

City of Bainbridge Island

CITY COUNCIL AGENDA BILL



PROCESS INFORMATION		
Subject: Memorandum of Agreement – NRDA Funding for Shoreline Restoration		Date: 4/9/08
Agenda Item: Items over \$100,000		Bill No.: 08-0040
Contact Person: Peter Namtvedt Best	Referral(s):	
Reading:	<input type="checkbox"/> 1 st	<input type="checkbox"/> 2 nd <input type="checkbox"/> 3 rd

BUDGET INFORMATION		
Department or Fund: PCD		
Total Expenditure Required (tax included): Estimated \$1.2M+ in NRDA funding initially	Budgeted? <input checked="" type="checkbox"/> yes <input type="checkbox"/> no	Is a budget amendment required? <input type="checkbox"/> yes <input checked="" type="checkbox"/> no

POLICY INFORMATION
Comprehensive Plan: Environmental Element, Shoreline Management Master Program
Municipal Code: Shoreline Management Master Program

DESCRIPTION/SUMMARY
<p>The Elliot Bay Trustee Council is responsible for restoring natural resources damaged resulting from the Eagle Harbor/Wyckoff Superfund Site. Natural Resource Damage Assessments (NRDA) have been collected and are available to fund shoreline restoration projects. The Trustee Council currently has approximately \$3M in NRDA funding available for shoreline restoration in the Eagle Harbor vicinity. The Shoreline Stewardship Program has developed a partnership for implementing shoreline restoration projects with the Trustee Council that will be formalized through the attached Memorandum of Agreement (MOA). The MOA establishes the mechanisms for the transfer of NRDA funding to the City for implementation of shoreline restoration projects. From the City’s perspective, this funding partnership will function much like any granting program. The NRDA funding is the majority of the partner and grant funding for the budgeted projects being implemented under the Shoreline Restoration Projects – Consultant Services Contract (Anchor Environmental) approved by Council on March 12, 2008. An estimate of NRDA funding for the City’s current shoreline restoration projects is highlighted in the attached project cost estimate sheet.</p>

RECOMMENDED ACTION
<p>Approve and authorize the Mayor to execute an agreement with the Elliot Bay Trustee Council in a form substantially similar to the attached agreement for partner funding of shoreline restoration projects.</p>

**MEMORANDUM OF AGREEMENT
BETWEEN THE CITY OF BAINBRIDGE ISLAND AND THE ELLIOTT BAY
TRUSTEE COUNCIL FOR RESTORATION PROJECTS ON BAINBRIDGE ISLAND**

I. PARTIES

This Memorandum of Agreement (“MOA”) is entered into between the City of Bainbridge Island (“COBI”) and the Elliott Bay Trustee Council (“Trustee Council”). The Trustee Council consists of the National Oceanic and Atmospheric Administration (“NOAA”) of the U.S. Department of Commerce; the U.S. Department of the Interior, represented by the U.S. Fish and Wildlife Service; the Muckleshoot Indian Tribe; the Suquamish Indian Tribe; and the Washington Department of Ecology (as lead state Trustee), and operates under the Memorandum of Agreement for Elliott Bay, the Duwamish River and Eagle Harbor (effective date 1/19/06) (“Elliott Bay Trustee Council MOA”). COBI and the Trustee Council collectively shall be identified hereafter as the “Parties.”

II. RECITALS

A. The Elliott Bay Trustee Council MOA provides a framework for coordination and cooperation between Trustee Council members, including implementing restoration actions with settlement funds resulting from *United States, the Suquamish Tribe and the Muckleshoot Indian Tribe v. Pacific Sound Resources, et al.*, W.D. Wash. C94-687 (entered Aug. 29, 1994) (“PSR Settlement”). PSR Settlement funds are held in trust by the Department of Interior.

