

**MEMORANDUM OF UNDERSTANDING
RELATING TO THE *M/V COSCO BUSAN* OIL SPILL
NATURAL RESOURCES DAMAGE ASSESSMENT AND RESTORATION
AMONG**

**THE CALIFORNIA DEPARTMENT OF FISH AND GAME, OFFICE OF SPILL PREVENTION
AND RESPONSE,
THE CALIFORNIA STATE LANDS COMMISSION,
THE U.S DEPARTMENT OF THE INTERIOR (U.S. FISH AND WILDLIFE SERVICE, NATIONAL
PARK SERVICE, BUREAU OF LAND MANAGEMENT), AND
THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

INTRODUCTION

This Memorandum of Understanding ("MOU") is between the California Department of Fish & Game ("CDFG"), the California State Lands Commission ("CSLC"), the U.S. Department of the Interior ("DOI"), on behalf of the U.S. Fish and Wildlife Service ("FWS"), the National Park Service ("NPS") and the Bureau of Land Management ("BLM"), and the National Oceanic and Atmospheric Administration ("NOAA") (collectively referred to as the "Trustees", and each, individually, as a "Trustee"). This MOU is entered into to promote the coordination and cooperation of the Trustees in restoring, rehabilitating, replacing, and/or acquiring the equivalent of resources injured by the discharge of oil from the *M/V Cosco Busan* when it struck the San Francisco/Oakland Bay Bridge on November 7, 2007.

I. PARTIES

- A. 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:
1. Administrator, California Department of Fish and Game, Office of Spill Prevention and Response;
 2. Executive Officer, California State Lands Commission;
 3. Regional Director, Pacific West Region, National Park Service on behalf of the Department of the Interior; and
 4. Division Chief, Restoration Center, Fisheries Office of Habitat Conservation, NOAA

II. AUTHORITY

The CDFG, DOI (on behalf of FWS, NPS, and BLM), and NOAA enter into this MOU pursuant to the authority 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.*); and, the OPA Natural Resource 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 (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 CSLC enters into this MOU pursuant to its natural resource trustee authority under the California Public Resources Code sections 6009, 6301, *et seq.*

III. DEFINITIONS

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

A. Consent Decree

"Consent Decree" means the Consent Decree that was lodged on September 19, 2011, with the United States District Court for the Northern District of California, in the matter of the United States of America v. *M/V Cosco Busan et al.*, Civil Action No. C 07-6045(SC) and related actions. The Consent Decree, when entered, resolves claims brought by the United States, the State of California by and through the CDFG, the CSLC and the Regional Water Quality Control Board for the San Francisco Bay Region, the City and County of San Francisco ("CCSF"), and the City of Richmond ("Richmond"), in three separate lawsuits pertaining to the Incident.

B. 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.

C. 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 discharge of oil, and determining the restoration actions needed to bring injured natural resources and services back to baseline condition and make the environment and public whole for interim losses.

D. Natural Resource Damages

"Natural Resource Damages" means damages specified in section 1002 of OPA (33 U.S.C. § 2702(b)(2)), and includes the costs of assessing these damages.

E. Incident

"Incident" means the discharge of oil from the *M/V Cosco Busan* into San Francisco Bay which began on November 7, 2007.

F. 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 as a result of the Incident.

G. Restoration Funds

"Restoration Funds" means certain Natural Resource Damages totaling \$30,506,000, plus interest, which the Trustees recovered pursuant to the terms of the Consent Decree. These Restoration Funds are 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.

H. Cosco Busan Trustee Council Members

"Cosco Busan Trustee Council Members" shall mean the primary and alternate representatives appointed on behalf of CDFG, CSLC, DOI, and NOAA, pursuant to Paragraph V.A below.

I. Voting Cosco Busan Trustee Council Members

"Voting Cosco Busan Trustee Council members" shall mean the four primary representatives appointed and authorized to vote on behalf of the Trustees, specifically CDFG, CSLC, DOI (as represented by FWS or NPS, as described below), and NOAA, except for those representatives who elect to abstain from voting pursuant to Paragraph VI.B below. In the event one or more of the primary representative(s) is (are) unable to participate at a given meeting of the Trustee Council, their respective alternate representative(s) shall be deemed the voting member(s) for purposes of such meetings, and shall be entitled to vote or abstain from voting.

