

**MEMORANDUM OF UNDERSTANDING
RELATING TO
THE SAN FRANCISCO DRYDOCK- *SS CAPE MOHICAN* OIL SPILL
BETWEEN THE CALIFORNIA
DEPARTMENT OF FISH AND GAME,
OFFICE OF SPILL PREVENTION AND RESPONSE,
THE CALIFORNIA DEPARTMENT OF PARKS AND RECREATION,
THE U.S. FISH AND WILDLIFE SERVICE, THE
NATIONAL PARK SERVICE, AND THE U.S. NATIONAL OCEANIC
AND ATMOSPHERIC ADMINISTRATION**

I. INTRODUCTION

This Memorandum of Understanding ("MOU"), is between the U.S. Fish and Wildlife Service ("FWS"), the National Park Service ("NPS"), the National Oceanic and Atmospheric Administration ("NOAA"), the California Department of Parks and Recreation ("DPR"), and the California Department of Fish & Game ("CDFG") (collectively referred to as the "Trustees"). Additionally, the California Regional Water Quality Control Board - San Francisco Bay Region ("RWQCB") is executing this MOU in its advisory capacity, as described hereafter. This MOU is entered into to ensure the coordination and cooperation of the Trustees in restoring, rehabilitating, replacing, and/or acquiring the equivalent of the natural resources injured as a result of the release of oil on October 28, 1996 from the *SS CAPE MOHICAN* and from the drydock operated by San Francisco Drydock, Inc.

II. PARTIES

The following officials are executing this MOU as representatives of their respective agencies which act on behalf of the public as Trustees for natural resources:

- Regional Director, Region 1, U.S. Fish and Wildlife Service;
- Associate Director, Natural Resources Stewardship and Science, National Park Service;
- Administrator, California Department of Fish and Game, Office of Spill Prevention and Response;
- Director, California Department of Parks and Recreation;

-- Deputy General Counsel, National Oceanic and Atmospheric Administration

III. AUTHORITY

The Trustees enter into this MOU pursuant to the authorities provided to Natural Resource Trustees by the Oil Pollution Act, 33 U.S.C. § 2701 et. seq.; the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq.; Subpart G of the National Contingency Plan, 40 C.F.R. §§ 300.600 et seq.; Executive Order 12580, 3 C.F.R., 1987 Comp. p. 193, 52 Fed. Reg. 2923 (January 23, 1987), as amended by Executive Order 12777, 56 Fed. Reg. 54757 (October 19, 1991); the Oil Pollution Act Damage Assessment Regulations, 15 C.F.R. Part 990; the Department of the Interior (DOI) Natural Resources Damage Assessment Regulations, as amended, 43 C.F.R. Part 11, as applicable. The NPS also enters into this MOU pursuant to the Park System Resources Protection Act, 16 U.S.C. 19jj, and NOAA also enters into it pursuant to the National Marine Sanctuaries Act, 16 U.S.C. 1431, et seq. The CDFG also enters into this MOU pursuant to its natural resource trustee authority under Fish and Game Code § 1802, and the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act, Government Code §§ 8670.1 et. seq. The California Department of Parks and Recreation enters into this MOU pursuant to its authority under Public Resources Code Section 5003.

IV. DEFINITIONS

Whenever the following terms are used in this MOU, they shall have the following meanings:

A. Natural Resource and Natural Resources

"Natural Resource" and "Natural Resources" mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the State of California and/or the United States (including "park system resources" as defined at 16 U.S.C. section 19jj(d) and the resources of the fishery conservation zone established by the Magnuson Fishery Conservation and Management Act of 1976, 16 U.S.C. sections 1801 et seq. and resources of the Gulf of the Farallons National Marine Sanctuary), and the "services" that the resources provide to other natural resources and/or humans.

B. Oil Spill

"Oil Spill" means the the release of oil from the *SS CAPE MOHICAN* and the drydock operated by San Francisco Drydock into San Francisco Bay and thence into the Pacific Ocean which occurred on October 28, 1996.

C. Restoration or Restore

"Restoration" or "Restore" mean any action or combination of actions to restore, replace, rehabilitate, and/or acquire the equivalent of the Natural Resource and the "services" that were injured, lost, or destroyed by the Oil Spill.

V. **THE SETTLEMENT OF THE OIL SPILL**

A settlement of claims arising from the Oil Spill has been reached between the Trustees and the responsible parties in lieu of litigation and has been embodied in a Consent Decree. The Consent Decree, in addition to requiring reimbursement of certain costs and the payment for other claims which are not subject to this MOU, requires payment of an amount for injuries to natural resources which is subject to this MOU.

