

# COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT AGREEMENT FOR THE M/V *CAPE FLATTERY* INCIDENT

## I. PARTIES

This agreement is made between the Department of Health, State of Hawaii, (DOH), the Department of Land and Natural Resources, State of Hawaii, (DNLR), the United States Department of the Interior, acting through the U.S. Fish and Wildlife Service (DOI), and the National Oceanic and Atmospheric Administration (NOAA), [collectively, the "Trustees"], and **Cape Flattery Shipping Ltd. and Pacific Basin Marine Services Ltd.** [both referred to as "Responsible Parties"]. The Trustees and Responsible Parties are collectively referred to as the "Parties" and individually as a "Party."

## II. PURPOSE

The purpose of this Agreement is to set forth the nature and scope of the cooperative efforts that have been, and that are to be, undertaken by the Parties for the purpose of conducting a natural resource damage assessment, as that term is defined in 15 C.F.R. § 990.30, and for the purpose of determining natural resource damages in accordance with the applicable provisions of Chapter 128, Hawaii Revised Statutes (HRS), with respect to the Incident (as described in Article IV).

The Parties believe that this Agreement is in their best interests as it may facilitate early resolution and settlement of the Trustees' natural resource damage claims resulting from the Incident.

## III. AUTHORITY

The Trustees have authority to pursue natural resource damage assessment (NRDA) activities pursuant to state and federal statutes and regulations, including but not limited to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 *et seq.*; the Oil Pollution Act NRDA Regulations, 15 C.F.R. Part 990; the National Contingency Plan, 40 C.F.R. Part 300, Subpart G; Executive Order 12777; Chapter 128D HRS; and 11-451 Hawaii Administrative Rules.

## IV. BACKGROUND

On or about February 2, 2005 the bulk carrier M/V *Cape Flattery* grounded about a quarter mile off Barbers Point, Oahu. As a part of an Incident Action Plan, the U.S. Coast Guard, the State of Hawaii and the Responsible Parties developed a Salvage Operations Oil Spill Contingency Plan to provide direction because of the substantial threat of a discharge of oil as the result of the grounding and the subsequent salvage operations. Over the following days fuel and cargo were removed from the grounded vessel. Various tugs and other vessels attempted to remove the *Flattery* from its grounded position. These response activities and efforts to remove the *Flattery* caused injuries to the natural resources in the area. All of the foregoing is referred to as the

"Incident."

## **V. PREASSESSMENT PHASE**

The Trustees commenced the Preassessment Phase of the NRDA in accordance with 15 C.F.R. § 990.40, to determine if they had jurisdiction to pursue restoration under the Oil Pollution Act and, if so, whether it was appropriate to do so.

During the period of the response activities and the Preassessment Phase, the Trustees collected and analyzed the following: (1) data reasonably expected to be necessary to make a determination of jurisdiction or a determination to conduct restoration planning, (2) ephemeral data, and/or (3) information needed to design or implement anticipated emergency restoration and/or assessment activities as part of the Restoration Planning Phase.

Based on this data collection and these analyses, the Trustees found that: (1) an incident, as defined by 15 C.F.R. § 990.30, occurred; (2) the Incident did not involve any of the circumstances set forth in 15 C.F.R. § 990.41(2); and (3) natural resources under the trusteeship of the Trustees may have been, or may be, injured (as that term is defined in 15 C.F.R. § 990.30) as a result of the Incident. Therefore, the Trustees have jurisdiction to pursue restoration under the Oil Pollution Act.

The Trustees further determined, based on this data collection and these analyses that: (1) injuries (as that term is defined in 15 C.F.R. § 990.30) have resulted or are likely to result from the Incident; (2) response actions have not adequately addressed, or are not expected to address, the injuries resulting from the Incident; and (3) feasible primary and/or compensatory restoration actions (including "emergency restoration" actions, as authorized at 15 C.F.R. § 990.26) exist to address the potential injuries.

Consequently, the Trustees have determined to proceed with the Restoration Planning Phase of the NRDA, in accordance with 15 C.F.R. § 990.50, by which the Trustees will evaluate and quantify potential injuries (injury assessment) and use that information to determine the need for and scale of restoration actions (restoration selection.)

