

**Funding and Participation Agreement**  
**Portland Harbor Natural Resource Damage Assessment**  
**Path C**

This Funding and Participation Agreement (FPA) for the Portland Harbor natural resource damage assessment (NRDA) settlement negotiations is entered into by the Confederated Tribes of the Grand Ronde Community of Oregon, Confederated Tribes of the Siletz Indians, Confederated Tribes of the Umatilla Indian Reservation, Confederated Tribes of the Warm Springs Reservation of Oregon, Nez Perce Tribe, U.S. Department of the Interior, National Oceanic and Atmospheric Administration, and the Oregon Department of Fish and Wildlife, collectively the Natural Resources Trustees (Trustees) and City of Portland (City) whose signature appears below. Collectively, the Trustees and the City are the "Parties." The Trustees enter into this FPA as members of the Portland Harbor Natural Resource Trustee Council (Trustee Council). The Parties agree to the following:

1. The NRDA for the Portland Harbor Superfund site is being conducted in a three-phase approach. Phase 1 included the development of the Natural Resource Damage Assessment Plan (AP) and implementation of several early studies. That stage is complete. Phase 2 is the implementation of those portions of the AP necessary to estimate liability for purpose of early settlements at the end of Phase 2. Phase 3 involves the full implementation of the AP and the final injury and damage determination.
2. The Phase 2 FPA provides the opportunity for the Trustees and the Phase 2 Participant(s) to discuss restoration proposal(s) or engage in settlement discussions. Those activities are to be funded under separate agreements.<sup>1</sup>
3. Due to delays in the issuance of the Record of Decision for the Portland Harbor site, which in turn has delayed the NRD allocation described in Attachment C to the Phase 2 FPA and settlement opportunities based on that allocation, the Trustee Council and the City are pursuing a process identified as "Path C" as described in Exhibit A to this FPA.
4. The Parties recognize that the Trustees will incur costs following the execution of this FPA related to this settlement process.
5. The Trustees' initial budget estimate for engaging in the technical portion of the Path C process with the City is \$189,979.57.<sup>2</sup> This initial budget estimate covers a specific number of hours of Trustee legal and technical work. The parties understand and acknowledge that additional work will be needed to complete the settlement process. The Trustees and the City agree to meet and discuss supplemental funding necessary to complete the Path C process. Agreements regarding supplemental funding will be memorialized in an exchange of letters signed by the

<sup>1</sup> See paragraph 4 of the Phase 2 FPA.

<sup>2</sup> Exhibit A to this FPA describes the technical and advocacy steps in the Path C process.

Trustee Council chair and authorized representative of the City, which will be attached to and incorporated into this FPA.

6. The Trustees will provide a final accounting of the expenses of Path C to the Participant within 90 days of the conclusion of the activities covered by this FPA. Due to differences among Trustees' accounting procedures, the form of the accounting may differ among Trustees. The accounting will consist of a spreadsheet summarizing labor (hours and rates), travel costs, equipment costs, contractors' costs and miscellaneous expenses (e.g., supplies, overnight mail). The accounting will include contractor invoices.
7. Any funds not expended under this FPA will be credited against the City's NRD liability.
8. All funds received pursuant to this FPA are considered joint funds held for the use of the Trustees who have signed this FPA. Those funds can only be expended pursuant to the terms of this FPA and the consent of the Trustee Council. Should any of the Trustees withdraw from this FPA or the Trustee Council, that Trustee will return all unexpended funds received pursuant to this FPA to the U.S. Department of the Interior's Natural Resources Damage Assessment and Restoration Fund (NRDAR Fund) within 60 days of withdrawal. That Trustee will also provide an accounting of its Path C expenditures to the Trustee Council within 60 days of withdrawal. The returned funds will be used for Path C work as agreed upon by the Trustee Council.
9. The City will provide funding under this FPA for the activities to be performed by payment to the individual Trustees in accordance with the budget included as Exhibit B. Payments shall be made as follows:

