OSWER Directive 9295.0-02
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MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE NOTIFICATION AND COORDINATION OF ACTIVITIES PURSUANT TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
Washington, DC 20460

MEMORANDUM OF UNDERSTANDING BETWEEN THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION AND THE U.S. ENVIRONMENTAL PROTECTION AGENCY CONCERNING THE NOTIFICATION AND COORDINATION OF ACTIVITIES PURSUANT TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT

WHEREAS, pursuant to section 107(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. sections 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) and section 1(c) of Executive Order No. 12580, (3 CFR 193 (1988)),, the President shall designate in the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan, or the NCP) (40 CFR part 300) the Federal officials who will act on behalf of the public as trustees for natural resources;

WHEREAS, pursuant to section 104(b)(2) of CERCLA, the President shall promptly notify trustees of potential injuries to natural resources resulting from releases under investigation pursuant to section 104 of CERCLA, and shall seek to coordinate any assessments, investigations, and planning with the trustees;

WHEREAS, pursuant to Subpart G of the NCP (§300.600(b)(1)), the Secretary of Commerce is designated as a trustee for natural resources managed or protected by the Department of Commerce or other Federal agencies and that are found in or under waters navigable by deep draft vessels, in or under tidally influenced waters, or waters of the contiguous zone, the exclusive economic zone, and the outer continental shelf, and in upland areas serving as habitat for marine mammals and other protected species;

WHEREAS, the Secretary of Commerce has delegated to the Under Secretary for Oceans and Atmosphere the authority and responsibilities to act on behalf of the Secretary as trustee for natural resources;

WHEREAS, the Administrator of the Environmental Protection Agency (EPA) is responsible for responding to releases of hazardous substances necessary to protect the public health or welfare or the environment under CERCLA;

WHEREAS, the Administrator of EPA has delegated to the Assistant Administrator, Office of Solid Waste and Emergency Response (OSWER), certain authorities to apply those provisions of CERCLA that pertain to the development and implementation of removal and remedial actions at hazardous waste sites and any related activities;

WHEREAS, each of said agencies considers it desirable to enter into an understanding of how EPA will satisfy its responsibilities pursuant to section 104(b)(2) of CERCLA to promptly notify the National Oceanic and Atmospheric Administration (NOAA), acting as a Federal natural resource trustee, of potential injuries to natural resources and incidents resulting from releases under investigation pursuant to section 104 of CERCLA, to seek to coordinate assessments,

investigations, and planning with NOAA, and, pursuant to section 122(j)(1) of CERCLA, to notify NOAA of negotiations with potentially responsible parties (PRPs) and to encourage the participation of NOAA in such negotiations, if NOAA believes that the hazardous substance release has resulted or may result in injuries to natural resources under the trusteeship of NOAA.

NOW, THEREFORE, the Under Secretary for Oceans and Atmosphere, NOAA, and the Assistant Administrator of OSWER, EPA, hereby agree that EPA's and NOAA's actions pursuant to sections 104(b)(2) and 122(j)(1) of CERCLA will be carried out in accordance with the following stipulations, which will be deemed to satisfy EPA's responsibilities to NOAA pursuant to these subsections:

STIPULATIONS

1. PURPOSE AND APPLICABILITY

(a) This Memorandum of Understanding (MOU) sets forth the procedures by which EPA and NOAA will jointly carry out their notification and coordination responsibilities with respect to natural resources affected by a release at a hazardous substance site, as specified in sections 104 and 122 of CERCLA.

(b) This MOU is applicable to those response actions and related legal actions conducted by EPA or NOAA at CERCLA sites (i.e., NPL sites and any other sites where EPA has determined that a response action is necessary, including sites for which NOAA intends to or has initiated natural resource actions or claims for damages prior to any actions initiated by EPA) where releases or potential releases of hazardous substances can be demonstrated to have resulted in or have the potential to result in injuries to NOAA's trust resources.

(c) With respect to response actions for which EPA is not the lead agency (e.g., Federal facility or State-lead actions), EPA will, at NOAA's request and to the extent practicable, share with NOAA any available information on the site.

(d) If EPA determines that the Department of Commerce is a potentially responsible party (PRP) at the site in question, NOAA and EPA will re-negotiate implementation of the responsibilities set forth in this MOU on a site-specific basis.

(e) This MOU is intended solely to facilitate interagency coordination. It does not create any rights in third parties and does not give rise to any right of judicial review.

