

## MEMORANDUM OF UNDERSTANDING

### I. INTRODUCTION

This Memorandum of Understanding (MOU) by and among the State of Indiana (Indiana), the State of Ohio (Ohio), the United States Department of the Interior (DOI), collectively referred to as the Trustees, is entered into to ensure the coordination and cooperation of the Trustees and their representatives in the initiation of assessment and the assessment of damages for injuries to natural resources resulting from the September 15, 1993 discharge of number 2 diesel fuel to the environment in the Fish Creek watershed in northeastern Indiana and northwestern Ohio, and the application of any natural resource damages recovered toward the restoration, rehabilitation, replacement and/or acquisition of equivalent natural resources.

### II. PARTIES

The following officials, or their delegates, are parties to this MOU and act either on behalf of the public as Trustees for natural resources or as Agencies with which consultation is required for the development of an assessment plan for natural resource damages under this MOU:

1. The Assistant Commissioner, Office of Environmental Response, Indiana Department of Environmental Management,
2. The Deputy Director, Bureau of Water and Resource Regulation, Indiana Department of Natural Resources,
3. The Director, Ohio Environmental Protection Agency,
4. The Director, Ohio Department of Natural Resources,
5. The Regional Director, U.S. Fish and Wildlife Service, (FWS) Department of the Interior,
6. The Director, Office of Environmental Policy and Compliance (OEPC), Department of the Interior.

### III. LOCATION

This MOU is intended to address natural resources injured as a result of the discharge of number 2 diesel fuel to the environment in the Fish Creek watershed in northeastern Indiana and northwestern Ohio (the Incident). On September 15, 1993, a rupture of NORCO Pipeline, Inc.'s 8 inch Chicago to Toledo pipeline caused the discharge of number 2 diesel fuel to the environment in the Fish Creek watershed. The pipeline was being

controlled and monitored by ARCO Pipe Line Company's control center in Independence, Kansas. The total amount of diesel fuel discharged has been estimated at 676 barrels. Surveys of the spill site, Fish Creek watershed, and associated riparian areas by co-trustees verified the discharge of the diesel fuel to the environment. Based on visual surveys, biologists estimated that approximately 7 miles of Fish Creek were impacted by the Incident.

#### IV. PURPOSE

The Trustees and their representatives recognize the importance of integrating and coordinating the assessment of natural resource damages for injuries to natural resources affected by the Incident, seeking compensation for those injuries to natural resources and the services they provide and restoration of those affected resources and services provided by those resources. The purpose of this MOU is to provide a framework for such coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees and their representatives in furtherance of their natural resource trustee responsibilities. The Trustee's activities will primarily involve: (1) assessing damages for injuries to natural resources; (2) seeking compensation for those injuries to natural resources and the services they provide; and (3) restoring the injured natural resources and the services provided by those natural resources affected by the Incident. Nothing in this MOU is to imply that any signatory Party is in any way abrogating or ceding any responsibility or authority inherent in its control or trusteeship over natural resources.

#### V. AUTHORITY

The Parties and their representatives enter into this MOU in accordance with the natural resource trustee authorities provided for each Trustee by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq., the Oil Pollution Act of 1990, 33 U.S.C. 2701 et seq. (OPA), and applicable state laws and regulations.

#### VI. ORGANIZATION

The Trustees and their representatives recognize the importance of coordinating their efforts in order effectively and efficiently to meet their respective natural resource trustee responsibilities under applicable Federal and State law. Accordingly, there is hereby created a Trustee Council to implement the MOU to which each Trustee will designate a representative and an alternate. The Council may create subcommittees when they are deemed necessary to effect the purposes of this MOU. A representative designated by unanimous consent of the Trustee Council members will serve as Lead

Administrative Trustee for administrative purposes as defined below in Section VII. The representative shall fully coordinate its activities with and act under the direction of the Council. The Trustee Council will also seek advisory participation from the United States Department of Justice, the United States Department of Transportation (Coast Guard), the State Attorneys General or other legal advisor, other federal legal advisors, and the United States Environmental Protection Agency, when appropriate.

## VII. DUTIES AND RESPONSIBILITIES

On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the requirements contained in Section VIII. The Trustee Council may take whatever actions the Council, in its discretion, determines are necessary to fulfill the trust responsibilities of each Trustee under and to effectuate the purposes of applicable Federal and State law. It is expected that the Trustee Council, in accordance with applicable laws and policies, may take the following actions, among others, to address the Trustee's natural resource trustee responsibilities:

A. Conduct scientific and technical studies, sampling and other matters related to the assessment of natural resource damages for injury to trust resources which may be lost, injured or destroyed.

B. Seek compensation from responsible parties for the damages assessed by the Trustees and for the costs of planning and implementing the assessment.

