

# **MEMORANDUM OF AGREEMENT**

## **AMONG THE**

**TEXAS NATURAL RESOURCE CONSERVATION COMMISSION,  
TEXAS PARKS AND WILDLIFE DEPARTMENT,  
TEXAS GENERAL LAND OFFICE,  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,  
AND  
UNITED STATES DEPARTMENT OF THE INTERIOR**

### **I. INTRODUCTION**

This Memorandum of Agreement (MOA) executed by the Texas Natural Resource Conservation Commission (TNRCC), Texas Parks and Wildlife Department (TPWD), Texas General Land Office (TGLO), the National Oceanic and Atmospheric Administration of the United States Department of Commerce (NOAA), and the United States Department of the Interior (DOI) (collectively referred to as the Trustees) is entered into in recognition of their common interests and/or responsibilities as designated natural resource trustees, including their coordination and cooperation in the initiation and conduct of natural resource damage assessments, settlement negotiations, development of positions for covenants not to sue or administrative releases from liability, or development and support of claims for litigation for injuries to natural resources resulting from discharges of oil or releases of hazardous substances, and the application of any natural resource damages recovered via any of those mechanisms toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources.

### **II. PARTIES**

The following Trustees or their designees are Parties to this MOA and act on behalf of the public as Trustees for natural resources under this MOA:

1. The Executive Director of the Texas Natural Resource Conservation Commission,
2. The Executive Director of the Texas Parks and Wildlife Department,
3. The Commissioner of the Texas General Land Office,
4. The Director, Office of Ocean Resource Conservation and Assessment, National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce, and
5. The Secretary of the Department of the Interior.

Notwithstanding any other provision of this MOA, the participation of any natural resource trustee who is not a party to the MOA and who has a natural resource interest that is affected

by a discharge of oil or release of a hazardous substance shall not be precluded from participating in the natural resource damage assessment process by this MOA. Such other trustees may include, but are not limited to Tribal governments, other Federal agencies, foreign countries, local governments, or affected trustee agencies from other states, which may be added by addendum to this MOA, as necessary, provided that statutory authority exists designating such other parties as Trustees.

### III. LOCATION

This MOA addresses natural resources within the boundaries of the State of Texas that are held in trust by both the Federal and State Trustees which are injured as a result of discharges of oil as defined by the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251 et seq. ("FWPCA"), the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701 et seq. ("OPA"), the Texas Oil Spill Prevention and Response Act, Chapter 40, TEX. NAT. RES. CODE ANN. ("OSpra"), the Texas Water Code, or the Texas Natural Resources Code, or releases of hazardous substances as defined by the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. § 9601 ("CERCLA"), or the authorities already listed above, including surface and ground waters of the State out to the three marine league line (10.2 miles), the seaward boundary of the State, or injuries that may occur from discharges or releases in waters seaward of the State's boundary with the potential of migrating landward of the State's seaward boundary.

### IV. PURPOSE

The Trustees recognize the importance of integrating and coordinating among themselves and with the lead response, removal, remedial, or corrective action agencies in the reduction of risk to trust resources, and assessment of injuries or the potential threat of injuries to natural resources affected by discharges of oil or releases of hazardous substances including the consequences of removal, remedial, and corrective actions. The Trustees' primary goals are to ensure the restoration of injured natural resources and to seek compensation for interim lost use value caused by discharges of oil or releases of hazardous substances in order to restore, replace, rehabilitate, and/or acquire the equivalent of those affected resources and/or their services. In order to achieve their ultimate goals stated above, the Trustees' activities will primarily involve coordination of all planning, assessments and investigations with the lead response agency, ensuring protection or restoration of injured resources and/or their services as part of the removal, remedial or corrective action, determination of conditions upon which the Trustees may grant a covenant not to sue or other type of judicial or administrative release from liability during consent decree or other negotiations, or otherwise assessing and seeking damages for injuries to natural resources and/or the services they provide. The purpose of this MOA is to provide a framework for such coordination and cooperation among the Trustees, and for the implementation of the activities of the Trustees in furtherance of their natural resource Trustee responsibilities for those natural resources affected by those discharges or releases mentioned above. While this document is designed to eliminate the need for incident-specific MOAs, those additional

MOAs may be useful or necessary in some cases.

