

SAMPLE - DRAFT COOPERATIVE INJURY ASSESSMENT AGREEMENT

This Agreement is between [_____] (referred to as "trustees") and [_____] (referred to as "responsible party(ies)"). The trustees and responsible party(ies) are hereafter collectively referred to as the "Parties." This Agreement arises from the [_____] ("Incident").

The purpose of this Agreement is to provide the framework for a cooperative injury assessment to facilitate resolution of any natural resource damage claims arising from the Incident and to minimize the transaction costs associated with such claims. For the purposes of the Agreement, "injury assessment" is defined to encompass those activities related to the determination and quantification of injuries resulting from the Incident. Although this Agreement is drafted in terms of the injury assessment, the Parties also intent to explore the potential for continuing cooperative work throughout the development and implementation of a final restoration plan to resolve the natural resource damage claims arising from this Incident.

Signature on the agreement line provided below shall constitute acceptance of the Responsible Party(ies) and the Trustees. {Written concurrence is necessary to permit all Parties to continue the cooperative injury assessments already begun.}¹ The terms and conditions of this Agreement are as follows:

- I. Cooperative Studies.** The Parties will attempt to reach consensus on the necessity of, selection of, design of, and protocols for performing studies relating to the injury assessment for the Incident.
 - A. Process.** The Parties may propose studies. Any proposed study that all Parties agree is reasonable and appropriate shall be deemed a "Cooperative Study." The study plan for each Cooperative Study is or will be attached to this Agreement and will be subject to all of its terms and conditions.
 - B. Funding.** The Responsible Party(ies) shall fund all Cooperative Studies through to completion, unless the Parties agree to the contrary or the study design calls for discontinuation upon the occurrence of a specified event. The parties shall agree on specific procedures for disbursement of funds.

¹ This provision may be used when the Parties have begun cooperative work before the execution of this Agreement.

C. Retention of Persons Performing Cooperative Studies.

1. *Jointly Designated Experts.* In order to promote a cooperative injury assessment, the Parties may jointly agree on the retention of "Jointly Designated Experts" to perform all or part of a Cooperative Study. Prior to the completion of the Injury Assessment, any person designated as a Jointly Designated Expert shall not be retained separately by, and shall not otherwise perform services on behalf of, any Party, with respect to the Incident. The Parties may consult with such persons at scheduled meetings in which all the Parties shall have an opportunity to participate. Neither the Parties nor any persons retained by them shall engage in any *ex parte* communications (other than routine, non-substantive communications) regarding the Incident with Jointly Designated Experts, unless all Parties not party to the communication consent. Any and all contracts for Jointly Designated Experts shall prohibit any such *ex parte* communications. The Parties shall adopt such other reasonable strictures and controls as are appropriate to protect the objectivity and fairness of Jointly Designated Experts.
2. *Separately Retained Experts.* The Parties may separately retain experts relating to the incident. The Parties may elect to conduct one or more Cooperative Studies with the use of Separately Designated Experts. The Trustees may propose the use of their own Separately Retained Experts as part of a proposed Cooperative Study and may propose that the cost of such experts be funded by the Responsible Party(ies) as part of such proposal.

D. Data Collection. All parties may be present during data collection for Cooperative Studies. The parties agree to give advance notice by telecopy to the Study Contact (defined below) of data collection activities for Cooperative Studies. All data collected for Cooperative Studies shall be fully and freely shared among the Parties s soon after it is collected as is reasonably practical, and in any event no later than it is transmitted to any single Party.

E. Interpretation. The Parties will attempt to reach consensus on the interpretation of, and conclusions to be drawn from, data collected during Cooperative Studies. Each Party expressly reserves the right to produce and present separate and independent interpretations and conclusions.

- F. Modification of Cooperative Studies.** The Parties may agree to modifications of study plans for Cooperative Studies. The Study Contact designated by the Trustees pursuant to Paragraph VIII.B. may agree to modifications on behalf of all of the Trustees.
- G. Withdrawal from Cooperative Studies.** The Responsible Party(ies) shall not withdraw from its obligation to fund a Cooperative Study so long as the study is conducted consistently with the agreed study plan and any agreed modifications thereto.
- H. Use.** Unless advance written consent is provided by all Parties, Cooperative Studies shall be used only as part of this overall cooperative injury assessment, and in an effort to achieve a negotiated settlement of the natural resource damage claims arising from the Incident. The Parties agree that any result in a Cooperative Study that is not challenged by such Party in writing within 30 days of receipt of the final report shall be binding upon such Party in any judicial or administrative proceeding between or among the Parties relating to the natural resource damage claims arising from the Incident. The Parties also agree that the final results of any Cooperative Study, including interpretation, shall be admissible in any judicial or administrative proceeding between or among the Parties relating to the natural resource damages arising from the Incident, regardless of whether any Party has challenged such results. The Parties further agree not to challenge the reasonableness or appropriateness of the study designs or protocols of any Cooperative Study in any such proceeding. The Parties reserve the right to challenge the admissibility of Cooperative Studies an any judicial or administrative proceeding other than one for natural resource damages arising from the Incident.
- I. Subsequent Use of Experts.** Any Party may call a Jointly Designated Expert as a witness in any judicial or administrative proceeding relating to natural resource damages arising from the Incident, to testify regarding the conduct of, and conclusions reached, in performing such study. In addition, any Party may seek to retain, as a testifying or consulting expert, any Jointly Designated Expert, and no Party shall object to the retention or testimony of such person on the basis of such person's prior participation as a Jointly Designated Expert.

