



U.S. Department of Justice

Environment and Natural Resources Division

#90-11-3-07683/14

Environmental Enforcement Section  
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Washington, DC 20004

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July 29, 2022

VIA EMAIL

J. Douglas Reid-Green  
Director of Remediation  
BASF Corporation  
100 Park Avenue  
Florham Park, NJ 07932

Re: Interim Settlement and Crediting Agreement Concerning Early Restoration at the BASF Riverfront Project

Dear Mr. Reid-Green:

At the request of the Department of Interior, acting through the United States Fish and Wildlife Service, and the National Oceanic and Atmospheric Administration (collectively the "Trustees"), the Department of Justice initially approved the Interim Settlement and Crediting Agreement Concerning Early Restoration at the BASF Riverfront Project. Under the Agreement, BASF will design, fund, and build a five-acre waterfront park along the Passaic River in East Newark, New Jersey. In return, BASF will receive a credit against BASF's natural resource damage liability under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.* The initial approval of the Department of Justice, however, was subject to review of any public comments on the Agreement received after its publication in the Federal Register for a period of 30 days of public review.

The Department and the Trustees received two sets of comments, and the Trustees prepared responses to those comments. Based on a review of the comments and the Trustees' responses, the Department of Justice finds that the comments do not reveal facts or other considerations rendering the Agreement inappropriate, improper, or inadequate, permitting BASF Corporation and the Trustees to proceed with the Agreement.

Thank you.

Sincerely,

ELLEN MAHAN  
Deputy Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division

cc: Kate Barfield, NOAA  
Mark Barash, DOI  
David Gately, DOI  
Clay Stern, FWS  
Rich Takacs, NOAA  
Sheila Scheaffer, FWS  
David Schneider, Esq.

**INTERIM SETTLEMENT AND CREDITING AGREEMENT  
BETWEEN THE FEDERAL NATURAL RESOURCE TRUSTEES AND BASF  
CORPORATION CONCERNING EARLY RESTORATION AT THE BASF  
RIVERFRONT PROJECT**

**I. RECITALS**

**A. Authorities**

The United States Fish and Wildlife Service (“USFWS”), on behalf of the Department of the Interior, and the National Oceanic and Atmospheric Administration (“NOAA”), on behalf of the Department of Commerce, (collectively, the “Federal Trustees”), acting under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9601 *et seq.*; CERCLA natural resource damage (“NRD”) regulations, 43 C.F.R. Part 11; Executive Order 12580; and the National Oil and Hazardous Substances Contingency Plan (“NCP”), 40 C.F.R. Part 300, and related laws, have authority to: assess injuries to natural resources resulting from the release or threatened release of hazardous substances; recover damages for those injured resources and the services they provide and the reasonable costs of assessing injuries; and undertake appropriate restoration to compensate for such loss and injuries; and

With the approval of the Department of Justice (“DOJ”), the Federal Trustees possess the authority, under the above referenced laws, delegations, and regulations, to facilitate early restoration projects with Potentially Responsible Parties (“PRPs”) and to negotiate crediting for accomplished early restoration work, in advance of the Federal Trustees’ completion of a damage assessment or the filing of legal actions against parties liable under CERCLA and other applicable laws; and

The Federal Trustees and BASF Corporation (“BASF”) acknowledge that this Interim Settlement and Crediting Agreement (“Crediting Agreement” or “Agreement”) has been negotiated in good faith and that the actions undertaken by BASF in accordance with this Agreement do not constitute an admission of any liability. BASF does not admit, and retains the right to contest in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the findings of facts or conclusions of law set forth in the Recitals to this Agreement; and

**B. Diamond Alkali Superfund Site and Natural Resource Injuries, Damages and Restoration**

In 1983, environmental sampling revealed high levels of 2,3,7,8-tetrachlorodibenzo-*para*-dioxin (“TCDD”) at and near 80 Lister Avenue, in Newark, New Jersey – a facility at one time owned and operated by the Diamond Alkali Company – as well as in the adjacent Passaic River; and

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The Diamond Alkali Superfund Site (“DA Site”) was listed on the Superfund National Priorities List in 1984 and remains the subject of long-term ongoing remedial planning and cleanup work undertaken or overseen by the U.S. Environmental Protection Agency (“EPA”); and

The Diamond Alkali Superfund Site, as defined by EPA, includes the properties located at 80 and 120 Lister Avenue, Newark, New Jersey, as well as the Lower Passaic River Study Area (“LPRSA”) (a 17.4-mile stretch of the lower Passaic River from Dundee Dam to Newark Bay), and the Newark Bay Study Area, as well as any areas where contamination from the Diamond Alkali Superfund Site has come to be located; and

In 2004, the Federal Trustees completed a Preliminary Assessment Screen (“PAS”) of natural resource damages related to hazardous substance releases at and adjacent to the Diamond Alkali Superfund Site. For purposes of this Agreement, the Diamond Alkali Superfund NRD Site assessment area (or “DA Site”) includes the Diamond Alkali Superfund Site, and any additional areas where the Trustees determine that the Diamond Alkali Superfund Site-related contamination has come to be located; and

Hazardous substances, including TCDD, polychlorinated biphenyls, metals, polycyclic aromatic hydrocarbons, and pesticides have been found in sediments of the Passaic River within the DA Site, and DA Site-related hazardous substances have been detected throughout Newark Bay and its tributaries, the Hackensack River, the Arthur Kill tidal strait and the Kill Van Kull tidal strait; and

EPA has identified more than 100 Potentially Responsible Parties (“PRPs”) at the DA Site, including BASF Corporation and its subsidiary BASF Catalysts, LLC; and

The landscape in and around the DA Site is a mosaic of dense residential, commercial and industrial land uses, which are interconnected by an extensive road, rail, and maritime transport infrastructure, and which include deeply economically distressed communities; and

The release(s) and threatened release(s) of hazardous substances have significantly impacted fish, birds and benthic organisms and their respective habitats at the DA Site, as well as greatly limiting the public’s use and enjoyment of the Passaic River and the other waterways included in the DA Site; and

The Federal Trustees are undertaking an assessment to further identify and to quantify injury to natural resources resulting from hazardous substances released at and from the DA Site; and

The Federal Trustees have not yet quantified natural resources damages caused by hazardous substances that have been released, or are threatened to be released, at and from the DA Site, but anticipate asserting significant claims under CERCLA in light of the breadth, toxicity, and complexity of the hazardous substances released there; and

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Any recovery of natural resource damages under CERCLA must be used to restore, replace, or acquire the equivalent of the injured natural resources, while compensating the public for lost use; and

**C. Berry's Creek Study Area and Natural Resource Injuries, Damages and Restoration**

Berry's Creek is located in Bergen County, New Jersey, and, like the Passaic River, is part of the Hudson-Raritan Estuary; and

The Berry's Creek Study Area ("BCSA") includes the water body known as Berry's Creek, including the Berry's Creek Canal and the natural course of Berry's Creek; all tributaries to Berry's Creek from its headwaters to the Hackensack River; and wetlands that are hydrologically connected to Berry's Creek or its tributaries, all located in the Boroughs of Rutherford, East Rutherford, Carlstadt, Wood Ridge, Moonachie, and Teterboro in Bergen County, New Jersey, and any areas where contamination from the BCSA has come to be located; and

EPA has identified more than 100 PRPs at the BCSA, including BASF Corporation and its subsidiary Cognis USA LLC; and

The Federal Trustees completed a Preassessment Screen Determination in March 2014 for the BCSA, which confirmed that there is a reasonable probability that a successful claim for natural resource damages may be made with respect to injury caused to migratory birds, their habitats, and their potential food sources, including benthic invertebrates and fish, and, accordingly, the Trustees anticipate asserting significant claims under CERCLA in light of the breadth, toxicity, and complexity of the hazardous substances released there; and

**D. Proposed BASF Riverfront Project**

BASF proposes to undertake an early natural resource restoration project, as defined herein and as further defined and depicted in the BASF Restoration Project Plan and "Basic Design" (Appendix A): BASF proposes to fund, design, and construct an approximately five-acre urban waterfront natural resource restoration project along the Passaic River (the "BASF Riverfront Project" or "Project"), as depicted in the Basic Design that forms the basis for the Parties' valuation and crediting of the Project, together with the other obligations of this Agreement. BASF would also establish and fund a Maintenance Escrow Account in an amount considered sufficient by the Trustees to address maintenance of the Project for thirty (30) years, as required under the Scope of Work ("SOW") for the Project (Appendix C), setting forth the process for completing this Project; and

The Project is to be located in East Newark, New Jersey, and like the above-mentioned Lister Avenue property, is located along the lower 8 miles of the Passaic River, one of the most heavily contaminated portions of the DA Site; and

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The Project location is approximately four (4) miles from the BCSA, as the bird flies, and even closer to other areas of the Hackensack Meadowlands, as outlined in maps of the tributaries related to both the DA Site and BCSA, provided herein as Appendix B and G; and

In order to create the 5-acre Project, BASF intends to combine its approximately 2-acre lot (*Clay Street and Passaic Avenue*) along the Passaic River in East Newark, New Jersey, with an adjacent 3-acre lot that BASF has purchased, and BASF has further committed to undertake all required site-investigations and remedial work on both lots; and

BASF and the Federal Trustees believe that the Project can be effectively engineered to meet all design requirements in a manner that is consistent with CERCLA and the NCP; and

### **E. A Unique and Time-Sensitive Opportunity**

Available shoreline real estate in the vicinity of the DA Site is scarce, so the Project presents a unique opportunity for on-site shoreline restoration at the near-center of the DA Site; and

At this time, no other DA Site or BCSA PRP has proposed to undertake an early restoration project at or near either the DA Site or the BCSA, and the Project represents the only current opportunity to provide ecological and public use and enjoyment benefits in the near term; and

### **F. Anticipated Benefits of the Proposed Project**

#### **1. Ecological Benefits**

The proposed Project will provide for on-site and in-kind ecological restoration, and is being designed to affirmatively restore lost ecological functions and services; and

In its current state, the site on which the Project will be built is dominated by impervious cover and highly disturbed surface soils, and underlain by historic fill material (N.J. Admin. Code § 7:26E-1.8) that is contaminated, highly compacted, demonstrates poor infiltration rates, and provides little or no ecological sustainment of a healthy soil biome; and

The Project will include the management of historical fill material at the site in a manner that will be protective of human health and the environment; and

The Project contemplates the use of soil materials and amendments to replicate “natural” soils, which will, among other things, be conducive to the sustainability of deep-rooted natural flora, allow for natural water infiltration, support natural flora and micro-biome, promote nutrient cycling, and reduce runoff; and

Natural landscaping cultured with native grasses, shrubs and trees indigenous to the State of New Jersey will provide a functional and sustainable riparian buffer to the adjacent Passaic River frontage and will complement and not conflict with the EPA-proposed remedy for the River; and

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Natural riparian landscapes are highly desirable ecotones that are exceedingly rare along the lower 17 miles of the Passaic River; and

The Project will provide valuable upland habitat and create habitats and habitat edges that are highly attractive to a variety of bird species, including passerines and other avifauna that are expected to use the Project and adjacent river. Multiple bird species, including species injured by releases of hazardous substances at both the DA Site and the BCSA, are anticipated to utilize the newly-created habitat for breeding. The habitat is also anticipated to provide critical foraging and resting habitat for numerous migratory birds; and

The Project also is expected to promote ecological sustainability and multigenerational use through conservation in perpetuity via conservation easement/deed restrictions; and

### **2. Recreational Benefits**

The proposed Project will also restore recreational uses that were lost due to the release or threatened release of hazardous substances at and from the DA Site; and

Natural riparian landscapes provide not only ecological functions and services, but opportunities for the public to engage in active and passive recreational activities, while safely interacting with natural landscapes and the wildlife therein; and

The Project includes features to promote recreation, such as pedestrian pathways, viewing sites, riverfront access and the structural elements necessary to facilitate construction by others of a kayak or small watercraft launch should a Future Project Owner deem that to be an appropriate Project feature; and

The Project aligns with community goals, such as the park development goals advanced by the Passaic River Coalition (an urban watershed association dedicated to protecting water quality and quantity of the Passaic River watershed) in its 2015 plan for public access for the lower Passaic River (Passaic River Coalition, *A River for the People: A Public Access Plan for the Lower Passaic River* (2015), available at <https://passaicriver.org/site/wp-content/uploads/2018/01/ARiverForThePeople2015.WebCopy.pdf> (last accessed Oct. 22, 2019)); and

### **3. Environmental Justice Benefits**

In accordance with Executive Order 14008, federal agencies, including the Federal Trustees, are required to consider actions to address disproportionately high and adverse health, environmental, climate-related and other cumulative impacts on disadvantaged communities; and

East Newark was recently designated as an Environmental Justice Community by the State of New Jersey. A 2020 New Jersey Department of Environmental Protection (“NJDEP”) report noted that the City is disproportionately lacking in opportunities to connect with the environment. For

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example, East Newark has very limited access to public parks and open-greenspace options, as well as insufficient tree canopy and areas to where the public can walk or bike. Correcting such disparities is the goal of Environmental Justice. See, NJDEP, *Furthering the Promise: A Guidance Document for Furthering Environmental Justice*, Table 1, Page 30, September 2020. <https://www.nj.gov/dep/ej/docs/furthering-the-promise.pdf>; and

The East Newark community has been long-impacted by the release(s) or threatened release(s) of hazardous substances at and from the DA Site, and is relatively devoid of open space for recreation (Passaic River Coalition, *A River for the People: A Public Access Plan for the Lower Passaic River* (2015), at p.52, Table 3-19); and

The Project will create access to the River and natural habitat for the use and enjoyment of the local community and the public.

### **G. NRD Crediting for the Project**

In exchange for undertaking the Project, BASF desires to receive credit to be applied against any potential liability for natural resource damages resulting from hazardous substance releases at or from the DA Site and the BCSA, before a judicial finding of liability or entry of a final settlement agreement with the Federal Trustees (“NRD Credit”); and

The Federal Trustees recognize the rare opportunity and many benefits flowing from the Project, as discussed above; and

The Federal Trustees estimate that, if they were to purchase the property and design, construct, and operate the Project (not including Project structures unrelated to NRD and restoration) for a period of thirty (30) years, it would cost them approximately \$73.5 million (as described in the narrative set forth in Appendix D), and the Federal Trustees have relied on that estimate in negotiating the NRD Credit provided to BASF under this Agreement for meeting the Performance Standards related to the Project (“Base NRD Credit”); and

The Project must meet all Performance Standards set forth in Section VI before BASF is eligible to receive the Base NRD Credit; and

The Parties recognize that any future material changes requested by either party to the Basic Design of the Project or to the Governing Milestone Deliverables (as defined by the SOW) that are developed during the Project design process must be agreed to, in writing, by both Parties (“Material Change”) along with any appropriate change, if any, to the amount of NRD Credit as a result of the Material Change, as set forth in Section II; and

The Federal Trustees further believe, as set forth in Sub-section VII.D, that for a limited time period it is appropriate for BASF’s earned Certified NRD Credit to increase at a rate of 3% per annum based upon the time-value of the services provided by the Project, plus the monetary Inflation Rate, as collectively defined herein as the Multiplier Rate; and



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Given the overall projected scale of natural resource injuries at the DA Site and the BCSA, the advantages to the public of providing tangible ecological and recreational benefits far earlier than would otherwise be anticipated, and the benefits of encouraging other DA Site and/or BCSA PRPs to consider undertaking other early restoration proposals, the Federal Trustees determined that it is in the public interest to negotiate an interim settlement for NRD Credit for the completed Project that will be designed, constructed and funded by BASF for an initial period of thirty (30) years of operation; and

Based on the uncertainties concerning the amount of liability BASF will ultimately be assigned for NRD relating to the DA Site and the BCSA, if any, and subject to the requirements and limitations set forth in Sub-section VII.G, and in accordance with CERCLA and related laws, this Agreement also allows BASF to (1) elect to transfer all or any portion of its Certified NRD Credit to any other PRP at the DA Site to apply towards that PRP's liability for NRD at the DA Site, or (2) apply its Certified NRD Credit towards any liability it may have for NRD at the BCSA; and

### **H. Interim Settlement and Crediting Agreement**

While denying any and all liability, BASF is entering this Agreement with the Federal Trustees (collectively, the "Parties") to memorialize BASF's agreement to satisfy all the Performance Standards in Section VI in exchange for the Federal Trustees' agreement to provide NRD Credit; and

The Federal Trustees contend that the Project only partially restores or replaces injured or lost ecological resources, ecological services, and recreational uses related to the DA Site and the BCSA and, accordingly, reserve their rights to seek further recovery of NRD relating to the DA Site and/or the BCSA through future litigation and/or settlement options against all PRPs, including BASF; and

The Parties acknowledge that the NRD Credit received by BASF for the Project may or may not offset the entirety of BASF's legal liability relating to the DA Site and BCSA; and

The Parties recognize this Agreement is intended to expedite the restoration of natural resources injured at or from the DA Site and the BCSA, and that the terms of this Agreement are fair, reasonable, and in the public interest; and

### **I. Forthcoming Coordination with Other Regulatory Entities and Public Comment**

BASF affirms its responsibility to conduct all required consultation with EPA, the U.S. Army Corps of Engineers, the NJDEP and other relevant federal, State and local government agencies and appropriate permitting authorities about the Project, including design, construction, and oversight obligations as set forth in the SOW, including but not limited to, any consultations to avoid impeding or adversely affecting ongoing environmental clean-up being performed or to be performed at the DA Site and the BCSA; and

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The Parties recognize that the Federal Trustees have provided an opportunity for public notice and comment, including a response to comments received, on the BASF Restoration Project Plan / Environmental Assessment that outlines in greater detail Project design elements, land use options and project requirements, while DOJ will provide an opportunity for public notice and comment on this Agreement, in accordance with the terms laid out in Section XX of this Agreement. This Agreement is conditioned on final approval of its terms by the Federal Trustees and DOJ after consideration of all timely public comments.

NOW, THEREFORE, in consideration of the foregoing recitals, the Parties mutually agree as follows:

### **II. DEFINITIONS**

Unless otherwise expressly provided in this Agreement, terms used in this Agreement that are defined in CERCLA, the NCP, and/or the NRD Assessment regulations set forth at 43 CFR Part 11 shall have the meaning ascribed to them thereunder as of the Effective Date of this Agreement. Whenever the terms listed below are used in the Agreement, the following definitions shall apply:

“Agreement” or “Crediting Agreement” shall mean this Interim Settlement and Crediting Agreement and all Appendices incorporated herewith. In the event of a conflict between this Agreement and any Appendix, this Agreement shall control;

“Base NRD Credit” shall mean the \$73.5 million in NRD Credit (as described in Appendix D) to be assigned BASF for meeting the Performance Standards, as set forth in Sub-section VII.A;

“BASF” shall mean BASF Corporation and its subsidiaries, BASF Catalysts LLC, and Cognis USA LLC, unless otherwise specifically stated herein. BASF shall be considered a single entity for purposes of earning, applying and/or transferring NRD Credit and the parent company shall be responsible for managing and accounting for NRD Credit on behalf of these two subsidiaries;

“Basic Design” shall mean the conceptual Project as generally depicted in Appendix A, that will be more fully developed under the process set forth in the SOW, and that will be designed and built in accordance with the Project Objectives, General Terms and Conditions, and Structural Features set forth in Sections III, VI, and VII of the SOW;

“BASF Restoration Project Plan” or “Restoration Plan” shall mean the Early Restoration Plan/Environmental Assessment adopted by the Federal Trustees on July 29, 2021 that describes the Project and alternatives that were considered, and that provides responses to public comments received concerning the Project, as per the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et. seq.*, CERCLA, and other relevant requirements;

“Berry’s Creek Study Area” or “BCSA” shall mean the area which is comprised of the water body known as Berry’s Creek, including the Berry’s Creek Canal and the natural course of Berry’s Creek; all tributaries to Berry’s Creek from its headwaters to the Hackensack River; and wetlands that are

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hydrologically connected to Berry's Creek or its tributaries, all located in the Boroughs of Rutherford, East Rutherford, Carlstadt, Wood Ridge, Moonachie, and Teterboro in Bergen County, New Jersey; For purposes of this Agreement, the Parties agree that the BCSA is the area depicted on the map attached at Appendix G, together with any additional areas where the Trustees determine that BCSA-related contamination has come to be located;

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601, *et seq.*, as amended;

“Certification of Creditability” shall mean the Federal Trustees’ notice to BASF that the Federal Trustees have determined that BASF is eligible to receive Certified NRD Credit, as set forth in Section VII.C;

“Certified NRD Credit” shall mean the amount of the Base NRD Credit that the Federal Trustees certify, in writing, that BASF is entitled to under this Agreement after BASF has met the Performance Standards in Section VI; and which is both subject to increase based on the Multiplier NRD Credit and subject to reduction based on BASF’s use or transfer of Certified NRD Credits under Sub-sections VII D, F, G and H. For administrative purposes, the amount of Certified NRD Credit earned, applied, or transferred under this Agreement will be documented and memorialized through the process set forth in Section VII. Certified NRD Credit shall be accounted for on the Credit Tracking Sheet;

“Conservation Easement and Restrictions” or “CER” shall mean an instrument that grants rights and imposes restrictions running with the land in perpetuity, for the purpose of protecting the Project and ensuring non-interference with the integrity of the Project, in accordance with the CER template incorporated as Appendix E;

“Corrective Response Plan” shall mean that written plan that BASF shall develop, and that is approved by the Federal Trustees, that will describe the procedures to be implemented to address damages to the Project from any Force Majeure event or Other Corrective Response Incident that occur after the Project is Open to the public, as described in more detail in Section VIII.E.7. of the SOW;

“Corrective Response Oversight Costs” shall mean Federal Trustee oversight costs relating to an event covered by the Corrective Response Plan, which Corrective Response Oversight Costs shall be paid to the Federal Trustees from the Maintenance Escrow Account but shall not constitute nor be included as Maintenance Oversight Costs Following Opening;

“Creditability Report” shall mean the report submitted by BASF to the Federal Trustees as set forth in SOW Section VIII.F.7(b) requesting that the Federal Trustees: (1) inspect the Project and determine that all the Performance Standards set forth in Section VI (A)-(G) have been satisfied based upon the documentation submitted by BASF and the Project inspection, and (2) provide the Certification of Creditability to BASF. The Creditability Report shall include the documentation required by the SOW for the Creditability Report;

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“Credit Tracking Sheet” shall mean the method of tracking BASF’s Certified NRD Credit, which shall be in a form substantially similar to Appendix F;

“Diamond Alkali Superfund NRD Site” or “DA Site” for the purposes of this Agreement shall refer to the Diamond Alkali Superfund Site as defined by EPA, and any associated NRD assessment areas, including, but not limited to, the properties located at 80 and 120 Lister Avenue, Newark, New Jersey. the Lower Passaic River Study Area (“LPRSA”) (a 17.4-mile stretch of the lower Passaic River from Dundee Dam to Newark Bay); and the Newark Bay Study Area. For purposes of this Agreement, the Parties agree that the Diamond Alkali Superfund NRD Site or DA Site is the Diamond Alkali Superfund NRD Site assessment area, as depicted in purple on the map attached as Appendix B, which includes the Diamond Alkali Superfund Site, and any additional areas where the Trustees determine that Diamond Alkali Superfund Site-related contamination has come to be located;

“DOI” shall mean the United States Department of the Interior, acting through the United States Fish and Wildlife Service, and its successor departments, agencies, or instrumentalities;

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities;

“Federal Trustees” or “Trustees,” as referenced in the context of this Agreement, shall mean the United States Fish and Wildlife Service, on behalf of DOI, and NOAA, on behalf of the Department of Commerce;

“Future Project Owner” shall mean the entity that takes ownership, and operation responsibility of the Project so that it can be Open to the public. The Future Project Owner is expected to be the Borough of East Newark but could be another entity approved by the Federal Trustees.

