

**COOPERATIVE AGREEMENT
AMONG CITY OF FEDERAL WAY, PUYALLUP TRIBE OF INDIANS,
MUCKLESHOOT INDIAN TRIBE, WASHINGTON STATE DEPARTMENT OF
ECOLOGY, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,
DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE
REGARDING
WEST HYLEBOS CREEK HABITAT RESTORATION PROJECTS**

I. PARTIES

This Agreement is entered into among the City of Federal Way and the Commencement Bay Natural Resource Trustees (Trustees) consisting of: The Puyallup Tribe of Indians (Puyallup Tribe); The Muckleshoot Indian Tribe (Muckleshoot Tribe); the Washington State Department of Ecology (Ecology) as lead state natural resource trustee; the National Oceanic and Atmospheric Administration (NOAA) of the U.S. Department of Commerce; and the U.S. Fish and Wildlife Service (USFWS) on behalf of the U.S. Department of the Interior (DOI). The City of Federal Way and the Trustees collectively shall hereafter be identified as the Parties. This Cooperative Agreement concerns the management and use of property acquired by the City of Federal Way with funds provided in part by the Trustees.

II. RECITALS

A. The Trustees, acting under applicable state, federal and tribal law, enter into this Cooperative Agreement in furtherance of their general responsibilities to restore, replace and acquire the equivalent of natural resources of the Commencement Bay environment injured by releases of hazardous substances.

B. The Trustees are also parties to a Memorandum of Agreement Regarding Natural Resource Damage Assessment in the Commencement Bay, Washington Environment (MOA), including its First Supplement concerning Coordination in the Use of Natural Resource Damage Assessment and Restoration Planning Contributions and Application of Natural Resource Damage Recoveries (MOA Supplement). The MOA Supplement provides that the Trustees may enter into separate agreements or memoranda of understanding to define their respective roles and responsibilities regarding habitat restoration projects undertaken by or on behalf of the Trustees. As between and among the Trustees, the terms of this Cooperative Agreement are intended to apply in addition to those of the MOA and the MOA Supplement, the terms of which are hereby incorporated by reference solely for purposes of defining the rights and relationships among the Trustees.

C. As a consequence of settlements of natural resource damage claims against several parties, the Trustees have obtained funds, real property and commitments of in-kind services to be used for natural resource restoration purposes. The Trustees have adopted the Commencement Bay Natural Resource Damage Assessment Restoration Plan (Commencement Bay NRDA Restoration Plan) to guide use of the funds, property and services, and have begun implementing the Commencement Bay NRDA Restoration Plan by identifying potential

restoration projects and suitable project sites. The Commencement Bay NRDA Restoration Plan includes the east and west branches of Hylebos Creek within the plan's Primary Study Area.

D. Through a resolution of the Trustee Council (Resolution 2003-04, adopted March 11, 2003), the Trustees have agreed to partner with the City of Federal Way, the Friends of Hylebos and King County in the preservation and restoration of habitat on West Hylebos Creek. Per Resolution 2003-04 the Trustee Council agreed to contribute up to \$155,000 in natural resource damage funds toward the purchase by the City of Federal Way of a series of parcels along the creek (the West Hylebos Parcels).

E. Under the authority of RCW 84.34.200-84.34.250, and King County Code Chapter 26.12, King County has established a Conservation Futures Fund Program, through which King County uses earmarked property tax receipts to acquire rights and interests in open space, wetlands, habitat areas, farm, agricultural and timber lands. Per King County Code 26.12.010, property or rights acquired under the Conservation Futures Fund Program are to be subject to covenants and property restrictions to run with the land in perpetuity and in fulfillment of requirements necessary to protect, preserve, maintain, improve, restore, limit the future use of, or otherwise conserve the property for public use or enjoyment. King County is authorized to transfer property or rights acquired under the Conservation Futures Fund Program, subject to such covenants and property restrictions, to a city, state or local governmental agency empowered to hold fee simple or other interests in land on behalf of the public.

F. The City of Federal Way has adopted goals and policies in its Comprehensive Plan, adopted pursuant to the Growth Management Act, that encourage the acquisition and development of parks within the City. West Hylebos Creek is among areas prioritized by the City of Federal Way for open space preservation, and acquiring the West Hylebos Parcels would further the goals and policies of the Comprehensive Plan.

