

**MEMORANDUM OF UNDERSTANDING
AMONG
THE U.S. DEPARTMENT OF THE INTERIOR,
THE U.S. DEPARTMENT OF COMMERCE,
AND THE STATE OF ALASKA
RELATING TO THE M/V *SELENDANG AYU* OIL SPILL NATURAL
RESOURCE DAMAGE ASSESSMENT AND RESTORATION**

I. INTRODUCTION

This Memorandum of Understanding (MOU) is entered into to ensure the coordination and cooperation of the participating state and federal agencies in assessing natural resource injuries, restoration planning, and restoration implementation associated with the December 2004 release of oil from the M/V *Selendang Ayu* along Unalaska Island, Alaska. Additionally, this MOU describes duties of each agency regarding the responsible use and management of funding obtained (or to be obtained) from the U.S. Coast Guard's National Pollution Funds Center (NPFC) in support of natural resource damage assessment and restoration (NRDAR) activities.

II. PARTIES

This MOU is executed among the U.S. Department of the Interior (acting through the U.S. Fish and Wildlife Service (USFWS)), the U.S. Department of Commerce (acting through the National Oceanic and Atmospheric Administration (NOAA)), and the State of Alaska (acting through the Alaska Departments of Environmental Conservation (ADEC), Fish and Game (ADFG), Law (ADOL), and Natural Resources (ADNR)), which are agencies authorized to implement NRDAR activities pursuant to the Oil Pollution Act (OPA) (33 U.S.C. §§ 2701, *et seq.*).

III. AUTHORITY

The Parties enter into this MOU pursuant to the authority provided to officials designated as Natural Resource Trustees by the Federal Water Pollution Control Act (33 U.S.C. §§ 1251 *et seq.*); the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300-Subpart G); the OPA; the OPA Natural Resource Damage Assessment Regulations (15 CFR Part 990); and the authority of the Alaska Attorney General under Alaska Statute 44.23.020.

IV. DEFINITIONS

Terms used in this MOU are as defined in the Oil Pollution Act Regulations (15 CFR §990.30). Whenever the following terms are used in this MOU, they include the following meanings:

A. "Federal Lead Administrative Trustee" or "FLAT" means the USFWS as the federal agency that has been agreed upon by the Parties to coordinate the natural resource damage assessment, restoration planning, and restoration implementation activities; provide administrative support to the group; and act as liaison between the Parties and the NPFC regarding funding for the Parties' NRDAR activities for the M/V *Selendang Ayu* oil spill.

- B. “Assessment Plan” refers to the “Natural Resource Damage Assessment Plan for the M/V *Selendang Ayu* Oil Spill” dated October 2016.
- C. “2016 Claim” refers to the Parties’ November 2016 request for funding from the NPFC to support the Parties’ future work to complete the injury assessment and restoration planning activities and to generate a final Restoration Plan for the M/V *Selendang Ayu* oil spill. The NPFC claim number is J05003-OI03.
- D. “2017 NPFC Funding Award” refers to the funds the NPFC provided to the Parties as result of the 2016 Claim, as described in the NPFC’s September 22, 2017 determination letter.
- E. “Restoration Planning Funds” means that portion of the 2017 NPFC Funding Award received by the Parties for completing injury assessment and restoration planning tasks described in the Assessment Plan.
- F. “Activity,” when capitalized, refers to the line items identified in Table 1 of the NPFC’s September 22, 2017, determination letter.
- G. “Restoration Plan” means the document required by the OPA Natural Resource Damage Assessment Regulations (15 CFR §990.55) that evaluates a range of restoration alternatives that would offset the natural resource injuries.
- H. “Restoration Implementation Funds” means funds for the implementation, permitting, monitoring, and oversight of restoration projects as described in the Restoration Plan.
- I. “DOI NRDAR Fund” refers to the interest bearing account managed by the DOI Office of Restoration and Damage Assessment that receives NRDAR funds for use on the M/V *Selendang Ayu* NRDA.

