MEMORANDUM OF AGREEMENT BETWEEN THE NATURAL RESOURCE TRUSTEES AND [DEVELOPER] FOR PROVIDING TECHNICAL ASSISTANCE RELATED TO HABITAT RESTORATION PROJECTS TOWARD FUTURE SETTLEMENT OF NATURAL RESOURCE DAMAGE CLAIMS AT THE PORTLAND HARBOR CERCLA SITE

THIS MEMORANDUM OF AGREEMENT ("MOA") is made and entered into by and among the National Oceanic and Atmospheric Administration ("NOAA") on behalf of the Department of Commerce, the United States Fish and Wildlife Service ("USFWS") on behalf of the Department of the Interior, the Oregon Department of Fish and Wildlife, the Confederated Tribes of the Grand Ronde Community of Oregon, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Nez Perce Tribe (collectively, "the Trustees") and [Developer] ("Developer") (together, "the Parties"). The effective date of this MOA is the date of the signature of Developer and one Trustee.

RECITALS

WHEREAS, the Trustees are carrying out a damage assessment for the Portland Harbor Superfund site ("Site"), and anticipate bringing claims for injuries to natural resources under the Comprehensive Environmental Response Compensation and Liability Act, 42 USC § 9601, et seq. ("CERCLA"); and

WHEREAS, the Parties desire to facilitate the creation of habitat in the Restoration Focus Area in advance of the Trustees' completion of a damage assessment or the filing of actions against liable parties; and

WHEREAS, the Parties recognize that the terms of any natural resource damages ("NRD") settlement, including any restoration project the Trustees propose as part of the settlement, must be subject to public review and comment and court approval, and therefore the Trustees can make no final determination to accept a restoration project prior to entering into a settlement agreement; and

WHEREAS, the Parties agree that, if a habitat restoration project developed pursuant to this MOA is included in an NRD settlement agreement, it is appropriate to credit the ecological value produced by the project prior to entering into the settlement agreement against the liability of the settling party or parties who were responsible for developing and/or funding the development of the project; and

WHEREAS, Developer is willing to develop one or more habitat restoration projects in the Restoration Focus Area with the intention of marketing the ecological value credits produced by such project(s) to one or more parties liable for natural resource damage claims at the Site to be potentially used by such party or parties to offset some or all of their liability in settlements with the Trustees; and

WHEREAS, the Parties desire to work collaboratively to design and assess the value of one or more habitat restoration projects in the Restoration Focus Area;

NOW, THEREFORE, in consideration of the foregoing recitals the Parties mutually agree as follows:

AGREEMENT

1. **Definitions**

1.1 Project Baseline Condition. Solely for the purposes of this MOA, the "Project Baseline Condition" shall be the habitat conditions at the location of a habitat restoration project taking into account remedial measures that are, or are reasonably anticipated to be, required by the U.S. Environmental Protection Agency under CERCLA.

1.2 Covered Projects. "Covered Projects" shall refer to those habitat restoration projects as to which the Parties collaborate on project design and establishment of Forecast Settlement Credit Value pursuant to the terms of this MOA.

1.3 Forecast Settlement Credits Value. "Forecast Settlement Credits Value" shall be a determination of the value a habitat restoration project subject to this MOA is expected to generate taking into account the project's anticipated habitat benefits beyond the Project Baseline Condition. Forecast Settlement Credits Value will be estimated based on discounted service acre years ("DSAYs"), or such other measurement of value that the Trustees employ for determining damages to natural resources for the Site and pursuing claims against liable parties for such damages.

1.4 Technical Assistance. "Technical Assistance" shall mean the provision by the Trustees of assistance to Developer in the evaluation, design and planning of Site area habitat restoration projects and the determination of Forecast Settlement Credits Value for such restoration projects. Technical Assistance shall include review and evaluation of proposed projects by Trustee technical and legal representatives as needed.

1.5 Final Settlement Credits Value. "Final Settlement Credits Value" shall be the value of a habitat restoration project that will be recognized as offsetting some or all of a party's natural resource damage liability in a formal settlement agreement.

1.6 Potentially Liable Party. "Potentially Liable Party" shall mean any party identified by the Trustees as having potential NRD legal liability arising from releases of hazardous substances at or to the Site.

1.7 Restoration Focus Area. "Restoration Focus Area" includes the Portland Harbor Superfund study area and the Broader Focus Area defined by the Trustee Council.

2. Collaboration on Habitat Project Design and Settlement Credits Value Assessment

2.1 Site Habitat Project Evaluations. The Trustees will collaborate with Developer in evaluating options for potential habitat restoration projects located in or near the Site or the Broader Focus Area defined by the Trustee Council. Technical Assistance will be provided in an effort to maximize the ecological services of habitat restoration projects and the consistency of such projects with Trustee goals and responsibilities.

2.2 Payment of Trustee Technical Assistance Costs. Developer will reimburse the Trustees for the cost of Technical Assistance provided by the Trustees at Developer's request. In any future actions for or settlements of NRD claims with respect to the Site, the Trustees will not seek to recover any Technical Assistance costs paid by Developer pursuant to this MOA.

