

**COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT  
AGREEMENT GUIDING PRINCIPLES AND SAMPLE PROVISIONS**

*Prepared by*

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INDUSTRY/TRUSTEE STANDING COMMITTEE**

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## CONTENTS

<b>PREFACE.....</b>	<b>1</b>
<b>INTRODUCTION AND PURPOSE .....</b>	<b>2</b>
<b>PART A: GENERAL GUIDING PRINCIPLES FOR NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENTS .....</b>	<b>4</b>
<b>1.0 Description .....</b>	<b>4</b>
<b>2.0 Guiding Principles.....</b>	<b>4</b>
<b>PART B: ANNOTATED OUTLINE OF SAMPLE PROVISIONS FOR NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENTS .....</b>	<b>7</b>
<b>1.0 Description .....</b>	<b>7</b>
<b>2.0 Annotated Outline of Sample Provisions .....</b>	<b>8</b>
<b>APPENDICES</b>	
<b>APPENDIX A: LISTING OF NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENTS ENTERED BETWEEN TRUSTEES AND INDUSTRIAL PARTIES (2003 – 2008) .....</b>	<b>29</b>
<b>APPENDIX B: SELECTED NATURAL RESOURCE DAMAGE ASSESSMENT PROVISION OUTLINES.....</b>	<b>37</b>
<b>APPENDIX C: FULL TEXT OF SELECTED NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENTS .....</b>	<b>46</b>
<b>APPENDIX D: DESCRIPTION OF THE AD-HOC INDUSTRY NATURAL RESOURCE DAMAGE GROUP INDUSTRY/TRUSTEE STANDING COMMITTEE.....</b>	<b>47</b>
<b>ADDITIONAL RESOURCES</b>	

## **PREFACE**

The purpose of this document is to provide recommended guiding principles and sample provisions concerning cooperative Natural Resource Damage Assessment (“NRDA”) Agreements that can be of use to both government and tribal natural resource trustees and industrial parties. The information provided and practices described herein are intended to facilitate the initiation of the cooperative/coordinated NRDA process between trustees and industrial parties. In particular, this document is aimed at helping to identify and address issues that can, especially at the outset, sometimes bog down the cooperative NRDA. This document is intended to be a “living document” and, as such, is expected to be periodically updated as new information and practical experience comes to light. Additions and comments relative to this document are welcomed and may be sent to [group@nrdonline.com](mailto:group@nrdonline.com).

The Ad-Hoc Industry Natural Resource Damage Group (“Group”) Industry/Trustee Standing Committee has prepared this document. The Committee, established in 1999, provides a focal point and clearinghouse within the industrial community for communications and activities on NRD issues (under CERCLA, OPA and other federal and state laws) between the industrial community and federal and state trustee departments and agencies. This project was designated as a joint activity to be undertaken by the Committee.

This document was produced by industrial representatives in consultation with federal and state trustee agency staff with cooperative NRDAR assessment experience. Industrial representatives have prepared this document to facilitate cooperative natural resource damage assessments and the efficient, cost effective restoration of public natural resources injured by releases of hazardous substances or oil. The ideas and concepts expressed and disseminated in this document are those of the industrial representatives, and do not necessarily reflect the policy or positions of State, Tribal, or Federal natural resource trustees.

## **INTRODUCTION AND PURPOSE**

In early 2006, the Ad-Hoc Industry Natural Resource Damage Group (“Group”), via its Industry/Trustee Standing Committee, initiated its “Natural Resource Damage Assessment (NRDA) Agreements Project”. This Project developed guiding principles and sample provisions relative to these Agreements in order to jumpstart the cooperative NRDA process and bypass issues that can sometimes bog down the process (especially at the outset).

Since early 2006, the Group has worked with a number of Federal, State and Tribal Trustees, industrial company representatives and industry and government practitioners to collect and analyze NRDA Agreements entered 2003 and 2008. A full listing of these NRDA Agreements collected (2003 – 2008) is available in Appendix A to this document.

In September 2008 and January 2009, the Group convened two work sessions, the first involving industrial representatives and the second involving representatives of the industrial and trustee communities. The purpose of these work sessions was to: (1) identify current cooperative NRDA Agreement provisions which may serve as excellent examples; (2) determine whether selected items not currently present in Agreements should be developed into sample provisions; and (3) identify additional issues not present in Agreements that should be developed into sample provisions and/or guiding principles. As a result of these work sessions, the Group has prepared this document which includes NRDA guiding principles, tools for NRDA Agreements at specific sites, sample provisions for NRDA Agreements, and supplemental materials.

This document provides a starting point for discussions concerning cooperative NRDA Agreements involving the trustees and industrial parties. There is universal recognition among trustees and industrial parties that “one size does not fit all” relative to cooperative assessments and NRDA Agreements. More often than not, site-specific issues will shape a particular NRDA and any associated Agreement. Nonetheless, there are certain

unifying principles that should guide and set a reasonable, strategic approach to the cooperative NRDA process. These “guiding principles” contained in Part A of this document reflect commonsense approaches developed by very seasoned trustees and industrial parties.

At specific sites, parties may elect to enter into written NRDA Agreements (e.g., Memoranda of Understanding, Memoranda of Agreements and/or Funding Agreements) which describe planned cooperative NRDA activities and funding arrangements between the parties. Part B of this document contains an annotated outline of sample provisions for NRDA Agreements. These provisions are offered as recommendations and are not intended to serve as “model” Agreements. The sample provisions and principles are intended as a tool for parties in the cooperative NRDA process and will need to be tailored for site-specific purposes.

**PART A: GENERAL GUIDING PRINCIPLES FOR  
COOPERATIVE/COORDINATED NATURAL RESOURCE  
DAMAGE ASSESSMENTS**

**1.0 Description**

The Guiding Principles for cooperative/coordinated NRDA Agreements include the following key principles which should guide the cooperative assessment process.

**2.0 Guiding Principles**

**A. Principles Generally Applicable to Negotiations of Cooperative NRDA Agreements**

In all cases, parties that desire to enter into a cooperative NRDA Agreement should:

1. Negotiate in good faith and with an open mind;
2. Treat all other parties with courtesy;
3. Listen in good faith to the views expressed by other parties, and give fair consideration to those views;
4. Treat discussions between and among the parties as strictly confidential except to the extent that a particular Agreement allows public disclosure;
5. Exchange relevant documents and information in a timely fashion;
6. Identify representatives with the authority to make necessary decisions;
7. Negotiate a reasonable timeline and budget for studies and other cooperative assessment activities within the scope of the Agreement;
8. Negotiate reimbursement of trustees' reasonable assessment costs through possible funding options, including, but not limited to:
  - a. Industry funding of past and/or ongoing assessment costs;
  - b. Progressive study funding by industry<sup>1</sup>;

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<sup>1</sup> Progressive study funding is when an industrial party funds individual studies as they occur vs. providing one lump sum for all studies to be performed.

- c. Industry funding of study in which they agree with the proposed study's framework (e.g. NRDA regulations as substantive guidelines, limited scope, shared data, other); and
  - d. Other, as agreed upon between the parties.
9. Conduct all tasks, including scope of work development, review of data, use of data, interpretation of results, and development of conclusions, as collaboratively and transparently as possible, with the full participation of all parties, and with the understanding that trustees hold final authority as to interpretation of results and development of conclusions;
10. Seek to resolve any questions or disputes amicably and expeditiously;
11. Bear in mind that the ultimate goal of a cooperative NRDA Agreement is to achieve, at a reasonable cost, the restoration of injured natural resources or their services. As such, it will be useful, when possible, to achieve consensus early in the process as to the natural resource injuries to be studied.

