

**THE DRAFT ASSESSMENT PLAN: HOW IT RELATES TO COMMENTS  
PROVIDED BY PARTICIPATING PARTIES ON THE ASSESSMENT PLAN  
DRAFT OUTLINE DATED SEPTEMBER 17, 2008**

The following discussion synthesizes and responds to comments made by the participating parties on the Assessment Plan (AP) outline. The purpose of this document is to describe how the Natural Resource Damage Assessment Plan, Participating Party Preliminary Review Draft (Draft AP) relates and responds to comments and concerns expressed to date by the participating parties. The Trustees carefully considered the participating parties' comments and appreciated the constructive input, much of which is reflected in the Draft AP.

**1. Comments Regarding Activities Occurring in Phases 1-3:**

Many commenters who reviewed the AP outline had questions concerning the work to be done in each of the first three phases of the Portland Harbor Phased Damage Assessment. They suggested that some types of studies and the use of some types of quantification methodologies should be deferred to Phase 3. They urged the Trustees to rely on existing information for Phase 2 to the maximum extent possible and to minimize the use of new studies.

**How the Draft AP Relates to Comments:**

**In General.** The Trustees' Phase 2 Framework, which is included as an appendix to the Draft AP (Appendix A), provides an overview of the Trustees' anticipated Phase 2 actions that is consistent with the above category of comments. The Phase 2 Framework indicates that the Trustees primarily plan to use existing information to evaluate and quantify injuries to trust resources. See, e.g., Appendix A at A-1, A-5, A-8.<sup>1</sup> Where additional data collection is warranted, the Trustees will consider requests to collect such data in collaboration with participating parties. Id. at A-1. Similar to the expressed desire of many who commented on the AP outline, the Trustees believe the primary goal of Phase 2 is to complete an economical assessment of injuries to trust resources that will result in early settlements with participating parties. Draft AP at 1-8 to 1-9. This approach will enable early settlers to avoid the additional time and resource costs associated with Phase 3 assessment efforts, which are likely to include comprehensive and costly studies, modeling and other activities. Appendix A at A-1; Draft AP at 4-3. See also Appendix A at A-5 (explaining how the Trustees' approach to certain modeling methodologies might differ between Phases 2 and 3).

**Regarding Ecological Resources.** The Phase 2 Framework separately discusses the Trustees' planned approach to assessing injuries to ecological, Tribal and recreational

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<sup>1</sup> Citations in this document refer to page numbers, not section numbers, of the Draft AP and its Appendix A. For example, a citation to Appendix A at A-1 refers the reader to the first page of Appendix A, and a citation to Draft AP at 1-1 refers the reader to the first page of the Draft AP's section 1.

trust resources. For ecological resources, the Trustees explain that they have decided to apply Habitat and Resource Equivalency Analyses (HEA and REA) to quantify natural resource and ecological service losses and to scale compensatory restoration necessary to compensate the public for such losses. Appendix A at A-1. See also id. at A-3 to A-5 (explaining the Trustees' approach to HEA and REA modeling); Draft AP at 5-1 to 5-3 (discussing HEA and REA). The Trustees' decision to use HEA and REA for such purposes is consistent with prior comments from participating parties regarding appropriate quantification methodologies for Phase 2. See infra section 10 (reporting that commenters advocated for the use of HEA and REA because these methodologies establish a common currency for evaluating injuries and scaling restoration).

**Regarding Tribal Resources.** For Tribal resources, which are those trust resources and their associated services of particular significance to the Tribal Trustees, the Phase 2 Framework indicates that the Trustees have not yet decided which method(s) they will use to quantify lost uses and the corresponding benefits of restoration. Appendix A at A-6 to A-7. Although it is fair to state that the Trustees' approach to Tribal resources is less fully-developed at this point than their approach to assessing ecological resources, the Phase 2 Framework does indicate that the Trustees will employ a similarly pragmatic philosophy by striving to make use of existing information where possible and by limiting their efforts to only those needed to support early settlements. Id. The Trustees acknowledge that the Phase 2 Framework does not flesh out the ways in which the Trustees will delineate between Tribal and ecological services and avoid double counting, which were expressed concerns of some participating parties who commented on the AP outline. See infra section 9. Still, the Trustees continue to recognize that the same natural resource can provide both types of services and expressly acknowledge in the Phase 2 Framework that a single restoration project could address both Tribal and ecological services losses. See Appendix A at A-7 (stating that in Phase 2, the Trustees may identify additional Tribal-resource-specific components that could be added to restoration opportunities previously identified by the Trustee Council's Restoration Committee). The Trustees also acknowledge that the decision to include a Tribal resources overlay in Phase 2 runs counter to the expressed opinion of at least one commenter on the AP outline who desired to see any assessment of Tribal resource losses deferred to Phase 3. However, the Trustees believe that it is important to consider Tribal resource losses in Phase 2. See infra section 9.