2.3 Billing Payment Procedures for Trustee Technical Assistance. Developer shall pay the cost of Technical Assistance annually on a projected basis. Developer shall make an initial payment of $_____ to the Trustees within 30 days of the signing of this MOA by Developer and one Trustee, which is the projected cost of providing one year of Technical Assistance. The Trustees shall have no obligation to begin providing Technical Assistance prior to receiving the initial payment. However, if the Trustees elect to provide Technical Assistance prior to the effective date of this MOA, Developer will reimburse those costs as part of the initial payment. On an annual basis beginning one year after the effective date of this MOA, the Trustees will provide Developer with an invoice detailing the Technical Assistance work performed prior to that date (or, for subsequent invoices, since the date of the prior invoice) and the charges for such work, and detailing the Technical Assistance work the Trustees project performing during the succeeding year and the projected charges for such work. Within 30 days after the date of each such invoice, Developer shall pay the Trustees' projected costs, less any amounts paid previously that have not been expended by the Trustees. Payment instructions for each Trustee are included in Appendix A.

3. Establishment and Use of Settlement Credits Value

3.1 Identification of Covered Projects and Establishment of Forecast Settlement Credits Values. The Parties shall jointly identify one or more proposed habitat restoration projects as Covered Projects under the terms of this MOA. The Parties shall jointly agree on a proposed design for each Covered Project, and shall in good faith meet and discuss the Forecast Settlement Credits Value for each Covered Project. If and when the Parties agree on the Forecast Settlement Credits Value of a Covered Project, that value shall be documented in written form by the Trustees and conveyed to Developer.

3.2 Future Adjustments to Credit Amounts. Prior to entering into any future NRD settlement in which the Trustees would propose to apply credits from a Covered Project, the Trustees and Developer shall in good faith meet and review the results of performance monitoring for each Covered Project and determine a Final Settlement Credits Value for each. The Trustees will allow for an upward adjustment from the Forecast Settlement Credits Value that has previously been established under paragraph 3.1 of this MOA, in the following

circumstances: 1) The results of performance monitoring for the affected Covered Project demonstrate the project has produced or is expected to produce greater ecological benefits than were estimated in developing the Forecast Settlement Credits Value; 2) the Trustees' protocols for the evaluation of habitat restoration projects change such that a greater Final Settlement Credits Value would be available under the new protocols; 3) additional habitat is planned or developed by Developer or others in the vicinity of a Covered Project such that a greater Final Settlement Credits Value should be available under the Trustees' protocols; or 4) any other circumstances under which Developer would have obtained a greater Final Settlement Credits Value for a Covered Project had Developer delayed working with the Trustees on the establishment of a Forecast Settlement Credit Value for that project. The Trustees will recognize a Final Settlement Credits Value that is lower than the Forecast Settlement Credits Value in the following circumstances: 1) The results of performance monitoring for the Covered Project demonstrate that the project has produced or is expected to produce lower ecological benefits than were estimated in developing the Forecast Settlement Credits Value; 2) remedial actions, development actions or other activities are planned or have occurred in the vicinity of a Covered Project such that a lower Final Settlement Credits Value should be available under the Trustees' protocols; or 3) a party has previously received credit for all or a portion of a Covered Project against environmental or habitat mitigation requirements under federal, state or local laws or ordinances or against NRD liability in another settlement agreement.

3.3 Further Collaboration. The Parties recognize that additional collaboration will be necessary to develop further entitlement conditions for Covered Projects, including, but not limited to, real estate assurances (*e.g.,* conservation easement, deed restrictions), financial assurances (*.e.g.,* performance bonds), a monitoring and stewardship protocol, and the applicability, sale and transfer of credits to Potentially Liable Parties. Some or all of such additional collaboration would require an addendum to this MOA or a separate MOA.

3.4 Effect of MOA on Natural Resource Damage Assessment Process. This MOA and the Parties' actions or determinations pursuant to this MOA are not intended to prejudice or affect the course of or obviate the need for the Trustees' natural resource damage assessment process for the Site.

4. Miscellaneous

4.1 Modifications. The Parties may modify the terms of this MOA by mutual written agreement signed by authorized representatives of the Parties.

4.2 No Admission of Liability; No Release of Non-Parties; and No Third Party Beneficiaries. This MOA shall not constitute nor shall it be used as evidence of any admission of law or fact, or a waiver of any right or defense by any Party, except as expressly set forth in this MOA. The Parties do not admit to any fact or to any liability under federal, state, or local law or regulation, and no part of this MOA shall constitute such an admission. This MOA is not intended to, nor shall it, release, discharge or affect any rights or causes of action that any of the Parties may have against any other person or entity, and each of the Parties reserves all such rights. This MOA is neither expressly nor impliedly intended for the benefit of any third party,

and is neither expressly nor impliedly enforceable by any third party, including, but not limited to, local, state and federal governments and/or agencies. Nothing in this MOA is or shall be construed to be a waiver of sovereign immunity by any of the Trustees.

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

4.4 Counterparts. This MOA may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

(Signatures on the following page)

SIGNATURES

FOR DEVELOPER

By: _____

Printed Name: _____

Date: _____

FOR THE PORTLAND HARBOR NATURAL RESOURCE TRUSTEE COUNCIL

Confederated Tribes of the Grand Ronde Community of Oregon

By: _____

Date: _____

Confederated Tribes of Siletz Indians

By: _____

Date: _____

Nez Perce Tribe

By: _____

Date: _____

Confederated Tribes of the Umatilla Indian Reservation

By: _____

Date: _____

Confederated Tribes of the Warm Springs Indian Reservation of Oregon

By: _____

Date: _____

Oregon Department of Fish and Wildlife

By: _____

Date: _____

U.S. Department of the Interior

By: _____

Date: _____

National Oceanic and Atmospheric Administration

By: _____

Date: _____