

JOINT COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT  
AGREEMENT FOR THE TESORO/HAWAII SPM HOSE OIL SPILL

**I. PARTIES**

This Agreement is between the State of Hawaii, acting through the Department of Health and the Department of Land and Natural Resources (State); the National Oceanic and Atmospheric Administration (NOAA); the United States Department of the Interior, acting through the U.S. Fish and Wildlife Service (Interior); the Department of Defense, acting through the Department of the Navy (Navy); and Tesoro Hawaii Corporation (Tesoro). The State, NOAA, the Navy and Interior shall be collectively referred to as the "Trustees." Tesoro and the Trustees are collectively referred to as the "Parties." Interior shall serve as the designated "lead administrative trustee" and primary point of contact for Tesoro.

**II. PURPOSE**

The purpose of this Agreement is to provide the framework for a cooperative assessment to facilitate resolution of any natural resource damage claims arising from the release of oil from the single point mooring hose offshore of Barbero Point, Oahu, Hawaii occurring on or about August 24, 1998 (the Spill). The Trustees enter into this Agreement in furtherance of their responsibilities to assess and, if appropriate, assert claims for damages as the result of injuries to natural resources and resource services, including, but not limited to, the restoration, rehabilitation, replacement, or acquisition of the equivalent of injured natural resources and/or the services provided by such resources and reasonable damage assessment costs.

The Parties agree that early resolution and settlement of the natural resource damage claims are desirable and in the best interests of the Parties.

This Agreement cancels and supersedes the September 17, 1998 Joint Assessment letter agreement and the letter dated October 15, 1998 which extended the time period provided in the earlier letter for Tesoro's initial funding for NOAA, Interior, and the State as to each of those Trustees when they sign this Agreement.

### III. AUTHORITY

The Trustees have authority to pursue natural resource damage assessment and restoration activities pursuant to state and federal law, including, but not limited to, the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq., the Oil Pollution Act Natural Resource Damage Assessment Regulations, 15 C.F.R. Part 990, (OPA Regulations), the National Contingency Plan, 40 C.F.R. Part 300, Executive Order 12777, and Hawaii Revised Statutes Chapter 128D.

### IV. BACKGROUND

On or about August 24, 1998, Tesoro spilled a yet to be determined amount of oil, which Tesoro estimates to be no more than 117 barrels, into the Pacific Ocean from the single point mooring located approximately 1.5 miles offshore of Barbers Point, Oahu, Hawaii. In early September 1998, oiled seabirds began showing up at seabird colonies and on the beaches on the Islands of Kauai and Oahu. Oil samples from the feathers of some of those seabirds matched the oil spilled at the single point mooring. Tarballs also washed ashore on Kauai.

Following the Spill, response and clean-up operations were conducted, in which the Parties participated.

The Trustees are collecting and assessing information and data related to actual or potential injuries to natural resources. Based on a preliminary assessment of data and information gathered to date, the Trustees have determined that the Spill resulted in injuries to natural resources and/or resource services, that the response actions did not adequately address the injuries, and that restoration actions exist to address these injuries. Consequently, the Trustees intend to conduct restoration planning.

### V. SCOPE

The Parties agree that a cooperative effort to determine the nature of injuries to natural resources and/or the services provided by such resources (injury determination); to quantify such injuries (injury quantification); and to conduct restoration planning and implementation (restoration) may be cost-effective, avoid duplication, and effectively use limited personnel resources. These three general categories of activities may be referred to as Phases I through III. This Agreement covers Phases I & II. Based on the results and experiences of the cooperative effort in Phases I & II, the Parties may enter into a

written agreement for a cooperative effort for Phase III. The Parties may stipulate to the nature and extent of injuries or lost services. Any stipulation must be in writing, signed by the Parties or their designees and attached to this Agreement.

The Parties intend to follow the procedures outlined in the OPA regulations, 15 C.F.R. Part 990, and agree that, where practical, they will seek to coordinate Phase I and Phase II activities so as to avoid duplication.

