

AGREEMENT BETWEEN
ALLIANCE OF COMMUNITIES FOR SUSTAINABLE FISHERIES
AND
MONTEREY BAY AQUARIUM RESEARCH INSTITUTE

THIS AGREEMENT ("Agreement"), dated this ____ day of _____, 2005, is made by and between MONTEREY BAY AQUARIUM RESEARCH INSTITUTE, a California nonprofit corporation (hereinafter "MBARI"), and the ALLIANCE OF COMMUNITIES FOR SUSTAINABLE FISHERIES, a _____ (hereinafter "ACSF"), and those individual commercial fishermen licensed to fish in the Monterey Bay who sign this Agreement (which together with ACSF are hereinafter collectively referred to as "ACSF" or Fishermen"), based on the following:

RECITALS

A. WHEREAS, MBARI has obtained approval from the California State Lands Commission, the California Coastal Commission, the Monterey Bay National Marine Sanctuary and the United States Army Corp of Engineers, in addition to other governmental agencies having jurisdiction over the shoreline and Monterey Bay ("the Governmental Agencies"), to construct, install, operate and maintain a scientific research cable in Monterey Bay known as the Monterey Accelerated Research System Cable (hereinafter "the MARS Cable") the construction, installation, operation and maintenance of which is sometimes hereafter referred to as "the Project", and

B. WHEREAS, the Governmental Agencies are responsible for approving the Project and preparing and certifying environmental review documents in compliance with the requirements of the California Environmental Quality Act ("CEQA") and the National Environmental Policy Act ("NEPA"), to assess the possible environmental impacts of the MARS Cable and the Project, the cumulative impacts of the MARS Cable and the Project, alternatives to the Project, and to establish appropriate mitigation measures for the MARS Cable and the Project; and

C. WHEREAS, this Agreement is intended to reduce potential conflicts between the Project, and the installation, operation, maintenance and repair of the MARS Cable on the one hand, and properly licensed commercial fishing activities in Monterey Bay in the vicinity of the MARS Cable and the Project on the other; and

D. WHEREAS, the parties acknowledge that continuing commercial fishing activities in Monterey Bay is important to maintaining the economic viability of traditional and historic commercial fishing activity in the Monterey Bay area; and

E. WHEREAS, the MARS Cable will be installed in the area of Monterey Bay identified on **Exhibit A** attached hereto, which will hereafter be referred to as the “Project Area;” and

F. WHEREAS, the parties acknowledge that the installation and operation of the MARS Cable is important to the exploration of and research in Monterey Bay and the Monterey Bay National Marine Sanctuary, and that the research and information resulting from MBARI’s exploration and research will enhance scientific knowledge of Monterey Bay and the Monterey Bay National Marine Sanctuary, and will also provide valuable information which will assist the commercial fishing industry in the Monterey Bay area in managing and enhancing the [fish resources] available for commercial fishing in the Project Area and in Monterey Bay.

NOW, THEREFORE, MBARI and the ACSF hereby agree as follows:

1. **Installation and Burial of MARS Cable**

MBARI has examined the seafloor and subsurface within reasonable proximity to the approved cable route to determine a cable route which minimizes above-ground exposure of the MARS Cable due to hard ground, rock seabed or other features. The MARS Cable shall be buried to the extent reasonably possible and shall remain buried, except in locations where, due to geophysical constraints, that is not feasible. Any length of Cable or cable-crossing which cannot be completely buried shall be identified in "as-built" coordinates provided by MBARI to the ACSF and other interested parties. In the course of any repair or maintenance, the MARS Cable shall be reburied to the extent possible to the same depth as originally buried.

2. **Broadcasts During Cable Installation**

During the time when the Cable is being installed by MBARI, MBARI shall make daily radio broadcast announcements on the local fishers’ emergency radio frequency that provide the current Cable installation location and a toll free number which can be called for additional information.

3. **Fishermen List**

ACSF shall provide MBARI a list of all fishermen, including their mailing addresses, licensed to trawl in the Project Area so that MBARI may distribute the information required under the terms of this Agreement to the fishermen, and ACSF shall provide MBARI with updated list of the fishermen annually thereafter.

