

**MEMORANDUM OF AGREEMENT
BETWEEN THE**

**District of Columbia Department of Energy and Environment,
National Oceanic and Atmospheric Administration,**

And

**United States Department of the Interior, National Park Service and
U.S. Fish and Wildlife Service**

**Regarding Coordination Of
NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION ACTIVITIES
FOR THE ANACOSTIA RIVER**

I. INTRODUCTION

This Memorandum of Agreement (“Agreement”) is entered into by and among the District of Columbia Department of Energy and Environment (“DOEE”), the National Oceanic and Atmospheric Administration (“NOAA”), and the United States Department of the Interior (“DOI”), acting through the United States Fish and Wildlife Service (“FWS”) and the National Park Service (“NPS”), hereinafter referenced collectively as the “Trustees.” The purpose of this Agreement is to facilitate the coordination and cooperation of the Trustees participating in the natural resource damage assessment (“NRDA”) to assess damages for injuries to natural resources resulting from releases of hazardous substances at and from the Anacostia River, including but not limited to the Anacostia River Sediment Project Site, Kenilworth Landfill, Washington Gas, Poplar Point, and the PEPCO Benning Road Facility (“Site”) in Maryland and the District of Columbia, and in the application of any natural resource damages recovered toward the restoration, rehabilitation, replacement, and/or acquisition of equivalent natural resources and reimbursement of reasonable assessment costs.

II. PARTIES

The following officials, or their designees, are parties to this Agreement and act on behalf of the public as Trustees of natural resources under this Agreement:

1. The Director of the District of Columbia Department of Energy and Environment,
2. The Director, Office of Response and Restoration, and the Director, Office of Habitat Conservation, of the National Oceanic and Atmospheric Administration,
3. The Regional Director for the U.S. Fish and Wildlife Service, North Atlantic-Appalachian Region, and

4. The Area Director for the National Park Service, Region 1, National Capital Area

In addition, the United States Department of Justice may participate at the request of one or all of the federal Trustees and provide one delegate to serve in a legal/consultative role, who shall not be a member of the Trustee Council, but who shall nonetheless be able to attend all meetings of, or organized by, the Trustee Council. Similarly, the District of Columbia may provide one or more delegates to serve in a legal/consultative role. These delegates shall not be members of the Trustee Council but shall nonetheless be able to attend all meetings of, or organized by, the Trustee Council.

The parties affirm that no other entity legally designated to act as a natural resource trustee for the Site pursuant to the authorities cited in Section III wishes to join the Agreement at this time. Should other Trustees designated with authority over the natural resources that are the subject of this Agreement request to join the Agreement at a future time, the parties will consider that request.

III. AUTHORITY

The Trustees enter into this Agreement in accordance with the 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); the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), as amended, 40 C.F.R. §§ 300.600 – 300.615; the Natural Resource Damage Assessment Regulations (NRDAR), as amended, 43 C.F.R. Part 11, to the extent appropriate and elected for use by the Trustees; and other applicable State and Federal laws. DOEE enters into this Agreement under the further authority of D.C. Code § 8-151.08(8) and Mayor’s Order 2011-96 (May 10, 2011).

IV. PURPOSE AND SCOPE

The purpose of this Agreement is to provide a framework for the Trustees to cooperatively assess damages for injuries to natural resources resulting from the release of hazardous substances at and from the Site; coordinate the development of a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the natural resources or resource services injured, lost, or destroyed resulting from the release of hazardous substances at and from the Site; recover damages to implement said plan; and avoid the duplication of assessment or restoration costs.

The activities of the Trustees covered under this Agreement 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 releases at or from the Site; 2) the planning, design, implementation, maintenance, and monitoring of actions to restore, rehabilitate, replace, or acquire the equivalent of those natural resources and services; 3) any prosecution or settlement of natural resource damage claims associated with the Site; 4) coordination with response, remedial, or corrective actions carried out by or under the direction of other Federal or State agencies

related to the Site; 5) public outreach and information sharing related to any of the above activities of the Trustees related to the Site; and 6) the securing of funding for any of the foregoing.

V. TRUSTEE COUNCIL

The Trustees agree to establish a Trustee Council to implement this Agreement. The Trustee Council shall be comprised of one representative of each State and Federal Trustee.

