

**Funding and Participation Agreement  
Portland Harbor Injury Assessment  
Phase 2**

This Funding and Participation Agreement (Agreement) for the Portland Harbor Phase 2 natural resource damage assessment (NRDA) is entered into by the Confederated Tribes of the Grand Ronde Community of Oregon, Confederated Tribes of the Siletz Indians, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, U.S. Department of the Interior, National Oceanic and Atmospheric Administration, and the Oregon Department of Fish and Wildlife, collectively the Natural Resources Trustees (Trustees) and the party (Participant) whose signature appears below. Collectively, the Trustees and the Participant are the "Parties." The Trustees enter into this Agreement as members of the Portland Harbor Natural Resource Trustee Council (Council). The Parties agree to the following:

1. The NRDA for the Portland Harbor Site is being conducted in a three phase approach. Phase 1 was the development of an Injury Assessment Plan (IAP) and implementation of several early studies. That stage is completed except for implementation of the lamprey study and the osprey egg data validation. Phase 2 is the implementation of those portions of the IAP necessary to estimate liability for purpose of early settlements at the end of Phase 2 with potentially liable parties (PLPs) who have cooperated with the Trustees during the Phase 2 process. Phase 2 involves the implementation of the IAP sufficient to evaluate the appropriateness of and eligibility for early settlements with Participants. Phase 3 involves the full implementation of the IAP and the final injury and damage determination. Participants who settle at the end of Phase 2 will not be responsible for the funding of Phase 3.
2. The Phase 2 Assessment is outlined in Appendix B of the IAP and the Phase 2 Action Plan (Attachment A). That Action Plan outlines the Participant's involvement in the process.
3. While the Trustees intend to coordinate with the Participant on all major decisions and to reach consensus, should the Parties not agree, final decisions on the implementation of Phase 2 will be made by the Trustees.
4. During performance of this Agreement, the Trustees and the Participant may also discuss Participant-specific restoration proposal(s) or engage in settlement discussions. Those activities are not covered by this Agreement and will be funded under separate agreements.
5. The Trustees will provide an accounting of the expenses of Phase 2 to the Participant within 90 days of the conclusion of the activities covered by this Agreement. Due to differences among Trustee accounting procedures, the form of the accounting may differ among Trustees. The accounting will consist of a spreadsheet summarizing labor

(hours and rates), travel costs, equipment costs, contractors' costs and miscellaneous expenses (e.g., supplies, overnight mail).

6. On February 16, 2010, the Trustees met with PLPs to discuss the scope of Phase 2 and the estimated the costs of Phase 2. Trustees have re-examined their initial estimate and have made a good faith effort to estimate the costs accurately in the amount of \$XXXX<sup>1</sup>, but the Participant recognizes that the actual costs incurred may be more or less than that amount. If the actual costs are greater, the Trustees retain their rights to recover such costs in accordance with the natural resource damage (NRD) liability allocation formula. Any funds not expended under this Agreement will be credited against Participant's remaining natural resource liability. If the Participant's allocated liability for NRDs plus assessment costs is less than the Participant's payments to the Trustees under this Agreement (and the Phase 1 Funding and Participation Agreement, if applicable), then to the extent of their authority, the Trustees will work to structure settlements with other PLPs or use some other mechanism mutually agreeable to the Trustees and the Participant to ensure that the Participant receives a refund for the amount of any overpayment.

7. All funds received pursuant to this Agreement are considered joint funds held for the use of the Trustees who have signed this Agreement. Those funds can only be expended pursuant to the terms of this Agreement and the consent of the Trustee Council. Should any Trustee withdraw from this Agreement or the Trustee Council, that Trustee will return all unexpended funds received pursuant to this Agreement to the Department of the Interior Natural Resources Damage Assessment and Restoration Fund (NRDAR Fund) within 60 days of withdrawal. That Trustee will also provide an accounting of its Phase 2 expenditures to the Trustee Council within 60 days of withdrawal. The returned funds will be used for Phase 2 work as agreed upon by the Trustee Council.