4. **Post-Installation Information**

Within ninety (90) days after its final acceptance of the Project as completed, MBARI shall distribute to ACSF and to any fisherman licensed to trawl in the Project Area such written documentation indicating the “as built” Cable coordinates and the Cable’s burial depths as is reasonably necessary to show the accurate position and depth of the MARS Cable. Such documentation shall also be delivered by MBARI to the Office of the Moss Landing Harbor Master, the Monterey Bay National Marine Sanctuary office in Monterey, California, and the California Department of Fish and Game’s Marine Regional Headquarters in Monterey,

California. MBARI shall also maintain copies of such documentation at its office in Moss Landing, California, and shall make such documents available for inspection during its regular business hours.

5. **Notice to NOAA and USCG**

Within ninety (90) days after its final acceptance of the Project as completed, MBARI shall provide such information as is reasonably necessary to NOAA to permit NOAA to show accurately the location and depth of the MARS Cable on navigational charts. MBARI shall also provide such information to the United States Coast Guard by a Local Notice to Mariners.

6. **24-Hour Telephone Hotline**

MBARI shall maintain its existing fully-staffed 24-hour, toll-free telephone hotline and shall provide the hotline telephone number which is 866 830-0169, in writing, to any fisherman licensed to trawl in the Project Area and to any other party who requests the number. MBARI shall also provide its hotline number to NOAA for inclusion on navigational charts, and to the U.S. Coast Guard for inclusion in a Local Notice to Mariners. Should MBARI's hotline number change, MBARI shall notify all who have received the number as herein provided.

There shall be a representative of MBARI on duty at all times who has the authority, background, and experience to advise fishermen whether their reported position is in the vicinity of the MARS Cable.

7. **Notice to MBARI**

If a fisherman believes he or she has snagged his or her fishing gear on the MARS Cable or in any way damaged the MARS Cable, he or she shall immediately notify MBARI on MBARI'S hotline. Notification shall include advice as to the location of his or her vessel by GPS coordinates at the time of the probable snag or damage. If, due to serious adverse weather conditions or other emergency conditions, the fisherman is unable immediately to contact MBARI on its hotline, the fisherman shall note the date, time and location of the actual or suspected snag or damage, and shall thereafter immediately provide notice to MBARI of the actual or suspected snag or injury, as soon as emergency conditions have abated.

MBARI shall provide any of its findings on damage to the MARS Cable (including any video tapes or other information gathered by ROV) on written request, to the fisherman involved, within ten (10) days after MBARI obtains such findings.

8. **Gear Replacement Costs/Claims**

After notice by any fisherman who is a signatory to this Agreement to MBARI on MBARI's hotline, or otherwise if notice cannot immediately be given due to emergency conditions, and if, at MBARI's direction, the fisherman immediately sacrifices trawling gear which has snagged or damaged the MARS Cable and if the Fisherman has followed the protocol for operating in the proximity of the Cable set forth in **Exhibit A**, MBARI shall pay 100% of the actual reasonable retail replacement cost of gear comparable to the sacrificed gear, or the reasonable cost to repair any damaged gear and the value of any catch lost with the sacrificed

gear. Under no circumstances will MBARI pay the replacement costs or reimbursement costs provided in this paragraph unless the fisherman has informed MBARI on its 24-hour, toll-free telephone hotline of its snagging of or damage to the MARS Cable within 24 hours of any actual or suspected Cable snag or damage.

9. **Claims Reimbursement**

MBARI's payment for damaged or sacrificed gear and lost catch shall be made no later than ten (10) days after MBARI has been provided written documentation, including a written claim form in substantially the form attached hereto as **Exhibit B**, with invoices or bids for replacement cost of the gear or the reasonable cost to repair the gear, with certification on the claim form (in the form attached) that the claim for payment is being made by the owner of the sacrificed or damaged gear.