V. BACKGROUND AND PURPOSE

In response to the December 8, 2004 grounding of the M/V *Selendang Ayu* and the associated oil spill along Unalaska Island, Alaska, the Parties assessed the natural resource injuries in pursuit of implementing restoration projects that would compensate the public for the environmental harm caused by the spill. In 2012, the U.S Coast Guard granted the Responsible Party a limit of financial liability, which the Responsible Party had already exceeded before the Parties completed the injury assessment. As a result, the Parties sought funding from the NPFC in November 2016. In September 2017, the NPFC offered to provide to the Parties the majority of the 2016 Claim, which the Parties formally accepted in November 2017.

Accordingly, the purpose of this MOU is to formally recognize a framework for coordination and cooperation among the Parties in completing the NRDAR activities associated with the M/V *Selendang Ayu* oil spill, including completing injury assessment activities, developing a Restoration Plan, developing a claim for restoration implementation funds to be submitted to the NPFC, and implementing restoration projects. This document also outlines procedures regarding the use and management of any Restoration Planning Funds and Restoration Implementation Funds received from the NPFC.

VI. TRUSTEE COUNCIL

To implement this MOU, there is hereby created the M/V *Selendang Ayu* Oil Spill NRDAR Trustee Council to which each of the Parties will appoint one primary representative and at least one alternate representative. Prior to, or within twenty (20) working days after the final execution of this MOU, each agency shall notify the other agencies of the names, addresses, email addresses, and telephone numbers of its primary and alternative representatives to the Trustee Council. Changes to designated representatives shall also be communicated, in writing, to all other Parties within twenty (20) working days of the change.

VII. DECISION MAKING

A. Consensus-Based Decision-making by Voting Trustee Council Members

Each agency shall have one vote that shall be cast by the agency's Primary Trustee Representative, or in the absence of the primary representative, by an Alternate Trustee Representative. The Parties agree that decisions implementing this MOU shall require consensus approval of the voting Trustee Council representatives. All votes require an unequivocal expression of agreement, disagreement, or abstention from each agency's voting representative. A proposed decision is adopted if all voting representatives, excluding abstentions, agree to the decision. Trustee Council decisions shall be recorded in writing by Trustee Council Resolution signed by the voting Trustee Council representatives. A Trustee Representative that abstains from a vote will enter "Abstained" in his/her respective signature line on the Resolution.

Trustee Resolutions, signed by the voting representative of each agency, are required for the following milestone decisions:

- 1) Release of funds from the DOI NRDAR Fund;
- 2) Deviations from the activities described in the final Assessment Plan and/or the 2016 Claim, excluding any changes directly resulting from, and adequately described in, the NPFC's offer to pay the 2016 Claim;
- 3) Approval of all versions of the Restoration Plan that will be made publicly available;
- 4) Approval of the request to the NPFC for restoration implementation funds; and
- 5) Deviations from the restoration implementation activities in the final Restoration Plan and/or the Parties' claim to the NPFC for Restoration Implementation Funds, excluding any changes detailed in the NPFC's offer to pay such claim, if the Parties accept such offer.

The Parties may execute Trustee Resolutions for other decisions as they agree are necessary.

B. Authorization of Expenditures

All decisions authorizing expenditures or obligations of Restoration Planning Funds and Restoration Implementation Funds shall be memorialized in a Trustee Council Resolution signed by the voting members.

An agency may elect to receive payments of Restoration Planning Funds or Restoration Implementation Funds as reimbursements after expenditures are made, rather than receive funding in advance. An agency is not required to obtain Trustee Council approval for its expenditures prior to incurring costs; however, the Trustee Council will evaluate requests for reimbursement using the criteria described below (Section VII.C) and may refuse to reimburse expenditures that violate the criteria.