A. Designation of Representatives: Each Trustee hereby designates the following representative to the Trustee Council with responsibility for implementation of this Agreement:

For DOEE:

Gretchen Mikeska
Anacostia Coordinator, Office of the Director
Department of Energy & Environment
Government of the District of Columbia
1200 First Street NE, 5th Floor
Washington, DC 20002

For NOAA:

Simeon Hahn
NOAA – Assessment and Restoration Division
1650 Arch Street
Philadelphia, PA 19103

For FWS:

Alfred Pinkney
USFWS – Chesapeake Bay Field Office
177 Admiral Cochrane Drive
Annapolis, MD 21401

For NPS:

Christina Kravitz
NPS NRSS-WASO-EQD
Academy Place, Suite 470
P.O. Box 25287
Denver, CO 80225

B. Alternative Representative: Each Trustee shall also designate an alternative representative to attend and participate in meetings in the event that the primary representative is unavailable.

- C. Change of Representatives: A Trustee may change its representative by providing written notice to each of the other Trustee Council representatives. In the event that a representative can no longer serve on the Trustee Council, that Trustee must designate a new representative within 14 calendar days. The Trustee shall notify each of the other Trustee Council representatives of the new representative's name, address, email address, and telephone number.
- D. Legal Representatives: The participation of legal representatives in Trustee Council deliberations shall not waive any privileges applicable to such deliberations or their related products, nor be interpreted as an indication that the work being done by the Trustee Council is necessarily primarily in anticipation of litigation. NRDA efforts require routine and varied legal interpretation of statutes and regulations and the costs of legal representatives carrying out such activities are considered reasonable assessment costs.
- E. Lead Administrative Trustee: DOEE shall serve as the Lead Administrative Trustee ("LAT") in implementing this Agreement. DOEE shall fully coordinate its activities with, and act under the direction of, the Trustee Council. DOEE may, with the approval of the Trustee Council, delegate administrative tasks to other Trustee Council members over the course of implementing this Agreement.
- F. Federal Lead Administrative Trustee: DOI shall serve as the Federal Lead Administrative Trustee ("FLAT"). As the FLAT, DOI will coordinate assessment activities and other activities for the federal agencies, and provide technical support to the LAT.

VI. DUTIES AND RESPONSIBILITIES

- A. Trustee Council: On behalf of the Trustees, the Trustee Council shall coordinate and authorize all Trustee Council activities and matters under this Agreement in accordance with the decision-making requirements contained in Section VII. The Trustee Council may take whatever actions that it determines are necessary to implement this Agreement, in accordance with applicable laws, regulations, policies, and this Agreement. The Trustee Council may take the following actions, among others, to fulfill the Trustees' natural resource damage assessment and restoration responsibilities for the Site:
 - 1. Plan, approve, conduct, fund, and/or oversee scientific and technical studies, sampling, and other activities related to the assessment of natural resource damages. The Trustee Council may arrange for contracts or agreements with one or more professional consultants, technical or otherwise, which the Trustee Council determines are necessary and best qualified to provide services to the Trustee Council. The Trustee Council shall undertake the specific actions of identifying those natural resources and/or services which have been, are, or which may be injured, destroyed, or lost as a result of releases of

hazardous substances at or from the Site. Further, the Trustee Council shall undertake the specific action of designing a strategy of reliable and valid assessment methodologies to determine the nature and extent of such injuries. The Trustee Council also shall undertake the specific action of determining whether the assessment and activities related thereto may be implemented in a cooperative manner with, or funded by, one or more of the potentially responsible parties (“PRPs”) for the Site, and then in reducing such agreement into writing.

2. Coordinate Trustee natural resource damage assessment and restoration activities and communications with State and Federal response agencies, including their remedial project managers, response personnel, and contractors for the Site.
3. Develop and implement, and/or oversee the development and implementation of a plan for the restoration of natural resources and/or services that have been injured, destroyed, or lost.
4. Seek restoration and/or compensation from PRPs for the damages assessed by the Trustees, and for the costs of planning and implementing the assessment and/or restoration.
5. Supervise, manage, and obligate any money paid to the Trustees by or on behalf of PRPs for the purpose of assessing injury to natural resources and/or restoring the injured resources and/or services.

The Trustee Council shall adopt a periodic meeting or teleconferencing schedule to ensure the timely completion of these and other activities. Any member of the Trustee Council may, upon reasonable notice through the LAT, call a meeting to be conducted either in person or by telephone call.

From the effective date of this Agreement, the Trustee Council shall approve all proposals and work plans for studies and analyses to be conducted or funded in furtherance of the purposes of this Agreement, before such work is initiated. In cooperating with each other regarding selecting, designing, and approving studies, and in electing a Trustee agency to lead in the implementation or oversight of a study, appropriate consideration will be given to the special expertise and/or management interests that a particular Trustee has regarding certain resources.

