

MEMORANDUM OF UNDERSTANDING  
AMONG

the State of Michigan,  
acting through  
the Department of Environmental Quality, the Department of Natural  
Resources, and the Attorney General;  
the United States Department of Interior,  
acting through the Fish and Wildlife Service and the Bureau of Indian  
Affairs; and  
the Saginaw Chippewa Indian Tribe of Michigan

REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT  
AND RESTORATION FOR THE  
TITTABAWASSEE RIVER SITE

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## **MEMORANDUM OF UNDERSTANDING**

### **I. INTRODUCTION**

This Memorandum of Understanding (MOU) by and between the State of Michigan (State), acting through its trustees and co-trustee for natural resources, namely the Director of the Michigan Department of Environmental Quality (MDEQ), the Director of the Michigan Department of Natural Resources (MDNR) and the Attorney General of the State of Michigan (MAG), respectively; the United States Department of the Interior (DOI), acting through its representatives, the Fish and Wildlife Service (Service) and Bureau of Indian Affairs (BIA); and the Saginaw Chippewa Indian Tribe of Michigan; all of whom are collectively referred to as the "Trustees", is entered into to ensure the coordination and cooperation of the Trustees in assessing damages for injuries to natural resources and natural resource services resulting from releases of hazardous substances at and from the Dow Chemical Company Midland Facility to the Tittabawassee River Site (Site) and the application of any damages recovered toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources. In addition, this MOU is intended to ensure coordination of Trustee concerns and activities with removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

### **II. PARTIES**

#### **A. State, Federal, and Tribal Natural Resource Trustees**

The following officials, or their designees, who are natural resource trustees designated pursuant to 40 C.F.R. Part 300 – Subpart G, are parties to this MOU, and act on behalf of the public under this MOU:

1. The Director of the Michigan Department of Environmental Quality;
2. The Director of the Michigan Department of Natural Resources;
3. The Attorney General of the State of Michigan;
4. The Regional Director of Region 3 of the U.S. Fish and Wildlife Service, as Authorized

Official for the Department of the Interior, who represents the interests of DOI including its participating bureaus, the Service and BIA; and

5. The Saginaw Chippewa Indian Tribe of Michigan

B. Other Natural Resource Trustees

Any natural resource trustee designated pursuant to 40 C.F.R. Part 300 – Subpart G that is not a party to this MOU and that has a natural resource interest shall not be precluded from exercising its authority as a natural resource trustee or cooperating in the natural resources damage assessment process. Additional trustees may join this MOU through a modification as described in Section X.

### **III. PURPOSE**

The purpose of this MOU is to provide a framework for the coordination and cooperation of the Trustees in the assessment of damages for injuries to natural resources resulting from releases of hazardous substances at and from the Site, the recovery of such damages, and the use of any damages recovered to restore, rehabilitate, replace or acquire the equivalent of the affected natural resources. In addition, this MOU is intended to ensure coordination of Trustee concerns and activities with removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury and to achieve or enhance restoration of injured natural resources.

### **IV. AUTHORITY**

The Trustees enter into this MOU 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); Section 1006 of the Oil Pollution Act (OPA), as amended, 33 U.S.C. §2706; and other applicable federal, tribal, and state law and authorities including, but not limited to, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as amended, 40 C.F.R. Part 300, and Part 201 of the Michigan Natural Resources and Environmental Protection Act 451 of 1994, as amended (Part

201).

## **V. ORGANIZATION**

### **A. Trustee Council**

The Trustees hereby agree to form the Tittabawassee River Natural Resource Trustee Council (Trustee Council) to implement the provisions of this MOU. Being duly formed, the Trustee Council agrees to designate the Service as the Lead Administrative Trustee (LAT) to coordinate its activities with and act under the direction of the Trustee Council. The Trustee Council may designate a subsequent LAT at the Trustee Council's discretion. The Trustee Council also agrees to create subcommittees when necessary to effect the purposes of this MOU.

### **B. Council Representatives**

Each Trustee shall appoint one primary representative and one alternate representative to the Trustee Council. No later than twenty (20) working days after the final execution of this MOU, or following a change in any trustee's primary or alternate representative, each Trustee shall notify the other Trustees of relevant contact information for that Trustee's primary and alternate representatives as well as their legal advisors, to include: name, address, phone number, e-mail address, and facsimile number.

### **C. Advisors**

As determined to be appropriate by the trustees, or as required and/or permitted by applicable law, the Trustees will coordinate with and seek advisory participation of appropriate federal, state and local agencies and the public.