MBARI's President and CEO shall, by Resolution of its Board of Directors, have the authority to authorize the payment of any single Fisherman's claim up to \$100,000.00.

10. **Cable Damage Claims/Release of Liability**

MBARI agrees to release any claims for Cable damage which it might otherwise have, either individually, or collectively, against any Fisherman who is a signatory to this Agreement who, while using reasonable care, and following the protocol set forth in **Exhibit A**, snags the MARS Cable or any cable and instruments connected to or laid from the MARS node at the end of the Cable, if the Fisherman immediately notifies MBARI of the snag or other contact with the Cable on MBARI's hotline and cuts loose his or her gear, as directed by MBARI, to prevent further damage to the Cable, and any cable or instruments connected to or laid from the MARS node. MBARI will also refrain from taking any administrative, legal, or other action to sanction and/or recover damages against any Fisherman who notifies MBARI of a probable snag or damages on MBARI's hotline and who is directed by MBARI to cut loose his or her gear to prevent further damage to the Cable, or any cable or instruments connected to or laid from the MARS node. Under no circumstances will MBARI release claims for Cable or other damage or refrain from taking administrative or legal actions against a Fisherman who damages the Cable or any cable or instruments connected to or laid from the MARS node, unless MBARI is notified on its hotline number by the Fisherman within 24 hours of any actual or suspected snag or damage; and in the event of contact with or damage to cable or instruments connected to or laid from the MARS node, MBARI shall not release its claims against a Fisherman, unless any equipment contacted or damaged by the Fisherman is returned to MBARI. Nothing herein shall be construed to require that or indicate that MBARI waives any claim against any third party who damages or otherwise interferes with the Cable, it being MBARI's intent to retain fully any and all rights to recover damages and to take any legal or administrative action of any kind and character, except as expressly relinquished herein.

11. **ACSF/MBARI Committee and Meetings**

Representatives from ACSF and MBARI shall form a committee, not to exceed three people in size, which shall meet up to four (4) times in the first year after MBARI's final acceptance of the Project. The Committee shall be composed of one (1) person selected by

ACSF; one (1) person selected by MBARI; and one (1) person selected by the parties, or if the parties cannot agree on the third member of the Committee, then such member shall be selected by a neutral third party selected by the parties; or if the parties cannot agree on the neutral third party, then the neutral third party shall be selected by a retired Judge designated by the Judicial Arbitration and Mediation Service and such neutral third party shall then select the third member of the Committee. The third member shall serve a term of three (3) years, and thereafter may be reappointed for additional terms of three (3) years by agreement of MBARI and ACSF. The third member may also be removed at any time with the consent of both MBARI and ACSF. The Committee meetings shall be in Monterey County at a location selected by ACSF. The meetings in the first year after Project acceptance shall focus on an exchange of information and address any administrative or other issues which have arisen in connection with the Cable. During the second year after final acceptance of the Project, the Committee shall meet not more often than every 6 months, on request by either MBARI or ACSF; and each year thereafter, not more often than annually, on request by MBARI or ACSF. The Committee may also meet, if needed, to review any claims that are not otherwise resolved after direct negotiation between MBARI and any signatory to the Agreement. MBARI shall pay an honorarium of not more than \$475.00 per meeting to the ACSF representative for any such meeting attended, providing that there are not excessive and unnecessary meetings requested by ACSF or its representatives.

12. **Dispute Resolution**

The parties agree to submit any dispute over reimbursement for lost gear, or damage to the MARS Cable, to mediation by a mediator mutually selected by the parties, no later than 30 days after such dispute arises. If the dispute is not resolved by mediation within 30 days after submission to the mediator, then the parties shall submit the dispute to binding arbitration before a single arbitrator selected by mutual agreement of the parties, or if the parties cannot agree, then selected in accordance with the California Arbitration Act then in effect (presently embodied in Code Civ.Proc. §1280 et seq.) with said arbitration to occur no later than 60 days after the dispute arose. Each party agrees to pay one half the cost of any mediation conducted hereunder. Each party agrees that the arbitrator is authorized to award any arbitration costs and attorneys' fees incurred in the arbitration to the party prevailing (as defined by California law then in effect) in the arbitration as a part of the arbitrator's award.

