

**SETTLEMENT AGREEMENT AMONG
THE UNITED STATES DEPARTMENT OF THE INTERIOR,
THE COMMONWEALTH OF VIRGINIA
AND
NUTRIEN AG SOLUTIONS, INC.
FOR THE TINKER CREEK SPILL**

I. Introduction

A. The United States of America, on behalf of the Department of the Interior (“DOI”) acting through the Fish and Wildlife Services (“FWS”) and the Commonwealth of Virginia, through its Secretary of Natural Resources and the Virginia Department of Environmental Quality (“Virginia”) (collectively referred to as the “Trustees”) and Nutrien Ag Solutions, Inc. (f/k/a Crop Production Services) (“Nutrien” or “Settling Defendant”), enter into this Settlement Agreement (“Agreement” or “Settlement Agreement”) to resolve, without litigation, the Trustees’ civil claims under the Comprehensive Environmental Response, Compensation, and Liability Act, (“CERCLA”) 42 U.S.C. § 9607; the natural resource damages provision of the Clean Water Act, (“CWA”), 33 U.S.C. §§ 1321(f)(4) and (5); and the Virginia State Water Pollution Control Law (“SWCL”), Va. Code § 62.1-44 for injury to, impairment of, destruction of, loss of, diminution of value of and/or loss of use of natural resources, including the reasonable costs of assessing the injuries, resulting from the July 29, 2017 release of approximately 165 gallons of Termix 5301 into Tinker Creek in Cloverdale, Virginia from the Nutrien facility at 218 Simmons Drive.

B. The Trustees have shared jurisdiction for the natural resources and their services injured as a result of the Tinker Creek Spill, and this Settlement Agreement is executed by the governmental agencies in their capacity as Natural Resource Trustees under CERCLA, CWA and the National Contingency Plan, 40 C.F.R. §§ 300.600-300.605.

C. Under the CWA, the owner or operator of a facility from which oil or a hazardous substance is discharged to a water of the United States is liable for any costs incurred by the Federal or state government in the restoration or replacement of natural resources damaged or destroyed as a result of the discharge. 33 U.S.C. § 1321(f)(4).

D. Under CERCLA, each potentially responsible party for a facility from which hazardous substances are released into the environment which causes injuries to natural resources is liable for

damages for injury to, destruction of, loss of, or loss of use of, natural resources and their services, including the reasonable costs of assessing the injuries. 42 U.S.C. § 107(f).

E. The execution of this Agreement shall not constitute, nor is it in any way an admission by the Settling Defendant of any liability, and shall not be used in any other action against the Settling Defendant as proof of liability.

II. Parties Bound

1. The provisions of this Settlement Agreement shall apply to and be binding upon the Settling Defendant and all of its successors and assigns, and upon the Trustees.

III. Definitions

2. Except as otherwise expressly provided herein, the terms used in this Settlement Agreement which are used in CERCLA, or in the Natural Resource Damage Assessment regulations promulgated by the DOI pursuant to CERCLA (43 C.F.R. Part 11) shall have the meanings assigned to them by CERCLA, or by its regulations. Terms which are not used in CERCLA but are used in the CWA shall have the meaning assigned to them by the CWA and its regulations. Terms which are not used in CERCLA or the CWA shall have the meanings assigned to them by the SWCL.

a. "Natural resources" shall mean land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the fishery conservation zone established by the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C. § 1801 et seq.]), or any State government.

b. "Parties" shall mean the Trustees and Settling Defendant.

c. "Settlement Agreement" or "Agreement" shall mean this Settlement Agreement among the United States, the Commonwealth of Virginia and Nutrien Ag Solutions.

d. "Site" shall mean the Nutrien facility located at 218 Simmons Drive in Cloverdale, Virginia, and the geographic area where released hazardous substances came to be located, including but not limited to Tinker Creek near the facility downstream to the mouth of Tinker Creek at the Roanoke River.

e. "Tinker Creek Spill" shall mean the July 29, 2017 release of approximately 165 gallons of Termix 5301 at or from the Nutrien facility located at 218 Simmons Drive in Cloverdale, Virginia.

IV. Payment of Certain Costs and Damages

3. Payment for Natural Resource Restoration Projects. Within thirty (30) days after the Effective Date (as defined below) of this Settlement Agreement, the Settling Defendant shall pay \$385,000 to the United States (of that amount, \$28,100.00 including all interest earned on such funds, is to be used by the Trustees for restoration activities to compensate the public for recreational injuries and \$356,900.00 including all interest earned on such funds, is to be used by the Trustees for restoration activities to compensate the public for aquatic injuries.) The total amount paid pursuant to this Paragraph shall be deposited into a segregated, case-specific sub-account within the DOI Natural Resource Damage Assessment and Restoration Fund (“NRDAR Fund”). The Trustees shall jointly use these funds to restore, replace, rehabilitate, or acquire the equivalent of natural resources and their services injured by the Tinker Creek Spill consistent with the final Restoration Plan, and any amendments thereto, for the Tinker Creek Spill. These restoration funds will be used for restoration projects within the Tinker Creek watershed.