An agency may request funding in advance of actual expenditures. Such requests may occur annually or incrementally as needed, or an agency may request its entire allocation (or remaining allocation, as applicable) of Restoration Planning Funds or Restoration Implementation Funds. For annual or incremental requests for advance funds, anticipated costs will be described in a work plan and made available for Trustee Council review. For agencies requesting entire allocations (or remaining allocations), the relevant portions of the Assessment Plan or Restoration Plan, as applicable, can represent the work plan. The Trustee Council will evaluate requests for advanced funding using the same criteria as for reimbursements (Section VII.C) and may refuse to provide funds for expenditures that violate the criteria.

C. Criteria for Evaluation of Expenditures

The Trustee Council will use the following criteria to evaluate and approve or deny all expenditures of Restoration Planning Funds and Restoration Implementation Funds, including requests for reimbursement from those funds.

- All expenditures must be reasonable and related to work described in the Assessment Plan or the Restoration Plan.
- All expenditures of NPFC funding must be in compliance with funding award conditions imposed by the NPFC.
- All expenditures must be in compliance with relevant Trustee Council Resolutions.
- All requests for reimbursement must be supported by adequate and appropriate cost documentation that allows for an evaluation of whether costs are reasonable and appropriate. (Refer to the NPFC's September 22, 2017 determination letter for details on the content and specificity of cost documentation pertaining to the Restoration Planning Funds.)
- All requests for advanced funding will be supported with a work plan that details anticipated costs.
- Cumulative expenditures of Restoration Planning Funds (all agencies combined) within an Activity cannot exceed the amount authorized by the NPFC.
- Cumulative expenditures of NPFC funding by an agency cannot exceed the total amount originally budgeted for such agency in the 2016 Claim, adjusted to account for funds denied by the NPFC, or otherwise revised by Trustee Council Resolution.

D. Dispute Resolution

The Parties agree that decision-making deliberations will focus on the Parties' mutual purposes of restoring injured natural resources and diminished services. If the voting Trustee Representatives do not reach consensus approval on a decision, and the conflict cannot be resolved through informal means, the Parties will use the following dispute resolution process and will make good-faith efforts to resolve disputes within sixty (60) working days.

1. Any unresolved dispute will be elevated to the voting Trustee Representatives' supervisory levels or higher. This person will be identified by each agency within five days of the Trustee Representatives' decision to elevate the dispute.
2. If the Parties continue to disagree, the matter will be elevated to the officials designated as the Trustee for each agency, who will resolve the matter or decide the appropriate forum or means for ultimate resolution.

For purposes of this section, the position within each agency that operates as the Trustee for that agency is as follows:

For the U.S. Department of the Interior (DOI):
Regional Director, USFWS, Alaska Region, as the DOI Authorized Official

For the U.S. Department of Commerce:
Assessment and Restoration Division Chief, Office of Response and Restoration, NOAA

For the State of Alaska:
Commissioner, ADEC
Commissioner, ADFG
Commissioner, ADOL
Commissioner, ADNR

VIII. POWERS, DUTIES, AND RESPONSIBILITIES

A. Trustee Council

The Trustee Council, in accordance with applicable laws and policies, may take the following actions to address the Parties' NRDAR responsibilities:

- Oversee and direct the remaining injury assessment activities, restoration planning activities, and restoration implementation activities, including seeking restoration implementation funding from the NPFC;
- Ensure all Trustee Council-approved actions are in compliance with all applicable federal and state laws and policies;
- Arrange for the letting of contracts, through one or more of the agencies, with consultants or contractors best qualified to provide services to the agencies; and
- Oversee the management and administration of Restoration Planning Funds and Restoration Implementation Funds.

Any Trustee or Trustee Representative may request that a Trustee Council meeting be convened.

