

**MEMORANDUM OF UNDERSTANDING
RELATING TO THE
MONTROSE SETTLEMENTS RESTORATION PROGRAM
BETWEEN**

**THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
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 FISH AND WILDLIFE SERVICE,
AND THE NATIONAL PARK SERVICE**

I. INTRODUCTION

This Memorandum of Understanding (MOU), is between the National Oceanic and Atmospheric Administration (“NOAA”), the California Department of Fish & Game, Office of Spill Prevention and Response (“CDFG”), the California Department of Parks and Recreation (“CDPR”), the California State Lands Commission (“CSLC”), and the U.S. Department of the Interior, as delegated to the Fish and Wildlife Service (“USFWS”) and the National Park Service (“NPS”) (collectively referred to as the “Trustees”). This MOU is entered into to promote the coordination and cooperation of the Trustees in restoring, rehabilitating, replacing, and/or acquiring the equivalent of injured natural resources resulting from the releases of dichlorodiphenyltrichloroethanes (“DDTs”) and polychlorinated biphenyls (“PCBs”) into the Southern California marine environment.

Upon execution, this MOU supersedes the Trustees’ 1990 Memorandum of Agreement (“MOA”), the First Modification to the 1990 MOA, and the Second Modification to the 1990 MOA.

I. PARTIES

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

- Office of Response and Restoration, NOAA;
- Administrator, CDFG, Office of Spill Prevention and Response;
- Director, CDPR;
- Executive Officer, CSLC;
- Manager, California-Nevada Operations Office, USFWS
- Regional Director, Pacific West Region, NPS

II. AUTHORITY

The Trustees enter into this MOU pursuant to the authority provided to Natural Resource Trustees by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. §§ 9601 *et seq.*); the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*); and the CERCLA Damage Assessment Regulations (43 C.F.R. Part 11). 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 (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 the California Fish and Game Code, § 1802. The CDPR enters into this MOU pursuant to its authority under the California Public Resources Code, § 5003. The CSLC enters into this MOU pursuant to its authority under the California Public Resources Code, §§ 6201, *et seq.*

III. 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.

B. Natural Resource Damage Assessment (NRDA) or Assessment

"Natural Resource Damage Assessment," "NRDA," or "Assessment" means the process of collecting and analyzing information to evaluate the nature and extent of injuries resulting from a release of hazardous substances, and determining the restoration actions needed to bring injured natural resources and services back to baseline and make the environment and public whole for interim losses.

C. Natural Resource Damages

"Natural Resource Damages" means damages specified in section 107 of CERCLA (42 U.S.C. § 9607), and includes the costs of assessing these damages, as defined in section 101(6) of CERCLA (42 U.S.C. § 9601(6)).

D. Release

"Release" means the discharge of DDTs and PCBs into the Southern California marine environment from sources associated with the case of *United States and California v. Montrose Chemical Corporation, et al.*

E. Restoration or Restore

"Restoration" or "Restore" means 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 Release.

F. Restoration Funds

"Restoration Funds" means those Natural Resource Damages recovered from the defendants in the Montrose case to be used for the design, implementation, permitting (as necessary), monitoring, and oversight of Restoration projects, and for the Trustees' costs of complying with the requirements of the law to conduct a restoration planning and implementation process. It does not include the cost of assessing natural resource damages.

G. Montrose Trustee Council Representatives

"Montrose Trustee Council Representatives" shall mean the primary and alternate representatives appointed and authorized to vote on behalf of the participating Trustees, i.e., NOAA, CDFG, CDPR, CLSC, USFWS, and NPS. In the event a primary representative(s) is(are) unable to participate at a given meeting of the Montrose Trustee Council, his or her alternate, duly appointed in accordance with Section VI, may participate as well as vote in his or her stead.

H. Voting Montrose Trustee Council Representatives

"Voting Montrose Trustee Council Representatives" shall mean all primary representatives and alternates voting in the place of primary representatives, except for those representatives who elect to abstain from a vote pursuant to paragraph VII.B below.

