

MEMORANDUM OF AGREEMENT
BETWEEN
THE COMMONWEALTH OF PENNSYLVANIA
acting by and through the Pennsylvania Fish & Boat Commission
AND
THE UNITED STATES DEPARTMENT OF THE INTERIOR

REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT,
RESTORATION, REPLACEMENT AND/OR ACQUISITION
OF EQUIVALENT NATURAL RESOURCES INJURED,
DESTROYED OR LOST BY RELEASES FROM
THE PAOLI RAIL YARD SUPERFUND SITE

I.
INTRODUCTION

This Memorandum of Agreement ("Agreement" or "MOA") by and between the Commonwealth of Pennsylvania acting by and through the Pennsylvania Fish and Boat Commission ("State") and the United States Department of the Interior ("DOI") (hereinafter referred to collectively as "Parties" or Trustees"), is entered into in recognition of their common interest in the restoration, replacement and/or acquisition of equivalent natural resources which have been injured, destroyed or lost by the releases of hazardous substances from and/or at the Paoli Rail Yard Superfund Site ("Site") and to ensure the coordination and cooperation of the Parties in their application of natural resource funds including natural resource damages ("NRD") recovered for the Site. The Site is located in Chester County, Pennsylvania and includes the 28-acre rail yard as well as the surrounding Valley Creek watershed.

The United States and the Commonwealth of Pennsylvania have filed complaints in Federal Court to recover, among other things, damages for injury to, destruction of, or loss of natural resources resulting from the releases of hazardous substances into the environment in and around the Paoli Rail Yard Superfund Site. Pursuant to the Consent Decree entered in the above-referenced case, the Parties have jointly recovered \$850,000.00 from three of the potentially responsible parties (Conrail, the Southeastern Pennsylvania Transportation Authority (SEPTA) and Amtrak) for damages to natural resources, oversight costs, and past assessment costs.

II.
AUTHORITY

A. The Parties enter into this Agreement in accordance with the natural resource trustee authorities provided for each party by Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), as amended, 42 U.S.C. 9607(f), Section 2506 of the Fish and Boat Code of 1980 (30 Pa. C.S. 2506) and other applicable Federal and State laws and regulations including Executive Order No. 12580 (January 23, 1987); 43 C.F.R. Part 11, as amended.

B. In accord with Subpart G of the NCP, 40 CFR 300.600 through 300.615, 55 Federal Register 47450 - 47452 (September 15, 1994), the following officials or their designees shall act on behalf of the public as Federal and State Trustees for natural resources under this Agreement:

1. The Executive Director of the Pennsylvania Fish and Boat Commission as subdesignee for the Secretary of Environmental Protection, designee of the Governor of the Commonwealth of Pennsylvania
2. The Secretary of the Interior

III.
DEFINITIONS

For purposes of this Agreement the following definitions shall apply:

A. "Damage Assessment Costs" means costs including all related administrative, legal and enforcement costs associated with the planning, design, implementation and oversight of the Trustees' damage assessment process, which addresses the fact, extent and quantification of the injury to, destruction of or loss of natural resources and the services provided by those resources resulting from releases related to the Paoli Rail Yard Superfund Site, and with the planning, implementation, and monitoring of restoration of such natural resources and the services provided by those resources, and any other costs necessary to carry out the Trustees' responsibilities with respect to natural resources injured by the Paoli Rail Yard Superfund Site, provided, however, that such other costs shall be limited to costs incurred and described in the Trustees' damage claims consistent with the Consent Decree.

B. "Federal Trustee" means the Secretary of the Interior or his authorized designee.

C. "Joint use" means use of natural resource damage recoveries by the State or Federal Trustee, whether individually or collectively, in such a manner as is agreed upon by the Trustees in accordance with the terms of this Agreement.

D. "Monitoring" means Trustee actions appropriate to measure, evaluate and document the success of the selected restoration actions.

E. "Natural resources" shall have the same meaning as set forth in Section 101(16) of CERCLA, as amended, 42 U.S.C. '9601(16).

F. "Natural resource damage(s) recovery(ies)" means any award, judgment, settlement or other payment to the Federal Trustees or the State Trustee which is received or controlled by either of the Trustees, individually or jointly, for or as a result of claims for natural resource damages against any potentially responsible parties at the Site, except any such award which is judgment, settlement, or payment in reimbursement of natural resource damage assessment costs incurred independently by either Trustee.