Payment of the initial budget estimate is due within 30 days after approval of this Agreement by City Council. Payment of any supplemental funding will be due within 30 days following any agreement for supplemental funding referred to in paragraph 5 above.
10. The City agrees to fund the activities to be performed under this FPA with no admission of liability or responsibility. Neither the existence of this FPA nor the fact that the City agreed to fund Path C is admissible as evidence in any litigation or contested proceeding, to the extent provided by Federal Rule of Evidence 408 or Oregon Rule of Evidence 408, to establish the City's liability for NRD or the City's allocated share, if applicable, of the NRD liability at the Portland Harbor Superfund site. The City does not waive and reserves all rights to challenge the NRDA or the costs thereof.
11. The Parties agree that any Trustee or City reports, data, analyses, maps, documents, or estimates of NRDs collected, developed, or prepared pursuant to this FPA that are shared between the Parties shall be considered "settlement confidential." The Parties recognize and agree that it may be necessary to provide documentation developed during this process to the court to support a settlement. The Parties agree that oral communications that are in furtherance of settlement negotiations will be considered settlement confidential pursuant to Federal Rule of Evidence 408 and Oregon Evidence Code Rule 408. Nothing herein shall limit the ability of the Trustees to share information, data, and communications with other trustees or

EXHIBIT A

otherwise coordinate activities. However, this provision does not apply to previous written or oral communications which were not already deemed settlement confidential.

12. The Parties recognize that each Party from time to time may need to share settlement confidential information with other members of their respective company, agencies, governments, contractors, insurance carriers, indemnitors, the U.S. Department of Justice, the Oregon Department of Justice, and other public authorities. The sharing of settlement confidential information shall be done in a manner reasonably calculated to maintain the confidential nature of the information.
13. Except as provided above, settlement confidential information shall not be released to third parties except in the following circumstances after notice to the City:
  - a. In response to a judicial order compelling disclosure; or
  - b. Pursuant to a determination by the Multnomah County District Attorney or the Oregon Attorney General that the communication must be disclosed under the Oregon Public Records Statute; or
  - c. As may otherwise be required by law or regulation, including after consideration of the disclosure's harm to the public interest pursuant to the Oregon Public Records Law.

However, nothing in this FPA shall be construed as preventing the Federal Trustees from complying with the rules and regulations implementing the Federal Freedom of Information Act or the State Trustee from complying with the Oregon Public Records Law and its implementing regulations.

14. Nothing in this FPA shall be construed as obligating the Trustees, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.
15. This FPA does not release the City from any potential liability.
16. It is recognized that each Party to this FPA reserves all rights, powers and remedies. It is further recognized that, notwithstanding anything else in this FPA to the contrary, nothing in this FPA or in the course of cooperation under this FPA is intended nor shall be construed as a waiver by any Party of any rights, defenses, privileges or affirmative claims in any proceeding related to NRD liability arising from the release of hazardous substances at the Portland Harbor Superfund site or any other site where the Party may be involved. Nothing in this FPA is or shall be construed to be a waiver of the sovereign immunity by any of the Trustees.
17. All Parties to this FPA acknowledge their intent to participate in this process so as to enter into good faith settlement negotiations during the Path C process.
18. The Trustees acknowledge that the City is entering this FPA with the goal of obtaining a settlement that will provide a complete release for all liability for all NRDs arising out of

Portland Harbor contaminant releases (except those NRDs relating to claims for alleged injuries to navigational services), regardless of where the injury or damage occurs. The City acknowledges that the Trustees cannot provide certainty at this time regarding the scope of the release to be included in any future settlement or consent decree.

19. The City will be provided an opportunity to settle on a several basis based on the results of an NRD allocation. The Trustees agree that, in recognition of the monies paid by the City, the Trustees will prioritize harborwide settlement negotiations with Path C Participants over non-participating parties. However, this FPA does not preclude the Trustees from negotiating settlements with non-participating parties in advance of negotiating settlements with Path C Participants where a settlement opportunity could otherwise be lost for reasons, including but not limited to, insolvency, bankruptcy, or dissolution of the Potentially Responsible Party.
20. The Trustees commit that the funding provided pursuant to this FPA will only be used for tasks necessary to enter into a NRD settlement with the City and will not be used for any task for which the primary purpose is litigation.
21. The Effective Date of this FPA will be the date on which it is signed by the City and at least one Trustee.