IV. BACKGROUND

From the late 1940s to the early 1970s, millions of pounds of DDTs and PCBs were discharged from industrial sources through a wastewater outfall into the ocean at White Point, near Los Angeles. These discharges resulted in widespread impacts on the natural and human environment. The contaminants, chemical mixtures banned in the United States today but manufactured in the past for pesticides and industrial purposes, contributed to severe declines in the populations of several species of birds, including the extirpation of bald eagles and peregrine falcons from the Channel Islands. The high levels of DDTs and PCBs in certain

species of fish also led the State of California to issue consumption advisories, impose bag limits, and enact a commercial catch ban on certain types of fish. Although the releases were largely brought under control in the 1970s, these chemicals still contaminate the marine environment (sediments, water, and biota) of the Southern California Bight (SCB).

In 1990, the federal government and the State of California initiated legal action against the Montrose Chemical Corporation (Montrose) and the other parties responsible for the discharges of DDTs and PCBs. In December 2000 a final settlement was signed, ending ten years of litigation. Funds from the prior and final settlements are being used (1) by EPA to pursue site remediation and implement programs to reduce the human health risks associated with consuming contaminated fish; and (2) by the federal and state Trustees who are parties to this MOU to pursue restoration of injured natural resources. In 2001, the Trustees created the Montrose Settlements Restoration Program (“MSRP”), which included authorization to hire full-time MSRP staff, as a multi-agency effort to manage the work of restoring the injured resources under the general supervision of the Trustee Council.

V. PURPOSE

In 1990, the Trustees entered into an MOA in order to facilitate coordination and cooperation in the conduct of a damage assessment related to the Release and to jointly pursue legal action against Montrose and the other responsible parties. That MOA was subsequently modified in 1991 and 1995. This revised MOU supersedes the 1990 MOA and its subsequent modifications. This revised MOU is also intended to provide a framework for coordination and cooperation among the Trustees in the use of Restoration Funds from the Montrose settlements for projects to restore bald eagles, seabirds, peregrine falcons, fish, and fishing services throughout the SCB.

In 2005, the Trustees prepared a Draft Restoration Plan/Environmental Impact Statement/Environmental Impact Report (RP/EIS/EIR) that was released for public comment, modified based on those comments, and finalized as a Final RP/EIS/EIR in November 2005. The Trustees intend to use the Restoration Funds for the design, implementation, permitting (as necessary), monitoring and oversight of restoration projects selected in Final RP/EIS/EIR and in subsequent phases of the planning and implementation process. The Trustees share joint responsibilities regarding the injured resources.

The Trustees retain the ultimate authority and responsibility to determine the use of Restoration Funds in accordance with the Final RP/EIS/EIR, provisions of applicable federal and state law, and the CERCLA Damage Assessment Regulations.

VI. ORGANIZATION - MONTROSE TRUSTEE COUNCIL AND LEAD TRUSTEES FOR SPECIFIC PROJECTS

To implement this MOU, there is hereby created the Montrose Trustee Council (or "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 Montrose Trustee Council. Communications regarding Montrose Trustee Council business shall be addressed to the primary and, unless the Montrose Trustee Council directs otherwise, copied to the alternate representative and to the Trustees' legal representatives.

Designated representatives of the NOAA Office of General Counsel, Staff Counsel of CDFG, and the Department of the Interior's Office of the Solicitor shall serve as legal counsel to the Montrose Trustee Council. The Montrose Trustee Council may seek advisory participation from other federal, state, or local agencies or any other entity as deemed appropriate by the Montrose Trustee Council.

VII. DECISION MAKING

A. Unanimous Approval of Voting Representatives Required

The Trustees agree that, except as explicitly delegated to a specific Trustee pursuant to Section VIII below, decisions implementing this MOU shall require the unanimous approval of the Voting Montrose Trustee Council Representatives. In any event, notwithstanding the abstention provision in paragraph VII.B below, at least four Voting Montrose Trustee Council Representatives must participate in any vote, and all must vote in the affirmative to constitute unanimous approval.

Such decisions shall be recorded in writing, either by resolution signed by the Voting and abstaining Montrose Trustee Council Representatives or in minutes approved as to content and form by the Voting and abstaining Montrose Trustee Council Representatives, pursuant to paragraph VII.B below. Written notice of Council meetings (which may consist of e-mail notification) will be provided to all Montrose Trustee Council Representatives.

B. Abstention

A Montrose Trustee Council Representative may abstain on behalf of his or her agency from voting on a particular matter.