## **VI. DUTIES AND RESPONSIBILITIES**

### **A. Trustee Council**

On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOU in accordance with the decision-making requirements contained in Section VII. The Trustee Council may take whatever actions the Trustee Council, in

its discretion, determines are necessary to fulfill the responsibilities of each Trustee under, and to effectuate the purposes of, applicable federal and state law. In order to address the Trustees' responsibilities, it is expected that the Trustee Council, in accordance with applicable laws and policies, may take actions, including, but not limited to, the following:

1. Conduct scientific and technical studies, sampling, and other matters related to the assessment of damages for injuries to natural resources that may be or have been lost, injured or destroyed.
2. Seek compensation from responsible parties for the damages assessed by the Trustees. In recognition of the Congressional intent under CERCLA and the legislative intent under Part 201 to restore natural resources injured as a result of releases of hazardous substances, the measure of recoverable natural resource damages contemplated under this MOU 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 assessment of natural resource damages and restoration, and
  - d. Trustee oversight costs associated with administering or implementing restoration projects for injured natural resources. This may include documented Trustee costs of participation in removal, remedial, corrective or other response actions carried out by others in an effort to abate and/or minimize continuing and residual injury, and to achieve or enhance restoration of injured natural resources.
3. Communicate with the public and encourage public review and comment on assessment and restoration planning.
4. Participate in negotiations with responsible parties consistent with Paragraph D, below.
5. Supervise, manage and obligate any money paid to the Trustees by or on behalf of responsible parties for the purpose of assessing, restoring, replacing, rehabilitating and/or acquiring the equivalent of the affected natural resources.
6. Conduct and/or oversee the development and implementation of a plan for the restoring, replacing, rehabilitating and/or acquiring the equivalent of the affected natural resources and/or the services provided by those resources.
7. Arrange for one or more contracts with professional consultants, technical or otherwise,

that the Trustee Council determines are necessary and best qualified to provide services to the Trustee Council.

8. Coordinate Trustee concerns and activities relating to affected natural resources with the 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.
9. Execute additional agreements, as necessary, to carry out the duties and responsibilities of this MOU.

B. Lead Administrative Trustee (LAT)

The LAT will provide a Trustee Coordinator to perform administrative activities. The selection of the Trustee Coordinator will be subject to approval of the Trustee Council. The duties of the Trustee Coordinator shall include, but are not limited to: coordinating, monitoring, and reporting on the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council, notifying members of those meetings on a timely basis, and preparation of agendas for those meetings; acting as a central contact point for the Trustee Council; managing and maintaining documents designated for inclusion in the Administrative Record by the Trustee Council in accordance with applicable federal and state law and guidance; overseeing the development of a cost documentation policy applicable to the Trustees' actions under this MOU; and other such duties as may be directed by the Trustee Council. The Trustee Coordinator will be responsible for informing other Trustees of all pertinent developments on a timely basis. The LAT may delegate any of its duties to another Trustee, with the permission of that Trustee.

C. Documentation of Assessment and Restoration Costs

Each Trustee is responsible for tracking and documenting the costs and expenses it incurs as a result of its participation in the natural resource damage assessment and restoration process under this MOU in a form and manner sufficient to support the recovery of such costs under CERCLA. The documentation of such costs will, at a minimum, (i) evidence the actual time spent, by date, and the hourly salary rate applicable to each agency participant; (ii) identify all indirect or overhead rates used in determining costs, including the manner of their application;

and (iii) include evidence (such as invoices or receipts) of all contract costs or other expenditures presented for payment. Each Trustee will be responsible for the accuracy of the assessment costs it reports or presents for payment under this MOU. No trustee is to certify or warrant any assessment or restoration cost information other than its own.

D. Notification of Negotiations with a Potentially Responsible Party (PRP)

The Trustees and the Trustee Council members agree that they will coordinate communications with and PRPs or their agents for matters related to the natural resource damage assessment and restoration for this Site. No Trustee will discuss these matters with a PRP without first providing the other Trustees with notice and an opportunity to participate in such discussions as appropriate. The above agreement shall not preclude a Trustee from having separate communications with a PRP on matters within the scope this MOU where circumstances warrant, provided that each Trustee notifies the other Trustees of the person contacted and summarizes the subject of the communications.

## **VII. DECISIONMAKING**

A. Approval

The Trustees agree that all decisions implementing the provisions of this MOU shall require unanimous approval. Each party to this MOU shall have one vote that shall be cast by the party's primary representative, or in the absence of the primary representative, by the alternate representative. Any Trustee may be represented for purposes of voting on decisions implementing this MOU through the submission of a proxy on behalf of the absentee Trustee to the Trustee Council. Proxy is defined as a written authorization by the absentee Trustee instructing another Trustee on how it should vote for the absentee Trustee.

B. Dispute Resolution

In the event of a dispute involving any decisions under this MOU, the Trustee Council representatives shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among the Trustee representatives 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 management of the Trustee representatives for decision or further instructions. If necessary, the Trustees may establish other



mechanism by which disputes may be resolved.

C. Intent

The Trustees 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.

D. Recording

All decisions agreed to by the Trustee Council shall be recorded in writing, either by resolutions signed by the Trustee Council or in minutes that are approved as to content and form by the Trustee Council.

## **VIII. CONFIDENTIALITY**

A. Data

The Trustees agree that it is in the public interest that, consistent with applicable law, all validated scientific data arising out of their review of injuries to natural resources as a result of a release of a hazardous substance be made public. Therefore, consistent with applicable law, such data shall be made public as soon as publication will not prejudice the accomplishment of the purposes of this MOU. Public sharing of validated scientific data will be the general policy of the Trustees.

