

MEMORANDUM OF AGREEMENT

AMONG THE

**COMMONWEALTH OF VIRGINIA,
STATE OF NORTH CAROLINA,**

And

UNITED STATES DEPARTMENT OF THE INTERIOR

**REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION ACTIVITIES AT THE DUKE ENERGY DAN RIVER STEAM
STATION COAL ASH POND IN ROCKINGHAM COUNTY, N.C.**

I. INTRODUCTION

This Memorandum of Agreement (Agreement) by and among the State of North Carolina acting through the director of the Division of Waste Management for the Department of Environment and Natural Resources, on behalf of the State of North Carolina; the Commonwealth of Virginia, acting through the Office of the Secretary of the Department of Natural Resources and the Virginia Department of Environmental Quality, on behalf of the Commonwealth of Virginia; and the U.S. Fish and Wildlife Service (USFWS), on behalf of the Department of the Interior (collectively, “Trustees”), and joined by the North Carolina Wildlife Resources Commission acting through its director in cooperation with the Department of Environment and Natural Resources as an interested advisor; and by the Virginia Department of Game and Inland Fisheries as an interested advisor (collectively, “Advisors”) is executed to recognize the Trustees’ and Advisors’ common interests in carrying out their collective natural resource trustee responsibilities resulting from the releases of hazardous substances at and from the Duke Energy Dan River Steam Station coal ash pond in Rockingham County, N.C. (“Site”), as more fully described below.

II. PARTIES

The following Trustees or their designees are parties to this Agreement and act on behalf of the public as Trustees or agencies with affected trust resources under this Agreement:

1. The North Carolina Department of Environment and Natural Resources, acting on behalf of the Governor of the State of North Carolina.
2. The Virginia Department of Natural Resources and the Virginia Department of Environmental Quality, acting on behalf of the Governor of the Commonwealth of Virginia.
3. The Regional Director of U.S. Fish and Wildlife Service, Southeast Region, acting on behalf of the Secretary of the United States Department of the Interior.

The following non-voting Advisors are state agencies with responsibilities and expertise for certain trust resources and desire to participate in this Agreement in a non-voting capacity:

1. The North Carolina Wildlife Resources Commission, acting as a state agency with responsibility over certain wildlife resources and with certain expertise in the likely subject matter of this agreement, and with an interest in acting to protect these resources in the interests of the State of North Carolina.
2. The Virginia Department of Game and Inland Fisheries, acting as a Commonwealth agency with responsibility over certain wildlife resources and with certain expertise in the subject matter of this agreement, and with an interest in acting to protect these resources in the interests of the Commonwealth of Virginia.

Notwithstanding any other provision of this Agreement, any natural resource trustee who is not a party to this Agreement and who has a natural resource interest that is affected by the release of a hazardous substance shall not be precluded by this Agreement 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 Agreement, 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 Agreement.

III. LOCATION

This Agreement is intended to cover, but is not limited to, natural resources (as defined under the authorities cited below, and other applicable federal and state law) belonging to, managed by, controlled by, or appertaining to the Trustees at the Site and downstream thereof into the Commonwealth of Virginia, which may have been injured as a result of releases of hazardous substances as defined under Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and other applicable federal and state law. This Agreement also addresses any and all areas where hazardous substances from the Site have come to be located, and any and all injuries, damages or other losses or impacts arising, resulting or otherwise in any way related to said hazardous substances or any clean-up activities therewith.

IV. PURPOSE

The Trustees and Advisors recognize the importance of coordinating and cooperating among themselves and with the lead response or corrective action agencies to cost-effectively and efficiently minimize and assess injury to, destruction of, or loss of natural resources resulting from releases of hazardous substances, including the consequences of removal, remedial, and corrective actions. The Trustees’ and prospective Trustee Advisors’ common interests and primary goals are to ensure the restoration of injured natural resources and to seek compensation for public losses caused by 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’ and Advisors’ 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(s); 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 Agreement 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 releases mentioned above.

