

**MEMORANDUM OF AGREEMENT BETWEEN THE NATURAL RESOURCE TRUSTEES
AND [COMPANY] FOR CREDITING 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 [COMPANY] (together, “the Parties”). The effective date of this MOA is the date of the signature of the last party hereto.

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”), the Oil Pollution Act (OPA) [insert citation] and other applicable laws and regulations; and

WHEREAS, the Parties desire to facilitate natural resource restoration and the creation or enhancement of habitat (“Projects”) in and near the Site 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 approved by all appropriate public officials and 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 Project developed pursuant to this MOA is included in an NRD settlement agreement, it is appropriate to determine the credit for 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, the Parties desire to work collaboratively to design and assess the value of one or more Projects in or near the Site;

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

AGREEMENT

1. Definitions

1.1 Project Initial Condition. Solely for the purposes of this MOA, the Project Initial Condition shall be the habitat conditions at the location of a 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 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 Credit Value. Forecast Settlement Credit Value shall be a determination of the value a Covered Project subject to this MOA is expected to generate taking into account the Covered Project's anticipated ecological services beyond the Project Initial Condition. Forecast Settlement Credit Value will be estimated based on discounted service acre years ("DSAYs") developed using the most current version of the Trustees' habitat equivalency model as of the effective date of this agreement (HEA) or such other measurement of value agreed upon by the Parties 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 [COMPANY] in the evaluation, design and planning of proposed or actual Covered Projects and the determination of Forecast Settlement Credit Value for such Covered Projects. Technical Assistance shall include review and evaluation of proposed Covered 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 Covered Project that will be recognized as offsetting some or all of a party's natural resource damage liability as set forth in an approved settlement agreement.

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

2.1 Site Habitat Project Evaluations. The Trustees will collaborate with [COMPANY] in evaluating options for potential Covered 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 Covered Projects and the consistency of such Projects with Trustee goals and responsibilities.

2.2 [COMPANY] Payment of Trustee Technical Assistance Costs. [COMPANY] will reimburse the Trustees for the cost of Technical Assistance provided by the Trustees at [COMPANY]'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 [COMPANY] pursuant to this MOA.

2.3 Billing Payment Procedures for Trustee Technical Assistance. [COMPANY] shall pay the cost of Technical Assistance annually on a projected basis. [COMPANY] shall make an initial payment of \$_____ to the Trustees within 30 days of the signing of this MOA by [COMPANY] 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, [COMPANY] 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 [COMPANY] 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, [COMPANY] shall pay the Trustees' projected costs, less any amounts paid previously that have not been expended by the Trustees.

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 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 [COMPANY].

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 substantially constructed Covered Project, the Trustees and [COMPANY] 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 may 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 that the project has produced or is expected to produce significantly greater ecological services than were estimated in developing the Forecast Settlement Credits Value; 2) the Trustees' HEA model or such other tool as they use for the evaluation of Projects changes such that a greater Final Settlement Credits Value would be available under the revised model or tool; 3) additional habitat is developed by [COMPANY] or others in the vicinity of a Covered Project such that a greater Final Settlement Credits Value should be available under the Trustees' HEA model or tool; or 4) any other circumstances under which [COMPANY] would have obtained a greater Final Settlement Credit Value for a Covered Project had [COMPANY] delayed working with the Trustees on the establishment of a Forecast Settlement Credit Value for that project. The Trustees may 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 significantly lower ecological services 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 would be available under the Trustees' HEA model or tool; or 3) [COMPANY] or another 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 Applicability of Credits to Future Settlements. At the time of entering into any future settlement of NRD claims against [COMPANY] the Trustees will include substantially constructed Covered Projects among the alternatives the Trustees are considering for compensatory restoration projects.¹ If the Trustees select one or more of the Covered Projects as preferred alternatives, the Trustees shall recognize the Final Settlement Credits Value for each selected project, as documented pursuant to paragraph 3.2 of this MOA, for the purpose of settling NRD claims against [COMPANY]. Prior to or simultaneously with entering into a settlement in which the Trustees recognize the Final Settlement Credits Value for one or more Covered Projects, [COMPANY] shall take steps acceptable to the Trustees necessary to ensure that the property associated with such Covered Project or Projects is 1) preserved for the exclusive use of the Covered Project in perpetuity; and 2) maintained monitored, and managed in accordance with adaptive management requirements in perpetuity. Notwithstanding anything in this MOA, the terms of any future settlement of NRD claims with respect to the Site, including the applicability of any or all credits to a claim made by the Trustees at the Site, shall remain subject to the approval of the United States Attorney General and the Oregon Department of Justice and may, in the discretion of the United States, be made subject to public review and comment and court approval.

3.4 No Prejudice to [COMPANY]. [COMPANY]'s participation in the planning, evaluation and construction of habitat restoration projects under this MOA shall not be used against [COMPANY] by any of the Trustees in any assessment of [COMPANY]'s NRD liability. In no event shall any allocation to [COMPANY] of Site NRD responsibility by the Trustees be increased due to [COMPANY]'s planned or actual construction of Projects and the establishment of Forecast Settlement Credits Value for such projects under this MOA.

3.5 Effect of MOA in Subsequent Litigation. In the event the Trustees bring an action for NRD claims against [COMPANY] relating to the Site or any other site, neither the terms of this MOA nor any determinations of Project Initial Condition, Forecast Settlement Credits Value, Final Settlement Credits Value, nor any other factual determination made or agreed to by the Parties pursuant to this MOA shall be binding upon nor used against the Parties or the United States in such proceedings. Any discussions or factual determinations made or agreed to by the Trustees pursuant to this MOA relating to proposed or potential allocations of liability to COMPANY are made solely for the purpose of facilitating settlement negotiations, are not intended to prejudice or have any bearing on the Trustees' position vis-à-vis the joint and several

¹ For purposes of this MOA a covered project shall be considered substantially constructed after all required earthwork, soil addition or amendment, and removal or alteration of structural elements is completed and the first season's planting of vegetation is completed.

liability of COMPANY or any other party liable for NRD claims at the Site and shall not be used against the Parties or the United States in such proceedings.

3.6 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.

4.3 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.

4.4 Confidentiality. The Parties acknowledge that the sharing and exchange of information, disclosure of documents and the negotiations conducted under this MOA are conducted to promote a settlement of potential liabilities of the Company for natural resource damages and agree that the substance and content of this agreement and settlement activities shall remain confidential to the extent permitted by law.

4.5 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.

(Signatures on the following page)

Signature blocks [COMPANY], Oregon, NOAA, USFWS, 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