

**MEMORANDUM OF UNDERSTANDING
BETWEEN THE**

**United States Department of the Interior
and
State of Colorado**

**REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT, RESTORATION,
AND
OTHER NATURAL RESOURCE TRUSTEE ACTIVITIES THROUGHOUT THE
STATE OF COLORADO**

I. INTRODUCTION

This Memorandum of Understanding (MOU) by and between the U.S. Department of the Interior and the Colorado Natural Resources Trustees (collectively referred to as the Trustees or Parties), is entered into in recognition of the common interests of the Trustees in the assessment and restoration of the natural resources and associated services that may be injured, destroyed, or lost as a result of the discharge of oil or release of hazardous substances within the State of Colorado.

II. AUTHORITY

The Parties 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 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706(a)-(g); Section 311(f) of the Clean Water Act (CWA), as amended, 33 U.S.C. § 1321(f); and other applicable federal and state laws 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 to the extent appropriate and elected for use by the Parties, the CERCLA Natural Resource Damage Assessment and Restoration regulations, as amended, 43 C.F.R. Part 11, and OPA Natural Resource Damage Assessment regulations, as amended, 15 C.F.R. Part 990. The terms used in this MOU shall have the meaning of those that are defined in CERCLA, OPA, CWA, and in the federal regulations referred to above.

III. PURPOSE

The purpose of this MOU is to provide a framework for intergovernmental coordination, cooperation, and decision-making among the Trustees in furtherance of the natural resource damage assessment and restoration (hereafter “NRDAR”) process where state and federal natural resource trustees jointly pursue NRD claims. The activities of the Trustees covered under this MOU include, but are not limited to: 1) the assessment of natural resource damages for injury to, destruction of, or loss of natural resources and associated services resulting from a spill or release; 2) the planning, design, implementation, maintenance, and/or monitoring of actions to restore, rehabilitate, replace, and/or acquire the equivalent of those natural resources and

services; 3) any prosecution or settlement of natural resource damage claims associated with a spill or release, including development of positions for covenants not to sue or administrative releases from liability; 4) coordination with response, remedial, or corrective actions carried out by or under the direction of other federal, state, or tribal agencies related to a spill or release; 5) public outreach and information sharing related to any of the above activities of the Trustees related to a spill or release; and 6) the securing of funding for any of the foregoing.

The MOU further addresses the application of any natural resource damages jointly recovered through any of the aforementioned activities toward: the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources and associated services; reimbursement of reasonable assessment costs; and payment of Trustees' reasonable costs related to restoration planning and implementation as well as monitoring and adaptive management oversight.

IV. PARTIES

- A. Parties. In accordance with Subpart G of the NCP, 40 C.F.R. §§ 300.600 through 300.615, and other applicable federal and state law, the following officials or their designated representatives are Parties to this MOU and act on behalf of the public as federal and state trustees for natural resources under this MOU:
1. Director, Office of Restoration and Damage Assessment, U.S. Department of the Interior, acting on behalf of the Secretary of the Interior; and
 2. The Colorado Natural Resources Trustees
 - a. The Attorney General of the State of Colorado;
 - b. The Executive Director of the Colorado Department of Public Health and Environment; and
 - c. The Executive Director of the Colorado Department of Natural Resources.
- B. Other Natural Resource Trustees. Notwithstanding any other provision of this MOU, any natural resource trustee who is not a Party to this MOU and who has a natural resource interest that is affected by a spill or release impacting natural resources in Colorado will not be precluded from participating in the NRDAR process or any other natural resource trustee activities under this MOU. Such other trustees may include, but are not limited to, tribal governments or other federal and state agencies, as necessary and appropriate and authorized by applicable federal, state, and tribal law.
- C. Reservation of Authority. Nothing in this MOU is to imply, or operate in a manner, that any natural resource trustee with an interest in a spill or release impacting natural resources in Colorado, whether a Party to this MOU 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 a spill or release.

V. NATURAL RESOURCE DAMAGES

In recognition of the Congressional intent under OPA and CERCLA to restore natural resources and associated services injured as a result of discharges of oil or releases of hazardous substances, respectively, the measure of recoverable natural resource damages contemplated under this MOU may include:

- reasonable costs of assessing natural resource injury, including direct and indirect costs;
- the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent natural resources;
- the costs of planning, administering, overseeing, and monitoring such restoration activities; and
- compensation for loss of use, other lost or reduced natural resource services, or diminution in value of natural resources from the onset of injury until the completion of restoration or recovery.