**Regarding Recreational Resources.** For recreational resources, the Phase 2 Framework explains that the Trustees plan to assess recreational resources and services by using a benefit transfer approach, possibly coupled with focused additional data collection. Appendix A at A-7 to A-8. See also Draft AP at 5-4 (discussing benefits transfer). This approach is partially consistent with previous comments from participating parties, some of whom advocated for the use of benefit transfer for scaling recreational losses on the grounds that the methodology is time and cost effective. The Trustees' approach is not consistent with the expressed view of at least one commenter who urged that any assessment of recreational losses be deferred to Phase 3. Again, the Trustees feel that it is appropriate to address recreational losses in Phase 2. See infra section 9. The Trustees acknowledge prior comments regarding the wisdom of focusing efforts on specific

recreational services of interest, at least in Phase 2. However, the Trustees' review of existing information indicates there are data gaps regarding the types of recreational activities and user groups affected by the release of contamination within the Portland Harbor Site, which will likely require some additional data collection to inform decisions about specific recreational uses/services of interest. See Appendix A at A-8.

**Regarding Multnomah Channel.** The Trustees' review of existing information during Phase 1 identified a possible data gap for the Multnomah Channel, a branch of the Willamette River that diverges from the main channel at River Mile 3.5 near the confluence with the Columbia River. Appendix A at A-2. Because the Trustees were not aware of this possible data gap when they prepared the AP outline, the participating parties have not had a prior opportunity to comment on the Multnomah Channel issue. The Trustees note that the Multnomah Channel has never been part of the study area for the Portland Harbor Remedial Investigation/Feasibility Study (RI/FS). However, the Trustees' review of existing literature revealed that under certain conditions, significant flows from the Willamette River enter the Multnomah Channel rather than flowing more directly downstream into the Columbia River. *Id.* Thus, consistent with their obligation to consider areas where hazardous substances released from the Portland Harbor Site have come to be located, the Trustees concluded they must take steps to fill this data gap. However, consistent with the pragmatic, settlement-oriented approach to Phase 2, the Trustees are addressing the Multnomah Channel issue by working to identify and review additional sources of available information rather than proposing their own studies at the outset. *Id.* at A-2 to A-3 (describing potentially relevant Oregon Department of Environmental Quality data that either exists or will be collected soon). The Trustees will evaluate any such data for relevancy and reliability as they assess whether natural resources in Multnomah Channel have been injured and determine whether reasonable assumptions can be used to fill data gaps regarding Multnomah Channel resources. *Id.* at A-3.

## **2. Geographic Scope of the Assessment**

Some commenters who reviewed the AP outline expressed concerns about the potential scope of the assessment area and urged that the geographic scope of the assessment be limited to the initial study area (ISA). Others asked what criteria would be used to determine the geographic scope and when the determination would be finalized.

### **How the Draft AP Relates to Comments:**

As stated above, the Trustees have an obligation to consider geographic areas where hazardous substances released from the Portland Harbor Site have come to be located to determine whether any injuries to natural resources have occurred as a result of those releases. At this point in the assessment process, the Trustees believe it remains premature to make a final determination related to the geographic scope of the full assessment. See Draft AP at 2-1 (explaining that the boundaries of the natural resource damage assessment (NRDA) area are not yet fully delineated, but also providing a general definition of the geographic area to guide the assessment process). However, for

Phase 2, the Trustees have committed to limit their assessment to the Portland Harbor Superfund Site Study Area and immediate vicinity and the Multnomah Channel (Portland Harbor Assessment Area (PHAA)). Appendix A at A-1. See also id. n. 1 (“The Phase 2 assessment will not include the Columbia River.”).