2. GENERAL NOTIFICATION AND COORDINATION PROCEDURES

(a) NOAA contacts to receive notification from EPA On-Scene Coordinators (OSCs)/Remedial Project Managers (RPMs) regarding potential injuries to natural resources will be listed in Regional Contingency Plans (RCPs) prepared by the Regional Response Team (RRT) in each EPA Region. For coastal regions where NOAA Coastal Resource Coordinators (CRCs) are assigned to EPA Regional Offices, the contact will be the CRC. Elsewhere where NOAA may have trust resources (e.g., anadromous fish), the contact will be the NOAA RRT representative. EPA will provide NOAA's designated Regional contact with an annual schedule, revised as

necessary, of planned response actions and enforcement negotiations at CERCLA sites. This schedule will include, as appropriate, the names of EPA Regional contacts (i.e., the OSC/RPM). NOAA will provide EPA with an annual schedule, revised as necessary, of planned natural resource actions or claims for damages. All notification and coordination under this paragraph will be subject to confidentiality as described in section 9(e) of this MOU.

(b) At any time during the response action that the OSC/RPM becomes aware that a discharge or release has injured, is injuring, or may injure natural resources, the OSC/RPM will promptly notify the NOAA contact. When requested, NOAA may provide EPA with information on the location of natural resources that could fall within NOAA's trust responsibilities that may be threatened by the discharge or release. When multiple trustees are involved, NOAA should coordinate and cooperate with other trustees in carrying out its trustee responsibilities.

(c) Upon notification or discovery of injury, destruction, loss or threat to natural resources, NOAA will cooperate with the OSC/RPM in coordinating assessments, investigations, and planning. In addition, EPA will provide NOAA with an opportunity to address technical issues at sites of concern to NOAA through participation in the Biological Technical Assistance Group (BTAG) or other analogous technical assessment group.

(d) NOAA will notify the OSC/RPM before planning any work on-site or, where practicable, will notify EPA before initiating communications with PRPs for natural resource actions or claims for damages (see Paragraph 7(k)). NOAA will coordinate all on-site activities with the EPA OSC/RPM. All on-site activity will be governed by the training and safety requirements, including those specified at 29 CFR §1910.120. NOAA will notify the EPA OSC /RPM before initiating any off-site response actions that may potentially affect EPA's response action, and will coordinate with EPA when carrying out such actions.

(e) If NOAA determines that its trust resources in the affected area may be injured or threatened, NOAA will advise EPA in writing that it desires participation in notification and coordination activities. If NOAA determines that its trust resources in the affected area have not been injured or are not threatened, NOAA will advise EPA in writing that the coordination process need not continue. If NOAA later determines that its trust resources may be injured or threatened, it will notify EPA in writing and the coordination process will resume.

(f) Where NOAA has agreed to participate in notification and coordination activities as set forth in this MOU, and NOAA is requested to provide information or to comment on EPA documents, NOAA will do so in a timely manner or EPA will assume that NOAA has no interest or no comments. Where EPA is requested to provide information or to comment on NOAA documents, it will do so in a timely manner or NOAA will assume that EPA has no interest or no comments. "Timely manner" will be defined as 30 days unless otherwise specified in this MOU or agreed upon on a site-specific basis. Any dispute will also be resolved expeditiously in accordance with Paragraph 9(a) of this MOU.

(g) If NOAA determines that natural resources under the trusteeship of any other trustee in the affected area are injured or threatened, it will notify EPA and the appropriate other natural resource trustee(s) of the injury or threatened injury to the natural resources for which the other trustee(s) has trust responsibility.

AUTHORITIES: CERCLA sections 104(b)(2), 107(f), 122(j)(1); NCP §§300.135(j), 300.135(k), 300.160(a)(3), 300.615.

3. NOTIFICATION AND COORDINATION PROCEDURES FOR REMOVAL ACTIONS

The parties to this MOU will carry out notification and coordination activities in accordance with the procedures set forth below for those sites where EPA has determined that a removal action is the appropriate response, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. When NOAA does participate, it will do so in accordance with Paragraphs 2(f) and 9(e) of this MOU.

(a) If EPA's removal site evaluation indicates that natural resources are or may be injured by the release, the OSC will promptly notify NOAA so that NOAA may initiate appropriate actions. NOAA will promptly notify and coordinate with the OSC prior to undertaking any activity at the site, including the assessment of injury and/or threats to its trust resources.

(b) EPA will seek to coordinate with NOAA the assessments, evaluations, investigations, and planning on removal actions. For emergency and time-critical removals that may have a potential effect on natural resources, EPA will promptly notify the appropriate RRT, on which NOAA is represented, with regard to the removal action it is taking. For non-time-critical removals and where it is practicable in time-critical removals, EPA will, at NOAA's request, provide NOAA with the Action Memorandum for the site, which includes information on site conditions, nature of the threat to the environment, and EPA's proposed action. NOAA will promptly notify EPA if it determines that its trust resources would potentially be adversely affected by the removal action. EPA will take measures to avoid or minimize adverse impacts on the environment at the removal site.