The Trustees commit themselves to coordinating any communications with non-Trustee PRPs (to the extent the United States or the District may be PRPs) for the Site on matters related to natural resource damage assessment, natural resource damages, and claims for those damages. No Trustee will discuss these matters with the PRPs without first providing the other relevant Trustees notice of and an opportunity to participate in such discussions, unless it concerns purely administrative matters, such as checking availability for meetings. If non-coordinated

communications with the PRPs occur, the contacted Trustee representative will promptly disseminate the content of the communication to the other Trustee representatives. Furthermore, each Trustee agrees that prior to filing any claim for natural resource damages or settling any claim or potential claim with any of the non-Trustee PRPs, each Trustee will provide the other Trustees with notice of its intent to file such claim and/or settle at least 90 calendar days in advance of such action.

B. Lead Administrative Trustee: The duties of the LAT shall include, but are not necessarily limited to, coordination and monitoring of the progress of the natural resource damage assessment process, scheduling of meetings of the Trustee Council and timely notification of all Trustees of such meetings, preparing agendas for meetings, recording the decisions at meetings, acting as initial point of contact for facilitating joint communications between the Trustees and external entities, establishing and maintaining the Administrative Record for the Site and other relevant records and documents, and such other administrative duties as directed by the Trustee Council.

VII. DECISIONMAKING

- A. All decisions under this Agreement shall require unanimous approval of the members of the Trustee Council. Required or otherwise critical decisions fulfilling their Trustee responsibilities, such as identification of injured resources, development of assessment strategies, agreements with PRPs, and development of restoration alternatives and plans, shall be documented by the Trustee Council in resolutions or memoranda for the administrative record for the Site. In the event that unanimous agreement cannot be reached, the matter in dispute will be elevated to the individuals who executed this Agreement. Additional mechanisms for dispute resolution may be established if necessary. Decision making deliberations shall focus upon the Trustees' mutual purpose of assessing damages for injuries to natural resources and their services, and of restoring, rehabilitating, replacing, and/or acquiring the equivalent of the injured natural resources and services.
- B. Where a Trustee notifies the Trustee Council of its intent to limit its involvement in NRDA activities, including any aspect of the damage assessment, restoration planning, restoration implementation, oversight and monitoring activities, or any other specific upcoming decision of the Trustee Council, the Trustee may choose to abstain from the actions or decisions, in which case the Trustee Council's actions and/or decisions shall be deemed unanimous notwithstanding the abstention.

VIII. FUNDS

- A. The Trustee Council shall use all natural resource damages recovered by the Trustees to restore, rehabilitate, replace, and/or acquire the equivalent of injured natural resources and

services, except for amounts received to reimburse Trustees for the cost of assessing such injuries and to fund future administrative costs for Trustee activities.

- B. The Trustees agree that any natural resource damage recoveries, with the exception of recoveries to reimburse past damage assessment costs or to fund future administrative costs for Trustee activities, obtained or received by the Trustees, individually or collectively, either as a result of judgment or settlement in whole or in part of natural resource damage claims brought against PRPs for the Site, and any interest earned thereon, shall be used to restore, rehabilitate, replace, and/or acquire the equivalent of the natural resources and services which have been injured, destroyed, or lost as a result of releases of hazardous substances/contaminants at or from the Site. To the extent permitted by law, the Trustees agree that all such natural resource damage recoveries, with the exception of recoveries to reimburse past damage assessment costs or to fund future administrative costs for Trustee activities, shall be deposited in the Department of the Interior NRDAR Fund to be disbursed only for the purposes described in this Agreement and in accord with the provisions of this Agreement. Disbursement of all restoration funds, including funds for reimbursement of administrative, technical, and legal costs and expenses incurred by the Trustees, will be by Trustee Resolution.

- C. Under this Agreement, the Trustees may work with the DOI NRDAR Fund Manager, and/or his/her 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 consensus decision-making process set forth in this Agreement and will be by Trustee Resolution. Interest earned on any investment of restoration funds will be made available for use by the Trustees to compensate the public for injuries to natural resources and resource services consistent with this Agreement.

- D. The Trustees agree that any disbursements of such recoveries, including recoveries to reimburse past damage assessment costs or to fund future administrative costs for Trustee activities, shall be made following appropriate and reasonable cost documentation, cost accounting, reimbursement, and expenditure practices in accord with applicable law. Each Trustee will be responsible for maintaining their own accounting for their costs. The LAT will be responsible for keeping an accounting of agreed upon joint NRDA activities.

IX. PUBLIC ACCESS TO INFORMATION

The Trustees will compile and maintain a publicly available administrative record that documents and supports their natural resource injury and restoration determinations for the Site. Further, the Trustees commit to providing the public with reasonable notice of and appropriate and meaningful opportunities to comment on the natural resource damage assessment and

restoration process, including seeking comment on a draft restoration plan(s) for the Site, as required by CERCLA, the National Environmental Policy Act, and relevant State laws.

