuant to and consistent with a scope of work and budget mutually agreed upon in writing and authorized by the Parties in advance of the work commencing. Work shall include comprehensive environmental investigation of the Property—including preparation of a Remedial Investigation, Feasibility Study, and draft Cleanup Action Plan—and implementation of the selected cleanup, including long-term monitoring obligations, if warranted.

SECTION 2 – PAST COST REIMBURSEMENT AND MUTUAL RELEASE

2.1 – Payment of Past Costs

Within 30 days of the effective date of this Agreement, Tacoma Power shall pay to the Port the amount of \$661,263 in satisfaction of the Port's claim for reimbursement of Past Costs

(Payment). Tacoma Power shall make this Payment by wire transfer into an account designated by the Port.

2.2 – Mutual Release

Upon execution of this Agreement and Payment by Tacoma Power to the Port, the Port hereby fully and irrevocably forever waives and releases Tacoma Power, its officers, employees, agents and representatives, from any and all environmental claims relating to or affecting the Property or any allegations of any obligations under state and federal environmental laws, other than claims arising from Tacoma Power's breach of this Agreement.

Upon execution of the Agreement and Payment by Tacoma Power to the Port, Tacoma Power hereby fully and irrevocably forever waives and releases the Port, and its officers, employees, agents and representatives, from any and all environmental claims relating to or affecting the Property or any allegations of any obligations under state and federal environmental laws, other than claims arising from the Port's breach of this Agreement.

The above mutual release extends solely to the upland Property, as defined in the Purchase and Sale Agreement. The release expressly excludes all environmental claims arising under state or federal laws that relate to the Hylebos Waterway and its sediments.

SECTION 3 – PAYMENT OF FUTURE COSTS

3.1 Allocation of Future Costs

The Parties are collectively funding future cleanup activities to be conducted under this Agreement. Tacoma Power shall pay 84% of Future Costs; and the Port shall pay 16% of Future Costs. This allocation of responsibility for Future Costs is final and is intended to apply until Work is no longer required under this Agreement.

3.2 Method of Payment

The Port shall invoice Tacoma Power on a quarterly basis for Tacoma Power's designated share (84%) of the Future Costs the Port incurs pursuant to this Agreement. If Tacoma Power incurs Future Costs, the Port's designated share (16%) of those costs will be credited against the amounts owed by Tacoma Power in the quarterly invoices. The Parties shall provide each other copies of all supporting invoices and a detailed description of all costs/expenses in a form to be agreed upon by the Parties. In the event of a dispute concerning whether particular invoiced costs/expenses constitute Future Costs, the Parties shall employ the informal procedures set forth in SECTION 4, or, if necessary, initiate SECTION 9 – Dispute Resolution. Tacoma Power shall pay the Port the undisputed invoiced amount for Future Costs by check or by wire transfer within 45 days after the invoice date.

SECTION 4 – Project Management

To ensure effective management of the Work, the Parties agree that all Work and activities hereunder shall be formulated, planned, and conducted collaboratively, and that each Party shall at all times cooperate fully with the other to effectuate the purposes of this Agreement. The Parties recognize that time is of the essence to accomplish the Work under this Agreement and will adhere to all review deadlines and implementation schedules established in the Work Plan and Scope of Work defined below. Each Party shall have the right to provide meaningful input into the scope and direction of the Work, including the right to approve or disapprove of work proposed by the other Party. Such rights of input, approval, and disapproval shall apply to actual investigative or remedial actions and to correspondence, reports and other deliverables that may be prepared in connection with the Work. Accordingly, the Parties hereby establish a project management structure that shall remain in effect until the expiration of this Agreement.

4.1 Project Manager Designation

Each Party shall designate a Project Manager to manage the Work on behalf of the designating Party. The Project Manager can be an internal employee of the Party or an outside consultant designated by that Party. As of the Effective Date of this Agreement, Sarah Weeks is the designated Port Project Manager, and Jeromy Adams is the designated Tacoma Power Project Manager. Either Party may designate a replacement Project Manager at any time upon prompt written notice to the other Party.

4.2 Project Management Decisions

Workplan. By June 1st of each year, the Parties will agree to a succinct five-year workplan setting forth the estimated scope, schedule, and budget for the project with sufficient detail for the upcoming year to estimate the month for which cost will be realized. This plan will be renewed annually until the provisions of this Agreement are met.