II. *Independent Studies.* The Parties expressly reserve the right to perform independent injury assessment studies ("Independent Study(ies)").

A. *Notice.* At least ___ days prior to the commencement of any Independent Study conducted by or on behalf of a Party, such Party shall provide detail work plans and protocols for such Independent Study to the other Parties. The Parties shall also provide prompt notice of any changes made to the scope of work of any Independent Study in progress.

B. *Data Collection.* All Parties may be present during data collection for Independent Studies. The Parties agree to as reasonable advance notice as circumstances allow of data collection activities for Independent Studies. All data collected for Independent Studies shall be fully and freely shared among the Parties as soon after it is collected as is reasonably practical, and in any event no later than it is transmitted by the analyst to the Party sponsoring the Independent Study.

C. *Final Reports.* Any Party conducting an Independent Study shall provide copies of any final report relating to such study within 7 days of its completion.

D. *Use.* The Parties agree and stipulate that failure to comply with the requirements of Sections II.A. and II.B. with respect to any Independent Study shall result in a bar to the admissibility and use of any such Independent Study in any judicial or administrative proceeding between or among the Parties for natural resource damages relating to the Incident.

III. *Refused Studies.* The requirements, prohibitions, and limitations and agreements of Sections II.B. through II.D. shall not apply to any study proposed by the Trustees for funding as a Cooperative Study that the Responsible Party(ies) refuses to fund, and that the Trustees undertake at their own expense ("Refused Study").

IV. *Non-Party Studies.* A "Non-Party Study" is any study that was not conducted directly or indirectly by, on behalf of, or with the input of any of the Parties. Agencies of Federal, State, or tribal Government other than the Trustees are not Parties to this agreement for purposes of this definition. The Parties reserve the right to use Non-Party Studies in any judicial or administrative proceeding, and to object to such use.

- V. Disclosure of Experts/Conflicts of Interest.** The Parties agree that they will identify any outside experts that they intend to retain with respect to natural resource injury assessment (for purposes of giving testimony, conducting studies, or otherwise), including Separately Retained Experts as described in Paragraph I.C.2. above, at least 7 days prior to formalizing such retention or, in the case of experts already retained, within 3 days of signing this Agreement. The Parties agree that they will require the disclosure of potentially conflicting relationships by the experts as part of their employment, which disclosed information shall be shared among all Parties, and further agree to require in all contracts for expert services reasonable and appropriate strictures and controls to prevent the transfer of confidential information.
- VI. Dispute Resolution.** The Parties may jointly designate a mediator or special master, with expertise in natural resource damage actions, for assistance in resolving disputes over issues upon which the Parties cannot agree. Such involvement by the designee shall not result in any final or binding decision on any such issue, but rather shall be in the form of mediation assistance to help the Parties reach mutual agreement on such disputed issues. The costs for any such mediator or special master shall be shared equally between the Trustees and the Responsible Party(ies).
- VII. Public Participation.** In compliance with applicable law, the Trustees will provide public notice and solicit public review and comment during certain phases of the injury assessment process, including the assessment planning and/or restoration planning phases, and prior to finalizing any proposed settlement. In the event that the Trustees and the Responsible Party(ies) have entered agreements that propose activities subject to public notice, review, and comment, the Parties agree that none of the activities shall be initiated until the appropriate notice, review, and comment requirements are fulfilled unless a time-sensitive or emergency situation exists. In such cases, certain studies may go forward pending the public notice, review, and comment process.

VIII. Notice.

A. General. Except as provided in Paragraph VIII.B. below, Notice under this Agreement shall be given to the following persons on behalf of the Parties:

1. *As to the Responsible Party(ies):*

2. *As to the individual Trustees:*

_____, etc.

B. Study Contacts. The Trustees shall jointly designate a single Study Contact for each Cooperative Study who shall be authorized to act on behalf of all of the Trustees with respect to that particular Cooperative Study.

IX. Modification. This Agreement may be modified or supplemented through appendices upon agreement in writing by all Parties.

This Agreement may be executed in one or more counterparts, all of which shall be considered an original. The Effective Date of this Agreement shall be the lat date of execution of any counterpart hereto.

The Parties to date have acted in good faith, to the Parties' collective benefits, and look forward to continuing to work among themselves under the framework set forth above.

FOR THE RESPONSIBLE PARTY(IES)

_____ Date

FOR THE TRUSTEE(S)

_____ Date