IV. BACKGROUND

- A. The Trustees prepared and released the Cosco Busan Draft Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA") in September 2011. The Draft DARP/EA describes the results of the NRDA activities and provides information concerning the natural resource restoration projects considered by the Trustees and the process for selecting projects that restore or enhance recreational opportunities in the San Francisco Bay Area. After considering and responding to public comments on the Draft DARP/EA, the Trustees will prepare a Final DARP/EA, which will select and describe the restoration projects for birds, fish, and shoreline habitats and describe the process for selecting recreational projects. The Trustees have committed to allocating the Restoration Funds as follows: approximately \$5,000,000 for bird restoration projects; approximately \$2,500,000 for fish restoration projects; approximately \$4,000,000 for shoreline habitat restoration projects; approximately \$ 17,006,000 for recreational projects¹; and approximately \$2 million will be used by the Trustees to pay the costs of complying with the requirements of the law to conduct the Restoration implementation process and any additional administration and oversight costs associated with the process.
- B. Pursuant to the terms of the Consent Decree, the Restoration Funds will be deposited into two (2) separate accounts as follows: approximately \$23,246,000 will be deposited into the CB Oil Spill NRD account within the DOI Natural Resource Damage Assessment and Restoration Fund ("NRDAR Fund") and approximately \$7,260,000 will be deposited into the San Francisco Bay Shoreline Parks and Recreational Use account established by the National Fish and Wildlife Foundation ("NFWF Rec Account"). Of the Restoration Funds deposited into the NRDAR Fund, approximately \$9,746,000 will be administered by the NPS and is to be spent for projects to compensate for lost recreational uses on NPS lands. Restoration Funds in the NFWF Rec Account will be administered by the CDFG and CSLC in accordance with the Consent Decree, the Final

¹ Note: In addition to this amount, the Consent Decree allocates approximately \$1.794 million of the Settlement funds directly to recreational use accounts established by CCSF and Richmond to implement appropriate recreational projects identified in cooperation with the Trustees. The Trustees do not control the allocation of these funds for projects.

DARP/EA, this MOU, and their Memorandum of Understanding with NFWF (attached as Exhibit A and made a part of the Consent Decree).

- C. Also, under the terms of the Consent Decree, approximately \$1.125 million will be deposited into the Cosco Busan Recreational Use account established by CCSF and approximately \$669,000 will be deposited into the Cosco Busan Recreational Use account established by Richmond, the Trustees will work cooperatively with CCSF and Richmond to identify appropriate restoration projects within the geographic boundaries of CCSF and/or Richmond to be funded with the Restoration Funds they administer.

V. ORGANIZATION – COSCO BUSAN TRUSTEE COUNCIL

- A. To implement this MOU, there is hereby created the Cosco Busan Trustee Council (“Trustee Council”), to which CDFG, CSLC, FWS and NPS (both representing DOI), and NOAA will each appoint one primary representative and one alternate representative. Each party to this agreement (CDFG, CSLC, DOI, NOAA) shall have one vote. For CDFG, SLC, and NOAA, that vote shall be cast by the party's primary representative, or in the absence of the primary representative, by an alternate representative. The NPS and FWS primary representatives, or alternate representatives in the absence of the primary representatives, shall determine when a vote by DOI on a matter at a given meeting shall be cast by the NPS representative or the FWS representative.
- B. 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 Trustee Council. Communications regarding Trustee Council business shall be addressed to the primary representatives and, unless the Trustee Council directs otherwise, copied to the alternate representatives and to the Trustees’ legal representatives.
- C. Designated representatives of the Office of the General Counsel of CDFG, the Legal Division of the CSLC, the NOAA Office of General Counsel, and the DOI's Office of the Solicitor shall serve as legal counsel to the Trustee Council. The Trustee Council may seek advisory participation from other federal, state, or local agencies or any other entity as deemed appropriate by the Trustee Council.

