

**NATURAL RESOURCE TRUSTEE  
MEMORANDUM OF AGREEMENT  
FOR ELLIOTT BAY, THE DUWAMISH RIVER AND EAGLE HARBOR**

This Memorandum of Agreement (MOA) is entered into by and between the following governmental entities:

The National Oceanic and Atmospheric Administration (NOAA)  
The United States Department of the Interior (DOI)  
The State of Washington (State), Department of Ecology as lead State Trustee,  
Department of Natural Resources, Department of Fish and Wildlife  
The Muckleshoot Indian Tribe  
The Suquamish Tribe

These governmental entities are collectively referred to as the Trustees.

**I. Purpose**

The purpose of this MOA is to establish a process for coordinating and cooperating in 1) the assessment of damages for injuries to natural resources resulting from releases of hazardous substances or spills of oil at or from facilities in Elliott Bay and the Duwamish River, including the Harbor Island NPL Site and the Lower Duwamish Waterway National Priority List (NPL) Site ("the Elliott Bay/Duwamish Area"); 2) the planning, designing, implementing, maintaining and monitoring of actions to restore, replace or acquire the equivalent of those resources ("restoration"); 3) any prosecution or settlement of natural resource damage claims associated with the Elliott Bay/Duwamish Area; and 4) restoration actions utilizing proceeds of the settlement in *United States, the Suquamish Tribe and the Muckleshoot Indian Tribe v. Pacific Sound Resources, et al.*, W.D. Wash. C94-687 (entered Aug. 29, 1994) ("PSR Settlement"). The purpose of this MOA is to provide a framework for such coordination and cooperation between the Trustees, for managing natural resource damage recoveries, and for implementing joint damage assessment and restoration actions.

**II. Relationship to Other Agreements**

The Trustees are party to several other agreements that relate to the matters addressed in this MOA. Those agreements consist of:

*Memorandum of Agreement Concerning Wyckoff/Eagle Harbor Superfund Site and Wyckoff Company, West Seattle Wood Treating Facility (8/29/94) ("1994 Wyckoff MOA")*

*Memorandum of Agreement among the United States Department of Commerce, the United States Department of the Interior, the State of Washington, Muckleshoot Indian Tribe, and the Suquamish Tribe Regarding Natural Resource Damage Assessment in Elliott Bay, Washington (5/26/95) ("1995 Elliott Bay MOA")*

*Memorandum of Agreement Concerning Wyckoff Company, West Seattle Wood Treating Facility Restoration Coordinator (3/15/96) ("1996 Wyckoff MOA")*

The 1994 Wyckoff MOA, to which the Trustees and the U.S. Environmental Protection Agency (EPA) are parties, addresses the division of proceeds from the PSR Settlement between the Trustees and EPA. The 1994 Wyckoff MOA continues in force and effect. The 1995 Elliott Bay MOA, to which the Trustees are parties, addresses coordination and cooperation among the Trustees in natural resource damage assessment and restoration in Elliott Bay and the Duwamish River. The 1995 Elliott Bay MOA acknowledges that the Trustees may decide to adopt a more formal working structure for cooperation and from time to time may enter into subsequent agreements concerning the assessment of natural resource damages and the restoration of injured resources. The 1995 Elliott Bay MOA was renewed and extended by the Trustees in 2001 and remains in force and effect. The 1996 Wyckoff MOA has expired by its own terms. This MOA is intended to supplement the terms of the 1994 Wyckoff MOA and the 1995 Elliott Bay MOA as regards cooperation and coordination between the Trustees in assessing natural resource damages in the Elliott Bay/Duwamish Area and planning and implementing restoration activities in connection with natural resource damage claims in the Elliott Bay/Duwamish Area and in connection with the PSR Settlement.

