

MEMORANDUM OF AGREEMENT

AMONG

**the State of New Jersey, Department of Environmental Protection, Office of Natural
Resource Restoration,
National Oceanic and Atmospheric Administration,
and the
United States Fish and Wildlife Service**

**REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT and RESTORATION
FOR THE**

Diamond Alkali Superfund Site and Environs

I. INTRODUCTION & PURPOSE

This Memorandum of Agreement (Agreement) by and among the State of New Jersey, Department of Environmental Protection (NJDEP) and its Commissioner, by and through the New Jersey Office of Natural Resource Restoration (NJONRR), the National Oceanic and Atmospheric Administration (NOAA), and the United States Department of the Interior, acting through the United States Fish and Wildlife Service (USFWS), (collectively referred to as the Trustees), is entered into to ensure the coordination and cooperation of the Trustees in addressing their respective natural resource damage and restoration concerns and responsibilities arising from the release of hazardous substances at and from the Diamond Alkali Superfund Site and Environs (Site). The Trustees agree that the scope of their coordination and cooperation may include, to the extent deemed appropriate by the Trustees, any and all hazardous substances (together with their sources) which are considered to impact or influence either Site related injuries to natural resources, or restoration options related to such injuries.

Activities of the Trustees covered under this Agreement include, but are not limited to: (1) the assessment of natural resource damages (hereinafter NRDA) for injury to, destruction of, or loss of natural resources and natural resource services (hereinafter injury or injured natural resources); (2) restoration planning and implementation; and (3) coordination of any activities undertaken pursuant to this Agreement with response, remedial or corrective actions carried out by or under the direction of other federal and state agencies. This Agreement provides a framework for coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees in furtherance of their mutual goal of restoring

injured natural resources.

It is the express desire of the Trustees to achieve meaningful and appropriate restoration as expeditiously as possible. Towards this end, the Trustees shall work together to explore all avenues and approaches to try to implement restoration as promptly as can be achieved.

II. AUTHORITY

The Trustees enter into this Agreement in accordance with the natural resource damage provisions under Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9607(f), and other applicable federal and state law and authority (hereinafter other applicable law) including, but not limited to, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as amended, 40 C.F.R. Part 300, and, to the extent appropriate and elected for use by the Trustees, the Natural Resource Damage Assessment Regulations, as amended, at 43 C.F.R. Part 11; N.J.S.A. 13:1D-9f and 9q; and the New Jersey Spill Compensation and Control Act, N.J.S.A. 58:10-23.11 et seq.

This Agreement is intended to cover, but is not limited to, natural resources as defined under the authorities cited above and other applicable law, belonging to, managed by, controlled by, or appertaining to the Trustees at or related to, or affected by the Site.

III. Trustees

. **Natural Resource Trustees.** The Trustees to this agreement have shared trusteeship over the natural resources of the Site pursuant to Subpart G of the NCP, 40 C.F.R §300.600, as amended, and other applicable law. The following officials or their designated representatives act on behalf of their respective agency for all activities under this Agreement:

. The Commissioner of the New Jersey State Department of Environmental Protection

. The Regional Director of the United States Fish and Wildlife Service, Region 5

. The Director of the Office of Response and Restoration for the National Oceanic and Atmospheric Administration

. **Other Natural Resource Trustees.** Notwithstanding any other provision of this Agreement, any other natural resource trustee, who is not a Trustee signatory to this Agreement and who has an interest with respect to any natural resource impacted or affected by the Site shall

not be precluded from participating in the NRDA activities or any other natural resource trustee activities under this Agreement. Such other Trustees may include, but are not limited to, tribal governments, other federal agencies, or affected trustee agencies from other states, which may be added by addendum to this Agreement, as necessary and appropriate under applicable law.

. **Advisors.** As determined to be appropriate by the Trustees, or as required by applicable law, the Trustees will coordinate with, and seek the advisory participation of appropriate federal and state agencies and departments, and the public.

IV. NATURAL RESOURCE TRUSTEE COUNCIL

. **Composition.** The Trustees recognize the importance of coordinating their efforts in order to effectively and efficiently address their respective natural resource concerns and responsibilities under applicable law. Accordingly, the Trustees hereby agree to create the Diamond Alkali Environs Natural Resource Trustee Council (Trustee Council). Each Trustee, as specified herein shall designate one primary voting representative to the Trustee Council and one alternate representative to act in the absence of the primary voting representative. In addition, the U.S. Department of Justice, the New Jersey Department of Law and Public Safety and in-house counsel for each of the Trustees, may provide one delegate in a legal/consultative role, who shall not be a member of the Trustee Council, but who shall nonetheless be able to attend all meetings of, or organized by, the Trustee Council. Each Trustee may, by written notification to all other Trustees, change the designated delegate and/or alternate.