G. The purpose of this Cooperative Agreement is to create a framework for cooperation by the Trustees and the City of Federal Way in acquiring the West Hylebos Parcels and to identify the rights and responsibilities of the Parties regarding the West Hylebos Parcels and the restoration project(s) potentially to be developed on them.

H. This Cooperative Agreement builds upon an existing relationship between the Trustees and the City of Federal Way established under a prior cooperative agreement entered into in May 2004 pursuant to Trustee Council Resolution 2003-04. The prior cooperative agreement, which provided for the acquisition and use of another of the West Hylebos Parcels, and this Cooperative Agreement, while independently enforceable, are intended to be interpreted harmoniously and the terms and conditions of each agreement are not intended to conflict with or alter the terms, force and effect of the other.

III. AUTHORITY

This Cooperative Agreement 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. The following officials or their designees act on behalf of the public as state, federal and tribal Trustees for natural resources under this Cooperative Agreement:

The Tribal Council, or its designee, for the Puyallup Tribe of Indians;

The Tribal Council, or its designee, for the Muckleshoot Indian Tribe;
The Secretary of the Interior;

The Undersecretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce;

The Director of the Department of Ecology for the State of Washington, as lead state Trustee.

IV. TERMS AND CONDITIONS

A. Purpose and Goal.

The purpose of this Cooperative Agreement is: (1) the acquisition of one or more of the West Hylebos Parcels by the City of Federal Way using Conservation Futures Fund monies, natural resource damage funds provided by the Trustees and other funds; (2) the placement by the City of Federal Way of a restrictive covenant, attached hereto as Exhibit 1, to ensure the parcel(s) will be preserved and used consistently with the purpose of this Cooperative Agreement; (3) the preservation of existing habitat values; and (4) the potential development by the Trustees of alterations and improvements of existing upland and aquatic habitat on the acquired parcel(s), to benefit fish and wildlife species that utilize the Commencement Bay environment as described below in Section IV.E. The overall goal of the preservation and restoration actions is to restore natural resources of the Commencement Bay environment injured by releases of hazardous substances. This goal will be accomplished by precluding inconsistent uses of the parcel(s) and by taking actions to protect and potentially to enhance fish and wildlife habitat on the parcel(s), thereby increasing the ecosystem complexity and habitat value of Commencement Bay and its tributaries for birds, wildlife, fish and other aquatic organisms.

B. Project Managers.

For purposes of implementing the terms of this Cooperative Agreement, the following individuals shall serve as Project Manager for the Trustees and for the City of Federal Way, respectively:

For the Trustees:

Jennifer Steger
Commencement Bay Restoration Case Manager
NMFS/RC/NW

7600 Sand Point Way NE
Seattle, WA 98115
206-526-4363

For the City of Federal Way:

Ken Miller
Deputy Director of Public Works
PO Box 9718
Federal Way, WA 98063-0718
253-835- 2711

A Party may change its Project Manager by providing notice in writing to the other Party. Any notice required under this Cooperative Agreement to be given to the other Party shall be deemed sufficient if addressed to the individual last identified by the other Party as Project Manager in accordance with the terms of this Cooperative Agreement.

C. Project Parcel Identification.

By an exchange of letters between the Project Managers, the Trustees and the City of Federal Way shall identify one or more of the West Hylebos Parcels that will be acquired under terms of this Cooperative Agreement. The exchange of letters shall identify the amount of property acquisition funding to be provided by the Trustees and will provide information needed to transfer the agreed funds. The acquisition, management and use of each such parcel (Project Parcel) shall be subject to the terms of this Cooperative Agreement.

D. Property Acquisition, Ownership, Use and Maintenance.

1. Property Acquisition and Ownership. Following the identification of a Project Parcel pursuant to Section IV.C. above, the Trustees will cause the agreed sum of funds to be transferred to the City of Federal Way (or to such escrow company or agent as the City of Federal Way shall designate). The City of Federal Way shall promptly thereafter acquire the Project Parcel utilizing the funds provided by the Trustees plus funds from the Conservation Funds Fund Program and/or other sources as needed. For each Project Parcel so acquired, the City of Federal Way shall place a restrictive covenant on the deed for the parcel in the form attached hereto as Exhibit 1 (Restrictive Covenant), and shall cause the Restrictive Covenant with a copy of this Cooperative Agreement attached to be filed in the real property records for King County. It is the purpose of this Restrictive Covenant to assure that the Project Parcel subject to the Restrictive Covenant will remain available for habitat restoration in perpetuity. The City of Federal Way shall take such action as is necessary to preclude use of the property inconsistent with the purposes of this Cooperative Agreement.