VI. DECISION MAKING

- A. Unanimous Approval of Voting Members Required

The Trustees agree that, except as specifically delegated to one or more Trustee Council members pursuant to Section VII below, decisions implementing this MOU shall require the unanimous approval of the voting Trustee Council members, subject to the abstention provision in Paragraph VI.B below. 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 Trustee Council members participating in the Council meeting. Written notice of Trustee Council meetings (which may consist of e-mail notification) shall be provided to all Trustee Council Representative.

B. Abstention

The Trustees acknowledge that not every Trustee will have an interest in every decision of the Trustee Council. The principles of fiscal responsibility and good governance favor an organization and decision making process that allows a Trustee to refrain from participating in meetings or otherwise expending resources for matters unrelated to its interests or trust resources. Accordingly, any Trustee Council member, who does not wish to approve or disapprove an action or position, may abstain from voting. The decision to abstain will be deemed a non-objection and will not prevent a decision approved by the Voting Trustee Council Members from being deemed an approved decision of the Trustee Council. In order to ensure the integrity of the Trustee Council decision-making process, if any Trustee intends to abstain from voting through non-attendance, that Trustee's representative will provide written notice in advance of a Trustee Council meeting, to the Lead Administrative Trustee.

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 Trustee Council meeting minutes when a Trustee abstains through non-attendance. 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 Trustee 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 Trustee representative abstains from a vote authorizing an expenditure of funds pursuant to Paragraph VI.C, the written record of abstention must consist of an annotation and signature by the abstaining Trustee representative on the Trustee Council Resolution from which he or she abstained.

C. Authorization of Expenditures

All decisions authorizing disbursements and/or expenditures of Restoration Funds from the NRDAR Fund and/or the NFWF Rec Account shall be memorialized in a Trustee Council resolution signed by all the voting Trustee Council members, including without limitation, decisions authorizing restoration planning activities and associated budgets, decisions authorizing grant awards and disbursements to grant recipients (except as otherwise set forth herein), disbursements to Trustee agencies for project implementation, and disbursements to Trustee agencies for agency costs associated with complying with the requirements of the law to conduct the Restoration implementation process. Such resolutions may cover the entire sum approved for a given activity, project, or project phase. The CDFG and CSLC shall have approval authority for individual invoices and/or disbursements associated with authorized grant awards from the NFWF Rec Account. Approval authority for individual invoices associated with other Restoration activities or Restoration projects may be delegated by the Trustee Council to the Lead Oversight Trustee for the Restoration project. In all cases, use of funds must be documented and an accounting provided to the Trustee Council in a manner and according to a schedule specified by the Trustee Council.

D. Dispute Resolution

In the event that unanimous agreement cannot be reached among the members of the Trustee Council for any matter under deliberation by 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.

VII. POWERS, DUTIES, AND RESPONSIBILITIES

A. Cosco Busan Trustee Council

On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the procedures contained in Section V and VI, above. The 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 Trustee Council may request that a meeting be convened. The Trustee Council, in accordance with applicable laws and policies, may take the following actions to address the Trustees' Restoration responsibilities:

1. Oversee implementation of the Final DARP/EA;
2. Arrange for the letting of contracts, through one or more of the Trustees, with consultants or contractors that the Trustee Council determines to best qualified to provide services to the Trustee Council;
3. Oversee the management and administration of the Restoration Funds;
4. Authorize or direct the Lead Oversight Trustee(s) for specific projects to request, through submittal of an approved resolution, disbursements from the NRDAR Fund or from the NFWF Rec Account for specific Restoration Plan project costs, and to take all steps necessary to effect the disbursements when so directed or authorized by the Trustee Council;
5. Select alternative Restoration projects if (1) any of the preferred Projects described in the Final DARP/EA prove infeasible, impractical, or otherwise not in the public interest, (2) any of the recreational projects selected by the Trustee Council prove infeasible, impractical, or otherwise not in the public interest, including failure of the grant recipient to implement or begin implementing the approved project(s) within a reasonable period of time, or (3) any funds remain after the successful implementation of the projects described in the Final DARP/EA, provided that such alternative projects address the injuries caused by the discharge of oil from the Cosco Busan, are subject to public review and comment, and otherwise meet the requirements of applicable federal and state law;
6. Coordinate with the CCSF to identify appropriate recreational projects within CCSF's jurisdiction for funding with the Restoration Funds it received. Coordinate with Richmond to identify appropriate recreational projects within Richmond's jurisdiction for funding with the Restoration Funds it received;
7. Coordinate with the East Bay Regional Park District, San Mateo and Marin Counties, local cities and other public and private organizations in accordance with the Final DARP/EA to identify and fund a suite of recreational projects according to the relative magnitude of spill impacts; and,

