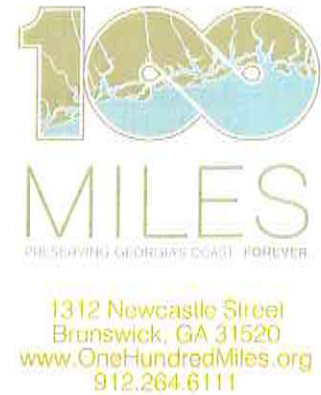


February 18, 2020

VIA Electronic Mail to: jim.brown@dnr.ga.gov

Mr. Jim Brown
Program Manager
Georgia Environmental Protection Division
2 Martin Luther King, Jr. Drive, SE
Suite 1054
Atlanta, GA 30334



RE: Comments OPPOSING the entry of Consent Decree for Partial Settlement of Claims for Natural Resources Damages at the LCP Superfund Site in Brunswick, GA

Dear Mr. Brown:

Thank you for the opportunity to comment on the proposed Consent Decree lodged with the U.S. District Court for the Northern District of Georgia, Atlanta Division, by the Commissioner of the Georgia Department of Natural Resources (DNR), Trustee for the State of Georgia, and Honeywell International, Inc. on December 19, 2019. One Hundred Miles (OHM) is a non-profit advocacy organization with the mission to preserve and protect Georgia's 100-mile coast through education, advocacy, and community engagement. OHM submits the following comments on behalf of our 850 members to oppose the entry of the proposed Consent Decree for Partial Settlement of Claims for Natural Resource Damages at the LCP Superfund Site in Brunswick, Georgia.

For 65 years, the community surrounding the LCP industrial site has suffered from the ongoing release of chemicals of concern into their ground and surface water and its members have anticipated the filing of a complaint by the State. However, the terms and conditions of the proposed Consent Decree are severely inadequate, and therefore not in the best interest of the citizens of the State of Georgia. Further, the public notice, procedures, and process to capture public comment on the Consent Decree fail to afford the public its due process right to discover information held by the Trustees.

The DNR should withdraw the Consent Decree or withhold its consent to its entry. Alternatively, the District Court should decline to approve entry of this Consent Decree because, as the following comments and supporting facts demonstrate, the Consent Decree is inappropriate and inequitable.

1. The State has violated Georgia law and the terms of the Memorandum of Agreement with Honeywell by denying the public's due process right to discover the underlying facts, documents, and research held by the Trustees that went into decision making to enter into the proposed consent judgement.

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes State Trustees to act on behalf of the public for the natural resources within a State's boundaries or for resources controlled by the State when there is injury to, destruction of, loss of, or threat to natural resources.¹ The statute grants to all members of

¹ 40 CFR 5300.605

the public the right to have the Court consider their comments. If members of the public are entitled to comment, we certainly have a due process right to discover the underlying facts, documents, and research held by the State Trustee that went into its decision-making process to enter into the proposed consent judgment. The public should, at least, have access to documents that may include redacted statements, names, sensitive or truly confidential information.

In response to two requests officially submitted by OHM in compliance with the Georgia Open Records Act (submitted on December 23, 2019 and January 14, 2020), DNR invoked the work-product privilege in anticipation of litigation as well as Attorney Client privilege pursuant to the exceptions in OCGA 50-18-70(a)(41)² as justification for denying the public access to important facts that can inform our comments on the Consent Decree. However, there are statutory and case law examples that support the State disclosing information necessary for the public to make informed comments:

- A. The Georgia Open Records Act (O.C.G.A. 50-18-70(a) lists 46 records that are not subject to public disclosure, yet Section (a)(41) begins with:

"Records containing communications subject to the attorney-client privilege recognized by state law; provided, however, that this paragraph *shall not apply to the factual findings* but shall apply to the legal conclusions, of an attorney conducting an investigation on behalf of an agency so long as such investigation does not pertain to pending or potential litigation, settlement, claims, administrative proceedings, or other judicial actions brought or to be brought by or against the agency or any officer or employee..." (emphasis added).³

The emphasized clause describing attorney client privilege above is clear: the exemption from disclosure shall not apply to the factual findings underpinning this proposed settlement.

Furthermore, the Assistant Attorney General assigned to the case justified denying public access to important information by claiming trial preparation privilege.⁴ However, all documents presented to Honeywell by DNR and all documents presented to DNR by Honeywell have been presented to the adverse parties and are therefore no longer privileged. The only justification for maintaining the trial preparation privilege is if the State considers the public as an adverse party who may challenge the agency in the matter. If a settlement has been reached, how can it now be in anticipation of litigation. Neither signatory to the agreement is litigating, so it defies logic to continue to assert privilege.

- B. The Memorandum of Agreement (MOA) between the Natural Resource Trustees and Honeywell regarding the LCP site in Brunswick was signed in 2003 (see Attachment A) and is designed to facilitate, among other things, the evaluation and negotiation of an agreement relating to restoration of those injured natural resources and natural

² Email correspondence responding to Georgia Open Records Act request. Sent to Alice M. Keyes from Melanie Johnson, Deputy Executive Counsel, Georgia DNR. January 7, 2020.

³ O.C.G.A. 50-18-72(a)(41)

⁴ Mr. Timothy Ritzka, Senior Assistant Attorney General Response to comments/questions during public information session hosted by GA DNR and Honeywell, Brunswick Library. January 7, 2020.

resource services.⁵ Section Seven(l) of the MOA, entitled "Confidentiality (l) Agreement on Confidentiality", states:

"The Parties agree that, subject to the terms of this MOA and the requirements of law and/or Court order:

- i) Oral communications between Trustees and Honeywell leading up to and pursuant to this MOA are in furtherance of settlement negotiations pursuant to Federal Rules of Evidence 408.
- ii) Written communications which are marked "settlement negotiations" or which in some way indicate that they are confidential settlement communications, shall be treated by the Parties as confidential and shall be deemed in furtherance of settlement negotiations pursuant to Federal Rules of Evidence 408.
- iii) Maps, photographs, and data that have been compiled, verified and validated by the Trustees, shall not be treated as confidential. (emphasis added).

- C. Further, the State of Georgia and the U.S. District Court of Northern District of Georgia must consider a recent ruling that weighs on agencies' decisions to not share pertinent information necessary to inform public comment. On January 3, 2020, U.S. District Court of South Carolina, Charleston Division ruled that, "... the Federal Defendants are directed to produce within 45 days all memos, emails, and attachments containing factual information relied on or considered, directly or indirectly, including all emails, communications, memos or other information shared or received between agencies or with nonagency third parties that were considered." The defendants were also required to produce a privilege log listing all documents withheld based on a claim of the deliberative process privilege⁶ (see Attachment B).

The January 3, 2020, ruling supports our position that privilege generally does not attach and that the public needs the information to make meaningful comments. Members of the public are entitled to comment and have a due process right to discover the underlying facts, documents, and research held by the State Trustee, that went into its decision to enter into the proposed consent judgement.

- D. By not disclosing information to the public, the Parties have not demonstrated to the injured public that the settlement is based on formal Natural Resource Damage Assessment (NRDA).

According to the U.S. EPA, "An NRDA is the process of collecting, compiling and analyzing information, statistics or data to determine the extent of injuries to natural resources from hazardous substance releases or oil discharges, and to determine appropriate ways of restoring and compensating for those injuries [43 CFR Part 11: 15 CFR Part 990]."⁷ Trustees have at their disposal approved methods for conducting

⁵ Natural Resource Damage Assessment & Restoration Data & Visualization website entitled, "LCP Chemicals, Georgia NRDA Case Documents Page - <https://www.diver.orr.noaa.gov/web/guest/diver-admin-record?diverWorkspaceSiteId-6203>

⁶ *South Carolina Coastal Conservation League; et al., v. Wilbur Ross*. 2:18-cv-03326-RMG; Dkt. No. 347. Filed 01/06/20.

⁷ <https://www.epa.gov/superfund/natural-resource-damages-frequently-asked-questions#2>

natural resource damages assessments provided by the Department of the Interior (43 CFR Part 11) and Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) (15 CFR Part 990). The basic understanding is that complaints are to be settled through negotiations using NRDA's and other data as needed.

Although the Trustees' MOA and the Georgia Open Records Act allow for factual findings and data used in the settlement to be shared with the public, no information regarding any analyses or recommended methods or models have been made public.

The only justification for denying the public access to information, documents, and reports that have already been shared with the Defendant in the case, is if the State is treating the public as an adverse party. Considering that the DNR serves as the sole Trustee representing the people of the State of Georgia, we recommend the Court acknowledge their fiduciary responsibility to the public and deny the entry of the Consent Decree.

2. Information that the Trustees deem appropriate for public access is incomplete, inaccessible, and difficult to examine.

- A. On December 19, 2019, the State of Georgia announced its proposed settlement with Honeywell.⁸ In response to public outcry, the DNR extended the comment period an additional 30 days to February 18, 2020. During the extended public comment period, however, the DNR website excluded the full civil docket and included broken weblinks to critical information.

The only documents listed on the DNR webpage⁹ include a PDF of the press release, a PDF of the proposed Consent Decree itself, and a hyperlink to the U.S. EPA homepage portal for LCP Chemicals Superfund site.¹⁰ The information posted does NOT include the Complaint filed by the Commissioner of DNR or the Notice of Lodging of Proposed Consent Decree - official documents that comprise the original proceedings of the civil docket and critical information for public understanding of the case and the terms of the settlement. The civil docket was only discovered through a PDF linked to a news article printed in The Brunswick News on December 30, 2019, by Wes Wolfe.¹¹

Additionally, for approximately ten (10) days the DNR website hosting the information for public review included links that were broken.¹² After learning the website contained inoperable links for ten days, OHM officially requested that DNR extend the comment period for at least two additional weeks. The DNR declined the request after apologizing for the inconvenience it has caused¹³ (see Attachment C). With the extended public comment period, the public should have had 40 working days to

⁸ "Settlement Reached with Honeywell to compensate the State of Georgia for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia." Press Release issued by DNR on December 19, 2019. <https://coastalgadnr.org/sites/default/files/crd/pdf/NRDAPressrelease.pdf>

⁹ <https://coastalgadnr.org/settlement-reached-honeywell-compensate-state-georgia-recreational-fishing-losses-due-0>

¹⁰ <https://cumulis.epa.gov/supercpad/cursites/csinfo.cfm?id=0401634>

¹¹ "Legislator, advocates share concerns over settlement." The Brunswick News, December 30, 2019. By Wes Wolfe. https://thebrunswicknews.com/news/local_news/legislator-advocates-share-concerns-over-lcp-settlement/article_b2910942-4e3b-5608-8d2e-cb70ff85ba95.html

¹² Email correspondence between Tyler Jones, Georgia DNR and Rachael Thompson, Glynn Environmental Coalition, January 21, 2020.

¹³ Email correspondence between Melanie Johnson, Deputy Executive Counsel for DNR, and Alice M. Keyes, OHM, January 31, 2020.

review the documents available through the web-based public notice. However, because of the technical failings of the agencies, the public was only afforded 32 working days to review the web-based information.

- B. Publicly available information supposedly accessible through the U.S. EPA's official Administrative Record for the LCP Chemicals site (online Virtual Reading Room) is incomplete and unsearchable in its current physical location – the Brunswick Library, creating insurmountable challenges for public review. In the void of information that is readily available to the public, citizens and those acting in the interest of the public are directed to review information and data through the official U.S. EPA Administrative Record for the LCP Superfund Site and forced to search and discover information on their own.¹⁴ The compact disc (CD) available at the Brunswick Library, and willingly mailed to interested citizens by the public relations team at U.S. EPA is unsearchable and offers no insight into any natural resources damages assessment.

