

MEMORANDUM OF AGREEMENT

AMONG THE

TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION AND UNITED STATES DEPARTMENT OF THE INTERIOR

I. INTRODUCTION

This Memorandum of Agreement (MOA), executed by the Tennessee Department of Environment and Conservation and the United States Department of the Interior (DOI) (including the U.S. Fish and Wildlife Service, National Park Service, Bureau of Land Management, and Bureau of Indian Affairs) (collectively referred to as the Trustees), is entered into in recognition of their common interests and/or authorities as designated natural resource trustees under the Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C. §§ 1251 et seq., the Oil Pollution Act of 1990 (OPA), 33 U.S.C. §§ 2701 et seq., and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601 et seq. Their common interests include coordination and cooperation in the initiation and conduct of natural resource damage assessments, settlement negotiations, development of positions for covenants not to sue or administrative releases from liability, and/or development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances, as well as the application of any natural resource damages recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

II. PARTIES

The following Trustees or their designees are parties (the Parties) to this MOA and act on behalf of the public as Trustees for natural resources under this MOA:

1. The Commissioner of the Tennessee Department of Environment & Conservation, acting on behalf of the Governor of the State of Tennessee, and
2. The Director, Office of Restoration and Damage Assessment, acting on behalf of the Secretary of the United States Department of the Interior.

Notwithstanding any other provision of this MOA, any natural resource trustee who is not a Party and who has a natural resource interest that is affected by a discharge of oil or release of a hazardous substance shall not be precluded by this MOA from participating in the natural resource damage assessment process. At the election of such trustee, he or she may be added by addendum to this MOA, as necessary. Such other trustees may include, but are not limited to, Tribal governments, other Federal agencies, foreign countries, and affected trustee agencies from other states, provided that statutory authority exists for designating such other parties as Trustees under this MOA.

III. LOCATION

This MOA addresses natural resources within the boundaries of the State of Tennessee that are held in trust by both the DOI and State Trustees, including surface and ground waters of the State, which are injured as a result of discharges or substantial threats of discharges of oil as defined by the FWPCA and OPA, or injured as a result of releases of hazardous substances as defined by CERCLA. This MOA also addresses injuries that may occur from discharges or releases in waters outside of the State's boundary with the potential of migrating into the State.

IV. PURPOSE

The Trustees recognize the importance of coordinating and cooperating among themselves and with the lead response or corrective action agencies to minimize and assess injury to, destruction of, or loss of natural resources resulting from actual or threatened discharges of oil or releases of hazardous substances, including the consequences of removal, remedial, and corrective actions. The Trustees' primary goals are to ensure the restoration of injured natural resources and to seek compensation for public losses caused by discharges (or substantial threats of discharges) of oil or releases of hazardous substances in order to restore, replace, rehabilitate, and/or acquire the equivalent of those affected resources and/or their services. In order to achieve these goals, the Trustees' activities will primarily involve coordination of all planning, assessments and investigations, with the lead response agency; ensuring protection and restoration of injured resources and/or their services as part of the removal, remedial or corrective action; determination of conditions upon which the Trustees may grant a covenant not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations; and otherwise assessing and seeking damages for injuries to natural resources and/or the services they provide. The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees in furtherance of their natural resource trustee authorities for those natural resources affected by those discharges or releases mentioned above. While this document is designed to eliminate the need for site- or incident-specific MOAs, such additional MOAs may be useful or necessary in some cases.

V. AUTHORITY

The Trustees enter into this MOA concerning natural resource damages assessments under the FWPCA, OPA, and CERCLA in accordance with the legal authorities provided for each Trustee by the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) (40 C.F.R. Part 300), CERCLA, the FWPCA, OPA, the DOI's natural resource damage assessment regulations, 43 C.F.R. Part 11, the OPA regulations, 15 C.F.R. Part 990, any amendments to the foregoing, and any other applicable laws or authorities. The State Trustee enters into this MOA pursuant to designation by the Governor of the State of Tennessee under CERCLA, the FWPCA, OPA, and any other applicable laws or authorities. The Trustees intend to follow the natural resource damage assessment regulations in 43 C.F.R. Part 11 or 15 C.F.R. Part 990, as applicable

to the site or incident, and nothing in this MOA shall be construed to interfere or conflict with those regulations.