B. The Trustee Council enters into this MOA in furtherance of their general responsibilities as set forth in the PSR Settlement and the Elliott Bay Trustee Council MOA to restore, replace, or acquire the equivalent of natural resources and services of the Eagle Harbor, Bainbridge Island, Washington (“Eagle Harbor”) environment injured by releases of hazardous substances from the Wyckoff, Eagle Harbor, Superfund Site. The Trustee Council has sole discretion to fund restoration projects in part or in whole using PSR Settlement proceeds.

C. COBI is interested in conducting habitat restoration projects on properties in and near Eagle Harbor, and is seeking financial support to assist in implementing habitat projects.

III. PURPOSE AND FRAMEWORK

A. The purpose of this MOA is to establish a framework for funding habitat restoration projects implemented by COBI within or near Eagle Harbor (“Bainbridge Island environment”). The scope of habitat restoration projects may include but is not limited to one or more of the following components: project planning, investigations, construction, monitoring, and site stewardship.

B. This MOA provides the terms and conditions and roles and responsibilities of the Parties.

IV. AUTHORITY

This MOA is entered into pursuant to the Natural Resource Trustee provisions of section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9607(f), section 311 of the Clean Water Act (CWA), as amended, 33

U.S.C. §1321, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), Subpart G, 40 C.F.R. §§300.600 – 300.615, Interlocal Cooperation Act, RCW 39.34, RCW 84.34.200-84.34.250, and other applicable federal, state, and tribal law.

V. ROLES AND RESPONSIBILITIES

A. Trustee Council.

1. The Trustee Council retains sole discretion for selecting whether a habitat restoration project proposed by COBI will receive funding in whole, or in part, from PSR Settlement funds.
2. The Trustee Council is responsible for reviewing the scope of work, budget, and schedule prepared by COBI for each restoration project.
3. The Trustee Council will work cooperatively with COBI on habitat restoration projects.
4. The Trustee Council shall approve by resolution disbursement of PSR Settlement funds to COBI.
5. NOAA, the Lead Administrative Trustee (“LAT”), shall review financial progress reports prepared by COBI that documents project-specific expenditures, and shall ensure compliance with federal, state, and local laws governing the use of these funds.
6. On behalf of the Trustee Council, the Suquamish Tribe shall serve as the depository for each disbursement from the PSR Settlement fund. The Suquamish Tribe shall pay funds received from the PSR Settlement funds to COBI as directed in each Trustee Council resolution. The Suquamish Tribe shall also send a letter to NOAA documenting when PSR Settlement funds are received and when funds are disbursed to COBI.

B. COBI

1. COBI shall be responsible for preparing scopes of work, designs, cost estimates, schedules, and other applicable documents for proposed habitat restoration projects for review by the Trustee Council.
2. COBI will work cooperatively with the Trustee Council on habitat restoration projects.
3. Upon receipt of PSR Settlement funds, COBI agrees to abide by all federal, state, and local laws and regulations governing the use of these funds.
4. COBI shall provide periodic financial and project progress reports quarterly to the LAT by March 15, June 15, September 15, January 15, unless otherwise agreed to by the LAT and COBI.
5. COBI is responsible for obtaining all permits for habitat restoration projects.

6. COBI is responsible for obtaining permission from property owners for conducting habitat restoration projects.
7. COBI is responsible for obtaining a Restrictive Covenant from property owners prior to construction of habitat restoration projects.

VI. TERMS AND CONDITIONS

A. Property Use, Access, Maintenance, and Adaptive Management

1. Restrictive Covenant. A Restrictive Covenant substantially consistent with the example provided in Exhibit A covering the portion of the property funded in whole, or in part, by PSR Settlement funds for habitat restoration projects that proceed to construction shall be placed on the deed of such property and shall be recorded in the real property records for such property. Restrictive Covenants shall be approved by the parties. The purpose of the Restrictive Covenant is to ensure that property that has undergone habitat restoration funded by the Trustee Council will remain restored in perpetuity.