B. Federal Lead Administrative Trustee

The Parties designate the USFWS as the FLAT for the M/V *Selendang Ayu* oil spill NRDAR. The FLAT, acting through the USFWS's case manager for the M/V *Selendang Ayu* oil spill NRDAR, will coordinate the Trustee Council's natural resource damage assessment, restoration planning, and restoration implementation activities and will provide administrative support to the Trustee Council. The FLAT's additional responsibilities include, but are not limited to, the following:

- Schedule, provide notice of, and prepare agendas for meetings of the Trustee Council;
- Act as the central contact point for the Trustee Council;
- Maintain the publicly available administrative record;
- Act as liaison between the Parties and the NPFC;
- Administer and distribute the Restoration Planning Funds in accordance with the NPFC's September 22, 2017 determination letter;
- Prepare and submit annual progress reports and final project reports to the NPFC on behalf of all

- of the Parties, as required in the NPFC's September 22, 2017 determination letter; and
- Act as liaison between the Trustee Council and DOI NRDAR Fund.

C. Project Lead

The Trustee Council will designate a lead agency (State or federal, as appropriate) for each project selected for implementation in the final Restoration Plan for purposes of leading the implementation of that project. Each Project Lead shall, for the project for which it has been designated, perform the following duties:

- Ensure that the amounts allocated toward the project are managed for the benefit of the injured resources for which the project was designed to address;
- Ensure that the project, and any use of project funds, comply with all applicable State and/or federal laws;
- Complete any planning activities required for the commencement of project implementation (e.g., engineering designs, permitting, public notices, etc.);
- Act as point-of-contact for outreach activities associated with the project, including coordinating with the FLAT;
- Oversee, coordinate, and monitor the progress of the project and update the Trustee Council as needed;
- Submit progress reports every six months (unless otherwise agreed) to the Trustee Council that shall include an accounting of funds spent and cost documentation for all expenditures associated with the project's funding;
- Provide a final accounting to the Trustee Council when the project is completed;
- Maintain project records in accordance with the Project Lead's agency rules and policies;
- Provide project records on a timely basis to the FLAT for inclusion, as appropriate, in the Administrative Record; and
- Carry out other project-associated duties as requested by the Trustee Council.

IX. FUNDS MANAGEMENT

The Parties agree to use the Restoration Planning Funds in accordance with the Assessment Plan, 2016 Claim, and the NPFC's September 22, 2017 determination letter. Any funds remaining unspent after the completion of an Activity must be returned to the DOI NRDAR Fund within four months after Activity completion; the DOI NRDAR Fund will return the funds to the NPFC. Remaining funds may not be redirected to another Activity. "Activity completion" is accomplished when all work described in the Assessment Plan for that Activity has been completed (excluding any tasks deemed by the Agencies to no longer be necessary), all associated contracts are closed (or, when a contract addresses more than one Activity, all specific tasks and deliverables associated with the subject Activity are completed, invoiced, and paid), and all other associated obligations are paid.

X. REPORTING RESPONSIBILITIES

All Parties agree to assist the FLAT in fulfilling its duties required by the NPFC with respect to funding received from the NPFC. Specifically, the Parties agree to provide project updates, funds accounting information, and all other necessary information to the FLAT in accordance with established timelines in order to meet reporting deadlines.

Regarding the Restoration Planning Funds, the FLAT is responsible, on behalf of the Parties, for

submitting to the NPFC annual progress reports (due September 22 of each year) and Activity completion reports. Expenditures must be reported by Activity, in accordance with the NPFC's September 22, 2017 determination letter. For purposes of annual progress reporting, by August 18 of each year, each agency shall provide to the FLAT narrative project updates, summaries of the work performed by each employee charging against the Restoration Planning Funds (regardless of whether through advance funding or reimbursement), and expenditure summaries.

The Parties understand that, in order for the FLAT to issue formal correspondence on behalf of the Trustee Council, the necessary materials and/or information should be provided to the FLAT at least five weeks in advance of the due date for such correspondence. This provides a minimum amount of time for the FLAT to compile the draft correspondence from the materials provided by the Parties, obtain approval from the Trustee Council on the draft correspondence, and fulfill internal USFWS correspondence processes.