## **B. Guiding Principles Concerning Assessment Studies**

Identification and quantification of the natural resource injuries for which compensation is appropriate may be essential to the successful conclusion of a cooperative NRD Assessment. In such cases, the parties should:

1. Discuss (a) which studies will be performed; (b) how the data will be collected; and (c) potential scope and endpoints of each study;
2. Use best efforts to identify specific methodologies (i.e. how to determine baseline, causation, valuation, etc.) to be used at the site;
3. Use existing data when appropriate. Use relevant, quality assured, and quality controlled data. Share data when appropriate in order to save costs by avoiding the performance of multiple and/or unnecessarily repetitive studies;
4. Determine whether data gaps exist, and if such gaps exist, determine how to deal with those gaps;
5. Develop reasonable technical assumptions that all of the parties deem scientifically supportable;

6. Use best efforts to reach consensus on how the data from a study should be interpreted, with the understanding that trustees will have final authority concerning data interpretation;
7. Select appropriate tools to estimate the level of potentially injured natural resources and the associated loss of services, and to estimate potential damages and/or scale appropriate restoration projects to compensate for the estimated injuries and service losses;



**PART B: ANNOTATED OUTLINE OF SAMPLE PROVISIONS FOR  
NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENTS**

**1.0 DESCRIPTION**

The sample provisions are offered by way of recommendation for inclusion in NRDA Agreements, but are not necessarily offered as “models”. The sample provisions have been provided from the following Agreements: (1) Funding and Participation Agreement Between the National Oceanic & Atmospheric Administration, the US Department of the Interior, the State of North Carolina and Weyerhaeuser Company Concerning Cooperative Natural Resource Damage Assessment, Restoration Planning and Restoration Implementation Activities for the Weyerhaeuser Plymouth Millsite, Martin County, NC” (“Weyerhaeuser Funding Agreement”); (2) “Amended Memorandum of Agreement Between the Natural Resource Trustees and Dow Chemical Company Governing Cooperative Natural Resource Damage Assessment Activities” (“Amended MOA Between Natural Resource Trustees and Dow”); (3) “Natural Resource Damages Claim Letter Concerning Chevron Refinery, Castro Cove, Richmond CA” (“Castro Cove Agreement Letter”); (4) “Former Indian Refinery Natural Resource Damage Assessment Funding and Participation Agreement” (“Former Indian Refinery Agreement”); (5) “Interim Cooperative Assessment Funding Agreement for the Lower Passaic River Portion of the Diamond Alkali Superfund Site, New Jersey” (“Lower Passaic Funding Agreement”); (6) “Cooperative Natural Resource Damage Assessment Agreement For the *M/V Cape Flattery Incident*” (“Flattery Agreement”); and (7) “Memorandum of Agreement Between Bouchard Transportation Co. and Natural Resource Trustees Governing Cooperative Natural Resource Damage Assessment and Restoration Planning Activities for the Bouchard Oil B. 120 Oil Spill” (“Bouchard MOA”).

## 2.0 ANNOTATED OUTLINE OF SAMPLE PROVISIONS

### I. Introduction and Authority

#### A. Entering Parties and Definition of PRPs and Trustees

- Sample Provision 1: “This Agreement is between the Illinois Department of Natural Resources (“IDNR”) and the Illinois Environmental Protection Agency (“IEPA”); the United States Department of the Interior (“USDOJ”), acting through the US Fish and Wildlife Service (“USFWS”); and Chevron Environmental Management Company (“CEMC”), a wholly owned subsidiary of ChevronTexaco Corporation on behalf of Texaco Inc. The IDNR, IEPA, and USFWS shall be collectively referred to hereafter as the “Trustees.” CEMC and the Trustees are collectively referred to hereafter as the “Parties”. (Source: Former Indian Refinery Agreement)

### II. Purpose

- Sample Provision 1: “The purpose of this agreement is to provide an expedited, focused framework for a cooperative Natural Resource Damage Assessment (NRDA) to facilitate the resolution of any claims for natural resource damages (NRD) arising from the release of hazardous substances (Release) from the Weyerhaeuser Plymouth Millsite (Facility) in Martin County, North Carolina. This Agreement sets forth procedures for (a) coordinating data collection and assessment activities to determine the extent of natural resource injuries; (b) expediting restoration of any injured natural resources and/or the services provided by those resources; and (c) paying the assessment costs incurred by the Trustees. Through this Agreement, the Parties intend to work efficiently and in a cost-effective manner to advance the NRDA and resolve NRD claims related to the Release. The real extent of the assessment encompasses: the lower Roanoke River, its tributaries and adjacent habitats from Jamesville, NC to the mouth of the river; the Facility, including, but not limited to, Welch

Creek, Former Landfill No. 1, and the Former Chlorine Plant, and the impacted natural resources; and western Albermarle Sound and adjacent habitats out to the Bull Bay and Harvey's Point.” (Source: Weyerhaeuser Funding Agreement)

- Sample Provision 2: “The Trustees have completed a preassessment screening accordance with 43 C.F.R. Part 11 for this site. Based on the results of the preassessment screen, the Trustees have determined that a natural resource damage assessment (NRDA) is warranted. The Trustees have invited Dow to participate in the assessment process. The purpose of this Agreement is to provide the framework for cooperative implementation of the NRDA whenever the Parties can agree on assessment goals, approaches, and implementation to facilitate resolution of any natural resource damage (NRD) claims arising from the releases of hazardous substances to the environment at and from Dow's Midland manufacturing plant property, the aerial deposition zone for airborne matter originating from the plant property, the Tittabawassee River and its floodplains downstream of Midland, the Saginaw River and its floodplains, and Saginaw Bay (hereinafter the "NRDA" Area). Accordingly, this Agreement lays out the procedures for (a) undertaking cooperative NRD studies, including those necessary for the determination and quantification of injury to natural resources and/or services and for restoration planning/scaling, and (b) payment of reasonable assessment costs incurred by DOI, Michigan, and the Tribe. Through this Agreement, the Parties intend to work cooperatively, efficiently, and in a cost effective manner to resolve NRD claims through a restoration-based approach.” (Source: Amended MOA Between Natural Resource Trustees and Dow)
- Sample Provision 3: “The Parties agree that the goal of the cooperative assessment process will be settlement of the alleged claims without contested litigation, and that agreement to this process does not constitute any admission of or any evidence of liability, or constitute a waiver of any claims or defenses, by any of the Parties, The Parties may jointly develop

or discuss "debit" and "credit" estimates, but those estimates, and the underlying assumptions, are for settlement purposes only, and would not be binding on the Parties in any subsequent litigation. Based on the Parties' initial discussions, the objective of this process is a settlement addressing all natural resource damages liability associated with releases at the Chevron facility for injury to resources in Castro Cove (as subsequently to be defined by the Parties), with the settlement vehicle expected to be a project or projects that would offset any lost resource values.” (Source: Castro Cove Letter Agreement)

### **III. Establishment of Coordinating Committee**

#### **A. General Purpose**

- Sample Provision 1: “To advance the purpose of this Agreement, the Parties agree to establish an organizational structure that consists of 1) A Joint Assessment Team, 2) Technical Working Groups, and 3) Outside Resources.” (Source: Weyerhaeuser Funding Agreement)

#### **B. Establishing Management and Working Group(s)**

- Sample Provision 1: “The Parties agree to form a technical and administrative team (“Team”) for NRDA Activities and Cooperative Studies. The objective of the Team is to maintain an open dialogue regarding the scope, objectives, and other technical issues to ensure that the requirements of the NRDA are fulfilled in a timely, effective, technically sound and efficient manner. The Team is authorized to address administrative and technical issues only as they relate to the Team objective. The Team will refer all other issues to the management of each individual Party for appropriate consideration and determination. To further support the Team, technical subgroups may be formed, if needed, to address specific technical issues. Membership on the Team and all technical subcommittees shall be open to all Parties and their authorized representatives”. (Source: Former Indian Refinery Agreement)