A written record shall be maintained of all abstentions in the Administrative Record. This written record shall consist of an annotation and signature by the abstaining Representative on the Trustee Council Resolution from which he or she abstained or an annotation in Council meeting minutes. Should the annotation be in the meeting minutes, the meeting minutes must be submitted to the abstaining Representative for review and approval prior to finalization. Should a Representative find upon reviewing meeting minutes that an abstention was entered on his or her behalf in error, he or she shall notify the other Representatives in writing (which may consist of e-mail notification).

In the event a Representative abstains from a vote authorizing an expenditure of funds pursuant to paragraph VII.C, the written record of abstention must consist of an annotation and signature by the abstaining Representative on the Trustee Council Resolution from which he or she abstained.

C. Authorization of Expenditures

All decisions authorizing expenditures of funds shall be memorialized in a Trustee Council resolution authorizing the action, including without limitation, those for restoration planning and implementation activities and for Trustee costs associated with complying with the requirements of the law. Such resolutions may cover the entire sum approved for a given study, activity, project, or project phase. Approval authority for individual invoices associated with a particular study, Restoration activity, or Restoration project may be delegated by the Montrose Trustee Council to one or more of the Montrose Trustee Council Representatives. In all cases, use of funds must be documented and an accounting provided to the Montrose Trustee Council, in a manner and according to a schedule specified by the Trustee Council.

D. 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 agreement cannot be reached among the MSRP Trustee Council Representatives, the matter in dispute may be elevated within the Trustee agencies for resolution. If necessary, the Trustees may establish further mechanisms to resolve disputes.

VIII. POWERS, DUTIES, AND RESPONSIBILITIES

A. Montrose Trustee Council

On behalf of the Trustees, the Montrose Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the procedures contained in Section VII (Decision Making), above. The Montrose Trustee Council, at 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 Montrose Trustee Council may request that a meeting be convened. The Montrose Trustee Council, in accordance with applicable laws and policies, may take the following actions to address the Trustees' Natural Resources Damage Assessment and Restoration responsibilities:

1. Oversee any remaining NRDA activities and prepare, as appropriate, additional National Environmental Policy Act (“NEPA”) and California Environmental Quality Act (“CEQA”) documentation for projects for which the Final RP/EIS did not constitute final NEPA review;
2. Ensure adequate public notice, opportunity for public input, and consideration of all public comments prior to planning and implementing projects for which further NEPA and/or CEQA documentation is prepared;
3. Oversee implementation of the Montrose Final Restoration Plan;
4. Through one or more of the Trustees or MSRP staff, enter into agreements with other entities that the Montrose Trustee Council has determined are qualified to provide services to the Montrose Trustee Council;
5. Oversee the management and administration of Restoration Funds, which may include depositing all or a portion of the Restoration Funds into a segregated account within the Department of the Interior Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund), transferring all or a portion of the funds to a trust fund account established with the National Fish and Wildlife Foundation, or transferring all or a portion of the funds to some other similar non-profit organization, to the extent permitted by State and federal law;
6. Authorize or direct MSRP staff or the Lead Trustee for specific projects to request, through submittal of an approved resolution, 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 project costs, and to take all steps necessary to effect the disbursements when so directed by the Montrose Trustee Council;
7. 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 Release, have been the subject of public review and comment, and otherwise meet the requirements of applicable federal and State law;

8. Delegate specific duties to individual Trustee representatives or MSRP staff. Certain duties set out below are hereby delegated to the Lead Trustee for specific projects.

B. Lead Trustees for Restoration Projects

A Lead Trustee (State or federal) may be designated for projects selected in the Restoration Plan. Each Lead Trustee, in cooperation with appropriate MSRP staff, 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. As appropriate for the Lead Trustee, ensure that the project(s) is implemented in a manner that complies with all applicable laws, which may include, but are not necessarily limited to, 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 to the Montrose Trustee Council for its review and approval a detailed statement of the proposed project(s), project schedule(s), and estimated budget(s) for the life of the project(s), including an estimate of any contract, administrative, and overhead costs to be charged to the project(s);
4. Obtain the Montrose Trustee Council's written authorization to commence the project(s);
5. Oversee and monitor the progress of the project(s);
6. Submit annual reports (unless otherwise agreed) to the Montrose 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 Trustee for inclusion, as appropriate, in the administrative record or the official case working file;
8. Provide a final accounting to the Montrose Trustee Council when the project(s) is(are) completed and an interim accounting(s) at any other time requested by the Trustee Council;
9. Prepare agenda items for meetings of the Montrose 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 Montrose Trustee Council.