“Inflation Rate” shall mean the "Consumer Price Index for All Urban Consumers: All Items in U.S. City Average", as available at <https://fred.stlouisfed.org/series/CPIAUCNS>, the annual rate applied by the Federal Trustees to the Certified NRD Credit amount to account for monetary inflation;

“Interest” shall mean the rate and method of interest defined at 28 U.S.C. § 1961(a) and (b);

“Lead Administrative Trustee” or “LAT” for the NRD claims on behalf of the Federal Trustees relating to the DA Site shall mean the designated representative of the United States Fish and Wildlife Service, unless the Federal Trustees agree to a re-authorization;

“Maintenance” shall mean all activities, after the Federal Trustees provide BASF the Certification of Creditability and the Project is Open to the public, that are required to preserve, protect and maintain the operational effectiveness of the Project under a Maintenance Plan that has been approved by the Federal Trustees as set forth in the SOW;

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“Maintenance Escrow Account” shall mean the escrow account that is funded by BASF for a period of thirty (30) years, through an escrow fund or equivalent means, to fund Maintenance of the Project in accordance with the Maintenance Plan, to fund the insurance coverage required by the Corrective Response Plan, and to fund any Corrective Response Oversight Costs;

“Maintenance Oversight Costs Before Opening” shall mean all costs, including, but not limited to, direct and indirect costs that the Federal Trustees have incurred prior to the Effective Date or will incur after the Effective Date, up to the point that the Federal Trustees provide BASF the Certification of Creditability and the Project is Open to the public, including but not limited to unreimbursed costs incurred negotiating this Agreement, consultations with partner agencies, reviewing or developing plans, reports, and other deliverables submitted under those documents, overseeing Project construction, or engaging in informal dispute resolution under Section XIX. Maintenance Oversight Costs Before Opening shall be fixed at \$763,000;

“Maintenance Oversight Costs Following Opening” shall mean all oversight activities of the Federal Trustees after the Federal Trustees provide BASF the Certification of Creditability and the Project is Open to the public. Maintenance Oversight Costs Following Opening shall also include Federal Trustee costs associated with engaging in informal dispute resolution under Section XIX, or otherwise facilitating the transfer or applicability of BASF’s Certified NRD Credits, as set forth in Sub-sections VII.F-H. Maintenance Oversight Costs Following Opening shall not exceed \$5,000 to DOI and \$5,000 to NOAA and will be paid annually from the Maintenance Escrow Account;

“Maintenance Plan” shall mean the Maintenance plan for the Project that will be finalized according to the process for developing the plan set forth in the SOW, including Federal Trustee approval of the proposed plan;

“Material Change” shall mean a Party’s request for a modification to the Project during the design or construction phases that is not a required element of the Basic Design or any Governing Milestone Deliverable that is in place at the time the request is made. A Material Change must be agreed to, in writing, by both Parties along with the appropriate change, if any, to the amount of NRD Credit as a result of the Material Change;

“Multiplier Rate” shall mean the monetary Inflation Rate plus a 3% annual rate applied by the Federal Trustees to the Certified NRD Credit amount to account for the time value of natural resources services provided by the Project, as set forth in Sub-section VII.D;

“Multiplier NRD Credit” shall mean the amount of NRD Credit, accruing at the Multiplier Rate, that is added to the amount of Certified NRD Credit, as set forth in Sub-section VII.D;

“Natural Resource” or “Natural Resources” has the meaning set forth in 42 U.S.C. § 9601(16);

“Natural Resource Damages” or “NRD” has the meaning set forth in 42 U.S.C. §§ 9601(6) and 9607(a)(4)(C);

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“NOAA” shall mean the National Oceanic and Atmospheric Administration of the United States Department of Commerce and any successor departments, agencies, or instrumentalities;

“NRD Credit” shall mean a dollar-denominated credit, for meeting all the Performance Standards as provided in Section VI, that BASF may either apply against any potential NRD liability of BASF attributable to hazardous substance release(s) at or from the DA Site or the BCSA as provided under Sub-section VII.F, or transfer as provided under Sub-section VII.G. NRD Credit may include all of the Base NRD Credit, and/or Multiplier NRD Credit, and/or any credit adjustment, positive or negative, associated with a Material Change. The amount of NRD Credit earned, applied, or transferred under this Agreement will be documented and memorialized per Section VII.D.4.;

“Open” or “Opening” to the public shall mean that BASF has received the Certification of Creditability, transferred ownership of the Project to the Future Project Owner, and assisted the Future Project Owner with fence removal, with the intention being that the Project will generally remain open to the public seven (7) days a week;

“Opening Date” shall mean date the general public can access the Project;

“Other Corrective Response Incident” shall mean an event caused by the actions of a third-party, whether intentional or negligent, arising beyond the control of BASF or a Future Project Owner, or any entity controlled by BASF or a Future Project Owner, including but not limited to their contractors and subcontractors, which causes property damage in excess of \$10,000;

“Parties” shall mean the United States, acting through the Federal Trustees, and BASF;

“Performance Standards” shall mean the measures and requirements as set forth in Section VI for eligibility for Certification of Creditability and for receipt and use of Certified NRD Credit;

“Potentially Responsible Party” (“PRP”) shall have the same meaning as set forth in 43 C.F.R. § 11.14(kk);

“Project” shall mean the approximately 5-acre natural resource restoration project that BASF will design and construct at the corner of Clay Street and Passaic Avenue in East Newark, New Jersey, in accordance with the SOW, including the properties identified on the most current East Newark, New Jersey tax maps as Block 17, lot 1 and Block 17, lot 2, and as generally depicted in Appendix A;

“Restoration Plan” shall mean “BASF Restoration Plan” as defined above;

“Scope of Work” or “SOW” shall mean the Scope of Work for the BASF Project, incorporated at Appendix C;

“United States” shall mean the United States of America, acting through the Federal Trustees.

### **III. OBJECTIVES OF THE PARTIES**

The objectives of the Parties entering into this Agreement are to:

- A) Obtain BASF's performance of all the requirements to complete the Project and other obligations set forth in Sections IV (Commitments by BASF) and VI (Performance Standards) herein;
- B) Outline the amount of NRD Credit to which BASF shall be entitled as set forth in Section VII herein;
- C) Reimburse the Federal Trustees for certain costs as set forth in Section IX herein; and
- D) Achieve the Project's early restoration objectives outlined in Section V below, sooner than would otherwise be accomplished.

### **IV. COMMITMENTS BY BASF**

- A) BASF shall fund, design, and construct the Project, and otherwise meet all the Performance Standards, as set forth in this Agreement;
- B) BASF shall establish a Maintenance Escrow Account. Within sixty (60) days following the Opening Date (per Section VII.C), BASF shall make an initial deposit in the amount of \$1 million, and contribute additional funding into the Maintenance Escrow Account, as needed, for a duration of thirty (30) years from the date the Project is Open to the public, regardless of whether ownership of the Project is transferred to a Future Project Owner, as set forth in Sub-sections VI.E of this Agreement and the SOW for; the Maintenance of the Project; funding of insurance required by the Corrective Response Plan; and funding of any Corrective Response Oversight Costs, as specified in the SOW,;
- C) All activities undertaken by BASF under this Agreement shall be performed in accordance with the requirements of all applicable federal, state and local laws and regulations, including CERCLA and the NCP as outlined in this Agreement. BASF shall also ensure that all activities undertaken by BASF under this Agreement shall not interfere with ongoing cleanup work conducted by EPA or others on its behalf, or EPA's goals and requirements, for response actions at the DA Site and BCSA;
- D) BASF shall pay the Federal Trustees costs as provided in this Agreement at Section IX;
- E) BASF, or its contractors, shall obtain adequate insurance, as required by Section XIII. F of this Agreement; and
- F) BASF shall ensure the effective recording of a Conservation Easement and Restriction ("CER") applicable to the Project, in the general form as set forth in Appendix E, and as set forth herein in Section XI.

## **V. PROJECT OBJECTIVES**

The Parties agree that the Project, if completed in accordance with this Agreement will be consistent with CERCLA, the NCP, and the NRD Assessment regulations, will be in the public interest, and will meet the following objectives:

- A) Restores or enhances currently-degraded environmental conditions at the 5-acre area that shall be converted into the Project;
- B) Provides significant environmental and recreational benefits by converting impervious or semi-impervious surfaces on vacant property into viable habitat, to include meadows, native plantings, possible wetlands, and tree canopy, as well as the construction of pedestrian pathways, viewing sites, riverfront access and the structural elements for a possible future kayak or small watercraft launch;
- C) Provides partial compensation to the public towards injuries to natural resources resulting from hazardous substance releases at the DA Site and/or the BCSA, by restoring, rehabilitating, replacing, or acquiring the equivalent of certain of the injured natural resources and compensating for certain of the interim lost uses and other services provided by those resources, as outlined in the *Preassessment Screen and Determination for the Diamond Alkali Superfund Site, Newark, Essex County, New Jersey*, issued in August 2004; the *Final Natural Resource Damages Assessment Plan for the Diamond Alkali Site*, issued in February 2020; and the *Preassessment Screen Determination for the Berry's Creek Watershed*, issued in March 2014;
- D) Is consistent with the Restoration Plan;
- E) Is highly likely to be consistent with the natural resource restoration plan or plans, if any, adopted by the Federal Trustees at the conclusion of a full natural resource damages assessment for the DA Site and/or the BCSA, and will not interfere with any other reasonably foreseeable restoration alternatives outside the footprint of the Project; and
- F) Shall not impede or interfere with EPA's response actions, or other state or local regulatory authorities, related to the DA Site or the BCSA.

## **VI. PERFORMANCE STANDARDS FOR CREDITABILITY AND CERTIFIED NRD CREDIT**

To be eligible to receive a Certification of Creditability, BASF must meet all of the following Performance Standards:

- A) BASF shall hold fee simple title to its former facility location, along the Passaic River in East Newark, New Jersey, identified on the most current East Newark, New Jersey tax maps as



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Block 17, Lot 2, and to the adjacent real estate parcel north of this former facility location, identified on the most current East Newark, New Jersey tax maps as Block 17, Lot 1;

- B) BASF shall design and construct the Project as set forth in Section X herein and the SOW;
- C) BASF shall execute and record a grant of Conservation Easement and Restriction (“CER”) for the Project and its underlying real estate to protect the Project in accordance with the laws of New Jersey, as set forth in Section XI herein;
- D) BASF shall establish a Maintenance Plan that contains the elements set forth in Section VIII.E.6 of the SOW and is approved by the Federal Trustees under the SOW;
- E) BASF shall establish a Maintenance Escrow Account with the purpose of ensuring funding for a period of thirty (30) years after Opening the Project to the public, to cover Maintenance Plan activities, Maintenance Oversight Costs Following Opening, insurance required by the Corrective Response Plan, and Corrective Response Oversight Costs, and BASF shall provide funding to the Maintenance Escrow Account in accordance with Section X.C.2;
- F) BASF shall establish a Corrective Response Plan to address any damages to the Project from any Force Majeure event or Other Corrective Response Incident that occur after the Project is Open to the public, as set forth in Section VIII.E.7 of the SOW; and
- G) BASF shall pay all Maintenance Oversight Costs Before Opening to the Federal Trustees under Section IX.A. of this Agreement.

To actually receive and use and/or transfer the Certified NRD Credit, BASF must meet these additional Performance Standards:

- H) BASF shall have received a Certification of Creditability; and
- I) BASF shall transfer ownership of the Project to the Future Project Owner and assist the Future Project Owner with making the Project Open to the public. BASF shall only be entitled to use and/or transfer the Certified NRD Credit as of the date the Project is Open.

## **VII. NRD CREDIT**

### **A. Base NRD Credit**

The Federal Trustees agree to provide the dollar-denominated Base NRD Credit in the amount of \$73.5 million (the calculation of which is described in Appendix D) for the completed Project, provided that, and not until, BASF meets all the Performance Standards as set forth in Section VI. This Base NRD Credit amount may be supplemented in accordance with the terms of this Agreement.

**B. INTENTIONALLY OMITTED**

**C. Certification of Creditability**

- 1) NRD Creditability Report and Inspection. After BASF determines that, in BASF's view, BASF has satisfied the Performance Standards set forth in Section VI A) - G), BASF shall so notify the Federal Trustees and provide a Creditability Report to the Trustees requesting the Federal Trustees' issuance of a Certification of Creditability as set forth in Section VIII of the SOW. The Creditability Report shall contain the elements required by Section VIII F.7.(b) of the SOW and the Federal Trustees review of Performance Standards relating to Project construction shall be guided by Section VIII F.7.(d) of the SOW. The Parties will then schedule an inspection of the Project as set forth in Section VIII F.7.(c) of the SOW ("the Creditability Inspection"), which must be attended by BASF and the Federal Trustees and/or their representatives;
- 2) Federal Trustee Response to NRD Creditability Report. After the Creditability Inspection is conducted, the Federal Trustees shall respond to BASF to provide the Federal Trustees' determination on whether or not to issue BASF a Certification of Creditability that BASF has met the Performance Standards A) - G) above, determining that BASF is eligible to receive the NRD Credit:
  - i) If the Federal Trustees determine that BASF has not satisfied the relevant Performance Standards set forth in Section VI to fulfill the requirements to earn Base NRD Credit, the Federal Trustees shall include in their response to BASF a description of any deficiencies: BASF shall be provided an opportunity to correct the stated deficiencies and submit a revised Creditability Report and schedule a further Creditability Inspection, if requested by the Trustees. This process may be repeated;
  - ii) If the Federal Trustees conclude that BASF is eligible to receive NRD Credit, the Federal Trustees shall so notify BASF in writing, including the specific dollar amount of BASF's Certified NRD Credit, including the Base NRD Credit Amount and any adjustments to that Base NRD Credit that the Trustees have determined are applicable in accordance with this Agreement. This notification will constitute the Certification of Creditability for purposes of this Agreement.
- 3) The Trustees will use best efforts to notify BASF of any deficiencies or complete the Certification of Creditability process within 45 days after BASF provides the Creditability Report required under Section VII. C.1.
- 4) Upon receipt of the Certification of Creditability, BASF will coordinate with the Federal Trustees and the Future Project Owner to determine a date that the Project will be Open to the public. Once the Project is Open, as of the Opening Date, BASF shall be entitled to use and/or transfer the Certified NRD Credit, consistent with the terms of this Agreement.

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5) BASF Multiplier NRD Credit shall begin to accrue as of the Opening Date.

**D. Multiplier NRD Credit**

- 1) The amount of BASF's Certified NRD Credit shall increase at the Multiplier Rate from the date the Project is Open to the public, and ending at the earlier of:
  - i) A twenty (20) year period thereafter;
  - ii) The date of any PRP signature on any settlement agreement using BASF's Certified NRD Credit to resolve the NRD liability of such PRP; in which case, the amount of NRD credit provided by that settlement shall be deducted from the total Certified NRD Credit subject to the Multiplier, while any unused amount of Certified NRD Credit shall continue to accrue with the Multiplier; or
  - iii) After the Federal Trustees' first publish (in a report or other context) a quantification of NRD liability for the DA Site (including quantification in dollars), and, following this publication, the date that the United States then provides a written initial settlement demand to a PRP group of which BASF is a member (or, if requested by BASF, to BASF individually), stating the dollar amount that the United States would accept to resolve the DA Site liability of the relevant PRP group or BASF. For BASF to be eligible for such an offer, it must have provided information in response to any request by the United States (including the Federal Trustees) relating to its liability or equitable responsibility for NRD at the DA Site.
- 2) The 3% annual rate component of the Multiplier Rate that accounts for the time value of natural resources services provided by the Project shall not apply during any time period that the natural resources services provided by the Project are materially disrupted, including from a failure to undertake required Maintenance obligations under the Maintenance Plan as required, or from causes that require corrective action under the Corrective Response Plan.
- 3) If, during the period that the Multiplier Rate applies, BASF uses or transfers a portion of its Certified NRD Credit, the Multiplier Rate will continue to apply to the amount, if any, of the remaining BASF Certified NRD Credit but will not apply to the transferred credit.
- 4) **Tracking Current Amount of Certified NRD Credit:** Annually and when a transfer or use of Certified NRD Credit occurs, BASF will submit to the Federal Trustees for confirmation a Credit Tracking Sheet, indicating the current amount of the BASF Certified NRD Credit, taking into account earned Multiplier NRD Credits and any Certified NRD Credits that have been used or transferred by BASF. The LAT shall advise BASF in writing within 15 days if the Federal Trustees disagree with BASF's Credit Tracking Sheet. Any disagreement between

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the Parties as to the current amount of BASF Certified NRD Credit shall be resolved in accordance with Section XIX of this Agreement.

**E. Effect of BASF Withdrawal on NRD Credit**

- 1) Notification: BASF may withdraw from the Agreement at any time prior to the Federal Trustees' issuance of a Certification of Credibility. To do so, BASF must provide written notice of BASF's withdrawal to the Federal Trustees, as specified in Section XV (Notices). BASF shall bear responsibility for the costs of winding-down any partially completed parts of the Project.

- 2) Effect of BASF Withdrawal on NRD Credit:

If BASF withdraws from the Agreement after completing some, but not all, of the Project, the Trustees will determine, in their discretion, whether BASF is entitled to any NRD Credit and, if so, the amount of such Credit, as follows:

- i. For the Project to be eligible for NRD Credit, the Project property must be subject to a properly recorded Conservation Easement and Restriction in accordance with Section IX, a Federal Trustee approved Maintenance Plan, with a Maintenance Escrow Account that is adequate to provide funding for the Maintenance Plan for thirty (30) years from the date the Project Opens to the public.
  - ii. If such partially completed Project results in significant, long-term restoration of Natural Resources and/or natural resource services injured as a result of releases of hazardous substances, the Trustees may agree in writing to award BASF NRD Credit, relating to the DA Site only, commensurate with the resulting restoration benefits, as determined by the Federal Trustees subject to approval by DOJ.
- 3) Trustee Oversight Costs After BASF Withdrawal. Should BASF withdraw from this Agreement, BASF shall remain obligated to pay, and shall not be entitled to a refund for, the Maintenance Oversight Costs Before Opening. BASF shall not be obligated to pay Maintenance Oversight Costs Following Opening.

**F. Applicability of Certified NRD Credit**

The amount, or any portion of the amount, of BASF's Certified NRD Credit may be used and applied to reduce the amount of the Federal Trustees' claim of NRD against BASF related to the DA Site or BCSA in any civil litigation or other proceeding brought by the Federal Trustees seeking NRD against BASF, subject to the relevant limitations in Section VII of this Agreement. Any such use or application shall be recorded in writing by BASF in a format similar to Attachment F (Credit Tracking Sheet) and provided to the LAT in accordance with Section VII.D.4.

