



U.S. Fish and Wildlife Service
Wendi Weber, Regional Director
300 Westgate Center Drive
Hadley, MA 01035

Re: Coordination and cooperation between Pennsylvania Department of Environmental Protection (PA DEP) and U.S. Department of Interior (DOI) for Lower Darby Creek: Folcroft Landfill and Annex Site NRDAR

Dear Stakeholders:

The purpose of this Letter of Understanding (LOU) is to establish the terms under which PA DEP and U.S. Fish and Wildlife Service on behalf of the DOI agree to cooperate to assess and restore the natural resources and associated services that have been injured, destroyed, or lost as a result of releases of hazardous substances and oil at and/or from the Lower Darby Creek: Folcroft Landfill and Annex Facility (Facility and Site) on the Lower Darby Creek Area Superfund Site in Philadelphia, Pennsylvania (Superfund Site), and anywhere contaminants have come to be located (collectively referred to as the Assessment Area). The 64 acres where the Facility is located is part of the 1,200-acre John Heinz National Wildlife Refuge (JHNWR) which include Tinicum Marsh, the largest freshwater marsh (350 acres) in Pennsylvania and is managed by the United States Fish and Wildlife Service (USFWS). The PA DEP and DOI, each acting in its capacity as a trustee for natural resources, will work collaboratively to restore, replace, rehabilitate, and/or acquire the equivalent of natural resources or their associated services that were affected within the Assessment Area.

Secretary

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BACKGROUND AND MUTUAL BENEFITS

This LOU executed by the PA DEP and the DOI is entered into in recognition of the common interests of the assessment and restoration of the natural resources and associated services that have been injured, destroyed, or lost.

This LOU addresses the Parties' coordination and cooperation in the initiation and conduct of a natural resource damage assessment and restoration (NRDAR) process, including: 1) the assessment of natural resource damages (hereinafter "NRDA") for injury to, destruction of, or loss of natural resources and associated services resulting from releases at or from Site; 2) restoration planning and design; 3) implementation, maintenance, and monitoring of actions to restore, replace, or acquire the equivalent of those natural resources and services; 4) any prosecution or settlement of natural resource damages claims associated with the Assessment Area, including development of positions for covenants not to sue or administrative releases from liability; 5) coordination with response, or remedial actions carried out by or under the direction of other federal or state agencies related to the Site; and, 6) public outreach and information sharing related to any of the above activities of the agencies and commissions related to the Assessment Area. The LOU further addresses the application of any natural resource damages jointly recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources and administrative costs related to restoration. This LOU is intended to cover natural resources as defined under Section 101(16) of CERCLA, as amended, 42 U.S.C. 9601(16), Section 1001(20) of the Oil Pollution Act, 33 U.S.C. 2701(20), belonging to or managed by, controlled by, or appertaining to each signee which may have been injured by releases of hazardous substances and/or oil at or from the Assessment Area located in or near the JHNWR, as defined under CERCLA, CWA, and other applicable federal and state law.

PARTIES AND ADVISORS

- A. Natural Resource Trustee Parties: In accordance with Subpart G of the National Contingency Plan, and other applicable federal and state law, the following officials or their designated representatives are Parties to this LOU and act on behalf of the public as Trustees for natural resources under this LOU:
1. Commonwealth of Pennsylvania: The Secretary of the PA DEP, acting on behalf of the Governor of the Commonwealth of Pennsylvania.
 2. DOI: Regional Director, U.S. Fish and Wildlife Service North – Atlantic Appalachian Region, as Authorized Official, acting on behalf of the Secretary of the Department of the Interior.
- B. Other Natural Resource Trustees. Notwithstanding any other provision of this LOU, any other natural resource trustee (as defined in 40 C.F.R. §§ 300.600-605) who is not a Party to this LOU and who has an interest with respect to any natural resource impacted or affected by releases at and from the Facility or Site are not to be precluded from participating in the NRDA process or any other natural resource trustee activities under this LOU. Such other Trustees may include, but are not limited to, other Pennsylvania state agency, tribal governments, other federal agencies, or affected trustee agencies from other states, which may be added by addendum to this LOU, as necessary and appropriate and authorized by applicable federal, state, or tribal law.