The Trustees are also party to a settlement agreement in the matter of *United States, et al. v. The City of Seattle and Municipality of Metropolitan Seattle*, W.D. Wash. C90-395WD (entered 12/23/91; as amended 10/14/99) ("City/Metro Settlement"), under which the Trustees resolved natural resource damage claims against settling defendants relating to Elliott Bay and the lower Duwamish River. Pursuant to the City/Metro Settlement, the Trustees and settling defendants are implementing a series of sediment remediation and habitat restoration projects in the Elliott Bay/Duwamish Area. This MOA is unrelated to the City/Metro Settlement and the mechanisms for coordination and cooperation identified in this MOA are intended to operate completely independently of and apart from the procedures established for implementing the City/Metro Settlement.

### **III. Geographic Scope**

This agreement is intended to address the assessment, resolution and restoration of injuries to natural resources occurring within the Elliott Bay/Duwamish

Area. For purposes of this MOA, the Elliott Bay/Duwamish Area includes, but is not limited to, Elliott Bay (comprising the waters of Puget Sound lying eastward of a line drawn between West Point on the north and Alki Point on the south), including the Harbor Island NPL site and the Pacific Sound Resources NPL site, and the Duwamish River, including the Lower Duwamish Waterway NPL site. The Elliott Bay/Duwamish Area is co-extensive with the Elliott Bay environment, as defined in the 1995 Elliott Bay MOA. Restoration actions may occur within Elliott Bay, the Duwamish River or its tributaries. This agreement is also intended to address restoration actions utilizing the proceeds of the PSR Settlement in and around Eagle Harbor on Bainbridge Island. The Trustees may also elect to apply the terms of this MOA where appropriate regarding areas outside the Elliott Bay/Duwamish Area or Eagle Harbor where activities in such areas may affect natural resources or restoration efforts in the Elliott Bay/Duwamish Area or Eagle Harbor, provide restoration options beyond the Elliott Bay/Duwamish Area or Eagle Harbor, or where natural resources in such areas may be affected by activities within the Elliott Bay/Duwamish Area or Eagle Harbor.

#### **IV. Authority**

The Trustees enter into this MOA in furtherance of and in accordance with their respective responsibilities and authorities as natural resource trustees pursuant to, *inter alia*, Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607(f) (CERCLA), Section 1006(b) of the Oil Pollution Act of 1990, 33 U.S.C. § 2706(b) (OPA), Section 311(f) of the Clean Water Act, 33 U.S.C. § 1321(f), the National Oil and Hazardous Substances Contingency Plan, 40 CFR 300, Subpart G (NCP), Executive Order 12580 and other applicable federal, state and tribal laws and regulations.

#### **V. Lead Administrative Trustee**

Pursuant to the 1995 Elliott Bay MOA, NOAA was designated as Lead Administrative Trustee (LAT). The Trustees agree that the LAT's responsibilities shall also include coordination of restoration actions utilizing the proceeds of the PSR Settlement. By unanimous agreement the Trustee Council may designate another Trustee as LAT. The LAT may delegate any of its duties to another Trustee with the unanimous approval of the Trustee Council.

#### **VI. Trustee Council Establishment and Responsibilities**

##### **A. Trustee Council**

The Elliott Bay Trustee Council is established and will be the forum through which the Trustees coordinate the damage assessment and restoration actions that are

the subject of this MOA.

**B. Trustee Council Responsibilities**

The Trustee Council is responsible for the following activities:

- a. Facilitating Trustee review and comment on plans, proposals and work products developed by or under the direction of EPA or other remedial agencies that implicate the assessment or restoration of the natural resources that are the subject of this MOA. This facilitation may include but does not require the development of joint positions.
- b. Facilitating Trustee development and implementation of any damage assessment and restoration activities within the scope of this MOA.
- c. Facilitating the development of joint Trustee negotiation, settlement, litigation and restoration positions for recommendation to authorized Trustee officials and other decision makers.
- d. Approving contractor selection, scopes of work, plans, budgets and deliverables for damage assessment and restoration actions within the scope of this MOA.
- e. Selecting the depository or depositories for funds received in settlement of natural resource damage claims that are the subject of this MOA, including the proceeds of the PSR Settlement, approving the terms of any agreement with or regarding any depository and approving deposits to and disbursements from any depository.
- f. Adopting such bylaws, statements of Trustee Council policy or position, cost accounting procedures or cost reimbursement guidelines as are needed to further the purposes of this MOA.