**G. Transfer of Certified NRD Credit**

- 1) BASF may transfer the amount, or any portion of the amount, of its Certified NRD Credit to one or more other PRP(s) at the DA Site. Any such transfer shall be recorded in writing, signed by the parties to the transfer, and provided to the LAT with an updated Attachment F (Credit Tracking Sheet) to confirm the amount of Certified NRD Credit being transferred and the amount remaining after the transaction. Each recipient DA PRP may use the transferred Certified NRD Credit amount on its own behalf to reduce its NRD liability at the DA Site under the same terms as set forth in Sub-section VII.F, as if the recipient stood in the shoes of BASF, except that no recipient DA PRP other than BASF may use Certified NRD Credit to satisfy any liability it may have related to the BCSA;
- 2) While there is no limit on the number of PRPs to which Certified NRD Credits may be transferred, to prevent double-counting, each dollar of any Certified NRD Credit that is used by BASF, or transferred to another PRP, must be reflected on the Credit Tracking Sheet.
- 3) BASF may elect to use the Certified NRD Credit to reduce the amount of any NRD liability it may have to the Federal Trustees related to the BCSA, whether that liability is fixed by a judicial determination or settlement, subject to the following conditions:
  - i. BASF can use its Certified NRD Credit at BCSA only to satisfy or reduce its own NRD liability at the BCSA and may not transfer the Certified NRD Credits to any other PRP for use at the BCSA;
  - ii. Prior to applying its Certified NRD Credit against its NRD liability for the BCSA, BASF agrees to negotiate in good faith with the Federal Trustees for the use of the Certified NRD Credits at the DA Site, it being the Parties' intent that BASF's Certified NRD Credits be used in the first instance towards offsetting BASF's liability at the DA Site if the opportunity to do so is available at the time the opportunity to use the Certified NRD Credits at the BCSA arises; provided, however, that such opportunity will not be considered available at the DA Site if the conditions set forth in Section VII.D.1(iii) for the Multiplier Rate to terminate have not been satisfied.
  - iii. The amount of Certified NRD Credit that BASF can use at the BCSA is limited to no more than 10% of the Federal Trustees' initial NRD assessment amount for the BCSA.

**H. Settlement Offers**

Any offer on behalf of the Federal Trustees to resolve NRD liability at the DA Site or BCSA, or any portion of such liability, will be expressed as a demand in a specific monetary amount. As an alternative to the monetary demand, equivalent NRD compensation projects may also be

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demand, provided that the value of such projects is also expressed in a specific monetary amount. If the Federal Trustees' NRD claim at either the DA Site or the BCSA is resolved, in whole or in part, through equivalent NRD compensation projects, the Federal Trustees agree to work with BASF in good faith to achieve a result where BASF's Certified NRD Credits may be used to satisfy the Federal Trustees' claim, it being the parties' intention that the NRD Credits generated by the Project be usable by BASF for the purposes authorized by this Section VII.

**I. No Precedential Effect**

None of the terms of this Agreement, including without limitation the amount of NRD Credit, or the methodology used to calculate the NRD Credit, shall be used as precedent for any other restoration project in this or any other matter.

**VIII. EFFECT OF AGREEMENT AND PARTIES BOUND**

- A) Effect of Agreement on Natural Resource Damage Assessment Process. Nothing in this Agreement or the Parties' actions or determinations under this Agreement shall be construed to limit in any way the authority of the Federal Trustees to perform assessments, engage in restoration planning, select and implement restoration projects, or to in any other way prejudice or affect the course of, or obviate the need for, the Federal Trustees' natural resource damage assessment of the DA Site and/or BCSA;
- B) Effect of Agreement in Subsequent Litigation or Settlement on Joint and Several Liability. The terms of this Agreement do not prejudice, or have any bearing on, the Federal Trustees' position regarding the joint and several liability of BASF or any other party liable under CERCLA for NRD claims, associated with the DA Site and/or the BCSA;
- C) Effect of Agreement in Subsequent Litigation or Settlement with Third Parties. The Federal Trustees expressly reserve all claims, demands, and causes of action, either judicial or administrative, past or future, in law or equity, including but not limited to, natural resource damage liability, including but not limited to assessment cost liability, against any person or entity not a party to this Agreement for any matter arising out of or in any way related to the DA Site and/or the BCSA;
- D) Effect of Agreement on Regulatory Compliance. The terms of this Agreement do not modify or limit BASF's responsibility to ensure that all required federal, state and/or municipal regulatory requirements (including land-use controls) applicable to the Project are met to the satisfaction of the appropriate regulator;
- E) Parties Bound. This Agreement is binding upon the Parties and their successors and assigns; and
- F) The undersigned representative of each Party certifies that he or she is fully authorized to enter into the Agreement and execute and legally bind such Party to this document.

**IX. PAYMENT OF FEDERAL TRUSTEE COSTS**

- A) Payment by BASF for Maintenance Oversight Costs Before Opening. Within sixty (60) calendar days after the Effective Date, BASF shall pay \$763,000, plus any Interest accruing from the date that payment is due, to the United States to reimburse Maintenance Oversight Costs Before Opening incurred by the United States. Of this total amount:
- 1) \$300,000 plus Interest, if any, shall be payable to DOI;
  - 2) \$463,000 plus Interest, if any, shall be payable to NOAA.
- B) Payments from the Maintenance Escrow Account for Maintenance Oversight Costs Following Opening. On each anniversary of the Opening Date, BASF shall make or shall cause to be made from the Maintenance Escrow Account a payment not to exceed \$5,000 to DOI and \$5,000 to NOAA. Interest shall accrue on the payments due if payment is not received within sixty (60) days of the annual anniversary of the Opening Date. This obligation shall expire after payment is made on the 30<sup>th</sup> anniversary of the Opening Date. These annual payments made to the Federal Trustees for Maintenance Oversight Costs Following Opening shall not cover any Corrective Response Oversight Costs.
- C) Payments to DOI. BASF shall pay costs incurred by DOI electronically according to payment instructions to be provided to BASF by DOI:

Notification of payment shall be emailed to:

U.S. Department of the Interior  
Natural Resource Damage Assessment and  
Restoration Program  
Attn: Bruce Nesslage, Restoration Fund Manager  
1849 C Street, NW  
Mail Stop 4449  
Washington, D.C. 20240  
bruce\_nesslage@ios.doi.gov

and

Mark Barash, Esq.  
Senior Attorney  
Office of the Solicitor of the U.S. Department of the Interior  
15 State Street, 8th Floor  
Boston, MA 02109-3502  
mark.barash@sol.doi.gov

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- D) Payments to NOAA: BASF shall pay costs incurred by NOAA electronically according to payment instructions to be provided to BASF by NOAA;

Notification of payment shall be emailed to:

NOAA/U.S. Department of Commerce  
NOAA Office of Response and Restoration  
Attn: Vernee Holley, DARF Manager  
1315 East-West Highway  
Silver Spring, MD 20910-3281  
Vernee.Holley@noaa.gov

and

Kate Barfield  
National Oceanic and Atmospheric Administration  
Office of General Counsel Natural Resources  
1315 East-West Highway  
SSMC3# Room 15107  
Silver Spring, MD 20910-3282  
Kate.Barfield@noaa.gov

- E) Payment by BASF of Federal Trustee Formal Dispute Resolution and Enforcement Costs. The Parties agree to work in good faith to resolve disputes, but should the Federal Trustees incur costs related to formal dispute resolution set forth in Section XIX.E. or to enforce the terms of this Agreement against BASF, BASF agrees to pay those formal dispute resolution and enforcement costs (including both Federal Trustee and DOJ costs, as applicable). The Federal Trustees and DOJ, as applicable, will bill BASF for any such enforcement or formal dispute resolution costs, which shall not constitute nor be included in Maintenance Oversight Costs Before Opening or Maintenance Oversight Costs Following Opening.

**X. PERFORMANCE OF THE WORK, PROJECT OWNERSHIP,  
MAINTENANCE AND RETENTION OF RECORDS**

**A. Performance of Design and Construction in Accordance with the SOW**

BASF shall develop the Project design and undertake the Project construction in accordance with the SOW and all Federal Trustee-approved Governing Milestone Deliverables, as required by the SOW. These Governing Milestone Deliverables shall be subject to approval by the Federal Trustees in accordance with SOW Section VIII (Federal Trustee Review and Approval of



Milestone Deliverables and other Submittals and Review and Coordination of Other Tasks and Deliverables).

## **B. Modification of Deliverables**

Any approval, or modification followed by approval, of any deliverable shall be incorporated into the related deliverable required under the SOW.

## **C. Project Ownership and Maintenance**

- 1) **Ownership:** The Federal Trustees acknowledge that it is BASF's intent to transfer ownership of the Project and Maintenance responsibility to a Future Project Owner. Transfer of ownership of the Project to a third-party, other than the Borough of East Newark, is subject to Federal Trustee approval, which approval shall not be unreasonably withheld. Any transfer of real estate title for the Project property shall not occur until a CER for the Project real estate is approved and recorded as set forth in Section XI. Regardless of land transfer, the Project shall remain subject to the ongoing obligations set forth in the Maintenance Plan, Corrective Response Plan and the CER.
- 2) **Maintenance Obligations:** As set forth in Sub-section VI.D, BASF shall establish the Maintenance Escrow Account in the initial amount of \$1 million. The Federal Trustees shall have the right to review and approve any agreement related to the operation of the Maintenance Escrow Account. Any agreement between BASF and a Future Project Owner to undertake Maintenance for the Project will include a guaranty by BASF to maintain adequate Maintenance funding in the Maintenance Escrow Account for thirty (30) years from the date the Project is Open, and detail how payments will be made from the Maintenance Escrow Account to satisfy Maintenance Escrow Account funding obligations described in the Agreement. Such terms may include the requirement that such Future Project Owner contribute funds to the Maintenance Escrow Account and/or BASF may use financial assurance options acceptable to the Federal Trustees to satisfy any of its Maintenance Escrow Account funding obligations. BASF shall annually review the balance and expected credits and debits for the Maintenance obligations based on remaining Maintenance obligations and shall confirm to the LAT that the available funding sources are sufficient to complete all Maintenance Plan obligations for the following year. If there are deficiencies in the funding necessary to satisfy the next year's Maintenance Plan obligations, BASF shall contribute additional funds to the Maintenance Escrow Account to eliminate any such deficiency. Any agreement between BASF and a Future Project Owner relating to the transfer of Maintenance responsibilities shall (a) provide that the Federal Trustees are third-party beneficiaries of the agreement; (b) recognize that BASF remains responsible for funding the Maintenance obligations set forth in the Maintenance Plan, (c) specify that any Corrective Response Oversight Costs shall be paid from the Maintenance Escrow Account but such costs shall not constitute nor be included

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in the Maintenance Oversight Costs Following Opening, and (d) be subject to review and approval by the Federal Trustees, which approval shall not be unreasonably withheld.

- 3) Maintenance Reporting: Unless otherwise set forth in the Maintenance Plan, BASF or the Future Project Owner shall provide annual reports to the LAT documenting current Project conditions, and any future Maintenance activities required under the Maintenance Plan.
- 4) Corrective Response Plan Obligations: Any agreement between BASF and a Future Project Owner that transfers ownership, operational, and/or Maintenance responsibility shall require that Future Project Owner to be responsible for the implementation of the Corrective Response Plan. BASF shall have no obligation to implement or to fund the Corrective Response Plan other than to ensure, for a period of thirty years, sufficient funding in the Maintenance Escrow Account to fund the insurance required by the Corrective Response Plan and to pay any Corrective Response Oversight Costs, and the Maintenance Escrow Account shall not be used to fund corrective measures required by the Corrective Response Plan other than for the purchase of such insurance or for such Corrective Response Oversight Costs. Any such agreement between BASF and a Future Project Owner shall also (a) provide that the Federal Trustees are third-party beneficiaries of the agreement; (b) recognize and set forth the insurance coverage on behalf of the Future Project Owner to implement the Corrective Response Plan, (c) specify that any Corrective Response Oversight Costs shall be paid from the Maintenance Escrow Account but such costs shall not constitute nor be included in the Maintenance Oversight Costs Following Opening, and (d) be subject to review and approval by the Federal Trustees, which approval shall not be unreasonably withheld.

**D. Retention of Records**

- 1) Until five (5) years after the Certification of Creditability of the Project or BASF's withdrawal from this Agreement, BASF shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to BASF's performance under this Agreement. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, BASF shall provide copies of any documents, records, or other information required to be maintained under this Paragraph. BASF shall also make reasonably available to the Federal Trustees employees, agents, or representatives of BASF with knowledge of relevant facts concerning BASF's performance under this Agreement.

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- 2) At the conclusion of the information-retention period provided in the preceding Paragraph, BASF shall notify the United States at least ninety (90) days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, BASF shall deliver any such non-privileged documents, records, or other information to the United States. BASF may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. However, no final versions of any documents, records, or other information created or generated pursuant to the requirements of this Agreement shall be withheld on grounds of privilege.
- 3) This Agreement in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of BASF to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

**XI. CONSERVATION EASEMENTS AND RESTRICTIONS**

- A) BASF shall submit to the Federal Trustees, for approval according to Section XII below, a proposed Conservation Easement and Restrictions (“CER”), as generally outlined in Appendix E, for the parcel(s) of real property that comprise the Project, according to the following terms:
  - 1) The CER shall be conveyed to a non-profit entity, or another third party, that is jointly designated and approved in writing by the Federal Trustees;
  - 2) The CER shall describe future land use and management restrictions and appropriate land uses to protect the habitat in perpetuity for birds, fish, wildlife, and human use. Each CER shall be designed to protect wetlands, uplands, and related habitat, including fish and wildlife habitat and to protect the ecological value of the land, provide open space protection, protect scenic and natural features, and allow for compatible outdoor recreational and educational uses. The general requirements of each CER is outlined in Appendix E;
  - 3) The CER shall be enforceable by the grantee/beneficiary of each such instrument and by each of the Federal Trustees as third-party beneficiaries of each such instrument; and
  - 4) A list of any prior liens and/or encumbrances shall be provided to the Federal Trustees for the CER. The CER shall be free and clear of any liens and/or encumbrances, except as accepted by the Federal Trustees, based upon their determination that such liens and/or encumbrances will not interfere with the compensatory purpose and intended use of the parcel. The preceding obligation does not apply with respect to any liens or encumbrances that were not properly

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recorded as of the effective date of any title insurance acquired by BASF in connection with the CER (Appendix E), with respect to these parcels.

- B) Recording the CERs. BASF shall arrange for the recording, with the Hudson County Register of Deeds, of the CER, as approved under Section XII of this Agreement (Approval of Conservation Easements and Restrictions), for each parcel of land that comprises a portion of the Project. BASF shall deliver proof of such recording, with page and book numbers, to the Federal Trustees;
- C) Treatment of Property During Intervening Time Period. As of the Effective Date, any land that is owned by BASF that comprises a portion of the Project shall be used and maintained by BASF in a manner that is consistent with the restoration work planned for that land and with the function and performance of the work as set forth in the SOW;
- D) BASF shall (i) provide the Federal Trustees, their contractors, representatives, and subcontractors, with access at all reasonable times to the Project property to conduct any activity regarding the Project, including those listed below in Sub-section XI.E (Access Requirements); and (ii) refrain from using the Project property in any manner that the Federal Trustees determine will interfere with or adversely affect the implementation or integrity of the Project;
- E) Access Requirements. The following is a list of activities for which access is required:
  - 1) Monitoring the Project, including inspections;
  - 2) Verifying any data or information submitted to the Federal Trustees; and
  - 3) Implementing, monitoring, maintaining, reporting on, and enforcing any CER.

**XII. APPROVAL OF CONSERVATION EASEMENTS AND RESTRICTIONS**

- A) After review of any proposed Conservation Easement and Restriction submitted under Sub-section XI.A, the Federal Trustees shall in writing: (1) approve the CER; (2) approve part of the CER, with conditions; or (3) disapprove the CER;
- B) If the submission is disapproved in whole or in part under Sub-section XII.A, BASF shall correct all deficiencies and resubmit the CER, for approval, in accordance with the preceding Section.

**XIII. INDEMNIFICATION AND INSURANCE/RESPONSIBILITY FOR DAMAGES**

- A) The United States does not assume any liability by entering into this Agreement;
- B) BASF shall indemnify, save, and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, and representatives, and each other for or from any and all claims or causes of action by any person or entity arising from, or on account of negligent or other wrongful acts or omissions of BASF, and its respective officers, directors, employees, agents, contractors, subcontractors, and any persons acting on BASF's behalf or under their control, in carrying out BASF's obligations pursuant to this Agreement. For avoidance of doubt, the indemnity provided by this Section XIII B. does not apply to any negligent or other wrongful acts or omissions of a Future Project Owner, or any third party responsible for implementing the Maintenance Plan, or to any claims arising from any conditions on the lands of the Project site, after its transfer, that were not created or caused by BASF or persons acting on its behalf. BASF agrees to pay the United States all costs it incurs including, but not limited to, costs of litigation and settlement arising from, or on account of, claims by any person or entity made against the United States for which an indemnity is owed by BASF under this Section.
- C) The United States shall not be held out as a party to any contract entered into by or on behalf of BASF in carrying out activities pursuant to this Agreement, except that the Federal Trustees shall be designated as third-party beneficiaries of any contract to undertake Maintenance activities for the Project and as third-party beneficiaries of the CER. Neither BASF nor any of its contractors shall be considered an agent of the United States;
- D) The United States shall give BASF notice of any claim for which the United States seeks indemnification pursuant to this Section, and shall consult with BASF prior to settling such claim. BASF covenants not to sue and agrees not to assert any claims or causes of action against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between BASF and any person for performance of work on or relating to this Agreement, including, but not limited to, claims on account of construction delays. In addition, BASF shall indemnify, save, and hold harmless the United States with respect to any and all claims by any person or entity for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between BASF and any person for performance of work on or relating to this Agreement, including, but not limited to, claims on account of construction delays.
- E) BASF's indemnity obligations to the United States under this Section XIII shall terminate thirty (30) years following the date the Project is Open to the public

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- F) BASF shall ensure that no more than fifteen (15) days before commencing any on-Site work, BASF's primary contractor shall secure, and shall maintain until three (3) years after the Federal Trustees issue the Certification of Credibility under Paragraph VIII.C. 7(e) of the SOW, commercial general liability insurance with limits of liability of \$1 million per occurrence, automobile liability insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming the United States as an additional insured with respect to all liability arising out of the activities performed by or on behalf of BASF according to , this Crediting Agreement. In addition, up to the point when the Certification of Creditability is issued, BASF shall ensure that its contractors shall satisfy, and that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the work on behalf of BASF in furtherance of the SOW and this Crediting Agreement. Prior to commencement of the work under the SOW, BASF shall provide to the designated Federal Trustee Representatives certificates of such insurance evidencing these coverages. BASF shall resubmit such certificates each year on the anniversary of the Certification of Creditability for those coverages which must be carried for the three year period following issuance of such Certification. If BASF demonstrates by evidence satisfactory to Federal Trustees that any contractor or subcontractor maintains insurance equivalent to that described above covering the same risks, with the United States as an additional insured, but in a lesser amount, then, with respect to that contractor or subcontractor, BASF shall be required to provide that portion of the insurance described above that is not maintained by the contractor or subcontractor. BASF shall ensure that all policies under this Paragraph identify and name the entire Project as an insured location.
- G) Damage Caused by BASF and/or its Contractors. BASF and its contractors shall be responsible for all damages to persons or property that occur as a result of the BASF's and/or its contractors' and subcontractors' negligence and shall take proper safety and health precautions to protect the work, the workers, the public and the property of others. In addition, BASF shall be responsible for all materials delivered and work performed until the issuance of the Certification of Creditability in accordance with the terms of this Agreement.

#### **XIV. MODIFICATION**

Both material and non-material modifications to this Agreement may be made only by written approval of the Parties. Any proposed modification that seeks to materially modify this Agreement, including the SOW, is subject to further public comment under the same process described in Section XX (Public Comments) of this Agreement.

## **XV. NOTICES**

A) Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Agreement, they shall be made in writing and addressed to those listed below. Any Party may change the person and/or address applicable to it by providing notice of such change to all Parties. All notices under this Section are effective upon receipt, unless otherwise specified. Except as otherwise provided, notice to a Party by email (if that option is provided below) and by regular mail in accordance with this Section satisfies any notice requirement of this Agreement:

1) As to the United States:

EES Case Management Unit  
Environment & Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Ben Franklin Station  
Washington, DC 20044-7611  
[eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)  
Re: ----- Case Reference Number

2) As to DOI:

Mark Barash, Esq.  
Senior Attorney  
Office of the Solicitor of the United States Department of the Interior  
15 State Street, 8th Floor  
Boston, MA 02109-3502  
[Mark.Barash@sol.doi.gov](mailto:Mark.Barash@sol.doi.gov)

3) As to NOAA:

Kate Barfield  
National Oceanic and Atmospheric Administration  
Office of General Counsel Natural Resources  
1315 East-West Highway  
SSMC3# Room 15107  
Silver Spring, MD 20910-3282  
[Kate.Barfield@noaa.gov](mailto:Kate.Barfield@noaa.gov)

4) As to BASF:

Karyllan Dodson Mack  
Assistant General Counsel

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BASF Corporation  
100 Park Avenue  
Florham Park, NJ 07932  
[karyllan.mack@basf.com](mailto:karyllan.mack@basf.com)

With a copy to:

J. Douglas Reid-Green  
Expert  
BASF Corporation  
100 Park Avenue  
Florham Park, NJ 07932  
[douglas.reid-green@basf.com](mailto:douglas.reid-green@basf.com)

With a copy to:

David P. Schneider  
BRESSLER, AMERY & ROSS, P.C.  
325 Columbia Turnpike  
Florham Park, NJ 07932  
[dschneider@bressler.com](mailto:dschneider@bressler.com)

- B) If BASF claims that a Force Majeure event results in an anticipated or actual delay in undertaking the requirements of this Agreement, BASF shall provide written notice to the Federal Trustees in accordance with this Section.