- C. Reservation of Authority. Nothing in this LOU is to imply, or operate in a manner, that any natural resource trustee with an interest in the Site, whether a Party to this LOU or not, is in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources which may have been affected by the Site.
- D. Advisors. As determined to be appropriate by the Trustee Parties, or as required by applicable federal or state law, the Trustee Parties will coordinate with and seek the advisory participation of the following federal and state government agencies and departments:
1. U.S. Department of Justice (“DOJ”)
 2. U.S. Department of the Interior, Office of the Secretary (“DOI/OS”), Office of the Solicitor (“DOI/SOL”), Office of Policy Analysis (“DOI/PA”), and Office of Environmental Policy and Compliance (“DOI/OEPC”),
 3. U.S. Environmental Protection Agency (“EPA”)
 4. Pennsylvania Attorney General’s Office (“PAGO”)
 5. Other federal, state, or tribal agencies and departments, and legal advisors as determined necessary and appropriate by the Trustees.

NATURAL RESOURCE TRUSTEE COUNCIL

- A. Establishment. The Trustees and their representatives recognize the importance of planning and coordinating their efforts to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable law. Accordingly, the Trustees hereby agree to create the Lower Darby Creek: Folcroft Landfill and Annex Site Natural Resource Trustee Council (“Trustee Council”).
- B. Composition of the Lower Darby Creek Trustee Council
1. The Trustee Council consists of one voting member for each Trustee specified above. Each Trustee will designate one primary voting representative to the Trustee Council and one alternate representative to act in the absence of the primary voting representative, but who has the right to attend all meetings and actively participate in meetings. The representatives and their alternates to the Trustee Council are identified in Appendix A to this LOU.
 2. Each Trustee may, by written notification to all other Trustees, change the primary voting representative and/or alternate representative.
- C. Meetings. Any Party may, upon reasonable notice and coordination with the LAT, as defined below, or Trustee Council Chairperson, call a meeting of the Trustee Council to be conducted either in person or virtually by telephone conference call, email, or other electronic communication method. With reasonable prior notice, representatives of each Natural Resource Trustee Party or DOJ and/or PAGO legal counsel may attend meetings and participate in the deliberations of the Trustee Council.
- D. Trustee Council Chairperson. A representative of the Lead Administrative Trustee (LAT) as below, will serve as the initial chairperson for Trustee Council meetings. The representatives on the Trustee Council may agree to reassign or rotate the position of Chairperson as they deem appropriate. The Chairperson, with the assistance of the LAT if the Chairperson is not a representative of the LAT, will be responsible for organizing and scheduling meetings, preparing.

proposed agendas, identifying in the agendas any issues to be voted upon at the proposed meeting, distributing agendas to the designated primary, alternative, and legal advisors at least three (3) working days in advance of meeting, barring any unforeseen and unavoidable circumstances, and presiding over convened meetings.

E. Responsibilities of LAT. The Trustees agree that the duties of the LAT shall include but are not limited to:

1. Coordinating the development of a Preassessment Screen Determination, an Assessment Plan, and other assessment related documents for approval by the Trustees as determined appropriate;
2. Coordinating the progress of the formulation of technical and legal positions for covenants not to sue, administrative agreements, or other negotiations;
3. Preparing Trustee Council Resolutions for review by the Trustees;
4. Overseeing and/or developing a draft and final restoration plan(s) and, as applicable, environmental compliance and National Environmental Policy Act analysis for approval by the Trustees;
5. Coordinating the preparation of all appropriate documentation of the natural resource damage assessment and restoration process in accordance with applicable laws;
6. Coordinating preparation of all press releases and other public informational documents for approval by the Trustee Council;
7. Scheduling meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis;
8. Preparing agendas for those meetings;
9. Acting as a central contact point for the Trustee Council;
10. Establishing and maintaining the administrative record for both the injury assessment and restoration;
11. Performing other administrative duties; and
12. Informing the other Trustee Council representatives of all pertinent developments on a timely basis. The LAT may delegate any of her/his duties to another Trustee representative with the concurrence of the Trustee Council.

