

**MEMORANDUM OF UNDERSTANDING
RELATING TO
THE *M/T Command* OIL SPILL
BETWEEN THE CALIFORNIA
DEPARTMENT OF FISH AND GAME,
OFFICE OF SPILL PREVENTION AND RESPONSE,
THE CALIFORNIA DEPARTMENT OF PARKS AND RECREATION,
THE CALIFORNIA STATE LANDS COMMISSION, THE U.S. DEPARTMENT OF THE
INTERIOR, FISH AND WILDLIFE SERVICE, AND THE U.S. NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION**

I. INTRODUCTION

This Memorandum of Understanding ("MOU"), is between the California Department of Fish & Game ("CDFG"), the California State Lands Commission ("CSLC"), the California Department of Parks and Recreation ("CDPR"), the U.S. Fish and Wildlife Service ("FWS"), and the National Oceanic and Atmospheric Administration ("NOAA"), (collectively referred to as the "Trustees"). 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 September 26, 1998 from the *M/T Command*.

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 under this MOU:

- Manager, California-Nevada Operations Office, U.S. Fish and Wildlife Service;
- Administrator, California Department of Fish and Game, Office of Spill Prevention and Response;
- Executive Officer, California State Lands Commission;
- Director, California Department of Parks and Recreation;
- 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.); the National Marine Sanctuaries Act (16 U.S.C. §§ 1431 et seq.); and the Oil Pollution Act Damage Assessment Regulations (15 C.F.R. Part 990). In addition, the Federal Trustees enter into this MOU pursuant to the authority provided in Subpart G of the National Contingency Plan (40 C.F.R. §§ 300.600 et seq.); and 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 CDFG also enters into this MOU pursuant to its natural resource trustee authority under Fish and Game Code section 1802, and the Lempert-Keene-Seastrand Oil Spill Prevention and

Response Act, Government Code sections 8670.1 et seq.. The CDPR enters into this MOU pursuant to its authority under Public Resources Code section 5003. The CSLC enters into this MOU pursuant to its authority under the Public Resources Code section 6201 et seq..

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 resources of the fishery conservation zone established by the Magnuson Stevens Fishery Conservation and Management Act of 1976, 16 U.S.C. sections 1801 et seq. and resources of the Gulf of the Farallones and Monterey Bay National Marine Sanctuaries), and the "services" that the resources provide to other natural resources and/or humans.

B. Oil Spill

"Oil Spill" means the discharge of oil from the *M/T Command* into the Pacific Ocean outside San Francisco Bay and in the Gulf of the Farallones and Monterey Bay National Marine Sanctuaries on or about September 26, 1998. Some of the oil eventually washed ashore on beaches in San Mateo County, California.

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 Resources and the "services" that were injured, lost, or destroyed by the Oil Spill.

D. Voting Command Trustee Council Members

"Voting Command Trustee Council members" shall mean the primary representatives appointed and authorized to vote on behalf of each Trustee, or in the event the primary representative(s) is(are) unable to participate at a given meeting of the Command Trustee Council, their respective alternate(s). Participation at a given meeting of the Council may be either in person or by telephone conference, see section IX.

V. THE SETTLEMENT OF THE OIL SPILL

Trustees believe the Oil Spill impacted thousands of seabirds, primarily common murre. In addition, a number of California brown pelicans and marbled murrelets were impacted along with various other seabird species. California brown pelicans and marbled murrelets are listed as threatened and/or endangered species under the Endangered Species Act ("ESA") (16 U.S.C. § 1533(c)), and the California Endangered Species Act (Fish & Game

Code §§ 2050, *et seq.*). In addition to causing seabird injury, the Trustees believe the Oil Spill has impaired habitat and human use along the coast of San Mateo County.