VI. TRUSTEE FUNCTIONS

In accordance with this MOA, the Trustees or their representatives or designees will seek, through appropriate coordination and cooperation among themselves and with the lead response or corrective action agencies, to minimize, and to assess damages for, injury to, destruction of, loss of, or loss of use of, natural resources resulting from unauthorized discharges (or substantial threats of discharges) of oil or releases of hazardous substances. The measure of natural resource damages includes the cost of restoring or rehabilitating the injured natural resources to a condition where they can provide the level of services available at baseline, or replacing or acquiring equivalent natural resources capable of providing such services, or a combination thereof. Damages also include compensation for interim service losses or diminution in value pending restoration, assessment costs, and funds needed for restoration planning, implementation, oversight, and monitoring. The Trustees recognize that there shall be no double counting of damages.

Consistent with their individual authorities and policies, the Trustees or their representatives or designees may employ one or more of several types of actions, depending on the circumstances of each discharge or release, in order to minimize injury to natural resources, and to seek restoration and compensation. Such Trustee actions may include, but are not limited to:

- A. Performing preliminary assessments to determine the potential threat or the nature and extent of threats to natural resources;
- B. Preventing injury, destruction, or loss through requests for initiation of removal or remedial actions by authorized agencies, or by seeking injunctive relief where authorized by law;
- C. Performing emergency restoration actions and seeking cost recovery for those actions;
- D. Minimizing residual natural resource injuries by participating in removal, remedial, or corrective actions as advisors to the lead response or corrective action agency, and seeking restoration and compensation for any past or residual injury at response or corrective action sites or oil spill incidents;
- E. Negotiating a judicial covenant not to sue for natural resource damages for releases covered by CERCLA, where appropriate, through the U.S. Department of Justice and the Office of the Tennessee Attorney General & Reporter;
- F. Negotiating cooperative funding agreements with a potentially responsible party and/or interagency agreements between the Federal Lead Administrative Trustee and the National Pollution Funds Center;
- G. Performing natural resource damage assessments;
- H. Negotiating administrative or judicial agreements for resource protection measures, restoration, and/or compensation for natural resource damages;
- I. Referring claims for natural resource damages for litigation; and/or

- J. Preparing and implementing restoration plans.

VII. RESTORATION AND COMPENSATION GOAL

The goal of restoration and compensation projects is to assure that no net loss of natural resources and/or their services occurs. Prior to the consideration of restoration alternatives, the Trustees will strive to have any continuing releases that would impede natural recovery or limit the effectiveness of restoration activities controlled. In addition, the restoration of the chemical and physical quality of the environment to baseline or no effects levels will be sought. Methods to accelerate the rate of return of injured habitats or ecosystems to baseline levels of services will be used whenever possible. Key species should be restored to baseline levels and lost services should be replaced as directly as possible. Consistent with the guidelines above, and regardless of whether restoration action addresses restoration to baseline conditions or addresses interim losses, the restoration actions considered should have, as closely as possible, a demonstrable direct link to the injuries or losses caused by the release or discharge. Projects with less direct benefits to injured resources or lost services (*e.g.*, out-of-kind restoration or restoration distant from the site of injury) generally will only be considered when there are compelling reasons to consider such alternatives (*e.g.*, high levels of residual on-site contamination or restoration more effective in breeding habitat than on-site). When acquisition is included as an alternative, it will be supported by endowment funds to cover long-term operation and maintenance wherever possible.

VIII. TRUSTEE ORGANIZATION

The Trustees and their representatives recognize the importance of planning and coordinating their efforts in order to effectively and efficiently carry out their respective natural resource trustee authorities under applicable Federal and State law. The Trustees and/or Trustee representatives, or Trustee Council members (see below), will coordinate their efforts to ensure the following:

- (1) that notifications of discharges or releases will be relayed to Trustees according to the National Contingency Plan or Area Contingency Plans;
- (2) that sites with co-Trustee interests are identified by response agencies, including, but not limited to, CERCLA National Priorities List (NPL) sites, Resource Conservation and Recovery Act (RCRA) facilities, State sites, instantaneous discharges of oil or releases of hazardous substances, and fishing closures or advisories due to the discharge (or substantial threat of discharge) of oil or release of hazardous substances;
- (3) that where possible, Trustees coordinate written comments to the lead agency On Scene Coordinators or Remedial Project Managers on all lead agency directed scopes of work, work plans, assessments and investigations, including remedial investigations, feasibility studies, and remedial designs; and
- (4) that State and Federal agencies, departments, and offices coordinate in consent decree, administrative agreement, or other types of negotiations.