### **3. Literature Review**

Some commenters on the AP outline asked that the Trustees compile a list of information they planned to review and then afford the participating parties an opportunity to comment on that list, including making suggestions of additional studies or data to be added to the list. One commenter asked how the review would be used in conjunction with existing data, data from the Trustees’ three Phase 1 studies and potential refinements to data during RI development.

#### **How the Draft AP Relates to Comments:**

As requested, the Trustees provided the participating parties with a list of the literature and data under consideration for review. This was done prior to a February 25, 2009 telephonic conference between the Trustees and the participating parties. The Trustees also invited the participating parties to let them know of relevant literature, studies or data that had been omitted from the list, to which the participating parties responded with 14 additional sources of information. In addition, the Portland Harbor Case Manager, Dr. Stephen Zylstra, is in the process of establishing a webpage and reading room to facilitate access to relevant documents associated with the AP.

Regarding the ways in which the Trustees will use the results of the literature/data review and the Phase 1 studies, the Phase 2 Framework confirms that the Trustees are relying primarily on existing data and information in Phase 2 to evaluate and quantify injuries to trust resources. All of the information – existing information and data, results of Phase 1 studies, and refined RI data as it becomes available – will be used by the Trustees to inform the HEA/REA analyses. See, e.g., Appendix A at A-3 to A-4 (explaining that the Trustees will estimate service losses based on such inputs); id. at A-5 (stating that the Trustees will consider using RI/FS information and methods in evaluating background concentrations of contaminants); id. (discussing the differences between Phases 2 and 3 in terms of the Trustees’ primary reliance in Phase 2 on existing information, expert input, and informed assumptions flowing from such sources as RI/FS-collected data, habitat information, and other available data sets). The Trustees also plan to review existing data from Multnomah Channel in determining whether injuries to Multnomah Channel natural resources have occurred due to hazardous substance releases in Portland Harbor. Id. at A-3. See also supra section 1.

Regarding potential refinements to data during RI development, the Trustees intend to review and incorporate as appropriate any refinements of RI-generated data into their analysis. Indeed, one of the reasons the Trustees are engaged in the RI/FS process is to stay informed of and make use of such developments. Draft AP at 1-9 (stating that the Trustees’ “goal is to maximize the effectiveness of remedial and NRDA efforts by

coordinating remedial and NRDA activities in conjunction with one another whenever feasible”).

Regarding data from the Trustees’ three Phase 1 studies, such information is being incorporated into the Trustees’ analysis as it becomes available. This is discussed more fully in section 4 below.

#### **4. Phase 1 Studies – Lamprey, Osprey & Salmon**

Commenters on the AP outline asked that the Trustees provide additional information regarding the planned Phase 1 studies. Participating parties specifically requested copies of work plans, QAPPs and validated data associated with or resulting from the studies. Participating parties also asked for explanations of the objectives of the studies and the ways in which study results will be used in the assessment process.

##### **How the Draft AP Relates to Comments:**

Lamprey, osprey and salmon are resources of concern for the Trustees that must be addressed in this assessment process. As the participating parties know, the Trustees piggybacked on existing research efforts to collect additional data relevant to assessing injury to salmon and osprey. The Trustees did so because they recognized that ongoing studies related to osprey and salmon could provide information useful to the NRDA process at minimal costs. To better assess injury to lamprey in the face of a large data gap, the Trustees are developing a pilot study on the toxicity of Portland Harbor sediments to lamprey ammocoetes. Consistent with the commenters’ request for additional information about these three planned Phase 1 studies, the Trustees agreed in the Funding and Participation Agreement for Phase 1 to provide the participating parties with copies of validated data and reports related to the three studies.