#### **A. PHASE I INJURY ASSESSMENT - INJURY DETERMINATION**

The injury determination phase of the injury assessment process includes the collection, preservation, and analysis of data and/or samples required to identify pathways of exposure; the identification of potentially affected resources and/or resources services; and the selection of injured resources to be quantified. See 15 C.F.R. 990.51.

The Parties shall attempt to reach consensus on the necessity, selection, design and protocols for performing work related to the injury determination phase. The Parties have identified the following categories for study: 1) birds; 2) marine environment (including shoreline, intertidal, subtidal and water column); 3) marine mammals and 4) lost human use. The Parties may jointly identify additional study categories as appropriate. The Parties may form a Technical Work Group (TWG) with respect to any of these categories, to be led in each case by a Trustee representative. Each TWG will be primarily responsible for coordinating all cooperative activities among the Parties with respect to the relevant study category.

The Parties may propose studies. Any proposed study that all Parties agree is reasonable and appropriate shall be deemed a "cooperative study." The final workplan or description of activities for each cooperative study, when agreed to, will become a part of this Agreement and will be subject to all of its terms and conditions.

#### **B. PHASE II INJURY ASSESSMENT - QUANTIFICATION**

The quantification phase of the injury assessment process calculates the degree and spatial and temporal extent of injuries identified in the injury determination phase. See 15 C.F.R. 990.52.

The Parties shall attempt to reach consensus on the quantification approach for each injury. The Parties may work through any existing TWGs for this phase or may establish new

TWGs. Any approach that all Parties agree is reasonable and appropriate shall be deemed a "cooperative study." The final study plan or description of activities for each cooperative study, when agreed to, will become part of this Agreement and will be subject to all of its terms and conditions.

### C. TECHNICAL WORKING GROUPS

If the Parties utilize a TWG, they shall designate representatives to each initial TWG in writing to each other within ten (10) working days after the effective date of this Agreement or within ten (10) working days of the date upon which the Parties agree to a cooperative study, whichever is later. The Parties shall attempt to minimize duplication of the expertise of TWG members in order to reduce costs. The membership of a TWG can be expanded or reduced as necessary to achieve its purposes. Each TWG shall designate a lead administrative person to serve as a central point of contact for that TWG's activities.

## VI. DATA SHARING

Where the product of an agreed-upon cooperative study is the collection and/or compilation of data (including samples), the generation of a map, or the development of photographs or videos and said data, maps, and photographs or videos have already been collected and/or compiled, generated, or developed, they shall be exchanged among the Parties within ten (10) working days of the effective date of this Agreement or within ten (10) working days of the date upon which the Parties agree to the cooperative study, whichever is later. Where these products are yet to be collected and/or compiled, generated, or developed, they shall be exchanged among the Parties within fifteen (15) calendar days of the date upon which they are compiled, generated, or developed.

Where the product of an agreed-upon cooperative study is a report or an analysis, a final draft of such report or analysis shall be delivered to the 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 final draft and the final report or analysis, shall be placed in the administrative record maintained by the lead administrative trustee for this matter.

Where an agreed-upon cooperative study involves field work, the Party conducting the field work shall provide the other Parties with reasonable advance notice so that they may arrange and coordinate observation of such field activities. The Parties

shall seek to limit the number of "observers" of field activities to those that are necessary.

#### **VII. INDEPENDENT FINDINGS AND ACTIVITIES**

The Parties will use their best efforts to reach consensus on the interpretation of the data resulting from any cooperative study. The Parties expressly reserve the right to disagree on the interpretation of the data resulting from any cooperative study and to produce separate and independent findings and conclusions. The Parties expressly reserve the right to perform independent natural resource damage assessment activities other than those which are agreed upon and funded in accordance with this Agreement. The Parties agree, however, that each shall be barred from introducing new or different data resulting from such independent activities to challenge the validity of the data collected or compiled pursuant to an activity agreed upon and funded under this Agreement in either a judicial or administrative proceeding which involves any of the Trustees and Tesoro.