Notification, including by telephone, electronic mail, letter, facsimile, or other method to or between the Trustees, pertaining to activities which are subject to coordination and cooperation under this MOA shall be sent to persons designated to receive such information.

For each individual site or incident involving significant participation by two or more Trustees, the Trustees agree to create a council (Trustee Council) representing the Trustees with an interest in potentially affected resources, which will implement this MOA and to which a representative will be designated by each Trustee. Such representative shall have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. The Trustees agree to appoint representatives to the Trustee Council who have, at a minimum, the level of authority necessary to make decisions on issues presented to the Council. The Trustees may create Trustee Councils for either a portion of or the entire damage assessment and restoration process. For example, the Trustees may create one Trustee Council to address the damage assessment phase and another to handle the restoration phase. The Trustee Council will designate a Lead Administrative Trustee (see 40 C.F.R. 300.5) or the functional equivalent for individual sites or incidents for administrative purposes. The Trustee Council may seek additional legal or scientific expertise outside its membership when needed. The Trustee Council may also establish committees and subcommittees as necessary for the efficient operation of the Council. Each Trustee agency will notify Council members when representatives resign and agree to inform other Trustee representatives about who the replacement will be. For individual incidents, the Trustee Council will attempt to name the Lead Administrative Trustee (or the functional equivalent) within 24 hours of Trustee notification in order that a Trustee point-of-contact is established as rapidly as possible. In addition, where appropriate, the Federal Trustees shall designate a Federal Lead Administrative Trustee as required by the National Pollution Funds Center for the purposes of accessing the Federal Oil Spill Liability Trust Fund.

IX. TRUSTEE COUNCIL AUTHORITIES

On behalf of the Trustees, the Trustee Council created to address each site or incident shall coordinate and authorize (consistent with applicable law, policy, areas of jurisdiction, and areas of special expertise) all Trustee activities and matters under this MOA in accordance with the decision-making requirements contained in Section XI. The Trustee Council may take whatever action it determines is appropriate to carry out the Trustees' respective authorities under applicable Federal and state law. It is expected that the Trustee Council may, as appropriate and consistent with each representative's delegated Trustee authority, take any of the following actions, among others, related to a particular site or incident.

- A. Develop a case work plan and budget.
- B. Designate a case manager to oversee and implement the work plan.
- C. Conduct or oversee scientific and technical studies, sampling, and other matters related to the determination of injuries and/or the assessment of damages for trust resources which may have been lost, injured or destroyed.
- D. Seek compensation from responsible parties for damages and/or restoration costs and for the costs of planning and implementing the assessment and/or restoration.

- E. Participate in negotiations with responsible parties.
- F. In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate on behalf of the Trustees any money paid to the Trustees, except for reimbursement of assessment and administrative costs, by or on behalf of responsible parties for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.
- G. Oversee the development, implementation, and appropriate monitoring of a plan for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those trust resources and/or their services that may be injured, destroyed or lost.
- H. In accordance with applicable law, make all necessary decisions on a case-by-case basis for the management and administration of funds pursuant to Section XII.
- I. In accordance with applicable law, arrange contracts with professional consultants that the Trustee Council determines are necessary.
- J. Communicate with potentially responsible parties or their agents and with other persons or entities. The Trustees agree that the Trustees and their respective Trustee Council Members will endeavor to have coordinated communications with potentially responsible parties or their agents and with other persons or entities on matters related to natural resource damages and claims for those damages. To the maximum extent possible, no Trustee or Trustee Council member will undertake to speak on behalf of the Trustees with the potentially responsible parties or to speak on behalf of the other Trustees with other persons or entities without first providing the other Trustees or Trustee Council, whichever is appropriate, notice and an opportunity to participate in such communications as appropriate. The above agreement shall not preclude a Trustee or Trustee Council member from having separate communications with the potentially responsible parties on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council member notifies the other Trustees and agrees to provide documentation of the communication for the Administrative Record, if appropriate. Nothing in this Section purports to or shall prohibit the respective Trustees from fulfilling the mandates of their Office or Department.
- K. Ensure adequate public participation.
- L. Maintain an administrative record of assessment and restoration activities.