F. Decision-making.

1. The members of the Trustee Council have equal authority, and all decisions under this LOU will be made by consensus agreement of the voting members of the Trustee Council, subject to the dispute resolution procedures specified, below. The Trustees agree that decision-making deliberations will focus on the Trustees' mutual goals as set forth in this LOU.

2. The Trustee Council members will conduct good faith discussions directed toward obtaining consensus agreement. In the event agreement cannot be reached, the dispute resolution procedures below will govern.

PROJECT GOAL

- A. In accordance with applicable law, the Parties will work collaboratively to carry out the following duties:
 1. Oversee the development, implementation, and monitoring of plans and reports for the assessment, restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those natural resources and/or their services that may be injured, destroyed, or lost;
 2. Create a Technical Workgroup and a Legal Work Group, and other workgroups or committees that report to the Parties, when they are deemed necessary and appropriate to further the purposes of applicable law and this LOU;
 3. Conduct or oversee scientific and technical studies, sampling, and other matters, including response, related to the determination of injuries and/or the assessment of damages for natural resources and their services which may have been lost, injured, or destroyed;
 4. In coordination with agency counsel and the Pennsylvania Office of the Attorney General and the U.S. Department of Justice, seek compensation from Potentially Responsible Parties (PRP)s for damages for restoration, assessment costs, for the Parties' costs of planning and implementing the assessment and/or restoration, and for other legally authorized expense;
 5. Participate in negotiations with PRPs;
 6. Coordinate NRDAR activities with response actions carried out by other federal and state agencies, as appropriate;
 7. In accordance with applicable law, respective agency policy, and applicable delegation of authority, manage any money jointly paid to the Parties (either advanced funding or recovered damages) for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources and/or their services;
 8. In accordance with applicable law, develop contracts with professional consultants that the Parties determine are necessary to fulfill the Parties' duties and responsibilities pursuant to applicable statutes and regulations;
 9. Encourage public participation and involvement in a manner consistent with applicable law and regulations;
 10. Maintain an administrative record of assessment and restoration activities.
 11. Each Party will review and approve draft documents to be made available for public review and comment as well as final documents (i.e., milestone documents, study plans and reports). Such approval will either be by signature on the document or written (email is acceptable) approval by the designated Party or Authorized Official for each Party; and

12. Coordinate and/or carry out such other actions as may be necessary and appropriate to achieve the purposes of this LOU and to fulfill the trustee responsibilities of each Party.

TERMS OF UNDERSTANDING

- A. The following terms and conditions will govern the Parties' understanding:
 1. Nothing in this LOU is intended or shall be construed to be an admission by the Trustees in any dispute or action between the Trustees or between the Trustees and a third party. Nothing in this LOU is intended or shall be construed as a waiver by the Trustees of any claims or defenses in any legal action, or of any other rights or remedies.
 2. This LOU is not intended to and does not create any contractual rights or obligations with respect to the Parties or any third parties.
 3. The Parties to this LOU have equal authority, and all decisions under this LOU will be made by consensus agreement of all the Parties, subject to the dispute resolution procedures. The Parties agree that decision-making deliberations will focus on the Parties' mutual goals as set forth in this LOU. The Parties will conduct good faith discussions directed toward obtaining consensus agreement. In the event of a dispute between the agencies for the Commonwealth of Pennsylvania involving any decisions under this LOU, including, but not necessarily limited to potential resolution of a claim or expenditures of recovered funds, the agencies agree that they will attempt to resolve a disagreement or dispute by referring it to successively more senior personnel within their respective agencies until agreement is achieved. Any dispute arising among the Pennsylvania agencies under this LOU shall be submitted to the Pennsylvania Office of General Counsel for final resolution.
 3. This LOU defines, in general terms, the basis upon which the PA DEP and DOI will collaborate. Expenditures of funds, human resources, equipment, supplies, facilities, training, public information, and expertise will be provided by each agency to the extent that its participation is required, and to the extent resources are available to each Party to achieve the collaborative products.
 4. This LOU in no way restricts the PA DEP or DOI from participating in similar activities or arrangements with other public or private agencies, organizations, or individuals provided that such Party or agent informs and consults with the other Parties, either prior to the communication or timely thereafter.
 5. The Parties may enter into an agreement with a PRP(s) in which the PRP(s) agrees to fund and/or conduct NRDAR activities, including assessment or early restoration. Such an agreement will specify the terms of the activity, monetary disbursement, if any, and the PRP's level of participation. Any funds received will be administered in accord with the terms established pursuant to this LOU. To the extent provided by law, each Party agrees to cooperate in the administration of any private funding source or sources, except for recovered past assessment costs.

