

File No. 140375

Committee Item No. 11

Board Item No. _____

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Committee: Rules

Date May 15, 2014

Board of Supervisors Meeting

Date _____

Cmte Board

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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Resolution |
| <input type="checkbox"/> | <input type="checkbox"/> | Ordinance |
| <input type="checkbox"/> | <input type="checkbox"/> | Legislative Digest |
| <input type="checkbox"/> | <input type="checkbox"/> | Budget and Legislative Analyst Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Youth Commission Report |
| <input type="checkbox"/> | <input type="checkbox"/> | Introduction Form |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Department/Agency Cover Letter and/or Report |
| <input type="checkbox"/> | <input type="checkbox"/> | MOU |
| <input type="checkbox"/> | <input type="checkbox"/> | Grant Information Form |
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| <input type="checkbox"/> | <input type="checkbox"/> | Subcontract Budget |
| <input type="checkbox"/> | <input type="checkbox"/> | Contract/Agreement |
| <input type="checkbox"/> | <input type="checkbox"/> | Form 126 – Ethics Commission |
| <input type="checkbox"/> | <input type="checkbox"/> | Award Letter |
| <input type="checkbox"/> | <input type="checkbox"/> | Application |
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OTHER (Use back side if additional space is needed)

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| <input checked="" type="checkbox"/> | <input type="checkbox"/> | List of Parties |
| <input checked="" type="checkbox"/> | <input type="checkbox"/> | Mediation Agreement |
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Completed by: Alisa Miller Date May 9, 2014

Completed by: _____ Date _____

1 [Tolling and Standstill Agreement - Yosemite Slough Environmental Claims]

2
3 **Resolution approving a Tolling and Standstill Agreement to toll the statute of**
4 **limitations and forbear the City and other parties that are potentially responsible for**
5 **environmental contamination at Yosemite Slough from taking action with respect to**
6 **claims related to costs or expenses arising from the Yosemite Slough Superfund Site.**
7

8 WHEREAS, Yosemite Slough is an inlet channel tidally connected to the San Francisco
9 Bay located between the Hunters Point Naval Shipyard and the Candlestick Point State
10 Recreational Area that contains contaminated sediments identified by the United States
11 Environmental Protection Agency (EPA); and

12 WHEREAS, EPA has designated Yosemite Slough as a site that will be investigated
13 and cleaned up under the Comprehensive Environmental Response, Compensation, and
14 Liability Act of 1980 ("CERCLA"), 42 U.S.C. Sections 9601, *et seq.* (the "Site"); and

15 WHEREAS, EPA has named the City as a Potentially Responsible Party (PRP) liable
16 under CERCLA for the Site cleanup along with numerous other private and public entities, a
17 complete list of whom is contained in Board of Supervisors File No. 140375; and

18 WHEREAS, In January 2014 EPA issued a final Engineering Evaluation/Cost Analysis
19 that includes a proposed remedy for a cleanup project at the Site; and

20 WHEREAS, The City and certain other PRPs have agreed to participate in a non-
21 binding mediation process with a third-party neutral mediator in an attempt to fairly and
22 equitably allocate potential liabilities in connection with the Site; and

23 WHEREAS, Some PRPs have expressed concerns that delay associated with
24 participation in the mediation should not be considered in calculating applicable limitations
25

1 periods for potential claims between participants and that the mediation participants should
2 agree not to pursue claims against any other participant during the mediation process; and

3 WHEREAS, To facilitate an efficient and mutually beneficial resolution of potential
4 claims associated with the Site and to avoid the need for potentially unnecessary litigation,
5 participants in the mediation are asked to agree that the limitations period for any potential
6 litigation related to the Site shall be tolled and no participant shall pursue claims or causes of
7 action against any other participant until termination of the mediation process. This tolling and
8 standstill agreement is set forth in the Yosemite Slough Superfund Site Mediation Agreement
9 ("Mediation Agreement"), Section IV, on file with the Clerk of the Board of Supervisors in File
10 No. 140375; now, therefore, be it

11 RESOLVED, That Board of Supervisors authorizes the City to agree that the statute of
12 limitations for any party to the Mediation Agreement to file an action against the City with
13 respect to any claimed costs or expenses arising out of the Site shall be tolled as of the
14 Effective Date of the Mediation Agreement pursuant to the termination provisions therein; and,
15 be it

16 FURTHER RESOLVED, That Board of Supervisors authorizes the City to agree that
17 until expiration or termination of the Mediation Agreement it will not pursue against any other
18 participant to the Mediation Agreement any claims or causes of action under any statute or
19 common law relating to the matters the Mediation Agreement is designed to resolve; and, be it

20 FURTHER RESOLVED, That the Board of Supervisors hereby approves the tolling and
21 standstill provisions in the Mediation Agreement, Section IV, contained in Board of
22 Supervisors File No. 140375 and authorizes the City Attorney to enter into such Agreement on
23 behalf of the City and County of San Francisco.