## V. AUTHORITY

The Trustees enter into this MOA in accordance with the legal authorities provided for each Trustee by the National Contingency Plan, 40 C.F.R. Part 300, FWPCA, OPA, CERCLA, the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11, or the OPA regulations, when promulgated, and any other applicable laws or authorities. The State Trustees enter into this MOA pursuant to their designation by the Governor of Texas under CERCLA, OPA, OSPRA, and the Texas Natural Resource Damage Assessment Regulations, 31 T.A.C. 20, or any other applicable laws or authorities.

## VI. TRUSTEE FUNCTIONS

The Trustees or their representatives or designees shall seek to abate, through appropriate response coordination, potential threats, reduce risks, or assess damages for injury to, destruction of, loss of, or loss of use of, natural resources, resulting from unauthorized discharges of oil or releases of hazardous substances, including recovering response costs and the reasonable costs of assessing the damages. The measure of damages shall be the cost of restoring, replacing, rehabilitating, or acquiring the equivalent of the injured natural resources and/or services, plus interim lost use or diminution in value pending recovery, assessment costs, and Trustee administrative oversight and procedural costs associated with planning and administering or implementing the restoration of those natural resources and/or services. The Trustees recognize the Congressional and legislative intent that restoration is the preferred alternative wherever possible and practicable.

Consistent with their individual authorities and policies, the Trustees or their representatives or designees may employ one of several types of actions, depending on the circumstances of each discharge or release, in order to carry out their responsibility to minimize or eliminate risk, or to seek restoration and compensation. Such Trustee actions may include, but are not limited to:

- A. Performing preliminary assessments to determine the potential threat or the nature and extent of threats to natural resources;
- B. Preventing injury, destruction, or loss through requests for initiation of removal or remedial actions by authorized agencies, or by seeking such injunctive relief where authorized by law;
- C. Performing emergency restoration actions and seeking cost recovery for those actions;
- D. Minimizing residual natural resource injuries by participating in removal, remedial, or corrective actions as advisors to the lead response agency, and seeking restoration and compensation for any past or residual injury at remedial or corrective action sites;

- E. Negotiating a judicial covenant not to sue for natural resource damages for incidents covered by CERCLA, where appropriate, through the U.S. Department of Justice and the Office of the Texas Attorney General;
- F. Performing natural resource damage assessments;
- G. Negotiating administrative or judicial agreements for resource protection measures, restoration, and/or compensation for natural resource damages;
- H. Referring claims for natural resource damages for litigation; and/or
- I. Preparing and implementing restoration plans.

## VII. RESTORATION AND COMPENSATION GOAL

The goal of restoration or compensation projects is to assure that no net loss of natural resources or their services occurs. Prior to the consideration of restoration alternatives, the Trustees will strive to have any continuing releases that would impede natural recovery or limit the effectiveness of restoration activities controlled. In addition, the restoration of chemical and physical quality of the environment to baseline or no effects levels will be sought. Methods to accelerate the rate of return of injured habitats or ecosystems to baseline levels of services will be used whenever possible. Key species should be restored to baseline levels and lost services should be replaced as directly as possible. Consistent with the guidelines above, the following hierarchy will be considered when the Trustees evaluate restoration or compensation project options: 1) on-site and in-kind -- natural resources or services are restored at the site of injury and are physically and biologically the same as those lost; 2) off-site and in-kind -- natural resources or services are restored at a site different than where injuries occurred but are physically and biologically the same as those lost; and 3) on-site and out-of-kind -- natural resources or services are restored at the affected site but are physically and biologically different than those injured. The Trustees understand that circumstances may arise that may require the revision of this hierarchy of preferences. Such revision may include, but is not limited to, the consideration of additional restoration or compensation options that are within the scope of Trustees' authority and this MOA, such as: 1) off-site and out-of-kind -- natural resources that are physically and biologically different than those lost are restored on a site different than the one affected but preferably in the same watershed or ecosystem; or 2) acquisition of equivalent natural resources and/or services under private ownership which replaces the lost natural resources or services by reducing future losses by placing acquired resources under public ownership and protection.