**C. Trustee Council Membership**

The Trustee Council shall consist of one voting member from each of the Trustees. Other representatives of each Trustee may attend meetings and participate in the deliberations of the Trustee Council. A Trustee may designate different individuals to serve as its Trustee Council representative regarding the different activities that are the subject of this MOA.

No later than twenty (20) working days after the execution of this MOA by a Trustee, the Trustee will notify the other Trustees of the names, addresses, e-mail

addresses, telephone numbers and facsimile numbers of the Trustee's primary, alternate and legal representatives to the Trustee Council. Where the Trustee has designated different individuals to serve as its Trustee Council representative regarding different subject matters the Trustee's notification will identify the subject matter assigned to each of its representatives.

#### D. Trustee Council Chairperson

A representative of the LAT will serve as the initial Chairperson for Trustee Council meetings. The Trustees may agree to reassign or rotate the position of Chairperson as they determine appropriate. The Chairperson, with the assistance of the LAT if the Chairperson is not a representative of the LAT, will be responsible for organizing and scheduling meetings, preparing proposed agendas, identifying in the agendas any issues to be voted upon at the proposed meeting, distributing agendas to the designated primary, alternate and legal representatives at least three (3) days in advance of a meeting, and presiding over convened meetings.

#### E. Trustee Council Decisions

Trustee Council decisions shall be made by consensus. Consensus means the affirmative vote of each Trustee Council representative or an affirmative vote by four of the five Trustee Council representatives with one abstention. The Trustees will conduct extensive good faith discussions directed toward obtaining consensus. It is the goal of the Trustees to resolve disputes informally. In the event consensus cannot be reached, the dispute resolution procedures provided in Section VII will govern.

Trustee Council decisions will be recorded in writing, either by resolution signed by the voting representatives or in minutes approved as to form and content by the voting representatives. Provided, however, that all decisions authorizing the expenditure of funds or the acceptance of work effort as satisfying in-kind contribution obligations shall be memorialized in a Trustee Council resolution signed by the voting representatives. All records of Trustee Council decisions plus copies of any supporting documents shall be maintained in the administrative record.

Trustee Council meetings may be convened by face-to-face meetings, by telephone conference call, or by some combination that involves the direct participation of Trustee representatives.

The Trustee Council may seek advisory participation from other federal, state or local agencies or any other entity as the Trustee Council may deem appropriate.

## VII. Dispute Resolution

Any Trustee may invoke dispute resolution regarding a matter that fails to achieve a consensus as described in Section VI.E. of this MOA. Dispute resolution shall involve the following process:

A. Any unresolved dispute will be elevated to the Trustee representatives' respective managers. Dispute resolution will be initiated by a written notice transmitted by the party invoking the dispute resolution process to the other Trustee representatives.

B. If the Trustees continue to disagree, the matter will be elevated to the official who executed this agreement on its behalf, or to any other official having authority to decide on such matters and to bind the Party, for resolution. The officials will resolve the matter or decide the appropriate forum or means for ultimate resolution.

C. The Trustees agree to work in good faith to resolve disputes within thirty (30) working days of the initiation of the dispute resolution process.

D. The provisions of this Section do not preclude separate government-to-government consultation between and among the Trustees.