13. **Governmental Agency Permits**

In the event that any provision of this Agreement conflicts with the terms and conditions of that certain lease dated September 2, 2005 between MBARI and the California State Lands Commission (the "Lease"), the terms of the Lease shall govern the rights and obligations of the parties. If there is any conflict between the terms and conditions of this Agreement and any permits issued to MBARI or its representatives, by any Governmental Agency for the Project, the terms and conditions of the Governmental Agency permits shall govern.

14. **Notification**

Upon execution of this Agreement, MBARI shall notify the State Lands Commission, the California Coastal Commission, and the Monterey Bay National Marine Sanctuary that this Agreement has been signed.

15. **Governing Law**

This Agreement and the rights and duties of the parties arising hereunder shall be governed by and construed in accordance with the laws of the State of California except for provisions of California law referring governance or construction to the law of another jurisdiction.

16. **Amendment**

An amendment or modification of this Agreement shall be effective or binding on a party only if it is in writing and signed by each of the parties.

17. **No Third-Party Beneficiaries**

This Agreement is solely for the benefit of the parties and their respective successors, donees and permitted assigns, and this Agreement shall not otherwise be deemed to confer upon or give to any other third-party any remedy, claim, liability, reimbursement, cause of action or other right.

18. **Binding Effect**

The provisions of this Agreement set forth the binding agreement of the parties.

19. **Assignment**

This Agreement shall be assignable to the successors, assigns and donees of MBARI, including their lenders as required, provided that each such successor, assignee or donee agrees to be bound by the provisions of this Agreement.

20. **Counterparts**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which constitute but one Agreement.

21. **No Partnership or Joint Venture**

Nothing in this Agreement shall be construed to create or constitute a partnership, agency, joint venture or similar relationship or to create joint or several liability on the part of any of the parties.

22. **Successors**

This Agreement is binding on and for the benefit of, the parties, and their representatives, successors and assigns.

23. **Correspondence**

All correspondence should be directed to the addressees and individuals indicated next to the signature of each party, or to such other address or individuals as a party may request in writing from time to time.

24. **Termination**

This Agreement shall terminate as to MBARI or its successors or assignees at such time as it ceases to operate the MARS Cable within the Project Area or if MBARI does not place a cable in service before December 31, 2008. This Agreement shall also terminate if there are no trawlers licensed to fish in the Project Area.

IN WITNESS WHEREOF, the parties have entered into this Agreement effective as of the day and year shown at the beginning of this Agreement.

MBARI

Dated: December ____, 2005

By: _____

Authorized Officer

Address:

ACSF

Dated: December ____, 2005

By: _____

Authorized Officer

Address:

Dated: December ____, 2005

FISHERMEN

Name

Address:

Vessel Name

(signatures continue on following page)

Dated: December ____, 2005

Name

Address:

Vessel Name

Dated: December ____, 2005

Name

Address:

Vessel Name

Dated: December ____, 2005

Name

Address:

Vessel Name

Dated: December ____, 2005

Name

Address:

Vessel Name

Dated: December ____, 2005

Name

Address:

Vessel Name

(signatures continue on following page)

Dated: December ____, 2005

Name

Address:

Vessel Name

Dated: December ____, 2005

Name

Address:

Vessel Name

EXHIBIT A

CABLE PROTOCOL

PROCEDURES TO FOLLOW WHILE OPERATING NEAR THE MARS CABLE IN MONTEREY BAY

PURPOSE OF THESE PROCEDURES

These procedures have been jointly developed by a committee of representatives of the local fishing industry and the Monterey Bay Aquarium Research Institute (MBARI) to use as a guide to responsible conduct in the vicinity of the cable to be placed in Monterey Bay. They are intended to protect the cable from being damaged by contact with trawl or other fishing gear. Fishermen who sign agreements with MBARI can be protected from liability for damaging the cable by complying with these procedures. Compliance will also facilitate compensation for gear sacrificed to avoid damage to the cable.

