

**Agreement for Reimbursement by United States on Behalf of the Settling Federal Agencies  
of Hylebos Waterway “Cost Overrun” Response Costs Pursuant to Anderson Consent**

**Decree**

THIS AGREEMENT is entered into as of February 6, 2017, by the Port of Tacoma (hereafter the “Port”), Occidental Chemical Corporation (hereafter “OCC”), Arkema Inc. (hereafter “Arkema” formerly Atofina Chemicals, Inc.), and General Metals of Tacoma, Inc.<sup>1</sup> (hereafter “GMT”) (hereafter collectively the “Performing Parties” and individually a “Performing Party”) and by the United States of America (on behalf of the Bonneville Power Administration, the U.S. Department of Defense, U.S. Department of Navy, U.S. Department of Air Force, and U.S. Army Corps of Engineers) (hereafter collectively the “Settling Federal Agencies”).

**RECITALS**

A. The Performing Parties are performing environmental remediation of the Hylebos Waterway, a portion of the Commencement Bay/Nearshore Tidelands Superfund Site pursuant to consent decrees entered in *United States v. Port of Tacoma, et al.*, (U.S. District Court for the Western District of Washington, Civil Action No. C05-5103 FDB) (hereafter the “Hylebos Mouth Consent Decree” under which OCC and the Port are performing response actions) and in *United States v. Atofina Chemicals, Inc., et al.*, (U.S. District Court for the Western District of Washington, Civil Action No. C04-5319 RBL) (hereafter the “Hylebos Head Consent Decree” under which Arkema and GMT are performing response actions). The Performing Parties have incurred, and are continuing to incur, response costs pursuant to the Hylebos Mouth Consent Decree and the Hylebos Head Consent Decree. The Performing Parties also incurred response

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<sup>1</sup> General Metals of Tacoma, Inc., also doing business as Schnitzer Tacoma (formerly Schnitzer Steel of Tacoma), is wholly-owned indirectly by Schnitzer Steel Industries, Inc.

costs pursuant to an administrative order on consent in EPA Docket No. 1093-07-03-104/122, as well as two unilateral administrative orders issued in EPA Docket No. 10-2002-0064 and in EPA Docket No. 10-2002-0065, which preceded, and were incorporated by reference into the Hylebos Mouth Consent Decree and the Hylebos Head Consent Decree, respectively. The Performing Parties have incurred and are continuing to incur “Response Costs” for the “Hylebos Waterway Problem Areas” as those terms are defined in Paragraphs 4.r. and 4.h., respectively, in the consent decree entered in *United States v. Anderson, et al.*, (U.S. District Court for the Western District of Washington, Civil Action No. CV 03-05107 RBL) (hereafter the “Anderson Consent Decree”). Hereafter, the term “Response Costs” shall refer to “Response Costs” for the “Hylebos Waterway Problem Areas” as defined in the Anderson Consent Decree.

B. The Performing Parties enter into this Agreement for Reimbursement by the United States on behalf of the Settling Federal Agencies of the Performing Parties’ Hylebos Waterway “Cost Overrun” Response Costs Pursuant to Anderson Consent Decree (hereafter “Agreement”) with the United States of America to fulfill the United States’ and Settling Federal Agencies’ obligations pursuant to Paragraph 6 and Appendix C of the Anderson Consent Decree to pay a share of Response Costs overruns incurred by the Performing Parties (including applicable interest, consistent with the computation of previous payments made by the United States on behalf of the Settling Federal Agencies pursuant to the Anderson Consent Decree). The Performing Parties and the United States on behalf of the Settling Federal Agencies have agreed upon terms for the United States on behalf of the Settling Federal Agencies’ payment of Response Costs overrun claims asserted by the Performing Parties for Response Costs incurred by the Performing Parties from October 1, 2001, through September 30, 2015, including applicable interest. This Agreement addresses: (a) the reimbursement by the United States on

behalf of the Settling Federal Agencies of Response Costs incurred by the Performing Parties from October 1, 2001, through September 30, 2015; and (b) the process for the reimbursement by the United States on behalf of the Settling Federal Agencies of Response Costs incurred, and yet to be incurred, by the Performing Parties after September 30, 2015. The Performing Parties have collectively pursued efforts to obtain reimbursement of Response Costs from the United States on behalf of the Settling Federal Agencies, and will continue to do so under the terms of this Agreement.