## **XVI. RESERVATION OF RIGHTS**

- A) The United States reserves all rights to enforce the terms of this Agreement pursuant to the Dispute Resolution provisions set forth in Section XIX. The United States also reserves all rights against BASF with respect to all matters not expressly included within this Agreement, including:
- 1) Liability of BASF, if any, for natural resource damages in excess of the Certified NRD Credit as provided and applied under this Agreement, excluding any such credit transferred to a third party. Except for the amount of Certified NRD Credit assigned to BASF under this Agreement, this Agreement fully reserves and shall not limit the rights of the United States against BASF to recover damages for injuries to natural resources, reasonable assessment costs, and costs associated with the selection and implementation of restoration projects related to the DA Site and/or the BCSA.



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- B) Except for the amount of the Certified NRD Credit provided and applied by the Federal Trustees under this Agreement, the United States reserves all legal and evidentiary rights to assert any claim including, without limitation, any natural resource damage assessment associated with the DA Site and/or BCSA, including any methodologies the Federal Trustees may use to assess natural resource injuries, to determine their natural resource damages claim, and in planning and scaling restoration or any other liability associated with the DA Site and/or BCSA;
- C) Except for the amount of the Certified NRD Credit provided and applied by the Federal Trustees under this Agreement, BASF reserves all legal and evidentiary defenses it may have against any claim asserted by the United States including, without limitation, any natural resource damage assessment associated with the DA Site and/or the BCSA, and any methodologies the Federal Trustees may use to assess natural resource injuries, to determine their natural resource damages claim, and in planning and scaling restoration, or any other liability associated with the DA Site and/or the BCSA. BASF reserves all claims, cross-claims or counterclaims it may have against any person or entity not a party to this Agreement.

**XVII. COUNTERPARTS**

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

**XVIII. FORCE MAJEURE**

- A) BASF agrees to perform all requirements of this Agreement, unless the performance is delayed or prevented by a Force Majeure event. Should BASF wish to invoke Force Majeure, it must do so by providing written notice to the Federal Trustees, as specified in Section XV (Notices) of this Agreement. Such notice shall be submitted within seventy-two (72) hours of the time BASF, including its contractor(s), know or should have known of the Force Majeure event;
- B) For purposes of this Agreement, a Force Majeure event is defined as an act of God, natural disaster, or other similar catastrophic event, arising from causes beyond the control of BASF, or of any entity controlled by BASF, including but not limited to its contractors and subcontractors, which causes property damage and/or delays or prevents performance of any obligation under this Agreement despite BASF's best efforts to fulfill the obligation;
- C) If the Federal Trustees agree that a delay or anticipated delay is attributable to a Force Majeure event, the time for performance of the obligations under this Agreement that are affected by the event may be extended for such time as is necessary to complete those obligations;

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- D) BASF may also petition the Federal Trustees for a modification of the Project Final Design by reason of property damage or construction delay occasioned by a Force Majeure event, and such request shall not unreasonably be denied by the Federal Trustees. Should the modification result in a decrease in services provided by the Project, the Federal Trustees may, in consultation with BASF, reduce the amount of the Base NRD Credit to reflect the reduction in services resulting from the modification. The Federal Trustees' decision as to the reduced value of the Base NRD Credit may be challenged by BASF pursuant to Section XIX of this Agreement.
- E) The invocation of Force Majeure by BASF shall not, of itself, extend the time for performance of any other obligation under this Agreement, including the payment of the Federal Trustees' costs per Section IX.
- F) Once the ownership of the Project has been transferred to a Future Project Owner, that party shall be responsible for implementing the Corrective Response Plan to restore or replace any damage to the Project resulting from any Force Majeure event or Other Corrective Response Incident that occurs after the date that ownership was transferred, and BASF shall have no responsibility, financial or otherwise, with respect to same other than to ensure, for a period of thirty (30) years, sufficient funding in the Maintenance Escrow Account to pay the insurance coverage and any Corrective Response Oversight Costs as required by Section X.C.4 of this Agreement.

**XIX. DISPUTE RESOLUTION**

- A) Prior to initiating the dispute resolution procedures described in this Section, the Parties shall attempt, at the Project Management Team level, to resolve any such disagreement or dispute expeditiously and informally. If a dispute cannot be resolved at the Project Management Team level, unless otherwise expressly provided for in this Agreement, the Parties shall seek to resolve any dispute that arises between them concerning this Agreement or the implementation of the Project in accordance with the dispute resolution procedures of this Section prior to seeking judicial resolution of any dispute subject to judicial review as set forth below. The Parties shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally. BASF may initiate the dispute resolution process which shall be addressed in a timely and good faith manner.
- B) The Federal Trustees and BASF each shall identify Dispute Resolution Representatives who shall meet to discuss the matter in dispute at the earliest available opportunity and will work in good faith to resolve the matter in dispute.

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C) An administrative record of the dispute shall be maintained by the LAT on behalf of the Federal Trustee(s) and shall contain all Statements of Position, including supporting documentation, submitted pursuant to this Section, pertaining to both informal and formal dispute resolution.

D) Informal Dispute Resolution. Any dispute under this Agreement shall, in the first instance, be the subject of informal negotiations between the Federal Trustees and BASF.

- 1) Any initial determination by the Federal Trustees under this Agreement, including but not limited to modifications, conditional approvals, bills and/or receipts for Trustee Costs, shall be final and binding unless the dispute resolution procedures of this Section are invoked.
- 2) A dispute shall be considered to have arisen when, within thirty (30) days of written notice of the Federal Trustees' determinations, BASF provides a written notice of dispute to the LAT, specifying the nature of the dispute and requested relief ("Notice of Informal Dispute"), at which point BASF shall have the option of requesting that such Notice of Informal Dispute be sent to and reviewed by the LAT's New Jersey Field Office Supervisor in coordination with NOAA;
- 3) A period for informal negotiations shall follow and shall not exceed twenty-one (21) days from the date the Notice of Informal Dispute is received by the Federal Trustees, unless it is modified by written agreement of the Parties.
- 4) The Parties may agree on the selection of a neutral party to guide discussions and negotiations consistent with generally accepted non-binding mediation/dispute resolution practice, provided that BASF agrees to pay for the costs of the neutral party, unless the Parties agree to another arrangement in writing.
- 5) Any resolution of the dispute reached by the Parties under this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Agreement.
- 6) Except by agreement of the Parties, the invocation of informal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of BASF under this Agreement.

E) Formal Dispute Resolution.

- 1) In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Sub-section, then the position advanced by the Federal Trustees shall be considered final and binding unless, within twenty-eight (28) days after the conclusion of the informal negotiation period, BASF invokes the formal dispute

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resolution procedures of this Section by serving on the Federal Trustees a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by BASF. The Trustees may, within twenty (28) days thereafter, submit a Statement of Position, unless all Parties agree to a modified timeframe for response.

- 2) After receipt of BASF's Statement of Position, the Lead Administrative Trustee ("LAT") management official at the appropriate Regional Director level or higher shall review the dispute and, after consultation with an equivalent official of the co-Trustee, issue a written decision within a reasonable period of time, which shall also be approved and signed by the appropriate co-Trustee equivalent officer, which shall serve as the final Federal Trustee response ("the Written Decision"). The Federal Trustees shall endeavor to provide the Written Decision as expeditiously as possible, within sixty (60) days from receipt of BASF's Statement of Position, unless an alternate time period is agreed upon. The Federal Trustees will serve on BASF their Written Decision, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the Federal Trustees.
- 3) Upon the Federal Trustees' issuance of the Written Decision, it shall be considered binding upon BASF, subject to this Sub-section F) 2).
- 4) To the extent that the United States is required to participate in formal dispute resolution procedures under this Section, BASF shall be responsible for the payment of costs incurred by the United States relating to any such formal dispute.
- 5) Except by agreement of the Parties, the invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of BASF under this Agreement.

**F) Jurisdiction/Enforcement**

- 1) The Parties agree that the United States District Court for the District of New Jersey located in Newark, New Jersey, will have jurisdiction pursuant to section 113(b) of CERCLA, 42 U.S.C. § 9613(b), for the actions brought under subparagraphs F) 2) and 4), as described below, and that BASF shall not contest jurisdiction in any such matter or venue for any such action in that judicial district.
- 2) If BASF disputes any determination by the Federal Trustees under Section VII regarding NRD Credit, BASF may seek to enforce this Agreement in accordance with this Section F).

**East Newark Project  
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- 3) Before BASF may seek judicial enforcement of this Agreement, BASF must have exhausted the Dispute Resolution process set forth in this Section.
- 4) If BASF fails to meet its obligations under this Agreement, the United States, on behalf of the Federal Trustees, may seek to enforce this Agreement in accordance with this Section F).
- 5) To the extent that the United States prevails in any action under this Agreement, BASF shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.
- 6) **Record Review.** The Parties agree that judicial review of disputes under this Agreement shall be under the governing legal standard, which may include review on the administrative record, if that is the governing legal standard.

**XX. PUBLIC COMMENT**

- A) Solicitation of public comment shall include solicitation of, and evaluation and response by the Federal Trustees, to public comment on the Agreement.
- B) Public Comment on the Agreement. DOJ will publicize notice of the Agreement in the Federal Register for a period of thirty days, soliciting public comment on whether the Agreement is inappropriate, improper, inadequate, or otherwise not in the best interest of the public. The United States reserves the right to withdraw from or withhold consent to this Agreement if, upon consideration of any public comments, it concludes that this Agreement is inappropriate, improper, inadequate, or otherwise not in the best interests of the public.

**XXI. EFFECTIVE DATE**

The Effective Date of this Agreement shall be the date upon which the United States issues written notice to BASF that the public comment period pursuant to Section XX (Public Comment) has closed and that comments received, if any, do not require modification or withdrawal from this Agreement.

**XXII. APPENDICES**

The following appendices are attached to and incorporated into this Agreement:

- A) “Appendix A” is the Basic Design for the BASF Early Restoration Project;

**East Newark Project  
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- B) “Appendix B” is the map outlining in purple the location/extent of the Diamond Alkali Superfund NRD Site with reference to the location of the Project;
- C) “Appendix C” is the Scope of Work for the BASF Early Restoration Project;
- D) “Appendix D” is the description of the Development of an Independent Government Cost Estimate for the BASF Early Restoration Project in East Newark, New Jersey;
- E) “Appendix E” is the proposed form of CER, representing a CER Template;
- F) “Appendix F” is an example of the Credit Tracking Sheet administrative form for calculating Certified NRD Credit amounts, and for tracking the amount of any Certified NRD Credit applied at the DA Site and/or BCSA, or transferred to PRPs at the DA Site; and
- G) “Appendix G” is the map outlining the location/extent of the BCSA.

**ARTICLE XXIII. SIGNATURES**

[SIGNATURE PAGES TO FOLLOW]

**East Newark Project  
Interim Settlement and Crediting Agreement**

IN WITNESS HEREOF, the Parties hereto have signed their names and executed this Interim Settlement and Crediting Agreement Between the Federal Natural Resource Trustees and BASF Corporation Concerning Early Restoration at the BASF Riverfront Project in East Newark, New Jersey.

For the United States:

Todd S. Kim  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

/s/ Addie Fiske

Catherine Adams Fiske, Senior Counsel  
Environmental Enforcement Section  
United States Department of Justice  
Williams Building – Suite 236  
Boston, MA 02110  
Addie.Fiske@usdoj.gov

05/26/2022

Date

/s/Brian Donohue

Brian G. Donohue, Senior Trial Attorney  
Environmental Enforcement Section  
United States Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, DC 20044-7611  
Brian.Donohue@usdoj.gov


05/26/2022

Date

**East Newark Project  
Interim Settlement and Crediting Agreement**

IN WITNESS HEREOF, the Parties hereto have signed their names and executed this Interim Settlement and Crediting Agreement Between the Federal Natural Resource Trustees and BASF Corporation Concerning Early Restoration at the BASF Riverfront Project in East Newark, New Jersey.

For BASF Corporation:

 \_\_\_\_\_ Date 5/9/22  
Tobias Dratt  
Region North America  
BASF Corporation

*Approved  
Lore Dgt  
KMB*

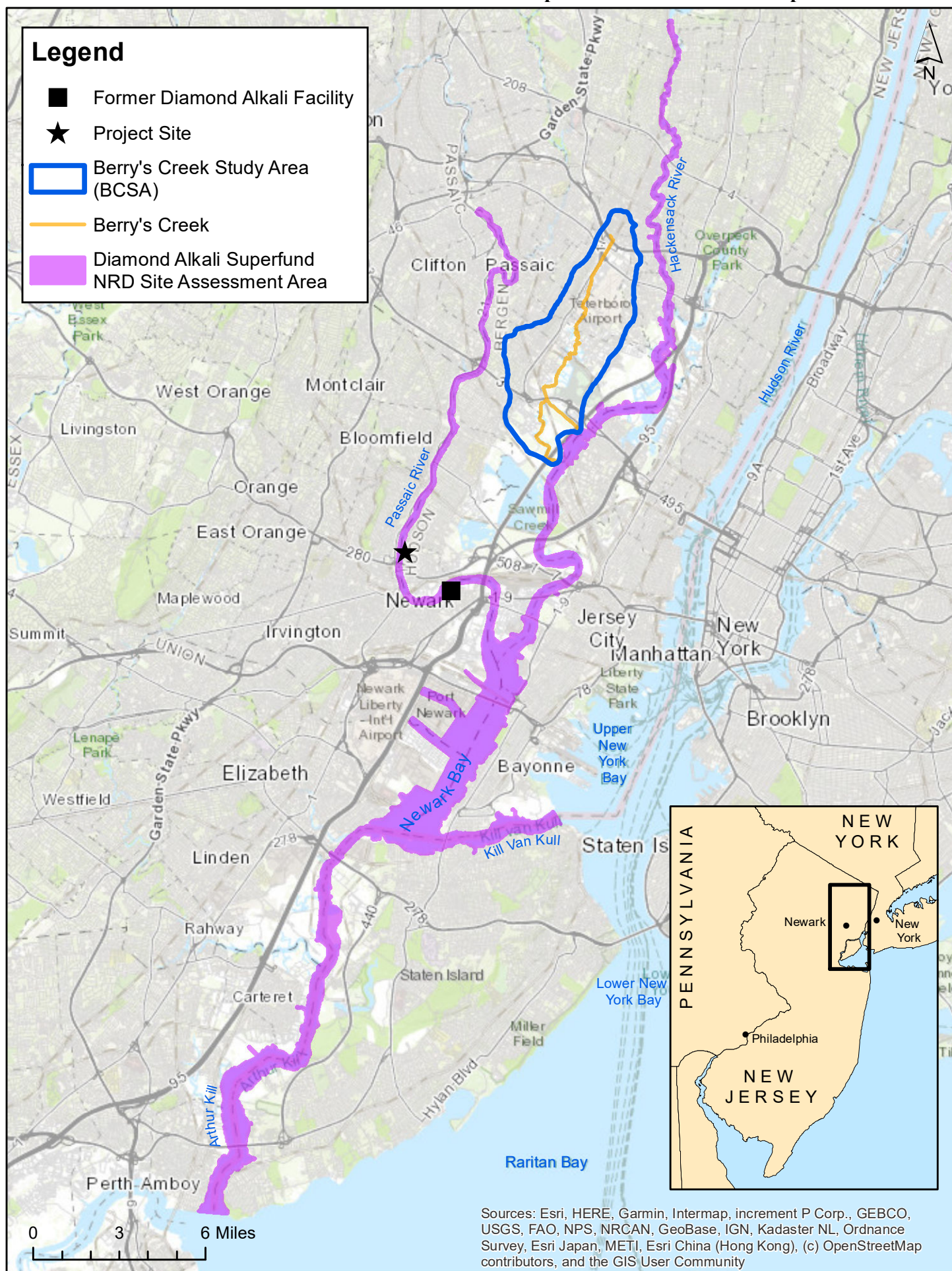


**Appendix A**  
**Basic Design for the BASF Early Restoration Project**





## Map of the Diamond Alkali Superfund NRD Site



Scope of Work for the BASF Early Restoration Project

**SCOPE OF WORK  
EARLY RESTORATION PROJECT  
BASF RIVERFRONT PROJECT  
East Newark, New Jersey**

**I. INTRODUCTION**

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This Scope of Work (“SOW”) is Appendix C to the Interim Settlement and Crediting Agreement (“Crediting Agreement”) between the Federal Natural Resource Trustees (“Federal Trustees”) and BASF Corporation (“BASF”) Concerning Early Restoration at the BASF Riverfront Project (“Project”).

BASF will implement the work described herein in accordance with the terms of the Crediting Agreement. The purpose of this SOW is to set forth additional detail regarding the design, construction, Maintenance, and Corrective Response Plan aspects of the Project in order to create clear guidelines and better define the roles and responsibilities of the Parties related to those aspects of the Project. More specifically, this SOW outlines the overall Project design, construction, and permitting activities and requirements, as well as the Parties’ expectations related to the design and construction process workflow, including, but not limited to, such specific tasks and subtasks as:

- Coordination with the Federal Trustees for Oversight and Quality Assurance;
- The Approval Process for Milestone Deliverables and Other Submittals;
- Project Design and Permitting; and
- Project Construction; and
- Project Maintenance and Corrective Response Plans.

**II. DEFINITIONS**

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Capitalized terms used in this SOW but not otherwise defined herein shall have the meanings assigned to them in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, (42 U.S.C. § 9601 *et seq.*), in the regulations promulgated under CERCLA, or in the Crediting Agreement. To the extent there is a conflict or inconsistency with respect to any term used herein, the Crediting Agreement controls.

For ease of reference, certain defined terms included in the Crediting Agreement are also included in this SOW. The following terms shall have the meanings set forth below:

“Agreement” or “Crediting Agreement” shall mean the Interim Settlement and Crediting Agreement between BASF and the Federal Trustees concerning the Project and all Appendices incorporated therewith. In the event of a conflict between the Agreement and any Appendix, the Agreement shall control;

**Scope of Work for the BASF Early Restoration Project**

“Alternate Trustee SOW Representative” shall be the individuals designated by each Federal Trustee to serve as alternate points of contact should a Trustee SOW Representative become unavailable, as described in more detail in Section IX of the SOW;

“BASF” shall mean BASF Corporation and its subsidiaries, BASF Catalysts LLC, and Cognis USA LLC, unless otherwise specifically stated herein. BASF shall be considered a single entity for purposes of earning, applying and/or transferring NRD Credit and the parent company shall be responsible for managing and accounting for NRD Credit on behalf of these two subsidiaries;

“Basic Design” shall mean the conceptual Project as generally depicted in Appendix A to the Crediting Agreement, that will be more fully developed under the process set forth in the SOW, and that will be designed and built in accordance with the Project Objectives, General Terms and Conditions, and Structural Features set forth in Sections III, VI, and VII of the SOW;

“Corrective Response Plan” shall mean that written plan that BASF shall develop, and that is approved by the Federal Trustees, that will describe the procedures to be implemented to address damages to the Project from any Force Majeure Event or Other Corrective Response Incident that occurs after the Project is Open to the public, as described in more detail in Section VIII.E.7 of the SOW and Section X.C of the Crediting Agreement;

“Design Objectives Memorandum” shall mean one of the Milestone Deliverables prepared by BASF as an output of the Design Objectives Workshop to guide the Project design process, as described in more detail in Section VIII.E.2.c of the SOW, and as will be amended to address development of Specific Design Elements, as defined in Section VIII.E.2.c of the SOW;

“Design Objectives Workshop” shall mean the workshop attended by representatives of BASF and the Federal Trustees that will result in the development and production of the Design Objectives Memorandum, as described in more detail in Section VIII.E of the SOW;

“Diamond Alkali Superfund NRD Site” or “DA Site” for the purposes of this Agreement shall refer to the Diamond Alkali Superfund Site as defined by EPA, and any associated NRD assessment areas, including, but not limited to, the properties located at 80 and 120 Lister Avenue, Newark, New Jersey; the Lower Passaic River Study Area (“LPRSA”) (a 17.4-mile stretch of the lower Passaic River from Dundee Dam to Newark Bay); and the Newark Bay Study Area. For purposes of this Agreement, the Parties agree that the Diamond Alkali Superfund NRD Site or DA Site is the Diamond Alkali Superfund NRD Site assessment area, as depicted in purple on the map attached as Appendix B, which includes the Diamond Alkali Superfund Site, and any additional areas where the Trustees determine that Diamond Alkali Superfund Site-related contamination has come to be located;

“DOI” shall mean the United States Department of the Interior, acting through the United States Fish and Wildlife Service, and its successor departments, agencies, or instrumentalities;

“Federal Trustees” or “Trustees” shall mean the United States Fish and Wildlife Service, on behalf of DOI, and NOAA, on behalf of the United States Department of Commerce;

**Scope of Work for the BASF Early Restoration Project**

“Field Inspections” shall mean construction inspections prior to the Crediting Inspection where the Trustees will have the opportunity to review the progress of the construction. These inspections shall be scheduled by BASF with advance notice sufficient for the Federal Trustees, through the LAT, to arrange in-person visits to the Project site to review the progress of the construction for consistency with the approved Final Design Plan;