## VIII. TRUSTEE ORGANIZATION

The Trustees and their representatives recognize the importance of planning and coordinating their efforts in order to effectively and efficiently meet their respective natural

resource trustee responsibilities under applicable Federal and State law. The Trustees and/or Trustee representatives, or Trustee Council members (see below), will coordinate their efforts to ensure the following: 1) that notifications of discharges or releases will be relayed to all Trustee agencies according to the National Contingency Plan or Area Contingency Plans; 2) that sites with co-Trustee interests are identified by response agencies, including, but not limited to NPL sites, RCRA facilities, State Superfund sites, instantaneous discharges of oil or releases of hazardous substances, and fish or shellfish closures or advisories due to the discharge of oil or release of hazardous substances; 3) where possible, coordination of written comments to the lead agency On Scene Coordinators or Remedial Project Managers on all lead agency directed scopes of work, work plans, assessments and investigations, including remedial investigations, feasibility studies, and remedial designs; and 4) State and Federal coordination in consent decree, administrative agreement, or other types of negotiations. Notification, as referred to above, shall be made by telephone (with direct contact), or by letter or facsimile to persons designated to receive such information.

For each individual case or incident involving significant participation by two or more State and Federal Trustees, the Trustees agree to create a council (Trustee Council) representing the Trustees which will implement this MOA and to which a representative will be designated by each Trustee agency. The Trustees agree to appoint representatives to the Trustee Council who have the level of knowledge and expertise needed to effectively guide the damage assessment and restoration process. Agencies agree to appoint representatives to the Trustee Council who have, at a minimum, the level of authority necessary to make decisions on issues presented to the Council. The Trustees may create Trustee Councils for either a portion of, or the entire damage assessment and restoration processes. For example, a Trustee may create one council to address the damage assessment phase and another to handle the restoration phase. The Trustee Council will designate Lead Administrative Trustee for individual cases or incidents for administrative purposes. The Trustee Council may seek additional legal or scientific expertise outside its membership when needed. Each Trustee agency will notify Council members when representatives resign and agree to inform other Trustee representatives about who the replacement will be. For individual incidents, the Trustee Council will attempt to name the Lead Administrative Trustee within 24 hours of Trustee notification in order that a Trustee point of contact be established as rapidly as possible. In addition, where appropriate, the Federal Trustees shall designate a lead Federal Trustee for the purposes of accessing the Federal Oil Spill Liability Trust Fund.

#### IX. TRUSTEE COUNCIL DUTIES AND RESPONSIBILITIES

On behalf of the Trustees, the Trustee Council created to address each incident shall coordinate and authorize (consistent with applicable law, policy, mandated areas of jurisdiction, and areas of special expertise) all Trustee activities and matters under this MOA in accordance with the decision making requirements contained in Section XI. The Trustee Council may take whatever actions it determines are appropriate to fulfill the trust responsibilities of the Trustees under and to effectuate the purposes of applicable Federal and State law. It is expected that the Trustee Council may, as appropriate and consistent with

each representative's delegated Trustee authority, take any of the following actions, among others, while focusing on their individual trust resource responsibilities related to a particular incident:

A. Conduct or oversee scientific and technical studies, sampling, and other matters related to the determination of injuries and/or the assessment of damages for trust resources which may have been lost, injured or destroyed.

B. Seek compensation from responsible parties for damages and/or restoration costs and for the costs of planning and implementing the assessment and/or restoration.

C. Participate in negotiations with responsible parties.

D. In accordance with applicable law and respective agency policy and delegation of authority, supervise, manage and obligate on behalf of the Trustees any money paid to the Trustees, except for reimbursement of assessment and administrative costs, 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.

E. Oversee the development, implementation, and appropriate monitoring of a plan for the restoration, replacement, rehabilitation, and/or acquisition of equivalent resources for those trust resources and/or their services that may be injured, destroyed or lost.

F. In accordance with applicable law, make all necessary decisions on a case by case basis for the management and administration of funds pursuant to Section XI.

G. In accordance with applicable law, arrange contracts with professional consultants that the Trustee Council determines are necessary.

H. When necessary, identify a contact for coordination with the Coast Guard regarding access to the Oil Spill Liability Trust Fund.

I. Communications with potentially responsible parties or their agents: The Trustees and Trustee Council members agree that they will endeavor to have coordinated communications with potentially responsible parties or their agents for an incident on matters related to natural resource damages and claims for those damages. To the maximum extent possible, no Trustee or Trustee Council member will discuss these matters with the potentially responsible parties without first providing the other Trustees or Trustee Council members notice and an opportunity to participate in such discussions as appropriate. The above agreement shall not preclude a Trustee or Trustee Council member from having separate communications with the potentially responsible parties on matters within the scope of the MOA where circumstances warrant, provided that each Trustee or Trustee Council member notifies the other Trustees and agrees to provide documentation of the communication for the Administrative Record.