## **VI. INJURY ASSESSMENT -- SCOPE**

The Trustees and the Responsible Parties agree that a cooperative effort to determine the injuries to natural resources and/or resource services, to quantify such injuries, and to conduct restoration planning may be cost-effective, avoid duplication, and effectively use limited personnel and other resources. The Parties also agree that data gaps may exist that require further study. The Parties shall attempt to reach consensus on study needs related to injury determination and quantification and the design of such studies. Any Party to this Agreement may propose a study or activity. If the Parties agree, the study or activity shall be deemed a "Cooperative Study or Activity."

The Cooperative Study or Activity will be described in detail in a Scope of Work (SOW). As SOWs are developed and agreed to by the Parties, they will become attachments to this Agreement and their terms will form a part of this Agreement. The Parties acknowledge that certain activities have been or are being conducted by the Trustees and/or by the Responsible Parties and agree that such activities that have been, are, or will be conducted are reasonable and necessary to accomplish the NRDA arising from the Incident.

The Responsible Parties shall fund all cooperative studies or activities through completion, unless the Parties agree to the contrary or the study design calls for discontinuation upon the occurrence of a specified event. If a Trustee entity is responsible for conducting a Cooperative Study or Activity, the Responsible Parties shall agree on the specific procedures for transferring the funding to a Trustee agency. A Responsible Party that terminates its participation in this Agreement pursuant to Article XV shall retain the funding obligations for such studies as set forth in that Article.

## **VII. EXCHANGE OF DATA AND REPORTS**

Unless subject to an alternative arrangement, the Parties agree to exchange data and reports pertaining to the cooperative activities described above within two weeks after the data or reports become available, or within two weeks of the effective date of this Agreement, if such are already available upon the effective date. If an activity consists in whole or in part of a report or written analysis of data, all Parties will be provided with a proposed final draft version of the report or written analysis and allowed a reasonable amount of time within which to review and comment on the document before it is issued in final form. Any such comments must be included as part of the final report or otherwise made a part of the Administrative Record maintained by the Trustees.

The Parties agree to attempt to reach consensus on the interpretation of, and conclusions to be drawn from, any data collected or generated as the result of any cooperative activity performed under this Agreement. Any such consensus and/or conclusion resulting therefrom may be memorialized as a stipulation. Any Party may propose a stipulation at any time. A stipulation may address issues of fact or law or both. A stipulation, agreed to by all Parties, the U.S. Department of Justice and the Department of the Attorney General, State of Hawaii shall be attached to this Agreement and shall survive the termination of this Agreement. Any matter covered by a stipulation or other form of agreement under this Agreement shall not be subject to objection or challenge by any Party.

In the event the Parties are unable to reach a consensus, any Party reserves that right to disagree on the interpretation of the data resulting from a cooperative activity and to develop separate and independent findings and conclusions and have these included in the Administrative Record.

## **VIII. INDEPENDENT ACTIVITIES**

The Parties expressly reserve the right to perform independent natural resource damage assessment activities unless such activities have been agreed to and funded in accordance with this Agreement. The Parties agree, however, that each shall be barred from introducing new or different data collected, generated by or 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 any judicial or administrative proceeding related to natural resource liability arising from the Incident.

## **IX. FINANCIAL RESPONSIBILITY**

### **A. Scope**

The Responsible Parties agree to fund all reasonable costs of assessing injury, destruction or loss of natural resources or the services provided by those resources resulting from the Incident that are consistent with damage assessment costs set out in 15 C.F.R. § 990.30 and any applicable statute or regulation of the State of Hawaii undertaken pursuant to this Agreement. In addition, the Responsible Parties agree to reimburse the Trustees for their reasonable costs of performing the Preassessment Phase of this NRDA in accordance with the provisions of Article V hereof, and for the reasonable costs otherwise recoverable by law associated with any administrative, legal, enforcement, monitoring and oversight, and public participation activities undertaken by the Trustees in their assessment of natural resource damages arising from the Incident. This obligation to reimburse shall extend to work performed by Trustee personnel or through contractors or others acting on their behalf. Trustee costs include, but are not limited to, travel expenses, personnel costs including Trustee attorney costs, oversight costs, administrative costs, overhead, costs of overseeing the performance of contractors and indirect charges.