Documented Trustee costs for either the assessment or restoration may include coordination with 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.

VI. NATURAL RESOURCE TRUSTEE COUNCIL

A. Establishment. Pursuant to this MOU, the Parties may establish Natural Resource Trustee Councils (Trustee Councils) for specific spills or releases by resolution. A resolution establishing a Trustee Council, at a minimum, will identify the specific spill or release, location, and authorized officials for each participating Trustee that is also a Party to this MOU. The resolution may identify the composition of the Trustee Council as described in subsection B. All terms under this MOU will apply to Trustee Councils created for a specific spill or release unless specifically modified in a resolution.

B. Composition of Trustee Councils established under this MOU:

1. For each claim subject to this MOU, each Trustee may designate to a Trustee Council one Trustee Council Representative. Trustees may replace Trustee Council Representatives or name alternates as necessary;
2. Other representatives from each Trustee, such as Trustees' legal counsel or agency representatives with special expertise, may attend meetings and participate in the deliberations of a Trustee Council; and
3. A representative of the Lead Administrative Trustee (LAT), as designated in Section VII, may serve as the initial chairperson for Trustee Council meetings. The Trustee Council Representatives may agree to reassign or rotate the position of chairperson as they deem

appropriate. The Trustee Council Chairperson, with the assistance of the LAT, will be responsible for organizing and scheduling meetings, preparing proposed meeting agendas, identifying in the agendas any issues to be decided upon at the proposed meeting, distributing agendas to the primary and alternate representatives of each Trustee and to legal counsel in advance of meetings, and presiding over convened meetings.

C. Decision-making.

1. All Trustee Council decisions will be made by unanimous agreement of all Trustee Council Representatives. The Trustees agree that decision-making deliberations will focus on the Trustees' mutual goals as set forth in this MOU;
2. Trustee Council Representatives will conduct good faith discussions directed toward obtaining unanimous agreement. The goal of the Trustee Council will be to resolve disputes informally. In the event agreement cannot be reached, the dispute resolution procedures in Paragraph D below will govern; and
3. Material Trustee Council decisions will be recorded in writing and approved by resolution or other Trustee Council documents.

D. Dispute Resolution. In the event of a dispute involving any decisions under this MOU, including but not necessarily limited to potential resolution of a claim, Trustee Council Representatives will initially attempt to resolve the dispute through good faith discussions directed toward obtaining unanimous agreement of the Trustee Council. If unanimous agreement cannot be reached after good faith discussions, the matter will be elevated to the next management level within each Trustee's agency for decision or further instructions. If unanimous agreement still cannot be reached, the matter will be further elevated to the named individuals who executed this MOU, or their successors, and, for federal Trustees, each Trustee's authorized official for the specific spill or release. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. In the event unanimous agreement cannot be achieved, each Trustee Council Representative may take individual positions or actions on their own behalf, but such individual positions or actions will not constitute or be regarded as positions or actions of the Trustee Council. In the event of irreconcilable disputes, the Trustees may agree to dissolve the Trustee Council and, if necessary, split funds into a state account to be controlled collectively by the Colorado Natural Resource Trustees and a federal account to be controlled by the Federal Trustee; however, disposition of funds recovered from potentially responsible parties (PRPs) will be governed by Section IX(A) below.

E. Duties and Responsibilities. Trustee Councils established under this MOU will coordinate all Trustee activities and matters directed towards the resolution of the Trustees' respective natural resource damage claims. Each Trustee Council

Representative shall be responsible for coordinating with and obtaining authorization from their respective Trustee in carrying out their responsibilities. In addition, Trustee Councils will be responsible for all NRDAR activities, including but not limited to, conducting the assessment, identifying and developing study plans, restoration planning, restoration implementation, and oversight both prior to and subsequent to final settlement or judgment covering all Trustee natural resource damages claims arising from the spill or release for which the Trustee Council was created.