- Sample Provision 2: “The Joint Assessment Team shall consist of one representative of each Trustee and one representative from Weyerhaeuser. Each representative may bring such advisers to meetings as each deems appropriate. The Joint Assessment Team will be chaired by a Trustee Representative. Each representative shall have one vote on the Joint Assessment Team.” (Source: Weyerhaeuser Funding Agreement)
- Sample Provision 3: The Joint Assessment Team shall consist of one representative of each Trustee and one representative from each Responding Party. Each representative may bring such advisers to meetings as each deems appropriate. The Joint Assessment Team will be chaired by a Trustee Representative. Each representative on the team shall have a fractional vote on the Joint Assessment Team equal to the number of representatives from the more populous faction divided by the number of representatives from that party’s faction, such that if there are more Responding Parties than Trustees, each trustee shall have a vote equal to the total number of Responding Parties divided by the number of Trustees and if there are more Trustees than Responding Parties each of the Responding Parties shall have a vote equal to the total number of Trustees divided by the number of Responding parties. The faction with the highest number of representatives on the Joint Assessment Team shall each have a vote equal to 1.0. (Source: Modified from Weyerhaeuser Funding Agreement)
- Sample Provision 4: “The Trustees have established a Trustee Council to oversee and approve the activities of the Parties. The Trustee Council is composed of one representative for each of the Trustees who is duly authorized on behalf of the public as a steward for natural resources under its trusteeship.” (Source: Bouchard MOA)

#### C. Duties of Committees/Working Groups/Teams

- Sample Provision 1: “The Joint Assessment Team will be responsible for coordinating activities that will meet the goals of this Agreement.” (Source: Weyerhaeuser Funding Agreement)
- Sample Provision 2: “The functions of the Joint Assessment Team shall include, but not necessarily be limited to, the responsibility to develop budgets; evaluate suitability of existing data to address potential natural resource injury; identify data gaps; design plans for obtaining necessary additional information; oversee implementation of Cooperative Studies; evaluate restoration opportunities; resolve disputes related to the implementation of Cooperative Studies pursuant to Section, \_\_\_ “Dispute Resolution”; establish Technical Working Groups, as appropriate; approve use of Outside Resources; and oversee budgets for Cooperative Studies. In addition to the responsibility listed above, the Joint Assessment Team shall develop a statement of work (SOW) describing tasks to be completed to develop a Natural Resource Damage Restoration and Compensation Determination (NRDRCD) Plan for the NRD arising from the Release.” (Source: Weyerhaeuser Funding Agreement)
- Sample Provision 3: “The Parties shall establish and form an organizational structure consisting of a Joint Assessment Team (JAT) and Technical Working Groups (TWGs). The Purpose of this organizational structure is to facilitate the efficient coordination and planning of the NRDA and restoration tasks among the Parties. The JAT shall be comprised of one or more technical representatives from each of the Parties, as appropriate. All study proposals shall be directed to the JAT for consideration. The JAT shall approve all cooperative technical activities on behalf of the Parties. JAT members will use good faith efforts to consult or inform, as appropriate, their respective Trustee Council representative (or in the case of the Responsible Party, the Responsible Party’s legal counsel) and legal counsel, prior to providing JAT level approval for any action. If the

JAT unanimously approves a Proposed Work Plan, and any modification thereto, it will become a Final Work Plan and the associated proposed Cooperative Study will become and be deemed a Cooperative Study.” (Source: Bouchard MOA)

D. Decision Making Framework

E. Agreement to Use Good-Faith Efforts to Reach Consensus

- Sample Provision 1: “The Parties will use good faith effort to reach consensus on the necessity, selection, design and protocols for Cooperative Studies related to the NRDA process for the Spill.” (Source: Bouchard MOA)

F. Designation of Coordinating Committee Members

**IV. Early Restoration Projects**

- Sample Provision 1: “Any restoration work or payments made to the Federal Trustees for restoration work shall be credited, by mutually agreed upon metrics that measure restoration credits agreed to by the Parties, against future claims for restoration of damages.” (Source: Lower Passaic Funding Agreement)

**V. Communication Between Parties**

A. Methods for Initiating Contact Between Industry and Trustees

B. Methods for Continuing Communication Between Industry and Trustees

**VI. Cooperative Assessment Activities**

A. General

- Sample Provision 1: “It is anticipated that the Parties will identify data gaps requiring further study. To avoid duplication of efforts and to reduce costs, the Parties will attempt to reach consensus on the study design, study protocols, including appropriate quality assurance/quality control standards, and selection of the principal investigator.” (Source: Weyerhaeuser Funding Agreement)

B. Models for the Decision Making Process (i.e. potential use of a site model)

C. Proposing and Selecting Cooperative Studies

- Sample Provision 1: “Any Party may propose a study to the Joint Assessment Team for consideration. Any proposed study agreed to by the Joint Assessment Team shall be deemed a ‘Cooperative Study’.” (Source: Weyerhaeuser Funding Agreement)

1. Scope

2. Best efforts to identify methods to determine baseline, causation, other

#### D. Retention of Persons Performing Cooperative Studies

- Sample Provision 1: “Cooperative Studies may be undertaken by any Party, its contractors or consultants, provided, however, that the Joint Assessment Team must specifically approve entity that will undertake such activities. As part of the approval process, the Joint Assessment Team will have the opportunity to review the qualifications of any proposed contractor or consultants prior to making a final decision. Any potential contractor or consultant will disclose any potential conflicts of interest as early in the contractual as possible and, in any event, before the contractor or consultant is retained.” (Source: Weyerhaeuser Funding Agreement)

#### E. Data Collection, Dissemination, and Retention

1. Identify Existing Data and Filling Data Gaps

- Sample Provision 1: “The Parties will attempt to analyze injury issues and estimate debit and credit values using existing data to the extent reasonable, and filling gaps in those data where possible by using appropriate, jointly agreed upon scientifically based assumptions or "reasonable worse case" analysis rather than new studies, except where the Parties jointly agree on the need for and nature of further technical studies.” (Source: Castro Cove Agreement Letter)

2. Development of Work Plans

- Sample Provision 1: “For each Cooperative Study, the Joint Assessment Team will: Request that a draft work plan be



developed by the (a) appropriate Technical Working Group or (b) consultants or contractors for either the Trustees or Weyerhaeuser. The draft work plan for each Cooperative Study will include the following technical information: purpose and need; study design/methods; qualifications of the study team; analytical work, including the laboratory to be used and the quality assurance/quality control plan; products/deliverables; duration; and budget. The draft work plan will be provided to the Joint Assessment Team for review and comment. Comments from individual members of the Joint Assessment Team that are approved by the Joint Assessment Team will be incorporated into the final work plan. The Joint Assessment Team must approve the final work plan.” (Source: Weyerhaeuser Funding Agreement)

- Sample Provision 2: “Any Party may propose a study to be performed as a Cooperative Study. Proposed Cooperative Studies are to be presented to the JAT for consideration and approval. If the JAT determines that a study proposal is reasonable and appropriate, the JAT shall assign the development of a Proposed Work Plan for the associated Proposed Study to the appropriate Working Group. ” (Source: Bouchard MOA)

#### F. Data Sharing

- Sample Provision 1: Where the product of the NRDA Activities or a Cooperative Study is a report or an analysis, a draft of such report or analysis shall be delivered to other Parties, providing a reasonable opportunity for them to review and comment, before the report or analysis is finalized. Any comments so provided, as well as the responses to comments and the final report or analysis, shall be placed in the administrative record (“Administrative Record”) maintained by the Lead Administrative Trustee for this matter. Where a Cooperative Study involves field work, the Party conducting the field work shall provide the other Parties with reasonable advance notice so that they

may have an opportunity to arrange and coordinate observation of such field activities.” (Source: Modified from the Former Indian Refinery Agreement”)

- Sample Provision 2: “Unless subject to an alternative arrangement, the Parties agree to exchange data and reports pertaining to the cooperative activities described above within two weeks after the data or reports become available, or within two weeks of the effective date of this Agreement, if such are already available upon the effective date. If an activity consists in whole or in part of a report or written analysis of data, all Parties will be provided with a proposed draft final version of the report or written analysis and allowed a reasonable amount of time within which to review and comment on the document before it is issued in final form. Any such comments must be included as part of the final report or otherwise made a part of the Administrative Record maintained by the Trustees.” (Source: Flattery Agreement)

