



MEMORANDUM OF UNDERSTANDING
BETWEEN THE
MISSOURI DEPARTMENT OF NATURAL RESOURCES
AND THE
UNITED STATES DEPARTMENT OF THE INTERIOR

I. INTRODUCTION

This Memorandum of Understanding (MOU) is entered into by and between the Missouri Department of Natural Resources (MDNR) and the United States Department of the Interior (DOI) (hereinafter collectively referred to as the Trustees). The Trustees enter into this MOU in recognition of their common interests in, and responsibilities for, natural resources under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.*; the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.*; and the Oil Pollution Act of 1990, 33 U.S.C. §2701 *et seq.* (hereinafter collectively referred to as the “Acts”). Specifically, the Trustees enter into this MOU to ensure cooperation and coordination between the Trustees in the preparation of the assessments of, as well as the pursuit of claims for, damages to natural resources under the Acts. Additionally, the Trustees enter into this MOU to ensure that natural resource damages jointly recovered from responsible parties, including any interest which may accrue thereon, are used towards the restoration, replacement, rehabilitation, or acquisition of the equivalent of the natural resources or resource services which were injured, destroyed or lost.

II. PARTIES

The Missouri Department of Natural Resources and the U.S. Department of the Interior are Parties to this MOU. The following officials or their designees are authorized to enter into this agreement.

1. Director
Missouri Department of Natural Resources
2. Program Manager
Natural Resource Damage Assessment & Restoration Program
U.S. Department of the Interior

Other parties may be added or deleted to this MOU, as appropriate, if both the Director of the Missouri Department of Natural Resources and the DOI, Natural Resource Damage Assessment and Restoration (NRDAR) Program Manager consent to the involvement of another party. The other parties must agree to the terms and conditions of this MOU in writing.

III. AUTHORITY

The Trustees enter into this MOU in accordance with the natural resource trustee authorities provided for each Trustee by the Acts as well as the National Contingency Plan, 40 C.F.R. Part 300; Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, and 15 C.F.R. Part 990; and other applicable State and Federal laws, regulations and directives.

IV. EVENTS

This MOU is intended to address all releases, discharges, spills or other incidents, occurrences, or events (hereinafter referred to as “events”) in the State of Missouri and its boundary waters, which: 1) affect coexisting or contiguous natural resources under the legally authorized trusteeship and concurrent jurisdiction of the parties; and 2) give rise to a claim for natural resource damages under the Acts.

V. PURPOSE

The Trustees recognize the importance of integrating and coordinating Trustee activities. This MOU is intended to guide and provide a framework for cooperation and coordination among the Trustees, consistent with their duties and responsibilities pursuant to the Acts including, assessing damages and using recovered damages to plan and implement actions appropriate to restore, replace, rehabilitate or acquire the equivalent of natural resources or resource services injured, lost, or destroyed pursuant to the Acts.

VI. NATURAL RESOURCE TRUSTEE COUNCIL

- A. Organization. The Trustees will establish a MDNR/DOI Trustee Council to implement this MOU when an event occurs. The Council shall be comprised of Designated Representatives for the State and Federal Trustees. The Trustee Council may seek advisory participation from the United States Department of Justice, the Missouri Attorney General, or other agencies, when necessary or appropriate.
- B. Designation of Representatives. The Director of the Missouri Department of Natural Resources, as the state Trustee, hereby designates the individual identified in Appendix A as his representative on the Trustee Council.

To ensure continuity in the Council’s work, the Director of the Missouri Department of Natural Resources hereby designates the individual identified in Appendix B as his alternate representative on the Council.

Upon occurrence of an event, the U.S. Department of the Interior will designate a primary and alternate representative who shall serve as the Trustee’s representative to the Council for all matters related to the event. The DOI shall use reasonable efforts to designate

representatives with experience and expertise in natural resources in the Midwestern United States.

- C. Changing Representatives. A Trustee may change its designated or alternate Council representative by providing notice, along with the representative's name, address, telephone and facsimile numbers, to each of the other Trustees' designates to the Council. In the event a Trustee's designated representative can no longer serve in this capacity, the Trustee must designate a new Council representative within fourteen (14) business days from the date the need presents itself. Business days will exclude state and federal holidays.

- D. Communications. All correspondence and communications to or between the Trustees, pertaining to activities that are subject to coordination and cooperation under this MOU, shall be sent to the primary representative of each Trustee.