Of particular interest is the Administrative Record for Operable Unit 1 (OU 1) – Marsh, which contains high concentrations of the remaining toxins and has the most direct impact on fishes and shellfish important for recreational fishing. (See comment 4-C below discussing the significant nexus between marsh, recreational fishing and human/animal health.) The 2016 Administrative Record contains a PDF file called "Administrative Record Index for the LCP CHEMICALS GEORGIA INC NPL Site." This index includes 169 documents, reports, correspondence, and assessments related to OU 1 - Marsh, but none of the documents are searchable and none of the documents corresponds to the 8-digit codes used to identify each file on the disc. While the Administrative Record for OU 1 is specific to the marsh, the nexus to fishing and lost recreational fishing is significant

- C. The NOAA website dedicated to holding information, data, and analyses regarding natural resource damages contains only the MOAs among Trustees and between Trustees and Honeywell.

According to Dr. Michele Gielazyn, with NOAA Assessment and Restoration Division and point of contact for the LCP superfund site, NOAA is the lead Trustee in the LCP Superfund case.¹⁵ As such, NOAA maintains both the Damage Assessment, Remediation and Restoration Program webpage¹⁶ and the Natural Resource Damage Assessment & Restoration Data & Visualization website entitled "LCP Chemicals, Georgia NRDA Case Documents Page." The NRDA case document page is designed to host documents and materials the Trustees rely on or consider in the decision-making process for NRDA.¹⁷ The website, however, contains no information related to the NRDA process, despite the fact that at least 28 documents that involve the Trustees and Trustee communications are available in the LCP Superfund Site Administrative Record, available at the Brunswick Library, and 8 of those documents originate from or are addressed to the DNR, State Trustee and plaintiff in the current

¹⁴ Phone conversations with Mr. Jim Brown, representative for State Trustee, December 20, 2019; Phone conversation with Mr. Anthony Sowers, US Fish & Wildlife Service, January 14, 2020; and Phone conversation with Dr Michele Gielazyn, NOAA, January 24, 2020.

¹⁵ Phone conversation with Dr Michele Gielazyn, NOAA, January 24, 2020.

¹⁶ <https://darrp.noaa.gov/hazardous-waste/lcp-chemical>

¹⁷ Natural Resource Damage Assessment & Restoration Data & Visualization website entitled, "LCP Chemicals, Georgia NRDA Case Documents Page" - <https://www.diver.orr.noaa.gov/web/guest/diver-admin-record?diverWorkspaceSiteId=6203>

complaint.¹⁸ The only documents available on this page are the Memoranda of Agreement among the three natural resource Trustees and between the natural resource Trustees and Honeywell. Other superfund websites managed by Trustees (the Kalamazoo River Superfund Site, for example)¹⁹, provide the public with a wealth of information, studies, reports, correspondence, literature reviews, and other important documents that provide the public confidence and assurance that the natural resource damages are being assessed.

Should the State maintain consent on this agreement, the Court must deny the entry of the Consent Decree because the public has been denied our due process right to discover facts, documents and research held by the Trustees pertaining to Lost Recreational Use Natural Resource Damages. Information that should be public is simply not accessible. The public is unable to offer informed comments on the Consent Decree when no information is made available regarding the analyses that underpin the agreement.

3. The Notice of Lodging of Proposed Consent Decree does not comply with the terms and conditions of the Complaint filed and the Consent Decree itself.

In the Notice of Lodging of Proposed Consent Decree (page 2) it states, "The Consent Decree provides for payment of *civil penalty* which will address the Defendant's violations and to protect human health and the environment. The Consent Decree requires the Defendant to pay a *civil penalty* of \$4,000,000 to the State of Georgia. The Consent Decree also provides for stipulated penalties in the event of violations of the Consent Decree by the Defendant," (emphasis added).

Contrary to the Notice of Lodging, Section VI. of the Consent Decree, entitled "Payment by Honeywell" declares, "...the total amount to be paid by Honeywell pursuant to this paragraph shall be deposited and managed by the state for the benefit and use of the state to pay for Natural Resource Restoration Projects proposed by a Project Team and selected by the Commissioner of DNR in accordance with section VII," (emphasis added). And the public notice released by DNR states, "Honeywell will fund \$4 million in natural resource restoration projects to compensate the public for lost recreational fishing caused by the release of hazardous substances from the LCP Chemical facility in Brunswick, Georgia."²⁰ **It is unclear whether the referenced \$4.0 million civil penalty and the \$4.0 million to be directed to natural resource restoration projects are the same \$4.0 million.**

The submitted legal documents include these and other discrepancies or mistakes. For example, the listing of a non-existent entity, "Finfish," to serve on the Project Review Team described in Section 10 was admitted to be a "typo" by a DNR representative at the public information session on January 7, 2002.²¹ Every term and every condition should be scrutinized by all the Trustees and the citizens they represent. The Court should not entertain this Consent Decree as currently written.

¹⁸ Administrative Record Index for the LCP Chemicals Georgia Inc NPL Site (Operable Unit #1) GAD 099303182

¹⁹ Kalamazoo River NRDA Administrative Record for the Natural Resource Trustee Council natural resource damage assessment process - <https://www.diver.orr.noaa.gov/web/guest/diver-admin-record?diverWorkspaceSiteId-6723>

²⁰ "Settlement Reached with Honeywell to compensate the State of Georgia for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia." Press Release issued by DNR on December 19, 2019. <https://coastalgadnr.org/sites/default/files/crd/pdf/NRDAPressrelease.pdf>

²¹ Mr. Doug Haymans, Director of Georgia Coastal Resources Division, in response to comments/questions during public information session hosted by GA DNR and Honeywell, Brunswick Library, January 7, 2020.

4. The settlement is premature, based on the highly unlikely success of a yet-to-be implemented remediation plan that fails to account for rising seas and the resultant erosion of contaminated sediments still pervasive in the marshes around the LCP Superfund Site.

The U.S. EPA has not yet finalized remediation plans and projects for the LCP Superfund Site. The Record of Decision (ROD) for OU 3 – Uplands – has not yet been released, and the selected remedy for OU 1 – Marsh – is only in the pilot project stage. Not knowing if the remediation will succeed, Lost Recreational Use Natural Resource Damages are likely to continue into the future. It is unknown to the public whether future compensation has been included in the proposed settlement.

- A. Of specific concern and relevant to this Consent Decree is the likely failure of the remedy selected for OU 1, which depends heavily on a thin layer cap of sand to contain the contaminants in the marsh.²² The feasibility study conducted by the U.S. EPA for OU 1 describes the Turtle River estuary system in this way: "...tidal hydrodynamics have a significant effect on the transport of waterborne substances (e.g. suspended sediment, chemicals) within the Site." It goes on to say that the seven- to eight-foot tide range, "...produces strong vertical mixing in the water column in a relatively long horizontal excursion of water."²³ The feasibility study also states that current velocities are relatively high within the tidal creeks during flood tide, and that sediment erosion is likely to occur in some portions of the tidal creek during spring tide conditions because the current velocities are high enough to exceed the critical shear stress of surface sediments.²⁴ Lastly, U.S. EPA Guidance on such remediation actions states, "...typically, sand caps are used in low velocity waterways to protect them from scouring by strong (high energy) currents."²⁵ With the 7-8 foot tidal range in the Turtle River estuary, the site cannot be considered low energy therefore the effectiveness of the thin layer cap is highly questionable. As such, the public anticipates the re-release and re-distribution of the toxic chemicals of concern.

Again, the remedy for OU 1 has not yet moved beyond the pilot project stage to determine its appropriateness and its effectiveness. It was only in February 2018, that the U.S. EPA initiated the 2/3-acre pilot study of thin layer cap component of the selected remedy.²⁶ Any settlement should only be negotiated after the suite of remedy components has proven to be effective.

- B. The settlement is based on remediation plans that fail to account for the rising seas experienced in Glynn County and expected to increase over time. The remediation plan for OU3 – Uplands - proposed in 2019, states that the most common risk facing the majority of superfund sites in the country is increased flooding due to rainier conditions brought about by warming temperatures.²⁷ Given the fact that sea level on

²² Record of Decision – LCP Chemicals Site Operable Unit 1 – Marsh, September 2015, US EPA Region 04 - https://www.justice.gov/sites/default/files/enrd/pages/attachments/2016/08/01/appendix_a_as_filed_part_1.pdf

²³ LCP Feasibility Study 2014 - https://www.epa.gov/sites/production/files/2015-04/documents/lcp_feasibility_study_june_2_2014.pdf

²⁴ Ibid.

²⁵ EPA Technical Innovation and Field Services Division - <https://clu.in.org/issues/default/focus/sec/Sediments/cat/Overview/>

²⁶ News Release from Region 04 "EPA Announces Start of Marsh Work Pilot Study as the LCP Chemicals Superfund Site in Brunswick, Ga." February 23, 2018

²⁷ US Government Accountability Office, Superfund, EPA Should Take Additional Actions to Manage Risks from Climate Change, October 2019. Available online: <https://www.gao.gov/assets/710/702158.pdf>

the Georgia coast has risen on average 3mm a year since 1933, translating to 11 inches in 87 years,²⁸ and that models predict that on our coast sea level will rise up to 6 more inches by 2031.²⁹ the Consent Decree must allow for future claims due to changing sea levels, storms, and other natural disasters. At the very least, DNR should reserve the right to claim damages from any contaminants re-released as a result of sea level rise. Unfortunately, DNR is accepting the illogical condition that the State does not reserve the right to seek recovery of lost recreational uses from damages caused by the "re-exposure, resuspension, or migration by natural causes."³⁰

- C. Contaminated marsh leads to contaminated fish and wildlife. In 1991, when PCBs and mercury were discovered to be in such high levels in the marshes around the LCP site, the first fish consumption advisories and fish closures were established for the area.³¹ Because the toxins, especially PCBs, stay in the environment for a long time,³² they will remain in the marshes well into the future further contaminating the people, animals, and birds that continue to consume the fish from the area.³³

Most, if not all, of the coastal finfish and shellfish in the Turtle River and its tributaries spend a portion of their lives in the marshes, feeding and growing. PCBs, Aroclor 1268, bioaccumulate (or build up in fatty tissue) in fishes that spend time in and migrate from the Turtle River estuarine area, and scientific studies have confirmed the extensive dispersal of the contaminants still found in the marsh. Robinson, et al (2015) found high levels of Aroclor 1267 in fish-eating least terns located 70 miles north of the LCP site demonstrating the toxins can spread widely due to bioaccumulation and trophic transfer.³⁴ Wirth, et al (2014) found Aroclor 1268 in levels of concern in fish and dolphins near Sapelo Island, 40 miles north of the contaminated marshes of the Turtle River.³⁵

- D. Lastly, the U.S. EPA Superfund Human Exposure Dashboard provides a status of the Human Exposure indicator for Superfund sites throughout the country. The LCP Superfund Site in Brunswick is listed as "Not under control," and specifically described in the following way:

"As of September 2019, EPA considers the LCP Chemicals Georgia site to be "Human Exposure Not Under Control" because EPA is aware that people are

²⁸ NOAA Tides and Currents -

<https://tidesandcurrents.noaa.gov/waterlevels.html?id=8670870&bdate=19500101&edate=20171231&units-standard&timezone-GMT&interval-m>; Dr. Clark Alexander Presentation "Sea Level Rise and its impacts on Skidaway Island" <https://www.skio.uga.edu/resources/sea-level-rise-links/>

²⁹ US Climate Resilience Toolkit: Source NOSS Climate.gov available online:

<https://toolkit.climate.gov/image/2450>

³⁰ Consent Decree - Section 16 "Special Reservations Against Honeywell."

³¹ ATSDR Final Report – Consumption of Seafood and Wildlife Contaminated with Mercury Brunswick, Glynn County, Georgia, July 1999

³² U.S. EPA Proposed Plan Summary for LCP Chemicals Marsh Brunswick, GA. November 2014.

https://www.epa.gov/sites/production/files/2015-04/documents/lcp_proposed_plan_summary_november_2014.pdf

³³ https://thebrunswicknews.com/follow-the-warnings-and-stop-eating-fish-from-lcp-site/article_21201db3-c143-5cfd-9717-7b9f5f6eca86.html:

³⁴ Robinson, Gabrielle, Gary L. Mills, Angela L. Lindell, Sara H. Schweitzer, and Sonia Hernandez. "Exposure to mercury and Aroclor 1268 congeners in least terns (*Sterna antillarum*) in coastal Georgia, USA. *Environ. Sci. Processes Impacts*. 2015, 17, 1424.

