

**MEMORANDUM OF AGREEMENT**

**BETWEEN THE**

**COMMONWEALTH OF VIRGINIA**

**AND**

**THE UNITED STATES DEPARTMENT OF THE INTERIOR**

**REGARDING NATURAL RESOURCE DAMAGES ASSESSMENT AND  
RESTORATION ACTIVITIES FOR THE TINKER CREEK FISH KILL,  
CLOVERDALE, VIRGINIA**

**I. INTRODUCTION**

This Memorandum of Agreement (MOA), executed by and among the Commonwealth of Virginia, acting through the Office of the Secretary of the Department of Natural Resources and the Virginia Department of Environmental Quality and the United States Department of the Interior (DOI), acting through the Fish and Wildlife Service (FWS) (individually referred to as Trustee, or collectively referred to as the Trustees), is entered into in recognition of their common interests and/or responsibilities as designated natural resource trustees. This MOA addresses the Trustees' coordination and cooperation in: 1) the initiation and conduct of natural resource damage assessment; 2) settlement negotiations, development of positions for covenants not to sue or administrative releases from liability; and/or 3) development and support of claims for litigation for injuries to natural resources and their services resulting from the release of Termix 5301 at and from a storage container owned by Crop Production Services located on property at 218 Simmons Drive in Cloverdale, Virginia (Site) on which Crop Production Services operates a pesticide and herbicide business (facility). The release of the hazardous substances from the Site is referred to herein as the Tinker Creek Fish Kill. The MOA 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/or their services.

**II. PARTIES**

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

1. The Virginia Secretary of Natural Resources and the Virginia Department of Environmental Quality, acting on behalf of the Governor of the Commonwealth of Virginia.
2. The Regional Director of U.S. Fish and Wildlife Service, Northeast Region, 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 (as defined in 40 C.F.R. §§ 300.600- 300.612) who is not a Party to this MOA and who has a natural resource interest that is affected by the 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 as a Party by addendum to this MOA, as necessary. Such other trustees may include, but are not limited to, Tribal governments, other Federal agencies, and affected trustee agencies from other states, provided that statutory authority exists for designating such other entities as a Trustee under this MOA.

### **III. GEOGRAPHIC SCOPE**

This MOA 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, including the Tinker Creek area and downstream thereof, which may be affected as a result of the release of hazardous substances as defined by the Federal Water Pollution Control Act (FWPCA or Clean Water Act), 33 U.S.C. §§ 1251 - 1387, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9628. This MOA also addresses any and all areas where hazardous substances released 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 recognize the importance of coordinating and cooperating among themselves and with the lead response agency to effectively and efficiently minimize and assess injury to, destruction of, or loss of natural resources and/or their services resulting from the release of hazardous substances including the consequences of removal and clean up actions. The Trustees' primary goals are to ensure restoration of injured natural resources and to seek compensation for the public for losses caused by release 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:

- a) coordination of all planning, assessments, and investigations to determine what natural resources and their services have been injured and the extent of such injuries as well as identification and implementation of appropriate restoration projects to compensate the public for the loss(es);
- b) to the extent practicable, coordination with the lead response agency to prevent and minimize injury to natural resources and their services as part of the removal, remedial or corrective action and, as appropriate, incorporation of restoration actions in the response;
- c) determination of conditions upon which the Trustees, individually or collectively, may grant covenants not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations;

- d) otherwise assessing and determining injury, seeking damages for injuries to natural resources and/or the services they provide and developing restoration projects to compensate for the injured resources and /or their services; and
- e) identification of possible restoration actions and the planning, implementing, and monitoring of selected restoration actions to compensate the public for the loss of natural resources and/or their associated services.

The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees for natural resource damage assessment and restoration (NRDAR), and for the implementation of the activities of the Trustees in furtherance of their natural resource trustee authorities for those natural resources affected by the Tinker Creek Fish Kill.