(c) Based on its initial evaluation of the site, NOAA will notify EPA within 45 days of its preliminary determination whether, and to what extent, any of its trust resources are potentially injured or threatened at the site. Should the timing for the removal action not allow NOAA 45 days to respond, then EPA will notify NOAA of the appropriate time frame for its response.

(d) If NOAA determines that its trust resources located in the response area have been injured or are threatened, NOAA may request that the EPA OSC remove, or arrange for the removal of, hazardous substances from a contaminated medium affecting its trust resources pursuant to section 104 of CERCLA. EPA will evaluate NOAA's request based on the NCP criteria and will respond within 60 days regarding the need for such a removal action.

(e) Based on such evaluation, EPA may, in situations where response actions are needed to avoid an irreversible loss of natural resources or to prevent or reduce any continuing danger to natural resources caused by a release of hazardous substances, carry out such emergency actions.

(f) Following the completion of any removal action, EPA will, at NOAA's request, provide NOAA with the final OSC Report and any other appropriate information obtained by EPA concerning conditions at the site so that NOAA may determine the extent to which any injury or threat of injury to its trust resources may have been addressed by the removal action, and whether EPA plans to consider undertaking any additional removal or remedial action at the site. The OSC

report will include information concerning content and time of notice to trustees, trustee damage assessment activities, and restoration efforts regarding injured natural resources.

(g) NOAA may request that EPA issue an administrative order or jointly pursue injunctive relief against PRPs at CERCLA sites where NOAA's trust resources are injured or threatened. NOAA's request will include all appropriate information in NOAA's possession at the time of the request. EPA will evaluate NOAA's request and respond within 60 days regarding the need for such enforcement actions. (Procedures for notification and coordination of additional enforcement actions are addressed in Section 7 of this MOU.)

AUTHORITIES: CERCLA sections 104(b)(2), 106(a), 111(i); NCP §§300.135(j), 300.160(a)(3), 300.165(c)(1)(vii) and (viii), 300.410(g), 300.615(b), 300.615(c), 300.615(e).

4. NOTIFICATION AND COORDINATION PROCEDURES FOR PRELIMINARY ASSESSMENT/SITE INSPECTION

The parties to this MOU will carry out notification and coordination activities in accordance with the procedures set forth below for each activity during the preliminary assessment/site inspection (PA/SI) stage of pre-remedial actions, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. When NOAA does participate, it will do so in accordance with Paragraphs 2(f) and 9(e) of this MOU. Enforcement-related activities during the PA/SI stage will be carried out as set forth in Paragraphs 7(b) and (c) of this MOU.

(a) Site Discovery. EPA will promptly notify NOAA of any discharges or releases from CERCLA sites that have affected or may potentially affect natural resources, so that NOAA can conduct a preliminary evaluation to determine whether its trust resources are threatened by actual or potential releases from the site. If requested by EPA, NOAA will provide appropriate information on its trust resources at or near the site/facility in a timely manner. EPA will use the information provided by NOAA, as appropriate, in determining its response to the release.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c), 300.615(e)(2).

(b) Preliminary Assessment. In order for NOAA to determine whether any of its trust resources are or could be threatened or injured by a release or potential release, and to set priorities for further evaluation, EPA will, at NOAA's request, provide NOAA with the Preliminary Assessment (PA) checklist (especially information on sensitive environmental targets) and will alert NOAA if a site has been recommended as a medium or high priority site. Within 90 days, NOAA will provide EPA with its determination and, if appropriate, its priorities for further evaluation. Because NOAA may become aware through other programs of sites that may pose a significant threat to human health and the environment, and because a mechanism is necessary to allow for the evaluation of these sites within the Superfund process, NOAA may provide copies of available information to EPA and request that EPA conduct a PA. EPA will notify NOAA within 90 days regarding its decision on NOAA's recommendation.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c)(1) and (2).

(c) Site Inspection. EPA will, as appropriate, inform NOAA whether a site will undergo a Site Inspection (SI) or an Expanded Site Inspection (ESI). EPA will, at NOAA's request, also provide information to NOAA concerning the current knowledge of the extent of contamination so that NOAA may determine the extent to which injury or threat to its trust resources exists inside the known area of contamination.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c)(1) and (2).

(d) HRS Scoring/NPL Listing. At EPA's request, NOAA will provide available information or other technical support to EPA to be used in conjunction with the Hazard Ranking System. NOAA may provide a preliminary survey of its trust resources or other analogous information (e.g., Coastal Hazardous Waste Site Reports) to help determine the potential for environmental endangerment at specific sites and help determine the need for further NOAA involvement in the Superfund process at a specific site.