³⁵ Wirth, E.F., P.L. Pennington, C. Cooksey, L. Schwacke, L. Balthis, J. Hyland, M.H. Fulton. "Distribution and sources of PCBs (Aroclor 1268) in the Sapelo Island National Estuarine Research Reserve. *Environ Monit Assess* (2014) 186:8717-8726 DOI 10.1007/s10661-014-4039-4.

consuming contaminated fish, despite warning signs and fish advisories. The levels of methylmercury and polychlorinated biphenyls (primarily Aroclor 1268) detected in fish fillets resulted in a fish consumption advisory for the Turtle River/Brunswick Estuary issued by the Georgia Department of Natural Resources from 1995 to the present. EPA issued the cleanup plan for the marsh (Operable Unit 1) in September 2015, is currently conducting the remedial design (expected completion in 2020) and expects to begin the remedial action in 2021..."³⁶

It is premature for DNR to settle for lost natural resource uses when the remediation plan for the LCP Superfund site is incomplete and toxins of concern to continue to be released into the environment. Impacts to the recreational uses of surrounding tidal waters are likely to be in perpetuity.

5. The settlement amount is unreasonable and underestimates the cost of compensating the community for the past, current, and future Lost Recreational Fishing Use Natural Resource Damages the Glynn County community has experienced due to the contamination from the LCP Superfund Site.

Honeywell claims liability for the disposal of PCBs, Aroclor 1268, and other hazardous substances, "... as well as for damages due to injury to destruction of our loss of natural resources belonging to managed by controlled by or pertaining to the state of Georgia including the cost of assessing such damage caused by the release of hazardous substances from the Site."³⁷

The Consent Decree directs Honeywell to pay DNR \$4 million for "Lost Recreational Use Natural Resource Damages." The public notice states the funds will be used for "lost recreational fishing,"³⁸ which was further defined in the public information session on January 7, 2020, to be a category of loss that includes losses to bird watching opportunities, hunting opportunities, and boating, among other things.³⁹

Four million dollars significantly understates the recreational use losses the community has suffered over the past 26 years. A \$4 million settlement can be interpreted as the State accepting \$142,000 a year for lost recreational opportunities. The settlement amount is inadequate based on evidence from studies of recreational losses from other Superfund sites with similar contaminants:

- A. In 2002 TAMS Consultants, Inc. was contracted to review available data for the LCP site and the surrounding estuary in Brunswick. The final report included an estimated cost of remediation for the entire estuary system (totaling 62 square miles or 39,690 acres) and the localized area of the Turtle River estuary closest to the LCP superfund site (totaling 5.5 square miles or 3,500 acres). TAMS cost estimates were intended for scoping discussion purposes and not as recommendations for remediation, but the

³⁶ U.S. EPA Superfund Human Exposure Dashboard - <https://www.epa.gov/superfund/superfund-human-exposure-dashboard>

³⁷ Complaint filed by Commissioner of *DNR v. Honeywell* – Section 15.

³⁸ "Settlement Reached with Honeywell to compensate the State of Georgia for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia." Press Release issued by DNR on December 19, 2019. <https://coastalgadnr.org/sites/default/files/crd/pdf/NRDAPressrelease.pdf>

³⁹ Mr. Jim Brown, GA Environmental Protection Division, Response to comments/questions during public information session hosted by GA DNR and Honeywell, Brunswick Library, January 7, 2020.

scale of the estimates were determined using contamination in similar superfund sites around the country⁴⁰ and should factor into the settlement agreement.

TAMS estimated the cost of remediating the damages caused by mercury and PCBs in the 62 square miles of estuary system to be \$29.2 billion.⁴¹ Adjusted for inflation that amount would total \$41.9 billion today. TAMS also calculated the cost of remediation for the Turtle River estuary only. The cost of remediating damages in the 5.5 square miles of local estuary totaled \$3.4 billion.⁴² The local amount adjusted for inflation totals \$4.9 billion today.

Because the TAMS study investigated all the natural resource damages to the Turtle River estuary and surrounding area caused by operations on the LCP Superfund site, the relevance of the findings is considerable. The revelation of the findings demonstrates that the State is settling for far less than the damages inflicted on the people and wildlife that depend on a healthy Turtle River estuary. TAMS estimates are to remediate all of the natural resource losses, and Lost Recreational Fishing Use Natural Resource Damages is only a portion of this estimated remediation amount. **Put into perspective, \$4 million is only 2/25^{ths} of one percent of the estimated \$4.9 billion cost of remediating the damages in the Turtle River estuary caused by chemical operations at the LCP Superfund site.**

- B. A case study of compensation for recreational fishing comes from the Great Lakes region of the United States. In 2006, after 23 years of negotiations, the New York State Department of Environmental Conservation (DEC) was awarded \$12 million to offset damages to sportfisheries in the Niagara River, Lake Ontario and St. Lawrence River systems.⁴³ **Adjusted for inflation, NY DEC would have been granted \$15.2 million today for projects to improve fishing, and fishing access along the affected waterways.**
- C. Around the same time DNR and Honeywell announced the \$4 million settlement for damages in the Turtle River, U.S. EPA Region 05 announced a \$245 million settlement for PCB remediation in Michigan. The settlement will address damages caused by PCBs discharged by Allied Paper, Inc.⁴⁴ **On December 11, 2019, the federal and Michigan state Trustees partially settled for \$25 million dollars for natural resource damage claims from PCB discharge into the Kalamazoo River.** The \$25 million is in addition to \$135.7 million cleaning up three contaminated operable units surrounding the river, \$76.5 million paid to U.S. EPA for clean-up activities, and \$6 million to the State of Michigan for past and future costs.⁴⁵

⁴⁰ TAMS Consultants, Inc - "An Examination of AlliedSignal-Related Contamination in the Estuaries of the Turtle and MacKay Rivers." (March 18, 2002). Prepared by TAMS Consultants, Inc. for Butler, Wooten, Fryhofer, Daughtery & Sullivan and Bell, James, & Bentley.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Israel, Brian D. Esq. (2019) "State-by-State Guide to NRD Programs in All 50 States and Puerto Rico". Available online - <https://www.arnoldporter.com/-/media/files/perspectives/publications/2019/07/state-by-state-nrd-guide.pdf> and [http://bassfan.com/news_article/2699/love-canal-funds-\\$12-million-fisheries-wish-list-#Xka7BSzZPFZ](http://bassfan.com/news_article/2699/love-canal-funds-$12-million-fisheries-wish-list-#Xka7BSzZPFZ)

⁴⁴ Kalamazoo River Natural Resources Damage Assessment - https://www.fws.gov/midwest/es/ec/nrda/KalamazooRiver/index.html?utm_campaign=kalamazoo+river+settlement&utm_medium=pr&utm_source=govdelivery

⁴⁵ EPA News Release from Region 05, "EPA and DOJ announce \$245 million agreement for clean up at the Allied Paper Inc./Portage Creek/Kalamazoo River Superfund Site. December 11, 2019.

Given the extent of the damage caused by contamination from the LCP operations in the Turtle River estuary and considering the settlement amounts from similar sites and similar contaminants, the public understandably questions how \$4 million is a reasonable settlement to cover 26 years of previous Lost Recreational Use Natural Resource Damages and future lost recreational opportunities that will continue to cause suffering as a result of the LCP Superfund site contamination.

6. The settlement funds are to be applied toward projects that will increase public access to waters that still contain dangerously high levels of toxins, inequitably increasing environmental injustice in Glynn County.

Section VII of the Consent Decree, titled "Natural Resource Restoration Projects" states that the settlement funds will be applied toward the, "...costs of restoration, rehabilitation, or replacement of injured natural resources, and/or acquisition of equivalent resource, related to Lost Recreational Uses." In the information session hosted by Honeywell and DNR on January 7, 2020, the projects described as possible candidates for funding included boat ramps, fishing piers, and docks⁴⁶ – all projects designed to increase the exposure of Glynn County residents to a contaminated environment, contaminated waters, contaminated fish, and contaminated seafood.

Even after previous excavation and remediation efforts, dangerously high levels of PCBs, mercury, and cancer-causing polycyclic aromatic hydrocarbons (PAHs) remain in the marshes and tidal creek beds of the Turtle River system. These toxins have the greatest impact on the subsistence fishermen and women who depend on local fish and seafood for sustenance. The LCP Superfund site is surrounded by other industries and the ARCO neighborhood - named for the petroleum refinery that was located in the area, Atlantic Richfield Company (ARCO).⁴⁷ The majority of the population in the ARCO community is predominantly African American women, children, and elderly, as well as a growing immigrant population.⁴⁸ Proximity to pollution and consequentially low property values has disproportionately impoverished this area. In the neighborhood around the superfund site, 49% of households lived at or below the poverty level in 2017.⁴⁹ Specifically, the ARCO area contains one of Glynn County's highest concentrations of elderly and persons in poverty. Demographics show that 57.7%, on average, of all the persons living in this area are persons in poverty.⁵⁰

The terms of the Consent Decree will disproportionately impact those communities of Brunswick surrounding the LCP Superfund Site, many of which are impoverished. Allowing the entry of the Consent Decree will perpetuate environmental injustice against subsistence fishermen and women and further endanger future generations if the proposed projects provide greater access to contaminated waters and wildlife.

In conclusion, we urge the State to withdraw the proposed Consent Decree or withhold consent to its entry. As this comment letter summarizes, the State of Georgia is improperly treating the public as adversary and denying citizens their due process right to relevant data, facts, and

⁴⁶ Mr. Doug Haymans, Director of Georgia Coastal Resources Division, Response to comments/questions during public information session hosted by GA DNR and Honeywell, Brunswick Library, January 7, 2020.

⁴⁶ 40 CFR §300.605

⁴⁷ ATSDR Public Health Assessment for LCP Chemicals Superfund Site and Adjacent Areas, Dry-land Soils, Brunswick, GA (Final Release), April 16, 2014.

⁴⁸ US Census Bureau American Community Survey, 2013.

⁴⁹ US Census Bureau American Community Survey Data Files, 2017.

⁵⁰ US Census Bureau American Community Survey, 2013.

documents critical to submitting informed comments. Also, the terms of the settlement described in the proposed Consent Decree are inadequate to compensate for the Lost Recreational Use Natural Resource Damages the people of the State of Georgia have suffered as a result of contamination released from the LCP Superfund site. Alternatively, we urge the District Court to deny entry of the Consent Decree because the terms are inappropriate and inequitable and are not in the best interest of the people of the State of Georgia.

Thank you for your timely consideration of these comments, and OHM looks forward to your response. Contact me at any time should you have further questions or concerns – alice@onehundredmiles.org or 912-264-4111.

Sincerely,



Alice M. Keyes
VP of Coastal Conservation

ATTACHMENTS

Copy: Pam Scully, U.S. EPA - scully.pam@epa.gov
Commissioner Mark Williams, GA DNR - mark.williams@dnr.ga.gov
Dr. Michele Gielazyn, NOAA - michel.gielazyn@noaa.gov
Dr. Anthony Sowers, U.S. Fish and Wildlife Service - anthony_sowers@fws.gov

Attachment A

Memorandum of Agreement between Natural Resource Trustee and Honeywell
International Regarding the LCP Site, Brunswick, GA

**MEMORANDUM OF AGREEMENT BETWEEN
THE NATURAL RESOURCE TRUSTEES AND HONEYWELL INTERNATIONAL
REGARDING THE LCP SITE, BRUNSWICK, GEORGIA**

Section One: Introduction and Background

I. Introduction

This Memorandum of Agreement (MOA) is by and between the Georgia Department of Natural Resources ("Georgia"), the National Oceanic and Atmospheric Administration of the United States Department of Commerce ("NOAA"), and the United States Department of the Interior, acting by and through the United States Fish & Wildlife Service, ("USDOI"), (collectively, "the Trustees") and Honeywell International Inc. ("Honeywell"). The Trustees and Honeywell are hereinafter collectively referred to as "the Parties." The provisions of this MOA shall apply to, and be binding upon, the Parties to this MOA, their agents, successors and assigns.