#### **VIII. FUNDING**

It is the intent of the Parties that the Trustee activities covered by this Agreement shall be handled on a cost/expense reimbursable basis. However, if the Trustees require advance payment in order to engage necessary consultants, Tesoro will work with the Trustees to develop reasonable advance payment arrangements.

##### **A. Phase I & II**

Tesoro shall fund the reasonable costs and expenses resulting from the activities of the Trustees and their contractors or others acting at their direction and on their behalf, including the reasonable cost of Trustee staff time. Tesoro will not withdraw from its obligation to fund an agreed-upon cooperative study so long as the study is conducted consistent with the agreed upon study plan and any agreed modification thereto unless the Parties agree to the contrary or the study design calls for discontinuation upon the occurrence of a specified event. If Tesoro refuses to fund the agreed-upon cooperative study, the Trustees reserve the right to fund the study and to seek reimbursement for such costs.

The Parties recognize that some of the activities which may be agreed to in a cooperative study may have been commenced by the

Trustees and/or by Tesoro or their contractors. Tesoro agrees to reimburse, pursuant to the provisions discussed below, the Trustees for the activities required by a cooperative study which have been, or are being, performed by the Trustees, whether by their own personnel or through contractors or others acting at their direction and on their behalf. For those cooperative studies or portions of such studies which the Parties agree that Tesoro or its contractors will perform, Tesoro shall be entirely responsible for funding said activities.

#### **B. Reasonable Damage Assessment Costs**

To the extent not covered by Section VIII.A. above, Tesoro agrees to reimburse the Trustees for reasonable assessment costs, as that term is defined at 15 C.F.R. 990.30, for the period commencing August 24, 1998 until termination or expiration of this Agreement.

Tesoro agrees to provide funding to reimburse Interior (pursuant to the terms of this Agreement) for its reasonable costs and expenses under this Agreement in an initial funding amount of \$50,000. The initial funding amount is agreed upon in order to allow Interior to set up a reimbursable account and to avoid any potential for violation of the Anti-Deficiency Act. Interior will notify Tesoro in writing within thirty (30) calendar days if its costs reach ninety percent (90%) of this initial amount and if Interior will be requesting additional funding. Interior and Tesoro agree to review the costs actually incurred and to work in good faith to determine whether the amount listed above should be adjusted. Notwithstanding the foregoing, nothing herein shall be construed to limit the obligation of Tesoro to the above-specified initial funding for Interior.

#### **C. Documentation of Trustee Costs**

Each Trustee may periodically submit to Tesoro an accounting of costs incurred pursuant to Section VIII.A. & B. above. The accounting shall consist of a summary of the costs incurred with supporting documentation as to each Trustee's personnel costs; reasonable assessment-related administrative and legal costs; invoices from contractors; and other miscellaneous expenses (e.g., overnight mail, supplies, travel). Each Trustee shall submit a final summary of its costs within sixty (60) calendar days after the earlier of 1) completion of the work covered by this Agreement or 2) withdrawal by a Trustee or termination of this Agreement in accordance to Sections X, XIV or XVI below.

Tesoro shall reimburse each Trustee for its reasonable costs and expenses within forty-five (45) calendar days after receipt of an itemized accounting in accordance with the documentation instructions in the preceding paragraph and the payment instructions provided by each Trustee. These accountings should be directed to the following representative of Tesoro:

Dennis Saito  
Tesoro Hawaii Corporation  
733 Bishop Street, Suite 2700  
Honolulu, HI 96813

Promptly upon receipt of funds from Tesoro for reimbursement of a Trustee's costs, the Trustee shall provide Tesoro with an acknowledgement of receipt of such funds.

#### **IX. DISPUTE RESOLUTION**

The Trustees and Tesoro agree to attempt to resolve any disputes concerning the implementation of this Agreement through good faith negotiations among the individuals identified in Section XIII (Notices), or their designees. Disputes that cannot be resolved at that level shall be elevated, in a timely manner, to appropriate officials of the Parties for resolution.

#### **X. MODIFICATION AND TERMINATION**

Any modification of the Agreement or its attachment(s) must be in writing and executed by all of the Parties.