V. AUTHORITY

The Trustees enter into this Agreement concerning natural resource damages under the Federal Water Pollution Control Act (Clean Water Act or “CWA”), 33 U.S.C. §§ 1251 *et seq.*, and the CERCLA, 42 U.S.C. §§ 9601 *et seq.*, and 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, CWA, the Department of the Interior’s natural resource damage assessment regulations (43 C.F.R. Part 11), any amendments to the foregoing, and any other applicable laws or authorities. The State and Commonwealth Trustees enter into this Agreement pursuant to designation by the Governors of the State of North Carolina and the Commonwealth of Virginia, respectively, under CERCLA, CWA, and any other applicable laws or authorities. The Advisors enter into this agreement as government participants acting in the public interest along with the Trustees. The Trustees intend to follow the natural resource damage assessment regulations in 43 C.F.R. Part 11, as applicable to the Site, and nothing in this Agreement shall be construed to interfere or conflict with those regulations.

VI. NATURAL RESOURCE DAMAGES

In recognition of the Congressional intent under CERCLA to restore natural resources injured as a result of releases of hazardous substances, the measure of recoverable damages for Natural Resource Damage Assessment and Restoration (“NRDAR”) contemplated under this Agreement may include:

- A. the costs of restoring injured natural resources,
- B. interim lost use or diminution of value of the injured natural resources pending natural recovery or restoration of the injured natural resources,
- C. reasonable costs of the NRDAR, and
- D. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources.

Damages may include documented Trustee costs of participation in removal, remedial, corrective, or other response actions carried out by other federal and state agencies in an effort to abate and/or minimize continuing and residual injury, and to achieve or enhance restoration of injured natural resources. These costs may also include the expense of Advisors where those expenses are incurred as part of a natural resource damage investigation, to determine whether or not a trust resource has been injured, and the expense of Advisor participation when that

participation provides expertise and authority necessary to achieve timely and efficient NRDAR.

VII. TRUSTEE COUNCIL

A. Composition. The Trustees who are parties to this Agreement recognize the importance of coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable federal and state law. Accordingly, the Trustees hereby agree to create the Dan River Coal Ash Trustee Council (“Trustee Council”). Within ten (10) days of the execution of this Agreement, each voting Trustee, as specified under Section II, shall designate one primary voting representative to the Trustee Council and one alternate representative to act in the absence of the primary voting representative. Each Trustee may, by written notification to all other Trustees, change the Primary and Alternate Trustee Representative designees. The Council may create a Technical Work Group and/or additional subcommittees when they are deemed necessary to achieve the purposes of this Agreement. In addition to the voting Representative, the U.S. Department of Justice, the Office of the Attorney General for the State of North Carolina, and in-house counsel for each of the Trustees, may each appoint one attorney who may attend all meetings of, or organized by, the Council in a legal/consultative role, but such attendance or participation by an attorney shall not create additional voting rights.

B. Decision-making. The three (3) voting members of the Trustee Council shall have equal authority, and all decisions under this Agreement shall be by unanimous agreement of all Trustee Council members.

C. Dispute Resolution. In the event of a dispute involving any decisions under this Agreement, the Trustee Council representatives shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among the Trustee parties involved in the dispute and consensus by the Trustee Council as a whole. If unanimous consent still cannot be reached after good faith discussions, the matter shall be elevated to the officials who executed this Agreement on behalf of each Trustee, or to any other official having authority to decide on such matter or bind the party or parties, for further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. The Trustees agree that decision-making deliberations will focus upon the Trustees’ mutual goals of source control and abatement of hazardous substance releases, NRDAR, and restoration of injured natural resources, rather than upon independent control or trusteeship over the affected natural resources.