. **Communications.** To the extent not designated herein. within ten (10) days of the execution of this Agreement each Trustee shall notify all of the Trustees of the name(s), address(es), phone number(s), E-Mail addresses, and facsimile number(s) of the Trustee's primary and alternate delegates to the Trustee Council who shall receive, and shall be responsible for on behalf of that Trustee, all correspondence and communications on behalf of such Trustee.

. **Meetings.** Any Trustee may, upon reasonable notice, call a meeting of the Trustee Council to be conducted either in person or by telephone conference call. Such meetings shall generally be held in conjunction with other set meetings among the Trustees.

. **Decisionmaking.** The three members of the Trustee Council shall have equal authority, and all decisions under this Agreement shall be by unanimous agreement of all Trustee Council voting representatives.

. **Dispute Resolution.** In the event of a dispute involving any decisions under this Agreement, the Trustee Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among the Trustees involved in the dispute and

consensus by the Trustee Council as a whole. If unanimous consent still cannot be reached after good faith discussions the matter shall be elevated to the next management level within the Trustees for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. The Trustees agree that decisionmaking deliberations will focus upon the Trustees mutual goals of restoration of injured natural resources, rather than upon independent control or trusteeship over the affected natural resources.

. **Duties, Objectives, and Authorities.** In accordance with applicable law, the Trustees hereby authorize the Trustee Council to carry out the following duties:

- . To undertake appropriate NRDA and restoration activities at or related to the Site;
- . To carry out studies, prepare reports, and collect information that the Trustee Council determines are necessary and relevant to the NRDA;
- . To share information with and consult with each other as is determined to be appropriate and consistent with this Agreement;
- . To coordinate activities undertaken pursuant to this Agreement with response, remedial or corrective actions carried out by other federal and state agencies, as appropriate;
- . To develop, consider and evaluate plans for the restoration of injured natural resources;
- . To participate in removal, remedial, corrective or other actions under the authority of EPA or other federal or state agencies in accordance with applicable law;
- . To support the Trustees efforts to recover damages for injuries to natural resources from potentially responsible parties (PRPs);
- . To plan, arrange for, oversee, or undertake restoration;
- . To authorize individual Trustees to contract as deemed necessary to achieve these objectives;
- . To coordinate and/or carry out such other actions as may be necessary and appropriate to achieve the purposes and objectives of this Agreement and to address the natural resource damage concerns and responsibilities of the Trustees.
- . To encourage public participation and involvement in a manner consistent with applicable law and regulation.

V. PRP FUNDING

. If PRP funding of NRDA, restoration or response activities becomes available, the Trustee Council may enter into an agreement with the PRP(s) to determine the terms of monetary disbursement and PRP participation in Trustee Council activities. Each Trustee agrees to cooperate in the administration of any funding source or sources that may become available to the Trustees from PRPs. Such funds shall be administered through the Trustee Council established pursuant to this Agreement.

VI. COORDINATION & NOTIFICATION

. The Trustees recognize and agree that their interests in the recovery of claims for natural resource damages associated with the Site are related and have agreed to coordinate negotiation and, if necessary, litigation of their claims and damages that arise out of the Site. Towards that end, the Trustees agree to notify and consult with each other of and concerning all activities, events, or decisions that may affect the NRDA process or the recovery of natural resource damages for injuries to natural resources at, from or related to the Site. The Trustees intend by this Agreement to communicate with each other on, among other things, the following:

- . Plans or proposals for NRDA or for restoration;
- . Response, removal or remedial actions that any Trustee plans to take with respect to the Site;
- . Developments in litigation with the PRPs;
- . Any communications any Trustee may have, or anticipates having, with any PRP concerning the settlement or other resolution of any Trustee's claim for natural resource damages at, from or related to the Site.

. The Trustees shall provide information to each other concerning such matters as promptly as practicable, with the goal of enabling the other Trustees to comment on any issues they deem significant. The Trustees further agree to provide copies of any agreements or other documents reflecting settlement or other disposition of claims, including quasi-public claims, involving or related to natural resource injuries arising from or related to the Site. If a Trustee is found to have failed to provide any of the above for any reason, that Trustee shall no longer be a party to this Agreement unless all remaining Trustees request in writing within ten days (10) that such

Trustee remain a Trustee.