- E. Duties and Responsibilities. The Trustee Council shall coordinate all Trustee activities and matters within the scope of this MOU. Actions to be taken or authorized by the Trustee Council in implementing this MOU will include, but are not limited to:
 - 1. Conducting scientific and technical studies, sampling and other matters related to the assessment of natural resource damages resulting from events;
 - 2. Seeking compensation from responsible parties for the damages assessed by the Trustees and for the costs of planning and implementing the assessment;
 - 3. Participating in negotiations with responsible parties in concert with attorneys for the Trustees;
 - 4. Overseeing the development and implementation of a plan for the restoration, replacement, rehabilitation, and/or acquisition of the equivalent of natural resources, or resource services, injured, destroyed or lost in accordance with applicable laws;
 - 5. Coordinating Trustee decision-making, planning, and project contracting, technical or otherwise, and ensuring such actions are conducted in accordance with applicable administrative procedures and/or legal requirements;
 - 6. Making all necessary decisions, on a case by case basis and in accordance with applicable law, for the management and administration of funds pursuant to Section VII Decision Making Authority of this MOU;
 - 7. Establishing protocols, standards, procedures, budgets, or other directions as necessary to support access to, or the use of, damages and/or interest;
 - 8. Taking other actions as the Trustee Council determines necessary or appropriate to implement this MOU, including fulfilling responsibilities of the Trustees under applicable State or Federal laws;

9. Coordinating with the National Pollution Funds Center to establish access to the Oil Spill Liability Trust Fund for NRD activities; and
10. Designating a Lead Administrative Trustee/Lead Authorized Official. The duties of the Lead Administrative Trustee as defined by OPA (15 CFR 990.30) or the Lead Authorized Official as defined by CERCLA (43 CFR 11.14), include the following:
 - a) Scheduling meetings, preparing agendas and recording actions of the Trustee Council meetings;
 - b) Acting as the central contact for the Trustee Council;
 - c) Maintaining records and documents received or generated by the Trustee Council;
 - d) Preparing, issuing or arranging for public notices or reports as determined necessary by the Trustee Council;
 - e) Maintaining records of fund expenditures and receipts related to events;
 - f) Such other duties as agreed upon by the Trustee Council; and
 - g) Seeking and receiving approval from the State and Federal Trustees on binding decisions.

The parties agree that the Lead Administrative Trustee/Lead Authorized Official possesses no decision-making rights beyond those normally held by each Trustee and is not authorized to act on behalf of the Trustees, except as provided for in this agreement.

VII. DECISION-MAKING AUTHORITY

All decisions by the Trustee Council implementing this MOU shall be by unanimous approval. In the event that unanimous agreement cannot be reached among the Trustee representatives to the Trustee Council, the matter in dispute shall be elevated to the State and Federal Trustees. If necessary, the Trustees may establish further mechanisms by which disputes may be resolved. The Trustees further agree that, while recognizing the areas of expertise and authority of the Trustees, decision-making deliberations will focus on the Trustees' mutual purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the injured natural resources and/or resource services. Trustee administrative costs associated with dispute resolution will not be reimbursable from settlement funds.

VIII. FUNDS

The Trustees agree to cooperate in good faith to utilize, to the extent consistent with applicable law, the United States Department of the Interior Natural Resource Damage Assessment and Restoration Fund, for purposes of receiving, depositing, holding, disbursing, and expending all funds, and the interest earned thereon, recovered, obtained or received by the Trustees from parties responsible for natural resource injuries arising out of an event under this MOU. The Trustees agree to deposit any funds recovered for injury to natural resources, obtained or received by or on behalf of any Trustee as a result of joint assessment and restoration activities under Federal and/or State natural resource damage assessment regulations, in this joint account(s), unless all Trustees agree that funds recovered from a particular case require different

treatment.

Disbursement of any funds obtained or received by, or on behalf of, any Trustee as a result of joint assessment and restoration activities will be by unanimous written agreement of the Trustee Council members, regardless of the location where the funds are held.

The Trustees agree that they will use all recovered damages for natural resource injuries arising out of an event under this MOU exclusively for activities that would restore, replace, rehabilitate or acquire the equivalent of the injured resources. Said activities shall be consistent with Trustee Council approved plans to address those injuries to natural resources and the services that they provide. In accordance with their decision making process in Section VII, the Trustees will establish standards and procedures governing the use of all natural resource damages jointly received by the Trustees for the purposes of developing and administering or implementing a Final Restoration Plan for restoring, replacing, rehabilitating and/or acquiring the equivalent of natural resources injured as a result of an event and the reduced or lost services provided by those resources.

The Trustees agree to pursue the recovery of reasonable costs (past, current and future) for the initiation of damage assessment and for the planning, conducting, evaluating, and coordinating of all natural resource damage assessment activities pursued by the Trustee Council with respect to natural resource injuries or lost services resulting from an event. The Trustees agree to request that recovered costs be separately reimbursed to each individual Trustee agency claiming same. Recovered administrative costs will be disbursed by electronic transfer or by check to each recovering agency as soon as possible and shall be used at the individual agency's discretion. For administrative costs not separately reimbursed, the Trustees agree that the reasonable costs, which are jointly agreed upon, shall be reimbursed to each Trustee out of any damage assessment cost recoveries or payments thereon, including funds received from the Oil Spill Liability Trust Fund.

IX. CONFIDENTIALITY

The Trustees agree that the free and open exchange of information and sharing of ideas and opinions with other Trustees is crucial to achieving the Trustees' close and common interests and the goals of this MOU. The Trustees also recognize that all written or oral communications related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. The Trustees agree that all scientific data arising out of the Trustee Council's review of the injury to natural resources resulting from events shall be made public and that such data shall be made public as soon as their publication will not prejudice the accomplishment of the purposes of this Agreement. Finally, it is understood and agreed upon that all information required to be disclosed pursuant to the Freedom of Information Act and/or the Missouri Open Records Act shall be released.