6. Each Party also agrees to coordinate the expenditure of any funds that are or may become available to a Party for the purposes of the NRDA, except for reimbursed damage assessment costs, with the other Parties. The Parties agree to jointly request that PRP(s) separately reimburse each individual Party for Each Party's recovered past assessment costs so that they may be used at its individual discretion in accordance with applicable law.
7. As determined to be appropriate by the Parties, or as required by applicable federal or state law, the Parties will coordinate with and seek the advisory participation of the following federal and state government agencies and departments:
 - a) U.S. Department of Justice ("DOJ")
 - b) U.S. Department of the Interior, Office of the Secretary ("DOI/OS"), Office of the Solicitor ("DOI/SOL"), Office of Policy Analysis ("DOI/PA"), and Office of Environmental Policy and Compliance ("DOI/OEPC"),
 - c) U.S. Environmental Protection Agency ("EPA")
 - d) Pennsylvania Attorney General's Office ("PAGO")
 - e) Other federal, state, or tribal agencies and departments, and legal advisors as determined necessary and appropriate by the Parties.
8. Each Party's primary, alternate representatives, and legal representatives will receive, and are responsible for all correspondence and communications on behalf of such Party. Party contacts are identified in Appendix A.

USE OF NATURAL RESOURCE DAMAGES RECOVERIES

The Parties intend to use any natural resource damages recovery obtained jointly by the Parties, and any interest earned thereon, to restore, replace, rehabilitate and/or acquire the equivalent of the natural resources or their associated services that were the basis of the claim and judgment and/or settlement.

Such joint recoveries for the restoration of natural resources and their services will be deposited in an interest-bearing account to be disbursed only for the purposes described in this LOU and in accordance with the provisions of this LOU. The Parties agree that expenditures from the account should be managed in such a way to maximize restoration benefits and minimize post settlement restoration planning and administrative costs.

Damages recovered jointly for costs of the Parties related to restoration planning and implementation and monitoring oversight (i.e., administrative costs of the Parties), and any interest earned thereon, should only be spent upon mutual, written agreement by the Parties pursuant to the provisions of this LOU. Parties that execute this LOU agree that recovered funds can be used for the administrative costs of the Parties and will endeavor to reach agreement on appropriate amounts to be spent, which may include annual documentation submitted to the Trustee Council for review.

NOTIFICATION OF NEGOTIATIONS WITH PRPs

The Parties agree that they will endeavor to have coordinated communications with PRPs or their agents for matters related to natural resource damages and claims for those damages. The above agreement does not preclude a Party or their agent from having separate communications with PRPs on matters within the scope of the LOU where circumstances warrant, provided that such Party or agent informs and consults with other Parties, either prior to the communication or timely thereafter.

CONFIDENTIALITY

The Parties support an open government policy of providing access to scientific information created or obtained by the Parties during the NRDAR process. The Parties and their representatives agree that it is in the public interest that all scientific data arising out of their review of the injury to natural resources at this Site be made public. Data should be made public as soon as publication will not prejudice the on-going assessment. Public sharing of scientific data will be the general policy of the Parties. However, all Parties 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 Parties will treat all communications and work product as privileged attorney-client communication, attorney work product, or protected by other applicable privilege (or combination thereof), as appropriate, and will protect 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. Privileged documents will be maintained in such a manner as to ensure that no intentional or unintentional disclosure is made which would compromise any asserted privilege. The Parties further understand that information created or obtained under this LOU by the Parties, the Commonwealth of Pennsylvania or DOI may be subject to disclosure under the Pennsylvania Right to Know Law, 65 Pennsylvania Statute §§ 67.101 et seq. or the Federal Freedom of Information Act, 5 U. S.C. § 552. All Parties agree to notify other Parties, in writing, of each request for information no more than five (5) business days from the date of receipt of the request. They further agree that a request will be forwarded for response to the Parties to which the privilege applies or whose representatives originally generated or contributed the record requested. Nothing contained herein is to be construed as prohibiting or restraining the Parties from agreeing to release any record or from disclosing any record for which disclosure is required by law.