The Trustees enter into this MOA in furtherance of their responsibilities to evaluate and, if appropriate, assert claims for damages for injury to, destruction of, or loss of natural resources and/or natural resource services resulting from the release of hazardous substances, and to plan and implement actions to restore, replace, or acquire the equivalent of the injured resources or resource services using the recovered damages. Natural resources subject to this MOA include all natural resources as defined in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.* which belong to, are managed by, held in trust by, appertain to, or are otherwise controlled by the Trustees.

II. Historical Background

The LCP Site was placed on the National Priorities List in June, 1996 (61 Fed. Reg. 30510). Honeywell and other parties including but not limited to LCP, Dixie O'Brien, Atlantic Richfield Company ("ARCO") and Georgia Power Company ("Georgia Power") have been identified as potentially responsible parties ("PRPs") under CERCLA. CERCLA PRPs are potentially liable for releases of hazardous substances from the LCP Site affecting natural resources as described above. Honeywell, ARCO and Georgia Power, working with the United States Environmental Protection Agency ("EPA") are presently concluding a Remedial Investigation and Feasibility Study ("RI/FS") in order to determine the nature and extent, including associated ecological risks, of the releases from the LCP Site and to provide for the appropriate remediation thereof. Honeywell, ARCO and Georgia Power, have conducted removal and remedial actions at the LCP Site pursuant to EPA Administrative Orders.

For the purposes of this MOA, references to the "LCP Site" shall include any location at which hazardous substances released from and at the LCP Property have come to be located. The LCP Property is described on Attachment A to this MOA.

III. Authority

The Trustees enter into this MOA in accordance with the legal authorities provided to each Trustee by §107(f) of CERCLA, 42 U.S.C. §9607(f), and any other applicable federal and state laws including Subpart G of the NCP, 40 C.F.R. §300.600-300.615, and the Natural Resource Damage Assessment Regulations at 43 C.F.R. Part 11. The National Contingency Plan (NCP), 40 C.F.R. Section 300.615(d)(2) provides Trustees and Potentially Responsible Parties (PRPs) the opportunity to negotiate cooperative agreements that establish the terms of PRP-financed or PRP-conducted assessments. The CERCLA natural resource damage assessment and restoration regulations also contemplate PRP-financed and/or PRP-conducted assessments.

IV. Purpose

It is the Parties' intention to develop a process that serves their commitment to a cooperative approach and that is sufficiently flexible to accommodate additional participants and experience gained in the assessment process. This MOA is intended to provide for the development of a cost-effective and efficient process to determine and quantify injury to, destruction of, or loss of natural resources and/or services and determine and implement the most appropriate approach to restore, replace, rehabilitate, or acquire the equivalent of those natural resources and/or services.

A purpose of this MOA is to recognize, and facilitate coordination and cooperation with respect to, the Parties' common interests in:

- 1) Determining whether natural resources have been affected as a result of releases at or from the Site;
- 2) Compensating the Trustees for specific costs incurred in conducting their natural resource damage assessment and restoration responsibilities; and
- 3) If a determination is made that natural resources and/or their services have been injured, evaluating and negotiating an agreement relating to restoration of those injured natural resources and natural resource services.

An additional purpose of this MOA is to provide a framework for a cooperative assessment of damages resulting from the LCP Site, and cooperative development of restoration strategies, where appropriate. Specifically, this MOA is intended to serve the common interests of the Parties by outlining cooperative mechanisms to achieve:

- (1) Coordination of appropriate data collection and assessment activities in order to determine the nature, extent and severity of any injuries to natural resources and/or natural resource services as a result of releases at or from the LCP Property;
- (2) Integration, to the extent practicable, of natural resource assessment and restoration activities with the remedial process currently underway at the Site;
- (3) Establishment of mechanisms for PRP-financed cooperative assessment and restoration activities; and

- (4) Facilitation of the resolution of any claims for natural resource damages arising from the releases at or from the LCP Property, including those claims that may be residual to remedial actions.

Section Two: Establishment of A Coordinating Committee

I. General Purpose

To advance the purposes of this MOA, and in exchange for the mutual considerations contained herein, the Parties agree to establish a Coordinating Committee ("the Committee") that shall consist of one representative of each of the Parties. Each representative may bring such advisers to meetings as deemed appropriate. The Committee shall be chaired by a Trustee representative.

The Parties agree that the Trustees retain the right to make all final decisions with regard to the discharge of their duties under CERCLA and other applicable law.

II. Agreement to Use Good-Faith Efforts to Reach Consensus

In conducting its duties, the Committee shall use its best efforts to reach consensus. For the purposes of this MOA, consensus means an agreement of all Parties that they can support an idea, proposal, alternative, or recommendation -- recognizing that not every Party supports every idea, proposal, alternative or recommendation with equal enthusiasm. The Parties will use good faith efforts to reach consensus on the processes, studies, or other actions necessary to 1) define and implement an appropriate assessment process for the Site and 2) define and implement an appropriate restoration strategy for the Site, to the degree that such restoration is necessary

III. Designation of Coordinating Committee Members

Each Trustee hereby designates the technical contact person listed below as its representative member of the Coordinating Committee, and as its representative to implement this MOA on its behalf. Each Trustee also hereby designates a legal contact person. All written communications, submission of data and notices of a technical nature shall be sent to the technical contact person and all written communications, submission of data and notices of a legal nature shall be sent to the legal contact person. A Trustee may change its designated representatives by providing written notice of such a change to the other members of the Coordinating Committee.

Honeywell hereby designates the following technical contact person listed below as its representative member of the Coordinating Committee, and as its representative to implement this MOA on its behalf. Honeywell also hereby designates its legal contact person. All written communications, submission of data and notices of a technical nature shall be sent to the technical contact person and all written communications, submission of data and notices of a legal nature shall be sent to the legal contact person. Honeywell may change its designated representatives by providing written notice of such a change to the other members of the Coordinating Committee.

DESIGNATED MEMBERSHIP OF COORDINATING COMMITTEE AND LEGAL CONTACTS:Coordinating Committee Member For DNR:

Bill Mundy
 Program Manager II
 Hazardous Waste Management Branch
 Environmental Protection Division
 Floyd Towers East, Suite 1154
 2 Martin Luther King, Jr. Blvd.
 Atlanta, GA 30334
 404-657-8616
 404-651-9425 (fax)

Legal Contact for DNR

Timothy J. Ritzka, Esq.
 State of Georgia
 Assistant Attorney General
 40 Capital Square, SW
 Atlanta, GA
 30334-1300
 404-657-3976
 404-651-6341 (fax)

Coordinating Committee Member for USFWS:

Keith Hastic
 United States Fish and Wildlife Service
 247 South Milledge Avenue
 Athens, GA 30605
 706-613-9493, Ext. 27
 706-613-6059 (fax)

Legal Contact for USFWS:

Harriet M. Deal, Esq.
 United States Department of the Interior
 Regional Solicitor's Office
 75 Spring Street, SW, Room 304
 Atlanta, GA 30303
 404-331-4447 (ext. 231)
 404-730-2682

Coordinating Committee Member for NOAA:

Norman Meade
 Damage Assessment Center
 1305 East West Highway
 Silver Spring, MD 20910
 301-713-3038 (ext. 201)
 301-713-4387 (fax)

Legal Contact for NOAA:

Sheila O'Brien, Esq.
 9721 Executive Center Dr. N.
 Suite 137
 St. Petersburg, FL 33702
 727-570-5587
 727-570-5376 (fax)

Coordinating Committee Member For Honeywell:

Mark Kamilow
 Honeywell International
 P.O. Box 1139
 Morristown, NJ 07962-1139
 973-455-2119
 973-455-3082 (fax)

Legal Contact for Honeywell

Charles H. "Chet" Tisdale, Esq.
 King & Spalding, LLP
 191 Peachtree Street
 Atlanta, GA 30303-1763
 404-572-4820
 404-572-5139 (fax)

David P. Cooke, Esq.
 Honeywell International
 P.O. Box 2245
 Morristown, NJ 07962-2245
 973-455-2817
 973-455-5904 (fax)

IV. Duties of the Coordinating Committee

The functions of the Coordinating Committee shall include, but not necessarily be limited to the following:

1. Identification of potential injuries to be evaluated;
2. Development and implementation of cooperative assessment plans for injury determination, quantification and restoration scaling;
3. Evaluation of existing data to determine its suitability for injury determination, quantification and restoration scaling and development of plans for obtaining additional data, as required;
4. Identification of opportunities for coordinating remedial and assessment activities;
5. Evaluation of projects and development of plans for the restoration of any injured resources;
6. Resolution of disputes related to this MOA as provided in the dispute resolution provisions below; and
7. Development and implementation of public participation activities.

The Committee may establish Technical Working Groups to assist it in assessment or restoration activities, as necessary.

Section Three: Agreement on Cooperative Studies

I. General Purpose of Cooperative Studies

The Parties agree that there is a need to collect data and conduct assessments. To avoid duplication of effort and to reduce overall assessment costs, the Parties shall attempt to reach consensus on: 1) data collection protocols and data requirements, 2) assessment and restoration scaling methods, 3) restoration implementation plans, 4) quality assurance/quality control standards, 5) selection of principal investigators and their assistants, and 6) use of existing data and studies, where appropriate.

The Parties stipulate that the process for natural resource damage assessment described in this MOA, including all incorporated Attachments, represent appropriate and reliable scientific methodologies for determining natural resource injuries and losses attributable to the LCP Site and for determining appropriate restoration measures.

The Parties further agree to utilize methods and models for assessment that represent appropriate and reliable scientific methodologies for determining injuries and appropriate restoration measures with respect to the LCP Site. It may be necessary to work with several methods and models before determining the most appropriate method or model. Once agreement is reached to use a particular method or model, such agreement will be incorporated as an attachment to this MOA.

II. General Procedures for Cooperative Studies

A. Procedures for Proposal of a Cooperative Study:

Any Coordinating Committee member may propose a Cooperative Study. Such member who wishes to propose a study shall produce a "Proposed Cooperative Study Plan" which shall include, at a minimum, a description of the following components of the proposed Cooperative Study:

1. Purpose and Need
2. Study Design/Methods
3. Qualifications for, or designation of, a Principal Investigator
4. Analytical Procedures to be conducted
5. Quality Assurance/Quality Control plan (QA/QC)
6. Work Product expected
7. Expected Duration
8. Budget

Upon completion and review of the Proposed Cooperative Study Plan, the Committee may agree, by unanimous consent, to implement the Cooperative Study in accordance with the proposed Plan, or to implement the proposed Study in accordance with a modification agreed to by unanimous consent of the Committee. Upon unanimous agreement of the Committee, the Proposed Cooperative Study Plan will become a Final Cooperative Study Plan. (hereinafter, "Study").

A final Plan for each Study implemented under this MOA shall be attached to this MOA, and all work or contracts related to the implementation of a Study must be in accordance with the requirements of this MOA.

The Parties agree that, unless otherwise agreed to, all aspects of a Study, including but not limited to the eight components of a Study Plan discussed above, may be subject to public access and information availability requirements under applicable State and Federal law.

B. Designation of Study Contacts:

A representative of each of the Parties may be designated as a contact point for issues related to a particular Study, and that representative will be known as the "Study Contact" with respect to that Study.

C. Procedure for Modification of a Cooperative Study Plan

If a Party decides to modify a Study, the Party requesting such modification will notify the respective Study Contacts and describe the modification prior to implementation. Approval to modify a Cooperative Study Plan requires unanimous consent of the associated Study Contacts. Such consent on behalf of each of the Study contacts may be given either orally or through written means.