G. "Oversight expenses" means any costs associated with individual trustee participation in the restoration planning process, Trustee Council administrative proceedings, costs associated with the retention of consultants, coordinators, or any other technical or administrative services associated with the development of the restoration plan, or any other costs reasonably related to the implementation of this Agreement other than the physical implementation of the final restoration plan approved by the Trustee Council. For the purposes of this MOA, the trustees agree to cap these expenses in accordance with the Statement of Principles set forth at Paragraph X.C. of this MOA.

H. "Restore", "Restoration", "Replace", "Acquire the Equivalent of" means any actions undertaken by the Trustees pursuant to CERCLA Section 107(f)(1), as amended, 42 U.S.C. '9601(f)(1), and other applicable laws or regulations, including planning, implementation, administration and oversight, which serve to restore, replace, acquire the equivalent of, or provide substitutes for natural resources or natural resource services injured, destroyed or lost as a result of the release of hazardous substances from the Site.

I. "Restoration Coordinator" means a person who may be appointed/hired by the Trustee Council to conduct activities as described at Section VIII, Paragraph F.

J. "Restoration Plan" means the plan jointly developed by the Trustees to restore those natural resources adversely affected by the releases related to the Site and/or remediation of the Site. The restoration actions selected under the Plan shall have the objectives of facilitating, accelerating and/or enhancing recovery of the affected natural resources, including the biological, ecological and human services provided by those resources. The Restoration Plan shall accomplish these objectives by identifying, evaluating and selecting restoration actions that: (1) restore injured trust resources and their habitats, and (2) replace lost biological, ecological and human services. It is the intent of the trustees that the cumulative effect of restoration actions will improve the functioning and productivity of the ecosystem as a whole.

K. "Site" or "Site vicinity" means the Paoli Rail Yard Superfund Site ("Site"), encompassing the Rail Yard itself, approximately twenty-eight (28) acres as well as its surrounding watershed. The Site is located Chester County, Pennsylvania and includes all areas beyond those acres where releases of hazardous substances, particularly polychlorinated biphenyls (PCBs), at or from the Site are now or come to be located, and all natural resources and areas which may have been or may be affected by hazardous substances released at or from the Site, located in or near Chester County.

L. "State Trustee" means the Governor of the Commonwealth of Pennsylvania or his designee. In this case, the Executive Director of the Pennsylvania Fish and Boat Commission, acting pursuant to its responsibilities under Section 2506 of the Fish and Boat Code of 1980 (30 Pa.C.S. 2506), serves as a subdesignee.

M. "Trustees" means the Federal and State Trustees.

N. "Trustee Representatives" means the two (2) authorized designees one of whom is appointed by appointed by PFBC and the other of whom is appointed by DOI to the Trustee Council.

O. "Trustee Council" means the two Trustee Representatives appointed by the State and DOI to oversee coordination of the natural resource damage assessment and restoration as described herein at Section VIII.

IV. SCOPE

This Agreement is intended to cover natural resources as defined under Section 101(16) of CERCLA, as amended, 42 U.S.C. 9601(16), and Section 2506 of the Pennsylvania Fish and Boat Code of 1980 (30 Pa. C.S. 2506), belonging to or managed by, controlled by, or

appertaining to the Trustees under CERCLA and the NCP in the vicinity of the Site located in or near Chester County, Pennsylvania.

V.

PURPOSE

The purpose of this MOA is to provide a framework for intergovernmental coordination among the Parties for restoration of natural resources affected by hazardous substances released from the site. It is understood and agreed that restoration within the Valley Creek watershed is the principal objective of this MOA. The Restoration Plan will include measures to restore, replace or acquire the equivalent of natural resources affected by hazardous substances released from the Site. It is understood and acknowledged that additional agreements may be executed among the Trustees with regard to natural resource restoration, replacement, and/or acquisition of equivalent natural resources in the vicinity of the Site which have been injured, destroyed or lost by the release of hazardous substances from the Site.

The Trustees shall base their determination of appropriate restoration actions on the following factors: nature and extent of injury being addressed; proximity and benefit to the affected natural resources and services; proven technology/prospects for success, cost-effectiveness; recovery period; human health and safety; public comment; and consistency with applicable Federal and State laws and policies. Through the restoration planning process, the Trustees shall: (1) identify and evaluate a reasonable number of possible alternatives; (2) select one or more of the alternatives; and (3) provide its reasons for the selections(s), including an explanation of how its choice is consistent with the Trustee's legal obligations. It is understood that the Trustees may identify an action or category of actions which cannot be fully implemented because of the limitations of available settlement funds; however they may determine that it is appropriate and prudent to initiate certain actions with the understanding that if additional funding becomes available, other phases of the restoration activities related to this category will be pursued. The Trustees may adjust the sequence of individual actions provided that such adjustments are consistent with the goals of the final Restoration Plan as approved.