Scope of Work. The Project Managers shall confer, collaborate, and ultimately agree on the development of a written scope of work for the Work, including detailed descriptions of the proposed work, cost estimates, budgets, and schedules for planned deliverables. All decisions regarding the Work shall be jointly made. The Project Managers shall act in good faith in attempting to settle any disagreement on any matter concerning the Work that arises. Such good-faith efforts shall include at least two discussions or meetings to resolve the matter. In the event that the Project Managers cannot resolve an issue concerning the Work within ten (10) business days, the Project Managers shall jointly refer the matter to the appropriate representatives of the Parties who shall endeavor to resolve the dispute via good-faith negotiation. If the Parties are unable to resolve the dispute informally, either Party may initiate SECTION 9 Dispute Resolution.

Administrative Procedure to Accomplish Work: The Parties shall develop a SOW under this Section and select a contractor to accomplish the Work. Within 15 days of contractor selection, the Parties shall collaboratively submit a letter to Ecology requesting an Agreed Order per WAC 173-340-530(2) to accomplish the Work. If the request is accepted, the Parties will proceed under an AO(s) to accomplish the Work with Ecology oversight and approval of the selected remedial alternative(s).

In the event Ecology declines the request, the Parties agree to independently proceed with the Work necessary to complete the RI/FS and draft Cleanup Action Plan consistent with the substantive requirements of MTCA. When the RI/FS-dCAP effort is complete, the Parties shall submit a second letter to Ecology requesting an Agreed Order to approve and implement the CAP and selected remedial alternative(s). If the request is again denied, the Parties shall seek entry into the Voluntary Cleanup Program to accomplish the remainder of the Work. If Ecology denies the VCP application so that neither program is a viable administrative alternative, the project will be paused while the Parties collaboratively seek an administrative solution with Ecology, the goal of which shall be Ecology's express approval of the Parties' CAP.

4.3 Future Contracting Arrangements

(A) Notwithstanding the requirement that all decisions regarding the Work shall be jointly made, and consistent with such requirement, the Port shall have the authority to contract individually with those outside persons, companies and consultants selected by the Parties to the extent necessary to perform the Work, subject to regulations that govern consultant and remediation services procurement.

(B) Any contract entered into between the Port and any person, company or consultant hired to perform Work shall require such person, company, or consultant to

communicate with and report to both Project Managers by copying both Project Managers on all written correspondence relating to the Work and responding to inquiries by either Project Manager. Project Manager notice information is set out in SECTION 10 below.

SECTION 5 – COMMUNICATIONS WITH GOVERNMENT AGENCIES

The Port shall provide copies of all correspondence and other relevant documents relating to the Work to Tacoma Power at a reasonable time prior to their submittal to the government agencies to ensure that the Port and Tacoma Power reach agreement on drafts of such submissions. The Port shall provide Tacoma Power with prior notice of, and the opportunity to participate in, all scheduled meetings with governmental agencies relating to the Property's cleanup under MTCA and/or the Work. The Port shall promptly provide Tacoma Power with all communications from Ecology and/or other government agencies which relate to the Work. Tacoma Power understands that the Port attends quarterly meetings with Ecology to discuss all Port sites subject to Ecology jurisdiction. When providing Ecology with an update of the former Tacoma Power Site, the Port will attempt to avoid substantive discussion. If Ecology requires substantive discussion, the Port shall request a separate meeting so that Tacoma Power can participate in all substantive cleanup discussions with Ecology consistent with the terms of this Agreement.

5.1 – MTCA Grant Application

The Port and Tacoma Power agree to collaborate in seeking MTCA grant funding to assist in funding the remedial action activities that are subject of this Agreement. Grant funds received by either party for remedial action activities subject to this Agreement will be applied to the project costs. If funds are recovered after Work is complete, the funds shall be shared according to the 84/16% Tacoma Power/Port allocation.

SECTION 6 – CONTRACTOR INSURANCE AND COMPLIANCE WITH LAW

6.1 Contractor Insurance Requirements:

The Parties shall ensure that prior to performing any Work, all contractors shall obtain, and shall thereafter maintain in full force and effect until one year after the completion of the Work, the insurance types and coverage amounts required by the respective party's insurance specifications, with the addition of Subsections 6.1.1 and 6.1.2 below. Section 4.3 designates the Port as the party primarily responsible for contracting with consultants and other vendors as necessary to accomplish the tasks under this Agreement.