#### G. Documentation of Cooperative NRDA Activities

- Sample Provision 1: “When members of the JAT or any of the TWGs [Working Groups] develop a proposal or reach a preliminary or interim decision, understanding, or agreement related to the Cooperative Studies and other cooperative NRDA activities including, but not limited to, the following: (1) The performance or acquisition of services of others to perform an activity or study; (2) The purpose, scope, design, and/or cost of activity or study; (3) The procedures to be followed, techniques to be used or criteria to be consulted when conducting an activity or study; (4) Decisions as to the use of existing literature values or information, or literature-based assumptions for Spill-specific issues either in addition to, or in lieu of Spill-specific data collection; (5) Data collection; (6) Costs of a particular activity; (7) Approval of meeting minutes; and (8) Public Outreach Activities; at least one of the representatives of the Trustees (if duly authorized to

act on behalf of all Trustees) and the representatives of the Responsible Party on the JAT or relevant TWG shall use best efforts to memorialize the proposal or preliminary or interim decision, understanding or agreement in writing and submit it to the JAT for review and approval.” (Source: Bouchard MOA)

#### H. Modifying Cooperative Studies

- Sample Provision 1: “Any Party may propose to modify any Cooperative Study based on preliminary results, changed circumstances, or for other reasons. Any proposed modification that the Parties jointly agree is reasonable and appropriate shall be incorporated in the Final Study Plan. The modified Study Plan will be incorporated by reference into this MOA and will be subject to all of its terms and conditions.” (Source: Bouchard MOA)

#### I. Finalizing Cooperative Studies

#### J. Interpreting Data from Cooperative Studies

##### 1. Consensus

- Sample Provision 1: “The Parties agree to attempt to reach consensus on the interpretation of, and conclusions to be drawn from, any data collected or generated as the result of any cooperative activity performed under this Agreement. Any such consensus and /or conclusion resulting therefrom may be memorialized as a stipulation. Any Party may propose a stipulation at any time. A stipulation may address issues of fact or law or both. A stipulation, agreed to by all Parties, the U.S. Department of Justice and the Department of the Attorney General, State of Hawaii shall be attached to this Agreement and shall survive the termination of this Agreement. Any matter covered by a stipulation or other form of agreement under this Agreement shall not be subject to objection or challenge by any Party. In the event that the Parties are unable to reach consensus, any Party reserves the right to disagree on the interpretation of the data

resulting from a cooperative activity and to develop separate and independent findings and conclusions....” (Source: Flattery Agreement)

## 2. Independent Interpretation and/or Conclusions

- Sample Provision 1: “The Parties recognize that, good faith efforts notwithstanding, it may not be possible to agree on the interpretations of, and/or conclusions to be drawn from, data collected pursuant to a Cooperative Study. The Parties, therefore, expressly reserve the right to produce and present independent interpretations and/or conclusions.” (Source Bouchard MOA)

## K. Withdrawing from Cooperative Studies

## L. Challenges to Completed Cooperative Studies

# VII. Independent Studies

- Sample Provision 1: “The Parties expressly reserve the right to perform independent NRDA studies, i.e., studies on which the Parties have not agreed and that are not governed by this Agreement (Independent Studies). The Trustees reserve their right to seek reimbursement of costs arising from or related to Independent Studies to the extent permitted under CERCLA, 43 C.F.R. Part 11, and applicable state law.” (Source: Amended MOA Between Natural Resource Trustees and Dow)
- Sample Provision 2: “The Parties expressly reserve the right to perform Independent NRDA Studies. Each Party agrees not to undertake any Independent Study unless such study has been first proposed as a Cooperative Study to all the Parties. If a proposed study is not approved as a Cooperative Study, or the Parties are otherwise unable to reach consensus on the proposed study, a Party or Parties may conduct the proposed study as an Independent Study at their own-expense, subject to reimbursement to the extent permitted by 15 C.F.R § 990.30 or otherwise as allowed by applicable law.” (Source: Bouchard MOA)

# VIII. Funding

## A. Agreement on General Principles

## B. Generally

- Sample Provision 1: “Dow shall fund the reasonable costs of the following: (a) any Cooperative Studies as defined in Section IV.A. that are implemented by the Trustees by agreement of the Parties; (b) administrative, monitoring, oversight, travel, and legal costs of the Trustees related to (i) discussing (internally and with Dow) and evaluating potential Cooperative Studies, (ii) implementing Cooperative Studies, and (iii) all related cooperative assessment activities incident to this Agreement; (c) Trustee Coordinator (as defined in Section III.B.3) costs; and (d) Trustee costs for reviewing Dow plans and reports relating to corrective action and CERCLA response actions relating to the NRDA Area and otherwise participating in the corrective action or CERCLA response action process relating to the NRDA Area (provided, however, that the Trustees will use best efforts to avoid duplicative cost claims or charges for activities performed for both NRDA purposes and for purposes of participation in the corrective action or CERCLA response action process.” (Source: Amended MOA Between Natural Resource Trustees and Dow)

## C. Cooperative Studies

- Sample Provision 1: “Dow shall (1) provide funding for any Trustee implemented Cooperative Studies and related Trustee activities as described in this Agreement and (2) implement Cooperative Studies with Trustee oversight as described in this Agreement. The Parties shall meet at least quarterly to identify and discuss the current status or results of Cooperative Studies pursuant to Section IV.A.” (Source: Amended MOA Between Natural Resource Trustees and Dow)

### 1. Budget

## D. Assessment Costs

- Sample Provision 1: “The Responsible Party shall fund all Reasonable Assessment Costs arising from or related to the Spill

including, but not limited to, costs incurred for the following activities: a) Trustee coordination; b) Cooperative Studies pursuant to Section III of this MOA; c) public outreach and information dissemination; d) administrative tasks; 3) oversight and monitoring activities; f) restoration planning and oversight; g) legal costs; h) indirect rates and overhead costs; and i) all other costs identified in Section V.B.4.” (Source: Bouchard MOA)

E. Undisputed Costs and Payment by Responsible Party

F. Disputed Costs

G. Past Costs

- Sample Provision 1: “Prior to the Effective Date of this amended Agreement, Dow reimbursed the Past Natural Resource Damage Assessment Costs of the Trustees as follows...” (Source: Amended MOA Between Natural Resource Trustees and Dow)
- Sample Provision 2: “The Cooperative Companies shall reimburse the Federal Trustees for a \$300,000 portion of their past assessment costs incurred in connection with the LPRSA within thirty (30) calendar days after the Federal Trustees have provided the Cooperative Companies with a summary of the costs being reimbursed and the full execution of the Interim Funding Agreement.” (Source: Lower Passaic Funding Agreement)

H. Advanced Funding

- Sample Provision 1: “NOAA and CDFG will seek reimbursement of their costs incurred subsequent to September 30, 2005 by periodically invoicing Chevron, as described below. To participate fully in this cooperative effort, the Department of the Interior (DOI) requires funding in advance for costs incurred or to be incurred subsequent to September 30, 2005. Chevron agrees to provide advance funding in the amount of \$50,000 to DOI to cover anticipated DOI costs for the period from October 1, 2005 to June 30, 2006, subject to the documentation requirements as described below. Should the amount

actually expended by DOI exceed \$40,000 and DOI anticipates that additional funding may be required prior to June 30, 2006, it shall notify Chevron in writing, and the Parties shall meet promptly to discuss further advanced funding. By May 1, 2006, the Parties shall also meet to discuss provision of advanced funding for the period subsequent to June 30, 2006. Any funds not expended prior to June 30, 2006 will be credited towards future funding periods, if any.”