## **V. AUTHORITY**

The Trustees enter into this MOA 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), the FWPCA, CERCLA, the CERCLA NRDAR Regulations, 43 C.F.R. Part 11, any amendments to the foregoing, and any other applicable laws or authorities. The Commonwealth of Virginia Trustee enters into this MOA pursuant to designation by the Governor of the Commonwealth of Virginia under the FWPCA, CERCLA, and any other applicable laws or authorities. Nothing in this MOA shall be construed to interfere or conflict with the natural resource damage assessment regulations in 43 C.F.R. Part 11, as applicable to the Tinker Creek Fish Kill.

## **VI. NATURAL RESOURCE DAMAGES**

In recognition of the Congressional intent under CERCLA to restore natural resources and their services injured, destroyed, or lost as a result of a release of hazardous substances, the measure of recoverable damages for NRDAR contemplated under this Agreement may include:

- A. The costs of restoring injured natural resources and their services;
- 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 assessment costs of the NRDAR;
- D. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources.

## **VII. TRUSTEE COUNCIL DUTIES AND RESPONSIBILITIES**

- A. Composition. The Trustees who are parties to this MOA 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 Tinker Creek Trustee Council (“Trustee Council”). Within ten (10) days of the execution of this MOA, 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 of the primary voting representative. Each Trustee may, by written notification to the other Trustee, change the Primary and/or Alternative 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 MOA. In addition to the voting Representative, the U.S. Department of Justice, the Office of the Attorney General for the Commonwealth of Virginia, 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 any additional voting rights.

**B. Duties and Responsibilities.** On behalf of the Trustees, the Trustee Council shall coordinate and authorize (consistent with applicable law, policy, mandated 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 IX. The Trustee Council may take whatever action it determines is appropriate to fulfill the responsibilities of the natural resource Trustees under and to effectuate the purposes of 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, while focusing on their individual authority and the natural resources and services under their jurisdiction related to a particular site or incident:

- Develop and approve a case work plan and budget;
- Oversee and implement the work plan;
- Conduct or oversee scientific and technical studies, sampling, and other matters 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;
- Evaluate injuries to natural resources as a result of the release;
- Share information with and consult with each other as is determined to be appropriate and consistent with this MOA;
- Seek compensation from potentially responsible parties for damages and for the costs of planning and implementing the assessment and/or restoration.
- Support the Trustees’ efforts and participate in negotiations with potentially responsible parties to resolve the case;
- In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate any money jointly paid to the Trustees (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;

- 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;
- Oversee the development, implementation, and appropriate monitoring of a plan(s) for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those natural resources and/or their services that may be injured, destroyed or lost;
- Authorize individual Trustees to contract, in accordance with applicable law, with professional consultants that the Trustee Council determines are necessary to fulfill Trustee duties and responsibilities pursuant to applicable statutes and regulations.
- Communicate with potentially responsible parties or their agents and with other persons or entities;
- Ensure adequate public participation in a manner consistent with applicable law and regulation; and
- Maintain an administrative record of assessment and restoration activities.

#### **VIII. LEAD ADMINISTRATIVE TRUSTEE**

The Trustees hereby agree to designate the U.S. Fish and Wildlife Service to act as Lead Administrative Trustee (LAT) under this MOA. The LAT's duties 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 covenants not to sue, administrative agreements, or other negotiations;
- preparing Trustee Council Resolutions for approval by the Trustees;
- developing a draft restoration plan and, as applicable, National Environmental Policy Act analysis;
- coordinating and monitoring the preparation of all appropriate documentation of the natural resource damage assessment and restoration process 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 for both the injury assessment and restoration as agreed to by the Trustee Council; and
- performing other administrative duties as directed by the Trustee Council.

The Lead Administrative Trustee will be responsible for informing the other Trustee Council representative of all pertinent developments on a timely basis. The Lead Administrative Trustee 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 with decision-making rights for the other Trustee or beyond those normally held by each Trustee.

## **IX. DECISION MAKING**

All decisions by the Trustee Council implementing this MOA, including selection of the Lead Administrative Trustee (or the functional equivalent) 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, 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.

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, as set forth in this MOA.

## **X. FUNDS**

Each Party to this MOA shall be solely responsible for any costs it incurs in fulfilling its obligations under this MOA, and no Party shall have any claim against any 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 another Party. Any such cost sharing arrangement shall comply with Section VII of this MOA.