2. Property Use. Activities may be conducted on each Project Parcel that are consistent with the purpose provided in Section IV.A. above. Use of, or activity on, any Project Parcel 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.

The Parties agree that activities conducted in accordance with the terms and conditions of applicable laws, regulations and permit requirements and any restoration project plan (Restoration Project Plan) developed by the Trustees in consultation with the City of Federal Way under section IV.E. below would be consistent with the purpose of this Cooperative Agreement, including but not limited to:

- \$ construction, maintenance and adaptive management activities in accordance with the Restoration Project Plan, such as land grading, excavation, and recontouring, vegetation removal, substrate enhancement and planting native vegetation
- \$ ecological surveys and research
- \$ low impact recreation (wildlife viewing/observation)
- \$ construction and maintenance of informational and educational signs or kiosks
- \$ activities to control non-native, invasive or noxious plants and animals
- \$ construction of a path or trail with construction, design, location, and of materials intended to minimize disturbance of sensitive habitat areas
- \$ emergency activities to protect public health and safety
- \$ designation of a parking area as needed to provide public access to the Project Parcel and/or contiguous publicly owned property dedicated to similar use, provided that the size, configuration, design and elements of any such parking area shall be subject to the agreement of the Parties.

The Parties agree that activities that would not be consistent with the purpose of this Cooperative Agreement include but are not limited to:

- \$ alteration of hydrology, including dredging, diking, draining or filling, except pursuant to the Restoration Project Plan
- \$ constructing buildings or structures not permitted above
- \$ storage of vehicles, vessels, containers, equipment or other items except temporary storage of equipment or materials in use for restoration project development, monitoring and maintenance and routine site maintenance
- \$ any activities causing significant water pollution, erosion or sedimentation
- \$ removal or disturbance of native vegetation, except in connection with transplanting activities for further habitat restoration projects as specifically agreed among the Parties
- \$ aquaculture of non-native species
- \$ waste disposal or storage including sewage, manure, garbage, pesticides or hazardous waste
- \$ application of fertilizers or pesticides, except pursuant to the Restoration Project Plan or as otherwise agreed among the Parties
- \$ mining
- \$ intentional disruption of wildlife
- \$ planting of invasive non-native vegetation
- \$ erection of commercial billboards and signs

The listing of specific activities herein as being consistent with or not consistent with the purpose of this Cooperative Agreement is not intended to be exhaustive. The conducting by any person of the listed activities considered consistent with the purpose of this Cooperative Agreement shall be subject to the access restrictions of Section IV.D.3. of this Cooperative Agreement.

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 any Project Parcel for the purposes of carrying out the terms of this Cooperative Agreement.

b. Access by the general public to any part of any Project Parcel shall be in accordance with applicable laws, regulations or ordinances and such reasonable use restrictions as the Parties determine necessary to further the purpose of this Cooperative Agreement.

4. Property Maintenance. The City of Federal Way shall perform ordinary upkeep and maintenance of each Project Parcel. The term "ordinary upkeep and maintenance" means tasks that a prudent land manager would perform in the normal course of managing similar property. Maintenance of the Restoration Project (as defined below in Section IV.E. of this Cooperative Agreement) other than ordinary upkeep and maintenance shall be dealt with under Section IV.E.2. of this Cooperative Agreement.

E. Restoration Project Development, Administration and Implementation.

1. The Trustees reserve the option to develop an as-yet undesigned habitat restoration project (Restoration Project) on one or more Project Parcels, potentially involving alterations and improvements of existing upland and aquatic habitat features. In designing any such Restoration Project the Trustees shall consult with the City of Federal Way, and may consult with non-governmental entities including without limitation the Friends of the Hylebos. Prior to the development of any such Restoration Project, the Parties will, by an exchange of letters between the Project Managers, confirm the understanding of the Parties as to the agreed project design and the details of project administration and implementation. As between the Parties, the Trustees shall be responsible for designing, developing, implementing, constructing and monitoring any such Restoration Project for the Project Parcel(s).