AUTHORITIES: CERCLA sections 104(b)(2), 105(a)(8)(A); NCP §§300.135(j), 300.160(a)(3), 300.615(c)(1) and (2).

5. NOTIFICATION AND COORDINATION PROCEDURES FOR REMEDIAL INVESTIGATIONS/FEASIBILITY STUDIES

The parties to this MOU will carry out notification and coordination activities in accordance with the following procedures for each activity during the remedial investigation/feasibility study (RI/FS) stage of on-site remedial actions, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. When NOAA does participate, it will do so in accordance with Paragraphs 2(f) and 9(e) of this MOU. Enforcement-related activities during the RI/FS stage will be carried out as set forth in Paragraphs 7(d) - (f) of this MOU.

(a) Scoping of the RI/FS and Development of the Workplan. During scoping, EPA will notify NOAA if natural resources are, or may be, injured by the release. NOAA may, as appropriate, conduct an evaluation of potential injuries to its trust resources and provide a preliminary indication of its level of interest and concern at the site. At NOAA's request, EPA will provide NOAA with the opportunity to review and comment on the draft RI/FS workplan. Review of this information will allow NOAA to determine the extent to which these investigations will identify the threat to, or address the injury of, its trust resources. When requested by EPA, NOAA will provide technical assistance to EPA in developing the scope of the RI/FS workplan through the BTAG or other analogous group. The role of the BTAG will include developing RI/FS information requirements. In the event that NOAA recommends that work that goes beyond the scope of the workplan is necessary to address its concerns, NOAA will describe the work for consideration by EPA. Consistent with the requirements of CERCLA and the NCP, including the restrictions set forth in SARA section 517(c), NOAA and EPA may agree upon alternatives and methods for performing the work recommended by NOAA (e.g., EPA includes recommended work in the workplan, EPA contracts with NOAA to perform studies and investigations, or NOAA provides funding for EPA to perform recommended work).Any work undertaken by NOAA will be performed consistent with the established RI/FS schedule and in accordance with Paragraph 2(d) of this MOU.

AUTHORITIES: CERCLA sections 104(b)(2), 111(i); SARA section 517(c); NCP §§300.135(j), 300.160(a)(3), 300.430(b)(7), 300.615(c).

(b) RI - Site Characterization and Baseline Risk Assessment. At NOAA's request, EPA will provide NOAA with the opportunity to review and comment on the draft RI report, site characterization summaries, and risk assessment results (particularly ecological assessments). As appropriate, NOAA will coordinate its ecological assessments with EPA's ecological assessments in order to eliminate duplication of effort, to the extent possible. EPA may request that NOAA provide assistance at individual sites in conducting environmental assessments through specific interagency agreements.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c).

(c) FS - Development and Screening of Alternatives. At NOAA's request, EPA will, if such information is available during the development of the draft FS, provide NOAA with the opportunity to review and comment on the lists of remedial alternatives and identified applicable or relevant and appropriate requirements (ARARs), as well as any bench or pilot treatability studies that were or may be performed. EPA will, as appropriate, provide NOAA with an opportunity to comment on preliminary remediation goals and environmental regulations and statutes identified as potential ARARs.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c).

(d) FS - Analysis of Alternatives. At NOAA's request, EPA will provide NOAA with the opportunity to review and comment on the draft RI/FS report, including the detailed analysis of remedial alternatives.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c).

(e) Proposed Plan. At NOAA's request, EPA will provide NOAA with the opportunity to review, comment on, and propose additions to the draft Proposed Plan, which includes the preferred alternative. EPA will provide NOAA with the draft Proposed Plan prior to but no later than when it is made available to the States, although NOAA's concurrence will not be required.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.430(f)(2), 300.615(c).

(f) Record of Decision (ROD). EPA will, at NOAA's request, provide NOAA with an opportunity to review and comment on the draft ROD, which provides the remedy to be selected by EPA. Where appropriate, NOAA may prepare a Technical Position Statement that outlines whether injury to natural resources would remain after completion of the NCP cleanup and a statement of any changes to the draft ROD, including monitoring requirements, that NOAA recommends. Any changes to the draft ROD are to be based on the Administrative Record and in compliance with the NCP. If requested, EPA will provide NOAA with a copy of the final ROD. In response to its review of the ROD, NOAA will indicate in writing its intentions for future participation with EPA at the site.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.430(f)(5), 300.615(c).