As promised, the Trustees will be providing validated data from the osprey egg and salmon studies as they become available. In addition, the Trustees provided the participating parties with the Field Sampling Plan and the QAPP for the osprey egg analysis and the Statement of Work and QAPP for the salmon study via email on December 23, 2008. On August 26, 2009, two recently-completed data reports from the salmon study were provided to the participating parties: “Data Report for Lower Columbia River Juvenile Salmon PAH Exposure Assessment” and “Data Report for Lower Columbia River Juvenile Salmon Persistent Organic Pollutant Exposure Assessment.” And on September 2, 2009, the Trustees provided the participating parties with a progress report on the osprey egg analysis. For lamprey, the Draft AP explains that this Phase 1 study is in the development stage, as a result of which the Trustees currently have no information to provide to the participating parties. Draft AP at 4-11. Because Phase 1 was not fully funded by the Participating Parties, the Trustees had to delay the start of the lamprey work until other funding could be identified. As a result, the progress on this particular study has been slow due to uncertainty over funding sources, though the Trustees currently plan to conduct the pilot study beginning in fall 2009.

The Draft AP provides additional information about the purposes of these three studies. For example, regarding salmon, the Draft AP explains that as part of Phase 1, the Trustees collaborated with NOAA on a study of salmon to look at attributes such as growth rates, fish condition, genetic stock and contaminants. Draft AP at 4-10. The recently completed report, which provides information about whole body concentrations of selected contaminants in Columbia River juvenile Chinook salmon collected above, at and below the confluence with the Willamette River as part of the Lower Columbia River Estuary Partnership Program, has been cited and described in the Draft AP. Id. For osprey, the Draft AP explains that as part of Phase 1, the Trustees are collaborating with EPA on a study of osprey eggs. Id. at 4-11. The objectives of the study are to evaluate eggshell thickness and egg tissue contaminant concentrations and assess how they relate to injury thresholds for this top-level predator. Id. And for lamprey, the Draft AP explains that the study objective is to evaluate the potential toxicity to lamprey ammocoetes from exposure to contaminated sediments in the PHAA. Id.

## **5. Phase 2 Work Plan, now known as Phase 2 Framework**

Commenters on the AP outline asked how the Phase 2 work plan would be different from the Assessment Plan. One participating party suggested that the work plan be a separate section of the Assessment Plan and include the assumptions to be used for Phase 2 settlement purposes with respect to injury and baseline. Another asked when the work plan would be completed.

### **How the Draft AP Relates to Comments:**

After considering the participating parties' comments, the Trustees opted to include the Phase 2 work plan, now called the Phase 2 Framework, as an appendix to the Draft AP. See generally Appendix A. It thus was provided contemporaneously with the Draft AP for review and comment by the participating parties. Although some of the content of the Phase 2 Framework is included in the body of the Draft AP, the Trustees used the Phase 2 Framework as an opportunity to provide additional information about the actions the Trustees plan to undertake in Phase 2 to further early settlement objectives. For example, the Phase 2 Framework provides additional information about the Trustees' current thinking on how to approach injury to Tribal and recreational resources in the settlement-oriented Phase 2. Appendix A at A-6 to A-8. The Phase 2 Framework also provides insights into how the settlement negotiation process is likely to unfold. Id. at A-10 to A-13. The Phase 2 Framework does not include the assumptions to be used for Phase 2 settlement purposes as one participating party suggested because the Trustees envision developing these assumptions during Phase 2 by engaging in a collaborative review and comment process with the participating parties.

## **6. Injury Determination**

Commenters on the AP outline asked whether all of the resources listed in the outline would be part of the early settlement quantification. Others asked which species would

be the focus of Phase 2. Several asked how injury levels will be determined for each resource.

### **How the Draft AP Relates to Comments:**

The Trustees addressed the above comments regarding injury determination by, among other things, explaining at the outset of the Phase 2 Framework that:

(1) Phase 2 will focus on an assessment of key resources, which the Trustees have identified as juvenile salmon, lamprey ammocoetes, sturgeon, sediment, benthos, piscivorous birds (osprey/bald eagle), piscivorous mammals (otter/mink), other natural resources with Tribal-specific value and other fish covered by advisories or having recreational value; and

(2) Phase 2 will use a combination of HEA/REA and benefit transfer to quantify ecological and recreational losses, relying on existing information to the extent possible and employing reasonable, conservative assumptions to evaluate and quantify exposure and injuries to trust resources. Some additional data may be collected collaboratively with participating parties to quantify injury, if warranted.

