

**MEMORANDUM OF AGREEMENT
BETWEEN THE
COMMONWEALTH OF VIRGINIA
and
UNITED STATES DEPARTMENT OF THE INTERIOR**

**REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION AT THE CERTUS SITE**

I. INTRODUCTION

This Memorandum of Agreement (MOA or Agreement) by and between the Commonwealth of Virginia (Virginia or State Trustee) and the United States Department of the Interior (DOI or the Federal Trustee) (jointly referred to as the Trustees, Trustee Parties or Parties) is entered into to ensure the coordination and cooperation of the Trustee Parties in carrying out their collective natural resource trustee responsibilities concerning the restoration of natural resources injured or destroyed by the release of hazardous substances into an unnamed tributary that feeds directly into the Clinch River near the town of Cedar Bluff, Tazewell County, Virginia. The release occurred on August 28, 1998, when a tanker truck operated by Certus, Inc. overturned and ruptured (the Release). The Trustee Parties' responsibilities under this Agreement are the development and implementation of a Restoration Plan to restore, replace, rehabilitate or acquire the equivalent of the natural resources injured by the Release.

The Federal Trustee has conducted an extensive series of assessment activities in the area affected by the Release; the spilled substance traveled downstream for a distance of at least seven miles, turning the River milky-white as it passed through. Prior to the spill, the portion of the Clinch River downstream of the spill area supported a diverse riverine ecosystem, including substantial populations of fish and benthic organisms, such as snails and shellfish. This reach of the Clinch River was particularly important because it provided favorable habitat for significant populations of a variety of species of native, freshwater mussels including populations of three mussel species listed as endangered pursuant to the federal Endangered Species Act of 1973 (ESA) as amended. 16 U.S.C. §§ 1531 *et seq.*

As a result of exposure to the hazardous substances spilled by Certus, Inc., substantially all of the freshwater mussels, as well as most other forms of aquatic life, were virtually eliminated from the impacted area (the Site). In the days immediately following the Release, investigators collected more than 6,000 dead mussel specimens representing at least 16 species of freshwater mussels, including significant numbers of dead individuals belonging to the three endangered species known to have inhabited the Site. The endangered species were: the rough rabbitsfoot (*Quadrula cylindrica strigillata* -listed as an Endangered Species on January 10, 1997; 62 FR 1657), purple bean (*Villosa perpurpurea* listed as an Endangered Species on January 10, 1997; 62 FR 1657) and tan riffleshell (*Epioblasma f. walkeri* listed as an Endangered Species on August 23, 1977; 42 FR 42353).

In 1999, the Department of Environmental Quality (DEQ) of the Commonwealth of Virginia, on behalf of Virginia's State Water Control Board and the Virginia Department of Game and Inland Fisheries, settled a claim against Certus, Inc. to reimburse DEQ for the costs of the fish killed by the Release and to reimburse the Virginia Department of Game and Inland Fisheries for administrative costs which it incurred as a result of the fish killed by the Release. The DOI was not a party to the above-referenced settlement.

Pursuant to a Consent Decree which is expected to be entered in this case, Certus Inc. will pay \$3,707,432.84 into DOI's Natural Resource Damage and Restoration (NRDAR) Fund for the joint benefit of the Federal and State Trustees in carrying out their duty to restore the natural resources that were injured at the Site by the Release. Pursuant to Paragraph 10 of the Consent Decree, the settlement funds shall be used only "to plan, perform, monitor and oversee native, freshwater mussel restoration projects within the Clinch River watershed applying the methods identified in Alternatives 2, 3, 4, and 5 of the Initial Restoration and Compensation Determination Plan (Initial RCDP) for the Certus Chemical Spill, dated April 9, 2002."

The purpose of this Agreement is to provide a framework for intergovernmental coordination and cooperation between the Trustee Parties for the implementation of the activities in furtherance of their natural resource restoration responsibilities pursuant to the Consent Decree entered in this case.