6.1.1 - The Port of Tacoma and the City of Tacoma shall be named as additional insureds on all liability insurance policies, by amendatory endorsement or policy provision that provides for additional insured coverage for claims arising in whole or in part due to the negligence of the named insured.

6.1.2 - In the event a contractor proposes to satisfy insurance requirements by securing insurance coverage subject to a self-insured retained limit of liability or deductible, the contractor shall be required to indemnify and hold the Port of Tacoma and City of Tacoma harmless from any liability exposure due to the existence of a self-insured retained limit or deductible.

6.2 Compliance with Laws

All contractors and their subcontractors who are awarded contracts in connection with the Work shall be required to comply with all applicable workers' compensation and employer's liability statutes covering all of its personnel engaged in the performance of services pursuant to

this Agreement, as well as all other applicable governmental laws, regulations, ordinances, permits, orders and decrees relating to the Work.

SECTION 7 – RELATIONSHIP OF PARTIES

In performance of the duties and obligations hereunder, each Party shall be acting independently, and not as the agent, partner or joint venturer of the other Party.

SECTION 8 – PRIVILEGE AND USE OF INFORMATION

8.1 Shared Information

From time to time, the Parties may elect to disclose or transmit to each other, directly or through counsel, such information as each Party deems appropriate for the sole and limited purposes of this Agreement or asserting any joint claims or defenses in any related case (hereinafter called “Shared Information”). Shared Information may be disclosed to or transferred between the Parties orally or in writing or by any other appropriate means of communication. The Parties intend that no claim of work product privilege or other privilege be waived by reason of participation or cooperation in the activities performed in connection with or arising out of the Work.

Each Party shall indicate on any Shared Information whether such information should be considered privileged or confidential and restricted from disclosure to persons not participating in this Agreement or retained pursuant to this Agreement.

Disclosure to a Party shall not be deemed a waiver of any applicable privilege as to any other person not participating in this Agreement.

8.2 Privilege of Shared Information

Each Party agrees that all Shared Information received from any other Party or its counsel pursuant to this Agreement and not otherwise available to such Party shall be held in strict confidence by the receiving Party and by all persons to whom revealed by the receiving Party pursuant to this Agreement, and that such Shared Information shall be used only to accomplish the purposes of this Agreement.

If such information becomes the subject of an administrative or judicial order requiring disclosure of such Shared Information by a Party, the Party may satisfy its confidentiality obligations hereunder by notifying the Party that generated the Shared Information and by giving such Party an opportunity to protect the confidentiality of the Shared Information.

Each Party shall take all necessary and appropriate measures to ensure that any person who is granted access to any Shared Information or who participates in work on joint projects or who otherwise assists any counsel in connection with the performance of this Agreement is familiar with the terms of this Agreement and complies with such terms as they relate to the duties of such person.

The confidentiality obligations of the Parties under this Article shall remain in full force and effect, without regard to whether any case is terminated by final judgment or settlement. The provisions of this Article shall not apply to information which is now or hereafter becomes public knowledge without violation of this Agreement, or which is independently known by or available to a Party without violation of this Agreement, or which is sought and obtainable from a Party pursuant to applicable discovery procedures and not otherwise protected from disclosure.

The Parties understand and acknowledge that Tacoma Power and the Port are subject to the Washington Public Disclosure Act. Nothing in this Agreement is intended to prohibit the Port or Tacoma Power from complying with valid requests for disclosure of public records. If either Party, or any person to whom either Party transmits Shared Information pursuant to this Agreement, becomes legally compelled or is requested to disclose any confidential Shared Information under the Washington Public Disclosure Act, then such Party will provide prompt written notice to the other Party and allow not less than 30 days prior to any such disclosure so that the other Party may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. Unless such protective order is obtained, the first Party will release to the public the requested information, including Shared Information.

SECTION 9 – DISPUTE RESOLUTION

The Parties enter into this Agreement in good faith and promise to perform their respective obligations. In the event of a dispute arising under this Agreement, or breach of any of the provisions of this Agreement, each Party shall pursue dispute resolution as follows:

9.1 Dispute or Breach

If any of the Parties disagree concerning the interpretation or implementation of any provision of this Agreement (and informal resolution proves useless), or if any dispute arises out of or relates to this Agreement, or the breach thereof, the Parties shall commence direct good faith negotiations within ten (10) business days concerning the dispute after one Party notifies the other of the dispute in writing.