2. Property Use. Activities may be conducted on property on which Trustee-funded habitat restoration projects are built provided that such activities do not interfere with the effective implementation of such projects and the ability of such projects to restore natural resources injured by releases of hazardous substances to Eagle Harbor. Project design documents shall include information about proposed uses within the habitat restoration area and such uses shall be considered consistent with this MOA when the Trustee Council approves funding for the construction of the project. Use of, or activity on, any restoration project funded in whole, or in part, by the Trustee Council inconsistent with this purpose is prohibited and the Parties acknowledge and agree that they will not conduct, engage in, or permit such use or activity, except with prior approval of the Trustee Council. Any activities that are considered consistent with the purposes of this MOA shall be subject to the access restrictions of Section VI.A.3 of this MOA.

3. Property Access

a. At all reasonable times the Parties (or other Parties specifically designated by any of the Parties) may enter and freely move about project sites funded in whole, or in part, by settlement funds from the Trustees for the purpose of site inspection and for carrying out the terms of this MOA.

b. Access by the general public to portions of sites where habitat restoration has been funded in whole, or in part, by settlement funds from the Trustee Council shall be in accordance with applicable laws, regulations or ordinances and such reasonable use restrictions as the Parties determine necessary to further the purposes of the restoration projects.

4. Property Maintenance and Adaptive Management

COBI shall be responsible for any project maintenance and adaptive management activities for restoration projects and the Trustee Council shall be responsible for providing stewardship funds to be managed by COBI for project maintenance and adaptive management. For purposes of this MOA, "adaptive management activities" means additional actions that need

to be taken on a project to maintain habitat or change the habitat in some manner to meet the project purpose. Anticipated changes or developments that may require adaptive management may include, among others, the failure of vegetation to establish or spread, substantial erosion or sedimentation that adversely alters habitat characteristics, or adverse impacts from offsite development or access to the property.

B. Termination or Extinguishment of the Restrictive Covenant

The Restrictive Covenant may be terminated or extinguished, whether in whole or in part, only under one or more of the following circumstances:

1. The Parties jointly agree to extinguish the Restrictive Covenant or release a portion of any habitat restoration project funded in whole, or in part, by PSR settlement funds from the terms of the Restrictive Covenant, upon a determination by the Trustee Council that circumstances have rendered the purpose of the project impractical to achieve.
2. A court of competent jurisdiction has invalidated a Restrictive Covenant or a portion thereof.
3. The Parties jointly agree that COBI, at its sole expense, will provide equivalent habitat restoration at another location, which shall be subject to the Restrictive Covenant.

C. Dispute Resolution

1. Avoidance of Disputes. The Parties agree to work cooperatively, to consult informally and to use best efforts to avoid disputes concerning the implementation of this MOA
2. Notice of Dispute. If a dispute arises between the Parties concerning the implementation of this MOA, any Party may initiate dispute resolution by giving written notice thereof to the other parties. In the case of an actual or threatened violation of the MOA, the notice shall identify corrective action sufficient to cure the violation and to restore any portion of the habitat created with Trustee settlement funds injured as a result of the violation.
3. Informal Negotiations. Following receipt of a notice of dispute, the Parties shall attempt to resolve the dispute expeditiously and informally. If the dispute is resolved by informal negotiations, the Parties shall memorialize the resolution of the dispute by an exchange of letters.
4. Nothing in this dispute resolution procedure shall modify or reduce any party's rights to mediation, arbitration, and/or judicial proceedings in a court of competent jurisdiction.

D. Notices

All notices required or permitted to be given hereunder shall be in writing and shall be deemed given upon personal service or receipt after deposit in the United States first class mail addressed as follows:

To Trustee Council
Lead Administrative Trustee:
John Kern
7600 Sand Point Way, NE

Seattle, WA 98115

To COBI
Peter Namtvedt Best
Shoreline Stewardship Program
Planning & Community Development
280 Madison Avenue North
Bainbridge Island, WA 98110

and

City Attorney
Executive Department
280 Madison Avenue North
Bainbridge Island, WA 98110

VII. GENERAL PROVISIONS

A. Availability of Funds

The fiscal obligations of the Trustees hereunder shall be fulfilled solely from and are limited by the funds made available for such activities as a result of the resolution of natural resource damage claims for the Eagle Harbor environment. Nothing in this MOA shall be construed to require any Party to spend funds in excess of available appropriations.