6. NOTIFICATION AND COORDINATION PROCEDURES FOR REMEDIAL DESIGN/ REMEDIAL ACTION

The parties to this MOU will carry out notification and coordination activities in accordance with the procedures set forth below for each activity during the remedial design/remedial action (RD/RA) stage of on-site remedial actions, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. When NOAA does participate, it will do so in accordance with Paragraphs 2(f) and 9(e) of this MOU. Enforcement-related activities during the RD/RA stage will be carried out as set forth in Paragraphs 7(g) - (i) of this MOU.

(a) Remedial Design. At sites of concern to NOAA identified in accordance with Paragraph 5(f) of this MOU, EPA will provide NOAA with the opportunity to review the draft work plan and appropriate remedial design documents. NOAA may propose specific monitoring requirements consistent with the Record of Decision and/or Consent Decree, to ensure the effectiveness of the proposed remedy in preventing injury to its trust resources, and may provide comments on the need to monitor and mitigate impacts from the remedial implementation. EPA will notify NOAA of its decision regarding its proposal and/or comments prior to completion of the final work plan. At sites where NOAA is a co-signatory to the settlement agreement for RD/RA (as specified in Paragraph 7(i) of this MOU), coordination will be further dictated by the terms and conditions of the agreement.

AUTHORITIES: CERCLA sections 104(b)(2), 122(j); NCP §§300.135(j), 300.160(a)(3), 300.615(c), 300.615(d)(2).

(b) Completion of Operable Unit/Remedial Action. At sites of concern to NOAA as identified in accordance with Paragraph 5(f) of this MOU, EPA will provide NOAA with the opportunity to review the results of remedial actions (i.e., the Remedial Action Report) at the completion of operable units or the final remedial action. Within 45 days of EPA's report, NOAA will notify EPA of its determination regarding residual injury and any proposed future actions. At sites where NOAA is a co-signatory to the settlement agreement for RD/RA (as specified in Paragraph 7(i) of this MOU), coordination will be further dictated by the terms and conditions of the agreement.

AUTHORITIES: CERCLA sections 104(b)(2), 122(j); NCP §§300.135(j), 300.160(a)(3), 300.615(c), 300.615(d)(2).

7. NOTIFICATION AND COORDINATION PROCEDURES FOR ENFORCEMENT ACTIONS

The parties to this MOU will carry out notification and coordination activities in accordance with the procedures set forth below for each enforcement-related activity carried out, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. EPA and NOAA will each carry out these actions in accordance with Paragraphs 2(f) and 9(e) of this MOU.

(a) General Notification and Coordination of Enforcement Actions. Within 60 days of signature of this MOU, EPA will provide NOAA with a list of pending and planned enforcement actions at sites where NOAA has already expressed concern. Within 60 days of signature of this MOU, NOAA will provide EPA with a list of pending and planned natural resource actions or claims for damages. Thereafter, on an annual basis, EPA and NOAA will share information on pending and planned enforcement actions in accordance with Paragraph 2(a) of this MOU. In carrying out response actions at sites of concern to NOAA, EPA will notify NOAA of any negotiations with PRPs and will encourage NOAA's participation in such negotiations. NOAA will notify EPA of any negotiations with PRPs when pursuing natural resource actions or claims for damages at or related to CERCLA sites, and will encourage EPA's participation in such negotiations. Each agency will promptly give its notification in writing of its intention to participate in negotiations. Non-participation in one stage of the response action does not preclude participation at a later stage. At any point that NOAA determines that no injury to its trust resources has resulted and is willing to authorize a covenant not to sue for resources under its trusteeship, NOAA may authorize the Department of Justice (DOJ) to provide such a covenant in a consent decree or authorize EPA to provide such a covenant in an administrative order.

AUTHORITIES: CERCLA sections 104(b)(2), 107(a)(4)(C), 107(f)(1), 113(g), 122(j); NCP §§300.160(a)(3), 300.615(d).

(b) Initial Enforcement Activities. NOAA may request that EPA pursue enforcement actions as specified in Paragraph 3(g) of this MOU. To support its request, NOAA will provide EPA with appropriate information on the site in NOAA's possession. EPA will evaluate NOAA's request and respond within 60 days regarding the need for such enforcement actions.

AUTHORITIES: CERCLA sections 106(a), 122(j)(1); Executive Order 12580 section 4(d)(1); NCP §§300.615(e)(1).

(c) Issuance of Section 104(e) Information Requests and General Notice Letters. EPA and NOAA will exchange any available information on the identity of PRPs and will coordinate the formulation of CERCLA section 104(e) requests for information at sites of mutual concern. Before issuing an order to compel compliance with the section 104(e) information request, NOAA will consult with EPA. Where appropriate, EPA will notify NOAA when it intends to issue a general notice letter to PRPs. In cases where NOAA declines to participate in activities under section 104(e), EPA will, at NOAA's request, provide NOAA with access to any information obtained in response to the information request or general notice letter.