Appendix A at A-1. See also Draft AP at 4-3 (describing the focused Phase 2 approach). The Draft AP also explains that the Trustees may employ an integrative approach to injury assessment in Phase 2 by using information about injuries to multiple natural resources for an integrated scaling of restoration and/or damages. Id. at 4-2.

## **7. Development of Assumptions**

One commenter on the AP outline sought clarification on the meaning of the phrase “scientifically defensible, conservative assumptions.” Others stated that the development of assumptions is an important topic that should be discussed by the Trustees and participating parties collaboratively. Another commenter suggested formation of a technical group to vet the literature Trustees will rely on for assumptions.

### **How the Draft AP Relates to Comments:**

The Draft AP explains in various sections that the settlement-oriented Phase 2 will seek to fill gaps not with extensive data collection but rather by using conservative, simplifying assumptions to the extent practicable. See, e.g., Draft AP at 1-8 (referring to the use of “conservative, simplifying assumptions”); id. at 4-2 (referring simply to the use of appropriate “assumptions”); id. Appendix A at A-5 (describing differences between Phase 2 and Phase 3 and explaining that during the former, Trustees will make use of “informed assumptions”). Because the Trustees plan to develop assumptions in collaboration with participating parties to the extent possible, making it difficult to provide a dictionary-type definition for the phrase in question. In general, however, the Trustees believe that appropriate assumptions developed for Phase 2 settlements should meet the following criteria: (1) the assumptions must be supported by credible studies or data that are applicable to the Portland Harbor Site, i.e. based on relevant contaminants,

applicable species or habitat services, and appropriate endpoints; and (2) the assumptions must be conservative, meaning they are more, rather than less, protective of the environment. The Trustees believe that assumptions meeting these criteria would be both appropriate and more likely to withstand any judicial challenge to a settlement.

Turning to the participating parties' question about the manner in which assumptions will be developed, the Trustees agree that the development of gap-filling assumptions is an important topic that should be discussed by the Trustees and participating parties collaboratively. As explained above in section 5, the Trustees envision developing these assumptions during Phase 2 through a collaborative review and comment process with the participating parties. Regarding the suggestion for formation of a technical group to assist with this task, at this time the Trustees do not envision the formation of such a group and will rely on the review and comment process mentioned above as that process will be less time consuming and more cost efficient.

## **8. Baseline Determination**

Several commenters on the AP outline asked how the Trustees will approach baseline determinations. One participating party suggested that sufficient information existed to streamline the determination, and another assumed that significant baseline work could occur during Phase 1 through the compilation of existing information.

### **How the Draft AP Relates to Comments:**

The Trustees appreciate the importance of baseline determinations. Under the Department of the Interior's NRDA regulations, baseline is defined as the "conditions that would have been expected at the assessment area had the discharge ... not occurred, taking into account both natural processes and those that are the result of human activity." 43 C.F.R. § 11.72(b)(1). The regulations further provide that "[i]f available and applicable, historical data for the assessment area or injured resource should be used to establish the baseline," otherwise "baseline data should be collected from control areas." *Id.* § 11.72 (c)-(d). Consistent with this direction, the Draft AP reports the Trustees' determination that historic data generally are not available or appropriate at the Portland Harbor Site, as a result of which the Trustees expect to rely primarily on control area data to assess baseline conditions. Draft AP at 4-15. One exception to the control area data approach to baseline involves relevant birds, for which the Trustees may rely on historic data on eggshell thicknesses. *Id.* The Trustees agree that much information exists that may be useful in making baseline determinations. For example, the Draft AP reports that the Trustees will consider information and methods developed to define background conditions for the RI/FS in their evaluation of baseline. *Id.* at 4-16. See also Appendix A at A-5 (explaining that the Trustees will consider the RI/FS approach to evaluating baseline). While the Trustees also agree with the comment that significant baseline work could occur during Phase 1, they anticipate that the work will continue into Phase 2.

## **9. Tribal (Cultural) & Recreational Services, Uses & Values**

Not surprisingly, commenters on the AP outline asked how the Trustees will delineate between Tribal (cultural) and ecological services. Would the delineation be done on a geographic basis? How will overlap be addressed? The participating parties' comments relating particularly to recreational services suggested that the Trustees identify specific recreational services of interest and then use benefit transfer for scaling recreational losses. One commenter urged the Trustees to defer economic valuation of recreational and Tribal (cultural) losses to Phase 3.