Upon approval by the District Court of the Consent Decree, San Francisco Drydock, Inc. will be required to pay the sum of \$3,625,000.00 for the purpose of restoring natural resources. Of that sum, \$3,445,000 shall be deposited into the Natural Resources Damage Assessment and Restoration Fund created pursuant to 43 U.S.C. section 1474b ("NRDAR Fund"), and \$180,000 shall be deposited into the State Parks Contingent Fund (see Public Resources Code Section 5009 which reauthorizes the State Parks Contingent Fund).

Pursuant to the Consent Decree, the monies deposited into the NRDAR Fund will be placed in a segregated account within the NRDAR Fund ("the Cape Mohican NRD Account") for the purpose of restoring the injured natural resources for which the United States and the State are co-trustees, without apportionment. The Department of the Interior shall manage and invest such funds, and any return on investments or interest accrued on the Cape Mohican NRD Account shall be used for the benefit of the resources injured by the Oil Spill. Disbursements shall require approval of the Natural Resource Trustee Council created pursuant to this MOU.

Pursuant to the Consent Decree, the monies deposited into the State Parks Contingent Fund will be placed in a segregated project account for the purpose of restoring lost or diminished human uses and services resulting from the Oil Spill. The California Department of Parks and Recreation shall manage and hold such funds until disbursements are approved by the Natural Resource Trustee Council created pursuant to this MOU.

VI. PURPOSE

The purpose of this MOU is to provide a framework for coordination and cooperation among the Trustees in the use of the proceeds from the Oil Spill settlement for habitat restoration and protection, wildlife projects and lost and diminished human use of federal and State parks.

The Trustees commit to the expenditure of the \$3,625,000 awarded under the Consent Decree for the design, implementation, permitting, as necessary, monitoring and oversight of Restoration projects. The Trustees have joint responsibility regarding the injured habitat and resources and, of the above amount, will apply approximately \$500,000 to Restoration projects to benefit the sandy shoreline and rocky intertidal habitats, approximately \$400,000 of the above amount to Restoration projects to benefit wetland habitat, approximately \$800,000 for bird Restoration projects, approximately \$425,000 for fisheries and water quality Restoration projects, and approximately \$1,030,000 for lost and diminished human uses and services associated with impacted State and National Parks.

Of the sum allocated for lost and diminished human uses and services, the California Department of Parks and Recreation commits to apply \$180,000 to human use projects on State lands impacted by the Oil Spill. Additionally, the National Park Service commits to apply approximately \$850,000 to human use projects within National Park System boundaries impacted by the Oil Spill.

Up to \$470,000 of the monies deposited into the Cape Mohican NRD Account shall be made available to the Trustees for Restoration planning and implementation activities, including those duties to be performed by the Lead Administrative Trustees, and for the administration and oversight of the various restoration projects. These monies may only be expended pursuant to a budget which has been duly approved by the Trustee Council.

The Trustees will prepare a proposed Restoration Plan, containing details for specific projects, upon which the public will be invited to

VIII. DECISION MAKING

The Trustees agree that, except as specifically delegated to a specific Trustee pursuant to Section IX, below, decisions implementing this MOU and the Consent Decree shall require the unanimous approval of the voting NRT Council members. Decisions shall be recorded in writing, either by resolution signed by the parties, or in minutes approved as to content and form by the parties.

In the event that unanimous agreement cannot be reached among the members of the NRT Council, the matter in dispute will be elevated within the Trustee agencies for resolution. If necessary, the Trustees may establish further mechanisms to resolve disputes. The Trustees agree that decision making deliberations will focus on the Trustee's mutual purposes of Restoring injured Natural Resources and foregone services rather than on individual Trustee control or trusteeship over those resources.

IX. POWERS, DUTIES, AND RESPONSIBILITIES

A. Natural Resources Trustee Council

On behalf of the Trustees, the NRT Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the procedures contained in section VIII (Decision Making), above. The NRT Council in its discretion may take whatever actions it determines are necessary to fulfill the trust responsibilities of each Trustee under, and to effectuate the purposes of, applicable federal and State law. Any Trustee on the NRT Council may convene a meeting of the full NRT Council. It is expected that the NRT Council, in accordance with applicable laws and policies, may take the following actions, among others, to address the Trustees' Natural Resources trustee responsibilities:

1. Oversee the final development and implementation of the Restoration Plan and ensure public notice, opportunity for public input, and consideration of all public comments prior to preparing the final Restoration Plan;
2. Arrange for the letting of contracts that the NRT determines are necessary with professional consultants or contractors, technical or otherwise, best qualified to provide services to the NRT Council;

offer comments. The proposed Restoration Plan will include projects which were developed in the preassessment effort used to scale the injuries, unless one or more of the following conditions exist: (1) such projects are not feasible for reasons including insufficient funds; (2) such projects are no longer available; or (3) an alternative project is identified which may be more cost effective or which better meets the Trustees' goals and objectives of restoring resources injured by the Oil Spill. The proposed Restoration Plan may include such alternative projects.