“Field Change Order” shall mean a document prepared by BASF and approved by the LAT that provides for a change in an element of the Final Design Plan necessitated to address unknown conditions encountered at the Project site after the Final Design Plan is approved, as described in more detail in Section VIII.F.5 of the SOW;

“Final Design Plan” shall mean the 100% complete Project design, as described in more detail in Section VIII.E.4 of the SOW;

“Force Majeure Event” shall mean an act of God, natural disaster, or other similar catastrophic event, arising from causes beyond the control of BASF, or of any entity controlled by BASF, including but not limited to its contractors and subcontractors, which causes property damage and/or delays or prevents performance of any obligation under the Agreement despite BASF’s best efforts to fulfill the obligation;

“Future Project Owner” shall mean the entity that takes ownership and operation responsibility of the Project so that it can be Open to the public. The Future Project Owner is expected to be the Borough of East Newark but could be another entity approved by the Federal Trustees;

“Governing Milestone Deliverable” shall mean the final, Federal Trustee approved version of the Milestone Deliverable;

“Interim Designs” shall mean a 30%-35% Design and a 60%-65% Design as further described in Section VIII.E.3 of the SOW. These deliverables shall be submitted by BASF to the Federal Trustees (through the LAT) for review for consistency with the Design Objectives Memorandum. The 30% - 35% Design requires written approval by the Federal Trustees. The 60 – 65% Design does not. Interim Designs are not considered to be a Milestone Deliverable;

“Lead Administrative Trustee” or “LAT” for the NRD claims on behalf of the Federal Trustees relating to the DA Site shall mean the designated representative of the United States Fish and Wildlife Service, unless the Federal Trustees agree to a re-authorization;

“Maintenance” shall mean all activities, after the Federal Trustees provide BASF the Certification of Creditability and the Project is Open to the public, that are required to preserve, protect and maintain the operational effectiveness of the Project under a Maintenance Plan that has been approved by the Federal Trustees as described in more detail in Section VIII.E.6 of the SOW and Section X.C of the Crediting Agreement;

“Maintenance Plan” shall mean that written Maintenance plan that BASF shall provide to the Federal Trustees that will describe the procedure that will be developed to guide the



**Scope of Work for the BASF Early Restoration Project**

Maintenance efforts needed to ensure that the Project and its key physical and ecological features are properly maintained for the life of the Project, as described in more detail in Section VIII.E.6 of the SOW and Section X.C of the Crediting Agreement;

“Material Change” shall mean a Party’s request for a modification to the Project during the design or construction phases that is not a required element of the Basic Design or any Governing Milestone Deliverable that is in place at the time the request is made. A Material Change must be agreed to, in writing, by both Parties along with the appropriate change, if any, to the amount of NRD Credit as a result of the Material Change;

“Milestone Deliverables” shall mean the following deliverables: (1) Design Objectives Memorandum, (2) the Final Design Plan, and (3) the Maintenance Plan as more fully described in Section VIII.E of the SOW. These deliverables shall be submitted by BASF to the Federal Trustees through the LAT for review and approval;

“Natural Resource” or “Natural Resources” has the meaning set forth in 42 U.S.C. § 9601(16);

“Natural Resource Damages” or “NRD” has the meaning set forth in 42 U.S.C. §§ 9601(6) and 9607(a)(4)(C);

“NOAA” shall mean the National Oceanic and Atmospheric Administration of the United States Department of Commerce and any successor departments, agencies, or instrumentalities;

“NRD Credit” shall mean a dollar-denominated credit, for meeting the Performance Standards as provided in Section VI of the Agreement, that BASF may either apply against any potential NRD liability of BASF attributable to hazardous substance release(s) at or from the DA Site or the BCSA as provided under Section VII.F of the Agreement, or transfer as provided under Section VII.G of the Agreement. NRD Credit may include all of the Base NRD Credit and/or Multiplier NRD Credit, and/or any credit adjustment associated with a Material Change. The amount of NRD Credit earned, applied, or transferred under the Agreement will be documented and memorialized per Section VII.D.4 of the Agreement;

“Open” or “Opening” to the public shall mean that BASF has received the Certification of Creditability, transferred ownership of the Project to the Future Project Owner, and assisted the Future Project Owner with fence removal so that the Project is thereafter open to the public, with the intention being that it will generally remain open to the public seven (7) days a week

“Opening Date” shall mean the date on which the Project is Open;

“Other Corrective Response Incident” shall mean an event caused by the actions of a third-party, whether intentional or negligent, arising beyond the control of BASF or a Future Project Owner, or any entity controlled by BASF or a Future Project Owner, including but not limited to their contractors and subcontractors, which causes property damage in excess of \$10,000;

“Parties” shall mean the United States, acting through the Federal Trustees, and BASF;

**Scope of Work for the BASF Early Restoration Project**

“Performance Standards” shall mean the measures and requirements as set forth in Section VI of the Agreement for eligibility for Certification of Creditability and receipt of Certified NRD Credit;

“Potentially Responsible Party” (“PRP”) shall have the same meaning as set forth in 43 C.F.R. § 11.14(kk);

“Project” shall mean the approximately 5-acre natural resource restoration project that BASF will design and construct at the corner of Clay Street and Passaic Avenue in East Newark, New Jersey, in accordance with the SOW, including the properties identified on the most current East Newark, New Jersey tax maps as Block 17, lot 1 and Block 17, lot 2, and as generally depicted in Appendix A to the Crediting Agreement;

“Project Management Plan” shall mean that written plan that BASF shall provide to the Federal Trustees that will contain a preliminary description of all pre-construction activities, including on-going site investigations, advance studies and surveys, monitoring and design services to be employed, permit applications to be filed, contract specifications, contract bid services, Federal Trustee approval of Milestone Deliverables, construction administration, the interim construction inspection approval process and Federal Trustee oversight. The Plan is intended to be a living document that will be updated as needed during the design and construction phases of the Project.

“Project Management Team” shall mean BASF’s Project Coordinator and the representative of the LAT (and their alternates) that are designated pursuant to Section IX of the SOW and who will serve as primary contacts for all communications, requests for approval, etc. that are required by the SOW. The Project Management Team may involve others within their organizations in specific aspects of the Project to the extent their specific expertise may be necessary to achieve Project objectives;

“Quality Assurance Plan” shall mean the quality assurance plan developed and implemented by BASF to ensure all services are performed in accordance with established construction industry standards, as described in more detail in Section VIII.D.1 of the SOW;

“RI/FS” shall mean the Lower Passaic River Study Area Remedial Investigation/Feasibility Study released in July 2019;

“River” shall mean the Lower Passaic River;

“Specific Design Element” shall mean those elements identified as requiring more in-depth evaluation than can be completed during the Design Objectives Workshop (e.g., Hydraulic Connection with Passaic River), which will be developed in parallel with, and incorporated into, the 30-35% Design, as described in more detail in Section VIII.E.2.c of the SOW;

**Scope of Work for the BASF Early Restoration Project**

“Trustee SOW Representative” shall be an individual designated by each of the Federal Trustees to serve as the primary point of contact for that Federal Trustee, as described in more detail in Section IX of the SOW;

“United States” shall mean the United States of America, acting through the Federal Trustees.

**III. PROJECT OBJECTIVES**

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The Parties agree that BASF, to the maximum extent practicable, shall incorporate natural landscaping components (*e.g.*, forest, pollinator gardens, native grasslands, and wetlands) and effective storm water management into the Project design, construction, and maintenance. The Project design will evaluate and, if necessary, address any condition that is deemed to pose an unacceptable risk to human health or the environment. For example, to the extent necessary, and in coordination with U.S. Environmental Protection Agency (EPA) and the Federal Trustees, BASF will develop an approach to hydraulically connect the Project site with the River to allow for natural or controlled tidal flow, as appropriate. Accordingly, the Project design should evaluate the risks to human health and the environment that this connection will pose and, incorporate any appropriate measures to address the risk. It shall also be BASF’s responsibility to obtain all required Federal, State, and local permits, including but not limited to any necessary to undertake a hydrological connection or controlled tidal flow. The Federal Trustees will provide coordination in an advisory role, as appropriate, as part of the permitting process.

The Project shall also optimize the restoration or enhancement of injured natural resources by featuring natural systems that are ecologically sustainable, while providing public access to the River, and promoting active and passive recreational opportunities (such as site interpretation and education). Project planning and design shall maximize protection of the Project site from CERCLA-related contamination by the River, while remaining compatible with EPA response actions at or near the River. In general, to achieve these goals, the restoration/enhancement activities of the Project can and may involve modification of the existing site grade/topographic change via vegetative planting and engineered structures. The general overview of potential Project components shall be refined, through the development of a Design Objectives Memorandum and comprehensive engineered design plans, in accordance with this SOW.

**IV. NRD CREDIT**

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The NRD Credit associated with the Project shall be provided as set forth in the Crediting Agreement. The completed Project may also include features that are not subject to NRD Credit, such as retail kiosks, playgrounds, and other buildings, provided that such features remain at the same relative scale as set forth in the Basic Design.



**Scope of Work for the BASF Early Restoration Project****V. ROLE OF THE FEDERAL TRUSTEES IN THE APPROVAL OF MILESTONE DELIVERABLES AND CERTAIN OTHER SUBMITTALS AND THE ROLE OF THE LAT IN THE REVIEW OF OTHER DELIVERABLES**

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- A. As the LAT, DOI, through the Trustee SOW Representative of the United States Fish and Wildlife Service, will serve as the primary Point of Contact (“POC”) for Project oversight communications and necessary Federal Trustee approvals in accordance with Section IX (Communications/Contacts) of this SOW.
- B. In accordance with the Crediting Agreement and the process set forth in this SOW, the following procedures apply:
  - 1. Milestone Deliverables shall be submitted by BASF to the Federal Trustees, through the LAT, for Federal Trustee review and approval. If the Federal Trustees approve such submittals, it shall be documented in writing to BASF. Once a Milestone Deliverable has been approved, it will become the Governing Milestone Deliverable for the next phase of work under this SOW. BASF shall obtain such approval prior to commencement of the corresponding work to ensure the Project remains on track for creditability in accordance with the Crediting Agreement.
  - 2. While not a Milestone Deliverable or a Governing Milestone Deliverable, the 30%-35% Design shall also be submitted to the Federal Trustees for review and approval as detailed in Section VIII. Also, as detailed in Section VIII, the Corrective Response Plan and Field Change Orders require Federal Trustee approvals. All other activities (e.g., Field Inspections) or deliverables/submittals set forth herein require that BASF provide the LAT with an opportunity for review and comment, but do not require formal Federal Trustee approval.

**VI. GENERAL TERMS AND CONDITIONS OF THE PROJECT**

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To obtain NRD Credit for the Project as described in detail in the Crediting Agreement, BASF agrees, in addition to meeting any and all obligations included in the Crediting Agreement, to perform the following obligations under this SOW:

- A. BASF shall undertake all actions necessary to design and build the Project consistent with the Basic Design, which shall be specified in engineer-stamped drawings and plans to be developed in consultation with, and for the Milestone Deliverables approved by, the Federal Trustees;

**Scope of Work for the BASF Early Restoration Project**

- B. BASF shall provide all management, supervision, administrative support, labor, materials, tools, parts, supplies, equipment, and transportation required to successfully complete the Project in a safe manner;
- C. BASF shall design and construct the Project to allow safe public access along the River for a variety of passive and active recreational opportunities, including site interpretation and education, and the walkway along the River edge;
- D. BASF shall develop a Maintenance Plan under Section VIII.E.6 in order to optimize the restoration and enhancement of injured natural resources and the public's enjoyment of the services provided by the restored and enhanced natural resources;
- E. BASF shall develop a Corrective Response Plan under Section VIII.E.7 to address any Force Majeure event or Other Corrective Response Incident that occurs after the Project is constructed and ownership is transferred to a Future Project Owner;
- F. BASF shall design and construct designated areas of the Project to be accessible to and usable by handicapped persons in accordance with the Americans with Disabilities Act of 1990 (42 U.S.C § 1210 et seq.), Accessibility Guidelines (ADAAG), and the Uniform Federal Accessibility Standards (UFAS);
- G. BASF shall design, construct, and provide for the operation of the Project to be compatible with EPA CERCLA response actions related the Diamond Alkali Superfund Site;
- H. BASF shall design and construct the Project to prevent or minimize, to the extent practicable, the transport of significant debris, sediment, and CERCLA hazardous substances from or into the River;
- I. BASF shall be responsible for the professional quality, technical accuracy, and coordination of all designs, drawings, specifications, and other work or materials produced and furnished by its own staff and that of its contractors and subcontractors, and shall be required to correct or revise any errors or deficiencies in its work;
- J. BASF shall design the Project for a projected life span of fifty (50) years;
- K. BASF shall seek Federal Trustee approval of any material modifications to the previously-approved Milestone Deliverables, and BASF shall clearly identify any such modifications to previously-approved elements of design, construction, material, grade, hydrology, and/or vegetation, for which Trustee approval is being sought;
- L. BASF shall design and construct structural features that minimize impervious cover;

**Scope of Work for the BASF Early Restoration Project**

- M. BASF shall design and construct structural features that maximize management of storm water on-site; and
- N. BASF shall design and construct the Project to maximize establishment of flora native to the State of New Jersey.

**VII. STRUCTURAL FEATURES**

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The following list of structural features shall be included in the Project, unless otherwise agreed to by the Parties.

- A. BASF, in cooperation with the Federal Trustees, will evaluate the risk associated with River sediment entering the Project site. The issue will be addressed as a Specific Design Element as described in Section VIII.E.2.c. The results of the evaluation will be incorporated in the Design Objectives Memorandum and further expanded upon in the 30-35% Design;
- B. An open-water feature that can serve as a ponded area inside the water control structure, or as a tidal basin if full tidal exchange is achieved;
- C. A wet meadow;
- D. Upland understory, including trees, shrubs, and groundcover;
- E. An elevated walkway over water along the River;
- F. A transition zone between the wet meadow and the upland lawn;
- G. Upland lawn and/or meadow;
- H. Pervious paths and paved open areas to create access while preserving restoration areas;
- I. Lighting for safety;
- J. Benches for safety and passive recreation; and
- K. The structural elements for a possible future kayak or non-motorized personal watercraft launch, to be installed, if at all, by the Future Project Owner, including potential modification by the Future Project Owner of the water control structure, if necessary, to facilitate future boat access.

**Scope of Work for the BASF Early Restoration Project****VIII. FEDERAL TRUSTEE REVIEW AND APPROVAL OF MILESTONE DELIVERABLES AND OTHER SUBMITTALS AND REVIEW AND COORDINATION OF OTHER TASKS AND DELIVERABLES**

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**A. General Parameters**

1. As part of the requirements for BASF to ultimately obtain NRD Credit pursuant to the Crediting Agreement, all Milestone Deliverables and related required documentation outlined in this SOW shall be submitted to the Federal Trustees for review and approval. The Final Design Plan and associated documentation under this Section shall be stamped with an engineer's seal.
2. All formal communications related to the design and construction of the Project shall occur between BASF and the LAT. Milestone Deliverables and other submittals shall be submitted electronically via email to the LAT listed in Section IX and courtesy copied (cc) to the NOAA Trustee SOW Representative. Approvals of Milestone Deliverables shall be communicated in accordance with Section IX.
3. BASF shall, in a timely manner, provide to the LAT copies of any reports, findings, corrective orders, or certifications from any local authority having jurisdiction for inspections/certifications including, but not limited to: municipal engineers, code enforcement officials, fire marshal, sanitation officials, and land use regulators. A list of deliverable products will be prepared as part of the Design Objectives Memorandum, which will be a "living" document that will be updated as needed to assure that all deliverables are captured and tracked.

**B. LAT Review, Comment and Coordination on Submittals Not Requiring Formal Trustee Approval**

1. Except where formal Trustee approval is required by terms of this SOW, BASF shall coordinate with the LAT to provide reasonable opportunity for review and comment on all documents, plans, and drawings related to the design, construction, maintenance, monitoring, and long-term stewardship of the Project identified in the Design Objectives Memorandum.
2. Any revisions requested by the LAT, resulting from the review of BASF's submittal, will be returned to BASF for its consideration as to whether any modification to the submittal is appropriate. The focus of the LAT's review of these submittals will be to ensure consistency with the relevant Governing Milestone Deliverable.
3. The LAT will make every effort to complete reviews within twenty-one (21) calendar days of the receipt of the document.

**Scope of Work for the BASF Early Restoration Project**

**C. Federal Trustees' Review and Approval on Milestone Deliverables**

1. Once BASF provides the Federal Trustees with each of the completed Milestone Deliverables for review and approval as they are developed, the Federal Trustees will either approve the document for the next phase to begin, or reply to BASF, in writing, specifying the additional work that must still be accomplished or modified. In reviewing each Milestone Deliverable, the Federal Trustees will consider whether the document is consistent with, and will achieve, the Basic Design including the Project Objectives, General Terms and Conditions, Structural Features as set forth in Sections III, VI, and VII of this SOW and the Governing Milestone Deliverable that has proceeded it. In reviewing the Maintenance Plan, the Federal Trustees will consider whether the Maintenance Plan is consistent with, and will achieve, the requirements for the Maintenance Plan as set forth in the Crediting Agreement (Sections VI, and X.C.) and Section VIII.E.6 of this SOW. The Federal Trustees will make every effort to complete the review of the Milestone Deliverables within thirty (30) calendar days of receipt of the documents.
2. Federal Trustee review and approval of all other submittals of BASF for which formal approval is required shall be provided in accordance with the time frames set forth in this SOW and as applicable, the Crediting Agreement.

**D. BASF Coordination with the LAT and Related Tasks and Deliverables**

**1. Quality Assurance Plan**

BASF shall develop and implement a Quality Assurance Plan to ensure all services are performed in accordance with established construction industry standards. The Quality Assurance Plan will be included in the contractor bid documents and will be used to guide the contractor's development and implementation of procedures to identify, prevent, and ensure non-recurrence of defective services.

**2. Communications**

All formal coordination and review of materials and actions related to the design and construction of the Project between BASF and the Trustees shall occur through the Project Management Team; the Trustee SOW Representatives and Alternate Trustee SOW Representatives are listed under Section IX of this SOW.

**3. Periodic Meetings**

During the design and construction phases of the Project, BASF shall hold quarterly (or more frequently if circumstances dictate) meetings with the LAT, in person or via conference call,

**Scope of Work for the BASF Early Restoration Project**

to discuss project-related issues, including: progress reports and deliverable status, notification of unforeseen issues or setbacks, mid-course corrections, modifications and substitutions of construction requirements, and issues with the public. BASF will hold monthly on-site meetings during construction to allow all Parties to review progress and provide input. BASF shall prepare minutes of the conference calls and meetings and shall distribute the minutes to all Parties within five (5) working days of the respective call or meeting.

**4. Status updates**

At any time, the LAT may request that BASF provide a status update on any of its commitments under the SOW or the Crediting Agreement; BASF shall use best efforts to provide a response to the Federal Trustees within approximately five (5) working days or an alternative agreed-upon timeframe.

**E. Project Design, Permitting, Maintenance, and Insurance**

1. BASF shall be responsible for undertaking all work required to produce the Final Design Plan. The Basic Design shall be used as the model to advance the design consistent with Project requirements and structural features set forth in Sections III, VI and VII of this SOW.

**2. Design Objectives Development**

- a) BASF, working closely with the Trustees, has developed the Basic Design.
- b) The Basic Design will serve as the basis for a Design Objectives Workshop, where the Federal Trustees and BASF will meet to develop details and specific goals for each of the Project elements. At the Design Objectives Workshop, the parties will expand upon the Basic Design to describe the functions and attributes of each element of the Project, so that Project goals are fully understood and agreed upon.
- c) BASF will document the results of the Design Objectives Workshop in a Design Objectives Memorandum. The document will describe in detail the functions (environmental, human use, structural, etc.) and attributes (e.g., surface area of ecological cover types) of each Project element, thereby defining the success criteria for the design of the Project. Specific components of the Design Objectives Memorandum will include the following:
  - i. Design Objectives Workshop Summary Narrative, consisting of meeting minutes and summary tables documenting the Design Objectives Workshop findings.

**Scope of Work for the BASF Early Restoration Project**

- ii. Site Plan Drawing(s) and illustrations detailing the proposed Structural Features established in the Design Objectives Workshop, including:
  - 1. Existing topography;
  - 2. Preliminary grading plan;
  - 3. Areal extent of natural landscaping components (e.g., forest, pollinator gardens, native grasslands, and wetlands), including proposed plant species lists and planting densities;
  - 4. River access features including universal access and public safety measures, elevated walkway, and paths;
  - 5. Public amenities, including kiosks, plazas, seating court, and buildings, if any;
  - 6. Storm water management features and controls; and
  - 7. Any other features, consistent with the Basic Design and agreed to by the Parties during the Design Objectives Workshop.
  
- iii. Identification of Specific Design Elements that require more in-depth evaluation than can be completed during the Design Objectives Workshop (e.g. Hydraulic Connection with Passaic River). The solution for each Specific Design Element will be developed in parallel with the 30-35% design. The goals and objectives of the Specific Design Element analysis will be incorporated in the Design Objectives Memorandum and the engineering elements will be incorporated in the 30-35% Design. In the event that a Specific Design Element is identified, the Design Objectives Workshop will establish, at a minimum:
  - 1. The purpose and goals of the Specific Design Element;
  - 2. The process and schedule for developing the Specific Design Element; and
  - 3. Key design performance and decision criteria.
  