(Source: Castro Cove Agreement Letter)

- Sample Provision 2: “The Cooperating Companies shall fund the Federal Trustees’ reasonable administrative, oversight and assessment costs in an amount not to exceed \$500,000 incurred as part of the Interim Cooperative Assessment Agreement and relating substantially to NRDA activities for the LPRSA under this Agreement, including but not limited to attendance at LPRSA-related meetings, ongoing GIS development, historical data review and consultant support, but excluding the costs of development and implementation of NRDA study activities undertaken solely by the Federal Trustees or other entities, unless otherwise agreed to in writing by the Federal Trustees and the Cooperating Companies. For the purposes of funding of the Federal Trustees, reasonable assessment and administrative costs, other activities will also be funded if those activities are for the larger Site but cannot be separated from activities solely related to the LPRSA.” (Source: Lower Passaic Funding Agreement)
  - Sample Provision 3: “To participate fully in this cooperative effort, certain Trustees require funding in advance.” (Source: Flattery Agreement)
- I. Costs of Independent Studies and Independent Interpretations and/or Conclusions
  - J. Documentation
    - Sample Provision 1: “Each Trustee shall submit an accounting of costs incurred pursuant to the terms of this letter when seeking

reimbursement or when documenting the expenditure of advanced funding. Each such accounting shall consist of a spreadsheet summarizing labor (hours and rates), travel costs, equipment costs, contractors' costs, and miscellaneous expenses (e.g., supplies, overnight mail). Chevron recognizes that each Trustee has different accounting processes and understands that the accounting from each Trustee will not be in the same format.” (Source: Castro Cove Agreement Letter”)

- Sample Provision 2: “By May 31, 2008, the Trustees shall provide Dow with an accounting of their reasonable cooperative assessment activities for the period from September 28, 2007 through March 31, 2008. Within 60 days after the completion of each successive six month period of activities under this Agreement, the Trustees shall provide Dow with an accounting of their reasonable cooperative assessment costs that have been withdrawn from the Tittabawassee NRD Fund during that period.” (Source: Amended MOA Between Natural Resource Trustees and Dow)

K. Non-waiver by Responsible Party

**IX. Public Outreach Activities**

**X. Reservation of Rights and Claims**

- Sample Provision 1: “Nothing in this Interim Funding Agreement is intended to be nor should it be construed as an admission of liability on the part of the Cooperating Companies or any of its members or as a limitation upon any of their rights or defenses. Nothing in this Interim Funding Agreement is intended to be nor should it to be construed to be a limitation on the Federal Trustees’ (or the entities comprising them) authority to pursue any claims or causes of action against the Cooperating Companies for damages or otherwise, provided, however, that any payments of Federal Trustee costs pursuant to Paragraph V.C and the Cooperating Companies’ performance of NRD-related studies approved by the Federal Trustees shall be credited dollar-for-dollar or in a mutually



agreed-upon manner against any future claims for assessment costs, restoration costs and/or damages.” (Source: Lower Passaic Funding Agreement)

## **XI. Dispute Resolution**

### **A. Generally**

- Sample Provision 1: “The Parties shall endeavor in good faith to make decisions by consensus. In absence of consensus, the Parties shall attempt in good faith, for a period not to exceed ten (10) calendar days after receipt of written notice that briefly identifies the subject on which there is no consensus, to reach consensus through consultation among the Parties’ representatives, who are currently designated as follows...” (Source: Lower Passaic Funding Agreement)
- Sample Provision 2: “In the event that consensus is not reached by the representatives pursuant to Subparagraph X.B, the Parties shall attempt in good faith for a period not to exceed ten (10) days to reach consensus through consultation among the following management representatives...” (Source: Lower Passaic Funding Agreement)
- Sample Provision 3: “The Parties agree to attempt to resolve any disputes concerning the implementation of this Agreement, or arising from any of the provisions of this Agreement, through good faith negotiations among the designated representatives of the Parties identified in Attachment A. Disputes that cannot be resolved at that level shall be elevated to appropriate officials of the Parties.” (Source: Flattery Agreement)

### **B. Written Notice**

- Sample Provision 1: “A dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute. The notice shall describe the dispute with enough specificity to allow the other Parties to identify the issues involved and to respond effectively. To the extent practicable, such notice will be provided at least 30 days prior to the initiation of any field, analytical, or other assessment work under a Cooperative Study that is the subject of the disagreement.”

(Source: Amended MOA Between Natural Resource Trustees and Dow)

C. Informal Resolution

- Sample Provision 1: “The Parties shall attempt to resolve promptly any disputes concerning the implementation of this Agreement through good faith informal negotiations between the Trustees and Dow. The period of informal negotiations shall not exceed 30 days from the time the dispute arises unless otherwise agreed in writing between all Parties involved. The Parties may agree to use facilitated negotiations under the ADR Confidentiality Agreement to avoid or resolve disputes among the Parties.” (Source: Amended MOA Between Natural Resource Trustees and Dow)

D. Formal Resolution

E. Effect of Dispute Regarding an On-Going Cooperative Study

- Sample Provision 1: “An unresolved dispute regarding a Cooperative Study, or an aspect thereof, does not result in termination of this Agreement or modify any funding obligations hereunder. If the Trustees decide to perform an independent study which was removed as a Cooperative Study because of an unresolved dispute, the Trustees reserve the right to seek reimbursement from Dow for the cost of that study.” (Source: Amended MOA Between Natural Resource Trustees and Dow)

F. Trustees’ Decision to Conduct an Independent Study or Develop an Independent Interpretation and/or Conclusion

**XII. Payment of Funds**

- Sample Provision 1: “Payment of the funds to the Trustees by the Responsible Parties shall be made as follows:...” (Source: Bouchard MOA)

**XIII. Correspondence and Notification**

- Sample Provision 1: “All correspondence relative to this MOA shall be directed to the following persons on behalf of the Parties:...” (Source: Bouchard MOA)

#### **XIV. Modification of this Agreement**

- Sample Provision 1: “Any modification of this Agreement must be in writing and executed by all parties. Any Party may terminate its participation in this Agreement at any time by giving 30 days written notice to all other Parties.” (Source: Former Indian Refinery Agreement)

#### **XV. Duration of this Agreement**

- Sample Provision 1: “This agreement is intended to continue in full force and effect until either 1) The completion of the purposes of the MOA or 2) the termination of this MOA pursuant to the following section entitled “Termination of this MOA”. (Source: Bouchard MOA)

#### **XVI. Termination of this Agreement**

- Sample Provision 1: “A Party may opt out of this process without further obligation under the terms of this letter by providing thirty days written notice to the other Parties. Should Chevron terminate its participation in this process, however, it agrees that it will reimburse the Trustees for their reasonable costs incurred in carrying out work in this process through the effective date of the termination.” (Source: Castro Cove Agreement Letter)

#### **XVII. Access**

- Sample Provision 1: “If any property to which access is needed by the Responsible Party or the Trustees to perform a Cooperative Study is owned or controlled by persons other than the Responsible Party, the Responsible Party will use reasonable efforts to secure from such persons an agreement to provide access to such property for the Parties, as necessary to perform the Cooperative Study. If any access required by the Responsible Party or the Trustees to perform a Cooperative Study cannot be obtained in a time specified by the Trustees, the Responsible Party shall promptly notify the Trustees in writing, and include therein a summary of the steps taken to obtain such access.” (Source: Bouchard MOA)

#### **XVIII. Indemnification**

- Sample Provision 1: “The Parties agree to continue good faith efforts to discuss and develop indemnification and/or insurance provisions to address potential claims arising from contractor activities for Cooperative Studies. If the Parties are able to reach agreement on such provisions, they agree to amend this MOA as appropriate.” (Source: Bouchard MOA)

**XIX. Confidentiality and Publication Restrictions**

- Sample Provision 1: “Where a written communication or other document is claimed to be confidential, it shall not be disclosed to any party other than the Parties to this Agreement unless and until one of the following circumstances exist: (1) The prior written consent of the Party claiming it to be confidential has been provided. (2) Such document or photograph has been included in the Administrative Record. (3) Such document is releasable in accordance with Chapter 92F, HRS (the Hawaii Public Records Act) and/or the federal Freedom of Information Act; is required to be produced pursuant to any applicable federal or state law; or is ordered to be produced by a competent source of law.” (Source: Flattery Agreement)

**XX. Tolling Agreements**

**XXI. General Provisions**

A. Parties Bound

- Sample Provision 1: “This MOA shall be binding on the Trustees and on the Responsible Party and its officers, directors, agents, successor in interest, representatives and assigns.” (Source: Bouchard MOA)

B. No Assumption of Liability by All Entities

- Sample Provision 1: “The Trustees, the United States, the Commonwealth of Massachusetts, and the State of Rhode Island and Providence Plantations (collectively, the Trustees and/or the Governmental Entities) do not assume any liability by entering into this MOA.” (Source: Bouchard MOA)

C. Third Party Rights

- Sample Provision 1: “This MOA is not intended to create any rights or causes of action enforceable by third persons not Parties to this MOA. Nothing in this MOA may be the basis of any third party challenges or appeals.” (Source: Bouchard MOA)