A final Restoration plan will be developed and implemented after providing public notice, opportunity for public input, and consideration of all public comment. The Trustees retain the ultimate authority and responsibility to determine the use of funds received for Natural Resource Damages in accordance with the provisions of applicable federal and state law, any applicable regulations governing use of recoveries for Natural Resource Damages, and the terms of the Consent Decree.

VII. ORGANIZATION - NATURAL RESOURCES TRUSTEE COUNCIL AND LEAD TRUSTEES FOR SPECIFIC PROJECTS

To implement this MOU, there is hereby created a Natural Resources Trustee Council ("the NRT Council for the Cape Mohican Oil Spill" or "the NRT Council") to which each of the Trustees will designate one primary representative and at least one alternate representative. Each party to this agreement shall have one vote that shall be cast by the party's primary representative, or in the absence of the primary representative, by an alternate representative.

Within twenty (20) working days after the final execution of this MOU, each Trustee shall notify the other Trustees of the names, addresses, telephone numbers, and facsimile numbers of that Trustee's primary and alternative representatives to the NRT Council. Communications regarding NRT Council business shall be addressed to the primary and, unless the NRT Council directs otherwise, copied to the alternate representative.

Designated representatives of the Legal Advisor of CDFG, the General Counsel of NOAA, and the DOI's Office of the Solicitor shall serve as legal counsel to the NRT Council. The NRT Council will seek advisory participation of the RWQCB on water quality issues and from other federal or state agencies or any other entity as deemed appropriate by the NRT Council.

3. Oversee all necessary decisions for the management and administration of monies received in the settlement for the purpose of implementing the Restoration Plan;
4. Direct the Lead Trustee, for specific project categories, identified in subsection B, to approve disbursements from the NRDAR Fund for specific Restoration Plan project costs (with the exception of DPR which will be directed to approve disbursements from the State Parks Contingent Fund), and to take all steps necessary to effect the disbursements when so directed by the Trustee Council;
5. Select other Restoration projects if (1) any of the Projects described in the final Restoration Plan prove infeasible, impractical, or otherwise not in the public interest, or (2) any funds remain after the successful implementation of the projects described in the final Restoration Plan, provided that such other projects address the injuries caused by the Oil Spill or otherwise meet the requirements of applicable federal and State law;
6. Delegate specific duties to individual Trustee representatives. Certain duties set out below are hereby delegated to the Lead Trustee for specific projects.

B. Lead Trustee for the Restoration Projects

The Lead Trustee for the Habitat Restoration and Wildlife Projects conducted on other than federal lands shall be the CDFG, the Lead Trustee for the federal Human Use project(s) and for Habitat Restoration and Wildlife projects conducted within National Park boundaries shall be NPS, the Lead Trustee for projects conduct within National Wildlife Refuge boundaries shall be the FWS, the Lead Trustee for project(s) conducted within a National Marine Sanctuary shall be NOAA, and the Lead Trustee for the State Human Use project(s) shall be DPR. Each Lead Trustee shall:

1. Ensure that the amounts allocated toward those projects for which it is responsible are well managed for the benefit of the injured resources;

2. Ensure that the Projects or any other use of funds segregated for the Projects, comply with all applicable laws, including the National Environmental Policy Act, 42 U.S.C.A. §§ 4321 et seq. ("NEPA"), the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., the Coastal Zone Management Act ("CZMA") 16 U.S.C. § 1451 et seq., and the California Environmental Quality Act, California Public Resources Code §§21000 et seq. ("CEQA").
3. Consult with the California Regional Water Quality Control Board - San Francisco Bay Region on water quality issues, if any, associated with projects for which a Lead Trustee is responsible.
4. As to each project for which a Lead Trustee is responsible, provide for the NRT Council's approval a detailed statement of the proposed projects, project schedules, estimated budgets for the life of the projects, including an estimate of any contract, administrative, or overhead costs to be charged to the Projects:
5. Obtain the NRT Council's formal authorization to commence the Project(s) for which the Lead Trustee is responsible;
6. Oversee, coordinate, and monitor the progress of the Projects for which the Lead Trustee is responsible:
7. Submit quarterly reports to the NRT Council which shall include a progress report and an estimate of funds spent:
8. Establish and maintain records and relevant documents regarding the Projects for which the Lead Trustee is responsible;
9. Prepare agenda items for meetings of the NRT Council regarding the Projects for which the Lead Trustee is responsible;
10. Inform the other Trustees of all pertinent developments regarding the Projects on a timely basis; and
11. Carry out such other duties as directed by the NRT Council.