- iv. As an example, the “Hydraulic Connection with the Passaic River Design” element will require more in-depth evaluation than time will allow during the Design Objectives Workshop. Thus, this element will be identified as a Specific Design Element. As such, during the Design Objectives Workshop the Parties will focus on:
  - a. Establishing Goals – such as, demonstrating that the selected design will not result in an unacceptable risk to human health and the environment, by using the risk assessment tools developed in support of the RI/FS.
  - b. Develop a hydrologic model that will use the existing models from the RI/FS as input and determine the volume of sediment and COC concentrations expected to impact the Project site.

**Scope of Work for the BASF Early Restoration Project**

- c. If the risk assessments, supported by the hydrologic model, predict conditions that would represent unacceptable risk, BASF, with input from the Federal Trustees, will develop a Feasibility Study that will evaluate mitigation options. The selected option will then be incorporated into the Design Objectives Memorandum and the 30-35% design.
- v. A tabulation of local, state, and federal permits required for this Project.
- vi. A checklist of deliverables, plans, specifications, and other design documents to be included in the 30% to 35% design and subsequent design deliverables, through the Final Design Plan.
- vii. Following formal written approval of the Design Objectives Memorandum by the Federal Trustees, it will become a Governing Milestone Deliverable that will establish the framework for the detailed design to follow. This will ensure efficient progress through the subsequent design phases and a Final Design Plan that is consistent with the established expectations.

**3. Interim Designs**

The goals established in the Design Objectives Memorandum will guide all phases of the detailed design to follow.

**a) 30%-35% Design**

- i. BASF shall develop a 30%-35% Design. This submittal shall be of sufficient detail to demonstrate how the functional and technical requirements of the Structural Features of the Project (as described in Section VII of the SOW) shall be met, indicating the designer's approach to the solution of technical problems, and showing compliance with technical requirements, or providing justification for noncompliance.
- ii. The 30%-35% Design shall include:
  - 1. Identification of key elements that must be addressed prior to completing the design:
    - a. Determination of the physical, chemical, and hydrologic interaction between the River and water features of the Project, including permit submittal requirements and phased implementation as necessary;
    - b. Parking requirements; and
    - c. Public transit access.



**Scope of Work for the BASF Early Restoration Project**

2. Storm Water Management Plan, documenting runoff modeling and analysis used to establish storm water management features, controls, and best management practices that will be employed at the Project site.
  3. Engineering analysis as needed to confirm that the Project is based on sound engineering design to assure the safety and health of the visitors to the Project;
  4. Design narrative;
  5. Design calculations for all disciplines;
  6. A list of intended specifications, including for plantings and aquatic features of the Project;
  7. A permitting memorandum that will identify the permits, inspections, etc. that will be required prior to and during the construction of the Project, along with the requirements of each permit; and
  8. Plan drawings.
- iii. While not a Milestone Deliverable, the 30%-35% Design shall be submitted to the Federal Trustees for review and written approval in accordance with Section VIII of this SOW for the purpose of ensuring consistency with the goals and objectives established in the Design Objectives Memorandum.

**b) 60%-65% Design Plans**

- i. BASF shall develop a 60%-65% Design. This submittal is intended to ensure that the design criteria and previous review comments were correctly interpreted. Redlined marked-up specifications will be submitted at this design phase. The goals set forth in the Design Objectives Memorandum will guide the development of the 60%-65% Design. The 60%-65% Design will build off the 30-35% Design and comments from the reviewers.
- ii. The 60-65% Design shall consist of:
  1. Designs developed to approximately 60%-65% completion;
  2. A detailed review of safety features to assure that the Project meets all appropriate standards;
  3. 60%-65% complete drawings including those addressing construction phasing, including related to any construction phasing based on permitting limitations;
  4. Specifications, including for plantings and aquatic features of the Project;

**Scope of Work for the BASF Early Restoration Project**

5. Annotated review comments; and
6. A list of all permits for which applications have been or will be completed.

**4. Final Design Plan**

- a) BASF shall develop a Final Design Plan. The Final Design Plan represents a 100% complete design, subject to any revisions resulting from the Federal Trustees' review of this Milestone Deliverable.
- b) The Final Design Plan shall consist of:
  - i. Designs with all elements 100% complete. This shall include all backup material previously submitted and revised, as necessary, all design calculations, all explanatory material giving the rationale for design decisions and any information necessary for BASF and its contractors to implement Project construction contracts;
  - ii. 100% complete drawings including those addressing Project construction phasing, including related to any construction phasing based on permitting limitations;
  - iii. Final edited specifications, including for plantings and aquatic features of the Project;
  - iv. Annotated interim review comments;
  - v. Copy of all permit applications submitted in support of the Project;
  - vi. Resolution of the Federal Trustees' comments on the pre-final Project design and final versions of all pre-final deliverables; and
  - vii. A final Project design that is certified and stamped with an engineer's seal by a registered professional engineer licensed in the State of New Jersey and that follows the Construction Specifications Institute's Master Format 2012.

**5. Permits, Regulations and Codes**

- a) BASF and its contractors shall comply with all applicable Federal, State and local laws, regulations and building codes.
- b) BASF and its contractors shall obtain and comply with all necessary construction and related permits.
- c) BASF and its contractor shall comply with all applicable revisions, additions, changes and/or upgrades to any Federal, state, and municipal laws, codes, and regulations.

**Scope of Work for the BASF Early Restoration Project****6. Maintenance Plan and Obligations**

- a) Maintenance Plan: No later than ninety (90) days prior to the completion of the construction of the Project, BASF shall provide a Maintenance Plan to the Federal Trustees for their review and approval pursuant to this Section VIII of the SOW and the Crediting Agreement (Sections VI, and X.C.).
- b) The Maintenance Plan shall:
  - i. describe the Project's ecological components and constructed elements, including initial baseline monitoring;
  - ii. provide for 85% survivability of living materials after 3 years;
  - iii. outline the inspection and Maintenance activities necessary to maintain: the sustainability of the Project's ecological components; the dependability and longevity of the Project's constructed elements; the Project safety; the Project's overall aesthetic values, such as any graffiti or trash removal; the functionality of the constructed water control structure, including responsibility for operation of the structure;
  - iv. provide a process and plan for developing adaptive management measures if unforeseen circumstances interfere with the success of the Project. For example, if specific noxious weeds do not respond to hand or mechanical treatment methods, the adaptive management plan and process will consider the use of herbicides to achieve success. Development of the adaptive management plan shall be in consultation with the LAT, and the LAT will provide written approval prior to implementation;
  - v. indicate that the Project, once Open, is intended to generally remain open to the public seven (7) days a week
  - vi. outline provisions related to the Maintenance Escrow Account, as consistent with the Crediting Agreement, to include plans for long-term stewardship of the Project.
- c) BASF, its contractors or assignees, shall remain responsible for ensuring compliance with the Maintenance Plan, as set forth in this SOW and the Crediting Agreement (Sections VI, and X.C.).

**7. Corrective Response Plan and Obligations**

Corrective Response Plan: No later than ninety (90) days prior to the completion of the construction of the Project, BASF shall provide a Corrective Response Plan to the Federal Trustees for their review and approval pursuant to this Section VIII of the SOW and the Crediting Agreement (Sections VI, and X.C.).

**Scope of Work for the BASF Early Restoration Project**

- a) The purpose of the Corrective Response Plan shall be to address Force Majeure Events or Other Corrective Response Incidents, if any, that occur after the Project is Open to the public. The Corrective Response Plan is not intended to cover routine Maintenance described in the Maintenance Plan, ordinary wear and tear, gradual deterioration of Project features, the cost of remedying any errors in design or specifications, faulty material, faulty workmanship, or latent defect. The Corrective Response Plan will contain as an element insurance coverage or other financial mechanism suitable to the Federal Trustees, as described in more detail in the Crediting Agreement, to fund corrective actions that may be required by the Corrective Response Plan. Development of the Corrective Response Plan will be in consultation with the Future Project Owner and the Federal Trustees through the LAT, and the LAT will provide written approval on behalf of the Federal Trustees.
- b) Implementation and funding of the Corrective Response Plan shall be carried out in accordance with Section V.C of the Crediting Agreement.

**F. Project Construction****1. Overall Construction**

- a) BASF shall be responsible for the work required to construct the Project to the design specifications contained in the Final Design Plan;
- b) BASF shall ensure that its contractors provide all management, supervision, administrative support, labor, materials, tools, parts, equipment and transportation required to successfully perform overall Project construction.

**2. Health and Safety Plan:** The contractor and engineer (if different) will be required to prepare a Health and Safety Plan (“HASP”) that will be reviewed and commented on by BASF. The purpose of the HASP is to identify risks to workers and the community and support the development of monitoring plans and use of personnel protective equipment (“PPE”) as needed. A copy of the HASP will be provided to the LAT. The plan will address:

- a) Minimum protective equipment (hard hat, safety vest, steel toed shoes, etc.) to be worn at the site by all personnel including visitors;
- b) Sign-in procedures; and
- c) Nuisance monitoring – monitoring and mitigation for dust, noise, light etc. that have the potential to impact the community.

**Scope of Work for the BASF Early Restoration Project**

3. **Preconstruction Conference:** BASF shall hold a preconstruction conference with the Federal Trustees and others as directed by the Federal Trustees, which may be included as an agenda item in one of the regular Project Management Team quarterly meetings.
4. **Federal Trustee Site Inspections:** The Federal Trustees, and/or their representatives, reserve the right, after appropriate notification to BASF and/or its contractors, to enter the Project site to examine construction progress and condition. The Federal Trustees must comply with the site HASP whenever they enter the site.
5. **Field Change Orders:** In the event that previously unknown conditions are discovered at the site after the Final Design Plan is approved, said conditions will be documented by BASF and a Change Management Plan (“CMP”) for addressing these conditions will be prepared by BASF. All appropriate care will be taken by BASF to assure that any change needed will not alter the Governing Milestone Deliverable in place for the Project. The CMP will be sent to the LAT for review and written approval. In order to minimize the potential for construction delays, every effort shall be made by the LAT to provide written approval of the CMP within 24 hours. Any CMP approved in writing by the LAT is a Field Change Order. The Field Change Order will be documented in the as-built plans.
6. **Project Construction Inspection**
  - a) BASF shall schedule the following Federal Trustee construction inspections in a timely manner and the Federal Trustees shall use best efforts to provide any input resulting from those inspections in a timely manner. BASF shall cooperate with inspection personnel to facilitate scheduled inspections. The Project Management Plan will provide additional detail regarding pre-construction planning, site inspections, and the interim construction inspection process.
  - b) The construction inspection process outlined below provides for Federal Trustee review of certain stages of interim construction to ensure that the Project is built in accordance with the Final Design Plan and any approved Field Change Orders.
  - c) **Waterfront Structure Inspection.** BASF shall schedule a Federal Trustee inspection of the bulkhead (or equivalent), upon installation to review the final installed structure from both the landside and waterside. Updated drawings will be provided to the Federal Trustees in advance of the inspection.
  - d) **Excavation Inspection.** Upon completion of excavation of the wetland basin, and rough grading of the upland features, the excavation inspection will be

**Scope of Work for the BASF Early Restoration Project**

scheduled. The excavation inspection will include a review of topography achieved by the excavation and rough grading placement of imported soils and/or excavated materials on the upland portions of the Project site.

- e) **Final Grade Inspection.** This inspection shall be conducted upon backfilling the wetland basin to finish grade with appropriate substrate, completion of placement of any required urban fill engineered cover systems, and placement of backfill and topsoil in the upland portions of the Project site. The goal of the final grade inspection is to ensure that all parties are in agreement that final grades have been achieved with appropriate substrates and environmental protections, and that hardscaping, walkways, ADA accessibility features, and plantings can be installed.
- f) **Human Amenities Inspection.** This visual inspection shall be conducted upon completion of boardwalks, hardscapes, benches, and other human use Project amenities.
- g) **Living Materials Inspection.** Wetland and upland plant stock and installations shall be inspected following completion of plantings. In addition to inspection of living materials, the living materials inspection shall include incidental work items such as tree protection materials, mulching, staking and guying, herbivory fencing, erosion control and other initial planting operation materials.
- h) **Creditability Inspection.** Prior to attending the Creditability Inspection described in Section VII.C of the Crediting Agreement, the Federal Trustees will review the Final Design Plan, Field Change Orders, and Creditability Report to verify that the Project is built as approved. The goal of the Creditability Inspection is to clarify any discrepancies discovered during the review and confirm that the Project meets the Final Design Plan and any approved Field Change Orders.

**7. Construction Completion, Creditability Report, and Related Documentation**

- a) **Construction Activity Completion:** The Project's construction activity is "complete" when the Project has been constructed to meet the Final Design Plan and Field Change Orders, when conditions are suitable for public access, and after the Federal Trustees have provided BASF with the Certification of Creditability.
- b) **Creditability Report:** Following completion of Project construction, BASF shall provide the Federal Trustees with a Creditability Report as set forth in this

**Scope of Work for the BASF Early Restoration Project**

paragraph. In addition to requesting that the Federal Trustees inspect the Project and provide the Certification of Creditability to BASF, the Creditability Report will demonstrate and document compliance with the Performance Standards A) – G) set forth in Section VI of the Crediting Agreement, will include a description of overall Project construction, and will include the Final Design Plan, Field Change Orders, as-built drawings signed and stamped by a registered professional engineer licensed in the State of New Jersey, as well as a photolog, daily reports, and other records to sufficiently demonstrate construction completion. BASF shall demonstrate and certify that the construction activity is complete as set forth in this SOW under Section VI General Terms and Conditions. All deliverables shall be signed by BASF's Project Coordinator, or other responsible official of BASF, and must contain the following statement:

*"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and value the information submitted. Based on my inquiry of person(s) who manage the system, or those persons who are directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitted false information, including the possibility of fines or imprisonment for knowing violations."*

- c) BASF shall schedule a Creditability Inspection.
- d) If the Federal Trustees conclude that the construction activity is not complete, the Federal Trustees shall notify BASF in writing. This notification will include a description of any deficiencies requiring correction prior to Federal Trustee approval. The Federal Trustees shall base their determination on a comparison between the Final Design Plan plus Field Change Orders and the Project as constructed. The Federal Trustees shall make every reasonable effort to process such review within fifteen (15) working days, and no later than thirty (30) working days following the Creditability Inspection.
- e) When the Federal Trustees conclude, based on the Creditability Report and Inspection, that the construction activity is complete and Performance Standards A) – G) set forth in Section VI of the Crediting Agreement have been met, the Federal Trustees shall issue the Certification of Creditability to BASF. Per the terms of the Crediting Agreement, following receipt of the Certification of Creditability, BASF will transfer ownership of the Project to the Future Project Owner and Open the Project to the public.

**Scope of Work for the BASF Early Restoration Project****G. Insurance and Responsibility for Damages**

1. **Insurance:** No more than fifteen (15) days before commencing any on-site Project work, BASF and its contractor shall secure commercial general liability insurance meeting those requirements set forth in Section XIII of the Crediting Agreement.

**IX. COMMUNICATIONS / CONTACTS**

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Within fifteen (15) days of the Effective Date of the Crediting Agreement, BASF shall provide the Federal Trustees with the name and contact information of its designated Project Coordinator. The persons so designated shall have technical expertise sufficient to adequately manage all aspects of the Project and shall be responsible for supervising and directing all activities necessary to implement the terms of this SOW. BASF's Project Coordinator will serve as BASF's primary point of contact for all communications in connection with the design and construction performed pursuant to this SOW. The LAT shall within fifteen (15) days of the Effective Date of the Crediting Agreement provide BASF with the names and contact information of the Trustee SOW Representatives for both Federal Trustees as well as the names and contact information for both Alternate Trustee SOW Representatives in the event a Trustee SOW Representative is unavailable.

Per Section V of this SOW, DOI's Trustee SOW Representative will also be the primary POC for project communications on behalf of the LAT and the Federal Trustees. In addition to coordinating communications between BASF and the Federal Trustees, the POC shall be responsible for responding to BASF requests and communicating approvals on behalf of the Federal Trustees. BASF shall provide NOAA's Trustee SOW Representative with a courtesy copy of all written correspondence and materials provided to the LAT.

In accordance with the Crediting Agreement, prior to initiating the dispute resolution procedures described in Section XIX of the Crediting Agreement, the Parties shall attempt, at the Project Management Team level, to resolve any such disagreement or dispute expeditiously and informally.

END OF DOCUMENT



## **Appendix D: Development of an Independent Government Cost Estimate**

### **For the BASF Early Restoration Project in East Newark, New Jersey**

**Development of the Government's Cost Estimate:** When considering BASF's proposed natural resource restoration project in East Newark, New Jersey, the Federal Trustees for the Diamond Alkali Superfund Site agreed to develop an estimate for what it would cost the federal government to build and maintain the project proposed by BASF. The results of that government cost estimate were used to inform the Federal Trustees in developing the appropriate crediting for Natural Resource Damages (NRD) for the completed project. Both the Trustees' and BASF's engineering consultant shared information on the basic cost components of the project's construction, with reference to the BASF "Basic Design" depicted in Appendix A to the BASF Interim Settlement and Crediting Agreement, as well as lists of materials, area/volume(s) and related facts.

**Factors Considered in Estimating Costs:** The federal government's cost estimate was undertaken by the Department of the Interior (DOI) Office of Restoration and Damage Assessment Restoration Support Unit (ORDA RSU). This Office frequently develops government cost estimations on ORDA-related construction projects. The government's estimate for the project considered line-item costs for specific construction requirements, including, but not limited to: the expense of real estate acquisition; project-design fees; construction mobilization for both the project site and the riverfront bulkhead; site preparation (to include removal and disposal of impervious cover, as well as the excavation and disposal of on-site soils, riverfront sheet piling and aged bulkhead materials); and required permitting and consultation. After considering these costs, the ORDA RSU examined the expense of constructing the proposed project components, such as the development of walkways, riverfront access, viewing areas and possible parking spaces, as well as the expense of landscaping and tree planting/maintenance. Other costs considered included contingency rates, insurance bonding, escalation costs, indirect costs and long-term project maintenance. Food kiosks, private vending and other construction not related to Natural Resource Damage crediting were excluded from federal estimations.

**Consideration of the Federal Acquisition Regulations and Related Requirements:** As part of developing federal cost estimations, the Federal Trustees further examined the additional costs required under the Federal Acquisition Regulation (FAR; 48 C.F.R., Chapter 1, Parts 1-53) to acquire land, design, construct and maintain the project. Contract administration under the FAR was determined as a percentage of the overall costs. Costs under the FAR tend to be higher than if a private entity were to contract the required work. Federal funding and land acquisition requirements often require a greater level of assessment, project oversight and contract management. Likewise, the federal cost estimate also included expenses that are specific to federally-sponsored projects, such as the Federal Trustees' legal requirements to develop a Restoration Plan and other documents for public comment.

## **Appendix D**

### **Development of an Independent Government Cost Estimate**

**Assumptions:** The federal government’s project estimates included assumptions about ongoing remedial requirements to ensure the project’s footprint met all applicable federal, State and related cleanup requirements and restrictions. Likewise, BASF will be responsible for coordinating its construction planning and work with the U.S. Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (NJDEP), as well as local authorities. Costing exercises assumed that BASF received a “No Further Action” letter from the NJDEP, outlining that no additional remedial action was required for any of the project’s property. Any past or future costs to BASF to meet EPA, State and/or local remedial requirements were not included in the federal government’s estimate.

**Cost-Estimating Tools Used:** The federal government’s estimate of line-item costs was developed using recognized industry cost-estimating references and standards, proprietary sourcing, as well as the best professional experience of DOI planners, based on cost-development for similar projects. Such sources included, but were not limited to:

- Heavy Construction Costs with RSMeans Data 2018. (2017). United States: RSMeans;
- 2018 Site Work & Landscape Costs with RSMeans Data. (2017) The Gordian Group Inc., Rockland, Massachusetts;
- New Jersey Department of Transportation Cost Estimating Guidelines; and
- Publicly available commercial and governmental websites.

**Appendix E**

Prepared By: \_\_\_\_\_  
[Name], Esq.

**DEED OF CONSERVATION EASEMENT**

THIS DEED OF CONSERVATION EASEMENT (“Easement”) is made this \_\_\_\_ day of \_\_\_\_\_, 2022, by and between BASF CORPORATION (“BASF” or “Grantor”), a Delaware corporation, having an address at 100 Park Ave, Florham Park, NJ 07932, and [ENTITY NAME], having an address at [STREET ADDRESS], [CITY], [STATE] [ZIP CODE] (hereinafter referred to as “Grantee”). The United States Fish and Wildlife Service (“FWS”), having an office at [STREET ADDRESS], [CITY], [STATE] [ZIP CODE], and the National Oceanic and Atmospheric Administration (“NOAA”) having an office at [STREET ADDRESS], [CITY], [STATE] [ZIP CODE], (FWS and NOAA hereinafter collectively referred to as “the Federal Trustees”), are not parties to this Conservation Easement, but are being granted third party enforcement rights, as set forth in N.J.S.A. 13:8B-3, *et seq.*, and as further described herein.

**RECITALS**

**WHEREAS** Grantor is the owner in unencumbered fee of certain contiguous lands (the “Property”) designated as Tax Lots 1 and 2 in Block 17, in the Borough of East Newark, County of Hudson, State of New Jersey, more particularly described in *Schedule A* annexed hereto.

**WHEREAS** pursuant to “New Jersey Conservation and Historic Preservation Restriction Act,” N.J.S.A. 13:8B-1, *et seq.*, a conservation restriction may be acquired by the [Grantee].