The Trustees hereby agree that any information in the possession of the Trustees shall be kept confidential if it is covered by an applicable privilege and it is not otherwise included in the administrative record to document and support assessment decisions, provided, however, that all such information may be subject to disclosure pursuant to Federal and relevant 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 (“FOIA”) shall be released. If a FOIA request is received, the Trustee who has received the request shall inform the other Trustees and provide them a reasonable opportunity to object to the disclosure of the information.

X. RESERVATION OF RIGHTS

- A. Except for the agreements between the Trustees included in this Agreement, this document is not intended to create or diminish any further legal rights or obligations between the Trustees or their respective representatives, including but not limited to claims for natural resource damages and/or response costs, or between any Trustee and any other persons not party to this Agreement. Nothing in this Agreement 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.
- B. Nothing in this Agreement is intended to be or shall 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 Agreement is intended or shall be construed as a waiver by the Trustees of any claims or defenses in any legal action, or of any other rights or remedies.
- C. Nothing in this Agreement shall be construed as a waiver of, or foreclosing the exercise of, any rights, powers, remedies, or privileges of the individual Trustees or any other District or federal agency now or hereafter existing at law or in equity, by statute or otherwise.
- D. Nothing in this Agreement is intended to conflict with existing directives or policies of any Trustee. If the terms of this Agreement are found to be inconsistent with existing directives or policies of any Trustee, those portions of this Agreement that are determined to be inconsistent shall be identified by the affected Trustee. Within 30 calendar days of notice of the inconsistency, the Trustees shall discuss the inconsistency and determine whether it is possible, appropriate, and necessary to amend this Agreement.

XI. MODIFICATION OF AGREEMENT

This Agreement may be modified only in writing signed by all Trustees. Additional or more detailed agreements may be helpful to the Trustees with regard to planning or implementing restoration, and for expenditure of any joint damages recovered, among other things. These agreements may be executed as amendments or modifications to this Agreement, or may be developed as separate agreements subject to the same procedural and substantive requirements contained herein.

XII. WITHDRAWAL AND TERMINATION

This Agreement shall be in effect from the effective date of this Agreement, as defined in Section XV, until such time that the Trustees unanimously determine that the purposes underlying the Agreement have been fulfilled. Otherwise, this Agreement may only be terminated by written agreement of all Trustees. Any Trustee may withdraw from this Agreement by giving the other Trustees written notice at least 30 calendar days in advance of the withdrawal. In the event of such withdrawal, this Agreement shall remain in full force and effect for the remaining parties.

In the event of the withdrawal of a Trustee, or at the termination of this Agreement, each Trustee shall cooperate with the others in preparing a full and complete accounting of the status of all projects under the control or direction of each Trustee, and of all funds received, deposited, held, disbursed, or expended pursuant to this Agreement, except for funds already received to reimburse the withdrawing Trustee's past assessment costs.

XIII. LIMITATION

Nothing in this Agreement shall be construed as obligating the United States, the District of Columbia or any other public agency, its officers, agents, or employees, to expend any funds in excess of appropriations authorized by law.

XIV. THIRD PARTY CHALLENGES OR APPEALS

The rights and responsibilities contained in this Agreement are subject to the availability of funding and are intended to be guidance for the respective Trustees. This Agreement shall not be the basis of any claims, rights, causes of action, challenges, or appeals by any person not a party to this Agreement.

XV. EXECUTION AND EFFECTIVE DATE

This Agreement may be executed in counterparts. A copy with all executed signature pages affixed shall constitute an original of the Agreement and be maintained by the LAT in the Administrative Record for the Site. This Agreement shall be effective upon the date of signature of the last Trustee to sign this Agreement.

FOR THE DISTRICT OF COLUMBIA DEPARTMENT OF ENERGY AND ENVIRONMENT:



Tommy Wells
DOEE Director

Date

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:

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Date: 2021.02.12 11:00:56 -05'00'

Tony Penn
Chief, Assessment and Restoration Division
Office of Response and Restoration
National Oceanic and Atmospheric Administration
as designated by the Director of the Office of Response and Restoration

Date

Christopher Doley

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Date: 2021.02.05 16:05:39 -05'00'

Christopher Doley
Chief, Restoration Center
Office of Habitat Conservation
National Oceanic and Atmospheric Administration
as designated by the Director of the Office of Habitat Conservation

Date

FOR THE DEPARTMENT OF THE INTERIOR:

Lisa A Mendelson-Ielmini

Lisa A. Mendelson-Ielmini
Deputy Area Director
National Park Service
Region 1 – National Capital Area

January 19, 2021

Date