## VIII. Natural Resource Damage Recoveries

### A. Restoration Fund(s)

The Trustees by resolution shall identify one or more entities to serve as the depository and manager for all or any portion of the natural resource damages recovered via the settlements that are the subject of this MOA. In selecting the entity or entities, the Trustees will comply with applicable law and will take into consideration whether the proposed depository generates interest; any management or administrative fees or charges imposed by the depository; the record of performance of the depository in similar cases; the administrative convenience or complexity in making deposits to or obtaining withdrawals from the depository; and the security of the investment vehicles utilized by the depository. The resolution identifying each depository shall include specific instructions regarding procedures for disbursement from the depository that will at a minimum require a trustee resolution for each disbursement.

### B. Character and Use of Recovered Damages

Any and all damages recovered via settlements that are the subject of this MOA are subject to the joint and undivided interest and control of all the Trustees. Allocation

of a portion of recovered damages to reimburse restoration costs incurred by a Trustee do not affect the undivided nature of the balance of the funds. Recovered natural resource damages that are the subject of this MOA must be used only to restore, replace or acquire the equivalent of the natural resources for which the damages were recovered or as otherwise provided in any consent decree or settlement agreement under which such damages are recovered.

#### C. Cost Accounting and Reimbursement

The Trustees shall adopt restoration and restoration oversight cost accounting and reimbursement guidelines that shall insure that recovered damages are spent only on reasonable and adequately documented costs.

### IX. Restoration Actions

#### A. Application of PSR Settlement Proceeds

The Trustees agree that the proceeds of the PSR Settlement to which they are entitled shall be used for the restoration of natural resources injured as a result of releases of hazardous substances at the former Wyckoff facilities in Eagle Harbor and West Seattle. The Trustees agree that the proceeds should be evenly apportioned between restoration actions in and around Eagle Harbor and in the Elliott Bay/- Duwamish Area. However, the Trustee Council may, by resolution, agree to alter this apportionment as they determine appropriate.

#### B. Application of EB/DR proceeds

The Trustees agree that the proceeds of settlements of natural resource damage claims arising from releases of hazardous substances in the Elliott Bay/Duwamish Area shall be used for the restoration of natural resources injured by those releases or as otherwise provided in any consent decree or settlement agreement under which such damages are recovered.

#### C. Restoration Planning

The Trustees shall prepare a restoration plan or plans to guide the use of the natural resource damage recoveries that are the subject of this MOA. The Trustees shall adopt the plan(s) after an opportunity for public notice and comment.

#### D. Implementation

Restoration actions undertaken by or under the direction of the Trustees

pursuant to this MOA shall be consistent with applicable laws regulations and permits, the terms of applicable consent decrees and settlement agreements, this and other applicable MOAs, and restoration plan(s) adopted under this MOA. Restoration actions pursuant to this MOA may be implemented by whichever Trustee or Trustees as the Trustees shall designate. The Trustees may enter into one or more separate memoranda of agreement, consistent with this and other applicable agreements, to define the roles and responsibilities of the Trustees regarding any restoration project.

#### X. Execution and Effective Date

This MOA may be executed in counterparts. A copy with all original signatures affixed shall constitute the original MOA and shall be maintained by the LAT. The effective date shall be the date of the final signature of the parties to this MOA.

#### XI. Amendment and Termination

This MOA may be amended by unanimous approval of the Trustees. Any amendment must be in writing and signed by all the Trustees who are party to the MOA at the time of amendment. This MOA shall remain in effect until terminated by unanimous approval of the Trustees who are party to the MOA at the time of termination. A Trustee may withdraw from this MOA upon written notice at least ten (10) days in advance of the withdrawal. In the event of the withdrawal of any Trustee, or upon termination of this MOA, there shall be a full and complete accounting of all funds received and expended or otherwise controlled in any depository by the Trustees.

#### XII. Miscellaneous Provisions

##### A. Commitment of Resources

Nothing in this MOA shall be construed as obligating any Trustee, or its respective officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

##### B. Existing Directives

Nothing in this MOA is intended to conflict with existing directives of any Trustee. If the terms of this MOA are inconsistent with existing directives of any Trustee, those portions of this MOA that are determined to be inconsistent shall be identified by the affected Trustee. At the first opportunity for review of this MOA, all identified inconsistencies will be discussed the Trustees for possible amendment of this MOA as the Trustees determine appropriate.