The Lead Administrative Trustee will be responsible for developing a strategy to manage funds jointly recovered through settlement or litigation and for presenting it to the Trustee Council for approval. The funds management strategy may include items such as a timeline for restoration expenditures, investment strategy, and other considerations, as appropriate, to timely compensate the public for injured resources and lost services and may be updated periodically, as necessary. The Lead Administrative Trustee will be responsible for preparing Trustee Council resolutions for the investment of joint Trustee funds and/or for the distribution of any joint Trustee funds recovered through settlement or litigation, and for soliciting a vote and obtaining

all Trustees written approval of the investment and dispersal of joint funds. All Trustees must agree on the investment of joint funds and the disbursement of jointly recovered funds. The Lead Administrative Trustee will also be responsible for communicating the Trustees' investment strategy and investment instructions and/or dispersal of funds for restoration planning and implementation to the fund manager(s) of any such joint funds.

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 the FWPCA, CERCLA, and 43 C.F.R. Part 11, 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 and restoration planning, implementation, and monitoring. The Trustees agree to request that the potentially responsible party separately reimburse each individual Trustee agency for past and future assessment costs. Each Trustee's recovered individual assessment costs may be used at its individual discretion in accordance with the FWPCA, and CERCLA, and 43 C.F.R. Part 11, 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.

## **XI. RESTORATION GOAL**

The goal of restoration is to assure that no net loss of natural resources and/or their services occurs. The restoration of the chemical and physical quality of the environment and the ecological and natural resource services it provides to baseline and/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 be considered when there are compelling reasons for such alternatives (*e.g.*, high levels of residual on-site contamination or restoration more effective in breeding habitat than on-site).

## **XII. NOTIFICATION OF NEGOTIATIONS WITH POTENTIALLY RESPONSIBLE PARTY**

The Trustees and the Trustee Council members agree that they will coordinate communications with the potentially responsible party or their agents for matters related to the NRDAR for the Tinker Creek Fish Kill. No Trustee or Trustee Council representative will speak on behalf of the other Trustees without express authorization. To the maximum extent possible, Trustees and Trustee Council representatives will endeavor to provide notice to the other Trustee and to provide them with an opportunity to participate in communications with the potentially responsible party before speaking with the potentially responsible party and others. The above agreement shall not preclude a Trustee or Trustee Council member from having separate communications with the potentially responsible party on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council representative notifies the other Trustee 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.

### **XIII. CONFIDENTIALITY**

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the NRDAR process. The 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 Trustees shall 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 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 Trustees, may be subject to disclosure under the Virginia Freedom of Information Act, Va. Code § 2.2-3700 et seq. and/or the *Freedom of Information Act*. All Parties agree to notify other Parties, 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. The Parties to this MOA acknowledge 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.

## **XVI. TERMINATION**

This MOA shall be in effect from the date of execution (“Effective 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 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 X of this MOA. In the event of such withdrawal, this Agreement remains in full force and effect for the remaining parties.

## **XVII. LIMITATION OF AUTHORITY**

Nothing in this MOA shall be construed as obligating the United States, 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 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, settled or completed natural resource damage litigation under the FWPCA, and/or CERCLA 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 claims, defenses, challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

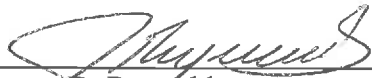
**XIX. EXECUTION AND EFFECTIVE DATE**

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, except that as other duly designated Trustees may elect to become a party to this MOA, their participation will commence on the date this MOA is signed.

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

*Memorandum of Agreement  
Tinker Creek fish kill  
August 2017*

TINKER CREEK FISH KILL – TRUSTEE COUNCIL MEMORANDUM OF AGREEMENT



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Jefferson D. Reynolds  
Director, Division of Enforcement  
Virginia Department of Environmental Quality

*21 Sep 2017*

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Date

*Memorandum of Agreement  
Tinker Creek fish kill  
August 2017*

TINKER CREEK FISH KILL – TRUSTEE COUNCIL MEMORANDUM OF AGREEMENT



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Wendi Weber  
Regional Director  
U.S. Fish and Wildlife Service  
U.S. Department of the Interior

9/18/2017

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Date