II. AUTHORITY

The Parties enter into this Agreement in accordance with the natural resource trustee authorities provided for each Trustee under Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended 42 U.S.C. §9607 (f), Section 311(f) of the Clean Water Act (CWA), as amended, 33 U.S.C. §1321(f), and other applicable Federal and Virginia law and authority including, but not limited to, the National Oil and Hazardous Substances Contingency Plan (NCP), as amended, 40 C.F.R. Part 300 and to the extent appropriate and elected for use by the Trustee Parties, DOI's Natural Resource Damage Assessment Regulations, as amended, 43 C.F.R. Part 11 and the State Water Control Law §§ 62.1- 44.2 *et seq.* The Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* provides additional legal authority for the activities to be conducted pursuant to this Agreement. The terms used in the Agreement shall have the meaning of those that are defined in CERCLA, CWA, and in the federal regulations referred to above.

III. LOCATION

This Agreement is intended to cover, but is not limited to, restoration of natural resources belonging to, managed by, controlled by, or appertaining to the Trustees (as defined under the authorities cited above, and other applicable Federal and Virginia law) in the portion of the Clinch River watershed affected by the Release that were or may have been injured as a result of the

release of hazardous substances as defined under CERCLA and other applicable Federal and Virginia laws. Based on an extensive series of natural resource damage assessment activities related to the Release which were conducted by or at the direction of DOI, it has been determined that restoration activities will focus primarily upon restoration of injuries to freshwater mussels in the Clinch River watershed with primary emphasis on restoration of the three endangered mussel species that were injured and their supporting habitat.

IV. PARTIES

A. In accordance with Subpart G of the NCP, and other applicable federal and state laws, the following officials, or their designated representatives are Parties to this Agreement and will act on behalf of the public as a Federal or State trustee for natural resources under this Agreement:

1. the Secretary of Natural Resources, acting on behalf of the Commonwealth of Virginia; and
2. the Regional Director (Region 5) of the Fish and Wildlife Service, U.S. Department of the Interior, acting on behalf of the Secretary of the Interior.

B. **Reservation of Authority.** Nothing in this Agreement is to imply, or operate in a manner, that any natural resource trustee with any interest in the natural resources impacted by the Release, whether a Party to this Agreement or not, is, in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources that may have been affected by the Release.

V. NATURAL RESOURCE DAMAGES

In recognition of the Congressional intent under CERCLA and the CWA to restore natural resources injured as a result of releases of hazardous substances, the natural resource damages recovered pursuant to Paragraphs 9 and 10 of the Consent Decree may be used for:

- a. The costs of restoring the freshwater mussels in the Clinch River watershed and their supporting habitat that were injured by the Release.
- b. Trustee planning and oversight costs associated with administering and/or implementing restoration projects for identified injured natural resources.

VI. TRUSTEE COUNCIL

A. **Composition.** The Trustee Parties recognize the importance of coordinating their efforts in order to effectively and efficiently meet their respective natural resource trustee responsibilities under applicable Federal and Virginia law. Accordingly, the Trustee Parties hereby agree to create the Certus Site Trustee Council (Trustee Council). Each Trustee Party, as

specified under Section IV.A., shall designate one primary voting representative to the Trustee Council and one alternate representative to act in the absence of the primary voting representative.

1. The Virginia Secretary of Natural Resources has designated Deputy Director for Operations of the Department of Environmental Quality or his designee to act on behalf of the Commonwealth of Virginia.
2. The Secretary of the Interior has designated the Regional Director of Region 5 of the U.S. Fish and Wildlife Service to act on behalf of the Department of the Interior and she has designated the Supervisor of the Virginia Field Office of the Fish and Wildlife Service or her designee to act on her behalf.

B. Decision-Making. The two (2) members of the Trustee Council shall have equal authority, and all decisions under this Agreement shall be made by agreement of both 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 agreement between the Trustees. If agreement cannot be reached after good faith discussions, the matter shall be elevated to the Trustee Parties for decision and further instructions. The Trustee Parties agree that decision-making deliberations will focus on the Trustees' mutual goals of restoration of the mussel resources in the Clinch River watershed that were injured as a result of the Release using the methods specified in Paragraph VI.D. below rather than upon independent control or trusteeship over the affected natural resources. If necessary, the Trustee Parties may establish other mechanisms by which disputes may be resolved.