In accordance with applicable law, Trustee Councils will carry out the following duties as necessary:

1. Oversee the development, implementation, and monitoring of plans and reports for the assessment, restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those natural resources and/or their services that may be injured, destroyed, or lost;
2. Conduct or oversee scientific and technical studies, sampling, and other matters, including data collection during response, related to the determination of injuries and/or the assessment of injuries to natural resources and their services which may have been lost, injured, or destroyed;
3. In coordination with each Trustee's counsel, seek compensation from the PRP(s) for damages for restoration, assessment costs, and for the Trustee costs of planning and implementing the assessment and/or restoration;
4. Participate in negotiations with the PRP(s);
5. Coordinate NRDAR activities with response actions carried out by other federal and state agencies, as appropriate;
6. In accordance with respective agency policy and delegation of authority, manage any money jointly paid to the Trustees (either advanced funding or recovered damages) for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources and/or their services;
7. Develop contracts with professional consultants that the Trustee Council determines are necessary to fulfill Trustee duties and responsibilities pursuant to applicable statutes and regulations;
8. Encourage public participation and involvement in a manner consistent with applicable law and regulation;
9. Maintain an administrative record of assessment and restoration activities;
10. Approve documents to be made available to the public (e.g., milestone documents, study plans, reports, restoration plans) either by signature on the document or written (email is acceptable) approval by the Trustee representative or authorized official for each Trustee; and
11. Coordinate and/or carry out such other actions as may be necessary and appropriate to achieve the purposes of this MOU and to fulfill the responsibilities of each Trustee.

VII. LEAD ADMINISTRATIVE TRUSTEE

- A. Designation. The Trustee Council may designate a LAT for NRDAR actions under this MOU upon unanimous approval. The Trustee Council will memorialize a LAT designation in writing.
- B. Duties. The LAT's duties will include, but are not limited to: scheduling meetings of the Trustee Council and notifying members of those meetings on a timely basis; preparing, in consultation with other Trustees, agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining the administrative record for the NRDAR and acting as repository for other related records and documents; and performing other administrative duties as directed by the Trustee Council. The LAT will be responsible for informing the other Trustee Council members 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. The LAT will fully coordinate its activities with and only act under the direction of the Trustee Council; assigned duties do not provide the LAT with decision-making rights for any other Trustee or beyond those normally held by each Trustee.

VIII. ASSESSMENT AND OTHER EXPENDITURES

- A. Potentially Responsible Party Funding. If PRP funding of assessment activities becomes available, the Trustee Council may enter into an agreement with the PRP(s) in which the PRP(s) agrees to fund and/or conduct assessment activities, including assessment or early restoration. Such an agreement will specify the terms of the activity, monetary disbursement, if any, the PRP(s)'s level of participation, and other terms and conditions as the Trustee Council determines are necessary and appropriate. To the extent provided by law, each Trustee agrees to cooperate in the administration of PRP funding. Each Trustee may have unique claims for unreimbursed past assessment costs and will coordinate the recovery of those costs from PRPs if needed.
- B. Trustee Agency Assessment Funds. Each Trustee agrees to coordinate the expenditure of any funds that are or may become available to a Trustee for the purposes of assessment.
- C. Reimbursement of Trustee Assessment Costs. The Trustees agree to request the PRP(s) to separately reimburse each individual Trustee agency for past and future assessment costs. Each Trustee's recovered past assessment costs may be used at its individual discretion in accordance with applicable law.

IX. USE OF RECOVERED NATURAL RESOURCE DAMAGES

- A. Exclusive Use of Recovered Damages. The Trustees agree that any natural resource damages recovery (hereafter referred to as “Restoration Funds”) will be used for the purpose of assessing, restoring, replacing, rehabilitating, and/or acquiring the equivalent of the affected natural resources, consistent with 42 U.S.C. § 9607(f)(1) and 33 U.S.C. § 2706(d)(1)(A).
- B. Deposit and Management of Restoration Funds. To the extent permitted by law, the Trustees may, but are not required to, deposit jointly recovered Restoration Funds in the U.S. Department of the Interior Natural Resource Damage Assessment and Restoration Fund or other interest-bearing account to be disbursed only for the purposes described in this MOU and in accord with the provisions of this MOU. The Trustees may work with the U.S. Department of the Interior Restoration Fund Manager, and/or their designee, in identifying risk-free investments, such as U.S. Treasury Bills, to earn a higher rate of return appropriate for unexpended restoration funds until their use is necessary. Appropriate investment activities will be determined through the decision-making process set forth in Paragraph C of Section VI of this MOU and will be approved by Trustee Council resolution. Interest earned on any investment of Restoration Funds will be made available for use by the Trustees in accordance with this MOU.
- C. Trustee Council Resolutions. All decisions authorizing the use of jointly recovered Restoration Funds will be memorialized in a Trustee Council resolution. Such resolutions may cover the entire sum approved for a given project, for a project phase, or for particular activities.