D. Procedure for Selection of Principal Investigator to Conduct Cooperative Studies

Performance of all or part of a cooperative study shall be undertaken by a mutually agreed upon Principal Investigator. A Principal Investigator may be an employee of, or contracted representative of, any of the Parties. Selection of a Principal Investigator(s) shall require unanimous consensus of the Coordinating Committee and documentation by written agreement among all of the Parties. The Parties agree that, prior to retention of a mutually agreed upon Principal Investigator(s), such Principal Investigator(s) must disclose to the Parties potentially conflicting relationships. The Parties further agree to require that all contracts for services of a Principal Investigator(s) shall contain reasonable and appropriate strictures and controls to prevent the transfer of privileged or confidential information to any Party outside this MOA, until such time as the information is made part of the Administrative Record, unless required by statute or judicial order.

F. Cooperative Study Dispute Resolution:

Any disputes arising from the conduct or implementation of a Study; or the methodology of such a proposed or agreed-to study; or the compliance of a Study with established protocols, shall first be addressed by the Technical Working Group established to implement such Study. If the Technical Working Group in question cannot adequately resolve the dispute within fifteen (15) working days, or if no Technical Working Group has been designated to oversee and implement the Study, then the matter will be referred to the Coordinating Committee for resolution. To the extent practicable, notice of a dispute shall be provided at least thirty (30) calendar days prior to the initiation of any field, analytical, or other assessment work that is the subject of the disagreement. Study implementation shall continue during the period of dispute unless the Trustees provide a notice of suspension to the Principal Investigator of the Cooperative Study. Any further disputes with respect to Cooperative Studies, or any other matter disputed in the course of implementing this MOA, will be resolved in accordance with Section Six: "Dispute Resolution" of this MOA.

F. Withdrawal of Funding for A Cooperative Study Plan:

Honeywell shall not be released from its obligation to fund a Study: (1) so long as the study is conducted consistently with an established Final Cooperative Study Plan, and/or modifications of that Study made in accordance with the provisions of this MOA; and (2) so long as the study or the continuation of such study is an appropriate and reliable scientific methodology for determining natural resource injuries and losses attributable to the site or for determining appropriate restoration measures. If Honeywell refuses to continue to fund an agreed-upon Cooperative Study, the Trustees reserve the right to fund the study and to seek reimbursement for such costs from Honeywell.

G. Finalization of Cooperative Study:

Upon completion of a Study, the Principal Investigator shall produce a draft Report describing the study and its conclusions and provide copies of that report to each member of the Coordinating Committee. The Coordinating Committee will review such Report, including review of any comments submitted to the Committee from members of the Committee with regards to the Report, and provide comments, questions, or recommendations for suggested revision to the Principal Investigator. With reference to the Report, the Principal Investigator shall consider all comments submitted to it from Committee members, and explain, in writing,

why any comments were rejected. Following such a comment period, the Principal Investigator shall produce and provide to the Committee members a final Report of the Cooperative Study. Timelines for providing draft and final reports, submitting comments and considering comments will be established for each Cooperative Study by the Technical Working Group for that Study, on a case-by-case basis.

H. Use of Existing Data and Studies:

The Parties shall develop an inventory of existing data and studies. Such existing data and studies may be utilized, where appropriate, in whole or in part, if agreed to by all of the parties, to avoid duplication and to take advantage of the work previously performed at the Site.

I. Contracting Agreements with Respect to Cooperative Study Plans

The Parties agree that no one Party to this Agreement shall exclusively manage or initiate all of the contracts associated with Cooperative Study Plans. For those studies where Honeywell contracts with a third party and/or Principal Investigator, Honeywell shall pay the party conducting the study in accordance with the budget for the study and the provisions of the contract(s). For those studies where a Trustee performs a study and/or contracts with a third party or Principal Investigator, Honeywell shall reimburse the Trustee in accordance with the budget for the study and the provisions of the contract(s). Multi-year contracts and/or study budgets may be authorized as one-time only expenditures and will not require budgetary approval on an annual basis, so long as the approved budget is adhered to. Payment in accordance with the budget shall be made only if the work is consistent with the budget and the agreed to Cooperative Study Plan.

III. Procedures Relating to Cooperative Study Data

The Parties agree that any data collected pursuant to a Cooperative Study, and any existing data which the parties agree to use, including the associated study design, data collection methodologies, and quality assurance procedures, shall be admissible evidence in any civil judicial or administrative proceeding between or among the Parties relating to natural resource damages arising from the LCP Site.

A. Data Collection, Availability, Quality Control and Retention

i. Notice of Data Collection Activities

The Study Contacts, or their agents and/or designees, may be present during the data collection phase of any Study. Notice of proposed data collection activities must be made to the appropriate Study Contacts no less than ten (10) working days before such activities are conducted. The Study Contacts are responsible for providing this notice of data collection activities to their respective agency or organization. The Study Contacts, and/or their designees, shall have the right to observe and review the performance of all laboratory work conducted during implementation of a Study to the extent permitted by laboratory protocols.

ii. Data Collected by Human Respondents:

The Parties may agree, in the case of data collection from human respondents (such as surveys or interviews), that the presence of all Parties and the sharing of complete data may impede the

collection of accurate, complete and candid responses. In such cases, the Parties shall agree on procedures for collection and sharing of such data that depart from the requirements of the previous paragraph (such as limiting the number of individuals present, including representatives of Honeywell, employing neutral interviewers using established, reliable, scientific methodologies for questions asked in surveys, aggregation of data prior to dissemination to protect the confidentiality of individual respondents, etc.) to the extent necessary to promote the accuracy and candor of the responses.

iii. Data Availability:

Any data collected or records generated in the course of implementation of a Study shall be available to the Study Contacts, and/or their designees. Such data shall be available in both paper and electronic format. The Study Contacts, Technical Working Group and Coordinating Committee shall have unencumbered access to, and free use of, all data collected during the course of a Cooperative Study.

Upon completion of all of the elements of a Study, the Study Contacts shall be provided, within a reasonable time frame and simultaneously, with a summary report of the data resulting from such Study, including all "raw data" generated. Each Study Contact will provide notice to their respective agency of the availability of such raw data. Raw data is not necessarily to be considered validated data.

iv. Quality Assurance/Quality Control:

All data collection activities pursuant to a Cooperative Study must be in accord with the Quality Assurance/Quality Control (QA/QC) Plan identified in the Study Plan established by the Technical Working Group. Any Party who wishes to assert that a Study is not being conducted in accordance with the established QA/QC procedures must provide written objection to such activities, along with a detailed description of the basis for such objection, within ten (10) days of learning of such potential discrepancies relating to QA/QC procedures, to the Coordinating Committee. The Coordinating Committee may, at its discretion, determine whether or not the Study shall continue in light of such objections.

v. Data Retention:

All samples taken in the course of a Cooperative Study, or records or data generated in the course of such Study, shall be retained, unless and until otherwise agreed to in writing by the Technical Working Group. The method and duration of such retention, and the selected repository of the samples, shall be specified in the QA/QC plan, when practicable. The Technical Working Group may revisit the retention standards specified in a QA/QC plan, where appropriate, after completion of each Study.

B. Interpretation of Data

1. Agreement to Employ Good Faith Efforts:

The Parties will employ good faith efforts to reach agreement on the interpretation of data or other information generated in the course of a Study.

ii. Report of Findings:

Within ninety (90) days following submission of a Final Report by the Principal Investigator of the Study to the Coordinating Committee, the Coordinating Committee shall in good faith seek to reach an agreement in a "Report of Findings and Conclusions" with respect to any Cooperative Study, which interprets data and reaches conclusions. If an agreement is reached on all or part of the findings and conclusions, the Parties will enter into a stipulation with respect to the agreed upon findings and conclusions. This stipulation will be binding on the Parties. The Parties shall explain the basis for any disagreement on any finding or conclusion.

iii. Reservation of Rights With Respect to Data Interpretation:

Each Party to this MOA reserves its right to produce separate findings and conclusions with respect to the data analysis and data interpretation relating to any Study. In the event that the Parties fail to reach consensus on the interpretation of, and conclusions to be drawn from, data collected during such a Study, the Parties expressly reserve the right to produce and present separate and independent interpretations and conclusions concerning such data.

Section Four: Agreement on Implementation of Independent Studies

While this MOA remains in effect, the Parties agree not to undertake any independent injury assessment or quantification study unless such study proposal has been first presented to the Coordinating Committee for consideration as a Cooperative Study. If the Coordinating Committee rejects the study proposal, or is otherwise unable to reach consensus, a Party may conduct an independent study. The Parties agree that any Party conducting such an independent study will notify the Committee of its decision to proceed with an independent study and the conduct and implementation of any independent study or assessment activity, by a Party to this MOA, shall be subject to the access, observation, and data sharing requirements of this MOA. The Trustees reserve the right to fund an independent study, in accordance with the provisions of this Agreement, and to seek reimbursement for such costs from Honeywell. Any independent assessment activity or study which is conducted by a Party to this MOA during the term of this MOA without presentation to the Coordinating Committee for a cooperative study or activity, shall not be used by any Party to this MOA for the assessment of injuries pursuant to, or within the scope of, this MOA. Each Party reserves the right to conduct studies, as appropriate, in the event that this MOA is terminated. Notwithstanding any of the above, the Parties, upon unanimous agreement, may stipulate that data resulting from independent studies conducted by a Party to this MOA or another entity may be used to assess injuries pursuant to, or within the scope of, this MOA.

Section Five: Cooperative Funding Agreement

I. Agreement on General Principles

The payment of any costs and expenses under this article is without prejudice to any Trustee claims for assessment costs, or any defenses thereto, which are beyond the funding levels provided from time to time under this MOA or have been or are incurred outside the scope of

effective period of this MOA. Honeywell further agrees to reimburse the Trustees for the reasonable costs associated with drafting and negotiating this MOA.

II. Funding of Specific Studies and Work

Honeywell agrees to fund specific studies and work agreed to pursuant to this MOA. Funding shall be established pursuant to a budget for agreed to studies and work. Honeywell agrees to provide funds for costs and expenses incurred by the Trustees for administrative and oversight costs associated with the studies and other specific tasks. Trustee costs may include, but are not limited to, travel expenses, personnel costs, including the Trustees' attorney costs, oversight costs, administrative costs, overhead and indirect charges. Trustees' costs shall be limited to those costs that are reasonably necessary to implement the work agreed to in this MOA.

III. Determination of Budget for Specific Work

Honeywell and the Trustees agree to meet following the execution of this MOA to discuss and agree upon funding levels necessary for specific studies and work to be performed during the first year. Thereafter, annual meetings to discuss funding and agree on budgets shall be held each year. A budget for each study and other work shall be developed and agreed upon by the Parties in advance of the study and work. Agreed-upon funding levels, payment dates, means by which payment shall be made, and means by which costs and expenses shall be accounted for shall all be provided in annual attachments to this MOA. As soon as any Trustee determines that its reasonable costs will exceed the amount budgeted, the Trustee shall give advance notice to Honeywell and the Trustee may request additional costs. Each Trustee shall use good faith efforts to maintain its costs within the agreed budget. Any Party may request a budgetary review meeting at any time.

IV. Trustees Initial Estimation of Cost

To participate fully in this cooperative effort, certain Trustees require funding in advance. Trustees seeking advanced initial funding shall provide such payment information requests and required funding estimates to the designated representative of Honeywell within ninety (90) calendar days of becoming a Party to this MOA, as defined in Section - "Effective Date". Funds advanced may be expended only on the work authorized.