The Trustees agree that a "designated privileged communication" or "designated privileged document" is a communication which occurs, or a document which is drafted, with an

expectation of confidentiality and includes, but is not limited to, communications between the Governments' attorneys or their staffs, agents, consultants, and/or experts in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional government deliberations.

Accordingly, except as provided below or otherwise provided herein, the Trustees shall treat all designated privileged documents generated, and designated privileged communications by, between or among the Trustees as privileged attorney-client communications, attorney work product or protected by other applicable privileges such as the deliberative process privilege (or as a combination thereof). The Trustees shall protect and maintain these documents and communications in such a manner as to ensure that no intentional or unintentional disclosure is made which would compromise any asserted privilege.

Unless otherwise specifically provided, the Trustees shall each be entitled to assert an applicable privilege with respect to any document or communication jointly transmitted, prepared, or funded by the Trustees. Each Trustee shall be entitled to assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Trustee. Nothing herein in any way affects or limits the authority of any signatory to waive any privilege and release any documents, information, analyses, opinion, conclusion, or advice that are subject to privileges held exclusively by that signatory.

The transmittal of any designated privileged documents or designated privileged communications between or among any of the Trustees or federal or state response action agencies or other federal trustees (and their counsel, representatives, contractors and consultants) does not waive, or imply any waiver, of any privilege or right which the transmitting government may assert with respect to that document or communication.

If a subpoena, discovery request, or other request in any form, for a designated privileged document or information provided under this Agreement is received by any Trustee, a copy of the subpoena or request will be immediately forwarded to counsel for the Trustee to which the privilege applies and to the government representative(s) who originally generated the document or communication requested. The Trustee who receives such a request shall also provide a draft of the Trustee's intended response to such request not less than ten (10) days prior to the date that the Trustee intends to issue its response. To the extent that applicable law may require a more prompt response, the Trustees agree to act in good faith to meet the aforementioned requirements.

An agreement between the Trustees to release a designated privileged document or communication shall not be construed as a waiver of privilege or confidentiality regarding any other documents or communications.

At the request and option of any Trustee, designated privileged documents shall be returned to the originating Trustee or destroyed, subject to the provisions of the Federal Records Act, 44 U.S.C. § 2901, et seq. or in accordance with Chapter 109, RSMo.

X. RESERVATION OF RIGHTS

Except for the confidentiality agreement contained in Section IX Confidentiality, all Trustees understand that this document is not intended to create or waive any legal rights or obligations among the Trustees or any other person or entity not a party to this MOU. Nothing in this MOU 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.

XI. MODIFICATION OF AGREEMENT

Modification of this MOU shall be in writing and upon approval of all Trustees currently parties to the MOU. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. Site and/or event-specific MOUs shall not be considered modifications to this MOU.

XII. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement by the Trustees. At any time the Trustees determine that there is no purpose served by this MOU, the MOU will terminate upon the declaration, in writing, of such a finding. Any Trustee may withdraw from this MOU at any time for any reason. In the event any Trustee withdraws from the MOU, it must provide thirty days written notice before the withdrawal can become effective. In the event of such withdrawal, this MOU remains in full force and effect for the remaining Trustees.

In the event of the withdrawal of any Trustee, or at the termination of this MOU, 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 VIII Funds of this MOU.

Furthermore, obligations arising under Section IX, Confidentiality, of this MOU survive the closure and termination of any events under this MOU, the withdrawal of any party to this MOU, or the termination of this MOU.

XIII. LIMITATION

Nothing in this MOU shall be construed as obligating the United States, the State of Missouri or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

XIV. THIRD PARTY CHALLENGES OR APPEALS

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

XV. EXECUTION: EFFECTIVE DATE

This MOU may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOU. The date of execution shall be the date of the final Trustee's signature.

SIGNATORY PAGE

Stephen Mahfood
Director
Missouri Department of Natural Resources

Date

Jeremiah W. (Jay) Nixon, Attorney General
State of Missouri

Shelley A. Woods
Assistant Attorney General

Date

Frank DeLuise
Program Manager
Natural Resource Damage Assessment & Restoration Program
U.S. Department of the Interior

Date

APPENDIX A

Designated Representatives:

1. State of Missouri: Dennis Stinson
Address: Missouri Department of Natural Resources
Air and Land Protection Division
Hazardous Waste Program, Superfund Section
P.O. Box 176, 1738 E. Elm Street
Jefferson City, MO 65102

Phone: (573) 751-4187
Fax: (573) 751-7869

APPENDIX B

Alternate Representatives:

1. State of Missouri: Frances Klahr
Address: Missouri Department of Natural Resources
Air and Land Protection Division
Hazardous Waste Program, Superfund Section
P.O. Box 176, 1738 E. Elm Street
Jefferson City, MO 65102

Phone: (573) 522-1347
Fax: (573) 751-7869