### **B. Advanced Funding**

To participate fully in this cooperative effort, certain Trustees require funding in advance. Those trustees are:

Department of the Interior  
DLNR

NOAA and the Department of the Attorney General will seek reimbursement of costs to be incurred subsequent to May 15, 2005. Trustees seeking advanced funding will provide payment information to the designated representative of the Responsible Parties.

The advanced funding amount to be paid to the DOI will allow it to set up a reimbursable account and avoid any potential for violation of the Anti-Deficiency Act.

The Responsible Parties agree to provide to DOI further advance funding to fulfill its obligations under this Agreement upon request from DOI to replenish this reimbursable account.

Within thirty days of the effective date of the Agreement, the Responsible Parties shall provide the following advanced funding: (1) \$75,000 to DOI and (2) \$50,000 to DLNR.

### **C. Past Damage Assessment Costs**

Each Trustee has incurred reasonable damage assessment costs, including emergency restoration costs, prior to the effective date of this Agreement. Pursuant to the procedures contained in Subpart D, "Invoices," of this Article, the Responsible Parties will reimburse Trustees for reasonable damage assessment costs, as follows:

NOAA for its costs (for the period February 2, 2005 to June 25, 2005) -	\$217,485
DLNR for its costs (for the period February 2, 2005 to May 15, 2005) -	\$ 22,658
DOI for its costs (for the period February 2, 2005 to July 9, 2005) -	\$ 77,627

### **D. Invoices**

Each Trustee shall submit an accounting of costs incurred pursuant to this Agreement when seeking reimbursement or when documenting the expenditure of advanced funding. This accounting shall consist of a spreadsheet summarizing labor (hours and rates), travel costs, equipment costs, contractors' costs, and miscellaneous expenses (*e.g.*, supplies, overnight mail). The Responsible Parties recognize that each Trustee has different accounting processes and understands that the accounting from each Trustee will not be in the same format.

The Responsible Parties agree to review promptly the accounting provided by Trustees and shall process payment to the individual Trustee, or its contractors where direct payments are authorized, within thirty (30) days of receipt of the accounting. The Parties agree that any issues related to the accounting will be discussed within this thirty day time period. If the Responsible Parties believe any portion of an accounting is unreasonable or that it contains a mathematical error, they shall pay the undisputed amount and shall attempt to resolve the disputed amount with the Trustee(s). If the dispute cannot be resolved, or if for any other reason the reimbursement has not been paid within sixty (60) days, and should a Trustee subsequently prevail in any action to collect any disputed or other such unpaid amounts, the Responsible Parties shall pay, in addition to the amount determined to be owed, interest on said amount calculated from the date that the reimbursement was payable under this Agreement. Any such interest payable by the Responsible Parties shall be calculated in accordance with the Debt Collection Act, 31 U.S.C. 3717.

These accountings should be directed to the following representative(s) of the Responsible Parties:

Eugene J. O'Connor, Esq.  
Fowler Rodriguez & Chalos, LLC  
366 Main Street  
Port Washington, NY 11050  
Attorney For:  
Cape Flattery Shipping Ltd.  
and  
Pacific Basin Marine Services Ltd.

## **X. DISPUTE RESOLUTION**

The Parties agree to attempt to resolve any disputes concerning the implementation of this Agreement, or arising from any of the provisions of this Agreement, through good faith negotiations among the designated representatives of the Parties identified in Attachment A. Disputes that cannot be resolved at that level shall be elevated to appropriate officials of the Parties.

In the event a dispute cannot be resolved within a reasonable time, the Trustees or the Responsible Parties may terminate this Agreement in its entirety or with respect to a particular activity that is the subject of the dispute. Such termination shall be pursuant to Article XV.

A Party may change its designated representative identified in Attachment A by providing written notification to the remaining Parties.

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

This Agreement does not release the Responsible Parties from any potential liability except for the liability for costs that are funded or reimbursed by the Responsible Parties. The Trustees reserve all claims against the Responsibility Parties related to natural resource liability arising from the Incident, including but not limited to claims for damage, injury, loss, or destruction of natural resources or their uses; claims for the costs of assessing damage, injury, loss, or destruction of natural resources or their uses; 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 Incident.

