

This document clarifies the types of agreements the department commonly enters into with other parties.

Memoranda of Understanding (MOUs) and Memoranda of Agreement (MOAs)

A Memorandum of Understanding (MOU) outlines the shared perspective of two or more parties toward a certain goal or project. An MOU is a formal agreement that expresses a mutual understanding between the parties, indicating an intended common line of action. It is often used to establish official partnerships, when parties do not want to imply a legal commitment, or when the parties cannot create a legally enforceable agreement. It is a more formal, stronger version of a gentlemen's agreement. An example is the MOU between the Washington Department of Fish and Wildlife (WDFW) and the USDA, Forest Service Pacific Northwest Region regarding hydraulic projects conducted by the U.S. Forest Service.

A Memorandum of Agreement (MOA) details the specific roles and tasks to be assumed by the parties in support of their shared objective. An MOA is otherwise known as a "cooperative agreement." This type of legal document is more formal than a verbal agreement but less formal than a contract. It sets out the ground rules of a cooperative effort for the parties wishing to work together on a project. The parties using MOAs are usually public bodies and/or government agencies. An MOA allows the parties to operate as separate entities with a lower level of contractual obligations yet still binds the parties in some way in case of legal dispute. An example is the MOA between WDFW and the Washington State Department of Transportation regarding the implementation of the hydraulic code for transportation projects

The Protection Division Manager or designee leads the development of MOUs and MOAs. Regional staff should send requests from other entities for MOUs and MOAs to the Protection Division Manager. When appropriate, regional staff will be included in negotiation, writing, and review.

Chapter 11.15 of the [Hydraulic Project Approvals \(HPA\) Procedures Manual](#) contains more information about MOUs and MOAs.

Mitigation Agreements

A mitigation agreement is a legal contract between WDFW and a hydraulic project proponent. A mitigation agreement is required to legally bind the project proponent when mitigation obligations extend beyond the HPA's statutory expiration date. A mitigation agreement includes a background information section and an agreement section. The background section provides an overview of the project and the reason for the mitigation. The agreement section spells out the mitigation actions required and often references a mitigation plan.

If you think a mitigation agreement is needed, contact your Regional Habitat Program Manager (RHPM) and the Protection Division Manager (PDM) as soon as possible. If the project proponent has submitted a complete application, ask the project proponent to request a suspension of the application review period to allow the time needed to complete the agreement. If the project proponent declines to request a suspension of the application review, the Habitat Biologist (HB) should ask their RHPM to deny the application due to inadequate ability to protect fish life.

The steps for processing a mitigation agreement include:

1. Upon written receipt of an applicant or agent request to suspend processing agreement negotiation, the HB places the application on hold.
2. The PDM assigns an Environmental Planner (EP) to facilitate the drafting of the mitigation agreement language. The Planner will coordinate with the project proponent, HB and the Assistant Attorney General (AAG).
3. The EP sends the draft agreement to the Assistant Director (AD) or Deputy Assistant Director (DAD) of the Habitat Program and the PDM for review.

4. If the AD or DAD and PDM have concerns, the EP works with appropriate parties to resolve those concerns and continue with the review process. If the AD or DAD and PDM have no concerns, the EP sends the draft agreement to the project proponent. The project proponent and their legal representative review the agreement. They must negotiate language changes directly with the AAG.
5. If changes are requested by the project proponent, the AAG will coordinate with the RHPM, HB and EP to ensure the agreement is acceptable.
6. Once the agreement is acceptable to all parties, the EP asks the Habitat Program Budget and Contracts Administrator to enter the final agreement into the agency contract system (Novatus CMS).
7. The Administrator obtains agency approval from either the Habitat Program AD or the DAD per Policy 1004.
8. The Administrator sends two copies of the signed agreement to the project proponent for their signature.
9. After the project proponent returns the signed mitigation agreement to the Administrator, the Administrator saves a copy in Novatus CMS and notifies the EP of contract completion.
10. The EP adds a copy of the final agreement to the department's online database system (APPS) and notifies the HB that the HPA is ready for issuance. The HB issues the HPA.

Settlement Agreements

A settlement is a resolution between disputing parties about a legal issue, reached either before or after court action begins. A settlement agreement is a legal document that spells out the terms of a settlement. It is reviewed by all the parties to the settlement to ensure that the document is comprehensive and accurate. After the parties sign it, it becomes a legal contract. Such agreements are most commonly used to settle HPA appeals. Settlement agreements are negotiated by the AAG and the project proponent's legal representative. The AAG will coordinate with the AD or DAD, RHPM and the HB to ensure the agreement is acceptable to staff.

Contracts

A contract is a voluntary arrangement between two or more parties that is enforceable by law as a binding legal agreement. Whether a document constitutes a binding contract depends only on the presence or absence of well-defined legal elements within the document (the so-called "four corners"). The required elements are: offer and acceptance, consideration, and the intention to be legally bound. Significant agreements involving the exchange of money or services should be memorialized in a contract. If you think a contract is needed, contact your supervisor and the PDM as soon as possible. The process follows the essentially the same steps as a mitigation agreement, however, a contract may not be related to a HPA application.

Role of the Assistant Attorney General (AAG)

The AAG must review and approve all contracts and other forms of agreement before the Assistant Director or designee can sign the document. The AAG will provide advice but they do not make policy decisions. They evaluate legal risk to help the agency choose which option is best. They will also help with legal strategy, if litigation is threatened.