

**MEMORANDUM OF UNDERSTANDING
RELATING TO
THE McGRATH LAKE OIL SPILL
BETWEEN THE
DEPARTMENT OF FISH AND GAME
OFFICE OF OIL SPILL PREVENTION AND RESPONSE,
THE DEPARTMENT OF PARKS AND RECREATION,
AND
THE U.S. DEPARTMENT OF INTERIOR,
Represented by the U.S. FISH AND WILDLIFE SERVICE**

I. INTRODUCTION

The Memorandum of Understanding (MOU), is between the California Department of Fish and Game (DFG), the California Department of Parks and Recreation (DPR), and the U.S. Department of the Interior represented by the U.S. Fish and Wildlife Service (USFWS) (hereafter referred to individually as the "Trustee" and collectively 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 from the Berry Petroleum Company (Berry) pipeline near McGrath State Beach in Ventura County, California, in December 1993.

II. PARTIES

The following officials, or their designees, are parties to this MOU and act on behalf of the public as Trustees for natural resources under this MOU:

- Administrator
Department of Fish and Game
Office of Oil Spill Prevention and Response
- Director
Department of Parks and Recreation
- Regional Director
United States Fish and Wildlife Service
Region 1
(on behalf of the Secretary of the U.S. Department of the Interior)

III. AUTHORITY

The Trustees enter into this MOU pursuant to the Natural Resources Trustee (NRT) authorities provided to the Trustees by: the Oil Pollution Act (33 U.S.C. §§ 2701 et seq.); the Water Pollution Prevention and Control Act (33 U.S.C. §§ 1251 et seq.); the National Oil and Hazardous Substances Pollution Contingency Plan, Subpart G (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)), and Executive Order 13016 (61 Fed.Reg. 45871 (August 30, 1996)); the Oil Pollution Act Damage Assessment

Regulations (15 C.F.R. §§ 990 et seq.); the DOI's Natural Resources Damage Assessment Regulations, as amended (43 C.F.R. §§ 11 et seq.), as applicable; and any other applicable law. The DFG also enters into this MOU pursuant to its NRT authority (Fish & G. Code § 1802), and the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act (Gov. Code §§ 8670.1 et seq.).

IV. DEFINITIONS

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

A. Natural Resource and Natural Resources

"Natural Resource" and "Natural Resources" mean land, fish, wildlife, biota, air, water, groundwater, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States and/or the State of California, and the "services" that the resources provided to other natural resources and/or humans.

B. Oil Spill

"Oil Spill" means the release of approximately 2075 barrels of crude oil from a Berry pipeline at the West Montalvo Field near Oxnard, California, in December 1993.

C. Restoration

"Restoration" means any action which restores, replaces, rehabilitates, and/or acquires the equivalent of the Natural Resources and the "services" (as that term is defined at 15 C.F.R. § 990.30 and 43 C.F.R. § 11.14 (nn), as applicable) provided by the Natural Resources that were injured, lost, or destroyed by the Oil Spill.

V. THE SETTLEMENT OF THE OIL SPILL

A settlement of the Oil Spill has been reached with Berry in lieu of litigation and has been embodied in a Consent Decree which was entered by the U.S. District Court for the Central District of California on February 13, 1997. Pursuant to the Consent Decree the defendant paid the sum of \$1,315,000, plus interest, to be dedicated to restoring Natural Resources. Additionally, the Consent Decree required the defendant to pay the sum of \$100,000, plus interest, to the DFG, \$100,000, plus interest, to the DPR, and \$10,000, plus interest, to the USFWS to develop a plan for restoration and for future oversight and monitoring of the restoration plan implementation.

Pursuant to the Consent Decree, \$1,315,000, plus interest, will be maintained in a trust account with the National Fish and Wildlife Foundation (the "McGrath Lake Trust"). The DFG, DPR, and USFWS, as co-equal joint Trustees, commit to the expenditure of the funds set forth in this paragraph, for the design, implementation, permitting, as necessary, and monitoring and oversight of Restoration projects in and around McGrath State Beach. The Trustees shall use said funds for water quality improvement of McGrath Lake, habitat improvements, revegetation, and/or protection of areas in and around McGrath State Beach.