### **How the Draft AP Relates to Comments:**

As an initial matter, the category of natural resources, uses and associated services formerly referred to as "cultural" now is being referred to as "Tribal." The Tribal Trustees requested this change because, while there are many cultures in the Portland Harbor area, the Draft AP is assessing only that subset comprised of the Native American culture. The Trustees view this terminology as more accurately describing their assessment process.

The Trustees' approach to both Tribal and recreational services, uses and values was discussed above in section 1. Rather than repeating that section here, the reader is referred to section 1's thorough discussion of this topic. Regarding the participating parties' specific questions, the Trustees can report that: (1) the delineation between Tribal and ecological services will not be done on a geographic basis; (2) any potential overlap will be addressed to avoid double counting; (3) the Trustees' focus will be on specific recreational services of interest during Phase 2, with benefit transfer being used to scale recreational losses; and (4) the Trustees ultimately were unwilling to defer all economic valuation of recreational and Tribal losses to Phase 3. See generally Appendix A at A-6 to A-7 (discussing the Trustees' Phase 2 approach to assessing injury to Tribal resources); id. at A-7 to A-8 (same for recreational resources).

## **10. Quantification Methodologies**

One commenter on the AP outline asked that the Trustees specify which methods will be used in Phases 2 and 3. Other participating parties advocated the use of only HEA and REA methods in Phase 2, noting that these methods are useful because they establish a common currency for evaluating injuries and scaling restoration. Another commenter noted that large-scale revealed preference or stated preference studies would not be necessary for achieving early settlement.

### **How the Draft AP Relates to Comments:**

The Trustees' approach to Phase 2 quantification methodologies is consistent with the participating parties' comments. As explained in the Phase 2 Framework, the Trustees will apply HEA and REA modeling to quantify natural resource and ecological service losses resulting from the releases of hazardous substances to the Portland Harbor Site and to scale compensatory restoration necessary to compensate the public for these losses. Appendix A at A-1, A-3. The Trustees also will employ a benefit transfer approach to

assess lost recreational uses at the Portland Harbor Site. Id. at A-7. Regarding Tribal resources, the Phase 2 Framework indicates that the Trustees have not yet selected appropriate quantification methodologies. Id. at A-6 to A-7.

Regarding Phase 3 quantification methodologies, the Trustees do not intend to commit to the use of specific methodologies at this time. The Trustees expect to develop appropriate quantification methods for Phase 3 at a later, more appropriate time.

## **11. Pre-1981 Bar to Damages**

One commenter on the AP outline noted that the Trustees must recognize CERCLA's pre-1981 bar to damages.

### **How the Draft AP Relates to Comments:**

The Draft AP is consistent with this comment. Draft AP at 1-2 (stating that damages will be determined for those situations where either the CERCLA "damage" or "release" occurred or continues after December 11, 1980, the enactment date of CERCLA). See 42 U.S.C. § 9607(f)(1).

The Trustees are aware that several courts have considered this provision and will look to relevant case law for guidance. For example, the first court to address the pre-enactment bar stated that "[s]ection 107(f) precludes liability under section 107(a)(4)(C) only where (1) all releases ended before December 11, 1980, and (2) no damages were suffered on or after December 11, 1980 as a result of the release." U.S. v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1120 (D. Minn. 1982). Similarly, another district court concluded that "where natural resource damages are readily divisible, the sovereigns cannot recover for such damages incurred prior to enactment." In re Acushnet River & New Bedford Harbor Proceedings, 716 F.Supp. 676, 685 (D. Mass. 1989). But "where the natural resource damages are not divisible and the damages or the releases that caused the damages continue post-enactment, the sovereigns can recover for such non-divisible damages in their entirety." Id. at 686. See also Idaho v. Bunker Hill, 635 F. Supp. 665, 675 (D. Idaho 1986) (same).

## **12. Double-Counting**

Several participating parties who commented on the AP outline cautioned that the Trustees must avoid double-counting of injuries and asked how double-counting will be addressed.