V. Payment:

Each Trustee shall submit a final accounting of its costs for specific work conducted under the budget ninety (90) days after the end of their fiscal year. Honeywell will review all accountings promptly and shall pay the costs submitted within ninety (90) calendar days after receipt of the accounting, provided that the costs fall within the agreed to budgetary allowances and are limited to the budgeted work. The accounting should be directed to the attention of Honeywell's representative on the Coordinating Committee. If Honeywell raises questions about the costs, the time necessary to resolve the questions shall not be included in the ninety (90) days. Honeywell will use its best effort to raise any questions or concerns relating to the costs as early as possible during the ninety (90) days.

Past Costs

The Parties agree to use good faith efforts to arrive at an agreement regarding payment, or partial payment, of past costs. Such an agreement, if established, will be included as an Attachment to this MOA.

Section Six: Dispute Resolution

The Parties agree to attempt to resolve any disputes concerning the implementation of this MOA through good faith, informal negotiations among the Parties. Disputes concerning implementation of Cooperative Studies will first be addressed according to the provisions of Section Three (II)(E) above. Other matters which may be disputed in the course of implementing this MOA may be referred to the Coordinating Committee. Such matters will either be resolved within thirty (30) working days from the time the matter is officially referred to the Committee, or the Committee will provide a written notification of the reasons for failure to resolve such dispute. Any dispute that cannot adequately be resolved by the Coordinating Committee within sixty (60) working days after the matter has been referred to the Committee may be presented for resolution to the individuals signatory to this MOA.

Section Seven: Confidentiality

I. Agreement on Confidentiality

The Parties agree that, subject to the terms of this MOA and the requirements of law and/or Court order:

- i) Oral communications between the Trustees and Honeywell leading up to and pursuant to this MOA are in furtherance of settlement negotiations pursuant to Federal Rule of Evidence 408.
- ii) Written communications which are marked "settlement negotiations" or which in some way indicate that they are confidential settlement communications, shall be treated by the Parties as confidential and shall be deemed in furtherance of settlement negotiations pursuant to Federal Rule of Evidence 408.
- iii) Maps, photographs, and data that have been compiled, verified, and validated by the Trustees, shall not be treated as confidential.

Section Eight: Public Participation

The Parties recognize and agree that public participation during the injury assessment and restoration planning process is both desirable and necessary. The Parties recognize that the Trustees are required by law to give public notice and to solicit public review and comment during certain phases of the injury assessment and restoration planning process. The Trustees will provide for public participation as required by law, and may exercise their discretion to

interact with the public as they see fit. The Parties agree to employ best faith efforts to develop a public participation plan which, when developed, shall become an attachment to this MOA. If, after good faith negotiations, the Trustees decide that public participation is necessary beyond what is required by law or by the public participation plan, the Trustees shall give Honeywell reasonable notice of such action so that Honeywell can participate if it desires.

Any Party who receives a request for documents pursuant to the federal Freedom of Information Act or the Georgia Open Records Act, or who is served with a subpoena or discovery request for any document which the Parties have agreed should be treated as confidential, shall provide timely notice to the other Parties, where the time frame of the applicable statutes permits that opportunity, so as to allow them, if they so choose, to assert a privilege or statutory exception seeking to prevent the release of such documents.

Section Nine: Effective Date

This MOA may be executed in one or more counterparts, all of which shall be considered an original document. This MOA shall be effective when signed by Honeywell and one Trustee. The Effective Date for each Trustee shall be the date upon which that Trustee and Honeywell sign the MOA and provide notice to the other Parties that they have signed.

Trustees that have not executed the MOA may participate in the matters covered, but Honeywell has no obligation under this MOA to reimburse costs related to that Trustee's activities corresponding to this MOA until that Trustee signs the MOA.

The Effective Date of any Attachment hereafter developed and incorporated into this MOA shall be the date set forth in such Attachment.

This MOA is intended to continue in full force and effect until the earlier of 1) the completion of the purposes of the Agreement; or 2) the termination of the Agreement by one, or all, of the Parties in accordance with Section Eleven of this MOA - "Termination".

Section Ten: Stipulations, Modifications and Amendments

The Parties shall endeavor to enter into stipulations, when appropriate, during the course of the cooperative assessment and restoration process. Any Party may propose a stipulation at any time. A stipulation may address issues of fact or law or both. A stipulation agreed to by all the Parties, the United States Department of Justice and the Georgia Attorney General's Office shall be attached to this MOA and shall survive the termination of this Agreement. Any matter covered by a stipulation or other form of agreement under this MOA shall be admissible in any administrative or judicial proceeding regarding a claim by the Trustees, or any one of them, for natural resource damages, and shall not be subject to objection or challenge by any Party.

Amendments and Modification to this Agreement must be made in writing and executed in accordance with the procedures set forth in Section Nine ("Effective Date") above.

Section Eleven: Withdrawal, Termination and Severability

I. Withdrawal

A Party may withdraw its participation in a disputed activity, or the MOA in its entirety at any time provided, however, that the Party first seeks to resolve any dispute or concern through informal negotiations with representatives of the other Parties. Withdrawal by a single Trustee Party shall not void the agreement as to the remaining Parties. Written notification of withdrawal from participation and agreement with any specific component of this Agreement, or withdrawal from the Agreement itself in its entirety, shall be provided to all Parties, by the withdrawing Party(s) within thirty (30) working days of such withdrawal, with an explanation of the reasons for the withdrawal. Written notice of an intent to terminate participation in the MOA must, in order to be effective, 1) clearly state the reasons for such termination, 2) be signed by an Authorized Official of the terminating Party(ies) and 3) be mailed to the legal representative of every other Party. Withdrawal from one or more activities shall not by itself void this MOA as to the remaining activities.

II. Termination

Termination of participation under this MOA, either as between the Trustees and Honeywell or by a single Trustee Party, is prospective only. As such, this MOA, including all Agreements, Attachments, Modifications and Stipulations contained herein and all Attachments that are or were incorporated prior to the Effective Date of such a termination shall survive and will remain in full effect.

III. Severability

The terms of this MOA are severable. If any term, covenant or condition of this MOA is determined by a court of competent jurisdiction to be invalid, it shall be considered deleted and shall not invalidate any of the remaining terms, conditions or covenants.

Section Twelve: General Reservation of Rights

I. Trustee Reservation of Rights Against Honeywell

This MOA does not release Honeywell from any potential liability, except for liability for costs that are actually funded or reimbursed by Honeywell pursuant to the terms of this MOA. The Trustees reserve all claims against Honeywell, and all other PRPs, related to injury to natural resources or services that may have resulted from the LCP Releases, including but not limited to claims for the costs to restore, rehabilitate, replace or acquire natural resources or services equivalent to those lost, claims for unpaid assessment costs, or for any other causes of action or requests for relief, either administratively or judicially, under either state or federal law, as well as any claims, causes of action, or requests for relief under any other theory, arising from the releases described above.

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

Except as specifically provided in this MOA or in any Attachments or Stipulations incorporated into this MOA, the Parties agree that none of them is making any admission of fact or law by entering into this MOA. This MOA shall not be admissible as evidence or proof of liability or non-liability. Except as provided in this MOA or in any Attachments or stipulations incorporated into this MOA, this MOA shall not be admissible as to the validity or non-validity of any claim or defense in any proceeding relating to this matter. Nothing in this MOA is to be construed to abrogate the right of any Party to pursue contribution from another Party or any third party or to abrogate the right of any Party to introduce the MOA and, where appropriate, costs expended pursuant to it, in any legal proceeding. Except as provided in this MOA or in any Attachments or stipulations entered into pursuant to this MOA, nothing in this MOA is intended nor shall be construed as a waiver by any of the Parties of any defenses or affirmative claims in any proceedings relating to the LCP Site.

II. Reservation of Attorney-Client Protections and Privileges

Information, documents, reports, data or other items exchanged between Trustees and Honeywell pursuant to this Agreement shall not be considered work product, attorney-client or otherwise privileged, unless specific provision has been made to establish such confidentiality under Section Seven of this MOA. The Parties shall not challenge the admissibility of such items on privilege grounds in any administrative or judicial proceeding brought by any Trustee against Honeywell regarding the natural resource liability arising from the release of hazardous substances at the LCP site. As a matter of policy, raw data collected pursuant to a Cooperative Study shall be considered privileged to the extent permissible under applicable law.

III. Early Action

Nothing in this MOA precludes early consideration of actions based on the collection of sufficient information or use of protective assumptions (even if a Cooperative or Independent Study remains incomplete), or actions such as emergency restoration, if the Trustees are able, at their discretion, to confidently predict that a proposed restoration truly restores natural resources to baseline conditions and/or is appropriate restoration for the LCP Site. At any time during the life of this MOA, Honeywell can propose settlement to the Trustees and negotiate an appropriate and enforceable document.

Section Thirteen : Limitations

This MOA in no way affects or relieves the Parties of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit. Furthermore, nothing in this MOA shall be construed as obligating the United States or the State of Georgia or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law. This MOA is not intended to create any rights or causes of action enforceable

by persons not Parties to this MOA. Nothing in this MOA may be the basis of any third party challenge or appeal.

Section Fourteen: Administrative Record

The Trustees may establish and maintain an Administrative Record ("AR"), if appropriate, which shall include reports, data and other documents relating to the activities under this MOA which have been approved for release by the Trustees. The Trustees agree to use good faith efforts to coordinate submission of documents to the AR and to notify Honeywell if and when they establish an Administrative Record, and when reports, data and other documents relating to the activities under this MOA are submitted to such Administrative Record.

Section Fifteen: Tolling of Statute of Limitations

In order to conduct work under this MOA and seek a resolution of any claim against Honeywell for natural resource damages, the Parties agree that the time period beginning on the effective date of this MOA and continuing until the MOA is terminated shall not be included in computing the running of any statute of limitations applicable to any action brought by the Trustees against Honeywell for natural resource damages. This provision does not apply to any claims against Honeywell for natural resource damages that are already barred by applicable law as of the effective date of this MOA.

SIGNATURE PAGE



Lonice Barrett, Commissioner
Department of Natural Resources
State of Georgia

Date: December 9, 2003

SIGNATURE PAGE



Craig R. O'Connor

Special Counsel for Natural Resources

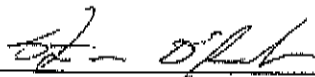
National Oceanic and Atmospheric Administration

Date: 12/5/03

SIGNATURE PAGE

The U.S. Department of Justice, on behalf of the National Oceanic and Atmospheric Administration and the U.S. Department of the Interior, hereby concurs in the provisions of Section Fifteen: Tolling of Statute of Limitations, of the attached Memorandum of Agreement between the natural resource Trustees and Honeywell International Inc. for Trustee activities related to the damage assessment and restoration activities at the LCP Superfund Site.

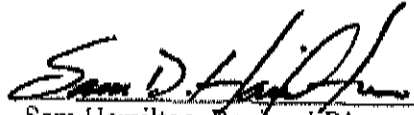
Ellen Mahan
Assistant Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice



By: _____
Steven O'Rourke
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

Date: 12/31/03

SIGNATURE PAGE



Sam Hamilton, Regional Director
Southeast Region
United States Fish & Wildlife Service

Date: 12/9/03

SIGNATURE PAGE

Signature: *Therese A. Fischka*

Name: Therese A. Fischka

Honeywell International, Inc.

Date: 11/19/2003

Attachment B

South Carolina Coastal Conservation League; et al., v. Wilbur Ross. 2:18-cv-03326-RMG;
Dkt. No. 347. Filed 01/06/20

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

South Carolina Coastal Conservation)
League; *et al.*,)
)
Plaintiffs,)
)
v.)
)
Wilbur Ross, in his official capacity)
as the Secretary of Commerce; *et al.*,)
)
Defendants.)
_____)

Civil Action No. 2:18-cv-03326-RMG
(Consolidated with 2:18-cv-3327-RMG)

ORDER AND OPINION

This matter is before the Court on the Plaintiffs' Motion to Compel Federal Defendants to Complete the Administrative Record (Dkt. No. 347). For the reasons below, the Court grants in part and denies in part the motion.