A settlement of civil claims arising from the Oil Spill has been reached between the Trustees and Defendants Pearl Shipping Corporation and Anax International Agencies, Inc. in lieu of litigation, and has been embodied in a Consent Decree. Pursuant to the Consent Decree, the Defendants placed a total of \$5,518,000 into an interest bearing escrow account pending entry of the Consent Decree. The Consent Decree and payment instructions by the U.S. Department of Justice, required payment of \$3,913,015.97 (together with the interest earned on the total escrow amount of \$5,518,000 pending entry of the Consent Decree) (the "NRDA money") to be deposited into the Natural Resources Damage Assessment and Restoration Fund created pursuant to 43 U.S.C. § 1474b ("NRDAR Fund") as natural resource damages. In addition, the Consent Decree required reimbursement of various costs and other claims which are not subject to this MOU.

Following entry of the Consent Decree by the District Court, the NRDA money was deposited into the NRDAR Fund on behalf of the Trustees. Pursuant to the Consent Decree, the NRDA money deposited into the NRDAR Fund will be maintained in a segregated account within the NRDAR Fund ("the *M/T Command* NRD Account") for the purpose of restoring the injured natural resources for which the United States and the State are co-trustees, without apportionment.

Pursuant to the Consent Decree, the Department of the Interior is required to manage and invest such funds. Additionally, the Consent Decree provides that any return on investments or interest accrued on the *M/T Command* NRD Account is to 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 (hereafter referred to as the "Command Trustee Council" or the "Council"). (See, Section VIII. below pertaining to authorization of expenditures.)

VI. PURPOSE

The purpose of this MOU is to provide a framework for coordination and cooperation among the Trustees in the use of the NRDA money from the Oil Spill settlement for seabird projects, habitat restoration and protection, and human use projects.

The Trustees commit to the expenditure of the NRDA money for the design, implementation, permitting (as necessary), monitoring and oversight of Restoration projects, and for the costs of complying with the requirements of the law to conduct a Restoration planning and implementation process. The Trustees share joint responsibilities regarding the injured seabirds, habitat, and human use losses. The Trustees will apply approximately \$2,850,000 of the NRDA money to fund Restoration projects benefitting seabirds, particularly common murrelets. Approximately \$400,000 will be allocated for Restoration projects benefitting marbled murrelets and approximately \$200,000 will be allocated for Restoration projects benefitting shoreline habitat and human use. This allocation may be adjusted based on post-settlement assessment work to be completed as part of the Restoration planning process carried out by the Command Trustee Council.

Up to \$463,016 of the funds deposited into the *M/T Command* NRD account may be used for the following purposes: to pay the costs of complying with the requirements of the law to conduct a Restoration planning and implementation process, to pay for costs associated with the development of a Restoration Plan including Trustee agency costs, and to pay for Trustee monitoring and oversight of Restoration projects. The Command Trustee Council may approve an initial upfront allocation of up to \$50,000 per Trustee agency to cover Trustee agency costs associated with Restoration planning, based on a preliminary estimate of personnel participation and expenditures prior to and during the first year this MOU is in effect. Use of any such upfront allocation must be documented and an accounting provided to the Command Trustee Council. Thereafter, these monies may only be disbursed to a Trustee agency pursuant to a budget, which has been duly approved by the Command Trustee Council.

Interest earned on the *M/T Command* NRD account and any excess funds from any of the categories above, may be used for any of the purposes described in this section. Priority consideration will be given to additional restoration projects which address those resources injured by the Oil Spill.

The Trustees will prepare a proposed Restoration Plan, containing details for specific projects and project selection criteria, upon which the public will be invited to offer comments. 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 - COMMAND TRUSTEE COUNCIL AND LEAD TRUSTEES FOR SPECIFIC PROJECTS

To implement this MOU, there is hereby created the Command Trustee Council to which each of the Trustees will appoint 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.

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

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

VIII. DECISION MAKING

A. Unanimous Approval of Voting Members Required

_____ 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 Command Trustee Council members, as defined. Such decisions shall be recorded in writing, either by resolution signed by the voting Trustee Council members participating in the Council meeting, or in minutes approved as to content and form by the voting Command Trustee Council members participating in the Council meeting.