9.2 Mediation and Other Remedies

If the Parties are unable to resolve a disagreement within sixty calendar days of their first meeting on the subject, the Parties shall promptly refer the disagreement to a single mediator

upon whom the Parties can agree. The Parties shall share the costs of the mediator equally. If the Parties are unable to agree or a mediator, or if they are unable to resolve the disagreement within sixty calendar days of its referral to the mediator, or with any other time interval on which the Parties agree, the Parties may have recourse to any legal or equitable remedies available to them in a court of competent jurisdiction within Washington State.

SECTION 10 – NOTICES

Any notices required under this Agreement shall be deemed sufficiently given if sent by certified United States mail addressed to the respective Parties at the following addresses, return receipt requested, or if sent by overnight delivery or electronic mail. Any notices required under this Agreement shall be deemed sufficiently given if sent by certified United States mail addressed to the respective Parties at the following addresses, return receipt requested, or if sent by overnight delivery or electronic mail:

If to Tacoma Power:

Keith Underwood
Natural Resource Manager

With a copy to the Tacoma Power Project Manager:

Jeromy Adams
Environmental Compliance Manager

With a copy to Tacoma Power's Counsel:

Stephen Tan
Cascadia Law Group

If to the Port of Tacoma:

Port of Tacoma

P.O. Box 1837
Tacoma, Washington 98401-1837
Attention: Sarah Weeks, Environmental Programs

With a copy to Port of Tacoma's Counsel:

Carolyn Lake
Goodstein Law Group
501 South G Street
Tacoma, WA 98405
clake@goodsteinlaw.com

Kimberly Seely
Coastline Law Group PLLC
4015 Ruston Way, Ste 200
Tacoma, WA 98402
kseely@coastlinelaw.com

SECTION 11 – WAIVERS

Any waiver and/or cure by Tacoma Power or the Port of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach or violation hereof.

SECTION 12 – CONSTRUCTION

Tacoma Power and the Port agree that this Agreement has been drafted jointly, and therefore agree that there shall be no presumption of construction against Tacoma Power or the Port.

SECTION 13 – ENTIRE AGREEMENT/MODIFICATION

This Agreement is the integrated memorial of all terms of any and all understandings and agreement(s) between the Parties with respect to the subject matter hereof, and except for the Purchase and Sale Agreement, it supersedes all prior to current understandings, negotiations, dealings, whether oral or written, between the Parties hereto with respect to the subject matter.

No amendment, modification, or waiver of any provision of this Agreement, and no understanding, course of dealing or performance, or usage of trade purporting to modify, explain or supplement the terms of this Agreement shall be effective unless hereafter made in writing and signed by authorized representative of both Parties, and specifically stating that it is an amendment, modification or waiver of this Agreement. No amendment, modification or waiver shall be effected by the acknowledgement or acceptance of purchase orders, shipping instructions, invoices, or other forms containing the terms or conditions at variance with or in addition to those set forth herein.

SECTION 14 – SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon the successors and assigns of the Parties. The rights and obligations hereunder cannot be assigned without the prior consent of the other Party.

SECTION 15 – LEGAL COUNSEL

Each Party expressly warrants that it has read this Agreement; has discussed its contents with his or its counsel prior to execution; fully understands its contents; and has executed it knowingly and in full recognition of its legal force and effect.

SECTION 16 – COUNTERPARTS

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which shall constitute one and the same Agreement.

SECTION 17 – GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of Washington, without regard to its conflict of laws rules and principles. Venue for any action that arises under this Agreement shall be Pierce County, Washington.

SECTION 18 – SEVERABILITY

If any provision contained in this Agreement shall be held to be invalid or unenforceable in any jurisdiction for any reason, such provision shall be reformed to the maximum extent permitted to preserve the Parties' original intent, failing which it shall be severed from this Agreement with the balance of this Agreement continuing in full force and effect. Such reformation or severance shall not have the effect of rendering such provision invalid or unenforceable in any other jurisdiction or in any other case or circumstances or of rendering unenforceable any other provision contained in this Agreement to the extent that such other provision is not itself actually in conflict with any applicable law.

IN WITNESS WHEREOF, TPU and the Port intending to be legally bound hereby, have executed this Agreement on the dates set forth below.

TACOMA POWER

By: _____

Title: _____

Date: _____

PORT OF TACOMA

By: _____

Title: _____

Date: _____