

MEMORANDUM OF AGREEMENT

**Between the Illinois Department of Natural Resources,
the Illinois Environmental Protection Agency,
and the United States Fish & Wildlife Service
Regarding Natural Resource Damage Assessment
at the Sauget Area 1 and Sauget Area 2 Superfund Sites**

I. INTRODUCTION AND PURPOSE

This Memorandum of Agreement (MOA) by and among the Illinois Department of Natural Resources (IDNR), the Illinois Environmental Protection Agency (IEPA), and the United States Fish & Wildlife Service (USFWS) (collectively referred to as the Trustees or the Parties) is entered into to provide for the coordination and cooperation of the Trustees in addressing the release or threat of a release of hazardous substances associated with the Sauget Area 1 and Sauget Area 2 Superfund Sites located in St. Clair County, Illinois (collectively referred to as the NRD Areas.) The U.S. Environmental Protection Agency (USEPA) has been directing removal and remedial activities at the Sauget Area 1 and Sauget Area 2 Superfund Sites, particularly within the NRD Areas. This MOA is intended to guide the Parties' coordination of their respective natural resource damage assessment (NRDA) activities at the NRD Areas. Activities of the Parties covered under this MOA include, but are not limited to: (1) coordination of the assessment of damages for natural resources injured by the release or threat of a release of hazardous substances to the NRD Areas; (2) coordination of Trustee concerns and activities with removal, remedial, corrective, mitigative and other response actions carried out by other federal and/or state agencies in an effort to abate and/or minimize continuing and residual injury to natural resources; (3) negotiations with potentially responsible parties (PRPs) for the release or threat of a release of hazardous substances to the NRD Areas for the purpose of resolving claims against them; and (4) coordination and collaboration on the restoration, rehabilitation, replacement and/or acquisition of the equivalent of natural resources injured as a result of releases of hazardous substances to the NRD Areas. This MOA is not intended to preclude further cooperative agreements between the Trustees on any other areas or locations within the Sauget Area 1 and Sauget Area 2 Superfund Sites.

NOW THEREFORE, the Trustees enter into this MOA to provide a framework for their coordination and cooperation at the NRD Areas.

II. AUTHORITY

The Trustees enter into this MOA in accordance with the provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9607(f), § 311(f) of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1321(f), and any other applicable federal and state law and authority including, but not limited to the National Contingency Plan (NCP), 40 C.F.R. 300, as amended, and, to the extent appropriate and elected for use by the respective natural resource Trustees, the Department of the Interior's Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, as amended.

III. PARTIES

Pursuant to the authorities cited in Section II of this Agreement, the IDNR, the IEPA, and the USFWS have either exclusive or shared natural resource trusteeship over natural resources of the NRD Areas and the authority to act on behalf of the public to recover damages for injury to natural resources resulting from the release of hazardous substances. The Trustees also have the authority to take appropriate actions necessary to restore, replace, rehabilitate or acquire the equivalent of injured natural resources.

A. **Natural Resource Trustees.** The following officials or their designated representatives are authorized to act on behalf of the public as natural resource trustees:

1. Director, Illinois Department of Natural Resources;
2. Director, Illinois Environmental Protection Agency; and,
3. Regional Director, U.S. Fish and Wildlife Service, Region 3.

B. **Other Natural Resource Trustees.** Notwithstanding any other provisions of this MOA, the Parties recognize that there may be other parties who are not signatories to this MOA and who may assert a natural resource interest that is located in the NRD Areas. Any other party who is not a signatory to this MOA and who has a natural resource interest shall not be precluded from exercising their authority as a natural resource trustee or cooperating in the NRDA process.

IV. TRUSTEE DUTIES AND RESPONSIBILITIES

A. **Composition.** The Trustees hereby agree to form a Trustee Coordinating Council (Council) to be comprised of one primary representative from the IEPA, the IDNR, and the USFWS. The Trustee Council may seek advisory participation from the United States Department of Justice, Illinois Attorney General's Office, or other agency legal counsel, when necessary and/or appropriate. The Council shall meet on an as needed basis, but no less than once per year. The purpose of the Council is to facilitate coordination on issues related to the assessment and restoration of injured natural resources in the NRD Areas. In the event the Trustee Council only meets once per year, the meeting shall be a Coordinated Action Plan Meeting (CAP meeting), as defined in Section IV. B. 1 herein.