## X. LEAD ADMINISTRATIVE TRUSTEE

The duties of the Lead Administrative Trustee shall include, but are not limited to: coordination and monitoring of the progress of the formulation of technical and legal positions for covenant not to sue, administrative agreement, or other negotiations; coordination and monitoring of the progress of the natural resource damage assessment process; scheduling of meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis; preparing agendas for those meetings; acting as a central contact point for the Trustee Council; establishing and maintaining records and relevant documents; and other administrative duties as directed by the Trustee Council. The Lead Administrative Trustee will be responsible for informing the other Trustee Council members of all pertinent developments on a timely basis. The Lead Administrative Trustee may delegate any of his/her duties to another Trustee representative with the concurrence of the Council. Assigned duties do not provide the Lead Administrative Trustee with decision making rights beyond those normally held by each Trustee.

## XI. DECISION MAKING

The Trustees will strive for unanimous consent on all decisions by a Trustee Council implementing this MOA. The dissent of one party will not prevent the other parties from proceeding except for the initial selection of the Lead Administrative Trustee, selection of which requires consensus. Matters in dispute by more than one agency may be elevated to the Authorized Officials of the Trustee Agencies for resolution in an expeditious manner. If necessary, the Trustees or their representatives may establish further mechanisms by which disputes may be resolved, including mediation as provided in the Texas NRDA rules. The Trustees further agree that decision making deliberations will focus upon the Trustees' mutual goals of mitigating injury through cleanup, source control and remediation, and of assessing, restoring, rehabilitating, replacing and/or acquiring the equivalent of the affected natural resources and services.

## XII. FUNDS

The Trustees agree to cooperate in good faith to attempt to establish and maintain, to the extent consistent with applicable law, a joint trust account(s) or joint court registry account(s) for purposes of receiving, depositing, holding, disbursing, and expending all funds for the conduct of the damage assessment and restoration process, including all natural resource damage recoveries obtained or received by the Trustees and interest earned thereon. The Trustees agree that they will use all recovered damages for natural resource injuries exclusively for restoration activities consistent with Trustee Council approved Restoration Plans conducted under this MOA to address those injuries to natural resources and the services that they provide. The Trustees agree to request that administrative costs recovered from responsible parties be separately reimbursed to each individual Trustee agency. Administrative costs, if deposited to the fund, will be disbursed by electronic transfer or by check to the individual agencies as rapidly as possible, and shall be used at the individual

agency's discretion. The Trustees agree to deposit any recoveries for injury to natural resources obtained or received by or on behalf of any Trustee as a result of joint damage assessment and restoration activities under Federal and/or State natural resource damage assessment regulations in a joint account(s), unless all Trustees agree that funds recovered from a particular case require different treatment.

The Trustees, in accordance with their decision making process in Section XI, shall establish standards and procedures governing the joint use of all natural resource damages received by the Trustees for the purposes of developing and administering or implementing a Final Restoration Plan for restoring, replacing, rehabilitating and/or acquiring the equivalent of natural resources injured as a result of an incident and the reduced or lost services provided by those resources.

The Trustees further agree that the reasonable costs jointly agreed upon for the initiation of damage assessment and for the planning, conduct, evaluation and coordination of all natural resource damage assessment activities pursued by the Trustee Council with respect to natural resource injuries or lost services resulting from an incident, shall be advanced or reimbursed to each Trustee out of any damage assessment cost recoveries or payments thereon, including funds received from the Oil Spill Liability Trust Fund.

### XIII. CONFIDENTIALITY

The Trustees support an open government policy of providing access to scientific information created or obtained by the Trustees during the damage assessment process. The Trustees do hereby agree that any information in the possession of the Trustees shall be confidential if, and only if, such information is obtained or retained in anticipation of litigation or during pending litigation, provided, however, that all such information is subject to disclosure pursuant to Federal and State rules of evidence and discovery. It is further understood and agreed that information subject to public disclosure upon request and pursuant to the Freedom of Information Act or the Texas Open Records Act shall be released. However, the Parties acknowledge and agree that all Federal documents produced in fulfillment of obligations under this MOA that are protected from release under Federal law will be protected from release by State agencies. All Trustees agree to notify other Trustees in writing, of each request for information no more than five (5) days from the date of such request. Trustees will disseminate all relevant documents to each other so that each agency can respond to any request it receives.

### XIV. RESERVATION OF RIGHTS

Except for the confidentiality agreement contained in Section XIII, all parties understand that this document is not intended to create any further legal rights or obligations among the Trustees or any other persons not a party to this MOA. Nothing in this MOA is to imply that any signatory government is in any way abrogating or ceding any responsibilities or authority inherent in its control or trusteeship over natural resources.