VI.

OBJECTIVES

The Parties shall coordinate, using a Restoration Coordinator as they deem appropriate, their activities pursuant to this Agreement to meet their respective natural resource trustee responsibilities under CERCLA, the Pennsylvania Fish and Boat Code and other applicable laws and regulations and to achieve the following objectives:

- A. Coordinate and conduct all Trustee activities required to restore natural resources injured at or by the Site;
- B. Prepare a comprehensive Restoration Plan to address natural resource injuries resulting from hazardous substance releases from the Site;
- C. Develop the Restoration Plan for restoration efforts in compliance with the federal National Environmental Policy Act, 42 U.S.C. 4321 et seq.;
- D. Identify and evaluate a range of potential restoration alternatives in the Site vicinity and select appropriate alternatives for restoration, replacement and/or acquisition of equivalent natural resources;
- E. Determine the costs and expenses likely to be incurred for the restoration, replacement and/or acquisition of equivalent natural resources;
- F. Implement the Restoration Plan to restore, replace, and/or acquire the equivalent natural resources injured, destroyed, or lost;
- G. Fairly allocate the costs and expenses of carrying out the objectives of this Agreement among the Trustees;
- H. Where appropriate, coordinate the activities under this Agreement with the ongoing remedial actions being undertaken at the Site; and
- I. Foster public participation in development and implementation of the Restoration Plan.

VII.

USE OF NATURAL RESOURCE DAMAGE RECOVERIES

- A. **State and Federal Trusteeships.** The Parties recognize that each of them has trusteeship, through their respective natural resource Trustees, under CERCLA over natural resources at the Site and that the scopes of their some of their respective trusteeships overlap.
- B. **Use of Natural Resource Damage Recoveries.** The Trustees agree that any natural resource damage recoveries, as defined in Section III of this Agreement, obtained or received by the Parties, individually or collectively, and any interest earned thereon, shall be jointly

used to restore natural resources which have been injured, destroyed or lost as a result of the release of hazardous substances from the Site.

VIII. ORGANIZATION

A. Natural Resource Trustee Council

To implement this Agreement, a Natural Resource Trustee Council (Trustee Council) is hereby created. Each Trustee will designate one representative to the Trustee Council. If the primary representative is unavailable, the Trustees may identify an alternate representative to serve on an ad hoc basis. Each party to this agreement will have one vote that will be cast by the party's primary representative, or in the absence of the primary representative, by the alternate representative. In addition, the U.S. Department of Justice, the Attorney General's Office of the Commonwealth of Pennsylvania, and the U.S. Department of Interior's Office of the Solicitor and the Chief Counsel for the Pennsylvania Fish and Boat Commission may each provide assistance to representatives in a legal or consultative role. The Trustee Council may seek advisory participation of other federal or state agencies or any other entity as deemed appropriate by the Trustee Council.

Within twenty (20) working days after the final execution of this Agreement, each Trustee shall notify the other Trustees of the names, addresses, telephone numbers, and facsimile numbers of that Trustee's primary representatives to the Trustee Council. Communications regarding the Trustee Council business shall be addressed to the primary representative.

B. Powers, Duties and Responsibilities

On behalf of the Parties to this Agreement, the Trustee Council shall coordinate and authorize all Trustee activities required to restore the injured natural resources at the vicinity of the Site. Any Trustee on the Trustee Council may convene a meeting of the full Trustee Council. The Trustee Council may conduct business via conference calls.