D. No Agency Relationship

- Sample Provision 1: “Neither the Responsible Party nor any of its officers, directors, employees, agents, subcontractors, or any persons acting on its behalf or under its control shall be considered an agent of the Trustees or the Governmental Entities.” (Source: Bouchard MOA)

E. Severability

- Sample Provision 1: “The terms of this MOA are severable. In any term, covenant or condition of this MOA 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, covenants, and conditions. However, within thirty (30) calendar days after the court’s determination that this MOA, or a portion thereof, is invalid, any Party hereto may withdraw from this MOA.” (Source: Bouchard MOA)

F. Limitation

- Sample Provision 1: “Nothing in this Agreement shall be construed as obligating the United States, the State of Hawaii or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.” (Source: Flattery Agreement)

G. Effective Date

- Sample Provision 1: “This Agreement may be executed in one or more counterparts. The Effective Date of this Agreement shall be the date of the last affixed signature. The Effective Date of any Attachment, including stipulations, hereafter developed and incorporated into this Agreement shall be the date set forth in such Attachment.” (Source: Former Indian Refinery Agreement)

- Sample Provision 2: “The effective date of this Interim Funding Agreement shall be the date of the last signature and the period of this Interim Funding Agreement shall be for one year from that date unless otherwise amended in writing.” (Source: Lower Passaic Funding Agreement)

H. Signatures

**XXII. Statement of Work**

**XXIII. Other**

**APPENDIX A: LISTING OF NRDA AGREEMENTS ENTERED BETWEEN  
TRUSTEES AND INDUSTRIAL PARTIES (2003 – 2008)**

**Table A**

**TABLE A**  
**NRDA AGREEMENTS ENTERED BETWEEN TRUSTEES AND INDUSTRIAL PARTIES**  
**(2003 – 2008)**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
1.	2003	“Funding and Participation Agreement for Portland Harbor Natural Resource Damage Assessment & Restoration Process”	Portland Harbor	Oregon	<ul style="list-style-type: none"> <li>• Confederated Tribes and Bands of the Yakama Nation</li> <li>• Confederated Tribes of the Grand Ronde Community of Oregon</li> <li>• Confederated Tribes of Siletz Indians</li> <li>• Confederated Tribes of the Umatilla Indian Reservation</li> <li>• Confederated Tribes of the Warm Springs Reservation of Oregon</li> <li>• Nez Perce Tribe</li> <li>• US DOI</li> <li>• Oregon Department of Fish and Wildlife</li> <li>• NOAA</li> <li>• City of Portland</li> <li>• Port of Portland</li> <li>• ATOFINA Chemicals, Inc.</li> <li>• Chevron U.S.A., Inc.</li> <li>• Gunderson, Inc.</li> <li>• NW Natural Gas</li> <li>• Oregon Steel Mills</li> <li>• Time Oil Co.</li> <li>• ConocoPhillips Company</li> <li>• Union Pacific Railroad</li> </ul>	Hazardous Waste Site	This document is available electronically upon request.



**Table A**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
					Company		
2.	2003	“Memorandum of Agreement between the Natural Resource Trustees and Honeywell International Regarding the LCP Site, Brunswick, Georgia”	Honeywell LCP Site, Brunswick, Georgia	Georgia	<ul style="list-style-type: none"> <li>• Georgia Department of Natural Resources</li> <li>• NOAA</li> <li>• US DOI</li> <li>• Honeywell International</li> </ul>	Hazardous Waste Site	<a href="http://www.darrp.noaa.gov/southeast/lcp/pdf/moa_1203.pdf">http://www.darrp.noaa.gov/southeast/lcp/pdf/moa_1203.pdf</a>
3.	2004	“Former Indian Refinery Natural Resource Damage Assessment Funding and Participation Agreement”	Former Indian Refinery	Illinois	<ul style="list-style-type: none"> <li>• Illinois Department of Natural Resources</li> <li>• Illinois Environmental Protection Agency</li> <li>• US DOI</li> <li>• US Fish and Wildlife Services</li> <li>• Chevron Environmental Management Company</li> </ul>	Hazardous Waste Site	This document is available electronically upon request.
4.	2004	“Funding for Joint Preassessment/ Assessment Activities:	Suisun Bay	California	<ul style="list-style-type: none"> <li>• US DOI</li> <li>• California Department of Fish and Game</li> <li>• NOAA</li> <li>• Kinder Morgan</li> </ul>	Oil Spill	This document was provided by US DOI Office of the Solicitor.
5.	2005	“Financial Responsibility Agreement”	M/V Casitas	Hawaii	<ul style="list-style-type: none"> <li>• US DOI</li> <li>• NOAA</li> <li>• State of Hawaii</li> <li>• Fishing Vessel North-Wind, Inc.</li> </ul>	Threat of oil discharge; removal actions; and injuries to coral.	This document was provided by US DOI Office of the Solicitor.

**Table A**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
6.	2006	“Memorandum of Agreement between the Bouchard Transportation Co., Inc. and the Natural Resource Trustees Governing Cooperative Natural Resource Damage Assessment and Restoration Planning Activities for the Bouchard B. 120 Oil Spill”	Bouchard	Massachusetts	<ul style="list-style-type: none"> <li>• NOAA</li> <li>• US DOI</li> <li>• The Executive Office Environmental Affairs of the Commonwealth of Massachusetts</li> <li>• Bouchard Transportation Company</li> </ul>	Oil Spill	<a href="http://www.darrp.noaa.gov/northeast/bouzzard/pdf/Bouchard_MOA_20061012.pdf">http://www.darrp.noaa.gov/northeast/bouzzard/pdf/Bouchard_MOA_20061012.pdf</a>
7.	2006	“Natural Resource Damage Claim Letter Agreement”	Chevron - Castro Cove	California	<ul style="list-style-type: none"> <li>• NOAA</li> <li>• US DOI</li> <li>• California Department of Fish and Game</li> <li>• Chevron USA Inc.</li> </ul>	Oil and Hazardous Substances Site	This document was provided by US DOI Office of the Solicitor.
8.	2006	“Cooperative Natural Resource Damage Assessment Agreement for the M/V Cape Flattery Incident”	Cape Flattery	Hawaii	<ul style="list-style-type: none"> <li>• Hawaii Department of Health</li> <li>• Health Department of Land and Natural Resources</li> <li>• US DOI</li> <li>• NOAA</li> <li>• Cape Flattery Shipping Ltd.</li> <li>• Pacific Basin Marine Services Ltd.</li> </ul>	Threat of oil discharge; removal actions/ and injury to coral reef habitats and biota	<a href="http://www.darrp.noaa.gov/pacific/capeflattery/pdf/Flattery_MOU.pdf">http://www.darrp.noaa.gov/pacific/capeflattery/pdf/Flattery_MOU.pdf</a>
9.	2008	“Amended Memorandum of Agreement between the Natural Resource Trustees and The	Tittabawassee River	Michigan	<ul style="list-style-type: none"> <li>• Michigan Department of Environmental Quality</li> <li>• Michigan Department of Natural resources</li> <li>• Attorney General of</li> </ul>	Hazardous Waste Site	<a href="http://www.fws.gov/midwest/TittabawasseeRiverNRDA/documents/TR%20MOA%20amended%20Apr08%20pdf%20on%2029May08.pdf">http://www.fws.gov/midwest/TittabawasseeRiverNRDA/documents/TR%20MOA%20amended%20Apr08%20pdf%20on%2029May08.pdf</a>

**Table A**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
		Dow Chemical Company Governing Cooperative Natural Resource Damage Assessment Activities”			Michigan <ul style="list-style-type: none"> <li>• US DOI</li> <li>• US Fish and Wildlife Services</li> <li>• Bureau of Indian Affairs</li> <li>• Saginaw Chippewa Indian Tribe of Michigan</li> <li>• The Dow Chemical Company</li> </ul>		
10.	2008	“Interim Phase 1 Funding and Participation Agreement”	Portland Harbor	Oregon	<ul style="list-style-type: none"> <li>• US DOI</li> <li>• NOAA</li> <li>• Oregon Department of Fish and Wildlife</li> <li>• Nez Perce Tribe</li> <li>• Confederated Tribes of the Warm Springs Indian Reservation of Oregon</li> <li>• Confederated Tribes of the Umatilla Indian Reservation</li> <li>• Confederated Tribes of Siletz Indians</li> <li>• Confederated Tribes of the Grande Ronde Community of Oregon</li> <li>• Confederated Tribes of the Yakama Nation</li> <li>• Air Liquide America L.P.</li> <li>• Bayer CropScience Inc.</li> <li>• BNSF Railway Company</li> </ul>	Hazardous Waste Site	This document is available electronically upon request.