The Parties shall submit official cost documentation for all case-related costs to the Trustee Council no less frequently than every six months. Cost documentation packages for Restoration Planning Funds must contain the components and level of detail prescribed in the NPFC's September 22, 2017 determination letter and will be due to the Trustee Council in accordance with the minimum schedule described below. Agencies may choose to submit cost documentation more frequently, e.g., on a quarterly basis. Cost documentation will also be required with usage of Restoration Implementation Funds, for which the Parties may establish a different reporting schedule by Trustee Resolution.

Due Dates for Deliverables		
Description of Deliverable	Submit to Whom?	Due Date
Formal cost documentation package for costs incurred January 1 – June 30	Trustee Council	October 15
Formal cost documentation package for costs incurred July 1 – December 31	Trustee Council	April 15
Annual narrative progress reporting and cost summaries for activities conducted July 1 – June 30*	FLAT	August 18

* The first annual reporting period is September 22, 2017 to June 30, 2018.

XI. TELECONFERENCING

A Trustee Council meeting may be convened by telephone conference call. A Trustee Council representative can participate by telephone conference and may vote by telephone on any issue requiring a vote by the Trustee Council.

XII. CONFIDENTIALITY

The Parties agree that it is generally in the public interest that final, quality assured, and quality controlled scientific data arising out of their assessment of the injuries to natural resources caused by the oil spill be made public when appropriate. 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. Nothing in this MOU is intended to, nor shall it be construed to, prejudice any assertion of privilege or protection as to documents or communications concerning the same or similar subject matter(s).

The Parties further agree that whenever a request for production of any written record is received pursuant to any applicable federal or state law, the Trustee Council will be notified within two calendar days of the recipient learning of the request, and the request will be forwarded for response to the agency 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 an agency or the Trustee Council from agreeing to release any record. Nothing contained herein shall be construed as requiring an agency or the Trustee Council to release any Privileged Document.

XIII. RESERVATION OF RIGHTS

Nothing in this MOU is to imply that any signatory government is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over natural resources.

XIV. LIMITATION

Nothing in this MOU shall be construed as obligating the United States, the State of Alaska, or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XV. THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOU may be the basis of any third party challenges or appeals. Nothing in this MOU creates any rights or causes of action in persons not parties to this agreement.

XVI. MODIFICATION OF AGREEMENT

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

XVII. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time that the Parties determine that the purposes set forth in this MOU have been satisfied, the MOU may be terminated. In the event any Party 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 Party or the termination of this MOU, each agency shall provide a full and complete accounting to the Trustee Council of all Restoration Planning Funds and Restoration Implementation Funds received, deposited, held, disbursed, managed, expended, or otherwise controlled by that agency in any joint or separate account as a result of the M/V *Selendang Ayu* oil spill, pursuant to this MOU.

XVIII. SEVERABILITY

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

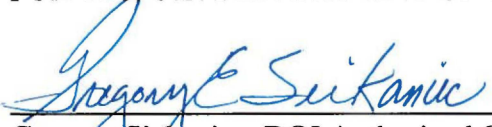
remaining terms and conditions.

XIX. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU and be retained by the FLAT. The date of execution shall be the date of the signature of the last Party to sign the MOU.

CONCURRED IN BY THE FOLLOWING WHO ARE DULY AUTHORIZED:

FOR THE U.S. DEPARTMENT OF THE INTERIOR:



 Gregory Siekaniec, DOI Authorized Official
 Regional Director
 U.S. Fish and Wildlife Service, Alaska Region

10 August 2018
 Date

FOR THE U.S. DEPARTMENT OF COMMERCE:

 Chauncey Kelly
 Section Chief, Natural Resources Section
 Office of the General Counsel
 National Oceanic and Atmospheric Administration