D. Duties and Responsibilities. The Trustees, through their representatives, may coordinate their efforts, including but not limited to the following:

1. Carry out studies, prepare reports, and collect information that the Trustee Council determines are necessary and relevant to the NRDA;
2. Share information with and consult with each other as is determined to be appropriate and consistent with this Agreement;
3. Coordinate activities undertaken pursuant to this Agreement with response, remedial, or corrective actions carried out by other federal and state agencies, as appropriate;
4. Evaluate injuries to natural resources due to the hazardous substances released at and/or from the Site;
5. Support the Trustees' efforts to recover damages for injuries to natural resources from potentially responsible parties ("PRPs");
6. Develop a Restoration Plan(s) to restore, replace, rehabilitate, and/or acquire the equivalent of the injured natural resources, and the reduced or lost services provided by such resources;
7. Develop and implement a strategy to have liable parties perform and/or pay for the costs of restoration and/or compensation for natural resource damages. Restoration costs may include the costs of oversight and administration necessary to ensure successful restoration, as well as the costs of performing an assessment of natural resource injuries and restoration;
8. Arrange for, oversee, or undertake appropriate NRDA and restoration activities at or related to the Site;
9. Authorize individual Trustees to contract as deemed necessary to achieve these objectives; and;
10. Encourage public participation and involvement in a manner consistent with applicable law and regulation.

VIII. LEAD ADMINISTRATIVE TRUSTEE

The Trustees hereby agree to designate, by unanimous consent, one of the Trustee parties to act as Lead Administrative Trustee ("LAT") under this Agreement. Because the impacts of the release of coal ash from the Dan River facility have been felt in two states, and because the USFWS has jurisdiction in both states, the Trustees have agreed that USFWS serve as the LAT.

The LAT's duties shall include, but are not limited to, coordinating and monitoring the progress of the natural resource damage assessment process; scheduling meetings of the Trustee Council and notifying members of those meetings on a timely basis; preparing, in consultation with other Trustees, agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining the administrative record for the natural resource damage assessment, acting as repository for other records and documents; and performing other administrative duties as directed by the Trustee Council. The LAT will be responsible for informing the other Trustee Council members of all pertinent developments on a timely basis. The LAT may delegate any of its duties to another Trustee party, with the permission of that party.

IX. FUNDS

The Trustee Council shall establish standards and procedures governing the joint use of all recovered natural resource damages received by the Trustees to restore, replace, rehabilitate and/or acquire the equivalent of natural resources injured at the Site and to compensate for the reduced or lost services provided by such resources pursuant to the final Restoration Plan. Such standards and procedures shall apply to the use of all recovered damages, except individual Trustee assessment and response costs, whether in any joint Trustee account or individual Trustee account, to the extent permitted by applicable law and policies.

If PRP funding of NRDAR activities becomes available, the Trustees may enter into an Agreement with the PRP(s) to determine the terms of monetary disbursement and PRP participation in Trustee Council activities. Each Trustee agrees to cooperate in the administration of any funding source or sources that may become available to the Trustees from PRPs. Such funds shall be administered through the Trustee Council established pursuant to this Agreement, except that monies collected by a trustee as reimbursement of past or future assessment costs shall be solely under the control of the trustee recovering such costs.

X. NOTIFICATION OF NEGOTIATIONS WITH POTENTIALLY RESPONSIBLE PARTIES

The Trustees, Advisors, and the Trustee Council members agree that they will coordinate communications with potentially responsible parties or their agents for matters related to the NRDAR for the Site. No Trustee or Advisor will discuss these matters with the potentially responsible parties without first providing the other Trustee parties with notice and an opportunity to participate in such discussions as appropriate. The above agreement shall not preclude a Party from having separate communications with potentially responsible parties on matters within the scope of the Agreement where circumstances warrant, provided that each party notifies the other parties and summarizes the substance of the communication for those parties.

The Trustees also agree to inform one another of the name(s) of person(s) authorized to speak to the media and the public on behalf of each party regarding the Site and related operations.

XI. CONFIDENTIALITY

The Trustees and Advisors, through 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 the Site be made public. Therefore, such data shall 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 Trustees and Advisors. However, all parties to this Agreement recognize that all written or oral communications specifically related to the assessment and recovery of damages for injury to natural resources are communications undertaken in anticipation of litigation. Accordingly, all oral and written communications and work products will be treated as privileged attorney-client communications, attorney work products, or protected by other applicable privilege (or a combination thereof), as appropriate, and will be protected from disclosure to the maximum extent possible under applicable federal or state law.