AUTHORITIES: CERCLA sections 104(e), 122(j)(1); Executive Order 12580 section 2(j)(2); NCP §§300.160(a)(3), 300.615(d)(2), 300.615(d)(3).

(d) Issuance of an RI/FS Special Notice Letter. EPA will notify NOAA of the Agency's decision to issue a special notice letter for an RI/FS pursuant to CERCLA section 122(e). If NOAA has agreed to participate in negotiations for the RI/FS, EPA will provide NOAA with a copy of the draft special notice letter package, including any additional information not provided in the general notice letter (e.g., the draft administrative order on consent). NOAA may, within 60 days, provide EPA with comments on work to be performed by the PRP. EPA will provide NOAA with a copy of the final special notice letter reflecting EPA's consideration of NOAA's comments. In cases where NOAA has declined participation, EPA will, at NOAA's request, provide NOAA

with a copy of the final special notice letter and access to any information obtained in response to the notice letter.

AUTHORITIES: CERCLA sections 104(b)(2), 122(e), 122(j)(1); NCP §§300.135(j), 300.160(a)(3), 300.615(d)(2).

(e) PRP "Good-Faith" Offer to Conduct RI/FS. In cases where NOAA has agreed to participate in negotiations for the RI/FS, EPA will provide NOAA with a copy of the PRP's good-faith proposal to conduct an RI/FS. In cases where NOAA has declined direct involvement in EPA's negotiations with PRPs, EPA will, at NOAA's request, provide NOAA with a copy of the good-faith offer.

AUTHORITIES: CERCLA sections 104(b)(2), 107(a)(4)(C), 122(e), 122(j); NCP §§300.135(j), 300.160(a)(3), 300.615(d)(2).

(f) RI/FS Settlement and Signing of the Settlement Agreement. In cases where NOAA has agreed to participate in negotiations for the RI/FS, EPA will provide NOAA with the opportunity to review and comment on any negotiated draft agreements (e.g., consent decree or administrative order on consent) regarding a PRP's performance of the RI/FS. In cases where NOAA has declined direct involvement in EPA's negotiations with PRPs regarding a PRP's performance of the RI/FS, EPA will, at NOAA's request, notify NOAA when negotiations have concluded and provide NOAA with a copy of the signed settlement agreement.

AUTHORITIES: CERCLA sections 104(b)(2), 107(a)(4)(C), 122; NCP §§300.135(j), 300.160(a)(3), 300.615(d)(2).

(g) Issuance of RD/RA Special Notice Letter. EPA will notify NOAA of the Agency's decision to issue a special notice letter for an RD/RA pursuant to CERCLA section 122(e). If NOAA has agreed to participate in negotiations for the RD/RA, EPA will provide NOAA with a copy of the draft special notice letter package, including any relevant additional information not already in NOAA's possession, e.g., copies of the ROD, the draft Statement of Work (SOW), and draft Consent Decree. NOAA will, as appropriate, propose any additional terms or conditions for inclusion in settlement negotiations (e.g., monitoring, habitat restoration, and other compensation for injury to its trust resources) if a covenant not to sue for natural resources damage is to be granted. These additional terms or conditions may be sufficient in some cases to allow NOAA to satisfy all claims at a site. EPA will provide NOAA with a copy of the final special notice letter reflecting EPA's consideration of NOAA's comments. When a comprehensive settlement is likely, EPA will request that NOAA promptly provide information on any costs NOAA has incurred that may be recoverable under CERCLA, and EPA will address such costs in the draft consent decree, as appropriate. NOAA will provide EPA with an accounting of such costs to be incorporated in the consent decree. In cases where NOAA has declined participation, EPA will, at NOAA's request, provide NOAA with a copy of the final special notice letter and access to any information obtained in response to the notice letter.

AUTHORITIES: CERCLA sections 107(a)(4)(C), 107(f)(1), 122(e), 122(j); NCP §§300.160(a)(3), 300.615(d)(2).

(h) PRP Good-Faith Offer to Conduct RD/RA. In cases where NOAA has agreed to participate in negotiations for the RD/RA, EPA will provide NOAA with a copy of a PRP's good-

faith proposal to conduct an RD/RA. If NOAA's negotiations with the PRP are successful, NOAA may grant a covenant not to sue based on the PRP's actions (see Paragraph 7(i) below). In cases where NOAA has declined direct involvement in EPA's negotiations with PRPs, EPA will, at NOAA's request, provide NOAA with a copy of the good-faith proposal. A copy of the proposal may assist NOAA in determining the PRP's ability and willingness to address injuries to NOAA trust resources.