B. Authorization of Expenditures

All decisions authorizing expenditures of funds, including without limitation disbursements to Trustee agencies for agency costs, shall be memorialized in a Trustee Council resolution signed by the participating voting members. Such resolutions may cover the entire sum approved for a given project, project phase, or for particular activities. Approval authority for individual invoices associated with a particular project or activity may be delegated by the Command Trustee Council to one or more of the Command Trustee Council members. In all cases, use of funds must be documented and an accounting provided to the Command Trustee Council.

C. Dispute Resolution

The Trustees agree that decision making deliberations will focus on the Trustees' mutual purposes of Restoring injured Natural Resources and diminished services rather than on individual Trustee control or trusteeship over those resources. In the event that unanimous agreement cannot be reached among the members of the Command Trustee 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, including consideration of trusteeship authority.

IX. POWERS, DUTIES, AND RESPONSIBILITIES

E. Command Trustee Council

On behalf of the Trustees, the Command Trustee 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 Command Trustee 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 Command Trustee Council may convene a meeting of the full Command Trustee Council. It is expected that the Command Trustee Council, in accordance with applicable laws and policies, may take the following actions to address the Trustees' Natural Resources Restoration responsibilities:

1. Oversee the 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, through one or more of the Trustees, that the Command Trustee Council determines are necessary with consultants or contractors best qualified to provide services to the Command Trustee Council;
3. Oversee the management and administration of monies received in the settlement for the purpose of implementing the Restoration Plan, which may include the transfer of funds to a trust fund account established with the National Fish and Wildlife Foundation or other similar non-profit organization;
4. Authorize or direct the Lead Trustee for specific projects to approve disbursements from the NRDAR Fund (or, as appropriate, from a Trust Fund account established with the National Fish and Wildlife Foundation or other similar non-profit organization) for specific Restoration Plan project costs, and to take all steps necessary to effect the disbursements when so directed by the Command Trustee Council;
5. Select alternative Restoration projects if (1) any of the preferred 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 alternative projects address the injuries caused by the Oil Spill, are subject to public review and comment, and 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

A Lead Trustee (State or Federal) shall be designated for each project selected in the Restoration Plan. Each Lead Trustee shall, for those projects for which it has been designated:

1. Ensure that the amounts allocated toward the Project(s) are well managed for the benefit of the injured resources;
2. Ensure that the Project(s) and any use of funds for the Project(s), comply with all applicable laws, including the National Environmental Policy Act ("NEPA") (42 U.S.C.A. §§ 4321 et seq.), 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.), the regulations pertaining to Essential Fish Habitat (50 C.F.R. §§ 600.805 et seq.), and the California Environmental Quality Act ("CEQA") (Pub. Resources Code §§21000 et seq.);
3. Provide for the Command Trustee Council's approval a detailed statement of the proposed projects, project schedules, and estimated budgets for the life of

the project(s), including an estimate of any contract, administrative, or overhead costs to be charged to the Project(s);

4. Obtain the Command Trustee Council's written authorization to commence the Project(s);
5. Oversee, coordinate, and monitor the progress of the Project(s);
6. Submit quarterly reports (unless otherwise agreed) to the Command Trustee Council which shall include a progress report, and an estimate of funds spent;
7. Establish and maintain records and relevant documents and provide these on a timely basis to the Lead Administrative Trustees for inclusion, as appropriate, in the administrative record;
8. Provide a final accounting to the Command Trustee Council when the Project(s) is(are) completed and an interim accounting at any other time requested;
9. Prepare agenda items for meetings of the Command Trustee Council regarding the Project(s);
10. Inform the other Trustees of all pertinent developments regarding the Project(s) on a timely basis; and
11. Carry out such other duties as directed by the Command Trustee Council.