To the extent authorized by applicable laws and policies, the Trustee Council may take the following actions, among others, to address the Trustees' natural resource responsibilities:

1. Conduct and/or oversee scientific and technical studies, sampling and the restoration remedies for injured natural resources;

2. Seek compensation from the responsible party(ies) for damages assessed to address the injured natural resources and for assessment costs as defined in Section III;
3. Arrange, through one or both of the Trustees, contracts with a professional consultant(s) or contractor(s), technical or otherwise, that the Trustee Council determines are necessary to provide services to the Trustee Council so that it can fulfill its responsibilities under this MOA;
4. Participate in negotiations with responsible parties when appropriate;
5. Conduct and/or oversee the development and implementation of a plan for the restoration of the injured natural resources;
6. Create trustee advisory committees or workgroups comprised of individual or organizational representatives to advise the Council on specific aspects of restoration activities;
7. Select a Restoration Coordinator
8. Delegate specific duties to individual Trustees;
9. Appoint individual Trustees to be Lead Trustees for specific restoration projects; and
10. Make or oversee all necessary decisions for the management and administration of monies received in settlement of natural resource liability related to the Paoli Rail Yard Site.
11. Authorize expenditures from the Damages Trust Account described in Article X.

C. Decision Making

The Trustees agree that decisions implementing this MOA shall require the unanimous approval of the Trustee Council members. In the event that unanimous agreement cannot be reached among the members of the Trustee Council, the matter in dispute will be elevated within the Trustee agencies for resolution. If necessary, the Trustees may establish further mechanisms to resolve disputes. The Trustees agree that decision-making deliberations will focus on the Trustees' mutual purposes of restoring injured natural resources.

D. Lead Trustee for Restoration Projects

The responsibilities of the lead trustee for a specific restoration project include, but are not limited to:

1. Provide for the Trustee Council's approval a detailed statement of the proposed project, a project schedule, and estimated budget for the life of the project;
2. Obtain the Trustee Council's authorization to commence the project;
3. Select and retain qualified contractor(s) to implement the project;
4. Disburse funds from the established account to pay for costs;
5. Oversee, coordinate and monitor the progress of the project;
6. Submit quarterly reports to the Trustee Council which shall include a progress report and a estimate of funds spent;
7. Establish and maintain records and relevant documents related to the project;
8. Inform other Trustees of all pertinent developments regarding the project on a timely basis; and
9. Carry out such other duties as directed by the Trustee Council.

E. Restoration Coordinator.

The Trustee Council may designate a Restoration Coordinator whose work shall be directed exclusively by the Trustee Council. The responsibilities of the Restoration Coordinator may include:

1. Preparation of a Restoration Plan;
2. Coordination, management, reporting and monitoring of the natural resource restoration process;
3. Scheduling of meetings of the Trustee Council and preparation of agendas for those meetings and the recording of all actions taken at such meetings;

4. Preparing and issuing, from time to time, public reports on the work of the Trustee Council;
5. Conducting public outreach and fostering public participation in the development and implementation of the Restoration Plan;
6. To the extent permitted by applicable law, identify and secure, wherever possible, other financial resources such as, but not limited to, grants that may be available to the Trustee Council or individual Trustees for use according to the terms of this Agreement.
7. Such other duties as are agreed upon by the Trustee Council.

IX.
TECHNICAL SERVICES

A. The Trustee Council may determine that it needs technical advisors, consultants or other service providers to assist it in carrying out its responsibilities under this Agreement. The Trustee Council, through its individual members or collectively, may expend natural resource damage recoveries for service providers to perform the following services:

1. Provide project design and technology review, site analysis, restoration planning or services, testing, sampling, and other services related to the development or implementation of a restoration plan for the Site;
2. Provide the Trustee Council with logistical support and coordination;
3. Organize and prepare for Trustee Council meetings;
4. Provide technical advice to the Trustee Council during Trustee Council meetings;
5. Provide technical or other advice to the Trustee Council as required to carry out the purposes of this Agreement;
6. Provide such other services, consistent with applicable law, as requested by the Trustee Council.

DAMAGES TRUST ACCOUNT

A. Structure of Account

To the extent permitted by applicable law, the Trustees agree that the settlement funds received and all future settlement funds received by the Trustees, either as a result of judgment or settlement of future natural resource damage actions brought against additional responsible parties, shall be deposited in an interest bearing trust account to be disbursed only for the purposes described in this MOA.

The Trustee Council shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees for the purposes of restoring the natural resources injured as a result of the Paoli Rail Yard Site.

B. Uses of Account

The Trustees may recover such costs and expenses from the account including, but not limited to: 1) past costs and expenditures for damage assessment and restoration actions undertaken for the Paoli Rail Yard Site; 2) costs and expenditures for on-going or future restoration actions; 3) costs incurred for compliance with federal, state and local laws including permitting requirements that may be applicable to the Trustee's activities; 4) costs for monitoring restoration projects; and 5) any other actions that the Trustees deem necessary or appropriate to carry out their responsibilities with regard to this MOA. The cost of establishing, maintaining and administering the account will be paid from the interest accrued in that account.