2. The Trustees shall also be responsible for any project maintenance and adaptive management activities for any such Restoration Project. For purposes of this Cooperative Agreement, "adaptive management activities" means additional actions that need to be taken on the Project Parcel(s) to maintain the constructed habitat or change the habitat in some manner to meet the objectives of the applicable Restoration Project Plan. Anticipated changes or developments that may require adaptive management include, among others, the failure of vegetation to establish or spread, substantial erosion or sedimentation that adversely alters habitat characteristics, the introduction of non-native, invasive or noxious plants and animals, or adverse impacts from offsite development or access to the property. The Trustees shall undertake adaptive management activities on any Project Parcel in consultation with the City of Federal

Way. Provided, however, that nothing in this Cooperative Agreement shall be interpreted to relieve the City of Federal Way of any obligation it may have under state and local laws and ordinances to manage invasive and/or noxious weeds, vegetation, insects or wildlife on any Project Parcel. Provided, further, that adaptive management to address adverse impacts on any Project Parcel that result mainly from access to and/or use of the property by the public or by employees, agents or contractors of the City of Federal Way shall be the responsibility of the City of Federal Way.

F. 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 Cooperative Agreement.

2. Notice of Dispute. If a dispute arises between the Parties concerning the implementation of this Cooperative Agreement, 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 Cooperative Agreement, the notice shall identify corrective action sufficient to cure the violation and to restore any portion of any Project Parcel 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. Formal Negotiations - Preparation of Joint Statement of Position. If the Parties are unable to reach a resolution of a dispute through informal negotiations, after fourteen (14) calendar days following delivery of the notice of dispute described above in subparagraph 2 any party may initiate formal negotiations by providing written notice to the other parties of the notifying party's intent to develop a Joint Statement of Position. The Joint Statement of Position shall consist of a concise written statement of the issues in dispute, including the relevant facts upon which the dispute is based and the data, analysis or opinion supporting each position, and any supporting documentation on which each party relies. The Parties shall complete the Joint Statement of Position within fourteen calendar (14) days following receipt of the formal negotiations notice, or by such later date as the Parties shall agree. Upon completion of the Joint Statement of Position, the dispute shall be referred to authorized officials of each Party for resolution. Each Party shall advise the other Parties in writing of the identity of the authorized official designated to participate in the dispute resolution process. The resolution agreed to by such authorized officials shall be binding upon the Parties. The Joint Statement of Position shall constitute the exclusive factual record of the dispute in the event that the Parties are unable to resolve the dispute and any party seeks judicial resolution.

G. Removal of the Restrictive Covenant and Termination of the Cooperative Agreement.

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, in writing, to extinguish the restriction or release a portion of any Project Parcel from the terms of restriction, upon a determination by Trustees in their discretion in consultation with the City of Federal Way that circumstances have rendered the purpose of the this Cooperative Agreement, as provided in Paragraph IV.A. above, impractical to achieve.

2. Upon petition by one or all of the Parties, a court having jurisdiction over this restriction determines by judicial proceedings that circumstances have rendered the purpose of the Cooperative Agreement as provided in Paragraph IV.A. above impossible to achieve.

3. All or any of the Project Parcel(s) is taken by exercise of the power of eminent domain or acquired in lieu of condemnation, whether by public, corporate, or other authority. The Parties shall act jointly to recover the full value of the interest in the Project Parcel(s) subject to the taking or in-lieu purchase and all direct or incidental damages resulting from the taking or in-lieu purchase.

The Parties agree that the proceeds to which the City of Federal Way shall be entitled after the satisfaction of prior claims, from any sale, exchange, or involuntary conversion of all or any portion of the Project Parcel(s), subsequent to such termination or extinguishment, shall be determined, unless otherwise provided, by Washington law. The City of Federal Way shall use such proceeds only to obtain similar substitute property acceptable to all the Parties within Commencement Bay or within the Puyallup-Carbon-White Rivers watershed closest to Commencement Bay if one within Commencement Bay is unavailable. The City of Federal Way shall impose upon such substitute property a restrictive covenant on the deed in the form attached hereto as Exhibit 1.

H. Subsequent Transfer.

The City of Federal Way shall:

1. Not sell, transfer or otherwise divest itself of all or any portion of any of the Project Parcels, including, without limitation, a leasehold interest, without prior written approval of the Trustees.