X. NOTIFICATION OF NEGOTIATIONS WITH POTENTIALLY RESPONSIBLE PARTIES

The Trustees agree that they will endeavor to have coordinated communications with the PRP(s) or their agents related to NRDAR claims the Parties jointly pursue.

The above agreement does not preclude a Trustee or their agent from having separate communications with the PRP(s) on matters within the scope of the MOU where circumstances warrant, provided that such Trustee or Trustee Council member or agent informs and consults with other Trustees, either prior to the communication or in a timely manner thereafter.

Unless this MOU is terminated in accordance with Section XVI, no Trustee may enter separate settlement negotiations with the PRP(s) for any spills or releases which fall under this MOU, with the exception of negotiations conducted by a Trustee pursuant to reservation of rights in accordance with Section XII of this MOU, unless all Trustees and their representatives agree in writing to such independent negotiations.

XI. CONFIDENTIALITY AND RECORD DOCUMENTS

- A. Confidentiality. The Trustees and their representatives support an open government policy of providing access to scientific information created or obtained by the Trustees during the NRDAR process. The Trustees agree that it is in the public interest to make scientific data arising out of their review of the injury to natural resources at and/or from any discharge of oil or release of hazardous substances within the State of Colorado publicly available or provide data if requested. However, all Parties to this MOU 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. Accordingly, the Trustees will treat qualifying oral and written communications and work products as privileged attorney-client communications, attorney work products, or protected by other applicable privilege (or a combination thereof), as appropriate, and qualifying oral and written communication will be protected from disclosure to the maximum extent possible under applicable federal or state law. Privileged documents will be maintained in such a manner as to ensure that no intentional or unintentional disclosure is made which would compromise any asserted privilege. To ensure protection of qualifying documents that a Trustee considers to be attorney-client privileged communication, attorney work product, or other applicable privilege, the originating Trustee should mark the documents with the appropriate privilege.
- B. Common Interest. After any discharge of oil or release of hazardous substances within the State of Colorado, the Trustees have potential claims for damages and anticipate possible litigation with PRP(s). In furtherance of their common interests, the Trustees to this MOU intend to work together by communicating in confidence about claims, evidence, settlement strategy, and other subjects pertaining to the possibility of litigation by the Trustees against the PRPs.
- C. Public Records Request. The Trustees agree that whenever a request for production of a record related to the NRDAR is received pursuant to any applicable federal or state law, the request will, to the extent permitted by applicable laws and regulations, be forwarded for response to the Trustee or Trustees to which the privilege applies or whose representatives originally generated or contributed the record requested. It is understood and agreed upon that all information required to be disclosed pursuant to the federal Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, or the Colorado Open Records Act, C.R.S. § 24-72-201 *et seq.*, will be released. Nothing contained herein will be construed as prohibiting or restraining the Trustees from agreeing to release any record or from disclosing any record for which disclosure is required by law.
- D. Administrative Record Index. As warranted by each spill or release, the LAT will open and maintain an administrative record index to the extent required by and consistent with the requirements of the relevant OPA or CERCLA NRDAR regulations. In addition, in accordance with applicable law and

regulation, the Trustees commit to providing the public with reasonable notice of and appropriate and meaningful opportunities to comment on the NRDAR process, such as seeking comment on a draft assessment plan, draft study plans, and draft restoration plan(s) for any discharge of oil or release of hazardous substances within the State of Colorado.

XII. RESERVATION OF RIGHTS

This document is not intended to create or diminish any further legal rights or obligations between the Trustees or their respective representatives and/or any other persons not party to this MOU. Nothing in this MOU is to imply that any signatory agency is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources. All Trustees understand that this document is not intended to create any further legal rights.