In the event a dispute cannot be resolved through the procedures provided in Section IX., the Trustees jointly or Tesoro may terminate this Agreement in its entirety or with respect to the particular activity in dispute. Written notification shall be provided to all Parties by the terminating Party within forty-eight [48] hours of such termination. Termination of one or more activities shall not, by itself, void the Agreement as to the remaining activities. In addition, Tesoro shall remain responsible for any reasonable costs incurred by the Trustees should Tesoro terminate an activity(ies).

In the event of a whole or partial termination of this Agreement, the Parties agree, as to the terminated activities, to exchange all products resulting from those activities prior to the date of the termination within fifteen (15) working days of such termination.

## **XI. CONFIDENTIALITY**

The Parties agree that all scientific data arising out of this cooperative assessment may be placed in the publicly available administrative record and otherwise may be made public as soon as the Trustees determine that the release will not prejudice the ongoing assessment. The Trustees will consult the guidance provided in 15 C.F.R. 990.45 for determining appropriate materials to be included in the administrative record. In addition to scientific data (once they have been validated by the Trustees), the type of documents which may be made public or placed in the administrative record include workplans, photographs, maps, trajectories, laboratory analyses, final draft reports, comments on final draft reports, and final reports.

Other than the types of documents described in the preceding paragraph, all documents (including those which interpret data) and other communications between representatives of the Trustees and Tesoro shall be presumed to be pursuant to settlement negotiations and therefor governed by Federal Rule of Evidence 408 and Hawaii Rule of Evidence 408. Also, such other documents shall be treated by the Parties as confidential. Any Party who receives a request for such documents pursuant to Hawaii Revised Statutes, Chapter 92F, or the federal Freedom of Information Act or who is served with a subpoena or discovery request for any such documents, or who otherwise intends to release such a document to anyone other than a Party to this Agreement, shall provide notice to the other Parties at the earliest opportunity so as to allow them, if they so choose, to assert a privilege or statutory exception seeking to prevent the release of such documents.

Nothing in this Agreement is intended as, nor shall it be construed to be, a general waiver of any attorney-client privilege, work product privilege, deliberative process privilege, joint enforcement privilege, or any other applicable privilege.

## **XIII. RESERVATION OF RIGHTS AND CLAIMS**

Except as otherwise stated herein, by entering into this Agreement, the Parties make no admission of fact or law. The Agreement may be admissible in an action to enforce its terms, but execution of the Agreement itself shall not be evidence or proof of liability or non-liability. Nothing in the Agreement is to be construed to abrogate the right of any Party to pursue claims against or contribution from another Party. Nothing in the Agreement is intended nor shall it be construed as a waiver



by the Parties of defenses or affirmative claims in any proceedings relating to the Spill or of any other rights or remedies. Notwithstanding the foregoing language, nothing in the Agreement precludes the Parties from agreeing otherwise in an amendment, modification, or attachment to the Agreement, or in a separate document.

Tesoro is not released from any potential liability, including but not limited to claims for damage, injury, loss, or destruction of natural resources or their services; claims for the costs of assessing damage, injury, loss, or destruction of natural resources or their services; claims for restoration or replacement of natural resources or lost uses of these resources; or any other causes of action or requests for relief, either administrative or judicial, under either State or federal law, as well as any claims, causes of action, or requests for relief in admiralty, arising from the Spill. Though not admissible on the issue of liability, the expenditure or payment of money by Tesoro in accordance with this Agreement may be admissible to reduce the amount of the Trustees' claim(s) for assessment costs arising from the Spill under applicable federal, State, or local laws or regulations. This Agreement does not address whether such expenditure or payment may be admissible for any other purpose.