**Table A**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
11.	2008		Cosco Busan - pending	California	Unknown	Oil Spill	This document is to be directly provided by US DOI Office of the Solicitor, when signed.
12.	2008	Interim Cooperative Assessment Funding and Agreement for the Diamond Alkali Superfund Site, New Jersey	Diamond Alkali Superfund Site	New Jersey	<ul style="list-style-type: none"> <li>• US DOI</li> <li>• NOAA</li> <li>• Occidental Chemical Corporation</li> </ul>	Hazardous Waste Site	This document is available electronically upon request.
13.	2008	Interim Cooperative Assessment Funding Agreement for the Lower Passaic River Portion of the Diamond Alkali Superfund Site, New Jersey	Diamond Alkali Superfund Site	New Jersey	<ul style="list-style-type: none"> <li>• US DOI</li> <li>• NOAA</li> <li>• Alcatel Lucent USA Inc</li> <li>• BASF Corporation</li> <li>• Benjamin Moore &amp; Co</li> <li>• Celanese LTD</li> <li>• Chevron Management Company</li> <li>• Croda Inc.</li> <li>• DuPont Company</li> <li>• Franklin-Burlington Plastics Inc.</li> <li>• General Motors Corporation</li> <li>• ISP Chemicals LLP</li> <li>• Linde Inc.</li> <li>• Millennium Chemicals Inc.</li> <li>• News Publishing Australia Limited</li> <li>• Novelis Corporation</li> <li>• NPEC, Inc.</li> <li>• Pharmacia Corporation</li> <li>• Public Service and Gas</li> </ul>	Hazardous Waste Site	This document is available electronically upon request.

**Table A**

#	Year	Agreement	Site Name	State	Signed Parties	Incident Type	Source
					Company • Purdue Pharma Technologies • Safety-Kleen Envirosystems Company • Tevel Corporation • Vertellus Specialties Inc.		

**APPENDIX B:        SELECTED NRDA AGREEMENT PROVISION OUTLINES**

1. Interim Cooperative Assessment Funding Agreement for the Diamond Alkali Superfund Site, New Jersey and Interim Cooperative Assessment Agreement for the Diamond Alkali Superfund Site, New Jersey (2008)
2. Interim Cooperative Assessment Funding and Agreement for the Diamond Alkali Superfund Site, New Jersey and Interim Cooperative Assessment Agreement for the Lower Passaic River Portion of the Diamond Alkali Superfund Site, New Jersey (2008)
3. Amended Memorandum of Agreement Between the Natural Resource Trustees and the Dow Chemical Company Governing Cooperative Natural Resource Damage Assessment Activities (2008)
4. Interim Phase 1 Funding and Participation Agreement Portland Harbor (2008)
5. Cooperative Natural Resource Damage Assessment Agreement for the M/V Cape Flattery Incident (2006)
6. Memorandum of Agreement Between Bouchard Transportation Co., Inc. and the Natural Resource Damage Trustees Governing the Cooperative Natural Resource Damage Assessment and Restoration Planning Activities for the Bouchard B. 120 Oil Spill (2006)
7. Former Indian Refinery Natural Resource Damage Assessment Funding and Participation Agreement (2004)

## **Appendix B**

### **PROVISIONS OUTLINE 1**

#### **INTERIM COOPERATIVE ASSESSMENT FUNDING AGREEMENT FOR THE DIAMOND ALKALI SUPERFUND SITE, NEW JERSEY (2008)**

- I. Parties
- II. Background
- III. Authority
- IV. Purpose
- V. Terms and Conditions
  - A. Reimbursement of Past Assessment Costs
  - B. Performance of Studies and Restoration Projects
  - C. Progressive Funding of Reasonable Administrative and Assessment Costs
  - D. Documentation
  - E. Replenishment Request by Trustees
- VI. Reservation of Rights
- VII. Termination
- VIII. Notices
- IX. Dispute Resolution
- X. Applicable Law
- XI. Authority
- XII. Execution
- XIII. Period and Effective Date
- XIV. Geographic Scope of Agreement

#### **INTERIM COOPERATIVE ASSESSMENT AGREEMENT FOR THE DIAMOND ALKALI SUPERFUND SITE, NEW JERSEY (2008)**

- I. Parties
- II. Background
- III. Authority
- IV. Purpose
- V. Terms and Conditions
- VI. Reservation of Rights
- VII. Termination
- VIII. Extension/Modification
- IX. Notices
- X. Dispute Resolution
- XI. Public Involvement and Confidentiality
- XII. Applicable Law
- XIII. Authority
- XIV. Execution
- XV. Period and Effective Date
- XVI. Geographic Scope of Agreement
- XVII. Exhibit A – Proposed Cooperative Assessment Approach and Framework Lower Passaic River Study Area

## **Appendix B**

### **PROVISIONS OUTLINE 2**

#### **INTERIM COOPERATIVE ASSESSMENT FUNDING AGREEMENT FOR THE LOWER PASSAIC RIVER PORTION OF THE DIAMOND ALKALI SUPERFUND SITE, NEW JERSEY (2008)**

- I. Parties
- II. Background
- III. Authority
- IV. Purpose
- V. Terms and Conditions
  - A. Reimbursement of Past Assessment Costs
  - B. Performance of Studies and Restoration Projects
  - C. Progressive Funding of Reasonable Administrative and Assessment Costs
  - D. Documentation
  - E. Replenishment Request by Trustees
- VI. Reservation of Rights
- VII. Termination
- VIII. Extension/Modification
- IX. Notices
- X. Dispute Resolution
- XI. Applicable Law
- XII. Authority
- XIII. Execution
- XIV. Period and Effective Date
- XV. Geographic Scope of Agreement

#### **INTERIM COOPERATIVE ASSESSMENT AGREEMENT FOR THE LOWER PASSAIC RIVER PORTION OF THE DIAMOND ALKALI SUPERFUND SITE, NEW JERSEY (2008)**

- I. Parties
- II. Background
- III. Authority
- IV. Purpose
- V. Terms and Conditions
- VI. Reservation of Rights
- VII. Termination
- VIII. Extension/Modification
- IX. Notices
- X. Dispute Resolution
- XI. Public Involvement and Confidentiality
- XII. Applicable Law
- XIII. Authority
- XIV. Execution
- XV. Period and Effective Date
- XVI. Geographic Scope of Agreement
- XVII. Exhibit A – Proposed Cooperative Assessment Approach and Framework Lower Passaic River Study Area



## Appendix B

### PROVISIONS OUTLINE 3

#### **AMENDED MEMORANDUM OF AGREEMENT BETWEEN THE NATURAL RESOURCE TRUSTEES AND THE DOW CHEMICAL COMPANY GOVERNING COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT ACTIVITIES (2008)**

- I. Introduction and Authority
- II. Purpose
- III. Funding
  - A. Cooperative Studies
  - B. Costs
    - 1. Funding
    - 2. Past Costs
    - 3. Trustee Coordinator
    - 4. Initial Planning Period
    - 5. Budget Estimates and Payments
    - 6. Exceedance of Tittabawassee NRD Fund
    - 7. Noncommitted Funds
    - 8. Accounting
    - 9. Credit
  - C. Independent Studies
- IV. Cooperative Assessment Activities
  - A. General
  - B. Retention of Persons Performing Cooperative Studies
  - C. Implementation
  - D. Data Collection
    - 1. General
    - 2. Database Collected from Human Respondents
  - E. Interpretation
    - 1. Consensus on Interpretation
    - 2. Independent Interpretations
    - 3. Draft Reports
  - F. Modification of Cooperative Studies
  - G. Withdrawal from Cooperative Studies
  - H. Challenges to Data
- V. Public Involvement
  - A. Consistency with CERCLA and the Regulations
  - B. Cooperative Efforts for Public Involvement
  - C. Initiation of Activities
- VI. Cost Documentation
  - A. Documentation
  - B. Objections
- VII. Reservation of Rights and Claims
- VIII. Confidentiality
- IX. General Provisions
  - A. Dispute Resolution
  - B. Payment of Funds
  - C. Correspondence
  - D. Modification and Termination
  - E. Effective Date
  - F. Trustee Funds