#### **SIGNATURES**

**For the Path C Participant:**

**City of Portland:**

By: \_\_\_\_\_

Date: \_\_\_\_\_

**For the Trustees:**

National Oceanic and Atmospheric Administration

By: \_\_\_\_\_

Date: \_\_\_\_\_

Department of the Interior

By: \_\_\_\_\_

Date: \_\_\_\_\_

Oregon Department of Fish and Wildlife

By: \_\_\_\_\_

Date: \_\_\_\_\_

Nez Perce Tribe

By: \_\_\_\_\_

Date: \_\_\_\_\_

Confederated Tribes of the Warm Springs Indian Reservation of Oregon

By: \_\_\_\_\_

Date: \_\_\_\_\_

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Portland Harbor Injury Assessment

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Confederated Tribes of the Umatilla Indian Reservation

By: \_\_\_\_\_

Date: \_\_\_\_\_

Confederated Tribes of Siletz Indians

By: \_\_\_\_\_

Date: \_\_\_\_\_

Confederated Tribes of the Grand Ronde Community of Oregon

By: \_\_\_\_\_

Date: \_\_\_\_\_

## **Exhibit A**

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Path C Funding and Participation Agreement

EXHIBIT A

## Path C Funding and Participation Agreement - Exhibit A

In order to settle at the earliest possible time on the basis of the Phase 2 work completed to date, the Trustee Council has contracted with EcoChem to conduct a streamlined allocation on a parcel-by-parcel basis. This allocation will be based on the contaminant footprints derived from the Trustee Council's HEA model. Information regarding releases and pathways will be derived from site summaries developed by the Oregon Department of Environmental Quality and the Lower Willamette Group. It will include consideration of fate and transport and non-point source pollution based on the analysis presented in the Remedial Investigation Report and Feasibility Study for the site. The allocation will assign a percentage of liability to individual parcels based on the sources, pathways and footprints for the contaminants included in the Trustee Council's HEA model. The streamlined allocation will be complete by the end of 2013 and will provide a basis for settlement negotiations with individual parties or groups of parties. The cost of the streamlined allocation will be funded by the Trustee Council. However, the Trustee Council will seek to recover these costs on a pro-rata basis in settlement.

Once the parcel-by-parcel allocation is complete, interested Participating Parties (PPs) can enter into negotiations with the Trustee Council. The Trustee Council will consider various factors with regards to any party's share of liability (i.e. the number of DSAYs needed to satisfy a party's liability) including the so-called "Gore factors." See e.g., *U.S. v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1536 n.5 (10<sup>th</sup> Cir. 1995); *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 74 (1<sup>st</sup> Cir. 1999). Settlements may be cash-based or project-based. However, project-based settlements will need to meet the Trustee Council's 50/50 geographic restoration policy.

Each PP interested in pursuing the earliest possible settlement can identify for the Trustee Council the specific HEA footprints for which they may have liability (e.g. based on ownership, leases, and/or use of a parcel). Interested PPs can also provide the Trustee Council any additional information related to their releases and potential liability that they want the Trustee Council to consider in determining their share of liability when negotiating a settlement, including any assumptions a party is willing to accept for purposes of settlement. Meetings with individual PPs will be scheduled during our monthly Trustee Council meetings, which typically occur on the fourth Thursday of the month.

The Trustee Council has spent significant time analyzing the likely costs and feasibility of various restoration projects within the study area and in the Broader Focus Area for restoration. Based on our current knowledge, and for purposes of negotiating the earliest settlements with PPs, the Trustee Council has set the settlement "cash-out price" at \$70,500 per DSAY.<sup>1</sup> Again, this "cash-out price" is for purposes of the earliest settlements (during the Phase 2 "time out") and is subject to change later based on the Trustee Council's evolving knowledge of the cost of restoration projects inside and outside the study area and the availability of the lowest cost DSAYs.<sup>2</sup>

<sup>1</sup> This price includes recreation damages and the cost of harborwide lamprey monitoring outlined in our draft monitoring and stewardship plan, as well as the cost of monitoring and stewardship oversight. Further, it is a blended price covering the Trustee Council's geographic restoration policy requiring at least 50% of a settling party's or group of settling parties' restoration to be completed inside the study area and up to 50% to be completed in the Broader Focus Area.