VII. GENERAL PROVISIONS

. **Reservation of Rights and Authority.** Nothing in this Agreement is intended or shall be construed to be an admission by the Trustees in any dispute or action between the Trustees or between the Trustees and a third party. Nothing in this Agreement is intended or shall be construed as a waiver by the Trustees of any claims or defenses in any legal action, or of any other rights or remedies. This Reservation of Rights applies to comments provided by all Trustees to this Agreement on any documents prepared by, or exchanged among, the Trustees in connection with this Agreement.

. Neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any legal responsibility under federal, state or other applicable law, to protect, restore, or enhance any natural resources associated with the Site over which any other Trustee or non-party asserts trusteeship, standing or jurisdiction. Furthermore, neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any liability for damage or injury (which may be shown to have occurred by the NRDA activities performed under this Agreement) to any natural resources associated with the Site over which any other Trustee or non-party asserts trusteeship, standing or jurisdiction.

. Nothing in this Agreement is meant to imply, or operate in a manner, that any natural resource trustee with an interest in the Site, whether a Trustee under this Agreement or not, is in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources of the Site.

. Nothing in this Agreement shall be construed as a waiver of, or foreclosing the exercise of, any rights, powers, remedies or privileges of the individual Trustees now or hereafter existing at law or in equity, by statute or otherwise.

. The parties to this agreement recognize that New Jersey has independent authority under State law to seek or order the restoration of natural resources or payment of natural resource damages, notwithstanding pending federal actions. Nothing in this agreement is meant to imply or operate in a manner that is in any way abrogating or ceding the right of NJDEP to address natural resource injuries and/or damages to the State's natural resources, including but not limited to ground water. Ground water resources located within the boundaries of federal facilities, which support or otherwise are hydrologically connected to joint trustee surface

resources or which otherwise impact surface water, remain subject to State and federal co-trustee jurisdiction.

. **Limitation of Authority.** No Trustee is authorized to enter into any settlement on behalf of any other Trustee. No Trustee is authorized to represent another Trustee in any litigation that may be commenced by another Trustee or Trustees. Nothing in this Agreement shall be construed as obligating any of the Trustees to expend any funds in excess of appropriations or other amounts authorized by law.

. **Third Parties.** This Memorandum of Agreement is not intended to, nor shall it, vest rights in persons who do not represent the Trustees to this Agreement or who are not Parties to this Agreement.

. **Effective Date, Amendment and Termination.** This Agreement shall be effective when executed by all of the Trustees and may not be amended except by written agreement of all the Trustees. This Agreement can be executed in one or more counterparts, each of which will be considered an original document. This Agreement shall continue in effect until the Trustees determine that the restoration plan or plans implemented under this agreement have been completed, unless terminated before that time or extended beyond that time by written agreement of all the Trustees. However, any Trustee may terminate its participation in the Agreement upon giving thirty (30) days written notice to all other Trustees or as otherwise provided for herein. The withdrawal of any Trustee to this Agreement for whatever reason, shall not affect the subsequent validity of this Agreement among the remaining Trustees. A Trustee that has withdrawn from this agreement shall have no further obligations under this agreement except for the obligations to continue to coordinate activities to the greatest extent practicable, and to expend unobligated funds recovered for natural resource damages solely to restore injured natural resources under their trusteeship, as mandated by Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9607(f).

IN WITNESS WHEREOF the Trustees have executed this Agreement on the dates attested to below.

**MEMORANDUM OF AGREEMENT
AMONG THE
New Jersey Department of Environmental Protection
National Oceanic and Atmospheric Administration
United States Department of the Interior
REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION
FOR THE
Diamond Alkali Superfund Site and Environs**

IN WITNESS WHEREOF the Trustees have executed this Agreement on the dates attested to below.

BY: _____

Craig R. O'Connor
Deputy General Counsel
National Oceanic and Atmospheric Administration

11/7/02
Date

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BY: _____

ACTING

Dr. Mamie A. Parker
Regional Director
United States Fish and Wildlife Service
For the United States Department of the Interior

11-20-02
Date

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BY: _____

Marc A. Matsil
Assistant Commissioner
New Jersey Department of Environmental Protection

3/20/03
Date