8. The Participant will fund the activities to be performed under this Agreement by payment to the NRDAR Fund in accordance with the procedures outlined in Attachment B. Payments shall be made as follows:

A. Phase 1 Participants:

- 1) General Notice Letter (GNL) recipients - \$XXX
- 2) Non-General Notice Letter (NGNL) recipients - \$XXX

B. Phase 1 Non-Participants:

- 1) GNL recipients - \$XXX
- 2) NGNL recipients - \$XXX
- 3) **GNL recipients who were NGNL recipients at the beginning of Phase 1**  
- \$XXX

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<sup>1</sup> This estimate does not include funds for the Trustees to conduct an independent NRD allocation. Those parties participating in Phase 2 as well as interested non-participating parties will fund that allocation.

**4) GNL recipients who provided Phase 1 funding under the Interim Phase 1 Funding and Participation Agreement - \$XXX.**

Payments may be made in two installments. The first installment shall be equal to 70% of the total amount due. The first payment is due within 14 days of the effective date of this agreement. The second installment shall be equal to 30% of the total amount due. The second payment is due July 1, 2011.

9. The Participant agrees to fund the activities to be performed under this Agreement with no admission of liability or responsibility. The Participant does not waive and reserves all rights to challenge the NRDA. All funding provided pursuant to this Agreement is on an interim basis and fully re-allocable in any subsequent settlement, allocation, litigation or other forum between or among any of the PLPs.

10. Nothing in this Agreement shall be construed as obligating the Trustees, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

11. This Agreement does not release the Participant from any potential liability except for the liability for the costs provided under this Agreement. Such costs are considered reasonable damage assessment costs and will be credited against a Participant's natural resource liability.

12. It is recognized that each Party to this Agreement reserves all rights, powers and remedies. It is further recognized that, notwithstanding anything else in this Agreement to the contrary, nothing in this Agreement or in the course of cooperation under this Agreement is intended nor shall be construed as a waiver by any Party of any rights, defenses, privileges or affirmative claims in any proceeding related to natural resource liability arising from the release of hazardous substances at the Portland Harbor site. Nothing in this Agreement is nor shall be construed to be a waiver of the sovereign immunity by any of the Trustees.

13. All Parties to this Agreement acknowledge their intent to participate in this process so as to enter into good faith settlement negotiations at the conclusion of Phase 2.

14. The Trustees acknowledge that the Participant is entering this Agreement with the goal of obtaining a settlement that will provide a complete release for all liability for all NRDs arising out of Portland Harbor contaminant releases, regardless of where the injury or damage occurs. The Participant acknowledges that the Trustees cannot provide certainty at this time regarding the scope of the release to be included in any future settlement or consent decree.

15. The Phase 2 participants will be provided an opportunity to settle on a several basis based on the results of the natural resource damage allocation. The Trustees agree that, in recognition of the monies paid and costs incurred by the Phase 2 participants, the Trustees will prioritize harborwide settlement negotiations with Phase 2

participants over non-participating parties. The Trustees will provide a six-month window following the production of demand letters to Phase 2 participants to initiate settlement negotiations exclusively with Phase 2 participants. However, this Agreement does not preclude the Trustees from negotiating settlements with non-participating parties in advance of negotiating settlements with Phase 2 participants where a settlement opportunity could otherwise be lost for reasons, including but not limited to, bankruptcy or dissolution of the corporation.

16. Benefits of participation and/or consequences of non-participation.

**Comment [EM1]:** The Trustee Council plans to send out a list of incentives and benefits on Wednesday, June 2 and will complete this section at that time.

17. The Trustees commit that the funding provided pursuant to this Agreement will only be used for tasks necessary to enter into NRD settlements and will not be used for any task for which the primary purpose is litigation.

18. The Effective Date of this Agreement will be the date on which it is signed by the Participant and one Trustee.

**SIGNATURES:**

**For the Participant:**

Name of Company:

Status of Company under Section 8: \_\_\_\_\_

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

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

**For the Trustees:**

National Oceanic and Atmospheric Administration

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

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

Department of the Interior

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

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

Oregon Department of Fish and Wildlife

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

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

Nez Perce Tribe

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

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

Confederated Tribes of the Warm Springs Indian Reservation of Oregon

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

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

Confederated Tribes of the Umatilla Indian Reservation

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

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

**5/28/10 DRAFT**

Confederated Tribes of Siletz Indians

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

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

Confederated Tribes of the Grand Ronde Community of Oregon

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

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