B. Severability

The clauses of this MOA are severable, and should any part of this MOA be declared by a court of competent jurisdiction to be invalid, the other parts of this MOA shall remain in full force and effect.

C. Entire Agreement

This MOA constitutes the entire understanding of the Parties with respect to its subject matter.

D. Amendment and Termination

This MOA may not be amended except by written agreement of all Parties to this MOA. This MOA shall continue in effect until it is terminated by agreement of all of the Parties. Any amendment to this MOA shall be consistent with the original purpose of the MOA.

E. Execution, Effective Date

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original and be retained by the Trustee. The date of execution shall be the date of the final signature of the Parties to this MOA.

F. Default

In the event that any Party defaults in the performance of any of that Party's obligations under this MOA, the non-defaulting Party or Parties shall have all remedies available in law or in equity, but no Party shall be liable for consequential damage.

G. Parties Bound

The provisions of this MOA shall apply to and be binding upon the Parties to this MOA, their agents, employees, successors and assigns. The undersigned representative of each Party certifies that he or she is fully authorized by the Party or Parties whom he or she represents to enter into this MOA and to bind that party to it.

H. Filing with County Auditor

The City Clerk of the City of Bainbridge Island shall file and record a copy of this MOA with the Kitsap County Auditor's Office immediately following the mutual execution of this MOA.

I. Non-Waiver

A waiver by either party hereto of a breach by the other party hereto of any covenant or condition of this MOA shall not impair the right of the party not in default to avail itself of any subsequent breach thereof. Leniency, delay or failure of either party to insist upon strict performance of any agreement, covenant or condition of this MOA, or to exercise any right herein given in any one or more instances, shall not be construed as a waiver or relinquishment of any such agreement, covenant, condition or right.

J. Fair Meaning

The terms of this MOA shall be given their fair meaning and shall not be construed in favor of or against either party hereto because of authorship. This MOA shall be deemed to have been drafted by both of the parties

IN WITNESS WHEREOF the Parties have executed this MOA on the date and year opposite their signature.

_____ CITY OF BAINBRIDGE ISLAND Darlene Kordonowy, Mayor	_____ Date
_____ National Oceanic and Atmospheric Administration	_____ Date
_____ U.S. Department of the Interior	_____ Date
_____ Washington Department of Ecology	_____ Date
_____ The Suquamish Tribe	_____ Date
_____ The Muckleshoot Indian Tribe	_____ Date

Restrictive Covenant Example

The Property that is the subject of this restrictive covenant is that portion of Kitsap County tax parcel number _____, more specifically described in attachment A, hereinafter "the Property".

The undersigned, _____, hereinafter "the Owner," holds legal title to the Property.

The Owner hereby covenants, agrees, and declares that the Property shall be held, hypothecated, leased, sold and conveyed subject to the following conditions and restrictions which shall run with the Property and shall be binding upon and inure to the benefit of all parties acquiring any right, title or interest in the Property or any portion thereof in perpetuity.

Restriction on Use of the Property. The Property shall be developed and used as a fish and wildlife habitat and for limited passive recreational use, exclusively and for no other purpose. The Property may not be disturbed in any manner that would impair or interfere with the integrity of the habitat restoration or the utilization of the habitat by fish and wildlife.

Duration. The covenants, conditions, and restrictions contained herein shall run with the land and shall bind, benefit, and burden the Property and shall be binding upon the Owner and its respective heirs, successors, and assigns in perpetuity from the date of final execution of this Agreement.

Beneficiaries. The beneficiaries of this restrictive covenant are the United States, the State of Washington, the Suquamish Tribe, and the Muckleshoot Indian Tribe.

By: Owner

Title: _____

Dated: _____