In accordance with applicable law, the Council shall coordinate natural resource damage activities including, but not limited to, the following:

1. Keep the Trustees, their designees and advisors under this MOA informed of all natural resource trustee activities pursuant to this MOA;
2. Work to ensure that there is active coordination and participation of the Parties in their respective activities under the Authorities cited in Section II of this Agreement

in order to accomplish effective and efficient assessment of injury and damages for natural resources, and restoration of injured natural resources in the NRD Areas;

3. Engage in discussions and negotiations with the PRPs for the purpose of aiding in the resolution of the Parties' claims against the PRPs;
4. Collaborate on the assessment of natural resource damage through the Council;
5. Collaborate on the restoration of natural resource damage through the Council; and,
6. Take such actions as may be deemed necessary to manage and achieve the objectives of this Agreement and to fulfill the responsibilities of each Party.

B. Lead Administrative Trustee.

The Trustees hereby agree to designate the USFWS representative to act as the Lead Administrative Trustee (LAT) under this Agreement. The LAT shall have no authority to exercise any legal authority on behalf of any other natural resource trustee. The LAT's duties and responsibilities shall include, but are not limited to the following:

1. Scheduling Trustee Council meetings, as appropriate, and an annual CAP meeting. The LAT is responsible for notifying Trustee representatives of said meetings. The purpose of the CAP meetings is to outline the NRDA activities to be undertaken and coordinated during the upcoming year. The LAT will prepare, in consultation with other Trustees, agendas for the Trustee Council and CAP meetings. The LAT will document the discussions of the Trustee Council and CAP meetings in the form of draft Meeting Minutes and distribute the draft Meeting Minutes to the Trustee Council. Any revisions to the Meeting Minutes agreed upon by Trustee representatives shall be incorporated into Final Meeting Minutes;
2. Coordinating the Trustees' participation in settlement negotiations for natural resource damages with PRPs;
3. Acting as a central contact point for the Trustee Council;
4. Establishing and maintaining the administrative record for the natural resource damage assessment;
5. Performing other administrative duties as directed by the Trustee Council; and,
6. Coordinating and/or carrying out such other actions as may be necessary and appropriate to achieve the purposes of this MOA. The LAT may delegate any of its duties to another Party under this MOA, with the permission of that Party. Neither the designation of the USFWS representative as the LAT, nor the formation of a

Council is intended to alter, abrogate or cede any natural resource trustee authority or responsibility over any affected natural resources whether the natural resource trustee is a Party to this MOA or not.

C. Duties and Responsibilities.

This MOA is intended to guide the Trustees' coordination and implementation of the NRDA activities as follows:

1. The Trustees will seek to coordinate their respective assessment and restoration activities at the NRD Areas;
2. The Trustees will seek to coordinate NRDA activities with other removal or remedial activities at the NRD Areas;
3. The natural resource trustee with whom any NRDA contractor has a contract to provide services shall inform all other Trustees of pertinent NRDA developments and shall make available to all other Trustees any comments, reports, plans or submittals prepared by the contractor. In order to insure that contractor information is thus shared, the Council will hold a quarterly conference call specifically for purposes of discussing pertinent NRDA developments and sharing contractor reports or other submittals;
4. Through effective coordination of their activities, the Trustees will strive to minimize costs and expenses where possible. For example, the Trustees will seek to compile a list of existing remedial data and utilize that data to the extent possible to evaluate and estimate injuries to natural resources;
5. The Trustees NRDA activities shall focus on the following:
 - a. abating and mitigating releases of hazardous substances which are injuring natural resources or limiting the effectiveness of restoration activities;
 - b. seeking to restore the biological, chemical and/or physical condition of the natural resource, and the services it provides, to baseline or pre-release or pre-discharge condition; and,
 - c. seeking to coordinate NRDA activities with other environmental response, removal or remedial activities where appropriate; and,
6. The Trustees and the Trustee Council members agree that they will endeavor to have coordinated communications with PRPs or their agents for matters related to NRDA activities or future damage claims. This MOA does not preclude a Trustee or Trustee Council member from having separate communications with PRPs or their agents on matters within the scope of this MOA where circumstances warrant,

7. provided that such Trustee or Trustee Council member informs and consults with the other Trustees.

D. Changing Representatives.

A Trustee may change its designated council representative by providing notice, along with the representative's name, address, telephone and facsimile numbers to each of the other Trustees' designates to the Council. In the event a Trustees' designated representative can no longer serve in this capacity, the Trustees must designate a new Council representative within fourteen (14) business days from the date the need presents itself. Business days will exclude state and federal holidays.

V. FUNDING

The Trustees agree to cooperate in good faith when receiving, depositing, holding, disbursing, managing and expending all natural resource damage recoveries obtained or received by the Trustees relating to natural resource injuries at the NRD Areas. Each Party shall be solely responsible to provide funding for any administrative, personnel or other resources necessary to carry out its duties and responsibilities pursuant to this MOA and for documentation to support reimbursement of its respective administrative costs. Each Party shall be responsible for identifying the fund into which its administrative costs recovered from a PRP are to be deposited. The Trustees agree to coordinate their cost-recovery activity or pursuit of any NRDA claim(s).