### **How the Draft AP Relates to Comments:**

As stated above in sections 1 and 9, the Trustees are aware of the need to avoid double-counting. The Draft AP commits to avoiding double-counting. Draft AP at 4-15 (stating that the Trustees' quantification approaches will avoid double-counting, which is the inclusion of damages to the same resources and services more than once). In general, the Trustees intend to avoid double-counting by carefully evaluating and quantifying all relevant debits and credits to resources and services and by identifying any

interdependent services. A specific example of how the Trustees will avoid double-counting is given in the context of osprey and eagles, where the Trustees acknowledge the potential for double-counting and state that they will consolidate benefits for osprey and eagles when considering restoration options. Appendix A at A-4 to A-5.

### **13. Early Settlements**

Some participating parties who commented on the AP outline requested a settlement timetable and a process for evaluating settlement proposals during Phase 2. One commenter questioned whether parties participating in Phase 2 would have the opportunity to settle substantially earlier than non-participating parties.

#### **How the Draft AP Relates to Comments:**

Consistent with the participating parties' comments, the Trustees have been working to develop a timeline for Phase 2 negotiations and also settlement negotiations. Regarding Phase 2, the Trustees currently envision an open invitation meeting on or about February 16, 2010. The Trustees would appreciate the input of participating parties regarding an appropriate deadline after the open invitation meeting for statements of interest from parties who desire to participate in the collaborative Phase 2 process, with the goal being final negotiated Phase 2 agreements by the end of May 2010. Parties who did not participate in Phase 1 but who desire to participate in Phase 2 would be required to pay a premium consistent with paragraph 11 of the Funding and Participation Agreement. The Trustees envision the premium consisting of the Phase 1 cost plus a surcharge (as yet to be determined) plus some amount (as yet to be determined) of Trustees' unreimbursed past costs. The Trustees would appreciate the input of participating parties regarding an appropriate premium that would both encourage further collaboration and reward participating parties' past collaboration. See Funding and Participation Agreement ¶ 11 (stating that the share of Phase 1 costs paid by new participants seeking to join in Phase 2 would "be applied as a credit against the Phase I Participants' share of Phase II costs").

Regarding settlement, the Trustees have outlined in the Phase 2 Framework the general process by which the Trustees envision entering into negotiated settlements with participating parties. See Appendix A at A-10 to A-13. The Trustees believe that the logistics of this cooperative process will provide participating parties with an inherent opportunity to settle earlier than non-participating parties. The Trustees also are providing the participating parties with a sample "restoration up front" agreement whereby participating parties would be able to enter into a memorandum of agreement with the Trustees prior to issuance of the Record of Decision to credit one or more habitat restoration projects towards a future settlement of natural resource damage claims at the Portland Harbor Site.

### **14. Restoration Planning**

Some commenters on the AP outline were interested in more details related to the criteria for valuing restoration projects and whether some projects might receive "extra" credit.

One commenter pointed out the need to maintain a parallel track on restoration evaluation because of the time sensitive nature of restoration actions.

#### **How the Draft AP Relates to Comments:**

The Trustees share the participating parties' interest in the criteria for valuing restoration projects and have been devoting considerable attention to this topic. To date, the Trustees have provided the participating parties with relevant information related to the Trustees' current thinking on habitat restoration. For example, the Trustees provided the participating parties with a detailed list of potential restoration opportunities within the PHAA prior to a February 25, 2009 telephonic conference between the Trustees and the participating parties. The Trustees also provided participating parties with the Trustees' operative wildlife criteria and fish criteria for determining the relative value or benefit of possible restoration opportunities to various species.

More recently, the Trustees have been working to determine whether/how to assign special value factors to restoration opportunities. The Trustees are interested in determining: the relative importance of restoration opportunities available within the PHAA to various fish and wildlife species and habitat; the relative importance of those species in the Trustees' planned HEA/REA modeling; and how ecological- and cost-based factors should be valued. To assist in making these determinations, the Trustees will convene an expert panel, assisted by an experienced facilitator, in the fall of 2009. The panel will be asked to provide the Trustees with special value factors, if any, related to habitat restoration opportunities within the PHAA (e.g., special value factors related to attributes such as the size, shape, connectivity and/or siting of restoration projects). See Appendix A at A-8 to A-9.