

SOUTHERN CALIFORNIA NATURAL RESOURCE DAMAGE ASSESSMENT
MONTROSE CHEMICAL CO. et al

MEMORANDUM OF AGREEMENT
AMONG THE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
THE STATE OF CALIFORNIA
THE U.S. FISH & WILDLIFE SERVICE
AND
THE NATIONAL PARK SERVICE

Whereas, the National Oceanic and Atmospheric Administration, (NOAA), the State of California, (STATE), and the Department of the Interior as delegated to the Fish & Wildlife Service (FWS) and the National Park Service (NPS), have trustee responsibilities over natural resources under their management, protection and control, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA), as amended, 42 U.S.C. 9601 et seq., the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 et seq., as implemented by the National Contingency Plan and Executive Order 12580, January 23, 1987; and

Whereas, NOAA, STATE, FWS and NPS, hereafter referred to as Co-Trustees, have designated the undersigned as their respective Authorized Officials for the purposes of implementing their separate trustee responsibilities; and,

Whereas, NOAA has determined that there is a reasonable probability that there have been and will continue to be damages to coastal and marine natural resources within the Trusteeship of the respective Co-Trustees caused by certain releases of DDT and PCBs into the Southern California coastal and marine environment, and has further determined that a natural resource damage assessment shall be carried out; and

Whereas, a copy of the Preassessment Screen Determination issued by NOAA is hereby attached to this agreement as Exhibit A and incorporated herein by this reference; and

Whereas, the assessment of natural resource damages should be carefully coordinated among the Co-Trustees to avoid duplication of efforts, to provide a forum for Co-Trustee review of all natural resource damage assessment procedures and results, and to facilitate full recovery and compensation for injury to or loss of the natural resources and eventual implementation of natural resource restoration, replacement and/or the acquisition of equivalent resources; and,

Whereas, the Co-Trustees recognize that it is imperative that the damage assessment be prepared in sufficient time to meet the limitations of actions prescribed by CERCLA, 42 U.S.C. § 9613(g); and,

Whereas, the Co-Trustees acknowledge that the reasonable cost of assessing the injury to, destruction of or loss of natural resources caused by the release of hazardous substances is recoverable by each Co-Trustee from the responsible parties, 42 U.S.C. § 9607(a)(4)(C), thus requiring that each Co-Trustee incurring an assessment cost adequately document such expenditures, and

Whereas, it is acknowledged that, with regard to the potential injuries to natural resources in this case, each Co-Trustee has and reserves the right to take what ever actions necessary to pursue or preserve any legal remedies available to that Co-Trustee and that nothing in this agreement is intended to waive or foreclose any such right;

Now, therefore, the Co-Trustees enter into this Agreement in furtherance of their respective responsibilities.

1. PURPOSE

This Agreement is intended to provide a basis for coordination and cooperation among the Co-Trustees to carry out their respective trustee responsibilities in accordance with the directive of the National Contingency Plan at 40 C.F.R. 300.74(c). The parties expressly reserve the issue of the disbursement of any damages that may be assessed and recovered until the details of such an award and a plan for natural resource restoration exist at which time the parties will pursue further agreement.

2. AUTHORITY

The Co-Trustees enter into this Agreement in accordance with the natural resource trustee authorities provided for each Co-Trustee by Section 107(f) of CERCLA, as amended, 42 U.S.C. § 9607(f), and Section 311(f)(5) of the FWPCA, 33 U.S.C. § 1321(f)(5) and, if utilized, the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11 (1988). Additional authority for the Federal Co-Trustees is found in the Fish and Wildlife Coordination Act, 16 U.S.C. § 661, and, for the NPS, in 16 U.S.C. § 1.

3. CO-TRUSTEE ADVISORY PANEL

3.1. Creation. There is hereby created a Co-Trustee Advisory Panel that shall have the rights and responsibilities described below.

3.2. Representation. Each Co-Trustee will designate one or more representatives and alternates, as the Co-Trustee deems appropriate, to participate on the Co-Trustee Advisory Panel.

3.3. Rights and Responsibilities.

3.3.1. The Co-Trustee Advisory Panel shall have the opportunity to review and provide comments to the Lead Co-Trustee on all damage assessment determinations including, but not limited to, the adoption of the Assessment Plan, Injury Determination, Economic Methodology Determination and Damage Determination.

3.3.2. The Co-Trustee Advisory Panel shall have the opportunity to review and provide comments to the Lead Trustee on the development of a natural resource restoration plan for the resources or ecosystem adversely affected in this case in the same manner as provided in Section 3.3.1, above, for the damage assessment.