CITY AND COUNTY OF SAN FRANCISCO



DENNIS J. HERRERA
City Attorney

OFFICE OF THE CITY ATTORNEY

ELAINE M. O'NEIL
Deputy City Attorney

Direct Dial: (415) 554-3881
Email: elaine.o'neil@sfgov.org

April 10, 2014

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
14 APR 10 PM 3:10
le

Angela Calvillo
Clerk of the Board of Supervisors
Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102-4689

Re: Resolution Approving a Tolling and Standstill Agreement to Toll the Statute of Limitations and Forbear the City and Other Parties that are Potentially Responsible for Environmental Contamination at Yosemite Slough from Taking Action with Respect to Claims Related to Costs or Expenses Arising from the Yosemite Slough Superfund Site.

Dear Clerk of the Board:

Our office requests introduction of a resolution approving execution of a tolling and standstill agreement related to a proposed mediation of environmental claims arising out of the Yosemite Slough Superfund Site. Enclosed with this letter are the following documents:

1. Original redline resolution, plus two double-sided copies;
2. A list, referenced in the resolution, of the potential parties to the tolling and standstill agreement, entitled "Yosemite Slough Superfund Site, List of Potentially Responsible Parties, Provided by United States Environmental Protection Agency on 4/10/14;"
3. A March 14, 2014 letter to the Office of the City Attorney from Convening Neutral David C. Batson inviting the City to participate in an ADR Allocation for All EPA-Identified Potentially Responsible Parties at the Yosemite Slough Site; and
4. The proposed Yosemite Slough Superfund Site Mediation Agreement, also referenced in the resolution.

Please contact me at 554-3881 if you have any questions. Thank you.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Elaine M. O'Neil
Elaine M. O'Neil
Deputy City Attorney

cc: Jon Givner, Esq.

Yosemite Slough Superfund Site
List of Potentially Responsible Parties
Provided by United States Environmental Protection Agency on 4/10/14

Liable Party	Operator / Owner / Generator Company
Aerojet	Aerojet Strategic Propulsion Co.
Akzo Nobel Paints LLC	International Paint Co.; U.S. Cellulose; ICI Paints/The Glidden Co.
Alcoa	Reynolds Metals Company
Anresco, Incorporated	Anresco, Incorporated
Ashland, Inc.	Ashland Chemical Company (a division of Ashland, Inc.)
California Department of Parks and Recreation	California Department of Parks and Recreation
California State Lands Commission	California State Lands Commission
Chemtura	Chemtura
Chevron Corporation	Chevron U.S.A., Inc.; Amsco - Union Chemicals; Union Oil Company of California dba Unocal Corporation; and Puregro Company
City and County of San Francisco	City and County of San Francisco
Cleasby Manufacturing Co., Inc.	Cleasby Manufacturing Co., Inc.
Delta Air Lines, Inc.	Delta Air Lines, Inc.
Dorsett & Jackson, Inc.	Carmona Chemical (Dorsett & Jackson)
E.I. DuPont de Nemours & Co., Inc.	Dupont
Eureka Chemical Company	Eureka Chemical Company
Eureka Fluid Works	Eureka Fluid Works
ExxonMobil Corporation	Exxon Company, USA
Ford Motor Company	Ford Motor Company
Garza Property Living Trust 2002	Garza Property Living Trust 2002
General Electric Company	General Electric Company
General Motors Corporation	General Motors Corporation
Great Western Chemical Company	Great Western Chemical Company
Haz/Control, Inc.	Haz/Control, Inc. (for South Bay Chemical, Inc.)
Hewlett-Packard Company	Hewlett Packard
Honeywell International, Inc.	Baron Blakeslee, Inc. (Allied Signal)
Ingersoll-Rand Company	Schlage Lock
Intel Corporation	Intel Corporation
International Paint Co.	International Paint Co.
International Paper Company	International Paper Company (for Stecher-Traung-Schmidt)
Inter-State Oil Company	Interstate Oil
ITW PMI Investments, Inc.	Stero Company
Kaiser Aluminum & Chemical Corp.	Kaiser Aluminum
Kelly Moore Paint Company, Inc.	Kelly Moore Paint Co. Inc
Lockheed Martin Corporation	Lockheed Missiles
Maxus Energy Corporation	Diamond Shamrock
McKesson HBOC, Incorporated	McKesson Chemical
Micro-Tracers Inc.	Micro-Tracers Inc.
Monsanto Company	Monsanto Company
NL Industries, Inc.	Spencer Kellogg
Northrop Grumman Corporation	Litton Industries
Olympian	Olympian Oil Co.
Owens-Illinois, Inc.	Owen Illinois (Brockway Glass)
Pacific Gas & Electric Company	Pacific Gas & Electric Company
Pacific Scientific Energetic Materials Company	Teledyne
Peninsula Oil Company	Peninsula Oil Company
Pennzoil-Quaker State Company	Pennzoil Company; Quaker State Oil
Perez Auto and Truck Painting and Suarez Auto Repair, a California General Partnership	Perez Auto and Truck Painting and Suarez Auto Repair, a California General Partnership
Alfonso and Martha Picazo	Alfonso and Martha Picazo
R.J. McGlennon Company, Inc.	R.J. McGlennon Company, Inc. (MacLac)

