

MEMORANDUM OF AGREEMENT

AMONG THE MISSOURI DEPARTMENT OF NATURAL RESOURCES, IOWA DEPARTMENT OF NATURAL RESOURCES, NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY AND THE U.S. DEPARTMENT OF THE INTERIOR

REGARDING COORDINATION OF NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION FOR THE NISHNABOTNA FERTILIZER SPILL MARCH 9-11, 2024

I. PARTIES

This agreement among Missouri Department of Natural Resources (“MoDNR”), the Iowa Department of Natural Resources (“IDNR”), the Director of the Nebraska Department of Environment and Energy (“NDEE”), and the United States Department of the Interior (“DOI”) as represented by the U.S. Fish and Wildlife Service (“USFWS”) (collectively, the “Trustees”) is made in recognition of the common interests of the Trustees in the assessment and restoration of the natural resources and associated services that have been injured, destroyed, or lost as a result of the release of hazardous substances from the NEW Cooperative Inc. (NEW) facility in Red Oak, Iowa, on or about March 9-11, 2024.

II. AUTHORITY

The Trustees enter into this agreement 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 311(f) of the Clean Water Act (“CWA”), as amended, 33 U.S.C. § 1321(f), and other applicable federal and state law and authority 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 natural resource trustees, the CERCLA Natural Resource Damage Assessment and Restoration (“NRDAR”) regulations, as amended, 43 C.F.R. Part 11. The terms used in this agreement shall have the meaning of those that are defined in CERCLA, CWA, and in the federal regulations referred to above.

III. BACKGROUND AND PURPOSE

On March 9-11, 2024, the NEW facility in Red Oak, Iowa released 1,500 tons (265,000 gallons) of liquid nitrogen fertilizer (UAN-32) a urea ammonium nitrate solution, through an open valve, which flowed over a graveled parking area into a stormwater drainage ditch, and then flowed into the East Nishnabotna River (anywhere contaminants have come to be located is collectively referred to herein as “the “Site”). The release was discovered at 5:30 a.m. on March 11, 2024, by employees who used soil to block the ditch and stop further contamination into the river. NEW notified IDNR of a release occurring on-site. The UAN-32 release resulted in a mass fish kill in the Nishnabotna River, extending downstream to its confluence with the Missouri River, with a

total impact of approximately 60 miles. Due to the release, the IDNR recommended that people avoid recreational activities on the Nishnabotna River and not to collect or consume dead fish. In addition to the fish kill, the release impacted water quality, potentially other wildlife species, and wetland, marsh, and riparian habitats. The UAN-32 release is collectively referred to herein as the “Nishnabotna Fertilizer Spill” or “Spill”.

The purpose of this Memorandum of Agreement (“MOA”) is to provide a framework for intergovernmental coordination, cooperation, and decision-making among the Trustees in furtherance of the NRDAR process. The activities of the Trustees covered under this MOA 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 the Spill;
- 2) Any prosecution, settlement, or presentment of natural resource damage claims associated with the spill, including development of positions for covenants not to sue or administrative releases from liability;
- 3) Coordination with response, remedial, or corrective actions carried out by or under the direction of other federal or state agencies related to the Spill;
- 4) 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;
- 5) Public outreach and information sharing related to any of the above activities of the Trustees related to the Spill; and
- 6) The securing of funding for any of the foregoing.

The MOA 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 oversight of restoration implementation and monitoring.

IV. COORDINATION & NOTIFICATION

The Trustees recognize and agree that their interests in the natural resource damages from the Spill are related and agree to coordinate assessment and restoration activities in accordance with the CERCLA NRDAR regulations. The Trustees agree to notify and consult with each other on all plans, proposals, activities, events, or decisions that may affect the NRDAR process or restoration related to the Spill.

The Trustees will endeavor to avoid non-cooperative behavior including unreasonable delays in responding to requests for information or data or in producing agreed upon deliverables, failure to attend and/or actively participate in meetings and discussions, making knowingly false or inaccurate statements, advocating positions or arguments that the Trustees have already rejected in the absence of new information, and unilateral public dissemination of information, interpretations, or communications regarding this NRDAR and restoration planning process without the prior agreement of the other parties.

V. NATURAL RESOURCE TRUSTEE COUNCIL

The Trustees recognize the importance of coordinating their efforts in order to effectively and efficiently implement the assessment and restoration to address the natural resource injuries. Accordingly, the Trustees hereby agree to create the Nishnabotna Fertilizer Spill Natural Resource Trustee Council (“Trustee Council”).