C. Participate in negotiations with responsible parties.

D. In accordance with applicable law, supervise, manage, obligate and expend any money paid to the Trustees by or on behalf of responsible parties or from the Oil Spill Liability Trust Fund (OSTLF), for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources.

E. Oversee the development and the implementation of a plan for the restoration, replacement, and/or acquisition of equivalent resources for those trust resources, and the services provided by those resources, that may be injured, destroyed or lost.

F. In accordance with applicable law, make all necessary decisions for the management and administration of funds pursuant to Section IX.

G. In accordance with applicable law, arrange for contracts with professional consultants, technical or otherwise, that the Trustee Council determines are necessary and best qualified to provide services to the Council.

H. Ensure that the requirements of the National Environmental Policy Act are adequately addressed.

The duties of the Lead Administrative Trustee shall include, but are not limited to: (1) coordinating and monitoring the progress of the natural resource damage assessment process; (2)

scheduling meetings of the Trustee Council and preparing agendas for such meetings; (3) acting as a central contact point for the Trustee Council; (4) establishing and maintaining records and relevant documents; and such other duties as directed by the Trustee Council. The Lead Administrative Trustee will be responsible for informing the other Trustees of all pertinent developments on a timely basis. The point of contact for coordination with the United States Coast Guard regarding access to the OSLTF will be the FWS.

#### VIII. DECISION MAKING

The Trustees and their representatives agree that all decisions implementing this MOU shall require unanimous approval. In the event that unanimous agreement cannot be reached among the members of the Trustee Council, the matter in dispute will be elevated to the Trustees for resolution. If necessary, the Trustees and their representatives may establish further mechanisms by which disputes may be resolved. The Trustees and their representatives further agree that decision making deliberations will focus upon the Trustees' mutual purpose of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources, rather than upon control or respective trusteeship over those resources.

#### IX. FUNDS

Pursuant to §§ 6002(b) of OPA and Executive Order 12777, the FWS, on behalf of all the potentially affected natural resource trustees, requested and was authorized access to \$172,500 of the OSLTF for reimbursement of the costs of initiation of a natural resource damage assessment. Executive Order 12777 requires federal lead trustees to allocate funds to reimburse costs of assessment of natural resource damages among all of the trustees designated by OPA, including state trustees. The Parties agree to cooperate in good faith with FWS to establish, to the extent consistent with applicable law, accounts for the transfer of funds allocated from the OSLTF. By means of this MOU, OSLTF money can be transferred to Parties for reimbursement of all documented, appropriate expenditures during the initiation phase of the damage assessment. The FWS shall allocate and transfer OSLTF money for reimbursement of documented, appropriate expenditures to the Parties, which allocation and transfer of OSLTF money shall not exceed amounts as indicated below:

##### STATE OF INDIANA

Indiana Dept. of Environmental Management	\$ 27,844.43
Salary	\$ 3,183.32
Analytical chemistry	24,298.49
Miscellaneous	362.62

Indiana Department of Natural Resources		\$ 7,159.20
Salary	\$ 5,825.20	
Miscellaneous	1,334.00	

#### STATE OF OHIO

Ohio Environmental Protection Agency		\$ 2,215.00
Salary	\$ 1,838.00	
Miscellaneous	377.00	

Ohio Department of Natural Resources		\$ 10,559.78
Salary	\$ 7,268.58	
Sampling	1,022.00	
Miscellaneous	2,269.20	

The Parties agree to cooperate in good faith to attempt to establish, to the extent consistent with applicable law, an account for purposes of receiving, depositing, holding, disbursing, managing and expending all money received for reimbursement of costs of assessment of natural resource damages and of developing and implementing a plan for the restoration, rehabilitation, replacement or acquisition of the equivalent natural resources. Alternatively, subject to the requirements of applicable law, each Party may, by agreement, establish an individual account or accounts for the Incident into which money received for natural resource damages may be deposited.

The Trustee Council, in accordance with its decision making process set forth in Section VIII, shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees. The Parties agree that the following damage assessment costs shall be reimbursed to each Trustee out of any damage assessment cost recovery or payment thereon, including funds received from the OSLTF: reasonable unreimbursed costs jointly agreed upon for the planning conduct, evaluation and coordination of all natural resource damage assessment activities pursued by the Trustee Council with respect to injuries incurred resulting from the Incident.