Yosemite Slough Superfund Site
List of Potentially Responsible Parties
Provided by United States Environmental Protection Agency on 4/10/14

Liable Party	Operator / Owner / Generator Company
Redding Petroleum, Inc.	Redding Petroleum aka Industrial Oil
Redwood Oil Company	Redwood Oil Company
Reichhold, Inc.	Reichhold Chemicals, Inc.
Ricci and Kruse Lumber Company	Ricci and Kruse Lumber Company
Roche Palo Alto LLC	Syntax Labs
Rochester Midland Corporation	Bytech Chemical
Rohm & Haas Company	Rohm & Haas Company
Romic Environmental Technologies Corporation	Romic Chemical
RWD Associates, LLC	RWD Associates, LLC
San Francisco Bay Area Rapid Transit District	Bay Area Rapid Transit District
Sequa Corporation	General Printing Ink (Sequa Corp.)
Shell Oil Company	Shell Oil
Simpson Coatings Group, Inc.	Simpson Coatings (Organic Coatings)
Stanford University	Stanford University
Syngenta Crop Protection, Inc.	Zoecon Corp.
Tap Plastics, Inc.	Tap Plastics, Inc. (Chemco)
Textron, Inc.	Spencer Kellogg
The Coca-Cola Company	The Coca-Cola Company
The Dow Chemical Company	Dow Chemical
The O'Brien Corporation	O'Brien Corp. (Fuller O'Brien Paints)
The Sherwin-Williams Company	Sherwin-Williams
TriMas Corporation	Norris Industries (Riverbank Ammo plant)
Tony J. Hwang	Tony J. Hwang
Tyco Electronics	Raychem Corporation
Union City Chemicals Incorporated	Union City Chemicals
United Air Lines, Inc.	United Air Lines, Inc.
United States Defense Reutilization Marketing Service	Defense Property Disposal
United Technologies Corporation	United Technologies Corporation
Univar USA Inc.	Van Waters & Rogers, Inc./Vopak Distribution Americas Corporation; Chem Central
University of California	Lawrence Berkeley Lab; U.C. Regents; and Univ. of California, San Francisco
W.R. Grace & Company	W.R. Grace/Dewey Almy
W.R. Meadows, Inc.	W.R. Meadows, Inc.
WDC Liquidating Inc.	Waymire Drum Co.

**YOSEMITE SLOUGH SUPERFUND SITE
MEDIATION AGREEMENT**

This Mediation Agreement ("Agreement") is made between and among certain entities that have been identified as potentially responsible parties ("PRPs") at the Yosemite Slough Superfund Site (the "Site") whose authorized representatives have executed this Agreement (hereinafter referred to as "Participant(s)"). A list of all Participants is set forth in Exhibit A.

WHEREAS, in January 2014 the United States Environmental Protection Agency, Region IX ("EPA") issued a final Engineering Evaluation/Cost Analysis ("EE/CA") that includes a proposed remedy for a cleanup project at the Site.

WHEREAS, certain PRPs have incurred administrative and technical costs and costs of response which they assert are recoverable pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601, *et seq.* in relation to the Site.

WHEREAS the Participants seek an efficient and mutually beneficial resolution of potential claims associated with the Site through mediation with a third-party neutral mediator jointly selected by the Participants; and

WHEREAS, without admitting any fact, responsibility, fault or liability in connection with the Site, the Participants hereto wish to:

- (i) develop and conduct a non-judicial, non-binding, negotiated or alternative dispute resolution-based, fair and reasonable process for equitably allocating potential liabilities associated with the Site;
- (ii) cooperate among themselves in this effort; and
- (iii) negotiate in good faith with the assistance of an allocation and mediation neutral (the "Mediator") settlement agreement(s) related to the Site.

This allocation and mediation process is termed "the Mediation" in this Agreement.

NOW, THEREFORE, in consideration of the foregoing, the Participants and the Mediator agree as follows:

Yosemite Slough Superfund Site Mediation Agreement

I. PARTICIPATION

A. Participant Group. The Participants hereby organize and constitute themselves as the Yosemite Slough Mediation Group (hereinafter the "Group"). Each party whose authorized representative has executed this Agreement is a Participant in the Mediation and a member of the Group. Exhibit A to this Agreement shall constitute the list of official contact persons for each Participant, and notice to the respective contact persons shall be deemed notice to the Participant(s) that he or she represents. Participant representatives in the process, as necessary and appropriate during the course of the mediation, may include the following: appropriate client representatives and/or counsel for each of the non-federal Participants, and for the United States, appropriate representatives of the Department of Justice and its client agencies.