4. Payment to the United States for Restoration Activities. Within thirty (30) days after the Effective Date (as defined below) of this Settlement Agreement, the Settling Defendant shall pay \$35,000 to the United States to be paid to DOI to fund restoration planning, implementation and monitoring of restoration projects, including oversight of project implementation.

5. Payment to the Commonwealth of Virginia for Restoration Activities. Within thirty (30) days after the Effective Date (as defined below) of this Settlement Agreement, the Settling Defendant shall pay \$5,000 to the Commonwealth of Virginia to fund restoration planning, implementation and monitoring of restoration projects, including oversight of project implementation.

6. As part of the cooperative assessment process for the Tinker Creek Spill, Nutrien has paid at least \$77,700.00 to DOI and \$3,650.00 to the Commonwealth as reimbursement for costs incurred in connection with the Release and prior to the date of publication of the notice of the Settlement Agreement in the Federal Register. The Trustees are not seeking, and this Agreement does not require, any additional payment of past assessment costs.

7. Payment of the amount set forth in Paragraphs 3 and 4 shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account, in accordance with instructions provided to Settling Defendant by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the Western District of Virginia after the Effective Date. The payment

instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Settling Defendant shall use to identify all payments required to be made in accordance with this Settlement Agreement. The FLU will provide the payment instructions to:

Sherri Kuhlmann
General Counsel, Retail
sherri.kuhlmann@nutrien.com

on behalf of Settling Defendant.

At the time of payment, Settling Defendant shall send a written notice of payment and a copy of any transmittal documentation to:

Amy Horner Hanley, Senior Attorney
Division of Parks and Wildlife (MS 6316)
Office of the Solicitor
U.S. Department of the Interior
1849 C Street NW
Washington, DC 20240
Amy.hanley@sol.doi.gov

With a copy to:

Chief
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044
DJ # 90-5-1-1-11891

And

Timothy Smith
Nutrien Ag Solutions, Inc.
140 Arkansas St.,
Monticello, AR 71655,
timothy.smith@nutrien.com

8. Payment of the amount set forth in Paragraph 5 shall be in the form of a check, payable to “Treasurer of Virginia” and referencing “Tinker Creek Spill NRDAR.”

Mail to:
Receipts Control
Department of Environmental Quality
P.O. Box 1104
Richmond, VA 23218

At the time of payment, Settling Defendant shall send a written notice of payment and a copy of any transmittal documentation to:

Kerri Nicholas
Virginia Department of Environmental Quality
1111 E. Main St., Suite 1400
Richmond, VA 23219
kerri.nicholas@deq.virginia.gov

and

Timothy Smith
Nutrien Ag Solutions, Inc.
140 Arkansas St.,
Monticello, AR 71655,
timothy.smith@nutrien.com

9. If Settling Defendant fails to make any of the payments specified in Paragraphs 3-5 when due, Settling Defendant shall pay interest on those payments at the rate specified in 33 U.S.C. § 2705(b)(4). Interest shall be calculated from the Effective Date of this settlement to the date of payment.

10. In addition, if Settling Defendant fails to make any of the payments specified in Paragraphs 3-5 when due, it shall pay Five Hundred Dollars (\$500) as a stipulated penalty for each day or portion thereof that each payment is overdue until all overdue payments (including stipulated penalties) are paid in full. Separate stipulated penalties shall accrue for failure to make each such payment.

11. A stipulated penalty for failure to make the payment specified in Paragraphs 3 and 4 shall be paid to the case specific, segregated sub-accounts in the DOI NRDAR Fund in accordance with the payment instructions in Paragraph 7. Stipulated penalty for failure to make the payment specified in Paragraph 5 shall be paid to Virginia in accordance with the payment instructions in Paragraph 8.

12. The stipulated penalty is due and payable within thirty (30) days of the date of the demand for payment of the stipulated penalty by the relevant Trustee. A Trustee making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Trustee.

13. Payments made under Paragraphs 9, 10, and 12 shall be in addition to any other remedies or sanctions available to the Trustees by virtue of the Settling Defendant's failure to comply with the requirements of this Settlement Agreement.

14. Notwithstanding any other provisions of this Section IV, the Trustees may, in their unreviewable discretion, waive payment of any portion of the stipulated penalty that has accrued pursuant to this Settlement Agreement. Such waiver of payment shall not be construed as a waiver of any other payment(s) required under this Settlement Agreement.

15. Settling Defendant shall be liable for attorneys' fees and costs incurred by the Trustees to collect any amount due under this Settlement Agreement that is not timely paid.

V. Covenant Not to Sue and Reservation of Rights by the Trustees

16. In consideration of the payments to be made by the Settling Defendant pursuant to Section IV (Payment of Certain Costs and Damages), the Trustees covenant not to sue or maintain any lawsuit, action, administrative proceeding, or other proceeding against Settling Defendant pursuant to CERCLA, 42 U.S.C. § 9607, the CWA, 33 U.S.C. §§ 1321(f)(4) and (5), or the SWLC, Va. Code § 62.1-44, for (i) injury to, impairment of, destruction of, loss of, diminution of value of, and/or loss of use of natural resources caused by the Tinker Creek Spill, known as of the date of execution of this Settlement Agreement by Trustees, and (ii) costs (including NRDA costs), attorneys' fees, other fees, or expenses incurred by the Trustees to recover such natural resource damages relating to injuries at or from the Site, including damage assessment costs.