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 any other Party. Except as provided in this Agreement or in any attachments or stipulations entered into pursuant to this Agreement, nothing in this Agreement is intended nor shall be construed as a waiver by any of the Parties of any rights, defenses, privileges or affirmative claims in any proceeding related to natural resource liability arising from this Incident. The RPs reserve any rights they may have under OPA, including the right to assert exoneration under § 2703 or limitation under § 2704, or to file a claim with the National Pollution Fund Center for reimbursement of their response costs or damages under § 2708.

Nothing in this Agreement is intended, nor shall be interpreted, to limit the scope of the natural resource injury assessment or restoration appropriate for this Incident or to otherwise restrict or abrogate the authority or discretion of the Trustees to determine the scope of that assessment.

## **XII. RETENTION OF PRIVILEGES**

Any and all data, photographs, maps, or reports collected, developed, prepared or exchanged between Trustees and Responsible Parties pursuant to this Agreement shall not be considered work product, attorney-client or otherwise privileged, and the Parties shall not challenge admissibility of such items on privilege grounds in any administrative or judicial proceeding regarding natural resource liability arising from this Incident.

Any Party may assert a claim of privilege with respect to: (1) written communications containing interpretations of raw or factual data that were not developed or prepared as part of a cooperative activity under this Agreement and (2) settlement offers (either monetary or in the form of restoration projects). To the extent authorized by law, the Parties intend for all written communications between their counsel concerning the scaling of restoration activities to be in furtherance of settlement and covered by Rule 408 of the Federal Rules of Evidence and Rule 48 of the Hawaii Rules of Evidence.

Any Party wishing to assert a claim of privilege is responsible for asserting its own claim. Where a claim of privilege has been asserted, the written communication or document shall be considered to be privileged and confidential in accordance with Article XIII, "Confidentiality."

## **XIII. CONFIDENTIALITY**

Where a written communication or other document is claimed to be confidential, it shall not be disclosed to any party other than the Parties to this Agreement unless and until one of the following circumstances exist:

1. The prior written consent of the Party claiming it to be confidential has been provided.
2. Such document or photograph has been included in the Administrative Record.

3. Such document is releaseable in accordance with Chapter 92F, HRS (the Hawaii Public Records Act) and/or the federal Freedom of Information Act; is required to be produced pursuant to any applicable federal or state law; or is ordered to be produced by a competent court of law.

With respect to Subpart 3 above, any Party who receives a request for documents pursuant to Chapter 92F, HRS or the federal Freedom of Information Act, or who is served with a subpoena or discovery request for any document which a Party has claimed as confidential, shall provide notice to the other Parties at the earliest opportunity so as to allow any of them, if they so choose, to assert a privilege or protection seeking to prevent the release of such documents.

#### **XIV. NOTICES**

Unless otherwise indicated in this Agreement, all written communications, submission of data, and notices shall be sent to the designated representatives of the Parties listed in Attachment B. Submittals may be electronic or via U.S. mail or other delivery service. A Party may change its designated representative by providing written notification to the remaining Parties.

#### **XV. MODIFICATION AND TERMINATION**

Any modification of this Agreement or its Attachment(s) must be in writing, and except for modifications to Attachments A and B, must be executed by all of the Parties.

In the event that a dispute cannot be resolved by the Parties through the process described in Article X, the Trustees jointly or the Responsible Parties jointly may withdraw their participation in the disputed activity. Any withdrawal is effective forty-eight (48) hours after the withdrawing Parties provide written notification of the withdrawal to all Parties. Withdrawal from one or more activities shall not, by itself, void this Agreement as to the remaining activities.

Any Party may terminate its participation in this Agreement at any time by giving a thirty (30) day written notice to all Parties. Termination by one or more Trustee(s) or by one of the Responsible Parties shall not void the agreement as to the remaining Parties.

Should the Responsible Parties terminate this Agreement in its entirety or with respect to one or more activities, they shall remain responsible, under the terms of this Agreement, for any costs incurred by the Trustees up to thirty days after the date of the notice of termination, or in the case of a cooperative activity, the costs related to completion of that activity, based on the agreed scope and budget of that activity at the time of termination or withdrawal. In addition, the Parties agree, as to the terminated activities, to exchange all products resulting from those activities prior to the date of termination.