D. Duties and Responsibilities. In light of the fact that DOI has already conducted extensive injury assessment which the Trustee Parties have reviewed and accepted and the Trustee Parties agree that there does not appear to be a need for the collection of any significant additional injury assessment data, the Parties, through their representatives, will coordinate their efforts in the following:

1. Development and facilitation of the implementation of a Restoration Plan to restore, replace, rehabilitate and/or acquire the equivalent of the injured natural resources, and, as appropriate, the reduced or lost services provided by such resources. It is agreed that the focus of the Restoration Plan will be the restoration of the mussel resources in the Clinch River watershed that were injured as a result of the Release and their supporting habitat, and that the Restoration Plan will employ the methods and goals identified in Alternatives 2,3,4, and 5 of the Initial Restoration and Compensation Determination Plan (Initial RCDP) for the Certus Chemical Spill, dated April 9, 2002 (relevant portions of the Initial RCDP are attached to this Agreement as Appendix A).

2. Communicating with the public regarding the development and progress of the Restoration Plan. The Parties agree to inform one another of the name(s) of person(s) authorized to speak to the press and the public on behalf of the Certus Site and related restoration activities.

VII. LEAD ADMINISTRATIVE TRUSTEE

The Trustee Parties hereby agree that the DOI Trustee Representative shall act as Lead Administrative Trustee (LAT) under this Agreement. The LAT's duties will include, but are not limited to: scheduling meetings (which may take place via telephone if appropriate) of the Trustee Council and notifying members of those meetings on a timely basis; preparing, in consultation with the State Trustee, agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining an administrative record for the natural resource damage assessment, restoration and monitoring processes; acting as a repository for other records and documents; drafting the proposed and final Restoration Plans (including the administrative tasks associated therewith); signing agreements on behalf of the Trustee Council for activities that have been approved by both Trustees; requesting annual disbursement of Settlement Funds from the NRDAR account and paying such funds to the appropriate persons or entities. The LAT will be responsible for informing the State Trustee of all pertinent developments on a timely basis. The LAT may delegate its duties to the State Trustee, with the approval of such State Trustee.

VIII. FUNDS

Pursuant to the Consent Decree to be entered in the case of United States of America v. Certus, Inc. (United States District Court for the Western District of Virginia/Abingdon Division-C.A. No. 1:02CV00095) the sum of \$3,707,432.84 will be deposited in DOI's Natural Resource Damage Assessment and Restoration Fund (NRDAR Fund) for the joint benefit and use of the Trustee Parties in implementing the Restoration Plan in this case. Such funds deposited in the NRDAR account shall be used only for the activities specified in Section VI.D. of this Agreement.

IX. CONFIDENTIALITY

The Trustees and their representatives agree that it is in the public interest that 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.

X. GENERAL PROVISIONS

A. Reservation of Rights. All Trustees understand that this document is not intended to create or waive any legal rights or obligations between the Trustees 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. Nothing in this Agreement shall be construed as obligating the United States 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 as a result of the Consent Decree entered in the U.S. v. Certus, Inc.

C. Third Parties. This Agreement is not intended to, nor shall it, vest rights in persons who do not represent the Trustee Parties to this Agreement 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.

D. Modification of Agreement. Modification of this Agreement must be in writing and is contingent upon approval of all Trustees who are currently Parties to the Agreement.

E. Termination or 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 jointly determine that the purposes underlying this Agreement have been fully addressed, the Agreement will terminate upon such a written finding.

Either Trustee may unilaterally withdraw from this Agreement, upon written notice in accordance herewith. In the event that a Trustee withdraws from the Agreement, such withdrawal must be in writing at least sixty days in advance of the withdrawal. Any such withdrawal shall not impact the implementation of the Restoration Plan adopted by the Trustees, provided that the remaining Trustee is able to complete the implementation of the Restoration Plan.

In the event of the withdrawal of one of the Trustees 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 this Agreement, or otherwise controlled in any joint account or individual account by the Trustees relating to NRDAR for this Site.

In the event a Trustee withdraws from this MOA, the Parties expressly agree that they will continue to coordinate their activities to the greatest extent practicable to restore the natural resources that are the subject of the Consent Decree, and that they will be guided by the objectives of this MOA.

F. Execution and Effective Date. This Agreement may be executed in counterparts. The effective date of this Agreement will be the date on which the last signature is entered.

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

COMMONWEALTH OF VIRGINIA:

By: W. Tayloe Murphy Date 1-16-03.
W. Tayloe Murphy
Secretary of Natural Resources

UNITED STATES DEPARTMENT OF THE INTERIOR:

By: Sherry H. Morgan **ACTING** Date March 25, 2003
Mamie A. Parker
Regional Director, Region 5
U.S. Fish and Wildlife Service