**WHEREAS** the Property will be predominantly used for open space, conservation, and passive recreation purposes.

**WHEREAS** the Property possesses, or will possess, significant natural, scenic, aesthetic, open-space, plant and wildlife habitat, watershed, wetland, forest, waterfront, resource conservation or similar features and conservation values that are of great importance to Grantor, Grantee, and the people of the state of New Jersey, the preservation and protection of which will yield a significant public benefit.

**WHEREAS** the Property is being converted from former industrial uses and will be maintained by the Grantor for public use for a period of thirty (30) years as part of an early restoration of natural resources to compensate for natural resource injuries concerning the Diamond Alkali Superfund Site, and thereafter as natural public parkland consistent with the terms of this Easement.

**WHEREAS** the physical features, vegetation, and other characteristics of the Property have been, or will be, catalogued in the Baseline Documentation compiled by the Grantor in connection with the granting of this Easement.

**WHEREAS** Grantor intends, as owner of the Property, to convey to Grantee the right to preserve and protect the natural resources and public access to those resources of the Property in perpetuity, consistent with the terms of this Easement.

**WHEREAS** Grantor desires to reserve the right to conduct those activities expressly reserved to Grantor in this Easement.

**WHEREAS**, for all of the purposes herein set forth, Grantor desires to give and grant to Grantee, and Grantee desires to accept, the Conservation Easement hereinafter described.

## **GRANT OF PERPETUAL EASEMENT**

NOW, THEREFORE, in consideration of the Interim Settlement and Crediting Agreement, the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and pursuant to the laws of the state of New Jersey, including the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A., 13:8B-1, *et seq.*, Grantor does hereby grant, bargain, transfer and convey unto Grantee and its successors and assigns, an easement and interest in perpetuity (the “Easement”) on, over and upon the Property, said Property being in the Borough of East Newark, County of Hudson, and State of New Jersey, of the nature and character, to the extent, and on the terms hereinafter set forth, with which the Grantor and Grantee in their respective capacities for themselves and their respective heirs, administrators, executors, successors and assigns, agree to comply and Grantee by its acceptance of this grant of Easement undertakes to enforce.

### **1. DECLARATION OF COVENANTS, RESTRICTIONS AND OTHER TERMS**

**1. Definitions.** The following terms shall have the following meanings when used herein, unless the context clearly requires otherwise. Terms defined in the singular shall have a correlative meaning when used in the plural and vice versa, and other inflected forms of such defined terms shall likewise have correlative meanings.

The term “Baseline Documentation” means those documents that describe the construction details of the Project, its features, permitted structures and uses and plan for its maintenance during the Initial Term. The documents that comprise the Baseline Documentation are listed in Schedule C.

The term “Building” means any structure or portion thereof or addition thereto having a roof supported by such things as columns, posts, piers, walls or air and intended for the shelter, business, housing or enclosing of persons, animals or property, but excluding temporary structures (such as tents and portable sanitary facilities) installed for and during special occasions or events and removed immediately thereafter.

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The term “Construct” means to construct, build, install, place, erect, alter, enlarge, manufacture, assemble, or fabricate by any means or method.

The term “Easement” means this Deed of Conservation Easement.

The term “Environmental Law” means any federal, state, and local law, statute, rule, order, regulation, ordinance, code, requirement or ruling now or hereafter in effect, imposed by any governmental authority regulating, relating to, or imposing liability or standards of conduct relating to pollution or protection of the environment (including, without limitation, ambient air, surface water, groundwater, land surface or subsurface strata), public health and safety or employee health and safety.

The term “Existing Facilities” means structures that are located on, above or under the Property as of the date of this Easement.

The term “Federal Trustees” shall mean the designated group of federal agencies acting in the role of trustees of the natural resources for the Diamond Alkali Superfund NRD Site and Berry’s Creek Study Area, including the United States Fish and Wildlife Service (“FWS”) (on behalf of the United States Department of the Interior (“DOI”)) and the National Oceanic and Atmospheric Administration (“NOAA”) (on behalf of the United States Department of Commerce). The Federal Trustees shall have the same rights of enforcement under this Conservation Easement as the Grantee.

The term “Grantee” means the party identified as Grantee in the preamble, its officials, employees, contractors, successors, assigns, authorized agents, personal representatives, tenants, and occupants, transferees, and where specifically set forth herein licensees and lessees of Grantee. The Federal Trustees shall have the same rights of enforcement under this Conservation Easement as the Grantee.

The term “Grantor” means BASF, as owner of the Property and subsequent owner(s) in fee simple of the Property that is subject to this Conservation Easement. The term shall include Grantor, its successors, transferees, heirs and assigns, and its authorized agents, personal representatives, tenants, occupants, contractors, and employees, and where specifically set forth herein, licensees and lessees of Grantor. If the Property is sold or otherwise transferred to a new owner, neither BASF nor any other former owner, shall have any further obligations with respect to this Easement.

The term “Hazardous Material” means each and every material or substance that, whether by its nature or use, is now or hereafter defined as a pollutant, dangerous substance, toxic substance, hazardous waste, Hazardous Material, hazardous substance or contaminant under any Environmental Law, or which is toxic, explosive, corrosive, flammable, infectious, radioactive, carcinogenic, mutagenic or otherwise hazardous and which is now or hereafter regulated under any Environmental Law.

The term “Initial Term” means the thirty (30) year period of operation of the Project

starting from the date the Property is open to the public.

The term “Interim Settlement and Crediting Agreement” or “Crediting Agreement” means the agreement entered into between BASF and the Federal Trustees on [TBD], attached as Schedule B.

The term “Maintain” means to keep in good condition, appearance and repair, and to renovate. During the Initial Term maintenance obligations shall be as set forth in the Maintenance Plan required by the Crediting Agreement.

The term “Passive Recreational Uses” means low-impact outdoor recreational pursuits that do not involve the use, placement, construction or installation of any structure or items of fixed or semi-fixed equipment, or result in any alteration of the land, other than trail related structures and surface alterations. By way of example, and without limiting the generality of the foregoing, Passive Recreational Uses shall not include such things as racquet courts, golf or miniature golf courses, skating rinks, sports stadiums, shooting ranges, and similar installations.

The term “Project” means the approximately 5-acre natural resource restoration project that BASF has constructed on the Property at the corner of Clay Street and Passaic Avenue in East Newark, New Jersey, in accordance with the Crediting Agreement and SOW, including the properties identified on the most current East Newark, New Jersey tax maps as Block 17, lot 1 and Block 17, lot 2, and as generally depicted in Appendix A;

The term “Structure” means any combination of materials to form a construction, fabrication, or any thing of human manufacture, for temporary or permanent occupancy, use or ornamentation, whether constructed on, above or below the surface of the land comprising the Property, including, but not limited to: (i) houses, cabins, mobile homes, trailers, barns, stables, sheds, silos, greenhouses, outhouses, cabanas, and other buildings and similar items of every kind and description, (ii) swimming pools, fences, docks, bridges, decks, satellite dishes and antennae, cellular telephone and other towers, billboards, signs, storage tanks and other accessory structures and fixed items of equipment; (iii) water, sewer, power, fuel and communication lines, other utility systems and related facilities; (iv) culverts, detention basins, and other stormwater or groundwater storage and control facilities; and (v) pads, patios, playing courts, riding rings, paddocks, corrals, pens, walkways, roads, driveways, parking areas and other areas constructed of or surfaced with wood, concrete, macadam, brick, paving stones, cinder block, gravel, clay, stone dust or other impervious or semi-pervious material.

The term “Supported Recreational Uses” means low-impact outdoor recreational pursuits that may involve the use, placement, construction or installation of any structure or items of fixed or semi-fixed equipment, and that may result in a minimal alteration of the land that is tailored to improve the public access and enjoyment of the waterway, riverfront, and park areas. During the Initial Term such Supported Recreational Uses shall be consistent with the Baseline Documentation. Supported Recreational Uses may include kayak rentals, limited food or drink vending, and other similar activities. By way of example, and without limiting the generality of the foregoing, Supported Recreational Uses shall not include such things as racquet courts, golf courses, mini-golf courses, skating rinks, sports stadiums, shooting ranges, and similar

installations.

The terms “Wetlands” and “Wetland Areas” mean wetlands as defined by the January 1989 edition of the Federal Manual For Identifying and Delineating Jurisdictional Wetlands, or such other criteria for identifying and delineating wetland areas as may from time to time be promulgated by an appropriate state or federal governmental agency, provided that such other criteria have been adopted by Grantee for purposes of this Easement by resolution of its governing board.

## **2. TERM, FUTURE INSTRUMENTS & NOTICE OF TRANSFER**

**2.1 Perpetual Term.** This Easement shall be perpetual and run with the land and shall be binding upon the Grantor and all future owners of any interest in the Property, thus creating open space, conservation easements and restrictions in perpetuity.

**2.2 Reference to Easement in Future Instruments & Notice of Transfer.** This Easement shall be recorded in the Office of the Clerk of Hudson County and a reference to the Easement shall be contained in any future deed, lease or document of transfer or conveyance affecting the Property. Grantor shall give written notice to the Grantee of any such transfer or conveyance of any interest in the Property within ten (10) days following the date of such transfer or conveyance, which shall include the name and address of the new owner or transferee of such Property interest. Grantor shall provide a copy of this Easement to its grantee of any fee simple interest in any part or all of the Property. The failure of the Grantor to perform any act required by this Paragraph shall not impair the validity of this Easement or limit its enforceability in any way.

**2.3 Purposes.** The purposes of this Easement include, but are not limited to ensuring that the Project is operated for the Initial Term in accordance with the requirements of the Baseline Documentation, and thereafter: (a) that the lands subject to this Easement be protected in their natural, scenic and open state in perpetuity, subject only to the specific rights expressly reserved to the Grantor herein, (b) that the natural features of the Property be respected and preserved to the maximum extent consistent with Grantor’s exercise of the rights expressly reserved to Grantor by the terms of this Easement; (c) that the natural area be forever protected and preserved in its natural and scenic and state free from all buildings, structures and activities that might damage, compromise or interfere with its ecological diversity, natural beauty or resource quality, or with the natural processes occurring therein; (d) that any alterations to the Property from the natural state under the terms of this Easement be conducted to enhance public access, use, and enjoyment of these natural areas including, but not limited to, the waterfront and public spaces; and (e) that future uses of the Property be confined to such activities as are not inconsistent with the said purposes or with the terms and conditions of this Easement.

**2.4 Rights of Grantee.** To accomplish the purposes of this Easement, the following rights are hereby conferred upon Grantee, its employees, agents, and representatives:

(a) to have access to and enter upon the Property for the purpose of inspecting the Property to monitor compliance with and otherwise enforce the terms of this Easement; provided, however, that except in cases in which Grantee determines that immediate entry is required to

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prevent, terminate or mitigate any violation of this Easement, such entry shall be upon prior reasonable notice to Grantor, and Grantee shall not unreasonably interfere with Grantor's use and quiet enjoyment of the Property; preserve and protect the natural features of the Property (subject to Grantor's reserved rights hereunder), and in connection therewith, to determine the consistency of any activity or use for which no express provision is made herein with the purposes of this Easement;

(b) to prevent Grantor or any third persons (whether or not claiming by, through, or under Grantor) from conducting any activity on or use of the Property that is inconsistent with the purposes of this Easement; to enforce this Easement in the case of any breach or violation by Grantor or by third persons (whether or not claiming by, through, or under Grantor) by means of the procedures and remedies provided for in Section 3 hereof; to require of Grantor or third persons the restoration of such areas or features of the Property as may be damaged by any inconsistent activity or use, and, if Grantor shall fail to do so and if Grantee shall so elect, to carry out reasonable and appropriate restoration activities on the Property following a violation of this Easement as set forth in Section 3 hereof.

**2.5 Prohibited Uses and Activities.** Activities on and uses of the Property that are inconsistent with the purposes of this Easement are prohibited. Without limiting the generality of the foregoing, and subject to the terms of Baseline Documentation during the Initial Term, from and after the date of this Easement the following activities and uses are expressly forbidden on, over, or under the Property, except as provided in Paragraphs 2.6. 2.7. 2.8, 2.9, 2.10. and 2.11:

(a) construction, building, installation, placement, erection, assembly, manufacture, fabrication, alteration, enlargement, maintenance, repair, renovation or replacement of any structure or structures (as defined herein) on, above or beneath the surface of the Property, unless expressly authorized by this Easement;

(b) processing, storage, disposal, spreading, placing or dumping of refuse, rubbish, debris, garbage, trash, dredge spoil, chemicals, Hazardous Materials, abandoned vehicles, appliances, or machinery, or of any other substance or material that has the potential to cause significant harm or damage to plants, wildlife, the scenic quality of the Property or other natural resource, except: (i) placement and relocation of soil, rock, compost, vegetative matter, or other natural materials reasonably necessary in order to combat erosion of natural resources or flooding, (ii) temporary storage of construction and maintenance materials, construction debris, fill and excavated material but only if, to the extent, and for so long as reasonably necessary in order to carry out another activity expressly permitted by this Easement, (iii) use and indoor storage of *de minimis* quantities of materials (even if otherwise classified as Hazardous Material) commonly utilized for maintenance and upkeep of buildings, machinery and equipment, provided they are stored in appropriate leak-proof containers, and (iv) movement, storage and use of soil, rock, compost, vegetative matter, animal manure, other natural materials, fertilizers and biocides if, and only if, the same is generally considered to be part of an agricultural use permitted by this Easement, and is consistent with Best Management Practices;

(c) excavation or removal of materials, including, but not limited to, dredging, mining, slant mining, drilling, quarrying or other extraction of loam, peat, turf, soil, gravel, sand, coal,



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rock, minerals, petroleum, or natural gas, or other natural resource from the Property;

(d) disturbance or alteration of the surface topography or natural features of the Property, except if: (i) the disturbance or surface alteration is reasonably necessary in order to carry out an activity that is expressly permitted by this Easement, (ii) the circumstances are such that no feasible alternatives are available that would avoid the need for such disturbance or alteration, and (iii) appropriate measures are taken to minimize and mitigate any adverse impacts on the Property or the natural features of the Property;

(e) draining, dredging, filling, diking, or other disturbance of Wetland Areas;

(f) alteration, or manipulation of the course, flow, size or other characteristics of any streams, rivers, lakes or other water bodies (other than artificially-created farm ponds) located on the Property, except for such conservation and water quality improvement measures as Grantee, and during Initial Term the Federal Trustees, may approve in writing

(g) cutting, destruction or removal of trees, limbs, shrubs, native plants, leaf litter, detritus, or other plant material, vegetation or naturally occurring substance (collectively, “vegetation”), whether alive, standing-dead, or fallen, and regardless of its characteristics, except: (i) control of non-native vegetation through responsible application of herbicides and biological control measures in accordance with Subparagraph 5(b), and (ii) trimming or removal of dead, fallen, diseased or infected trees, tree limbs and other vegetation that pose a health or safety hazard or that obstruct passage on paths, trails, roads or drives lawfully existing on the Property;

(h) planting, cultivation or propagation of any invasive or non-native species, except as provided in Paragraphs 2.7, 2.9, and 2.10;

(i) use of chemical or biological pesticides, herbicides, fungicides, rodenticides, or other biocides on the Property except in a responsible manner to control one or more species generally acknowledged to be a pest or invasive species, and provided that: (i) all applicable Environmental Laws, governmental policies and recommendations concerning the proper use and application of the substance in question are complied with, and (ii) the substance in question does not pose any significant risk of harm to any threatened or endangered species or rare community types as identified by the New Jersey Natural Heritage Database or similar compendium;

(j) use of trucks, all-terrain vehicles, trail bikes and other motorized off-road vehicles and equipment, except: (i) vehicles, machinery and equipment used on the Property for maintenance and cultivation of lawns and gardens in the open areas; (ii) use of vehicles on existing or permitted roads and driveways; and (iii) use of vehicles and equipment for emergency purposes and to carry out required management actions on the Property;

(k) except as expressly permitted herein, the conduct of any other activities on or uses of the Property that are likely to have a significant and demonstrable adverse impact on drainage, flood control, water conservation, soil conservation and erosion control, plant and wildlife habitat or any of the natural features of the Property; and

(l) partition, division or subdivision, legal or de facto, of the Property, or any portion thereof, into more than one ownership, including along any existing interior lot lines.

**2.6 Acts and Uses Not Otherwise Prohibited.** Grantor and Grantee reserve all rights inherent in the ownership of the Property that are not prohibited by or inconsistent with the terms and Purposes of this Easement.

**2.7 Supported Recreational Uses.** Grantor and Grantee may use and allow the Property to be used for Supported Recreational Uses for the purpose of improving public access and enjoyment of the waterway, riverfront, and park areas, such as: kayak rentals, limited food or drink vending, and other similar activities. The Parties agree that the commercial recreational improvements identified in the Crediting Agreement and Baseline Documentation shall be permitted under this Easement. The commercial recreational improvements identified in the Crediting Agreement and Baseline Documentation potentially allow for construction of a parking lot, limited retail, a restaurant, and interpretive exhibits. After the Initial Term, these activities may not exceed more than twenty (20) percent use of the Property.

**2.8 Passive Recreational Uses.** Grantee shall allow the Property to be used by the public for Passive Recreational Uses, such as: nature study and observation, walking, hiking, jogging, and biking, as provided in Paragraph 8.4. The scope and frequency of, number of participants in, and manner of carrying out such Passive Recreational Uses shall be limited by Grantor, Grantee, or during the Initial Term the Federal Trustees, as necessary to ensure that they do not result in significant and demonstrable damage to, or degradation of the Project or the natural features of the Property. The Parties agree that the recreational improvements identified in the Crediting Agreement and Baseline Documentation shall be permitted under this Easement. The recreational improvements identified in the Crediting Agreement and Baseline Documentation provide for the construction of walking paths, wetland, benches, interpretive signage, lawns, and other public spaces be installed on the Property.

**2.9 Owner Responsibilities.** Grantor retains all responsibilities and shall bear all costs, expenses, and liabilities related to the ownership, operation, upkeep and maintenance of the Project both during and following the Initial Term. Grantor shall: (a) maintain adequate liability insurance coverage with limits in commercially reasonable amounts taking into consideration the activities occurring on the Property, and shall, upon reasonable request, provide Grantee with a certificate of insurance showing the kind and amount of Grantor's insurance coverage; (b) pay before delinquency all taxes, assessments, fees and charges of whatever description levied on or assessed against the Property by competent authority, (c) be solely responsible for obtaining all applicable governmental permits and approvals for any construction or other activity or use permitted by this Easement, and (d) carry out all permitted activities in compliance with all applicable governmental laws, regulations, and guidelines.

**2.10 Owner Improvements.** During the Initial Term, Grantor shall not construct, install or maintain any facility or improvement within the Property except as is consistent with the Baseline Documentation. Thereafter, Grantor shall not construct, install or maintain any facility or improvements within the Property except as are consistent with the terms of this Easement.

**2.11 Owner Uses and Activities.** Grantor shall have the rights accorded to the general public to use the Property as well to exercise the following rights with such notice to Grantee as is reasonable under the circumstances: mow, cut trees, remove vegetation, plant vegetation, or otherwise disturb resources to the extent reasonably prudent to remove or mitigate against an unreasonable risk of harm to Persons on or about the Property. During the Initial Term, any such activities shall be conducted in accordance with the approved Maintenance Plan:

**2.12 Transfer of Development Rights.** Except as specifically reserved to Grantor in this Easement, Grantor hereby grants to Grantee, (a) all rights to construct, install, erect, or enlarge structures upon, develop or in any other manner improve or alter the Property in a manner that would violate the terms, or be inconsistent with the purposes, of this Easement, and (b) all development credits and all transferable, cluster or other development rights, howsoever designated, that are or may hereafter be allocated to, associated with, implied, reserved, or inherent in the Property. Grantor and Grantee agree that Grantor may not use such rights on any portion of the Property, transfer such rights to any other property, or consider such rights for the purpose of calculating permissible size, height, bulk or number of structures, development density, lot yield or any similar development variable pertaining to the Property or any other property. All of Grantor's right, title and interest in and to any such rights that may hereafter be created shall automatically be vested in Grantee. Grantee agrees not to exercise any of the rights transferred or vested by this Paragraph in any manner that is inconsistent with the terms of this Easement. Grantor hereby appoints Grantee as Grantor's attorney-in-fact for, and only for, the limited purpose of executing and recording such further instruments as may be necessary or appropriate to effectuate the extinguishment of such rights. Grantor acknowledges that the power of attorney herein granted is coupled with an interest in the subject matter and is irrevocable. If Grantee shall have occasion to exercise the power of attorney herein granted, Grantee shall notify Grantor within a reasonable time following such exercise specifying the action taken and shall provide to Grantor copies of all instruments evidencing such action.

**2.13 Baseline Documentation.** The Baseline Documentation shall be used during the Initial Term to establish the construction details, uses and condition of the Property as of the date of this Easement as well as the manner in which the Property is to be maintained by the Grantor so that Grantee may properly monitor and assure compliance with the terms hereof during the Initial Term. Grantee shall retain a copy of the Baseline Documentation identified on Schedule C. The Baseline Documentation, which was developed by BASF in consultation with the Federal Trustee constitutes an inventory of the Project's relevant features and conditions as of the date of this Easements. The Baseline Documentation shall be kept on file at Grantee's offices and shall be accessible to Grantor and the Federal Trustees upon reasonable notice during normal business hours.