B. Participation by the United States. The Participants acknowledge that the United States is participating in this Agreement on behalf of the Defense Logistics Agency. By entering into this Agreement, the United States does not compromise, release, or settle any claims or potential claims of EPA or any natural resource trustee as against the Participants or any other parties, even on an interim basis. Any action taken by the United States under this Agreement shall not be deemed to extend to, bind, or be endorsed by EPA, nor shall such action or this Agreement bind or limit EPA with regard to any right, claim, duty, action, or determination relating to the Site, any potential source areas, or any person or entity (including the Participants) identified by EPA as a potentially responsible party with respect to the Site. This Agreement shall not prejudice or limit the United States, the State of California, or the City and County of San Francisco from taking any legally appropriate action, to enforce federal or state law to protect public health, safety, or welfare, or the environment.

C. Withdrawal. Any Participant may withdraw from all participation in this Agreement upon written notice to all other Participants and the Mediator, which shall be effective as of the date the notice is postmarked or dated if by email. Any Participant shall after such withdrawal remain subject to the confidentiality provisions of this Agreement. Any Participant that withdraws from participation in this Agreement shall (1) return to the other Participants or the Mediator, as appropriate, all confidential documents (and all copies of such documents) received from the other Participant or the Mediator during the Mediation, and (2) remain obligated to pay its share of Shared Costs pursuant to this Agreement through the date the Notice of Withdrawal is provided to the other Participants.

D. Cooperation in the Mediation. The Participants agree to cooperate in the orderly process of the mediation. In the event that any Participant does not respond to the Mediator's request to that Participant in a timely fashion, or attempts to unnecessarily delay or impede the mediation process, the Mediator may proceed without input from that Participant, at his discretion after providing two week written notice to the Participant. Any Participant so situated may withdraw from the mediation pursuant to Section I.C.

Yosemite Slough Superfund Site Mediation Agreement

E. Additional Parties. The Participants may, in writing by consensus of the Participants, approve the entry into this Agreement of additional entities as Participants after the Effective Date of this Agreement.

II. SELECTION OF THE MEDIATOR, MEDIATION PROCESS, AND PAYMENT OF COSTS

A. Mediator. The Participants have selected Matthew Low as the Mediator.

1. Authority. The Participants, their counsel, and the Mediator understand that the Mediator has no authority to decide the claims or any issues in any related potential litigation or administrative action and that the Mediator is not acting as an advocate or attorney for any Participant.

2. Time. The Mediator shall ensure that each Participant shall have a reasonable amount of time during the mediation process to present its position with respect to the issues in mediation and to provide a response to other Participants' positions.

3. Conduct. The purpose of the Mediation shall be to assist the Participants in reaching their own agreement(s), and the Mediator shall conduct the Mediation in a fair and neutral manner to facilitate the resolution of this matter between and amongst the Participants. In addition, should the Participants agree, the Mediator also shall assist the Participants in negotiating agreements with EPA and/or other third parties such as the California Regional Water Quality Control Board for the San Francisco Bay Region. The Mediator shall work for the benefit of the Participants and be guided by the provisions of this Agreement.

B. Mediation Process. The process for conducting the Mediation is set forth herein.

1. Establishment of a Document Repository. The Mediator shall establish a data sharing site that will serve as a document repository for shared information. The documents shall include (a) available CERCLA 104(e) responses related to the Site or any potential source areas, (b) EPA source investigation/potentially responsible party search materials, (c) technical information, including but not limited to materials relating to EPA's EE/CA and materials relating to the Yosemite Slough wetlands restoration project adjacent to the Site; (d) the Participants' non-confidential submissions to the Mediator, and (e) all communications from and reports by the Mediator. Documents submitted to the repository shall be in PDF format, unless an alternative format is authorized by the Mediator.

2. Identification of PRPs and Potential Sources. The Participants and Mediator shall identify all entities or sources that are to be considered by the Mediator in conducting the non-binding allocation, including: (a) Participants; (b) entities identified as PRPs that opt not to participate in the mediation; (c) other entities that meet the definition of potentially responsible party under CERCLA; and (d) other sources that may have contributed to the contamination that are not linked to any specific entity.