SAFETY FIRST

These procedures define how vessels should operate when fishing in the vicinity of cables. These procedures do not change the vessel operator's authority and responsibility to care for the safety of crewmembers, passengers and the vessel, taking all relevant factors into account. No step in these procedures should be followed if doing so would be unsafe.

PROCEDURES WHEN OPERATING NEAR THE CABLE

For purposes of these procedures, a vessel is considered "near" a cable if the distance from the vessel to the charted position of the cable is equal to or less than:

- 3 times the depth of water, in depths of 150 fathoms (300 meters) or more, or
- 4 times the depth of water, in depths of less than 150 fathoms (300 meters).

A vessel relying on Loran C instead of GPS or DGPS should assume a potential error of ½ mile in the vessel's position, and should consider itself "near" a cable if it is within ½ mile plus three times the depth of water of the charted position of the cable.

WHENEVER OPERATING "NEAR" A CABLE, A VESSEL MUST COMPLY WITH ALL OF THE FOLLOWING STEPS, A THROUGH G:

A. The vessel shall have on board in useable form the most current nautical chart information, including:

1. The latest NOAA chart;
2. Any updates from Local Notices to Mariners; and
3. Any updates made available by the MBARI/fishermen liaison committee (the "Committee"), such as regarding cable burial status.

- B. Anyone acting as helmsman “near” a cable must understand and be able to implement these procedures.
- C. If a vessel has an electronic or video chart plotter, the route of the cable shall be displayed on the plotter screen or display. If the vessel has gear on the bottom “near” a cable, the plotter shall be recording the tow.
- D. When operating “near” a cable, special care should be observed. Gear should not be set or hauled up. No turns of more than 90 degrees should be executed and no activity that lays a door over should be executed.
- E. No clam or scallop dredge, anchor, grapple, or other gear designed to significantly penetrate the surface of the seabed should be used “near” a cable. All trawl gear should be in good condition, and free of elements that could snag cables.
- F. Gear should not be in contact with the bottom over any location where a cable is reported or known to be unburied.
- G. The helmsman should closely monitor the groundspeed by the most accurate means available when “near” a cable, and monitor the video plotter display for any sign of possible cable contact.

PROCEDURES IN CASE OF POSSIBLE CABLE CONTACT

1. In case of any deviation from normal towing conditions, the helmsman, if other than the master, should summon the master to the bridge. The master of the vessel shall take all appropriate action to keep the vessel safe and protect the cable.
2. If conditions (such as reduced speed or course deviation near a cable) suggest possible cable contact, the operator should take the vessel out of gear.
3. Do not attempt to free the gear by hauling up gear or by powering up the vessel.
4. The master will MBARI on the hotline telephone (866-830-0169) designated for this purpose and supply all information requested.
5. Vessel will cut away gear if advised by MBARI that the location given indicates a possible cable contact. The master of the vessel should follow the procedures provided in that certain Agreement Between Alliance of Communities for Sustainable Fisheries and Monterey Bay Aquarium Research Institute, dated _____, 2005, to obtain reimbursement for gear and catch.
6. In any case of a possible or known cable contact, the master and helmsmen should file a report with the Committee immediately upon returning to port; preserve all related records (including tow records); and cooperate with any investigation by the Committee and/or MBARI.

EXHIBIT B

CLAIM FORM

**Monterey Accelerated Research System Cabled Observatory (MARS)/
Monterey Bay Aquarium Research Institute (MBARI)
Claim Form**

INSTRUCTIONS:

In order to receive reimbursement on your claim:

1. You must have called MBARI on its 24-hour hotline at 1-866-830-0169 and followed MBARI's instructions regarding sacrificing your gear, immediately upon snagging the cable; or under emergency conditions, notified MBARI on its 24-hour hotline, of the snag, no later than 24-hours after the incident;

2. You must have been operating your vessel in a non-negligent fashion;

3. You must submit this Claim Form, with the accompanying information set forth on the attached checklist, either by mail, fax or hand delivery to:

**MBARI
Attention: Mike Pinto
7700 Sandholdt Road
Moss Landing, California, 95039
Phone (831-775-1776)
Fax (831-775-1645)**

4. You must sign a Release releasing MBARI, its officers, directors, employees, agents, and assigns from liability, other than the payment being made pursuant to the Claim submitted.