The transmittal of any designated privileged documents or designated privileged communications between or among any of the Trustees; Advisors; or federal or state response action agencies or other federal, state, or tribal 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. The Trustees and Advisors further agree that whenever a request for production of such a record is received pursuant to any applicable federal or state law, the request will, to the extent permitted by applicable laws and regulations, be forwarded for response to the Trustee(s) to which the privilege applies or whose representatives originally generated or contributed the record requested. If a question arises as to the application of federal Freedom of Information Act ("FOIA") or state public records laws to these communications, the party who has received a request for the communications shall, at a minimum, inform the other Trustees and Advisors of the request and provide them a reasonable opportunity to object to the disclosure of the communication. It is understood and agreed upon that all information required to be disclosed pursuant to the FOIA and applicable state public records laws shall be released. Nothing contained herein shall be construed as prohibiting or restraining the Trustees, Advisors, or the Trustee Council from agreeing to release any record or from disclosing any record for which disclosure is required by law.

XII. GENERAL PROVISIONS

The Trustees and Advisors agree that the following general provisions apply to this Agreement:

- A. Reservation of Rights. All parties understand that this document is not intended to create or waive any legal rights or obligations among the parties or any other person or entity not a party to this Agreement. Nothing contained herein is intended or shall be construed to limit any party's authorities under applicable law.
- B. Limitation of Authority. The Trustees, the Advisors and/or the LAT are not authorized to enter into settlements on behalf of the other Trustees and neither a Trustee nor the LAT represents another Trustee in any litigation that may be commenced by that party or another Trustee. Nothing in this Agreement shall be construed as obligating the United States, the State of North Carolina, or the Commonwealth of Virginia, or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law or funds received by potentially responsible parties for actions related to the Site.
- C. Third Parties. This Agreement is not intended to, nor shall it, vest rights in persons who do not represent the Trustees or who are not parties to this Agreement. The rights and responsibilities contained in this Agreement are subject to the availability of funding and are intended to be guidance for the respective Trustee parties. They may not serve as the basis for any third party claims, defenses, challenges or appeals.
- D. Modification of Agreement. The parties to this Agreement acknowledge that additional agreements may be executed by the Trustees 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 Agreement must be in writing and contingent upon approval of all Trustees that are currently parties to the Agreement.
- E. Termination and Withdrawal. This Agreement shall be in effect from the date of execution until termination by agreement of the Trustees. If at any time the Trustees determine that the purposes underlying this Agreement have been addressed, the Agreement will terminate upon such a finding. Any Trustee or Advisor may withdraw from this Agreement upon written notice in accordance herewith. In the event any Trustee or Advisor withdraws from the Agreement, such withdrawal must be in writing at least sixty days in advance of the withdrawal. In the event of such withdrawal, this Agreement remains in full force and effect for the remaining parties.

In the event of the withdrawal of any Trustee, or at the termination of this Agreement, there shall be a full and complete accounting of all funds received, deposited, held, disbursed, managed, expended pursuant to Section IX of this Agreement, or otherwise controlled in any joint account or individual account by the Trustees relating to the NRDAR for the Site.

- F. Execution and Effective Date. This Agreement may be executed in counterparts. It is effective as to each Trustee as of the date of its signature, whether or not the remaining Trustee parties execute the Agreement. A copy of the Agreement with the original executed signature pages affixed shall constitute the original Agreement.

IN WITNESS WHEREOF the Trustees have executed this Agreement on the dates attested to below.

Dan River Coal Ash, Eden, NC – Trustee Memorandum of Understanding

STATE OF NORTH CAROLINA



Dexter R. Matthews

Director

North Carolina Division of Waste Management, as designee for

John Skvarla Secretary

North Carolina Department of Environment and Natural Resources

5/5/2014

Date

COMMONWEALTH OF VIRGINIA

Molly Ward

Molly Joseph Ward
Commonwealth of Virginia, Secretary of Natural Resources

4-16-14

Date

Dan River Coal Ash, Eden, NC – Trustee Memorandum of Understanding

U.S. DEPARTMENT OF THE INTERIOR



Cynthia K. Dohner
Southeast Regional Director
U.S. Fish and Wildlife Service

5/1/2014
Date