8. Delegate specific duties to individual Trustee representatives. Certain duties set out below are hereby delegated to the Lead Oversight Trustee(s) for specific projects, and to Lead Administrative Trustees for administrative purposes.

B. Lead Oversight Trustee for Restoration Projects

A Lead Oversight Trustee (state or federal) shall be designated for each of the selected restoration and recreational projects. Each Lead Oversight 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 and/or with regard to recreational projects, the public;
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 Trustee Council's approval a detailed written 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. Oversee and monitor the progress of the project(s);
5. Submit annual reports (unless otherwise agreed) to the Trustee Council which shall include a progress report, and a statement of funds spent;
6. 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 or the official case working file;
7. Provide a final accounting to the Cosco Busan Trustee Council when the project(s) is(are) completed and an interim accounting(s) at any other time requested by the Trustee Council;
8. Prepare agenda items for meetings of the Cosco Busan Trustee Council regarding the project(s);
9. Inform the other Trustees of all pertinent developments regarding the project(s) on a timely basis; and,
10. Carry out such other duties as directed by the Cosco Busan Trustee Council.

C. Co-Lead Administrative Trustees

There shall be two Co-Lead Administrative Trustees, the CDFG and the FWS. 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 may delegate any of their duties to another Trustee with the concurrence of the Cosco Busan Trustee Council. The Co-Lead Administrative Trustees shall carry out the following duties:

1. Coordinate and monitor all aspects of the Restoration implementation process even if not specifically addressed above;
2. Schedule, provide notice of, and prepare agendas and minutes for general meetings of the Cosco Busan Trustee Council;

3. Act as primary contact points for the Cosco Busan 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 Cosco Busan Trustee Council;
6. The FWS will perform routine administrative duties related to the NRDAR Fund account established to hold certain of the Restoration Funds; and,
7. The CDFG will perform routine administrative duties related to the NFWF Rec account established to hold certain Restoration Funds.

VIII. CONFLICT OF INTEREST

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

IX. 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 Trustee Council members.

X. 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 Incident and/or developed through monitoring of Restoration projects 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 written record 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 Trustee Council from agreeing to release any record. Nothing contained herein shall be construed as requiring a Trustee or the Trustee Council to release Privileged Document.

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 Parties 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 Cosco Busan Trustee Council of all NRDAR Funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by that Trustee in any joint or separate account pursuant to this MOU.

XVI. 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.

XVII. 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. The date of execution shall be the date of the signature of the last Trustee agency to sign the MOU, which shall also be the effective date.

Dated: Jan 23, 2012

CALIFORNIA DEPARTMENT OF FISH
AND GAME

By: 
Scott D. Schaefer
Administrator (Acting)
Office of Oil Spill Prevention
and Response

Dated: January 9, 2012

CALIFORNIA STATE LANDS
COMMISSION

By: 

Curtis L. Fossum
Executive Officer
California State Lands Commission

Dated: February 10, 2012

UNITED STATES DEPARTMENT OF
THE INTERIOR

By: Patricia L. Neubacher
for Christine Lehnertz
Regional Director
Pacific West Region
National Park Service

Dated: Jan. 24, 2012

THE NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION

By: _____



Chris Doley
Division Chief
Restoration Center
Office of Habitat Conservation