

## Sample Joint Defense/Common Interest Agreement in Connection With Potential or Actual Litigation Relating to Contaminated Property

This Joint Defense Agreement (“Agreement”) is made effective as of \_\_\_\_\_, by and between \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ [or attach an Exhibit listing all parties to the agreement], which are collectively referred to herein as the “Parties.”

**WHEREAS**, the Parties [have been sued in the civil action captioned \_\_\_\_\_ (the “Action”)] or [have been identified as potentially responsible parties in connection with a matter that may result in litigation (the “Potential Action”)] relating to alleged environmental contamination at or near \_\_\_\_\_ (hereafter the “Property” or the “Site”); and

**WHEREAS**, the Parties have certain substantially similar interests and recognize that certain mutually beneficial activities might be undertaken with regard to responding to allegations that have been, or may be, asserted against them relating to conditions at or near the Property (hereafter “Covered Matters”); and

**WHEREAS**, the Parties may, with the purpose of assisting in any common defense or investigation of allegations made against them, engage in communications or elect to disclose or transmit to each other otherwise privileged, confidential or proprietary communications, information, or documents; mental impressions; investigative information; memoranda; interview reports; expert reports; and other privileged, confidential, proprietary or otherwise protected communications, information, or documents relating to the Covered Matters (the “Covered Materials”) that may be protected from disclosure to adverse or other Parties as a result of the attorney-client privilege, the work-product privilege, the joint defense doctrine, the common interest doctrine and/or other applicable privileges, rights, or rules; and

**WHEREAS**, the Parties desire that such Covered Materials shall remain privileged and confidential or otherwise protected from disclosure; and

**WHEREAS**, the Parties agree that the execution of this Agreement is made in good faith for the purpose of promoting cooperation and limiting administrative and legal costs.

**NOW, THEREFORE**, in consideration of the agreements and obligations listed below, the Parties, by and through their authorized representatives, hereby agree as follows:

1. **Confidentiality and Use of Information.**

- a) The Parties agree that the existence and terms of this Agreement shall be kept confidential, except that the Agreement and its terms may be disclosed in any action to enforce the Agreement, or as otherwise may be required by administrative or court order or other applicable law.
- b) The Parties recognize and agree that Covered Materials voluntarily exchanged among the Parties are covered by the "Joint Defense Doctrine" and/or the "Common Interest Doctrine." All Covered Materials previously exchanged among the Parties are subject to the provisions of this Agreement.
- c) It was and is the mutual understanding of the Parties that the exchanges and disclosures referred to in this Agreement are not intended to diminish in any way the confidentiality of such Covered Materials, and any exchange of Covered Materials is not intended to and will not be deemed to constitute a waiver of any available privilege or right. All communications relating to the furtherance of the common interest/joint defense, or made in connection with Covered Matters and among any of the signatories of this Agreement, are confidential, and no privilege shall be deemed to be waived with respect to, or as a result of, such communication(s).
- d) Covered Materials disclosed by one Party to any other Party shall be deemed and kept confidential but may be shared with and among the Parties and may be used by the disclosing party as it sees fit. Covered Materials will not be shown or produced by a receiving Party to anyone not a Party except as otherwise provided herein. Such Covered Materials may be disclosed by the receiving Party only: (i) with the consent of the disclosing Party in furtherance of the receiving Party's defense of Covered Matters, (ii) if required by administrative or judicial order, or (iii) with the prior consent of the disclosing Party, which shall not be unreasonably withheld, to a third party auditor, insurer, financial accountant, or financial advisor. In the case of any disclosure to a third party under (iii) above, such person shall be specifically informed of the obligations of confidentiality and shall agree in writing to be bound thereby before the Covered Materials are disclosed.
- e) Disclosure of Covered Materials by a Party or its counsel to either Party's experts or consultants is not a waiver of the attorney-client privilege, the work product privilege, the joint defense privilege, or any other privilege or immunity. Each Party shall instruct its experts or consultants not to disclose information to any third party without prior consent of the Party and such disclosure may only be made in a manner consistent with the terms and conditions of this Agreement.