#### X. CONFIDENTIALITY

The Parties agree that it is in the public interest that all scientific data arising out of assessment of the injury to natural resources as a result of the Incident be made public. Therefore, such data shall be made public as soon as publication will not prejudice the on-going assessment. While public sharing of scientific data will be the general policy of the Parties, it is recognized that written or oral communication related to the assessment and recovery of damages for natural resource injury may be undertaken in anticipation of litigation; therefore, attorney work product and all attorney client communications will be protected from disclosure to the maximum extent possible under applicable Federal and State law. They further agree that

whenever a request for production of such records is received pursuant to applicable Federal or State law, the request will be forwarded to the Trustee or Trustees to which the privilege applies or whose representatives generated or contributed to the record requested. Nothing contained herein shall be construed as prohibiting or restraining the Parties or the Trustee Council from releasing any record, nor shall anything contained herein be construed as prohibiting or otherwise restraining the release of records required by Federal or State law or regulation.

#### XI. RESERVATION OF RIGHTS

This MOU does not create nor shall it be construed to create any claim, right, cause of action or obligation on behalf of any Party, any person, corporation, firm, partnership, government agency or other entity. This MOU does not abridge, release or otherwise waive any claim, demand or cause of action which may exist against any Party to this MOU, any person, corporation, firm, partnership, government agency or any other entity.

#### XII. MODIFICATION OF AGREEMENT

This MOU may be modified in writing upon approval of all Parties hereto.

#### XIII. TERMINATION

This MOU shall be in effect from the date of execution until termination by agreement of the Parties. At any time the Parties determine that the purposes of the MOU have been addressed, the MOU will terminate upon such finding. Any Party may withdraw from this MOU at any time, however, only upon written notification at least thirty days in advance of the withdrawal.

In the event of withdrawal by any Party, the MOU shall remain in full force and effect for the remaining Parties. In the event of such withdrawal or at termination of this MOU, there shall be a full and complete accounting of all funds received, deposited, held, disbursed, managed, and expended pursuant to Section IX of this MOU, or otherwise controlled in any joint account by the Parties as a result of the Incident.

#### XIV. LIMITATION

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

#### XV. 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 Parties. They may not be the basis of any third party challenges or appeals.

#### XVI. 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 signature by a Party.

\_\_\_\_\_  
Greta Hawvermale  
Ass't Commissioner  
Indiana Department of  
Environmental Management  
Date: \_\_\_\_\_

\_\_\_\_\_  
Kathy Prosser  
Commissioner  
Indiana Department of  
Environmental Management  
Date: \_\_\_\_\_

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Dave Herbst  
Deputy Director  
Indiana Department of  
Natural Resources  
Date: \_\_\_\_\_

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Jonathan Deasen  
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Office of Environmental  
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Indiana Department of  
Environmental Management  
Date: 5/12/94

*Kathy Prosser*  
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Indiana Department of  
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Date: 5/13/94

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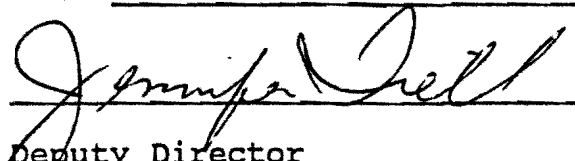
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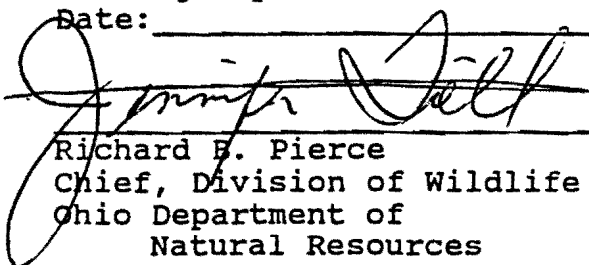
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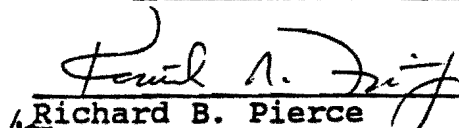
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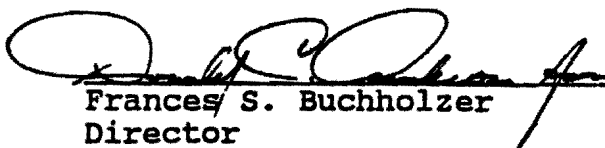
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Date: May 9, 1994

  
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Date: May 18, 1994

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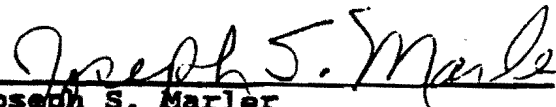
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Date: MAY 11 1994

U.S. Fish and Wildlife Service  
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Date: \_\_\_\_\_

Donald Henna  
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Regional Environmental Officer  
Office of Environmental  
Policy & Compliance  
Department of the Interior  
Date: 5/10/94

U.S. Fish and Wildlife Service  
Department of the Interior  
Date: \_\_\_\_\_

Jonathan Barton  
Jonathan Barton  
Director  
Office of Environmental  
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Date: 5/26/94