X. LEAD ADMINISTRATIVE TRUSTEE

The duties of a Lead Administrative Trustee (or the functional equivalent) for any site or *incident* shall include, but are not limited to:

- coordinating the development of a case work plan and budget for approval by the Trustee Council;
- coordinating and monitoring the progress of the formulation of technical and legal positions for covenant not to sue, administrative agreement, or other negotiations;

- coordinating and monitoring the progress of the natural resource damage assessment process;
- coordinating and monitoring the preparation of all appropriate documentation of the natural resource damage assessment in accordance with applicable laws;
- preparing all press releases and other public informational documents for approval by the Trustee Council;
- scheduling meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis;
- preparing agendas for those meetings;
- acting as a central contact point for the Trustee Council;
- establishing and maintaining the administrative record as directed by the Trustee Council; and
- performing other administrative duties as directed by the Trustee Council.

The Lead Administrative Trustee (or the functional equivalent) will be responsible for informing the other Trustee Council members of all pertinent developments on a timely basis. The Lead Administrative Trustee (or the functional equivalent) may delegate any of his/her duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the Lead Administrative Trustee (or the functional equivalent) with decision-making rights beyond those normally held by each Trustee.

XI. DECISION MAKING

All decisions by the Trustee Council implementing this MOA, including selection of the Lead Administrative Trustee (or the functional equivalent) for a particular site or incident, shall be by consensus. Consensus on a Council action is reached when all Trustee Council members agree or do not object to the proposed recommendation or action. If consensus cannot be achieved after good faith discussions, the matter shall be elevated by the Parties for a decision or further instruction. If consensus still cannot be achieved, each Trustee may take individual positions or actions on its own behalf, but such individual positions or actions shall not constitute or be regarded as the positions or actions of the Council. If necessary, the Trustee Council may establish other mechanisms by which disputes may be resolved. In addition, site- or incident-specific agreements among Trustees, or among Trustees and other parties, as appropriate, may address decision-making as to a particular site or incident.

This Section does not preclude a Trustee from proceeding independently on any aspect of a natural resource damage assessment claim when necessary and appropriate. Each Trustee reserves the right to initiate and conduct litigation against any potentially responsible party and to engage in individual pre-litigation settlement negotiations, subject to the obligation to communicate with other Parties/Trustees, as set forth in this MOA.

XII. FUNDS

The Parties to this MOA shall be solely responsible for any costs incurred in fulfilling their obligations under this MOA, and no Party shall have any claim against the other Party for reimbursement of such costs unless provided for and enforceable under a separate written agreement or memorandum signed by representatives of the Parties. The Parties may agree to share the cost of contractors, experts, and/or the cost of studies and other work performed by either Party. Any such cost sharing arrangement shall comply with Section XVII of this MOA.

The Lead Administrative Trustee (or the functional equivalent) will be responsible for preparing Trustee Council resolutions, and making funding requests to the fund manager(s), for the distribution of any joint Trustee funds recovered through settlement or litigation. The Lead Administrative Trustee (or the functional equivalent) will also be responsible for communicating the Trustees' investment strategy and investment instructions to the fund manager(s) of any such joint funds. In accordance with the goals in Section VII and the decision-making process in Section XI, the Trustees will establish standards and procedures governing the joint use of all recovered natural resource damages received by the Trustees under this MOA. Such standards and procedures shall apply to the use of all recovered damages, not including individual Trustee assessment costs, whether in any joint Trustee account or individual Trustee account, to the extent permitted by applicable laws and policies.