<sup>2</sup> If a settling party wishes to enter into a project-based settlement, the Trustee Council will still require some amount of "cash-out" to cover that party's share of recreation damages, as well as the cost of harborwide lamprey monitoring.



**Instructions to Interested Parties**  
**Step 1 –Submission of Factual Information**

The purpose of this submission is to provide factual information relevant to the allocation process that will take place during Step 1 of the Path C process. Advocacy for or against a particular allocation for your client or other parties is not appropriate during Step 1. However, once Step 1 is complete, Trustees will engage with Path C parties on issues related to position advocacy during Step 2 (described later in this document). In Step 2, the Trustees will accept position papers from Path C parties on legal and factual issues related to the Trustee's allocation and the number of DSAYs allocated to a particular tax parcel. After a period of review, the Trustees will schedule negotiation sessions to work through the positions presented by each Path C party.

**Guidelines for Submission of Supporting Documentation**

Each submission of supporting documentation must include the following:

- A cover letter summarizing the Path C Party's identification of areas where liability may be attributable to the Path C Party for specific HEA footprints, including the specific timeframe and tax parcels involved. For each footprint identified in the cover letter summary, the Path C Party must identify which, if any, of the included documents inform their assertion(s); and
- An annotated bibliography that lists each document included in the transmission, which, as applicable, shall include:
  - Title/Subject;
  - Author;
  - Recipient/Audience;
  - Date of publication, development, or transmission; and
  - A description of the document and specific elements regarding how it informs the Path C Party's identification of potential releases or liability.

Path C Parties are reminded that the cost of reviewing early settlement proposals is in part based on the time and resources required to review submissions. The Trustee Council therefore requests that submissions be limited to information that specifically and directly inform the Trustee Council's ability to allocate liability among individual parties.

**Types of Information that Inform Allocation of Liability**

History of ownership/tenancy for specific sites/tax parcels related to the Contaminants of Concern (COCs). Portland Harbor Phase 2 Natural Resource Damage Assessment (NRDA) COCs are:

- Site information, including size in acres; distance to the waterway; dock information including size, type, and construction date; identification of discharge outfalls; and identification and location of relevant stormwater drains and outfalls;
- History of activities, approximate dates the activities were performed and contaminants associated with these activities, including but not limited to:
  - Fuel storage information, including storage tank type (e.g., AST, UST), contents, volume, leak status, installation and removal date (if applicable), and dates of use;
  - Landfill/disposal practices, including source/type of fill material, volume, location, dates of fill, and associated COCs;

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- Shipbuilding activities, including number of ships built, serviced or dismantled; berth size, dates of use;
- Maintenance and service activities, including description of the service, materials used, volume, dates of activity, location of activity, and associated substances of concern;
- Manufacturing and production, including description of the process, materials used, volume, dates of process, service location, waste stream information (including disposal practices), and associated substances of concern;
- Date, duration and quantity of known spills and releases, including approximate location of spill (e.g., to waterway, onto paved ground), and any contemporaneous clean-up that was performed; and
- Identification of upland sites and associated sources of contamination requiring remediation under the Portland Harbor Joint Source Control Strategy, and information related to source control measures implemented or planned for implementation to address contaminant pathways from upland sources to the Willamette River and associated water bodies.

**Please do \*not\* include:**

- Documentation of releases related to contaminants that are not being considered within the context of the Phase 2 NRDA;
- Permitted discharge data (e.g., NPDES), monitoring data or site investigation data that are not accompanied by a summary of those data;
- Significant volumes of documentation that are not accompanied by summaries of that documentation; or
- Advocacy of an allocation position.

**Submission of Documentation**

Parties interested in pursuing Path C – Early Settlement should provide the Trustee Council with the information described in this memorandum as soon as possible, and no later than the end of the current calendar year (2013). Information will be reviewed on a “first come, first served” basis, and delay in submission of this information may result in delays in settlement discussions for individual parties.

Please contact Jessica Fydenkevez at Industrial Economics, Inc. regarding the process for transmitting this information.