VI. CONFIDENTIALITY

The Trustees agree that the free and open exchange of information and sharing of ideas and opinions with the other Trustees is crucial to achieving the Trustees' close and common interests and goals of this MOA. The Trustees also recognize that all written or oral communications related to the assessment and recovery of damages for injury to natural resources are being undertaken in anticipation of litigation and should be designated as "privileged communication" or "privileged document".

The Trustees agree that a designated "privileged communication" or "privileged document" is a communication which occurs, or a document which is drafted, with an expectation of confidentiality and includes, but is not limited to, communications between the Trustees' attorneys or other legal staff, technical staff, agents, consultants, experts and/or other Government employees in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional government deliberations.

Accordingly, except as provided below or otherwise provided herein, the Trustees shall treat all designated privileged documents and privileged communications as privileged attorney-client communications, attorney work product or protected by other applicable privileges such as the deliberative process privilege (or a combination thereof). The Trustees shall protect and maintain

these documents and communications in such a manner as to insure that no intentional or unintentional disclosure is made which would compromise any asserted privilege.

In addition to the privileges noted above, the Trustees believe that certain documents and communications would not be subject to public disclosure because: (1) they may constitute records or information compiled for law enforcement purposes, the production of which could reasonably be expected to interfere with enforcement proceedings within the meaning of 5 U.S.C. § 552(b)(7)(A); and (2) they may fall within the disclosure exemptions established by Illinois public records law, including those codified at 5 I.L.C.S. 140.7. These documents and communications shall also be considered designated privileged documents and designated privileged communications.

Unless otherwise specifically provided, the Trustees shall each be entitled to assert an applicable privilege with respect to any document or communication jointly transmitted, prepared or funded by the Trustees. Each Trustee shall be entitled to assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Trustee.

The Trustees agree as follows:

- A. **Non-Waiver.** The transmittal of any designated privileged documents or designated privileged communications between or among the Trustees' attorneys or other legal staff, technical staff, agents, consultants, experts and/or other Government employees does not waive, or imply any waiver, of any privilege, right or other basis for confidentiality that otherwise applies to these documents and communications.
- B. **Confidentiality.** If the Trustees exchange designated privileged documents, the Trustee sending such documents shall identify the sender and stamp or otherwise mark each such document or each collection of documents as "privileged and confidential," and the Trustee receiving the documents shall take measures to ensure that the documents remain confidential, which shall include but not be limited to: (1) maintaining such documents in separate files from non-privileged documents, and (2) restricting access to privileged files, documents or other information to the receiving Trustees' attorneys or other legal staff, technical staff, agents, consultants, experts and/or other Government employees involved in the assessment and recovery of damages for injury to natural resources.
- C. **Disclosure by Agreement.** The Trustees' attorneys or other legal staff, technical staff, agents, consultants, experts and/or other Government employees involved in the assessment and recovery of damages for injury to natural resources shall maintain the confidentiality of any privileged documents or communications. Nothing herein shall prevent the Trustees from disclosing documents, communications, or information to non-parties with the express, written permission of the authorized representative of the Trustee who provided the information or as required by court order. With respect to each Trustee, nothing in this Agreement shall be construed to prevent a Trustee from disclosing a public record as required by applicable law. However, should a third party request a review or release of any document subject to the requirements of this Agreement, the Trustee receiving such a request agrees to assert any good faith ground for maintaining the confidentiality of the document under its public records laws.

- D. **Third-party Request.** If a subpoena, discovery request, or other request in any form, for a designated privileged document or information provided under this Agreement is received by any Trustee, a copy of the subpoena or request will be immediately forwarded to counsel for the Trustee to which the privilege applies and to the Trustee representative(s) who originally generated the document or communication requested. The Trustee who receives such a request shall also provide a draft of its intended response to the other Trustees prior to issuance of the response.
- E. **Inadvertent Disclosure.** Any disclosure by a Trustee attorney or other legal staff, technical staff, agents, consultants, experts and/or other Government employees involved in the assessment and recovery of damages for injury to natural resources that is inconsistent with this Confidentiality provision shall not waive the confidentiality of such documents or communications.
- F. **Termination.** The provisions of this Confidentiality provision shall continue to apply to all documents and communications exchanged prior to or during the pendency of this *Memorandum of Agreement*.