C. The Port and OCC are performing an environmental remediation of the “Mouth” area of the Hylebos Waterway pursuant to the Hylebos Mouth Consent Decree. Arkema and GMT are performing an environmental remediation of the “Head” area of the Hylebos Waterway pursuant to the Hylebos Head Consent Decree. The Port/OCC and Arkema/GMT remediation projects have resulted, and will continue to result, in Response Costs significantly more than estimated by the United States Environmental Protection Agency (hereafter “EPA”) for the purpose of the terms of the Anderson Consent Decree.

D. On September 15, 2004, the Anderson Consent Decree was entered by the U.S. District Court, approving and documenting cashout settlements with approximately thirty (30) Settling Defendants and the Settling Federal Agencies. In accordance with arrangements established by EPA and the Performing Parties in the Hylebos Mouth Consent Decree and the Hylebos Head Consent Decree, all but 2.8164% of the resulting settlement payments made by the Settling Defendants and the United States on behalf of the Settling Federal Agencies to EPA have been subsequently conveyed by EPA to the Performing Parties to partially fund the Hylebos Waterway remediation projects (EPA retained 2.8164% of the settlement payments). Under the Anderson Consent Decree (see Paragraph 6), the Settling Defendants and United States on behalf

of the Settling Federal Agencies had two options: (a) pay a 100% premium in addition to their respective allocation percentage share of Response Costs estimated by EPA (and obtain a “release” of liability via a covenant not to sue and contribution protection); or (b) pay a 50% premium in addition to their allocation percentage share of Response Costs estimated by EPA (and be subject to a cost overrun reopener – meaning they would remain liable to pay their allocation percentage of all Response Costs exceeding EPA’s \$56,056,407 Response Costs estimate for the Hylebos Waterway Problem Areas). All but two Settling Defendants chose to pay the 100% premium and obtained the “release.” Two Settling Defendants and the United States on behalf of the Settling Federal Agencies chose to pay a 50% premium and remained liable for 7.74% of any Response Costs overruns exceeding the EPA Response Costs estimate of \$56,056,407 for the Hylebos Waterway Problem Areas, set forth in Paragraph 6 and Appendix C of the Anderson Consent Decree (hereafter “Response Costs Overruns”).

## **AGREEMENT**

In consideration of the foregoing and the mutual covenants and promises contained herein, the Port, OCC, Arkema, GMT, and the United States of America (on behalf of the Bonneville Power Administration, the U.S. Department of Defense, U.S. Department of Navy, U.S. Department of Air Force, and U.S. Army Corps of Engineers) hereby agree as follows:

1. United States’ on behalf of the Settling Federal Agencies Reimbursement of Performing Parties' Response Costs Incurred From October 1, 2001, Through September 30, 2015. The United States on behalf of the Settling Federal Agencies shall pay \$4,328,812, plus interest on that amount accruing from January 31, 2017, until the date of payment at the rate specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the United States Code. Such payment shall be made

as follows: (a) 97.1836% of the full amount due shall be paid directly to the Performing Parties by electronic transfer pursuant to instructions which the Performing Parties shall provide to the United States on behalf of the Settling Federal Agencies (as provided in Paragraph 3 below); and (b) 2.8164% of the full amount due shall be paid directly to the Hylebos Waterway Problem Areas Special Account established by EPA and defined in the Anderson Consent Decree.

2. Reimbursement by the United States on behalf of the Settling Federal Agencies' of Performing Parties' Response Costs Incurred After September 30, 2015.

a. Reimbursement of Response Costs

(i) For Response Costs incurred by the Performing Parties after September 30, 2015, the Performing Parties may periodically submit (as described in Paragraph 2.a.iii below) to the United States on behalf of the Settling Federal Agencies (as provided in Paragraph 3 below) a Complete Invoice, as defined in Paragraph 2.a.ii. below, for 7.74% of the total Response Costs incurred by the Performing Parties up to the date of that invoice. Complete Invoices and any supporting documentation may be submitted via overnight delivery, email, a web-based share site, or through other electronic means. Unless the United States on behalf of the Settling Federal Agencies disputes this invoice pursuant to the dispute resolution provisions in Paragraph 2.b. of this Agreement below, the United States on behalf of the Settling Federal Agencies shall pay the full amount of the Complete Invoice within 90 days of receiving it. 97.1836% of the full amount due shall be paid directly to the Performing Parties by electronic transfer pursuant to instructions which the Performing Parties shall provide to the United States on behalf of the Settling Federal Agencies (as provided in Paragraph 3 below). 2.8164% of the full amount due shall be paid directly to the Hylebos Waterway Problem Areas Special Account established by EPA and defined in the Anderson Consent Decree.