Yosemite Slough Superfund Site Mediation Agreement

3. Schedule. Within 30 days of the Effective Date of this Agreement, the Participants and Mediator shall set a date for an initial meeting to discuss the allocation factors that shall be used by the Mediator to conduct the allocation phase of the Mediation and to discuss the schedule for the allocation phase and the mediation phase. The allocation factors that shall be used by the Mediator to conduct, and the schedule for, the non-binding allocation phase of the Mediation, shall be established by the Mediator within 60 days of the Effective Date of this agreement. It is anticipated that the schedule will include dates(s) or timing provisions for:

- (a) the Participants' submissions of information to the Document Repository;
- (b) the Participants' identification of (a) any other entity that the submitting Participant contends is a potentially responsible party under CERCLA, and (b) any other source that may have contributed to the contamination that is not linked to any specific entity;
- (c) the Participants' submission of mediation statements (wherein a Participant may present position statements that may include, among other things, proposed factors for the neutral to consider in conducting the non-binding allocation, information on operations at and/or in relationship with alleged sources of contamination, and legal arguments);
- (d) the submission of supplemental information by a Participant after the initial submissions have been reviewed;
- (e) the submission of additional data by Participants following review of supplemental information submitted pursuant to Section II.B.3(d);
- (f) the mediation phase, at which the Mediator shall discuss the proposed allocation methodology and hold meetings with all of the Participants and/or individual Participants, as determined by the Mediator;
- (g) the circulation by the Mediator of a draft of his proposed preliminary allocation;
- (h) submission by Participants of comments on the preliminary allocation;
- (i) the submission by the Mediator of a final recommendations on allocation, and;
- (j) an in-person meeting of the Participants and the Mediator to discuss the final recommendations and to attempt to reach a settlement.

Yosemite Slough Superfund Site Mediation Agreement

4. **Allocated Costs.** The Mediator shall allocate only the following costs related to the Site: (a) a Participant's documented past costs that were incurred in a manner consistent with the National Contingency Plan, 40 C.F.R. Part 300, and are recoverable as a necessary cost of response under 42 U.S.C. § 9607 and/or § 9613; (b) a Participant's documented costs related to performance of predesign investigation(s) and/or engineering design required by the EE/CA pursuant to an administrative order by EPA; (c) EPA past costs; and (d) estimated future response costs as set forth in the EE/CA for the Site. The Mediator shall not allocate costs arising from upland source control work that is the responsibility of individual PRPs, and shall not allocate natural resource damage liabilities or assessment costs.

5. **Allocation Process.** The Mediator shall allocate Allocated Costs to all entities and sources identified pursuant to II.B.2 that bear a share of the responsibility for the hazardous substances located at the Site, including "orphans" as that term is defined in EPA's "Interim Guidance on Orphan Share Compensation for Settlers of Remedial Design/Remedial Action and Non-Time-Critical Removals," issued June 3, 1996 and EPA's September 30, 1997, policy statement entitled "Addendum to the 'Interim CERCLA Settlement Policy' Issued on December 5, 1984". The Mediator also shall consider sources for the hazardous substances located at the Site that are not attributable to any specific PRP or alleged source area. The Mediator shall, if appropriate, make recommendations with respect to a *de minimis* threshold.

6. **Meetings.** The Mediator shall hold at least one face-to-face "joint session" where all Participants shall have a representative(s) present. In the "joint session," each Participant will be expected to present a brief summary of its view of the issues associated with the Site, and respond to the Mediator's questions. After the initial joint session, the Mediator may hold private sessions with one or more Participants and/or additional face-to-face joint sessions to assist the Participants in trying to find a mutually acceptable solution. The Mediator may hold subsequent sessions and discussions with the Participants on the phone, in person, or via email. Any Participant may request that the Mediator excuse the other Participants from a session to discuss or share confidential information with the Mediator. The Mediator may request that representatives of Participants for any meeting be other than counsel (such as an official representative of a Participant or its insurance carrier).

7. **Ex Parte Communications.** Before the Mediator issues the final recommendations on allocation, except for communications and meetings initiated by the Mediator, and except for requests by a Participant(s) to share or discuss confidential information with the Mediator *ex parte* as permitted in Section II.B.6, no Participant shall directly or indirectly communicate with the Mediator *ex parte* concerning any matters that are the subject of this Agreement. After the Mediator issues the final recommendations on allocation, any Participant may communicate with the Mediator *ex parte* concerning any matters that are the subject of this Agreement or otherwise.

Yosemite Slough Superfund Site Mediation Agreement

C. Payment of Costs

1. **Shared Costs.** Without creating any precedent for determining appropriate shares of Site costs pursuant to any future agreement among the Participants, each Participant shall pay an equal share for the cost of the Mediation process ("Shared Costs"). The Participants and the Mediator shall make best efforts to keep the cost of the Mediation process fair and reasonable. To that end, Mediation sessions shall be held in locations as may be appropriate to achieve that goal and accommodate the Participants. Shared Costs shall include the following:

a. The Mediator shall be compensated at \$289 per hour for allocation, mediation, and preparatory time. These fees shall not include the time required to travel to or from individual or joint meetings unless actual mediation and facilitation services are being performed during such travel.

b. Costs incurred by the Mediator associated with establishing and maintaining the Document Repository, copying costs, and other administrative costs.

c. Costs associated with technical consultants deemed necessary by the Mediator for completion of the mediation/allocation process, but only with prior consensus approval of the Group in writing.

d. Required and necessary travel expenses of the Mediator for lodging and subsistence at the then-current government rate if supported by actual receipts. Upon request, the United States will furnish the Mediator with the current government per diem and subsistence reimbursement and mileage rates. If necessary, the United States agrees to make best efforts, as are appropriate and legal, to assist the Mediator to obtain government rates for travel expenses. Government rates shall apply unless after best efforts by the Mediator and the United States such rates are unavailable. If government rates are not available the Mediator shall attempt to obtain transportation and lodging at the lowest reasonably available cost.