I. Background

On December 11, 2018, two cases were filed challenging the decision of the National Marine Fisheries Service ("NMFS") to issue incidental harassment authorizations ("IHAs") to five companies to conduct seismic airgun surveys for oil and gas in the coastal waters of the Mid- and South Atlantic Ocean. As alleged in the Complaint, once the Bureau of Ocean Energy Management ("BOEM") issues permits to the five companies, they will be able to begin seismic airgun surveys. (Dkt. No. 1 at ¶ 99.) The Plaintiffs, nine environmental organizations ("Environmental Organization Plaintiffs"), seek declaratory relief that the Defendants violated the Marine Mammal Protection Act ("MMPA"), the Endangered Species Act ("ESA"), the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA"). Plaintiffs further request that the Court vacate three agency actions authorizing the surveys and enjoin Defendants from authorizing takings of marine mammals incidental to the airgun surveys.

On December 28, 2018, the Court granted a motion to consolidate this case with a related case, *City of Beaufort et al. v. National Marine Fisheries Service*, 2:18-cv-3327-RMG, brought by sixteen South Carolina municipalities and the South Carolina Small Business Chamber of Commerce (“Municipality Plaintiffs”). (Dkt. No. 57.) The Court subsequently granted ten coastal states (“Intervenor States”) the right to intervene as plaintiffs, and granted seven organizations, five of whom are the Exploratory Companies who received IHAs, the right to intervene as defendants. (Dkt. Nos. 117, 118.) Subsequently, all Plaintiffs moved for preliminary injunctions to enjoin the issuance of permits and seismic testing. (Dkt. Nos. 124, 143, 146, 148.) After it became clear that the BOEM permits were not “imminent,” the Court denied without prejudice all motions, but granted Plaintiffs leave to refile their motions once the BOEM permits are issued or when there is other evidence of imminent irreparable harm. (Dkt. No. 348.)

This matter now comes before the Court on Plaintiffs’ Motion to Compel completion of the administrative record. (Dkt. No. 347.) Specifically, the Environmental Organization and Municipality Plaintiffs allege that the administrative record compiled excludes broad categories of information and documents considered by NMFS when approving the IHAs for seismic airgun surveys and improperly excludes any documents determined to be predecisional or deliberative. (*Id.*) The Plaintiffs also request that the Federal Defendants be compelled to produce a privilege log for any documents being withheld under a claim of privilege. (*Id.*) The Federal Defendants oppose the motion, arguing that all predecisional and deliberative documents were properly excluded from the administrative record, the administrative record as certified is entitled to a presumption of regularity, and NMFS should not be required to provide a privilege log. (Dkt. No. 350.) Plaintiffs filed a reply. (Dkt. No. 351.)

II. Legal Standard

The Administrative Procedures Act (“APA”) provides for judicial review of a final agency action. *See, e.g. Roland v. United States Citizenship & Immigration Servs.*, 850 F.3d 625, 629 n. 3 (4th Cir. 2017). Under the APA, an agency’s decision must be set aside when it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “Review under this standard is highly deferential, with a presumption in favor of finding the agency action valid.” *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009) (citations omitted). Nonetheless, the review is not a “rubber-stamp” of agency action, and a court must engage in a “‘searching and careful’ inquiry of the record.” *Id.*

When reviewing an agency’s decision, a court is instructed to review “the whole record or those parts of it cited by a party[.]” 5 U.S.C. § 706. The Supreme Court has made clear that this review must be made based on the “full administrative record that was before the [agency] at the time [it] made [the] decision.” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S. Ct. 814, 825 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980 (1977). *See Camp v. Pitts*, 411 U.S. 138, 142, 93 S. Ct. 1241, 1244 (1973) (“the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”). As explained by multiple courts, including district courts in the Fourth Circuit, “[t]he whole administrative record includes pertinent but unfavorable information, and an agency may not exclude information on the ground that it did not ‘rely’ on that information in its final decision.” *Outdoor Amusement Bus. Ass’n, Inc. v. Dep’t of Homeland Sec.*, No. CV ELH-16-1015, 2017 WL 3189446, at *7 (D. Md. July 27, 2017) *citing Tafas v. Dudas*, 530 F. Supp. 2d 786, 793 (E.D. Va. 2008). This means an agency must include all documents and materials “directly or indirectly” considered by the agency. *See Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (stating that “the administrative record consists of

all documents and materials directly or indirectly considered by the agency.”). *See also Thompson v. United States Dep’t of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)(“The whole administrative record ... consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position”).

If an agency fails to produce a complete administrative record, a party may request that the record be supplemented. *Outdoor Amusement Bus. Ass’n, Inc.*, 2017 WL 3189446 at *12 *citing Otsuka Pharm. Co. v. Burwell*, No. GJH-15-852, 2015 WL 1579127 (D. Md. Apr. 8, 2015). An agency is “entitled to a strong presumption of regularity that it properly designated the administrative record,” and therefore supplementation of the record is “the exception not the rule.” *Id.* (citations omitted). Nonetheless, a plaintiff can overcome this presumption if they:

- (1) ‘identify reasonable, non-speculative grounds for the belief that the documents were considered by the agency and not included in the record,’ and (2) ‘identify the materials allegedly omitted from the record with sufficient specificity, as opposed to merely proffering broad categories of documents and data that are ‘likely’ to exist as a result of other documents that are included in the administrative record[.]’

Id. Where a party is attempting to include documents considered by the agency no showing of bad faith is required, and a plaintiff must only present “clear evidence,” which means a “strong, substantial or prima facie showing that the record is incomplete.” *Id.*

III. Discussion

It is clear that Plaintiffs have, first, identified reasonable, non-speculative grounds that documents considered by NMFS were not included in the record and, second, properly identified specific excluded records. *Id.* While the Federal Defendants construe Plaintiffs’ allegations as speculative, Plaintiffs, with specificity, identified documents that were considered “directly or indirectly” by the agency. *Bar MK Ranches*, 994 F.2d at 739. For example, Plaintiff’s identified an email from BOEM ultimately sent to NMFS referencing an “attached memo regarding Atlantic seismic permit applications” that is not included in the record, a “seismic protocol attachment”

that is not included in the record, an “appendix on vessel strike avoidance measures,” “duke data,” and an “attachment” that was sent to a “right whale expert.” (Dkt. Nos. 347-4 ~ 347-8.) These documents, referenced in agency communications when discussing the creation of the IHA at issue in this case, clearly identify other documents considered by the agency and necessitates supplementation of the record. To exclude these documents and any similar documents that have yet to be disclosed would, in effect, be creating an inaccurate record for the Court’s ultimate review.

The Federal Defendants, however, argue that all excluded documents are not actually a part of the record and are, instead, properly excluded as “pre-decisional and deliberative documents” that are not included as part of an administrative record. (Dkt. No. 350 at 13.) However, the only documents properly not disclosed are documents that “fall within the deliberative process privilege.” *Tafas v. Dudas*, 530 F. Supp. 2d 786, 794 (E.D. Va. 2008). While a document must be predecisional in order to be covered by the deliberative process privilege, not all predecisional documents are necessarily deliberative. *See Id.* at 800 (“Two requirements must be met in order for the deliberative process privilege to apply: (1) the document must be predecisional; and (2) it must be deliberative in nature.”) Indeed, to hold otherwise would essentially remove all documents from an administrative record as the record inherently contains the documents created and reviewed before a decision. Nonetheless, courts have repeatedly recognized the importance of excluding deliberative materials from the review of agency decisions for two reasons: first, because the predecisional motivation of an agency is irrelevant as to the final decision; and, second, excluding deliberative materials permits frank internal discussions at agencies. *See Id.* at 794.

While the Parties argue over the scope of the deliberative process privilege, pointing to decisions from district courts in the Fourth Circuit, the Court also has the benefit of guidance from

Fourth Circuit decisions explicitly defining what constitutes agency deliberative material, albeit in the context of FOIA. In that context, the Fourth Circuit held explicitly that deliberative material includes “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *City of Virginia Beach, Va. v. U.S. Dep’t of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993); *Ethyl Corp. v. U.S. E.P.A.*, 25 F.3d 1241, 1248 (4th Cir. 1994) (same); *Solers, Inc. v. Internal Revenue Serv.*, 827 F.3d 323, 329 (4th Cir. 2016) (same). These decisions, at the very least, provide the Court with a definition of “deliberative materials,” which, if predecisional, are protected from inclusion in the administrative record.

However, there are two important caveats to this holding. First, deliberative materials are only those that reflect the “internal” deliberations in the agency. *See Outdoor Amusement Bus Ass’n, Inc.*, 2017 WL 3189446, at *14 *citing Amfac Resorts, L.L.C. v. U.S. Dep’t of the Interior*, 143 F. Supp. 2d 7, 13 (D.D.C. 2001) (“intra-agency memoranda and other such records ... need not be included in the record.”). *See also In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (“Agency deliberations not part of the record are deemed immaterial.”); *Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1549 (9th Cir. 1993) (stating that “neither the internal deliberative process of the agency nor the mental processes of individual agency members” are proper components of the administrative record). As the deliberative process privilege is concerned with an agency’s own internal deliberations, all materials received from outside the agency or shared outside the agency, including to other governmental agencies, are not covered by the privilege. *See Ctr. for Biological Diversity v. Zinke*, No. 3:18-CV-00064-SLG, 2018 WL 8805325, at *4 (D. Alaska Nov. 16, 2018) (“When an agency obtains and considers materials from outside of that agency, or shares the

agency's documents with others outside the agency, including other governmental agencies, the deliberative process privilege does not apply. All such materials should be included within the administrative record."'). Therefore, while predecisional recommendations, draft documents, proposals, suggestions and comments within NMFS are protected by the deliberative process privilege, communications with BOEM or other agencies, including information or memoranda, must be included in the administrative record.

Second, if internal agency documents introduce "factual information not otherwise in the record," an agency must include "those portions of the documents...in the administrative record." *Tafas*, 530 F. Supp. 2d at 794 citing *National Courier Ass'n v. Board of Governors*, 516 F.2d 1229, 1242 (D.C.Cir.1975). Therefore, here, where the Federal Defendants have taken an expansive view of the deliberative process privilege, to the extent documents covered by the privilege contain factual information considered as part of the agency's rulemaking process, those portions of the documents must be produced.

Therefore, the Court will order the Federal Defendants to produce, within forty-five (45) days, all memos, emails, attachments containing factual information relied on or considered, directly or indirectly. Further, the Federal Defendants must produce all emails, communications, memos or other information shared or received between agencies or with non-agency third-parties that were considered. All these emails, communications, memos or other information shared or received, including the emails already produced, so long as they were considered in the regulatory process, shall be part of the administrative record.

Finally, the Parties disagree over whether the Federal Defendants must produce a privilege log. The Federal Defendants are correct in terms of the contents of the administrative record: as deliberative materials go towards the subjective motivation of the decisionmakers, they are not

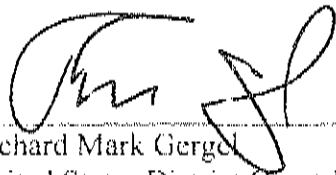
considered part of the administrative record and therefore courts have previously denied production of a privilege log. *See Outdoor Amusement Bus. Ass'n, Inc.*, 2017 WL 3189446, at *21. However, without an index of some sort there is no manner for the Plaintiffs, the Federal Defendants or the Court to know whether there are documents that should be included in the administrative record that have been improperly excluded. Indeed, in a recent case relied on extensively by the Federal Defendants, the Court was able to make its determination regarding the application of the deliberative process privilege only after reviewing the relevant documents. *See Id.* at *15 (“ Upon review of the relevant documents, the Court concludes that they are quintessentially deliberative and/or predecisional material...”). Other courts similarly review documents when determining the proper scope of an administrative record. *See Ctr. for Biological*, 2018 WL 8805325, at *7 (reviewing five exhibits and other communications and emails when determining the scope of the administrative record). Finally, as noted by Plaintiffs, recent orders by Courts of Appeal, including the Fourth Circuit, have indicated support, though no binding authority, for requiring production of a privilege log for the purpose of determining whether the Federal Defendants properly excluded materials from the record. *See Defs. of Wildlife v. U.S. Dep't of Interior*, No. 18-2090 (4th Cir. Feb. 5, 2019) (directing government to “submit a privilege log in the event the Government withholds any documents under the guise of the deliberative process privilege (or any other privilege)”); *In re Nielsen*, No. 17-3345, slip op. at 2 (2d Cir. Dec. 27, 2017) (requiring Government to produce a privilege log and noting that “without a privilege log, the District Court would be unable to evaluate the Government’s assertions of privilege”). The Court is concerned that without a privilege log, the Court would have no way to evaluate assertions of privilege and whether documents were improperly excluded from the administrative record. Similarly, the Court would not be able to engage, if necessary, in the same review

conducted by the district courts in *Outdoor Amusement Bus. Ass'n. Inc.* and *Ctr. for Biological Diversity*, both cases relied upon by the Federal Defendants here. However, the documents contained in the privilege log, without further ruling, are not considered part of the administrative record. Therefore, the Federal Defendants are required to produce, within forty-five (45) days, a privilege log listing all documents withheld based on a claim of the deliberative process privilege.