(ii) A Complete Invoice submitted by the Performing Parties shall consist of:

(1) a certification(s) under penalty of perjury by a responsible representative(s) of the Performing Parties stating: “On behalf of the Port of Tacoma, Occidental Chemical Corporation, Arkema Inc., and/or General Metals of Tacoma, Inc., I hereby certify that (a) all of the costs referenced in the attached Complete Invoice are the Performing Parties’ Response Costs for the Hylebos Waterway Problem Areas as defined in Paragraphs 4.r. and 4.h., respectively, of the Consent Decree entered in *U.S. v. Anderson, et al.* (U.S. District Court for the Western District of Washington, Civil Action No. CV 03-05107 RBL), (b) all of those costs have been paid in full, and (c) the costs are properly invoiced. Payment by the United States of 7.74% of the invoiced amount in the attached Complete Invoice, together with any interest accrued on that amount, shall be accepted by the Port of Tacoma, Occidental Chemical Corporation, Arkema Inc., and General Metals of Tacoma, Inc. as payment in full of all sums owing under the attached Complete Invoice.”

(2) a description of the work performed and the costs incurred, along with such documentation as may be necessary to enable the United States on behalf of the Settling Federal Agencies to determine that the costs are Response Costs;<sup>2</sup> and

(3) adequate proof of payment of all of the Response Costs included in the Complete Invoice. If personnel of a Performing Party have performed work constituting the Performing Parties’ Response Costs, such costs shall be documented by a statement identifying the personnel performing the work, their chargeable hourly rate (reflecting the cost to the Performing Party) and allocated overhead, the date and number of hours worked, and a description of the work performed.

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<sup>2</sup> Based on a separate agreement between the Port and Arkema, invoicing will be from the Port instead of Arkema.

(iii) Complete Invoices for the Performing Parties' Response Costs shall be submitted to the United States on behalf of the Settling Federal Agencies (as provided in Paragraph 3 below) no more frequently than semi-annually, except that any Complete Invoice for Response Costs that exceeds \$100,000 may, at the Performing Parties' election, be submitted to the United States on behalf of the Settling Federal Agencies (as provided in Paragraph 3 below) immediately upon payment by the Performing Parties of all of the costs in the Complete Invoice. The Performing Parties shall submit, as described in Paragraph 2.a(ii) of this Agreement above, Response Costs incurred after September 30, 2015, in a Complete Invoice within three years after the date on which they were paid by the Performing Parties. The United States on behalf of the Settling Federal Agencies has the right to refuse payment of such Response Costs that have not been submitted, as described in Paragraph 2.a(ii) of this Agreement above, to the United States on behalf of the Settling Federal Agencies in a Complete Invoice within three years of the date on which they were paid.

b. Resolution of Disputes

(i) If the United States on behalf of the Settling Federal Agencies objects to paying a Complete Invoice or a portion thereof, it shall provide written notice to the Performing Parties of the objection(s) within 45 days of the date the Complete Invoice is received. If the United States on behalf of the Settling Federal Agencies objects to only a portion of a Complete Invoice, it shall pay 7.74% of the undisputed portion of the Complete Invoice within 90 days of the date the Complete Invoice is received, in accordance with the payment percentages due to the Performing Parties and to EPA's Hylebos Waterway Problem Areas Special Account as established in Paragraph 2.a(i) of this Agreement above.

(ii) The United States on behalf of the Settling Federal Agencies may object to a Complete Invoice or a portion thereof on the following grounds:

(1) costs included in a Complete Invoice are not the Performing Parties' Response Costs as defined in the Anderson Consent Decree;

(2) the description of the work performed or the costs incurred, and any accompanying documentation submitted to the United States on behalf of the Settling Federal Agencies, is insufficient to enable them in good faith to determine that the costs are Response Costs;

(3) there is inadequate proof of payment of the Response Costs included in the Complete Invoice; or

(4) the certification is false, incorrect, incomplete, or absent. The United States on behalf of the Settling Federal Agencies shall specify with particularity their reason(s) for objecting to a Complete Invoice or portion thereof.

(iii) Within 30 days after the United States on behalf of the Settling Federal Agencies submits an objection to a Complete Invoice, the United States on behalf of the Settling Federal Agencies and the Performing Parties shall meet and confer in good faith in an effort to resolve the dispute informally. In the event that they are unable to mutually resolve a dispute, they agree to promptly submit the dispute to a nonbinding alternative dispute resolution process, such as mediation, a settlement conference, or a neutral environmental professional. Unless otherwise agreed to by the Performing Parties and the United States on behalf of the Settling Federal Agencies, such a nonbinding alternative dispute resolution process shall take place promptly in Seattle, Washington. Each party shall pay its own costs for the nonbinding alternative dispute resolution process. The costs of the mediator, the person or entity conducting the settlement

conference, or the neutral environmental professional shall be paid 50% by the Performing Parties and 50% by the United States on behalf of the Settling Federal Agencies.