AUTHORITIES: CERCLA sections 107(a)(4)(C), 122(e), 122(j); NCP §§300.160(a)(3), 300.615(d)(2).

(i) RD/RA Settlement and Signing of Consent Decree. In cases where NOAA has agreed to participate in negotiations for the RD/RA, EPA will provide NOAA with the opportunity to review and comment on each negotiated draft consent decree. The consent decree may contain a covenant not to sue provided that NOAA has reached settlement with the PRP and is co-signatory to the consent decree or has otherwise authorized DOJ to provide such a covenant (pursuant to Paragraph 7(a) of this MOU). If negotiations are not successful, NOAA may consider the development of damage claims to be brought against the PRPs by DOJ. NOAA's failure to achieve settlement of its claims for natural resource damages will not prevent EPA from entering into an agreement with PRPs. In cases where NOAA has declined direct involvement in EPA's negotiations with PRPs, EPA will, at NOAA's request, notify NOAA that negotiations have concluded and will provide a copy of the signed Consent Decree. This will aid NOAA in determining appropriate activities concerning damage assessments, damage claims that may be brought against PRPs, and restoration plans (see Paragraph 7(k) of this MOU).

AUTHORITIES: CERCLA sections 107(a)(4)(C), 122(j); NCP §§300.160(a)(3), 300.615(d)(1), 300.615(d)(2).

(j) PRP Cost Recovery. EPA will coordinate with NOAA for the recovery from PRPs under CERCLA section 107 of EPA costs incurred for carrying out a Fund-financed response action at a site where NOAA may have incurred costs associated with injury or potential injury to its trust resources. EPA will carry out this responsibility by providing an annual schedule of anticipated cost-recovery activities. Consistent with Paragraph 7(k) of this MOU, NOAA will determine in a timely manner whether to file its natural resource claim at the same time that EPA files its cost-recovery claim.

AUTHORITIES: CERCLA sections 107(a)(4)(C), 107(f)(1), 112(d)(2), 113(g); NCP §§300.160(a)(3), 300.615(d)(1).

(k) Natural Resource Actions or Claims for Damages. In cases where joint EPA/NOAA negotiations were not successful, where NOAA has declined direct involvement in EPA's negotiations with PRPs, or where EPA has not yet initiated or completed response actions or enforcement negotiations with PRPs, NOAA will, to the extent practicable, notify EPA 60 days before initiating communications with PRPs regarding natural resource actions or claims for damages. To the extent practicable, prior to reaching an agreement in principle with PRPs regarding natural resource actions or claims for damages at sites where EPA's negotiations with PRPs are not completed, NOAA will provide EPA the opportunity to review the terms of the agreement.

AUTHORITIES: CERCLA sections 107(a)(4)(C), 107(f)(1), 112(d)(2), 113(g), 122(j); NCP §§300.160(a)(3), 300.615(d)(1).

8. NOTIFICATION AND COORDINATION PROCEDURES FOR POST RD/RA

The parties to this MOU will carry out notification and coordination activities in accordance with the procedures set forth below for each activity during the post RD/RA stage of on-site remedial actions, unless NOAA has declined site-specific participation pursuant to Paragraph 2(e) of this MOU. When NOAA does participate, it will do so in accordance with Paragraphs 2(f) and 9(e) of this MOU.

(a) Interagency Reimbursement. In the event that NOAA has agreed to fund any additional assessments, investigations, planning, and remedial activities conducted by EPA (pursuant to Paragraph 5(a) of this MOU), EPA and NOAA will coordinate the reimbursement of EPA's costs.

(b) Operation and Maintenance (O&M). At NOAA's request, EPA will provide NOAA with the opportunity to review and comment on the site-specific plans for O&M when monitoring and reporting requirements have been specified as part of the remedial design or settlement agreement. EPA will also provide NOAA with a copy of the 5-year review report that will be conducted if hazardous substances remain on site at completion of the remedial action.

AUTHORITIES: CERCLA section 104(b)(2); NCP §§300.135(j), 300.160(a)(3), 300.430(f)(4), 300.615(c).

(c) Site Close-Out/Deletion from NPL. At NOAA's request, EPA will provide NOAA with the opportunity to either participate in close-out activities or review information concerning site close-out and deletion from the NPL. If NOAA's covenant not to sue is conditioned on its post-cleanup monitoring of the response action, EPA will provide NOAA the opportunity to review and comment on the draft Site Close-Out Report.

AUTHORITIES: CERCLA sections 104(b)(2), 122(j)(2); NCP §§300.135(j), 300.160(a)(3), 300.615(c).