- f) This Agreement does not obligate the Parties to share any particular materials or information.
- g) If any Covered Materials become the subject of an application for an administrative or judicial order seeking to require disclosure of such information or documents by a Party or under circumstances where the information, if disclosed, would be unprotected by confidentiality obligations, that Party shall give prompt written notice of the effort to require disclosure to all other Parties, such that any Party has a timely opportunity to seek to protect the confidentiality of the Covered Materials. The Parties shall cooperate with one another to preserve the confidentiality of Covered Materials, but the Party subject to an application for an order, subpoena or other legal process that provides notice to the Parties need not pay for any of the costs incurred by any Party in seeking to protect the confidentiality of the Covered Materials.
- h) The terms of this Agreement shall not apply to information or documents which are now in, or hereafter enter, the public domain, or are obtained from a Party pursuant to applicable discovery procedures, or are not otherwise protected from disclosure, except that it shall continue to apply to any Covered Materials disclosed wrongfully or in violation of this Agreement.
- i) Any unauthorized or accidental disclosure of Covered Materials by a Party to this Agreement shall not result in a waiver of any Party's claim of confidentiality or other protection as applicable to the disclosed materials. No Party may waive any applicable privilege or other protection on behalf of any other Party.
- j) The confidentiality obligations of this Agreement survive the termination of the Agreement.

2. **Identification and Return of Covered Materials.**

- a) All Covered Materials that are exchanged pursuant to this Agreement should be marked or designated with language to the following effect: "*Privileged and Confidential; Joint Defense Materials.*"
- b) All correspondence or electronic or oral communications to which only the Parties are a party shall be considered Covered Materials pursuant to this Agreement.
- c) Failure to designate Covered Materials in accordance with Paragraph 2(a) shall not in and of itself render any privilege or other protection inapplicable, but no claim of breach of duty, with respect to the later disclosure of such materials, may be made by a disclosing Party that failed to properly designate Covered Materials under this Agreement.

- d) Any Party withdrawing from the Agreement for any reason, or upon the Agreement's termination, shall immediately return all copies of materials marked pursuant to Paragraph 2(a) or reasonably believed to be covered under the terms of this Agreement to the disclosing Party upon written request by the disclosing Party and shall delete electronic copies of such materials to the extent feasible.
3. **Inadmissibility**. This Agreement shall not constitute or be used as evidence of any admission of law or fact against any Party, or as evidence of liability or responsibility for any claims, costs or damages. This Agreement shall not operate to release or affect any of the rights of any Party under state or federal law.
4. **Effect on Insurance**. The Parties do not intend for this Agreement to prejudice any Party with respect to its insurers. All of the provisions of this Agreement shall be interpreted so as not to conflict with each Party's obligations to its insurers.
5. **Representation**. Each Party understands and acknowledges that it is represented exclusively by its own Counsel in this matter and that this Agreement does not and will not create any attorney-client relationship with Counsel for any other Party.
6. **Conflicts**. The Parties hereto understand and agree that nothing arising out of this Agreement shall give rise to an assertion by either Party of a conflict of interest with regard to any Counsel, including any additional or substitute counsel, to the Parties that are signatories to this Agreement.
7. **Withdrawal**. Any Party may withdraw from this Agreement upon tendering written notice to all other signatories to this Agreement, in which case this Agreement shall no longer be operative as to the withdrawing Party but shall continue to protect all communications and information covered by the Agreement and disclosed to the withdrawing Party.
8. **Termination**. This Agreement shall terminate upon: (i) execution of a full settlement of the Action; (ii) filing of a stipulation discontinuing or dismissing with prejudice the Action; (iii) entry of an order discontinuing or dismissing with prejudice the Action; (iv) entry of a final, non-appealable judgment in

the Action; or (v) execution of a subsequent agreement by the Parties regarding Covered Materials. The confidentiality obligations of this Agreement shall survive any termination.

9. **Authority**. The individuals executing this Agreement on behalf of their respective clients represent that they have the authority to sign this Agreement and the authority to bind and commit their respective clients to the terms hereof.
10. **Modification**. This Agreement may be amended only by a writing signed by the Parties.
11. **Headings**. The headings contained in this Agreement are inserted solely for convenience and shall not be deemed to define or amend any provision of this Agreement.
12. **Applicable Law**. This Agreement shall be governed by the laws of the State of \_\_\_\_\_ without regard to conflict of laws principles.
13. **Counterparts**. This Agreement may be executed in counterparts and each counterpart signature shall constitute a duplicate original.

**IN WITNESS WHEREOF**, the Parties have caused this Agreement to be duly executed as of the date first written above.

**[Party 1]**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**[Party 2]**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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

**[Party 3]**

By: \_\_\_\_\_

Title: \_\_\_\_\_

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