3.3.3. The Co-Trustee Advisory Panel shall consider and provide advice to the Lead Trustee concerning quality control, scientific and economic peer review, and public review for the scientific and economic studies and findings prepared during the damage assessment and restoration planning.

3.3.4. The Co-Trustee Advisory Panel shall have the opportunity to coordinate the utilization of personnel and resources of the Co-Trustees for the assessment of damages for injury to the respective Trust natural resources affected by the release. The responsibility of providing staff support for the Co-Trustee Panel will be shared by the Co-Trustees.

3.3.5. The Co-Trustee Advisory Panel shall have the opportunity to evaluate the assessment procedures provided at 43 C.F.R. Part 11 and advise whether and to what degree, those procedures should be utilized to assess damages resulting from the release.

3.3.6. The Co-Trustee Advisory Panel will consider by separate agreement the means and methods for implementation of any restoration activities funded by damages recovered from potentially responsible parties.

3.3.7. Decisions by the Co-Trustee Advisory Panel shall be by unanimous consent. The Panel members shall establish procedures to resolve any disagreement as necessary.

3.4. Panel Meetings. The Co-Trustee Advisory Panel will meet with such frequency as the members deem necessary to fulfill the purposes of this Agreement.

4. LEAD CO-TRUSTEE

4.1. Designation. NOAA shall be the lead Co-Trustee for the purposes of conducting the natural resource damage assessment in this case. This designation is based upon the substantial extent of NOAA's natural resources at risk. NOAA has also made a significant commitment of personnel and funding in order to adequately review any potential claim for damages before NOAA's right to assert such a claim is potentially impaired by the limitation provisions of CERCLA, 42 U.S.C. § 9613(g).

4.2. Responsibilities.

4.2.1. To the extent the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, are utilized in this case, the Lead Co-Trustee shall have all the authorities provided by those regulations for the Lead Authorized Official.

4.2.2. To the extent the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, are not utilized, the Lead Co-Trustee shall have authority that is the functional equivalent of that described for the Lead Authorized Official in those regulations.

CO-TRUSTEE RIGHTS

All or any portion of this damage assessment and restoration plan, including all exhibits, data, studies, expert opinions or analysis prepared for this damage assessment, shall be available to any and all Co-Trustees that have executed this Memorandum of Agreement and are current participants on the Co-Trustee Advisory Panel, to support any and all efforts by that Co-Trustee to obtain legal remedies for the natural resource injuries in this case.

.6. RESERVATION OF RIGHTS

Each Co-Trustee has and reserves the right to take what ever actions necessary to pursue or preserve any legal remedies available to that Co-Trustee and nothing in this agreement is intended to waive or foreclose any such right.

MODIFICATION

Modification of this Agreement must be in writing and upon

approval of all Co-Trustees currently parties to the Agreement.

8. CONFIDENTIALITY

All Parties to this agreement recognize that all written or oral communications related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. Accordingly, all oral and written communications and work product will be treated as privileged attorney-client communications or attorney work product (or both), as applicable, and will be protected from disclosure to the maximum extent possible under applicable Federal or State law.

9. TERMINATION

This Agreement shall be in effect from the date of execution until the completed development of the restoration plan or plans, as provided herein, or for five years, whichever is sooner, but its effectiveness can be extended by the Co-Trustees, for an additional period not to exceed two years. In the event any Co-Trustee withdraws from the Agreement, such withdrawal must be in writing. In the event of such withdrawal, this Agreement remains in full force and effect for the remaining parties.

10. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this agreement are subject to the availability of funding and are intended to be guidance for the respective Co-Trustees. They may not be the basis of any third party challenges or appeals.

SIGNATURES

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, TRUSTEE

By:

Charles N. Ehler 1/25/90
Date

Charles N. Ehler
Director, Office of Oceanography
and Marine Assessment
National Ocean Service

STATE OF CALIFORNIA

By: *Gordon Van Vleck*
Gordon Van Vleck
Secretary for Resources
The Resources Agency

FEB 8 1990
Date

STATE OF CALIFORNIA

By: Charles Warren Jan 29, 1990
Charles Warren Date
Executive Officer
State Lands Commission

STATE OF CALIFORNIA

By: *Les McCargo*
Les McCargo
Chief Deputy Director
Department of Parks and
Recreation

MAY 30 1990
Date

U.S. FISH AND WILDLIFE SERVICE

By: Marvin L. Plenert FEB 1 1960
Marvin L. Plenert Date
Regional Director
U.S. Fish & Wildlife Service

NATIONAL PARK SERVICE

By:

Stanley T. Albright
Stanley T. Albright
Regional Director
Western Region
National Park Service

1/31/90
Date

STATE OF CALIFORNIA

By: Pete Bontadelli
Pete Bontadelli
Director
Department of Fish and Game

3-14-90
Date