Nothing in this Article is intended to limit the ability of the Trustees to recover from the Responsible Parties any unreimbursed damage assessment costs incurred prior to the effective date of this Agreement or subsequent to the effective date of the termination.

Termination of this Agreement either as between the Trustees and the Responsible Parties or by a single Party, is prospective only. As such, Article XI, "Reservation of Rights" and Article XIII, "Confidentiality," of this Agreement, any work conducted pursuant to this Agreement, and all Attachments and stipulations incorporated herein prior to the effective date of the termination, survive and shall remain in effect following any termination.

#### **XVI. EFFECTIVE DATE**

This Agreement may be executed in counterparts and in facsimile. This Agreement shall be effective when signed by one Responsible Party and one Trustee. The Effective Date for each Trustee and each Responsible Party shall be the date upon which that Trustee or Responsible Party signs the Agreement. Trustees that have not executed the Agreement may participate in the matters covered, but the Responsible Parties have no obligation under this Agreement to reimburse Trustee costs or to provide advanced funding until that Trustee has signed the document. The Effective Date of any Attachment hereafter developed and incorporated into this Agreement shall be the date set forth in such Attachment.

#### **XVII. DURATION**

The term of this Agreement is from the effective Date until the purposes set forth herein are accomplished unless the Parties agree otherwise or it is terminated pursuant to the prior provisions of this Agreement.

#### **XVIII. LIMITATION**

Nothing in this Agreement shall be construed as obligating the United States, the State of Hawaii or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

#### **XIX. 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.

**SIGNATURES**

For each Party:

Department of Land and Natural Resources, Hawaii

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Department of Health, Hawaii

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

United States Department of the Interior  
through the U.S. Fish and Wildlife Service,

Signed \_\_\_\_\_ Date: \_\_\_\_\_

National Oceanic and Atmospheric Administration,

Signed: \_\_\_\_\_ Date: \_\_\_\_\_

Cape Flattery Shipping Ltd.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
Attorney in Fact

Pacific Basin Marine Services Ltd.

Signed: \_\_\_\_\_ Date: \_\_\_\_\_  
Attorney in Fact

## ATTACHMENT A

**[insert names of designated reps for dispute resolution]**

For the Trustees:

DLNR/DOH:

DOI:

Charles McKinley  
Office of the Solicitor, DOI  
1111 Jackson St., Suite 735  
Oakland, CA 94607  
Tel: 510- 817-1461  
Fax: 510- 419-0143  
E-Mail: [mckinleydoi@yahoo.com](mailto:mckinleydoi@yahoo.com)

NOAA:

Katherine A. Pease  
Office of General Counsel, NOAA  
Suite 4470  
501 W. Ocean Boulevard  
Long Beach, CA 90802  
Tel: 562-980-4077  
Fax: 562-980-4065  
E-Mail: [katherine.pease@noaa.gov](mailto:katherine.pease@noaa.gov)

For the Responsible Parties

Eugene J. O'Connor, Esq.  
Fowler Rodriguez & Chalos, LLC  
366 Main Street  
Port Washington, NY 11050  
Attorney For:  
Cape Flattery Shipping Ltd.  
and  
Pacific Basin Marine Services Ltd

## ATTACHMENT B

### For the Trustees:

#### DLNR/DOH:

Alton Miyadaka  
Division of Aquatic Resources  
1151 Punchbowl Street  
Honolulu, Hawaii 96813  
Tel: 808-587-0092  
Fax: 808-587-0015  
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Fax: 808-587-3077  
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#### DOI:

Karen Rosa  
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Tel: 510- 817-1461  
Fax: 510- 419-0143  
E-Mail: [mckinleydoi@yahoo.com](mailto:mckinleydoi@yahoo.com)

#### NOAA:

John Cubit  
Damage Assessment Center, NOAA  
Suite 4470  
501 W. Ocean Boulevard  
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Fax: 562-980-4065  
E-Mail: [john.cubit@noaa.gov](mailto:john.cubit@noaa.gov)

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For the Responsible Parties

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366 Main Street  
Port Washington, NY 11050  
Attorney For:  
Cape Flattery Shipping Ltd.  
and  
Pacific Basin Marine Services Ltd