2. **Invoices.** The Mediator shall provide to each Participant a monthly invoice of Shared Costs, including a detailed description of all fees and expenses of the Mediator and the amount owed by each Participant. Each Participant shall take action to ensure the expeditious payment of such invoices. The non-governmental entities intend to establish a fund to be administered by the Mediator and to deposit anticipated contributions in advance into the fund and authorize the Mediator to withdraw from the fund the non-governmental entities' share of a monthly invoice thirty days following the receipt of that invoice by the Participants, unless any Participant objects and notifies the Mediator of its objection.

3. **Participant Costs.** Each Participant shall be independently responsible for its own fees and costs associated with the mediation process, including its respective share of Shared Costs, its own attorneys' fees and costs, or any expert fees and costs that a Participant deems necessary for its participation in the mediation.

Yosemite Slough Superfund Site Mediation Agreement

4. Obligations of the United States. Any requirement for the payment or obligation of funds by the United States shall be subject to the availability of appropriated funds legally available for such purpose, and no provision of this Agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, and 1511-1519. The United States' participation in this Agreement and its obligation for payment of the fees and expenses of the Mediator pursuant to Section II.C.2 shall not be effective until the execution of the funding agreement (Form OBD 47 - Request, Authorization and Contract for Services of Expert Witness, Litigative Consultant, or ADR Neutral) by the United States.

5. Obligations of the State of California. Any requirement for the payment or obligation of funds by the State of California government participants shall be subject to the availability of appropriated funds legally available for such purpose, and no provision of this Agreement shall be interpreted to require obligation or payment of funds unless provided for in the California Budget Act of the current year and/or any subsequent years covered under this Agreement. (See California Gov't. Code Section 13335 et. seq.) If the Budget Act in effect at the time does not appropriate sufficient funds, this Agreement shall be of no further force and effect against the State of California government participants. In this event, the State shall have no liability to pay any funds or to furnish any other considerations under this Agreement.

6. Obligations of the City and County of San Francisco. This Agreement is subject to the budget and fiscal provisions of the City and County of San Francisco's ("City") Charter. Charges will accrue only after prior written authorization certified by the Controller, and the amount of City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated. City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. **THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.**

7. Removal of Participant by Mediator – The Mediator shall have authority to remove any Participant from this Agreement that fails to meet its financial obligations to the Mediator pursuant to Section II.C.2 on any three (3) occasions. Any such removal shall be effective as of the date of postmark of a mailed notice to the removed Participant and all other Participants by the Mediator, or the date of a similar e-mailed notice by the Mediator, whichever is earlier. Upon the removal of a Participant, the remaining Participants shall be responsible to the Mediator for any unmet financial obligations to the Mediator of the removed Participant - each remaining Participant responsible for an equal share of such unmet obligations. Any Participant so removed shall remain subject to the confidentiality provisions of this Agreement. Any Participant removed from participation in this Agreement shall (1) return

Yosemite Slough Superfund Site Mediation Agreement

to the other Participants or the Mediator all confidential documents (and all copies of such documents) received from the other Participant(s) or the Mediator during the Mediation, and (2) have no right to any credit or refund of any amount paid pursuant to this Agreement.

III. CONFIDENTIALITY

A. Confidentiality of Mediation. To promote frank and productive discussion, the Participants and the Mediator agree that the Mediation shall be confidential. ("A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication" (5 U.S.C. § 574, subd. (b).))

B. Authority. The Mediation, including all dispute resolution communications, is confidential pursuant to the Administrative Dispute Resolution Act of 1996, 5 U.S.C. § 571 *et seq.*, Cal. Evid. Code § 1115 *et seq.*, and all other applicable federal and state authorities. The Mediation process shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence, Cal. Evid. Code § 1115 *et seq.*, and applicable state law.

C. Communications. All oral and written communications with or between the Participants, or by or to the Mediator, prepared or disclosed for purposes of the Mediation, including documents or information related to the Mediation, shall be confidential, and shall not be disclosed to third persons by the Mediator or any Participant, its elected and appointed officials, representatives, employees, agents, or other persons associated with the Participants, except as provided elsewhere in this Agreement or with the consent of all Participants, or as required by law to be made public. ("All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential." (Cal. Evid. Code § 1119, subd. (c).))

D. Mediator.

1. The Mediator shall not disclose to any Participant information conveyed to him in confidence by another Participant, unless authorized to do so by that Participant or as required by law. ("[The Mediator] in a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral" (5 U.S.C. § 574, subd. (a).))