Date _____

FOR THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

 Graham Wood, Program Manager
 Prevention Preparedness and Response Program
 Alaska Department of Environmental Conservation

Date _____

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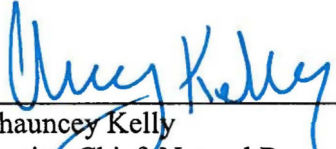
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Date

FOR THE U.S. DEPARTMENT OF COMMERCE:



Chauncey Kelly
Section Chief, Natural Resources Section
Office of the General Counsel
National Oceanic and Atmospheric Administration

Date 7-30-18

FOR THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION:

Graham Wood, Program Manager
Prevention Preparedness and Response Program
Alaska Department of Environmental Conservation

Date

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U.S. Fish and Wildlife Service, Alaska Region

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FOR THE U.S. DEPARTMENT OF COMMERCE:

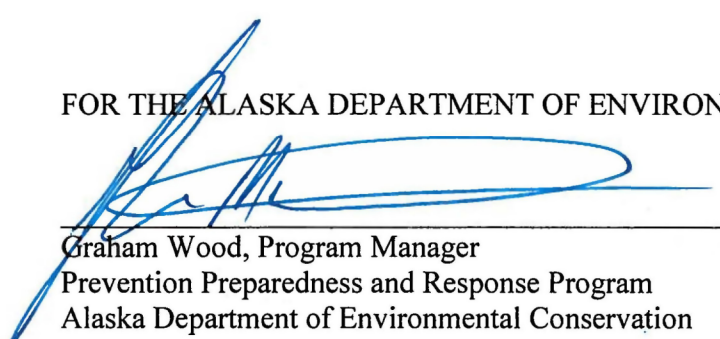
Christopher D. Doley
Chief, Restoration Center
National Marine Fisheries Service, Office of Habitat Conservation
National Oceanic and Atmospheric Administration

Date

Tony Penn
Chief, Assessment and Restoration Division
National Ocean Service, Office of Response and Restoration
National Oceanic and Atmospheric Administration

Date

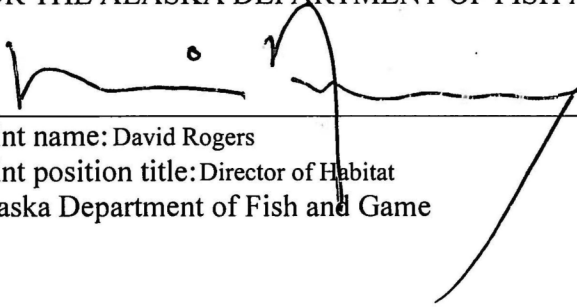
FOR THE ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION:



Graham Wood, Program Manager
Prevention Preparedness and Response Program
Alaska Department of Environmental Conservation

7/24/2018
Date

FOR THE ALASKA DEPARTMENT OF FISH AND GAME:



Print name: David Rogers
Print position title: Director of Habitat
Alaska Department of Fish and Game

7/18/18

Date

FOR THE ALASKA DEPARTMENT OF LAW:

Jahna Lindemuth
Attorney General
Alaska Department of Law

Date

FOR THE ALASKA DEPARTMENT OF NATURAL RESOURCES:

Print name:
Print position title:
Alaska Department of Natural Resources

Date

FOR THE ALASKA DEPARTMENT OF FISH AND GAME:

Print name:

Date

Print position title:

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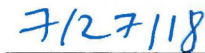
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Jahna Lindemuth

Attorney General

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FOR THE ALASKA DEPARTMENT OF FISH AND GAME:

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Alaska Department of Fish and Game

Date

FOR THE ALASKA DEPARTMENT OF LAW:

Jahna Lindemuth

Attorney General

Alaska Department of Law

Date

FOR THE ALASKA DEPARTMENT OF NATURAL RESOURCES:



Faith Martineau, Executive Director

Office of Project Management and Permitting
Alaska Department of Natural Resources

July 30, 2018

Date