C. Lead Administrative Trustee

NOAA shall be the Lead Administrative Trustee and shall carry out the following duties:

1. Coordinate and monitor all aspects of the Natural Resource Restoration process even if not specifically addressed herein;

2. Schedule, provide notice of, and prepare agendas and minutes for general meetings of the Montrose Trustee Council;

3. Act as the central contact point for the Montrose 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 an administrative record and official case working file;

5. Carry out such other duties as directed by the Montrose Trustee Council.

The Lead Administrative Trustee may delegate any of its duties to another Trustee with the concurrence of the Montrose Trustee Council.

IX. CONFLICT OF INTEREST

A Montrose Trustee Council representative will abstain from discussing and voting on any issue coming before the Montrose Trustee Council in which that representative has a personal financial interest. The Trustee Council representative will identify this conflict to the Montrose Trustee Council prior to consideration and voting on the issue(s). Should a Montrose Trustee Council Representative abstain from voting due to a conflict of interest, the conflicted Representative's alternate shall vote in his or her stead.

X. 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 and vote by telephone.

XI. CONFIDENTIALITY

The Trustees agree that it is generally in the public interest that scientific data arising out of their assessment of the injuries to Natural Resources caused by the Releases 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, pre-decisional, or protected by other applicable privileges (or a combination thereof) ("Privileged Document") 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 protection 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 document is received pursuant to any applicable federal or State law, the request will be forwarded for response to the Trustee(s) to which any privilege applies or whose representatives originally generated or contributed to the document requested. Nothing contained herein shall be construed as prohibiting or restraining a Trustee or the Montrose Trustee Council from agreeing to release any record. Nothing contained herein shall be construed as requiring a Trustee or the Montrose Trustee Council to release a Privileged Document.

XII. 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.

XIII. 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.

XIV. 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.

XV. MODIFICATION OF AGREEMENT

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

XVI. 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. Prior to the termination of this MOU, to the extent that it has not already done so, each Trustee shall give a full and complete accounting to the Montrose Trustee Council of all Restoration Funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by that Trustee.

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 addition, prior to such withdrawal becoming effective, the withdrawing Trustee shall give a full and complete accounting to the Montrose Trustee Council of all Restoration Funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by that Trustee, and at the discretion of the Trustee Council, shall return to the Council any unexpended Restoration Funds.

XVII. 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.

XVIII. 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: 12/28, 2006

**NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION**

By:

A handwritten signature in black ink, appearing to read "Kenneth Barton", with a long horizontal flourish extending to the right.

Kenneth Barton
Acting Director
Office of Response and Restoration

Dated: , 2006

OCT 31 2006

**UNITED STATES FISH AND WILDLIFE
SERVICE**



//s// Ken McDermond

By:

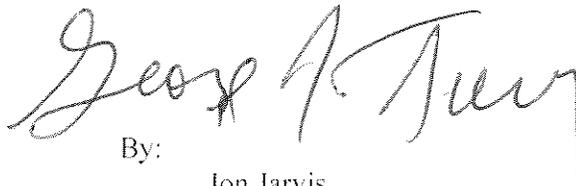
for

Steve Thompson
Manager

California-Nevada Operations Office

Dated: 12/19, 2006

NATIONAL PARK SERVICE

A handwritten signature in black ink, appearing to read "Jon Jarvis". The signature is written in a cursive, flowing style.

By:

Jon Jarvis
Regional Director
Pacific West Region

Dated: JAN 7 2007

CALIFORNIA STATE LANDS COMMISSION

A handwritten signature in black ink that reads "Paul D. Thayer". The signature is written in a cursive, flowing style.

By:

Paul D. Thayer
Executive Officer

Dated: 10/24, 2006

**CALIFORNIA DEPARTMENT OF PARKS
AND RECREATION**

A handwritten signature in cursive script that reads "Ruth Coleman".

By:

Ruth Coleman
Director

Dated: October 20, 2006

**CALIFORNIA DEPARTMENT OF FISH
AND GAME**

By:



Lisa Curtis
Administrator
Office of Oil Spill Prevention and Response