(iv) If the dispute is not fully resolved within 90 days after the United States on behalf of the Settling Federal Agencies submits an objection to a Complete Invoice, either side may request that the U.S. District Court for the Western District of Washington resolve the dispute in the matter of *U.S. v. Anderson, et al.* (U.S. District Court for the Western District of Washington, Civil Action No. CV 03-05107 RBL). The Performing Parties and the United States on behalf of the Settling Federal Agencies hereby consent to that Court referring the dispute to a United States Magistrate Judge and agree to cooperate and use their best efforts to enable the Court to resolve the dispute as reasonably promptly as the Court's calendar permits. If a dispute is referred to a United States Magistrate Judge, the District Court may reconsider the Magistrate Judge's decision where it has been shown that the Magistrate Judge's order is clearly erroneous or contrary to law, within the meaning of 28 U.S.C. § 636(b)(1)(A).

c. Interest

If payment of a Complete Invoice by the United States on behalf of the Settling Federal Agencies is not made in full within 90 days after they receive the Complete Invoice, interest on the unpaid balance shall accrue commencing on the 91st day after the Complete Invoice was received. Interest shall accrue at the rate specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26 of the United States Code. If the United States on behalf of the Settling Federal Agencies objects to all or any portion of a Complete Invoice pursuant to Paragraph 2.b. of this Agreement above, interest shall still be payable pursuant to this Paragraph on any portion of such Complete Invoice paid by the

United States on behalf of the Settling Federal Agencies after 90 days after they receive the Complete Invoice.

d. Independent Contractors

It is understood and agreed that the Performing Parties, or any person or entity arranging, performing, or contracting for environmental response work at the Hylebos Waterway Problem Areas, shall act as an independent contractor and not as an agent or employee of the United States in arranging, performing, or contracting for the work.

3. Notices. Written notices provided pursuant to this Agreement may be submitted via overnight delivery, email, a web-based share site, or through other electronic means and addressed as indicated below (or to such other addresses as the Performing Parties and/or the United States on behalf of the Settling Federal Agencies may designate by written notice):

**If to the Port, at:**

Port of Tacoma  
P.O. Box 1837  
Tacoma, Washington 98401-1837  
Attention: Robert Healy  
Direct Telephone No.: (253) 428-8643  
Email: rhealy@portoftacoma.com

**With a copy to:**

Kimberly Seely  
Coastline Law Group  
4015 Ruston Way, Suite 200  
Tacoma, WA 98402  
Direct Telephone No: (253)-203-6820  
Email: kseely@coastlinelaw.com

**If to OCC, at:**

Occidental Chemical Corporation  
c/o Glenn Springs Holdings, Inc.  
Law Department  
Attention: Frank A. Parigi  
5005 LBJ Freeway  
Dallas, Texas 75244  
Direct Telephone No.: (972) 687-7503

Email: Frank\_Parigi@oxy.com

**With a copy to:**

Robert F. Bakemeier  
Bakemeier, P.C.  
7683 S.E. 27<sup>th</sup> Street, Suite 464  
Mercer Island, Washington 98040  
Direct Telephone No.: (206) 230-0600  
Email: rfb@rflaw.com

**If to Arkema, at:**

Arkema Inc.  
c/o Legacy Site Services LLC, Agent for Arkema, Inc.  
Attention: Doug Loutzenhiser  
Executive Vice President  
486 Thomas Jones Way, Suite 110  
Exton, Pennsylvania 19341-2528  
Direct Telephone: (610) 594-4424  
Email: doug.loutzenhiser@total.com

**With a copy to:**

Stephen Parkinson  
Joyce Ziker Parkinson, PLLC  
1601 Fifth Avenue, Suite 2040  
Seattle, Washington 98101  
Direct Telephone: (206) 957-5965  
Email: sparkinson@jzplaw.com

**If to GMT, at:**

General Metals of Tacoma, Inc.  
c/o Schnitzer Steel Industries, Inc.  
Attention: Brenda Anderson  
Senior Environmental Manager  
299 S.W. Clay Street, Suite 350  
Portland, Oregon 97201  
Mailing Address: P.O. Box 10047  
Portland, Oregon 97296  
Direct Telephone No.: (503) 265-6376  
Email: blanderson@schn.com

**With a copy to:**

Mark M. Myers  
Williams Kastner  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
Direct Telephone: (206) 628-6633