9. ADDITIONAL STIPULATIONS

In carrying out the aforementioned stipulations, both parties to this MOU will abide by the following:

(a) In the event of a dispute between EPA and NOAA regarding this MOU, the OSC/RPM and NOAA contact to the RRT (generally the CRC) will attempt to resolve such disputes promptly. The period for negotiations at this level will not exceed 10 days from the time the dispute arises unless the parties agree to modify that timeframe. The dispute will be considered to have arisen when one party notifies the other in writing. This notification will include a statement of the issue under consideration, the relevant facts on which the dispute is based, the factual data, analysis, or opinion supporting the party's position, and all supporting documentation on which the party relies. Any resolution of the issue at this level will be documented in writing. If disputes

cannot be resolved at this level, the problem will be referred to supervisors of these persons for resolution. If the parties reach a joint resolution, the resolution will be documented in writing. If the parties do not reach a joint decision, the supervisory referral and resolution process will continue, if necessary, to the level of the Director, Office of Ocean Resources Conservation and Assessment, NOAA, and the appropriate Regional Administrator, EPA, who will both review the record of the dispute and confer with each other concerning the dispute. If agreement cannot be reached within 30 days of initiation of the dispute, the dispute will be finally resolved by the appropriate lead agency (i.e., EPA will reach final decision for disputes principally involving response actions, and NOAA will reach final decision for disputes principally involving restoration, rehabilitation, or replacing or acquiring the equivalent of any natural resource).

(b) No party to this MOU waives any administrative claims, positions, or interpretations it may have with respect to the applicability or the enforceability of CERCLA sections 104(b)(2) and 122(j)(1) to the development or implementation of response actions carried out under the authority of CERCLA.

(c) This MOU should not be construed to govern the activities of any of the parties hereto with respect to any other program administered by them.

(d) This MOU shall not be enforceable by any person other than the signatories hereto and does not create any rights in third parties. EPA and NOAA intend that compliance with this MOU will ensure compliance with their obligations to notify and coordinate with one another with respect to CERCLA sites under the NCP, but the procedures of this MOU go beyond the NCP's minimum requirements and noncompliance with this MOU shall not be evidence of inconsistency with the NCP.

(e) Both parties will treat confidential business information in accordance with Federal regulations stated at 40 CFR Part 2. Furthermore, the parties agree to protect the confidentiality and secrecy of information and strategies utilized in carrying out the actions set forth in this MOU. To facilitate case preparation and to protect the public interest, the parties agree: (1) to share and exchange among and between themselves and their counsel certain information, legal strategies, documents, and confidences, and asserting and protecting respective client interests and rights without authorizing and permitting any other publication and use; (2) that such sharing and exchange does not waive any attorney-client or attorney work product privilege attaching to such information; (3) that the attorney-client and attorney work product privilege is intended to remain attached to such information, and (4) not to reveal to any non-party, to the extent permitted by applicable law, any such confidential information, without the written consent, in advance, of the party who contributed or caused the same to be contributed to the joint effort.

(f) All communication between the parties to the MOU should be in writing to the extent practicable, or documented subsequent to any non-written communication.

(g) This MOU will become effective when signed by the Under Secretary for Oceans and Atmosphere, Department of Commerce and the Assistant Administrator, Office of Solid Waste and Emergency Response, EPA. With the exception of information shared pursuant to Paragraph 7(a) of this MOU, this MOU does not cover any stages of response actions already underway at the time of signature.

(h) The parties to this MOU agree to review the substance and effectiveness of this MOU within 12 months of the effective date, then at least every 24 months to make changes as appropriate. The parties agree to waive the review or to complete any review and associated revisions within 60 days of commencing the review.

(i) This MOU may be amended at any time by agreement of the parties if it is determined that an amendment is necessary to accomplish the objectives of this MOU or is necessary to modify the objectives of this MOU consistent with the requirements of CERCLA, any amendments thereto, or other applicable Federal law. Any amendment of this MOU shall only be effective if it is in writing, executed by the parties to this MOU.

(j) Any party to this MOU may terminate it providing 60 days written notice to the other party; provided, that proposed response actions that are pending review under the procedures covered by this MOU at the time notice of withdrawal is received by the parties, and those response actions that begin the trustee coordination process within the 60 day notice period, will continue to be governed by the procedures in this MOU. During this 60-day period, the parties will consult to seek agreement on amendments or other actions that would avoid termination.

Under Secretary
for Oceans and
Atmosphere
U.S. Department of Commerce
Date: June 24, 1992

Assistant Administrator
Office of Solid Waste and
Emergency Response
U.S. Environmental Protection Agency
Date: 5/7/92