VII. GENERAL PROVISIONS

- A. **Reservation of Rights.** This document is not intended to create any further legal rights or obligations among the Trustees and their representatives or any other person not a Party to this MOA.
- B. **Limitation of Authority.** No Party is authorized to represent another Party or another natural resource trustee in any litigation or settlement negotiations that may be commenced by any natural resource trustee. Nothing in this MOA shall be construed as obligating the State of Illinois, the United States or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law or funds received from PRPs for actions related to natural resource damages.
- C. **Termination.** This MOA shall be in effect from the date of execution until termination by agreement of the Trustees. Any Trustee may withdraw from this Agreement upon written notice in accordance herewith. In the event any Trustee withdraws from the Agreement, such withdrawal must be in writing at least thirty (30) days in advance of the withdrawal. In the event of such withdrawal, this Agreement remains in full force and effect for the remaining Parties.
- D. **Decision Making and Dispute Resolution.** The Council shall strive for consensus on all comments, positions and decisions necessary to conduct activities at the NRD Areas. In the event that the Council cannot reach a consensus, the Council shall attempt to resolve the dispute through discussions directed to obtaining a consensus agreement among the Council members involved in the dispute. The Trustee Parties agree that decision-making deliberations will focus upon the Trustees' mutual goals of assessment and restoration of injured natural resources, rather than upon independent control of trusteeship over the

affected natural resources. The Parties agree to expedite resolution of any disputes concerning the implementation of this Agreement through good faith negotiations. A dispute shall be considered to have arisen when a Trustee Management Designee (identified below) issues a written notice of dispute to the other Trustees. To the extent practicable, such notice will be provided at least twenty-one (21) days prior to the initiation of any field, analytical, or other work which is the subject of the disagreement.

If a notice of dispute is issued, each Trustee must submit a concise report of not more than five (5) pages to the Trustee Management Designees with copies to all Parties outlining the issue and their position on the dispute no later than fifteen (15) days after the notice of dispute is provided. The Trustee Management Designees will provide the Parties with an opportunity to meet and confer with the Designees, so that the Parties may negotiate their position on the dispute. If the Trustee Management Designees are unable to reach agreement during this negotiation, the matter shall be considered an Unresolved Dispute, which shall have the effect of removing the issue from the purview and requirements of the MOA. An Unresolved Dispute shall not result in the abrogation or cessation of any of the Trustees' responsibilities and duties as defined in Section II of this Agreement. Rather, an Unresolved Dispute shall not be deemed to be a part of this Agreement or binding on any of the Parties to this Agreement. Any study, plan, or other activity that is the subject of an Unresolved Dispute shall proceed and be undertaken and funded by the respective Trustee requesting said study, activity or plan.

For purposes of this Paragraph the Trustee Management Designees shall be as follows:

For the Department of the Interior:
Richard C. Nelson - Field Supervisor

For the Illinois Department of Natural Resources:
Todd Rettig, Manager - Division of Ecosystems & Environment

For the Illinois Environmental Protection Agency:
William Child, Chief - Bureau of Land

- E. **Modification.** Modification of this MOA must be in writing and executed by all parties.
- F. **Reservation of Authority.** Nothing in this MOA is intended to alter, abrogate or cede any natural resource trustee authority or responsibility over any natural resource(s) whether the natural resource trustee is a party to this MOA or not.

- G. **Trustee Contact.** The following persons shall serve as the primary representative for each Party. The primary representative for each Party may be changed by providing written notice to all other Parties.

Sandra Bron
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62702
Work: 217-557-3199
Fax: 217-782-3258
Email: sandra.bron@illinois.gov

Tom Heavisides
Illinois Department of Natural Resources
One Natural Resources Way
Springfield, Illinois 62702-1271
Work: 217-524-6832
Fax: 217-524-4177
Email: tom.heavisides@illinois.gov

Michael Coffey
U.S. Fish & Wildlife Service
Ecological Services
Division of Environmental Quality
Rock Island Field Office
4469 48th Avenue Court
Rock Island, IL 61201
Work: 309-793-5800 ext. 206
Fax: 309-793-5804
Email: michael_coffey@fws.gov

VIII. EFFECTIVE DATE

This Agreement may be executed in counterparts. It is effective upon the date of the final Trustee's signature.

IN WITNESS WHEREOF, the Trustees have executed this MOA on the dates attested to below:

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

A handwritten signature in cursive script, appearing to read "Douglas Scott", is written over a horizontal line.

Douglas Scott
Director

Date *March 28, 2007*

ILLINOIS DEPARTMENT OF NATURAL RESOURCES

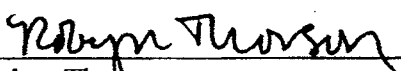
Sam Flood

Sam Flood
Acting Director

3-5-07

Date

U.S. FISH AND WILDLIFE SERVICES



Robyn Thorson
Regional Director

MAR - 7 2007

Date