##### C. Trusteeship and Authority

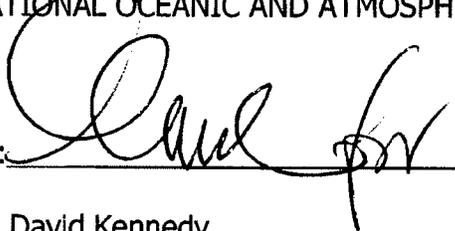
Nothing in this MOA is intended to imply that any signatory Trustee is in any way abrogating or ceding any responsibility or authority inherent in its trusteeship over natural resources. Nothing in this MOA shall be construed to restrict, enlarge, or otherwise determine the rights, interests or jurisdiction of any Trustee.

D. This MOA shall not be enforceable by any person other than the parties hereto, and does not create any rights in any party not a signatory hereto.

XIII. Signatures

Each of the undersigned officials executes this MOA on the date noted as an authorized representative of the party on whose behalf they each are signing:

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

By:  \_\_\_\_\_

David Kennedy  
Director, Office of Response and Restoration, NOAA

 \_\_\_\_\_

Date

UNITED STATES DEPARTMENT OF THE INTERIOR

By: \_\_\_\_\_

Dave Allen  
Regional Director, Region 1, USFWS

\_\_\_\_\_

Date

WASHINGTON DEPARTMENT OF ECOLOGY

By: \_\_\_\_\_

\_\_\_\_\_

Date

Nothing in this MOA is intended to imply that any signatory Trustee is in any way abrogating or ceding any responsibility or authority inherent in its trusteeship over natural resources. Nothing in this MOA shall be construed to restrict, enlarge, or otherwise determine the rights, interests or jurisdiction of any Trustee.

D. This MOA shall not be enforceable by any person other than the parties hereto, and does not create any rights in any party not a signatory hereto.

XIII. Signatures

Each of the undersigned officials executes this MOA on the date noted as an authorized representative of the party on whose behalf they each are signing:

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

By: \_\_\_\_\_ Date \_\_\_\_\_  
David Kennedy  
Director, Office of Response and Restoration, NOAA

UNITED STATES DEPARTMENT OF THE INTERIOR

By: David W. Allen Date 5/25/05  
For: Dave Allen  
Regional Director, Region 1, USFWS

WASHINGTON DEPARTMENT OF ECOLOGY

By: \_\_\_\_\_ Date \_\_\_\_\_

Director, Department of Ecology

THE MUCKLESHOOT INDIAN TRIBE

By: *Stanley Mudd*

John Daniels Jr.  
Tribal Council Chairman

7-22-05

Date

THE SUQUAMISH TRIBE

By: \_\_\_\_\_

Leonard Forsman  
Tribal Council Chairman

\_\_\_\_\_

Date

WASHINGTON DEPARTMENT OF ECOLOGY

By: Jan J. M. [Signature]

9/05/05

Director, Department of Ecology

Date

THE MUCKLESHOOT INDIAN TRIBE

By: \_\_\_\_\_

John Daniels Jr.

Tribal Council Chairman

\_\_\_\_\_

Date

THE SUQUAMISH TRIBE

By: \_\_\_\_\_

Leonard Forsman

Tribal Council Chairman

\_\_\_\_\_

Date

Director, Department of Ecology

THE MUCKLESHOOT INDIAN TRIBE

By: \_\_\_\_\_

John Daniels Jr.  
Tribal Council Chairman

\_\_\_\_\_

Date

THE SUQUAMISH TRIBE

By: Leonard Forsman

Leonard Forsman  
Tribal Council Chairman

6-6-05

Date