As a result of the release of hazardous substances at and from the Assessment Area, the Parties have potential claims for damages and anticipate possible litigation with the PRP(s). In furtherance of their common interests, the Parties to this LOU have been meeting and will continue to meet to discuss matters of common interest, including the possibility of litigation by the Parties against the PRPs.

In addition, the Parties will open and maintain a publicly available administrative record to the extent required by, and consistent with the requirements of, the CERCLA NRDAR regulations.

COST ACCOUNTING AND REIMBURSEMENT

Each Party will ensure that appropriate and reasonable practices for cost documentation, cost accounting, cost reimbursement, and expenditures are followed, in accordance with applicable law. In addition, the Parties may establish and adopt NRDAR cost accounting and reimbursement guidelines including a level of detail and a reporting schedule commensurate with the complexity and size of the recovery of damages. These guidelines ensure that recovered damages are spent only on reasonable and adequately documented costs.

MODIFICATION OF LOU

It is acknowledged that additional agreements may be executed by the Parties and their representatives with regard to natural resource damage claims that arise and to planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed, or lost.

Therefore, modification of this LOU must be in writing and upon approval of all Parties currently party to the LOU.

TERMINATION

A. This LOU is effective from the date of execution until the Trustee Council determines that the restoration plan(s) implemented under this LOU has (have) been completed, unless terminated in advance by written agreement of all Parties to this Agreement. Additionally, if, at any time the Trustees collectively determine that there is no purpose served by this LOU, the LOU will terminate upon such a finding.


B. Withdrawal from this Agreement. Any Party may withdraw from this LOU at any time for any reason. In the event any Party withdraws from the LOU, it must provide ten (10) calendar days written notice before the withdrawal can become effective. In the event of the withdrawal of a Party, or at the termination of this LOU, each Party agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Parties or their representatives pursuant to this LOU. Should a Party withdraw, the LOU continues in effect for the Parties remaining in the LOU.

ANTI-DEFICIENCY ACT

This LOU is neither a fiscal- nor funds-obligation document. Nothing in this LOU will be construed as obligating the United States, the Commonwealth of Pennsylvania, or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law, to expend funds in contravention of the Anti-Deficiency Act, 31 U. S.C. § 1341, or state law, or to expend appropriations or to enter into any contract or other obligations. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the Parties will be handled in accordance with applicable laws and procedures including those governing procurement by each Party of goods and services. Such endeavors will be outlined in separate agreements that will be made in writing by representatives of the Parties and will be independently authorized by appropriate statutory authority.

If the terms and condition outlined above are acceptable to you, please sign where indicated below. We look forward to initiating our cooperative efforts assessing and restoring the natural resources on the Lower Darby Creek: Folcroft Landfill and Annex Site.

Sincerely,



Jessica Shirley, Interim Acting Secretary
PA Department of Environmental Protection

cc: Michael Braymer, Chief Counsel, PA DEP
Amy Homer Hanley, Chief Counsel, U.S. DOI

ACKNOWLEDGED:

The United States Department of the Interior:
Acting By and Through the U.S. Fish and Wildlife Service

Wendi Weber, Regional Director, Northeast
300 Westgate Center Drive
Hadley, MA 01035

Date _____

APPENDIX A: Contacts and Voting Members of Trustee Council

PA DEP

Trustee Representative: Bonnie McClennen, Environmental Group Manager

Alternate Representative: Tim Cherry, Solid Waste Supervisor

U.S. Department of the Interior

Trustee Representative: Carrie Blakeslee, USFWS NRDAR Case Manager

Alternate Representative: Sonja Jahrsdoerfer, USFWS Field Office Project Leader