The Trustees have prepared a Restoration Scoping Document (Attachment A) which contains three restoration components: (1) Lake Restoration; (2) Riparian Restoration, and (3) Restoration of Modified Dunes. The Trustees shall prepare a Restoration Plan proposal containing details for specific projects outlined in the Restoration Scoping Document and/or

Trustee for the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes, shall:

1. Ensure that the \$1,315,000 allocated toward these projects, plus interest thereon, is placed in the McGrath Lake Trust;
2. Ensure that the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes or any other use of funds segregated for these projects, 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.), and the California Environmental Quality Act (CEQA) (Pub. Resources Code §§ 21000 et seq.).
3. 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;
4. Obtain the NRT Council's authorization to commence the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes;
5. Following approval of the NRT Council, direct disbursement of funds from the McGrath Lake Trust to pay costs incurred in connection with the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes;
6. Oversee, coordinate, and monitor the progress of the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes;
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 Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes;
9. Schedule meetings and prepare an agenda for the NRT Council meetings regarding the Lake Restoration and Habitat Restoration Projects including Riparian Restoration and Restoration of Modified Dunes;
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 Trustee

The Lead Administrative Trustee shall be the DPR. The duties of the NRT Council primary representative of the DPR or that representative's designee, on behalf of the Lead Administrative Trustee, shall include, but are not limited to:

1. Coordinating and monitoring all aspects of the Natural Resource Restoration process not specifically addressed above;

2. Scheduling meetings and preparing an agenda for the NRT Council general meetings;
3. Acting as a central contact point for the NRT Council;
4. Establishing and maintaining records and relevant documents other than those regarding specific Restoration projects; and
5. Carrying out such other duties as directed by the NRT Council.

The Lead Administrative Trustee may delegate any of its 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. Wherever possible, public sharing of scientific data 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 maximum 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 the funds deposited into the McGrath Lake Trust and/or 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 MOU.

XIV. MODIFICATION OF AGREEMENT

Modification of this MOU must be in writing and approved by the Trustees currently parties to this MOU.

XV. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. If at any time the trustees determine that the purposes set forth in this MOU have been satisfied, the MOU may be terminated. In the event a Trustee withdraws from the MOU, such withdrawal must be in writing and provided to the other parties to this MOU at least thirty (30) days in advance of the withdrawal.

In the event of the withdrawal of a Trustee and/or the termination of this MOU, the NRT Council shall request a full and complete accounting from the National Fish and Wildlife Foundation of all restoration funds received, deposited, held disbursed, managed, expended, or otherwise controlled by the trustee for the McGrath Lake Trust.


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: 3/5/97, 1997

UNITED STATES FISH AND WILDLIFE SERVICE

By: 
for **MICHAEL J. SPEAR**
Regional Director
Region One

Dated: 21 March, 1997

CALIFORNIA DEPARTMENT OF FISH AND GAME

By:

Pete Bontadelli

PETE BONTADELLI

Administrator

Office of Oil Spill Prevention and Response

Dated: 4/14/97, 1997

CALIFORNIA DEPARTMENT OF PARKS AND
RECREATION

By:


DONALD W. MURPHY
Director

KVS:mld

FILE: ExFile, OSPR, OSPR-RF, Chron, Subject File

MEMORANDUM OF UNDERSTANDING
AMONG
THE CALIFORNIA DEPARTMENT OF FISH AND GAME,
THE CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, AND
THE U. S. FISH AND WILDLIFE SERVICE

I. Introduction

This Memorandum of Understanding (MOU) is entered into by the California Department of Fish and Game (DFG), the California Department of Parks and Recreation (DPR), and the U. S. Department of the Interior as represented by the U. S. Fish and Wildlife Service (USFWS) (hereafter collectively referred to as the Trustees or Trustee Council), to ensure the coordination and cooperation of the Trustees in assessing injuries to natural resources resulting from the release of crude oil at McGrath State Beach on or about December 24, 1993, and in restoring, rehabilitating, and/or replacing such injured resources, and/or acquiring the equivalent natural resources.

II. Parties

The following officials, or their designees, are parties to this MOU and shall act on behalf of the public as Trustees for natural resources under this MOU:

- (a) The Administrator of the Office of Oil Spill Prevention and Response, DFG;
- (b) The Director of DPR; and
- (c) The Regional Director of the Pacific Region of the USFWS.

III. Location of Injured Natural Resources

This MOU is intended to address natural resources injuries resulting from the oil spill from the Berry Petroleum (Berry) facility at McGrath State Beach, California, on or about December 24, 1993 (the oil spill). The term "injured natural resources" in this MOU includes, but is not limited to, resources that have been lost or destroyed at McGrath State Beach, including McGrath Lake, the surrounding beach and dune areas, and the Santa Clara River Estuary Natural Preserve, as a result of the oil spill.