The amount of each Trustee's reasonable assessment costs, and future administrative costs, if any, shall be specifically identified as such in each claim, collection, settlement, or recovery of damages. Reasonable assessment costs include the costs of damage assessment activities incurred by natural resource trustees in accordance with CERCLA, the FWPCA, OPA, 43 C.F.R. Part 11, and 15 C.F.R. Part 990, as applicable. Such costs include administrative costs, legal costs, and other costs necessary to carry out a damage assessment; monitoring and oversight costs; costs associated with public participation; and overhead/indirect costs that are necessary to carry out a damage assessment. The Trustees agree to request that sources separately reimburse each individual Trustee agency for such costs. Each Trustee's recovered individual assessment costs may be used at its individual discretion in accordance with CERCLA, the FWPCA, and OPA, 43 C.F.R. Part 11, and 15 C.F.R. Part 990, as applicable. The Trustees agree to mutually establish appropriate parameters, including but not limited to, direct costs, overhead/indirect cost rates, budgets, estimates, documentation procedures, and limitations upon administrative expenses for joint accounts and joint court registry accounts. Costs for administering any fund established by the Parties shall be jointly reviewed and approved by the Trustee Council prior to incurring any costs.

XIII. CONFIDENTIALITY

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the damage assessment process. The Trustees understand that all communications, whether written, oral, or electronic, related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. Accordingly, the Trustees shall treat all communications and work

products as privileged attorney-client communication, attorney work product, or protected by other applicable privilege (or combination thereof), as appropriate, and shall protect such communications and work products from disclosure to the maximum extent possible under applicable law, including Federal and State rules of evidence and discovery and Federal and State open records and meetings laws. The Trustees further understand that information created or obtained under this MOA by the Tennessee Department of Environment & Conservation or by the Department of the Interior may be subject to disclosure under the *Tennessee Public Records Act* and/or the *Freedom of Information Act*. All Trustees agree to notify other Trustees, in writing, of each request for information no more than five (5) days from the date of receipt of such request.

XIV. RESERVATION OF RIGHTS AND PARTICIPATION IN SIMILAR ACTIVITIES

All Parties understand that this document is not intended to create any further legal rights or obligations among the Trustees or any other persons not a party to this MOA. Nothing in this MOA is to imply that any signatory government is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources. This instrument in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations and individuals.

XV. MODIFICATION OF AGREEMENT

This MOA may be modified only by a written document signed by all Trustees. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. These site- or incident-specific agreements shall not be considered modifications of this MOA.

XVI. TERMINATION

This MOA shall be in effect from the date of execution and for five (5) years from such date, unless terminated in advance by action of the Trustees. At any time the Trustees determine that there is no purpose served by this MOA, the MOA will terminate upon such a finding. Any Trustee agency may withdraw from this MOA at any time for any reason. In the event any Trustee withdraws from the MOA, it must provide thirty (30) days written notice before the withdrawal can become effective.

In the event of the withdrawal of any Trustee, or at the termination of this MOA, each Trustee agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Trustees or their representatives pursuant to Section XII of this MOA.

This MOA is subject to renewal by action of the Trustees for five year terms in successive periods.

XVII. LIMITATION

Nothing in this MOA shall be construed as obligating the United States, the State of Tennessee or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law, or to expend funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or State law. This MOA does not apply to any site which is the subject of pending natural resource damage litigation under CERCLA, the FWPCA, and/or OPA as of the effective date of this MOA.

This document is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the Trustees will be handled in accordance with applicable laws, regulations, and procedures including those governing procurement by each Party of goods and services. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the Trustees and shall be independently authorized by appropriate statutory authority.


XVIII. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this MOA are subject to the availability of funding and are intended to be guidance for the respective Trustees. They are not intended to be and shall not be construed as a basis of any third party challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

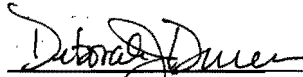
XIX. EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The effective date of the MOA shall be the date on which the last Trustee to sign the MOA does so sign.

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TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION
AND
UNITED STATES DEPARTMENT OF THE INTERIOR


Robert J. Martineau, Jr., Commissioner
Tennessee Department of Environment & Conservation

August 30, 2011
Date


Debbie Duren, Manager
Tennessee Department of Environment & Conservation
Natural Resource Trustee Program

8/30/2011
Date

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TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION
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UNITED STATES DEPARTMENT OF THE INTERIOR

Steve Glomb

Steve Glomb, Director,
Office of Restoration and Damage Assessment
U.S. Department of Interior

9/14/2011

Date