2. The Mediator shall, prior to or simultaneous with the final billing sent to the Participants, (1) destroy all notes taken and written records regarding the mediation, and (2) cause the Document Repository to cease operations and destroy all documents in the Document Repository, and also shall provide a certification that such actions have occurred, which shall be a condition precedent to final payment of the Mediator by the Participants. Notwithstanding the above, if a Participant requests the return of written records that it had provided to the Mediator, the Mediator shall return the original and all copies of the requested materials to that Participant. Mediation sessions shall not be recorded verbatim and no formal minutes or transcripts shall be maintained.

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3. The Mediator shall not be deemed a "necessary or indispensable" party, as defined in Rule 19 of the Federal Rules of Civil Procedure and any analogous state law, in any pending or future judicial, administrative or arbitral action related to matters discussed in the Mediation. No Participant shall subpoena or otherwise seek from the Mediator any information provided to him by another Participant that relates to the Mediation. In no event shall the Mediator voluntarily testify on behalf of a Participant, or participate as a consultant or expert, in any pending or future judicial, administrative, or arbitral action related to matters discussed in the Mediation.

E. Statements and Documents. Participation in the Mediation, including attendance at meetings, statements made and documents prepared or furnished by any Participant for the purposes of the Mediation shall not be construed as an admission of liability or against interest. Where a Participant references, discusses, or produces documents or information during settlement negotiations, doing so will not render otherwise discoverable documents or information confidential, privileged, non-discoverable, or inadmissible.

F. Binding Affect. The Participants, including any withdrawn or removed Participant, and the Mediator shall remain bound by these confidentiality provisions following termination of or withdrawal or removal from this Agreement. Any unauthorized or inadvertent disclosure of confidential communications shall not result in a waiver of the confidentiality of such communications.

G. Mediation Agreement. The Participants agree that this Agreement is not confidential.

IV. TOLLING, STANDSTILL, RESERVATIONS OF RIGHTS

A. Subject to Section I.B., the Participants agree that the running of any statute of limitations with respect to claims between Participants and/or with respect to any claimed costs or expenses arising from the Site shall be tolled as of the Effective Date of this Agreement until the termination of this Agreement pursuant to the termination provisions herein or, with respect to any claims by or against a Participant that withdraws or is removed from the Agreement pursuant to Sections I.C, I.D or II.C.8 of this Agreement, thirty (30) consecutive calendar days following the date of withdrawal or removal of that Participant (the "Tolling Period"). The Participants agree that the Tolling Period shall not be included in calculating the application of any statute of limitations or in the consideration of any defense or avoidance based on laches, estoppel, or any other principle concerning the timeliness of commencing a civil action applicable to a claim for cost recovery of or contribution to recoverable response costs associated with the Site.

B. The Participants agree that until expiration or termination of this Agreement no Participant shall pursue against any other Participant any claims or causes of action under any statute or common law relating to the matters this Agreement is designed to resolve. Notwithstanding the foregoing, except for claims initiated by EPA or a natural resources trustee, this standstill provision shall not be applicable to any claims or causes of

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action by or against any Participant that has withdrawn or been removed from this Agreement or to any third-party claims, cross-claims or any other claim by a Participant against another Participant if a civil suit seeking a determination of liability or responsibility for environmental conditions at or arising from the Site is initiated against one or more Participants by a person or entity not a Party to this Agreement. This standstill provision shall automatically terminate thirty (30) consecutive calendar days after the issuance of an EPA special notice letter, CERCLA Section 106 order, or letter or demand which compels initiation of remedial action at the Site.

C. Nothing contained in this Agreement shall waive, release or otherwise affect in any way any right, claim, defense, interest, or cause of action that any Participant may have with respect to any other person, entity or agency that is not a Participant.

D. Except as set forth in this Section IV, nothing contained in this Agreement shall be construed to limit the authority of the United States, the State of California, and the City and County of San Francisco, to undertake any action pursuant to applicable law or regulation. This Agreement in no way affects or relieves any Participant of its responsibility to comply with any federal, state, or local law or regulation. Nothing in this Agreement alters the rights and/or liabilities of the Participants with respect to any potential future litigation or administrative action.

V. MISCELLANEOUS PROVISIONS

A. **Denial of Liability.** This Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of liability, law or fact, a waiver of any right or defense nor an estoppel against any Participant by Participants as among themselves or by any other person not a Participant. However, nothing in this Section is intended or should be construed to limit, bar or otherwise impede the enforcement of any term or condition of this Agreement against any party to this Agreement.

B. **Insurance.** The Participants do not intend hereby to make any Agreement that will prejudice any Participant with respect to its insurers and, by entering into this Agreement, anticipate that the actions taken pursuant to this Agreement will benefit such insurers.

C. **Successors and Assigns.** This Agreement shall be binding upon the successors and assigns of the Participants. No assignment or delegation of the obligation to make any payment or reimbursement hereunder will release the assigning Participant without the prior written consent of each Participant.