Nothing in this MOU is intended to be or will be construed to be an admission by any Trustee in any dispute or action between the Trustees or between the Trustees and a third party.

Nothing in this MOU will be construed as a waiver of, or foreclosing the exercise of, any rights, powers, remedies, or privileges of the individual Trustees or any other tribal, state, or federal agency now or hereafter existing at law or in equity, by statute or otherwise.

Nothing in this MOU is intended to conflict with existing directives or policies of any Trustee. If the terms of this MOU are found to be inconsistent with existing directives or policies of any Trustee, those portions of this MOU that are determined to be inconsistent will be identified by the affected Trustee. Within thirty (30) calendar days of notice of the inconsistency, the Trustees will discuss the inconsistency and determine whether it is possible, appropriate, and necessary to modify this MOU.

A Trustee engaging in independent NRDAR claims or negotiations must withdraw from this MOU in accordance with Section XVI unless such claims or negotiations are for individual Trustee reimbursement of costs in accordance with Section VIII of this MOU, or are unanimously approved by the Trustee Council.

XIII. ANTIDEFICIENCY ACT

Nothing in this MOU will be construed as obligating the United States, the State of Colorado, or any other public agency, their officers, agents, or employees, to expend any funds in excess of amounts available in appropriations authorized by law, 31 U.S.C. §§ 1341, 1517, or funds received from the PRP(s) for actions related to any discharge of oil or release of hazardous substances within the State of Colorado.

XIV. THIRD PARTY CHALLENGES OR APPEALS

This MOU is not intended to, nor shall it, vest rights in persons who do not represent the Parties to this MOU or who are not Parties to this MOU. The rights and responsibilities contained in this MOU are subject to the availability of funding. This MOU will not be the basis of any claims, rights, causes of action, challenges, or appeals by any person.

XV. MODIFICATION

Modification of this MOU must be in writing and contingent upon approval of all Trustees that are currently Parties to the MOU. The modified MOU may be executed in counterparts. Once fully executed, the modified MOU will be sent to all Parties.

XVI. TERMINATION AND WITHDRAWAL

This MOU will be in effect from the Effective Date, as defined in Section XVII, until such time that the Trustees unanimously determine that the purposes underlying the MOU have been fulfilled. Any Trustee may withdraw from this MOU by giving the other Trustees written notice at least thirty (30) calendar days in advance of the withdrawal. In the event of such withdrawal, this MOU will terminate. In the event of the withdrawal of a Trustee, or at the termination of this MOU, each Trustee will cooperate with the others in preparing a full and complete accounting of all funds received, deposited, held, disbursed, or expended pursuant to this MOU, except for funds already received from the PRP(s), to reimburse the withdrawing Trustee's past assessment costs. Documents relevant to the NRDAR claim maintained by the withdrawing Trustee must be provided to the LAT that maintains records if a LAT has been designated for the specific incident. For confidential documents, in accordance with Paragraph A of Section XI, such confidentiality survives any termination of or withdrawal from this MOU.

XVII. EXECUTION AND EFFECTIVE DATE

This MOU may be executed in counterparts. The effective date of the MOU shall be the date on which the last Trustee to sign the MOU does so sign. Other duly designated Trustees may elect to become an additional Party to this MOU. The effective date as applied to any additional Parties becomes effective on the date of its signature.

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

United States Department of the Interior:

By: EMILY JOSEPH Digitally signed by EMILY JOSEPH Date: 2024.02.14 10:24:24 -05'00' Date: _____
Emily Joseph
Director, Office of Restoration and Damage Assessment

Colorado Natural Resources Trustees:

By: Phil Weiser Date: February 8, 2024
Phil Weiser
Colorado Attorney General
Colorado Natural Resources Trustee

By: Trisha Oeth Date: February 8, 2024
Trisha Oeth
Director of Environmental Health and Protection
Colorado Department of Public Health and Environment
Colorado Natural Resources Trustee

By: Dan Gibbs Date: February 8, 2024
Dan Gibbs
Executive Director, Colorado Department of Natural Resources
Colorado Natural Resources Trustee