B. Communications and Work Products

The Trustees recognize that all written or oral communications related to the assessment and recovery of damages for injuries to natural resources are being undertaken in anticipation of litigation. Accordingly, all written and oral communications and work products will be treated as either 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 transmittal of any designated privileged documents or designated privileged communication between or among any of the Trustees 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 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 consultation with the Trustee or Trustees to which the privilege applies or whose representatives originally generated or contributed 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 or from disclosing any record for which disclosure is required by law.

#### **IX. RESERVATION OF RIGHTS**

Except for the confidentiality agreement contained in Section VIII, the Trustees understand that this document is not intended to create any further legal rights or obligations between the Trustees, their Trustee representatives, or any other persons not a party to this MOU.

Nothing in this Agreement is to imply, or operate in a manner, that any natural resource trustee with an interest in the Site, 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 which may have been affected by the Site or agreeing to the existence and scope of trustee responsibility or authority asserted by any Trustee with respect to such natural resources.

#### **X. MODIFICATION OF AGREEMENT**

Modification of this MOU must be in writing and will become effective upon approval of all Trustees that are parties to the MOU at the time of modification.

#### **XI. TERMINATION**

##### **A. Completion**

This MOU shall be in effect from the date of execution until termination by agreement of the Trustees. At any time when the Trustees determine that the purposes underlying this MOU have been addressed, the MOU will be terminated. In the event that any Trustee withdraws from the MOU, such withdrawal must be in writing and must be sent at least thirty days in advance of the withdrawal. In the event of such withdrawal, this MOU remains in full force and effect for

the remaining parties.

**B. Accounting**

In the event of the withdrawal of any Trustee(s) or the termination of this MOU, the Trustee(s) shall give a full and complete accounting to the Trustee Council of all natural resource damages jointly received, deposited, held, disbursed, managed, expended, or otherwise controlled by the Trustee(s) in any joint or separate account held pursuant to this MOU. A Trustee who withdraws shall return any unused and unobligated jointly received funds for natural resource damages that it controls to the remaining Trustees no later than 90 days after the date of withdrawal from this MOU. If the MOU is terminated, the Trustees shall select an appropriate party or parties to whom to transfer any remaining jointly received funds for natural resource damages and shall effect such transfer within 120 days.

**XII. LIMITATION**

Nothing in this MOU shall be construed as obligating the United States, the State or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law. This MOU also does not grant the Trustee Council or the LAT the authority to exercise any legal authority held by any Trustee other than as provided for in this MOU. Nor does this MOU authorize any Trustee to represent another Trustee in any litigation or settlement negotiations other than as provided for in this MOU.

**XIII. THIRD PARTY CHALLENGES AND 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 Trustees. They may not be the basis of any third party claims, defenses, challenges or appeals.

**XIV. 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 Trustee's signature.


IN WITNESS WHEREOF the Trustees, through their authorized representatives, have  
executed this Agreement on the dates attested to below.

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AMONG

the State of Michigan,  
acting through  
the Department of Environmental Quality, the Department of Natural  
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the United States Department of Interior,  
acting through the Fish and Wildlife Service and the Bureau of Indian  
Affairs;  
and  
the Saginaw Chippewa Indian Tribe of Michigan

REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT  
AND RESTORATION FOR THE  
**TITTABAWASSEE RIVER SITE**

Director, Michigan Department of Environmental Quality:



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Steven E. Chester

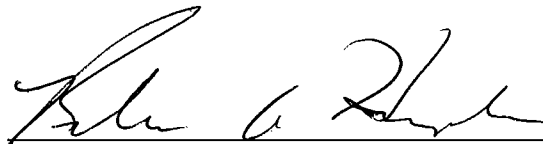
Date 12-20-05

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Director, Michigan Department of Natural Resources:



Rebecca A. Humphries

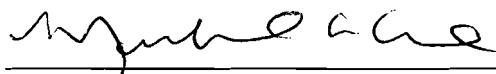
Date 11/28/05

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Attorney General, State of Michigan:



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Michael A. Cox

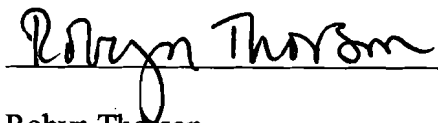
Date 1/20/06

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Regional Director, Region 3, U.S. Fish and Wildlife Service:

  
\_\_\_\_\_  
Robyn Thorson

Date FEB -9 2006

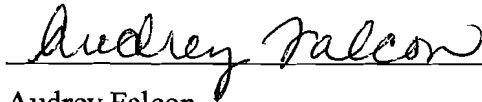


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REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT  
AND RESTORATION FOR THE  
**TITTABAWASSEE RIVER SITE**

Tribal Chief, Saginaw Chippewa Indian Tribe of Michigan

  
Audrey Falcon

Date 12-2-05