## XV. MODIFICATION OF AGREEMENT

Modification of this MOA shall be in writing and upon approval of all Trustees currently parties to the MOA. It is acknowledged that additional agreements may be executed by the Trustees with regard to natural resource damage claims that arise and for planning for the restoration, replacement, rehabilitation, and/or acquisition of equivalent natural resources that may be injured, destroyed or lost. These incident-specific MOAs shall not be considered modifications of this MOA, and will be the subject of the same procedural and substantive requirements contained herein.

## XVI. TERMINATION

This MOA shall be in effect from the date of execution until termination by agreement of the Trustees. At any time the Trustees determine that there is no purpose served by this MOA, the MOA will terminate upon such a finding. Any Trustee agency may withdraw from this MOA at any time for any reason. In the event any Trustee withdraws from the MOA, it must provide thirty days written notice before the withdrawal can become effective. In the event of such withdrawal, this MOA remains in full force and effect for the remaining parties.

In the event of the withdrawal of any Trustee, or at the termination of this MOA, each Trustee agrees to cooperate in preparing a full and complete accounting for and status report of all accounts managed jointly by the Trustees or their representatives pursuant to Section XII of this MOA.

## XVII. LIMITATION

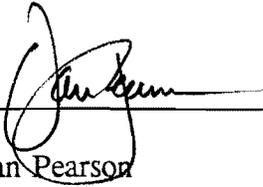
Nothing in this MOA shall be construed as obligating the United States, the State of Texas or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law.

## XVIII. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this MOA 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 challenges or appeals. Nothing in this MOA creates any rights or causes of action in persons not parties to this agreement.

## XVIX. EXECUTION: EFFECTIVE DATE

This MOA may be executed in counterparts. A copy with all original executed signature pages affixed shall constitute the original MOA. The date of execution shall be the date of the final Trustee's signature.



---

Dan Pearson  
Executive Director  
Texas Natural Resource  
Conservation Commission

Date 6/26/95

---

Andrew Sansom  
Executive Director  
Texas Parks and Wildlife  
Department

Date \_\_\_\_\_

---

Garry Mauro  
Commissioner  
Texas General Land Office

Date \_\_\_\_\_

---

Willie R. Taylor, Director  
U.S. Department of the Interior  
Office of Environmental  
Policy and Compliance

Date \_\_\_\_\_

---

Dan Pearson  
Executive Director  
Texas Natural Resource  
Conservation Commission

Date \_\_\_\_\_



Andrew Sansom  
Executive Director  
Texas Parks and Wildlife  
Department

Date July 13, 1995

---

Garry Mauro  
Commissioner  
Texas General Land Office

Date \_\_\_\_\_

---

Willie R. Taylor, Director  
U.S. Department of the Interior  
Office of Environmental  
Policy and Compliance

Date \_\_\_\_\_

---

Dan Pearson  
Executive Director  
Texas Natural Resource  
Conservation Commission

Date \_\_\_\_\_

---

Andrew Sansom  
Executive Director  
Texas Parks and Wildlife  
Department

Date \_\_\_\_\_



Garry Mauro  
Commissioner  
Texas General Land Office

Date 7-20-95

---

Willie R. Taylor, Director  
U.S. Department of the Interior  
Office of Environmental  
Policy and Compliance

Date \_\_\_\_\_

---

Dan Pearson  
Executive Director  
Texas Natural Resource  
Conservation Commission

Date \_\_\_\_\_

---

Andrew Sansom  
Executive Director  
Texas Parks and Wildlife  
Department

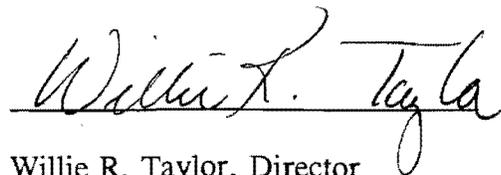
Date \_\_\_\_\_

---

Garry Mauro  
Commissioner  
Texas General Land Office

Date \_\_\_\_\_

---



Willie R. Taylor, Director  
U.S. Department of the Interior  
Office of Environmental  
Policy and Compliance

Date 9/5/95

CNEhler.

Charles N. Ehler  
Director, Office of Ocean Resource Conservation  
and Assessment  
U.S. Department of Commerce  
National Oceanic and Atmospheric  
Administration  
Authorized Official

Date 6/16/95