#### **XIII. NOTICES**

Unless otherwise specified, all written communications and notices shall be sent to the following designated representatives of the Parties:

For Tesoro as to technical matters:

R. Chris Jansen  
Environmental Compliance Manager  
Tesoro Hawaii Corporation  
733 Bishop Street, Suite 2700  
P.O. Box 3379  
Honolulu, HI 96842-0001

For Tesoro as to legal matters:

Dennis Saito  
Tesoro Hawaii Corporation  
733 Bishop Street, Suite 2700  
Honolulu, HI 96813

Barry Ogilby  
McCutchen, Doyle, Brown & Enersen, LLP  
Attorneys at Law  
Three Embarcadero Center  
San Francisco, CA 94111

For NOAA as to legal matters:

Katherine Pease  
Senior Counselor for Natural Resources  
U.S. Department of Commerce  
National Oceanic and Atmospheric Administration  
Office of General Counsel  
501 W. Ocean Blvd., Suite 4470  
Long Beach, CA 90802

For NOAA as to technical matters:

John Cubit  
Injury Assessment Coordinator  
National Oceanic and Atmospheric Administration  
Damage Assessment Center  
501 W. Ocean Blvd., Suite 4470  
Long Beach, CA 90802

For Interior as to legal matters:

Charles McKinley  
Assistant Field Solicitor  
Office of the Solicitor  
600 Harrison Street, Suite 545  
San Francisco, CA 94107-1373

For Interior as to technical matters:

Don Palawski  
Environmental Contaminants Project Leader  
U.S. Fish and Wildlife Service  
300 Ala Moana Blvd., Room 3108  
Honolulu, HI 96850

For the State as to legal matters:

Kathleen Ho  
Deputy Attorney General  
Department of the Attorney General  
465 South King Street, Room 200  
Honolulu, HI 96813

For the State as to marine technical matters:

Francis Oishi  
Aquatic Biologist  
Department of Land and Natural Resources  
Division of Aquatic Resources  
1151 Punchbowl Street, Room 330  
Honolulu, HI 96813

For the State as to wildlife technical matters:

Carol Terry  
Aquatic Biologist  
Department of Land and Natural Resources  
Division of Aquatic Resources  
1151 Punchbowl Street, Room 325  
Honolulu, HI 96813

For the Navy as to all matters:

Rebecca Hommon  
COMNAVBAS, Regional Counsel  
Box 110  
Pearl Harbor, HI 96860

#### **XIV. DURATION**

The period of duration of this Agreement is from the Effective Date until the purposes set forth in the Agreement are accomplished unless the Parties agree otherwise or the Agreement is terminated pursuant to Section X above. In addition, Tesoro or any Trustee may withdraw from this Agreement at any time on thirty (30) calendar days notice in writing to the other Parties. In case of withdrawal by a Trustee, the Agreement remains in effect between Tesoro and the remaining Trustee(s).

#### **XV. EFFECTIVE DATE**

The undersigned signatories represent that they are duly authorized to enter into this Agreement on behalf of the Parties they represent. This Agreement may be executed in counterparts and in facsimile. After Tesoro has executed this Agreement, this Agreement shall become effective as of the date of the last signature of the State, NOAA, and Interior. It shall become effective as to the Navy as of the date of its signature. The original executed Agreement shall be retained by the Lead Administrative Trustee.

#### **XVI. SEVERABILITY**

The terms of this agreement are severable. If any term, covenant or condition of this agreement 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) days after the court's determination, any Party hereto may withdraw from this Agreement upon written notice to the other Parties.

In witness whereof, the Parties set forth their signatures on the following dates:


Tesoro Hawaii Corporation

By: Charles L. Magee  
Charles L. Magee  
Vice President & General Counsel

Date: October 30, 1998

The state of Hawaii

By:

  
Bruce S. Anderson, Ph.D.  
Deputy Directory for Environmental Health  
Department of Health, State of Hawaii

Date:

NOV 13 1998

  
The National Oceanic and Atmospheric Administration

By:

\_\_\_\_\_  
Craig R. O'Connor  
Deputy General Counsel

Date:

11/12/98  
\_\_\_\_\_

The Department of the Interior

By: David R. Rosenberg, for  
Willie R. Taylor, Ph.D.  
Director, Office of Environmental Policy and  
Compliance, Office of the Secretary

Date: 11/12/98