C. Lead Administrative Trustees

There shall be two Co-Lead Administrative Trustees, the CDFG and the USFWS. Except as otherwise specified below, 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 even if not specifically addressed above;
2. Schedule, provide notice of, and prepare agendas for general meetings of the Command Trustee Council;
3. Act as the central contact points for the Command Trustee Council;
4. Establish and maintain records and relevant documents other than those regarding specific Restoration projects and with the assistance of all Trustees establish and maintain any administrative record that is required; and
5. Carry out such other duties as directed by the Command Trustee Council;

6. The USFWS Lead will perform routine administrative duties related to the NRDAR Fund account with the approval of the Command Trustee Council, e.g., investments, disbursements, and distribution of regular Statements of Account Activity; and

7. The USFWS Lead will prepare procedures for disbursements and advance payments from the NRDAR Fund account for approval by the Command Trustee Council;

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

X. CONFLICT OF INTEREST

A Command Trustee Council representative will abstain from discussing and voting on any issue coming before the Command Trustee Council in which that representative has a personal financial interest. The Trustee Council representative will identify this conflict to the Command Trustee Council prior to consideration and voting on the issue(s).

XI. TELECONFERENCING

A Trustee Council meeting may be convened by telephone conference call. Should a Trustee Council representative(s) be unable to travel to a meeting, that representative(s) may participate by telephone conference and may vote by telephone on any issue requiring a vote by the voting Command Trustee Council members.

XII. 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. 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. Nothing in this MOU is intended as, nor shall it be construed to be, a general waiver of any attorney-client privilege, joint enforcement privilege, or any protection afforded under the work product doctrine or any other doctrine or privilege under applicable law that has been or may be asserted in this matter and shall be without prejudice to any assertion of privilege or protection as to other documents or communications concerning the same or similar subject matter(s).

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 to the record requested. Nothing contained herein shall be construed as prohibiting or restraining a Trustee or the Command Trustee Council from agreeing to release any record. Nothing contained herein shall be construed as requiring a Trustee or the Command Trustee Council to release Privileged Communications.

XIII. 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.

XIV. 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.

XV. 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.

XVI. MODIFICATION OF AGREEMENT

Modification of this MOU must be in writing and approved by all parties to this MOU.

XVII. 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 Command Trustee 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.

XVIII. SEVERABILITY

The terms of this MOU are severable. If any term or condition of this MOU is determined by a court of competent jurisdiction to be invalid, it shall be considered deleted and shall not invalidate any of the remaining terms and conditions.

XIX. 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 that maintains records, (see section IX C 4 above). The date of execution shall be the date of the signature of the last Trustee to sign the MOU.

**MEMORANDUM OF UNDERSTANDING
RELATING TO THE M/T Command OIL SPILL**

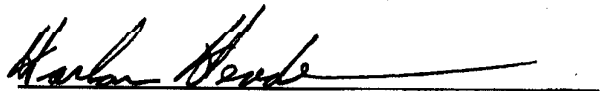
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SIGNATURES:

Dated: Oct 19, 2001

CALIFORNIA DEPARTMENT OF FISH AND GAME

By:

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HARLAN HENDERSON

Administrator

Office of Oil Spill Prevention and Response

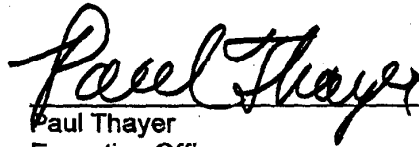
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Dated: Oct 22 2001

STATE LANDS COMMISSION

By:



Paul Thayer
Executive Officer

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Dated: 11/7, 2001

**CALIFORNIA DEPARTMENT OF
PARKS AND RECREATION**

By:


Rusty Arellas
Director

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OCT 26 2001

Dated: _____, 2001

UNITED STATES FISH AND WILDLIFE SERVICE

By: Steve Thompson
Steve Thompson
Acting Manager
California-Nevada Operations Office

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Dated: 10/18, 2001

**THE NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION**

A handwritten signature in black ink, appearing to read 'C. O'Connor', written over a horizontal line.

By:

Craig R. O'Connor
Acting General Counsel
Office of General Counsel