C. Statement of Principles.

The Trustees agree that expenditures from the Account should be managed in such a way as to maximize expenditures for restoration projects and efforts and minimize expenditures for oversight expenses, including restoration planning and administrative costs. The Trustees agree that they will limit expenditures for oversight expenses to no more than 10% of the \$850,000 initial deposit in the Account, exclusive of interest. By way of further explanation, it is understood that approved expenditures from the account should be limited to no more than 7½% for restoration planning and no more than 2½% for other oversight expenses including administrative costs. In the event that the Trustee Council determines that exigent circumstances require expenditures for oversight expenditures in excess of 10% of the amount deposited in the Account, such expenditures are subject to approval at an elevated level within the

Trustee agencies. The Trustees agree that if, in the future, the Account grows to amounts in excess of the \$850,000 deposited initially into it, it should be possible to expend lower percentages of the Account for oversight expenses, including restoration planning and administrative costs. Future assessment expenses beyond these recovered amounts will be sought from other sources.

XI.
AMENDMENT

A. This Agreement may be amended by agreement of the Parties if it is determined that an amendment is necessary to accomplish the objectives of this Agreement, or is necessary to modify the objectives of this Agreement consistent with the requirements of CERCLA, any amendments thereto, or other applicable Federal or State law.

B. Any amendment of this Agreement shall be effective only if it is in writing and executed by all parties to this Agreement.

XII.
CONFIDENTIALITY

The Trustees agree that it is generally in the public interest that scientific data arising out of the assessment of natural resource injuries related to the Paoli Rail Yard Site be made public. Therefore, such data shall be made public as soon as its publication will not prejudice the accomplishment of the purposes of this MOA. Public sharing of scientific data, whenever possible, will be the general policy of the Trustees. However, all parties to this MOA recognize that litigation related to the Paoli Rail Yard Site may occur. The Trustees and their legal counsel may determine that certain written or oral communications related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation. Accordingly, all oral and written communications and work product not shared affirmatively with the responsible party(ies) will be treated as privileged attorney-client communications, attorney work product 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 parties 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 be forwarded for response to the Trustee or Trustees to which the privilege applies or whose representatives originally generated or contributed to the record requested. Nothing contained herein shall

be construed as prohibiting or restraining the Trustees or the Trustee Council from agreeing to release any record.

XIV.
RESERVATION OF RIGHTS

Each Trustee reserves the right to take whatever action is necessary to pursue or preserve any legal remedies available to that Trustee in connection with the Paoli Rail Yard Site. Nothing in the MOA is intended to waive or foreclose any such right or to cede any responsibility or authority inherent in a Trustee's control or trusteeship over natural resources.

XV.
LIMITATION

Nothing in this MOA shall 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.

XVI.
THIRD-PARTY CHALLENGES OR APPEALS

Nothing in this MOA may be the basis of any third-party challenges or appeals. This MOA creates no rights or causes of action in persons not parties to this agreement.

XVII.
MODIFICATION OF AGREEMENT

Modification of this MOA must be in writing and approved by all Trustees currently parties to the MOA.

XVIII.
TERMINATION

This MOA shall be in effect from the date of execution until termination by agreement of the Trustees. At any time the Trustees determine that the purposes underlying this MOA have been addressed, the MOA will terminate. In the event any Trustee withdraws from the MOA, such withdrawal must be in writing and provided to the rest of

the Trustees at least thirty days in advance of the withdrawal. In the event of such withdrawal, this MOA 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 MOA, there shall be a full and complete accounting to the Trustee Council and their legal representatives of all funds received, deposited, held, disbursed, managed, expended from any joint or separate account(s) established in accordance with Section VI of this MOA.

XIX
EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA and shall be retained by the Trustee Coordinator. The date of execution shall be the date of the signature of the last Trustee to sign the MOA.

SIGNATURES:

The Commonwealth of Pennsylvania

By: Peter A Colangelo
Name: Executive Director PFOC
Title:

Date: March 9, 2000

Approved as to legality and form (Commonwealth of Pennsylvania):

[Signature]
Authorized Agency Attorney

[Signature]
(Deputy) Attorney General

The United States Department of the Interior

By: [Signature]
Name: Michael M. Soukup
Title: Associate Director, Natural Resource, Steward., & Science

Date: 2/09/00