D. **Relationship of Participants.** Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between or among the Participants. No Participant or its representative shall act or be deemed to act as legal counsel or a representative of any other Participant, unless expressly retained by such Participant for such purpose. The Participants do not intend to waive, and nothing herein shall be deemed to constitute a waiver of, any joint defense privilege that may exist between the Participants.

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E. Representation. The Participants recognize and agree that counsel for the various Participants will participate in activities of the Group as representatives of their clients only. These activities of said counsel do not constitute any legal representation for, or establish any separate fiduciary relationship with, any Participant, other than their respective clients.

F. Waiver of Conflict of Interest. Services rendered to the Group by counsel of a Participant, whether compensated or not, shall not be grounds for disqualifying the counsel in any matter relating to the Site or in any subsequent litigation, claim, or action between parties who were or are Participants.

G. Government Counsel.

1. United States. It is explicitly recognized that the trial attorneys for the United States Department of Justice do not have the authority to compromise the claims of the United States, and are authorized solely to negotiate the terms, and recommend approval, of proposed compromises on behalf of the United States. Therefore the attorneys for the United States do not have the ultimate authority to agree to the terms of any proposed agreement or settlement. That authority is vested with the Assistant Attorney General of the Environment and Natural Resources Division and/or, as appropriate, the Deputy or Associate Attorney General of the United States and, for certain appellate matters, the Solicitor General of the United States. However, if the allocation results in an agreement between the Participants on the equitable allocation of site costs, the attorneys for the United States will promptly make appropriate recommendations within the government concerning settlement.

2. State of California. It is explicitly recognized that the attorneys for the State of California government Participants do not have the authority to compromise the claims of, and are authorized solely to negotiate the terms, and recommend approval, of proposed compromises on behalf of their respective government entities. Therefore, the attorneys for the State of California do not have the ultimate authority to agree to the terms of any proposed agreement or settlement. That authority is vested with the appropriate management, or appointed bodies, of their respective government entities. However, if the allocation results in an agreement between the Participants on the equitable allocation of site costs, the attorneys for the State of California Government Participants will promptly make appropriate recommendations within their respective government entities concerning settlement.

3. City and County of San Francisco. It is explicitly recognized that the attorneys for the City do not have the authority to compromise the claims of, and are authorized solely to negotiate the terms, and recommend approval, of proposed compromises on behalf of the City. Therefore, the attorneys for the City do not have the ultimate authority to agree to the terms of any proposed agreement or settlement. That authority is vested with the City's Board of Supervisors and Mayor. However, if the allocation results in an agreement between the Participants on the equitable allocation of site costs, the City's attorneys will promptly make appropriate recommendations to the necessary city entities concerning settlement.

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H. Effective Date/Minimum Participation Required. This Agreement shall be void and have no effect unless at least fifty (50) Participants have executed the Agreement by May 30, 2014. Each Participant who executes the Agreement shall provide a copy of the executed agreement to the Mediator. When the minimum participation condition has been met, the Mediator shall sign the Agreement and notify all Participants of this fact. The date on which the Mediator signs the Agreement shall be the Effective Date of the Agreement.

I. Amendments. This Agreement may be amended only in writing by consensus of the Participants. Such amendment shall become effective upon written confirmation by all Participants.

J. Survival of Provisions. The following provisions shall survive termination of this Agreement: Section II.C's provisions regarding the Participants' responsibility to pay any outstanding invoices provided by the Mediator in accordance with Section II.C of this Agreement, and the confidentiality provisions set forth in Section III of this Agreement.

K. Nonwaiver. Except as provided in Section IV [Tolling, Standstill, Reservation of Rights], nothing in this Agreement shall be construed to waive any rights, claims or privileges which any Participant shall have against any other Participant or any other person or entity.

L. Entire Agreement. This Agreement constitutes the entire understanding of the Participants with respect to its subject matter. Each Participant is, and intends to be, contractually bound by this Agreement.

M. Termination. This Agreement shall terminate one (1) year following the Effective Date of this Agreement, or at such earlier time upon the final execution of any settlement reached by and amongst the Participants, or at such other time by consensus of the Participants, in writing.

N. Counterparts. This Agreement may be executed in multiple counterparts, each of which will be deemed an original, but all of which will constitute one and the same instrument.

Each of the undersigned representatives of each Participant to the Mediation represents that the representative is authorized to execute and bind that Participant to this Mediation Agreement. By signature below, each representative acknowledges that the representative has read, understands, and agrees to this Mediation Agreement.

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We agree to abide by the terms and conditions of this Mediation Agreement and indicate our assent by signing this document below.

Date: _____ Party: _____

By: _____
[Signature]

Name/Title: _____

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I have received executed signature pages of this Agreement from at least 50 parties, and I agree to abide by the terms and conditions of this Mediation Agreement and indicate my assent by signing this document below.

MEDIATOR:

Date: _____

_____ Matthew Low