IV. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs' Motion to Compel Federal Defendants to Complete the Administrative Record (Dkt. No. 347). The Motion is **GRANTED** and the Federal Defendants are **DIRECTED** to produce **WITHIN FORTY-FIVE (45) DAYS** all memos, emails and attachments containing factual information relied on or considered, directly or indirectly, including all emails, communications, memos or other information shared or received between agencies or with non-agency third-parties that were considered. The Motion is also **GRANTED** and the Federal Defendants are required to produce **WITHIN FORTY-FIVE (45) DAYS** a privilege log listing all documents withheld based on a claim of the deliberative process privilege. However, the documents in the Privilege Log **WILL NOT**, without further order, be considered part of the administrative record. The Motion is otherwise **DENIED**.

AND IT IS SO ORDERED.


Richard Mark Gergel
United States District Court Judge

January 3, 2020
Charleston, South Carolina

Attachment C

Email correspondence between Melanie Johnson, Deputy Executive Counsel and Alice M. Keyes, OHM, January 31, 2020.

Subject: FW: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia
Date: Friday, January 31, 2020 at 12:23:27 PM Eastern Standard Time
From: Johnson, Melanie
To: Alice M. Keyes, rachael@glynnenvironmental.org
CC: Brown, Jim, Haymans, Doug, Tim Ritzka
Attachments: image001.jpg, image002.jpg, image003.jpg, image004.jpg, image005.jpg, image006.jpg, image007.jpg, image008.jpg

Ms. Keyes:

Thank you for alerting the Department as to the issue with the links on our website. We apologize for the inconvenience that caused. After consideration, the department respectfully declines your request for another extension of the public comment period. The public comment period continues until February 18th which allows ample opportunity for meaningful public comment and involvement in this matter. Thank you again for letting us know about the links and please let me know if I may be of further assistance.

Sincerely,

Melanie Johnson
Deputy Executive Counsel
[Georgia Department of Natural Resources](#)
(404) 656-4813 | F: (404) 656-0770

From: Alice M. Keyes <alice@onehundredmiles.org>
Sent: Thursday, January 30, 2020 12:53 PM
To: Jones, Tyler <tyler.jones@dnr.ga.gov>; Brown, Jim <Jim.Brown@dnr.ga.gov>
Cc: Rachael Thompson <rachael@glynnenvironmental.org>
Subject: Re: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi Tyler and Jim,

Thank you again for the time you have invested in this project.

Considering the fact that the DNR website was down for at least 10 days during an important period of public comment, I wanted to officially request that DNR extend the comment period for the LCP superfund settlement agreement.

OHM, Glynn Environmental Coalition, and other public interest groups have sent messages to our members encouraging them to engage with you during the public comment period. Much of that communication occurred during a time when the DNR webpages were down.

We believe you respect the public's interest to engage in meaningful ways, so we hope you will grant an extension of at least two weeks.

I look forward to your response. Thank you in advance,

--Alice

Alice M. Keyes
One Hundred Miles
912.230.6494
alice@onehundredmiles.org

From: Rachael Thompson <rachael@glynnenvironmental.org>
Date: Tuesday, January 21, 2020 at 10:00 AM
To: Alice Keyes <alice@onehundredmiles.org>, Susan Inman <sue@altamahariverkeeper.org>, Laura Early <Riverkeeper@SatillaRiverkeeper.org>
Subject: FW: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia

Rachael Thompson
Executive Director
Glynn Environmental Coalition
Office: (912) 466-0934
Cell: (908) 313-3136
www.glynnenvironmental.org

From: Jones, Tyler [<mailto:tyler.jones@dnr.ga.gov>]
Sent: Tuesday, January 21, 2020 8:42 AM
To: Rachael Thompson <rachael@glynnenvironmental.org>; Brown, Jim <Jim.Brown@dnr.ga.gov>
Cc: Haymans, Doug <Doug.Haymans@dnr.ga.gov>
Subject: RE: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia

Hi Rachael,

Thank you for reaching out to us about issues with our website. On Jan. 10, at approximately 2 p.m., DNR (the entire department, all divisions) upgraded our web-hosting platform. This has caused some issues on certain pages of our website, which we are currently working to correct.

I appreciate you letting me know the specific links that were broken in the pages you referenced. I believe I have manually fixed them. They're working on my end, and if you could check them on your end and let me know everything is satisfactory, I'd greatly appreciate it. Sometimes you may need to clear the cache of your browser – but I'd try and see if they work on their own before doing that.

I believe I have fixed the broken links to be exactly what they were before the update, so any prior emails you send to your folks with those original links should work again.

I apologize for the inconvenience, and completely agree the public needs access to these documents. Thank you for letting me know about this – and if you find any other broken links, please let me know.

Thanks again,
Tyler

Tyler Jones
Communications Specialist 3
[Coastal Resources Division](#)
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A division of the
GEORGIA DEPARTMENT OF NATURAL RESOURCES

From: Rachael Thompson <rachael@glynnenvironmental.org>
Sent: Saturday, January 18, 2020 1:18 PM
To: Jones, Tyler <tyler.jones@dnr.ga.gov>; Brown, Jim <Jim.Brown@dnr.ga.gov>
Subject: FW: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Jim and Tyler,

It has come to my attention that the links on the press release for PDF documents related to the Consent Decree are not working at this time. Please amend this as soon as possible and notify me immediately once it is repaired.

If I click on the link below "View Previous Documents...." I get to the press release dated December 19. The links on the bottom of [this page](#) are not working. Specifically, "PDF of this Press release," and "PDF of this consent decree." In addition, it is stated that the proposed consent decree and associated documents can be found in public notices, but when visiting the homepage link the public notice isn't listed (see snapshot below).

The Second press release dated December 30 refers to the previous one with three separate links and also points to the public notice section. I have not been able to determine any other route on the DNR website to access the documents that are referred to in these press releases.

<https://coastalgadnr.org/public-comment-period-extension-proposed-settlement-recreational-fishing-losses-due-contamination>

Are you able to determine how long these links have been in-active? The GEC is aware that the state received numerous emails regarding an extension to the public comment period, our community requested a full 60 days for participation. This includes having the necessary documentation available through the full extent of that comment period for the public to access to participate in the comment period.

The public needs to be able to access these documents for submitting comments, and since these are the only documents that are being made available to our community it is imperative that these links are remedied immediately. If there are other permanent locations for these documents that I have overlooked or missed, please share those links to the general public so they don't have to spend their valuable time searching through the extensive DNR websites to find them.

Thank you in advance for your consideration of this email, and I appreciate your prompt action and response to this issue.

Rachael Thompson
Executive Director
Glynn Environmental Coalition
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From: GADNR/Coastal Resources Division [<mailto:GADNR@public.govdelivery.com>]

Sent: Monday, December 30, 2019 3:28 PM

To: rachael@glynnenvironmental.org

Subject: Public Comment Period Extension on Proposed Settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick, Georgia

Public comment period extended for proposed settlement for recreational fishing losses due to contamination from LCP Chemical site Brunswick

The Commissioner of the Department of Natural Resources (DNR) is extending the 30-day public comment period on the [proposed settlement](#) an additional 30 days. The original public comment period that was scheduled to expire on January 19, 2020, will now be extended to February 18, 2020.

Comments on the Consent Decree may be submitted in writing and should be mailed to:

Jim Brown, Program Manager,
Georgia Environmental Protection Division,
2 Martin Luther King Jr Drive Suite 1054
Atlanta, Georgia 30334

The proposed consent decree and associated documents are available at: <https://coastalgadnr.org/> under Public Notices or by [clicking here](#).

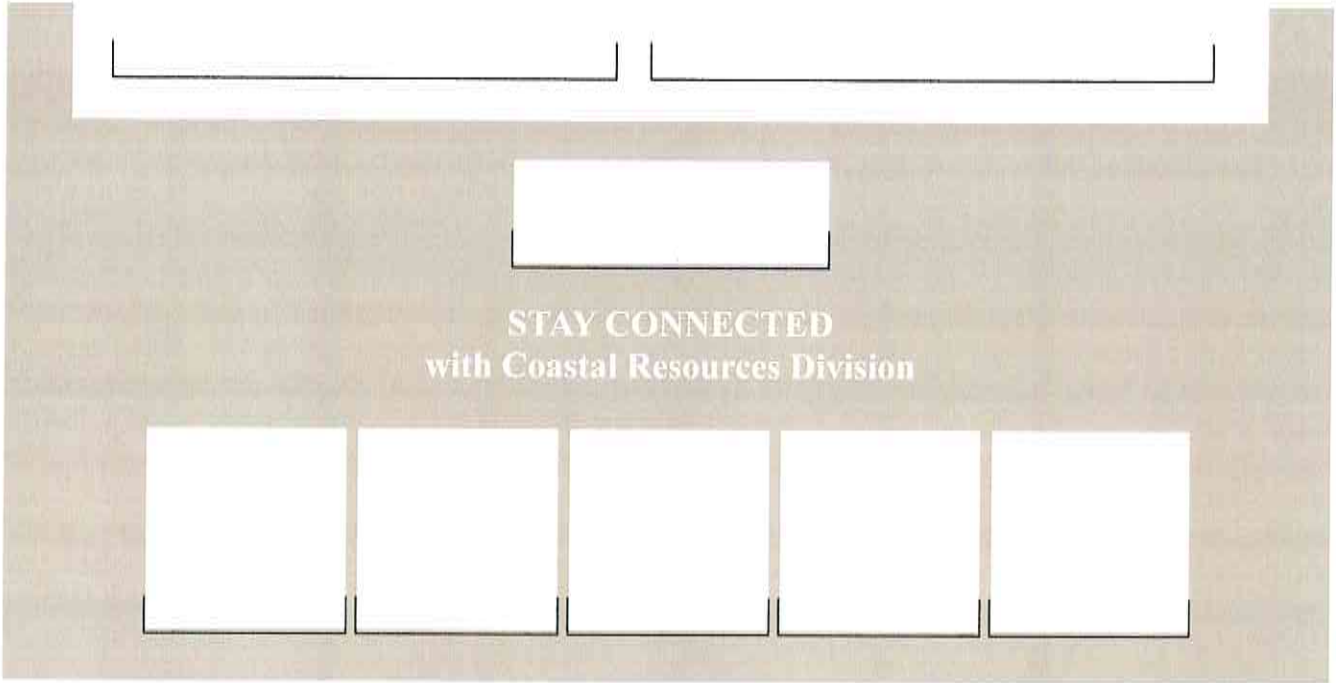
State personnel and representatives of Honeywell will be available at a public meeting to provide more information on the settlement and to answer questions from 7:00-9:00 pm on January 7, 2020, at the Brunswick-Glynn County Library, 208 Gloucester Street, Brunswick.

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[View the previous press release and associated documents by clicking here.](#)

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