C. Lead Administrative Trustees

There shall be two Co-Lead Administrative Trustees, the CDFG and the NPS. The Co-Lead Administrative Trustees may carry out their responsibilities jointly and/or divide their administrative duties between themselves. The Co-Lead Administrative Trustees shall carry out the following duties:

1. Coordinate and monitor all aspects of the Natural Resource Restoration process not specifically addressed above;
2. Perform routine administrative duties related to the NRDAR Fund account with the approval of the NRT Council, e.g., investments, disbursements, and distribution of regular Statements of Account Activity;
3. Prepare procedures for disbursements and advance payments from the NRDAR Fund account for approval by the NRT Council;
4. Schedule and prepare agendas for general meetings of the NRT Council;
5. Act as a central contact point for the NRT Council;
6. Establish and maintain records and relevant documents other than those regarding specific Restoration projects, and;
7. Carry out such other duties as directed by the NRT Council.

The Co-Lead Administrative Trustees may delegate any of their duties to another Trustee with the concurrence of the NRT Council.

X. **CONFIDENTIALITY**

The Trustees agree that it is generally in the public interest that scientific data arising out of their review of the injury to Natural Resources caused by the Oil Spill be made public. Therefore, such data shall be made public if publication will not prejudice assessment or recovery efforts in this or other legal actions. Public sharing of

scientific data, wherever possible, will be the general policy of the Trustees. However, all parties to this MOU recognize that oral and written communications that are privileged attorney-client communications, attorney work product, or protected by other applicable privileges (or a combination thereof) ("Privileged Communications") will be protected from disclosure to the extent possible under applicable federal and State law.

The parties to this MOU further agree that whenever a request for production of any written communication is received pursuant to any applicable federal or State law, the request will be forwarded for response to the Trustee to which any privilege applies or whose representatives originally generated or contributed the record requested. Nothing contained herein shall be construed as prohibiting or restraining a Trustee or the NRT Council from agreeing to release any record. Nothing contained herein shall be construed as requiring a Trustee or the NRT Council to release any record.

XI. RESERVATION OF RIGHTS

Nothing in this MOU is to imply that any signatory government is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over Natural Resources.

XII. LIMITATION

Nothing in this MOU shall be construed as obligating the United States, the State of California or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XIII. THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOU may be the basis of any third party challenges or appeals. Nothing in this MOU creates any rights or causes of action in persons not parties to this agreement.

XIV. MODIFICATION OF AGREEMENT

Modification of this MOU must be in writing and approved by all Trustees currently party to this MOU.

XV. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time that the Trustees determine that the purposes set forth in this MOU have been satisfied, the MOU may be terminated. In the event any Trustee withdraws from the MOU, such withdrawal must be in writing and provided to the other parties to this MOU at least thirty days in advance of the withdrawal.

In the event of the withdrawal of any Trustee or the termination of this MOU, the Trustees shall give a full and complete accounting to the NRT Council of all restoration funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by a Trustee in any joint or separate account as a result of the Oil Spill, pursuant to the Consent Decree or this MOU.

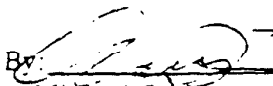
XVI. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU and be retained by the Lead Administrative Trustee. The date of execution shall be the date of the signature of the last Trustee to sign the MOU.

SIGNATURES:

Dated: 3/26, 1998

NATIONAL PARK SERVICE

By: 
Michael Soukup *Project 15 11/1/98*
Associate Director
Natural Resources Stewardship and
Science

Dated: April 9, 1998

CALIFORNIA DEPARTMENT OF
FISH AND GAME

By: Pete Bontadelli
Pete Bontadelli
Administrator
Office of Spill Prevention
and Response


Dated: 4/9, 1998

CALIFORNIA DEPARTMENT OF
PARKS AND RECREATION

By: Patricia J. Megason
Patricia J. Megason
Interim Director

Dated: APR 10 1998, 1998


UNITED STATES FISH AND
WILDLIFE SERVICE

By: 

Michael J. Spear
Regional Director
Region One

Dated: 4/1, 1998


THE NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION

By: 

Craig R. O'Connor
Deputy General Counsel

Dated: 4. 1, 1998

CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD FOR
THE SAN FRANCISCO BAY REGION

By: 
Loretta Barsamian
Executive Officer