**2.14 Required Reporting.** In order to monitor the ongoing uses and condition of the Property following the Initial Term and to assure compliance with the terms hereof, Grantor shall provide an annual written report to the Grantee, with a copy to the Federal Trustees, regarding the current uses, improvements, and condition of the Property, as well as Grantor's compliance with this Easement. Following the Initial Term, the Federal Trustees may request further documentation from the Grantor at any time to provide further evidence regarding compliance with this Easement.

### **3. REMEDIES AND ENFORCEMENT**

**3.1 Notice of Noncompliance and Opportunity to Cure.** If Grantee determine that a violation of this Easement has occurred, is occurring, or is threatened, Grantee shall give a written notice thereof (a “Notice of Noncompliance”) to Grantor or other responsible party, summarizing the facts in Grantee possession concerning the nature of the violation. Upon receipt of a Notice of Noncompliance, Grantor or other responsible party shall immediately (a) cease, and cause any third persons to cease, those actions that have given rise to the alleged violation, and (b) take such actions as may be necessary to prevent any further harm or damage to the Property or the natural resources. Within sixty (60) days after the date of the Notice of Noncompliance, Grantor shall cure all violations of this Easement and restore the Property to the condition that would have existed had there been no violation, provided, however, that if the violation is such that it cannot reasonably be cured within such sixty (60) day period, Grantor shall commence to cure such violation within the sixty (60) day period and shall thereafter diligently pursue the same to completion, and the period for cure shall be extended for such time as is reasonably necessary in order to permit the actions required to effect such cure to be diligently completed. If Grantee, believes that circumstances are such that immediate action is required to prevent or mitigate significant harm or damage to the Property or the natural resources of the Property, Grantee may pursue its remedies without waiting for any period provided for cure to expire, and without prior notice to Grantor (except as may be required by law). In the event of dispute between the Grantor and Grantee during the Initial Term as to whether a violation of this Easement has occurred that requires corrective action, or as to the specific measures necessary to remedy a violation, the matter shall be referred to the Federal Trustees for resolution, and the Federal Trustees decision on whether a violation has occurred, and the measures necessary to correct it, shall be binding on both the Grantor and Grantee. The Federal Trustees may also exercise the rights of Grantee as specified in this Paragraph and seek the remedies set forth in Paragraph 3.2. In the event of dispute between the Grantor and Grantee following the Initial Term as to whether a violation of this Easement has occurred that requires corrective action, or as to the specific measures necessary to remedy a violation, the parties may resort to the remedies provided for in Paragraph 3.2 below.

**3.2 Remedies.** Subject to the procedural steps set forth above, Grantee shall be entitled to preliminary restraints, and to injunctive and other equitable relief to prevent threatened or continuing violations of this Easement, and to otherwise enforce the terms of this Easement and including, without limitation, relief requiring Grantor or other responsible party to remove offending structures and otherwise restore the Property to the condition that would have existed had there been no violation of this Easement. Grantor agrees that Grantee’s remedies at law for violation of this Easement will be inadequate and that Grantee shall be entitled to the injunctive relief described herein, and to specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Alternatively, should Grantor fail to remedy a violation after Grantee follows the procedures in Paragraph 3.1 above, Grantee may undertake to correct the violation of the Easement and shall be entitled to recover damages from the Grantor in the amount of the costs necessary to restore the Property to the condition that would have existed had there been no violation of this Easement. The remedies described herein shall be in addition to all remedies now or hereafter existing at law or in equity.

**3.3 Forbearance.** Any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any term of this Easement by Grantor shall not be deemed or construed to be a waiver by Grantee of such term or of any subsequent breach of the same or any other term of this Easement or of any of Grantee's rights under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver; nor shall Grantor be entitled to assert any defense based upon laches, estoppel or prescription with respect to any violation of this Easement as to which Grantee was not specifically notified by Grantor in writing.

**3.4 Acts Beyond Grantor's Control.** Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Property resulting from causes beyond Grantor's control, including, without limitation, fire, flood, storm, earth movement, or from any prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant harm or damage to the Property resulting from such causes, except to the extent the Grantor is obligated during the Initial Term by the Property's Corrective Response Plan to address such conditions.

**3.5 Restoration Plans.** If restoration work is required as a result of a violation, Grantor shall submit a detailed restoration plan to Grantee for its approval prior to undertaking restoration activities on the Property. During the Initial Term, all restoration shall be carried out so as to comply with the standards for the Project set forth in the Baseline Documentation.

**3.6 Federal Trustees Enforcement Rights.** Nothing contained in this Easement shall be construed as limiting in any way in the rights of the Federal Trustees to take any enforcement action for any alleged violation by the Grantor of the Crediting Agreement or the Baseline Documentation. Grantee agrees not to take any enforcement action during the Initial Term pursuant to this Easement that is inconsistent with, or not authorized by, or duplicative of any enforcement action taken by the Federal Trustees and that any determination made by the Federal Trustees during the Interim Term regarding compliance by the Grantor with the Crediting Agreement or Baseline Documentation shall be binding on the Grantee. Actions to enforce this Easement may be taken at any time by the Federal Trustees and shall be in the United States District Court for the District of New Jersey.

## **4. INDEMNIFICATION**

**4.1 By Grantor.** Grantor hereby releases and agrees to hold harmless, indemnify and defend Grantee and its members, trustees, officers, employees, agents, and contractors and the heirs, personal representatives, successors and assigns of each of them (collectively "Indemnified Parties") from and against any and all liabilities, penalties, fines, charges, costs, losses, damages, expenses, claims, demands, orders, judgments or administrative actions, including, without limitation, reasonable attorneys' fees, arising from or in any way connected with: (a) injury to or the death of any person, or physical damage to any property, resulting from any act, omission, condition or other matter related to or occurring on or about the Property, regardless of cause, unless due to the negligence or wrongful acts of any of the Indemnified Parties; (b) the obligations specified in this Article; (c) the representations and warranties contained in Paragraph 7.1; and (d)

the presence or release upon or about the Property of any Hazardous Material or the violation or alleged violation of any Environmental Law unless caused by any of the Indemnified Parties or by a third party unrelated to and not under the control of Grantor.

**4.2 By Grantee.** Grantee hereby releases and agrees to hold harmless, indemnify and defend Grantor and its employees, agents, and contractors and the heirs, personal representatives, successors and assigns of each of them from and against any and all liabilities, penalties, fines, charges, costs, losses, damages, expenses, claims, demands, orders, judgments or administrative actions, including, without limitation, reasonable attorneys' fees, arising from or in any way connected with injury to or the death of any person, or physical damage to any property (other than damage necessarily associated with restoration activities), resulting from any act or omission of Grantee or its members, trustees, officers, employees, agents, and contractors while on the Property in connection with the exercise of any monitoring, enforcement or other rights conferred upon Grantee by this Easement.

## **5. ASSIGNMENT**

**5.1 Grantee's Right to Assign.** Grantee, and any future assignee of this Easement, may at any time, following approval by Federal Trustees and upon thirty (30) days' notice to Grantor and the Federal Trustees, transfer and assign this Easement and the rights and obligations created hereby, in whole or in part, to one or more of the following organizations or entities (each, a "Qualified Holder"): (a) an organization selected by Grantee that is exempt from federal income taxation under section 501(c)(3) of the Code and satisfies the requirements to be a "qualified organization" within the meaning of section 170(h) of the Code, or under any substantially similar provision of any successor tax code, and that is authorized to hold such an easement in and with respect to property located within the state of New Jersey, (b) any trust or other entity created by the legislature of the State of New Jersey or by the county in which the Property is located for substantially similar purposes, or (c) the State of New Jersey, the county or municipality in which the Property is located (provided such entity has not been assigned the role of Grantor), or any other public body in New Jersey selected by such assignor that is empowered to hold and administer such an easement; provided, however, that the assignee shall simultaneously with such assignment assume the obligation to carry out the conservation purposes for which this Easement is granted. In connection with any such assignment, the Grantee may, but need not, retain the right to enforce this Easement.

**5.2 Release of Grantee's Further Obligations.** The holder of this Easement immediately before any such assignment shall thereafter have no further obligation to monitor compliance with, or enforce the provisions of, this Easement; provided that the assignee meets the requirements set forth above and has assumed the obligation to monitor and enforce this Easement.

## **6. CONDEMNATION; TERMINATION**

**6.1 Condemnation Proceedings.** Should all or part of the Property be taken in exercise of the power of eminent domain, or acquired by purchase in lieu of condemnation, by any public, corporate, or other authority so as to terminate, abrogate or limit the restrictions created by this

Easement, in whole or in part, Grantor and Grantee shall join in appropriate actions to challenge such taking. In the event Grantor and Grantee are unable to prevent a taking notwithstanding their reasonable and appropriate efforts to the contrary, Grantor and Grantee shall join in appropriate actions to recover the full value of the interests in the Property subject to the taking or in lieu purchase, and all direct and incidental damages, costs and fees occasioned thereby. All expenses incurred jointly by Grantor and Grantee in connection with such actions shall be borne by them in the same proportion set forth below with respect to the sharing of the proceeds of a condemnation award, sale, lease, exchange or other disposition of the Property.

**6.2 Judicial and Statutory Termination Proceedings.** This Easement is intended to be of perpetual duration and therefore may not be terminated by mutual agreement of the Grantor and the Grantee. However, in the event an unexpected change in circumstances arises in the future that makes it impossible to accomplish the purposes of this Easement, this Easement may be extinguished in whole or in part through an appropriate judicial proceeding (and only through a judicial proceeding). In such event the Grantor shall also satisfy all other applicable legal requirements, including those set forth in the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1, et. seq., as amended (or any successor provision). Grantor and Grantee acknowledge the possibility that uses prohibited by the terms of this Easement may become more economically valuable than permitted uses, that neighboring properties may in the future be put entirely to such prohibited uses, and that Grantor may not be able in the future to conduct or implement any or all of the uses permitted under the terms of this Easement. However, such circumstances shall not be deemed to justify the termination or extinguishment of this Easement notwithstanding anything to the contrary including, but not limited to, the provisions of N.J.S.A. 13:8B-5 and N.J.S.A. 13:8B-6, and no conservation restriction established under this Deed of Conservation Easement may be released.

## **7. REPRESENTATIONS AND WARRANTIES**

**7.1 By Property Owners.** Grantor represents and warrants to Grantee that, other than those claims specified in Paragraph 7.2: (i) they own the Property in fee simple, free and clear of all liens and mortgage interests that have not been legally subordinated to this Easement, or that any such liens and mortgage interests shall be discharged at Closing, (ii) they have sole possession of the Property, have not entered into any contract to sell or lease the Property to someone else, and have not given anyone else any right of refusal, option or other rights concerning the purchase or lease of the Property, (iii) no person or entity possesses the right to remove any vegetation, mineral or other material from the Property, or carry out any other activity which is inconsistent with the purposes and terms of this Easement, (iv) the Property complies with all federal, state and local laws, regulations and requirements applicable to the Property and its use; (v) there is no litigation or other judicial, quasi-judicial or administrative proceeding pending or, to the best of their knowledge, threatened that in any way affects or relates to the Property; (vi) there are no judgments, liens or other legal obligations that may be enforced against the Property, (vii) to the best of their knowledge, no Hazardous Material is present on the Property that presents a risk to human health or the environment, and there are no underground storage tanks on the Property; and (viii) to the best of its knowledge, no civil or criminal proceedings or investigations have been instigated, and no notices, claims, demands or orders have been received, arising out of any violation or alleged violation of any federal, state or local law, regulation or requirement applicable

to the Property or its use.

**7.2 Ongoing Clean Up Proceedings.** Grantor represents and warrants to Grantee that the only exception to those representations in Paragraph 7.1 are those ongoing hazardous substance cleanup proceedings currently ongoing in accordance with EPA's Record of Decision for the Lower 8.3 Miles of the Lower Passaic River as Part of the Diamond Alkali Superfund Site, March 3, 2016 (<https://semspub.epa.gov/work/02/396055.pdf>) and any engineering or institutional controls that may be placed on the Property pursuant to State supervised cleanup programs.

## **8. MISCELLANEOUS PROVISIONS**

**8.1 Notice to Grantee Before Undertaking Certain Permitted Actions.** Grantor shall notify Grantee in writing before exercising any reserved right, the exercise of which may have an adverse impact on the natural resources associated with this Easement. Whenever notice is required to be given with respect to an activity permitted hereunder, Grantor shall notify Grantee in writing not less than thirty (30) days prior to the date Grantor intends to undertake the activity in question. The notice shall describe the nature, scope, design, location, timetable and any other material aspect of the proposed activity in sufficient detail to permit Grantee to make an informed judgment as to its consistency with the purposes of this Easement and all standards contained herein that are applicable to the activity in question.

**8.2 Approval by Grantee.** Where Grantee's approval is required by any provision of this Easement, Grantee shall grant or withhold its approval in writing within a reasonable time considering the nature of the activity for which approval is sought; the complexity and extent of the documents, plans, drawings reports and studies to be reviewed; and the degree of the potential impact on the natural resources of the Property. In any case where approval is withheld, or is granted with conditions, the Grantor may refer the issue to the Federal Trustees for decision, and the Federal Trustees' determination with respect thereto shall be final and binding. In any case in which this Easement provides that Grantee may not unreasonably withhold its approval, then, provided Grantee has received a written notice of the request for approval and all of the information required by this Easement to be submitted with such a notice, and that the request is bona fide and made in good faith, a failure by Grantee to respond to such request for approval within sixty (60) days following Grantee's receipt of same shall be deemed an approval of the request by Grantee.

**8.3 Use by Third Parties.** Grantor may not authorize, allow or permit any third party to use the Property in a manner inconsistent with the terms of this Easement. Accordingly, no right to use the Property, whether in the form of a right-of-way, easement, license, oil, gas or mineral lease, or other right or interest in, on or through the Property, may be conveyed or permitted to be established in, on or through the Property, unless the right or interest is consistent with the terms of this Easement. (These prohibitions do not apply to a right to use the Property that was in existence prior to this Easement unless said right was subordinated to this Easement.) Grantor shall take reasonable and appropriate steps to avoid unauthorized inconsistent activities by third parties. Notwithstanding the foregoing, Grantee may approve, in writing, a grant of a right to use the Property that benefits or does not detract from permitted uses or structures, such as a utility easement, for reasons that Grantee determines justify an exception to the prohibitions.



**8.4 Public Access.** This Easement has been created for the benefit of the general public through the protection and preservation of water and land resources and natural beauty. In addition, this Easement shall convey to the general public a right of access in perpetuity across the Property for Passive Recreational Uses. Nothing in this Easement limits the ability of Grantor and Grantee to avail themselves of the protections offered by any applicable law affording immunity to them including, to the extent applicable, the New Jersey Landowner Liability Act, N.J.S.A. 2A:42A-2, *et seq.* (as may be amended from time to time).

**8.5 Easement Binding Upon Successors.** The covenants, terms, conditions and restrictions of this Easement shall be binding upon, and inure to the benefit of, the parties hereto and their respective personal representatives, heirs, successors and assigns, and shall continue as a servitude running in perpetuity with the Property.

**8.6 Manner of Giving Notices.** All notices pertaining to this Easement shall be in writing delivered to the parties personally or by private courier, or by registered or certified mail, return receipt requested and postage prepaid, at the addresses set forth above or such other addresses as the parties may specifically designate in writing and shall be deemed delivered and effective upon actual receipt in the event of personal or private courier delivery or deposit with the U.S. Postal Service in the event of mail delivery.

**8.7 Captions.** The captions in this instrument have been inserted solely for convenience of reference, are not a part of this instrument, and shall have no effect upon construction or interpretation.

**8.8 Controlling Law.** The laws of the state of New Jersey shall govern the interpretation and performance of this Easement, although enforcement of this Easement by the Federal Trustees shall be in the United States District Court for the District of New Jersey.

**8.9 Counterparts.** The parties may execute this instrument in two or more counterparts, which shall, in the aggregate, be signed by both parties; and each counterpart shall be deemed an original instrument as against any party who has signed it. In the event of any disparity between the counterparts produced, the recorded counterpart shall be controlling.

**8.10 Entire Agreement.** This instrument sets forth the entire agreement of the parties with respect to the Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the Easement, all of which are merged herein.

**8.11 Liberal Construction.** Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant, to effectuate the purposes of this Easement and to preserve and protect the natural resources on the Property to the maximum possible extent. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid.

**8.12 No Extinguishment through Merger.** Should Grantee come to own all or any portion of the fee interest in the Property, (i) Grantee, as successor in title to Grantor, shall observe

and be bound by the obligations of Grantor and the restrictions imposed upon the Property by this Easement, (ii) in view of the public interest in its enforcement, this Easement shall survive such simultaneous ownership of fee and Easement interests in the Property, and shall not be extinguished notwithstanding any otherwise applicable legal doctrine under which such property interests would or might be merged, and (iii) said Grantee shall as promptly as practicable, either assign its interests in this Easement to another “qualified holder” in conformity with the requirements of this paragraph, or divest itself of its fee interest in the Property. Any instrument of assignment of this Easement or the rights conveyed herein shall refer to the provisions of this paragraph, and shall contain language necessary to continue it in force.

**8.13 No Forfeiture.** Nothing contained herein will result in a forfeiture or reversion of Grantor’s title in any respect.

**8.14 Severability.** If any provision of this Easement, or the application thereof to any person or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

**8.15 Termination of Rights and Obligations.** A party’s personal rights and obligations under this Easement, but not the Easement itself, terminate upon transfer of the party’s interest in the Easement or Property, except that liability for acts or omissions occurring prior to transfer shall survive transfer, and that the party’s rights and obligations shall continue with respect to any portion of the Property or any interest in the Easement retained by that party.

**8.16 Certificate Concerning Compliance.** Upon written request by Grantor, Grantee shall deliver to Grantor, or to any prospective purchaser, transferee, mortgagee, lessee or other interested party designated by Grantor, an appropriate document certifying to the best of Grantee’s knowledge, the status of Grantor’s compliance with any obligation of Grantor contained in this Easement. Grantee shall provide such certification within forty-five (45) days after Grantee’s receipt of the written request. Such certification shall be limited to the condition of the Property as of the date of Grantee’s most recent monitoring inspection and may be appropriately limited or qualified by Grantee to reflect such constraints and limitations upon the quality or completeness of the monitoring data as may have existed at the time of such inspection. If (i) Grantor requests a certification based upon more current documentation, or (ii) Grantee reasonably concludes, based upon relevant facts and circumstances, that a new inspection is necessary in order to issue such a certification, then Grantee shall conduct a new inspection, at Grantor’s expense, within thirty (30) days of Grantee’s receipt of Grantor’s written request. Grantor shall bear all of Grantee’s reasonable costs and expenses, including but not limited to, staff expense and legal review, associated with the issuance of the certification by Grantee and inspections of the Property reasonably necessary thereto and, if requested by Grantee, Grantor shall deposit with Grantee funds reasonably sufficient to cover such costs and expenses before they are incurred.

**8.17 Additional Enforcement Rights.** (i) Grantee shall have the right to grant to the State of New Jersey Green Acres Program or to any other governmental agency or Qualified Holder with the power to enforce any or all of the terms and conditions of this Easement in the same manner and to the same extent as could be done by Grantee. (ii) The Federal Trustees shall,

**Appendix E**  
**Proposed Form of the CER**

in the unreviewable exercise of their discretion, have the right to enforce the terms of this Deed of Conservation Easement through any remedy available at law or equity, including specific performance.

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**9. SCHEDULES AND EXHIBITS**

The following addenda, schedules, and exhibits are annexed to and shall form a part of this Easement:

- Schedule A: Description of the Property;
- Schedule B: Interim Settlement and Crediting Agreement for Early Restoration at the BASF Riverfront Project; and
- Schedule C: List of Baseline Documentation.

TO HAVE AND TO HOLD unto Grantee, its successors and assigns, forever.

IN WITNESS THEREOF, Grantor and Grantee have duly executed this instrument as of the date first above written.

**ATTEST**

**GRANTOR**

\_\_\_\_\_

\_\_\_\_\_

**ATTEST**

**GRANTEE**

\_\_\_\_\_

\_\_\_\_\_

**Schedule C**

List of Baseline Documentation

Interim Settlement Agreement and Appendices between BASF and Federal Trustees, dated \_\_\_\_.  
Design Objectives Memorandum, dated \_\_\_\_.  
Final Project Design, dated \_\_\_\_.  
NRD Creditability Report, dated \_\_\_\_;  
Project Maintenance Plan, dated \_\_\_\_.  
Corrective Response Plan, dated \_\_\_\_.

**Appendix F**  
**Credit Tracking Sheet**

**APPENDIX F – Credit Tracking Sheet**  
**BASF Certified NRD Credit Accounting**

<b>Activity</b>	<b>Additions</b>	<b>Subtractions</b>	<b>NRD Credit Balance</b>	<b>Date of Activity (Examples)</b>	<b>Date of Trustee Notification*</b>
Receipt of Certified NRD Credit [Opening Date]				Opening Date (Assume November 1, 2023)	
Multiplier NRD Credit 2024				November 1, 2024	
Multiplier NRD Credit 2025				November 1, 2025	
Multiplier NRD Credit 2026				November 1, 2026	
BASF use or transfer				May 1, 2027	
Multiplier NRD Credit 2027				November 1, 2027	

- The NRD Credit Balance on this sheet shall be deemed final as of fifteen (15) days from the Date of Trustee Notification of the activity, unless a Trustee objection is timely received.