IV. Purpose

The Trustees recognize the importance of integrating and coordinating: (1) the assessment of natural resource damages for injuries to natural resources resulting from the oil spill; (2) the pursuit of compensation for injuries to such natural resources, and the foregone services provided by such natural resources; and (3) the restoring, rehabilitation, and/or replacement of the affected resources and services, and/or the acquisition of equivalent natural resources (hereafter referred to as restoration).

In addition, the Trustees recognize that a phased joint cooperative assessment of natural resource injuries with the Responsible Party, Berry, which will enhance cost-effectiveness, avoid duplication, and allow sharing of limited personnel resources, is desirable. Therefore, the Trustees agree to negotiate with Berry in order to determine whether a joint phased cooperative assessment of natural resource injuries is feasible, and to enter into such an agreement if it is determined to be feasible by the Trustees.

Accordingly, the purpose of this MOU is to provide a framework for such coordination and cooperation among the Trustees, including the implementation of the Trustees' activities in furtherance of their natural resource Trustee responsibilities. The Trustees' activities will primarily involve assessing injuries to natural resources, quantifying natural resource damages, seeking compensation for such damages, and restoring the injured natural resources and the foregone services provided by those natural resources. Nothing in this MOU is to imply that any signatory Trustee is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over natural resources.

V. Authority

The Trustees enter into this MOU in accordance with natural resource Trustee authorities provided for each Trustee by the Federal Water Pollution Control Act (33 U.S.C. § 1251, et seq.), the Oil Pollution Act of 1990 (OPA) (33 U.S.C. § 2701, et seq.), the Comprehensive Environmental Response, Compensation and Liability Act, as amended (42 U.S.C. § 9601, et seq.), the Natural Resource Damage Assessment Regulations, as amended (43 CFR Part 11, if utilized); the OPA regulations, when promulgated; and other applicable Federal and State law.

VI. Organization

A Trustee Council is hereby created to implement this MOU to which each Trustee will designate a representative. The Council may create subcommittees if deemed necessary to effectuate the purposes of this MOU. The DFG will serve as the Lead Administrative Trustee under this MOU, and shall fully coordinate its activities with the Council.

In view of the decision by the Trustees to negotiate and commence a joint phased assessment of natural resource injuries with Berry if feasible, it is agreed by the Trustees that in order to facilitate and expedite such joint assessment, DFG is hereby granted authority by the Trustees to negotiate and execute any joint assessment agreements with Berry on behalf of the Trustee Council along with any stipulations relating to confirmation of oil product and wildlife mortality.

It is agreed that the signature of the Administrator of the Office of Oil Spill Prevention and Response, DFG, on the agreement shall be deemed assent by the Trustees to the agreements. If further agreements with Berry are contemplated, the Trustees may similarly authorize the Administrator to negotiate and execute such agreements so long as the Trustees have had an opportunity to review and approve in principle such agreements in advance of any negotiations with Berry.

VII. Duties and Responsibilities

On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the decision-making procedures contained in Section VIII below. The Trustee Council may take whatever action the Council, in its discretion, determines are necessary to fulfill the trust responsibilities of each Trustee under applicable Federal and State law.

It is expected that the Trustee Council, in accordance with applicable laws and policies, may take the following actions, among others, to address the Trustees' natural resource Trustee responsibilities:

- (a) Conduct and/or oversee scientific and technical studies, sampling and other matters related to the assessment of injury to natural resources resulting from the oil spill,

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the quantification of damages, and the restoration of injured resources and foregone services.

- (b) Seek compensation from responsible parties for the damages assessed by the Trustees, and for the costs of planning and implementing the assessment, and recovering natural resource damages.
- (c) Acting in concert with its attorneys, and participate in negotiations with responsible parties.
- (d) In accordance with applicable law, supervise, manage, and obligate any money paid to the Trustees by or on behalf of responsible parties for the purposes of assessing natural resource damages, recovering natural resource damages, and restoring the injured natural resources, and any lost services.
- (e) Oversee the development and implementation of a plan for the restoration of the injured natural resources and foregone services provided by those resources.
- (f) In accordance with applicable law, make all necessary decisions for the management and administration of funds pursuant to Section IX below.
- (g) In accordance with applicable law, arrange for one or more contracts with professional consultants, technical or otherwise, that the Trustee Council determines are necessary and best qualified to provide services to the Council.
- (h) Identify a contact for coordination with the U. S. Coast Guard, regarding access to the Oil Spill Liability Trust Fund.