2. Incorporate the terms of the Restrictive Covenant by reference in any deed or other legal instrument by which it divests itself of any interest in all or a portion of any of the Project Parcels, including, without limitation, a leasehold interest.

3. Describe the Restrictive Covenant in and append it to any executory contract for the transfer of any interest in any of the Project Parcels.

4. Give written notice to Trustees of the transfer of any interest in all or a portion of any of the Project Parcels no later than one hundred twenty (120) days prior to the date of such transfer. Such notice to Trustees shall include the name, address, and telephone number of the prospective transferee or the prospective transferee's representative.

The failure of the City of Federal Way to perform any act required by this Paragraph IV.H. shall not impair the validity of the Restrictive Covenant or limits its enforceability in any way.

I. 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 to the Project Manager for the other Party as identified above in Section IV.B.

V. GENERAL PROVISIONS

A. Funds Availability. 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 Commencement Bay environment. Nothing in this Cooperative Agreement shall be construed to require any Party to spend funds in excess of available appropriations.

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

C. Entire Agreement. This Cooperative Agreement constitutes the entire understanding of the Parties with respect to its subject matter.

D. Amendment and Termination. This Cooperative Agreement may not be amended except by written agreement of all parties to this agreement. This Cooperative Agreement shall continue in effect until it is terminated by agreement of all of the Parties. Any amendment to this agreement shall be consistent with the original purpose of the Restrictive Covenant and shall be recorded in the real property records for King County.

E. Execution, Effective Date. This Cooperative Agreement may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original and shall be retained by the Trustees. The date of execution shall be the date of the final signature of the Parties to this Cooperative Agreement.

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

G. Parties Bound. The provisions of this Cooperative Agreement shall apply to and be binding upon the Parties to this Cooperative Agreement, their agents, 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 Cooperative Agreement and to bind that party to it.

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

CITY OF FEDERAL WAY

BY: Neal Beets
Neal Beets, City Manager

11.10.2008
Date

ATTEST:

Carol McNeilly
City Clerk, ~~Laura Hathaway, CMC~~
Carol McNeilly

APPROVED AS TO FORM:

Patricia A. Richardson
Patricia A. Richardson, City Attorney

THE PUYALLUP TRIBE OF INDIANS

BY: _____
Chair
Puyallup Tribal Council

Date

THE MUCKLESHOOT INDIAN TRIBE

BY: _____
Chair
Muckleshoot Tribal Council

Date

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

BY: [Signature]

12/4/08
Date

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

CITY OF FEDERAL WAY

BY: Neal Beets
Neal Beets, City Manager

11.10.2008
Date

ATTEST:

Carol McNeilly
City Clerk, ~~Laura Hathaway, CMC~~
Carol McNeilly

APPROVED AS TO FORM:

Patricia A. Richardson
Patricia A. Richardson, City Attorney

THE PUYALLUP TRIBE OF INDIANS

BY: William J. [Signature]
Chair
Puyallup Tribal Council

2/4/09
Date

THE MUCKLESHOOT INDIAN TRIBE

BY: _____
Chair
Muckleshoot Tribal Council

Date

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

BY: [Signature]

12/4/08
Date

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

CITY OF FEDERAL WAY

BY: Neal Beets
Neal Beets, City Manager

11.10.2008
Date

ATTEST:

Carol McNeilly
City Clerk, ~~Laura Hathaway, CMC~~
Carol McNeilly

APPROVED AS TO FORM:

Patricia A. Richardson
Patricia A. Richardson, City Attorney

THE PUYALLUP TRIBE OF INDIANS

BY: _____
Chair
Puyallup Tribal Council

Date

THE MUCKLESHOOT INDIAN TRIBE

BY: Charlotte Williams
Chair
Muckleshoot Tribal Council

2/24/09
Date

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

BY: [Signature]

12/4/08
Date

WASHINGTON STATE DEPARTMENT OF ECOLOGY
Lead State Trustee

BY: _____ Date _____

Approved as to Form for the Washington State Department of Ecology.

BY: 1/14/09
Date

U.S. DEPARTMENT OF THE INTERIOR

BY: _____ Date _____

WASHINGTON STATE DEPARTMENT OF ECOLOGY
Lead State Trustee

BY: _____ Date _____

Approved as to Form for the Washington State Department of Ecology.

BY: _____ Date _____

U.S. DEPARTMENT OF THE INTERIOR

BY: David Wiley Date 1/20/09