Email: mmyers@williamskastner.com

**If to United States on behalf of the Settling Federal Agencies, at:**

Letitia Grishaw, Section Chief  
U.S. Department of Justice  
Environment & Natural Resources Division  
601 D Street, NW, Suite 8000  
Washington, DC 20004  
Telephone: 202-514-2219  
Email: letitia.grishaw@usdoj.gov

4. Release, Covenant Not To Sue by Performing Parties.

a. Upon the receipt of the payment required pursuant to Paragraph 1 of this Agreement, for and in consideration of the commitments by the United States in this Agreement, the Performing Parties agree to forever release, discharge, and covenant and agree not to assert (by way of the commencement of an action, the joinder of the United States on behalf of any of the Settling Federal Agencies in an existing action, counterclaim, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they had, may have had, or may hereafter have regarding Response Costs Overruns incurred by the Performing Parties from October 1, 2001, through September 30, 2015, including applicable interest. Upon the receipt of a payment of Response Costs pursuant to Paragraph 2 of this Agreement, for and in consideration of the commitments by the United States in this Agreement, the Performing Parties agree to forever release, discharge, and covenant and agree not to assert (by way of the commencement of an action, the joinder of the United States and any of the Settling Federal Agencies in an existing action, counterclaim, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity which they had, may have had, or may hereafter have regarding Response Costs Overruns incurred by the Performing Parties from October 1, 2015, through the end of the time period specified by the Complete Invoice

pertinent to the payment made by the United States on behalf of the Settling Federal Agencies and received by the Performing Parties.

5. Anti-Deficiency Act. The Parties to this Agreement recognize and acknowledge that the payment obligations of the United States under this Agreement can only be paid from appropriated funds legally available for such purpose. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that the United States or any federal agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

6. Denial of Liability. Each Party understands and agrees that by entering into this Agreement it does not admit and specifically denies liability or fault for any and all of the facts, legal contentions, claims, and occurrences alleged against it with respect to the Hylebos Waterway Problem Areas. Neither this Agreement nor any information submitted or any action taken by any Party pursuant to this Agreement shall 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 Party by another Party as between themselves or by any person not a Party.

7. Entire Agreement; Amendment; No Impact on Other Written Agreements. This Agreement constitutes the entire agreement between the Parties concerning the reimbursement by the United States on behalf of the Settling Federal Agencies of Response Costs Overruns pursuant to the Anderson Consent Decree and supersedes all prior communications, representations, proposals, understandings or agreements, either written or oral, between the Parties with respect to the subject matter. This Agreement may not be modified or amended, in whole or in part, except by writing signed by the duly authorized officers or representatives of all of the Parties. By executing this Agreement, the Parties do not intend to amend or alter any other

written agreements, as they exist or as they may be amended pursuant to their terms: (a) between the Port and Occidental; (b) between Arkema and General Metals; (c) among the Port, Occidental, Arkema, and General Metals; (d) between the Port and Arkema; (e) between the Port and General Metals; and (f) between and/or among any one and/or more of the Performing Parties and the United States of America.

8. Relationship of the Parties. Each Party represents that it has sought and obtained any appropriate legal advice it deems necessary prior to entering into this Agreement. No Party shall act or be deemed to act as legal counsel or representative of the other Party, unless expressly retained by such Party for such purpose, and, except for such express retention, no attorney/client relationship is intended to be created between the Parties. Nothing herein shall be deemed to create a partnership or joint venture and/or principal and agent relationship between the Parties.

9. Non-Waiver. The failure of any Party to enforce its rights under any provision of this Agreement shall not be construed to be a waiver of such rights. No waiver of any breach of this Agreement shall be effective unless contained in a writing signed by a duly authorized officer or representative of the Party sought to be charged with the waiver and no such waiver shall be held to be a waiver of any other breach or any other right arising under this Agreement.

10. Counterparts; Recitals; Headings. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The Recitals are not merely descriptive but are terms of this Agreement. The headings and subheadings contained in this Agreement are used solely for convenience and do not constitute a part of the Agreement, nor should they be used to aid in any manner in the construction or interpretations of this Agreement.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the dates set forth below. Each person signing this Agreement represents that he or she has been duly authorized to enter into this Agreement by the entity on whose behalf he or she has executed this Agreement.

**PORT OF TACOMA**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**OCCIDENTAL CHEMICAL CORPORATION**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**ARKEMA INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**GENERAL METALS OF TACOMA, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

**UNITED STATES OF AMERICA**

JEFFREY H. WOOD  
Acting Assistant Attorney General  
Environment & Natural Resources Division

By: \_\_\_\_\_  
Kent E. Hanson  
United States Department of Justice  
Environment & Natural Resources Division  
Environmental Defense Section  
Date: \_\_\_\_\_