## **Appendix B**

### **PROVISIONS OUTLINE 4**

#### **INTERIM FUNDING AND PARTICIPATION AGREEMENT - PORTLAND HARBOR (2008)**

- I. Parties
- II. Purpose
- III. Funding
- IV. Schedule
- V. Termination
- VI. Trustee Accounting of Expenses
- VII. Availability of Data
- VIII. Allocation of Costs
- IX. Reservation of Rights

## Appendix B

### PROVISIONS OUTLINE 5

#### COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENT FOR THE M/V CAPE FLATTERY INCIDENT (2006)

- I. Parties
- II. Purpose
- III. Authority
- IV. Background
- V. Preassessment Phase
- VI. Injury Assessment – Scope
- VII. Exchange of Data and Reports
- VIII. Independent Activities
- IX. Financial Responsibility
  - A. Scope
  - B. Advanced Funding
  - C. Past Damage Assessment Costs
  - D. Invoices
- X. Dispute Resolution
- XI. Reservation of Rights and Claims
- XII. Retention of Privileges
- XIII. Confidentiality
- XIV. Notices
- XV. Modification and Termination
- XVI. Effective Date
- XVII. Duration
- XVIII. Limitation
- XIX. Severability

## Appendix B

### PROVISIONS OUTLINE 6

#### MEMORANDUM OF AGREEMENT BETWEEN THE NATURAL RESOURCE TRUSTEES AND HONEYWELL INTERNATIONAL REGARDING THE LCP SITE, BRUNSWICK, GEORGIA (2003)

- I. Introduction and Authority
- II. Purpose
- III. Cooperative Assessment Activities
  - A. General
  - B. Organization
  - C. Proposing and Selecting Cooperative Studies
  - D. Retention of Persons Performing Cooperative Studies
  - E. Data Collection, Dissemination, and Retention
  - F. Documentation of Cooperative NRDA Activities
  - G. Modifying Cooperative Studies
  - H. Finalizing Cooperative Studies
  - I. Interpreting Data from Cooperative Studies
    - 1. Consensus
    - 2. Independent Interpretation and/or Conclusions
  - J. Withdrawing from Cooperative Studies
  - K. Challenges to Completed Cooperative Studies
- IV. Independent Studies
- V. Funding
  - A. Cooperative Studies
  - B. Assessment Costs
  - C. Undisputed Costs and Payment by Responsible Party
  - D. Disputed Costs
  - E. Costs of Independent Studies and Independent Interpretations and/or Conclusions
  - F. Non-waiver by Responsible Party
- VI. Public Outreach Activities
- VII. Reservation of Rights and Claims
- VIII. Dispute Resolution
  - A. Written Notice
  - B. Information Resolution
  - C. Formal Resolution
  - D. Effect of Dispute Regarding an On-Going Cooperative Study
  - E. Trustees' Decision to Conduct an Independent Study or Develop an Independent Interpretation and/or Conclusion
- IX. Payment of Funds
- X. Correspondence and Notification
- XI. Modification of this MOA
- XII. Duration of this MOA
- XIII. Termination of this MOA
- XIV. Access
- XV. Indemnification
- XVI. Confidentiality and Publication Restrictions
- XVII. General Provisions
  - A. Parties Bound
  - B. No Assumption of Liability by Government Entities

## **Appendix B**

- C. Third Party Rights
- D. No Agency Relationship
- E. Severability
- F. Limitation
- G. Effective Date
- H. Signatures

## **Appendix B**

### **PROVISIONS OUTLINE 7**

#### **FORMER INDIAN REFINERY NATURAL RESOURCE DAMAGE ASSESSMENT FUNDING AND PARTICIPATION AGREEMENT (2004)**

- I. Parties
- II. Trustee Authority
- III. The Natural Resource Damage Assessment Process
- IV. Administrative
- V. Acceptance and Approval of Submission
- VI. Data Sharing
- VII. Stipulations
- VIII. Reservation of Rights and Claims
- IX. Covenants Not to Sue
- X. Funding
- XI. Modification and Termination
- XII. Procedure Upon Disagreements
- XIII. Survival
- XIV. Tolling Agreement
- XV. Effective Date
- XVI. Trustee Contact Personnel
- XVII. Indemnification
- XVIII. Severability
- XIX. Confidentiality
- XX. Other Claims
- XXI. Public Involvement
- XXII. Signatures
- XXIII. Statement of Work

**APPENDIX C: FULL TEXT OF SELECTED NRDA AGREEMENTS<sup>2</sup>**

1. Interim Cooperative Assessment Funding Agreement for the Diamond Alkali Superfund Site, New Jersey (2008)
2. Interim Cooperative Assessment Funding and Agreement for the Diamond Alkali Superfund Site, New Jersey and Interim Cooperative Assessment Funding Agreement for the Lower Passaic River Portion of the Diamond Alkali Superfund Site, New Jersey (2008)
3. Amended Memorandum of Agreement Between the Natural Resource Trustees and the Dow Chemical Company Governing Cooperative Natural Resource Damage Assessment Activities (2008)
4. Former Indian Refinery Natural Resource Damage Assessment Funding and Participation Agreement (2004)

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<sup>2</sup> Appendix C has been posted as a separate document due to its very large size (10 MB).

**APPENDIX D: DESCRIPTION OF THE AD-HOC INDUSTRY NATURAL RESOURCE DAMAGE GROUP INDUSTRY/TRUSTEE STANDING COMMITTEE**

In 1999, the Ad-Hoc Industry Natural Resource Damage Group (“Group”) established an Industry/Trustee Standing Committee in order to provide a focal point and clearinghouse within the industrial community for communications and activities on NRD issues (under CERCLA, OPA and other federal and state laws) between the industrial community and federal and state trustee departments and agencies. The Committee provides a “ready mechanism” for trustees to identify and/or access people and other resources within the industrial community as needed for specific activities, including workshops and meetings. It also provides an efficient mechanism for information requests to and from the industrial community and for communication and practice exchange among the parties. An underlying objective of the Committee is to conserve and optimize people and time resources (especially since the same people are often involved in these communications and activities).

The industry representatives of the Committee represent a small subset of the Group’s members in a broad range of industrial sectors. Key national industry trade groups are also represented on the committee, by invitation. Currently, there are seven companies and five industry trade groups that form the Committee. The companies are: BP; Chevron Corporation; Exxon Mobil Corporation; Freeport-McMoran Copper & Gold, Inc. (FMI); GE; Occidental Petroleum Corporation; and US Steel. Other companies that have participated on this committee in the past include: Alcoa, Boeing, DuPont and others. The trade associations are: American Chemistry Council, American Petroleum Institute, Chamber of Commerce of the United States, and National Mining Association. Most recently, the National Association of Manufacturers has been invited to participate in this Committee. Meetings of the Committee are typically held 2-3 times a year and include representatives from US DOI, US DOC/NOAA, US DOD and US DOE and sometimes also US DOA and US EPA.

The Committee has established and maintains a Practice Exchange website ([www.nrdonline.com/exchange/](http://www.nrdonline.com/exchange/)) which serves as a mechanism for facilitating communication between natural resource damage trustees, the industrial community, and others engaged in the conduct of natural resource damage assessments and related matters, and which provides a focal point for exchanging information on NRD-related meetings and selected NRDA practice issues.



Further information can be obtained by contacting Barbara Goldsmith ([bjg@nrdonline.com](mailto:bjg@nrdonline.com)), who oversees the Group's program.