Date: _____

APPLICANT INFORMATION:

Corporate Name _____
(if applicable)

Tax Identification Number _____
(if applicable)

Name _____

Social Security Number _____

Street Address _____

Telephone Number (____) _____

City _____

State _____ Zip _____

Vessel Name _____

Coast Guard Document No. _____
or CA Reg. No. (if no USCG#) _____

DAMAGE/LOSS INFORMATION:

Location of Contact with MARS Cable (Use Loran-C, GPS Latitude Longitude, or the best available positioning fix)

Description of the nature of Damage or Loss (including gear description and lost catch): _____

Date and Time of Loss: _____

Date and Time of Reporting Incident to MBARI on MBARI's 24-hour hotline: _____

Destination Port: _____

Date Vessel First Returned to Port _____

Do you have insurance coverage for the loss for which you are seeking compensation? _____

If so, please provide the name and telephone number of your insurance company _____.

Additional Remarks: _____

(Use additional sheets, if needed)

MBARI will pay an approved claim within 10 business days after it receives a completed Claim Form from you, subject to MBARI's verification of cause and nature of loss, and the receipt of your signed release on MBARI's release form.

**Monterey Accelerated Research System Cabled Observatory (MARS)/
Monterey Bay Aquarium Research Institute (MBARI)**

Documentation and Check list for completion of Claim Form (attached):

- _____ Specific location of cable contact including Loran C coordinates and/or longitude and latitude, and distances and directions from cable
- _____ Description of how damage/loss occurred
- _____ Type/extent of damage/loss
- _____ Description of gear lost
- _____ Proof of ownership of lost/damaged gear
- _____ Description of lost catch (weight and value at destination port)
- _____ Proof of ownership of lost catch
- _____ Proof of status as active commercial fisherman, copy of commercial fishing license
- _____ Statements from witnesses/ crewmen (if any) with name, address and phone numbers
- _____ Estimates, bids, quotes, receipts, etc., for repairs or replacement gear
- _____ Any other supporting documents (photos of damage or loss, etc.)
- _____ Invoice directed to MBARI on Business stationery or letterhead from the fishing vessel/owner for the total amount claimed, showing vessel name, owner/operator name, address and Tax Identification Number (or, Social Security Number), certified, signed and dated by the owner/operator. (See sample invoice, attached)

Mail, fax or hand deliver the above information with a completed Claim Form to:

Monterey Bay Aquarium Research Institute (MBARI)

Attention: _____

7700 Sandholt Road

Moss Landing, CA 95039

(831) 775-_____

Fax **(831-775-1645)**

For further information and assistance in completing the Claim Form and supporting information, please contact: **NAME _____ MBARI at the above address/phone number**

(Example)

Name
Vessel Name
Address

Date:

INVOICE

TO: MONTEREY BAY AQUARIUM RESEARCH INSTITUTE (MBARI)

RE: FISHERMAN'S CLAIM FOR LOST OR DAMAGED GEAR AND LOST CATCH

Reimbursement for damaged/destroyed/lost (***pick one***) commercial fishing gear:

Description of gear: _____

Invoice for Repair/Replacement of gear (***pick one***) Costs: \$ _____

Reimbursement for lost Catch:

Description of lost catch: _____ pounds of _____

Invoice for lost catch [value at port of destination] Cost: \$ _____

Signed,

_____ Owner/Operator,
Soc. Sec. No. _____

I, _____ [fisherman], declare under penalty of perjury under the laws of the State of California, that the above reference claim is an accurate statement of and relates to fishing gear and catch owned by me at the time of loss and that said losses are not reimbursable by insurance.