Email: [Jfydenkevez@indecon.com](mailto:Jfydenkevez@indecon.com)

Phone: (617) 354-0074

## **Step 2 - Advocacy Submission**

In an attempt to be effective and time/cost efficient, the Trustees are requesting that Path C Parties enter into a partnership with the Trustees and agree not to advocate for or against a particular position during the Step 1 Factual Submission process. Position advocacy, whether overt or subtle, will likely result in delays related to review of the technical submissions (or possibly a decision to ignore all of the material presented by that party). The Trustees stress that the Step 1 process is designed to simply inform the relevant factual elements that will allow the Trustee Council to develop an allocation that can be used as a basis for subsequent settlement discussions.

The Trustee Council understands that the Path C parties will want to make a variety of arguments that may affect the outcome of the allocation as to a particular parcel or party. The Trustee Council will accept position papers (limited to twenty pages) from Path C Parties during Step 2 of the Path C process. We anticipate that Path C Parties will present arguments (and potentially additional information/documents) regarding why the allocation did not produce an accurate DSAY number for a particular parcel or properly allocate an individual party's liability.

### **Types of Information that Support a Party's Position Regarding Allocation of Liability:**

- The type of process the party was engaged in, and whether that process would have produced the type of contaminant release associated with the parcel;
- The timeframes and intensity of the party's activity at a particular parcel;
- The methodology used to allocate liability to a particular parcel;
- The activity and intensity of the processes performed by others associated with a particular parcel; and
- Other equitable considerations laid out in the Gore Factors cases.

### **Types of Information that the Trustees will Not Consider:**

- Material associated with the outstanding Phase 2 technical issues;
- Arguments related to the Trustee Council's 50-50 Policy; and
- Material in excess of twenty pages.

## **Exhibit B**

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Path C Funding and Participation Agreement

## City of Portland - Path C

## Estimated Trustee Technical Budget for Step 1 - Submission of Factual Information [1]

Task	Participants	Cost Per Task
<b>0. Receive and organize Path C Party submissions</b>		
a. Receive, organize and distribute as appropriate documents from Path C parties.	IEc	\$ 218.40
<b>1. Document Review and Processing</b>		
b. Review, process and categorize data and information provided by Path C parties [2]	EcoChem	\$ 162,029.52
<b>2. Path C Allocation Update</b>		
c. Update parcel by parcel allocation based on additional data provided by Path C parties	EcoChem	\$ 1,359.96
d. Develop range of potential liability estimate for individual party.	EcoChem	\$ 971.40
e. Develop HEA DSAY estimates based upon updated parcel by parcel allocation and range of party-specific potential liability. Conduct sensitivity analyses.	IEc	\$ 6,333.60
f. Prepare summary for Trustees' review.	IEc; EcoChem	\$ 1,043.76
g. Trustee review of analysis and conclusions regarding DSAY estimate	Trustee Council	\$ 5,955.36
h. Update allocation and HEA per Trustees' comments	EcoChem; IEc	\$ 1,213.92
<b>3. Administrative and other costs</b>		
i. Consultation and communication between relevant entities relative to document review, analysis implementation, contracting, FPAs, etc.	EcoChem, IEc, Trustee Council	\$ 6,160.05
j. Discussion/implementation of transition from technical to advocacy phase	Trustee Council	\$ 4,693.60
<b>Total</b>		<b>\$ 189,979.57</b>

Cost Per Trustee	
NOAA	\$ 3,548.21
ODFW	\$ 1,587.25
DOI	\$ 1,012.20
Nez Perce	\$ 3,570.00
Umatilla	\$ 1,200.00
Siletz	\$ 1,359.05
Warm Springs	\$ 800.00
Grand Ronde [3]	\$ 176,902.86
<b>Total</b>	<b>\$ 189,979.57</b>

## Notes:

[1] Budget includes effort for technical review and analysis of information provided during Step 1 - Submission of Factual Information. It does not include time for negotiation discussions or meetings between the Trustees and Path C parties.

[2] Budget based on City of Portland Path C Step 1 submittal to Trustees. Final files provided 6/19/2014. The submittal contained 157 documents. 73 are relevant to the allocation and will require some level of effort to review and incorporate into the allocation.

76 are maps or bibliographies which EcoChem will review but for which there is no charge.

8 were not relevant to the allocation and will not be reviewed.

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