The duties of the Lead Administrative Trustee shall include, but are not limited to: negotiation and execution of joint cooperative agreements with Berry on behalf of the Trustees; collection of data pursuant to joint study plans with Berry; coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council and preparation of agendas for those meetings; acting as a central contact point for the Trustee Council; establishment and maintenance of records and relevant documents; and such other duties as directed by the Trustee Council. The

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Lead Administrative Trustee will be responsible for informing the other Trustees of all pertinent developments on a timely basis.

VIII. Decision making

The Trustees agree that all decisions implementing the responsibilities set forth in this MOU shall require unanimous approval of the Trustee Council. In the event that unanimous agreement cannot be reached among the members of the 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. The Trustees further agree that decision-making deliberations will focus on the Trustees' mutual purposes of assessing natural resource damages and restoring injured resources and foregone services, rather than on control or respective trusteeship over those resources.

IX. Funds

The Trustees agree to cooperate in good faith to attempt to establish, to the extent consistent with applicable law, a joint trust account for purposes of receiving, depositing, holding, disbursing, managing and expending natural resource damage recoveries obtained or received by the Trustees relating to the natural resource injuries arising out of the oil spill, and interest earned thereon. If a joint trust account is not feasible, separate trust accounts may be established but, consistent with applicable law, must be used for the purposes of assessing natural resource damages, recovering damages, and restoring injured resources and lost services. Any natural resource damage recoveries obtained or received by or on behalf of any Trustee relating to the natural resource injuries arising out of the oil spill shall be deposited in the joint trust account, or if such joint trust account is not feasible, in the respective separate trust accounts. This agreement does not govern cost recoveries or any penalties which may be assessed in connection with the oil spill.

Decision making by the Trustees on expenditures of money in the joint trust account, or in the various trust accounts, must be by agreement of the Trustees for any projects to restore,

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rehabilitate, or replace resources injured by the spill. The Trustee Council, in accordance with the decision-making process in Section VIII, shall establish standards and procedures governing the joint use of all natural resource damages obtained or received by the Trustees, and used for projects to restore, rehabilitate or replace resources injured by the spill.

X. Confidentiality

The Trustees agree that it is in the public interest that all scientific data arising out of the assessment of natural resource injuries resulting from the oil spill be made public. Therefore, such data shall be made public as soon as publication will not prejudice the ongoing assessment or subsequent recovery efforts. Public sharing of scientific data, wherever possible, will be the general policy of the Trustees.

However, the Trustees recognize that all written or oral communications related to the assessment and recovery of natural resource damages are being made in anticipation of litigation. Accordingly, all oral and written communications and work product will be treated as privileged attorney-client communications, attorney work product, or protected by other applicable privileges (or a combination thereof), as appropriate, and will be protected from disclosure to the maximum extent possible under applicable Federal or State law.

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

XI. Reservation of Rights

Each Trustee reserves the right to take whatever action is necessary to pursue or preserve any legal remedies available to the Trustee in connection with the oil spill, and nothing in this MOU is intended to waive or foreclose any such right.

XII. Modification of Agreement

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

XIII. Termination

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time the Trustees determine that the purposes set forth in this MOU have been satisfied, the MOU may be terminated. In the event any Trustee intends to withdraw from the MOU such intention must be in writing and provided to the rest of the Trustees at least thirty (30) days in advance. In the event of such withdrawal, this MOU remains in full force and effect for the remaining parties.

In the event of the withdrawal of any Trustee, and at the termination of this MOU, the Trustees shall undertake a full and complete accounting of all funds received, deposited, held, disbursed, managed, and expended from the joint or separate trust accounts established in accordance with Section IX of this MOU.

XIV. Limitation

Nothing in this MOU shall be construed as obligating the United States, the State, 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

The rights and responsibilities contained in this MOU are subject to the availability of funding and are intended to be guidance for the respective Trustees. They may not be the basis of any third party challenges or appeals.

XVI. Execution: Effective Date

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the

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original MOU. The date of execution shall be the date of the last Trustee's signature.

SIGNATURES:

California Department of Fish and Game

By Pete Buttrick
Administrator
Office of Oil Spill Prevention
and Response
Department of Fish and Game

Date: 2-22-91

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U. S. Fish and Wildlife Service

By: *Marvin L. Plenart*
for Marvin L. Plenart
Regional Director, Region I
U. S. Fish and Wildlife Service

Date: 4/4/94

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California Department of Parks and Recreation

By: _____
Donald W. Murphy, Director
California Department of Parks
and Recreation

Date: _____