17. These covenants not to sue in Paragraph 16 are not effective until, and are conditioned upon, complete and satisfactory performance by the Settling Defendant of its obligations under Section IV (Payment of Certain Costs and Damages) of this Settlement Agreement. These covenants not to sue extend only to Settling Defendant and do not extend to any other person.

18. Notwithstanding any other provision of this Settlement Agreement, the United States and the Commonwealth of Virginia reserve, and this Settlement Agreement is without prejudice to any claims not included in Paragraph 16, including, but not limited to:

- a. Claims based upon a failure of the Settling Defendant to meet a requirement of this Settlement Agreement;

- b. Criminal claims;
- c. Claims for response costs or damages that the United States, other than DOI, may have under applicable law;
- d. Claims for response costs or damages that Virginia, other than Virginia DEQ, may have under applicable law;
- e. Claims for damages for injury to, destruction of, or loss of natural resources unrelated to the Tinker Creek Spill.

19. Notwithstanding any other provision of this Settlement Agreement, the United States and Virginia each reserves the right to file claims against Nutrien seeking recovery of natural resource damages caused by the Tinker Creek Spill if conditions are discovered or information is received by the Trustees, not known to the Trustees at the time of execution of this Settlement Agreement, that, together with any other relevant information, indicates that there is injury to, impairment of, destruction of, loss of, diminution of value of, or loss of use of natural resources of a type unknown or of a magnitude that is substantially greater than was known by the Trustees, as of the date of their execution of this Settlement Agreement.

VI. Covenant Not to Sue by the Settling Defendant

20. Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the Trustees, including their departments, agencies or instrumentalities, or their employees, agents, experts or contractors, for claims
- a. Related to natural resource damages at the Site;
 - b. Any claim for costs, attorneys' fees, other fees, or expenses incurred in connection with the Settlement Agreement or claims resolved herein.

21. In any subsequent administrative or judicial proceeding initiated by the United States or Virginia related to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defense based upon any contention that the claims raised by the United States or Virginia in the subsequent proceeding were or should have been settled in this Settlement Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section V (Covenant Not to Sue and Reservation of Rights by the Trustees) herein.

VII. Signatories

22. Each of the undersigned representatives of the Parties certifies that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and bind legally such Party to this document.

VIII. Entire Agreement

23. This Settlement Agreement constitutes the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in the Agreement and supercedes all prior agreements and understanding, whether oral or written. No other document, nor any representation, inducement, agreement, understanding or promise constitutes any part of this Agreement or the settlement it represents, nor shall it be used in construing the terms of this Agreement.

IX. Modification

24. The terms of this Agreement may be modified only by a subsequent written agreement signed by all of the Parties.

X. Execution

25. This Agreement may be executed in several counterparts, each of which shall constitute an original, and all of which shall constitute one and the same instrument.

XI. Public Comment

26. Final approval by the United States and the effectiveness of this Settlement Agreement are subject to public notice and comment for a period of not less than 30 days after publication of notice of this Settlement Agreement in the Federal Register. Settling Defendant agrees not to withdraw its consent to the Settlement Agreement pending consideration of public comments and approval of the United States or Virginia. If public comments disclose facts or considerations which indicate that this Settlement Agreement is inappropriate, improper, or inadequate, the United States or Virginia may withdraw their approval of the Settlement Agreement. Should the United States or Virginia withdraw their approval, this Agreement shall be null and void.

XII. Effective Date

27. The Effective Date of this Settlement Agreement shall be the date upon which the United States issues written notice to Settling Defendant that the public comment period pursuant to Section

XI (Public Comment) has closed and that comments received, if any, do not require modification or withdrawal from this Settlement Agreement.

SETTLEMENT AGREEMENT AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE COMMONWEALTH OF VIRGINIA AND NUTRIEN AG SOLUTIONS FOR THE TINKER CREEK SPILL

NUTRIEN AG SOLUTIONS, INC.

By: Timothy Smith Date: 10/11/19

Name: Timothy Smith

Title: Division Manager

SETTLEMENT AGREEMENT AMONG THE UNITED STATES DEPARTMENT OF THE INTERIOR, THE COMMONWEALTH OF VIRGINIA AND NUTRIEN AG SOLUTIONS FOR THE TINKER CREEK SPILL

By:




Matthew J. Strickler
Secretary of Natural Resources
Commonwealth of Virginia

Date:

2/3/2020

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FOR THE UNITED STATES OF AMERICA, ON BEHALF OF THE DEPARTMENT OF THE INTERIOR

By: 
Nathaniel Douglas
Deputy Section Chief
Environmental Enforcement Section

Date: 3/2/20