A. **Trustees.** In accordance with Subpart G of the NCP, 40 C.F.R. §§ 300.600 through 300.615, other applicable federal, state, and tribal law, and delegations of authority made by each agency, the following individuals shall act as the authorized officials for each Trustee and act on behalf of the public, as federal, state, and tribal trustees for natural resources under this MOA:

1. DOI: Regional Director, U.S. Fish and Wildlife Service Region 3 – Midwest as Authorized Official, acting on behalf of the Secretary of the Department of the Interior
2. Director, Missouri Department of Natural Resources, acting on behalf of the Governor of Missouri
3. Director, Iowa Department of Natural Resources, acting on behalf of the Governor of Iowa
4. Director, Nebraska Department of Environment and Energy, acting on behalf of the Governor of Nebraska

B. **Primary Representatives.** The Trustee Council consists of one voting member for each of the four Trustees specified above. Each Trustee shall designate no more than two primary representatives. Primary representatives shall receive and be responsible for all correspondence and communications on behalf of each Trustee. The following individuals will represent their Trustee on the Trustee Council to guide the natural resource damages assessment and restoration:

1. Ed Karecki, U.S. Fish and Wildlife Service, U.S. Department of the Interior
2. Leslie Lueckenhoff, U.S. Fish and Wildlife Service, U.S. Department of the Interior
3. Joe Larscheid, Iowa Department of Natural Resources
4. Dave Schumacher, Nebraska Department of Environment and Energy
5. Steve Thomas Nebraska Department of Environment and Energy
6. Robert Abney, Missouri Department of Natural Resources
7. Leigh Baalman, Missouri Department of Natural Resources

C. **Other Natural Resource Trustees.** Notwithstanding any other provision of this MOA, any natural resource trustee who is not a party to this MOA and who has a natural resource interest that is affected by the spill shall not be precluded from participating in the NRDAR process or any other natural resource trustee activities under this MOA. Such other trustees

may include, but are not limited to, other federal and state agencies, which may be added by addendum to this MOA, as necessary and appropriate and authorized by applicable federal and state law.

- D. **Advisors and Other Representatives.** As determined to be appropriate by the Trustees, or as required by applicable federal, or state, the Trustees will coordinate with and seek the participation of other representatives, including but not limited to, legal counsel for the Trustees, including the U.S. Department of Justice and other representatives as determined by the Trustees.
- E. **Lead Administrative Trustee.** Through this MOA, the Trustees agree to designate DOI's Trustee to act as Lead Administrative Trustee ("LAT") on behalf of the Trustee Council. The LAT shall fully coordinate its activities with and only act under the direction of the Trustee Council. The LAT's duties shall include, but are not limited to:
1. Coordinating the development of a Preassessment Screen Determination, an Assessment Plan, and other assessment related documents for approval by the Trustees as determined appropriate;
 2. Coordinating the progress of the formulation of technical and legal positions for covenants not to sue, administrative agreements, or other negotiations;
 3. Preparing Trustee Council Resolutions for review by the Trustees;
 4. Overseeing and/or developing a draft and final restoration plan(s) and, as applicable, environmental compliance and National Environmental Policy Act analysis for approval by the Trustees;
 5. Coordinating the preparation of all appropriate documentation of the natural resource damage assessment and restoration process in accordance with applicable laws;
 6. Coordinating preparation of all press releases and other public informational documents for approval by the Trustee Council;
 7. Scheduling meetings of the Trustee Council and notifying Trustee Council members of those meetings on a timely basis;
 8. Preparing agendas for those meetings;
 9. Acting as a central contact point for the Trustee Council;
 10. Establishing and maintaining the administrative record for both the injury assessment and restoration;
 11. Performing other administrative duties; and
 12. Informing the other Trustee Council representatives of all pertinent developments on a timely basis. The LAT may delegate any of her/his duties to another Trustee representative with the concurrence of the Trustee Council.
- F. **Meetings.** Upon reasonable notice, any Trustee may request a meeting of the Trustee Council to be conducted.
- G. **Decision-making.** Each member of the Trustee Council shall have equal authority, and all decisions under this MOA shall be by unanimous agreement of all Trustee Council representatives. If needed, Trustee Council resolutions may be adopted to formally document

decisions of the Trustee Council as they relate to restoration planning, implementation, and oversight of implementation and monitoring. Trustee Council resolutions, signed by the Trustees identified in Section V.A. will be required for releasing joint funds to specific trustee agencies.

- H. **Dispute Resolution.** The Trustees agree that deliberations will focus upon the Trustees' mutual goals of the timely and appropriate injury assessment and restoration of injured natural resources and associated services. In the event of a dispute involving any decisions under this MOA, the Trustee Council primary representatives and their legal counsel shall make their best efforts to resolve the dispute through discussions directed toward obtaining unanimous agreement. Trustee Council primary representatives should involve their immediate supervisors in deliberations to assist in resolving disputes as appropriate. If unanimous agreement cannot be reached, the matter will be elevated to the authorized official for each Trustee (typically the position within the organization who executed this MOA), for resolution or further instructions. The DOI primary representatives and their legal counsel will provide notice of formal elevation to their participating Bureau Technical Support Group (TSG) Coordinator, the Office of Restoration and Damage Assessment (ORDA), and other interested parties to assist the DOI Authorized Official and facilitate resolution of the dispute. The Trustees may also establish other mechanisms by which disputes may be resolved.

In the event unanimous agreement cannot be achieved, each Trustee may take individual positions or actions on its own behalf, but such individual positions or actions shall not constitute or be regarded as positions or actions of the Trustee Council.

- I. **Duties.** In accordance with applicable law and regulations, the Trustee Council may carry out the duties listed below. The Trustee Council may authorize a sub-team of representatives to implement any of these duties on behalf of the Trustee Council.
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 response, related to the determination of injuries and/or the assessment of damages for natural resources and their services which may have been lost, injured, or destroyed;
 3. In coordination with agency counsel and the Missouri, Nebraska, and Iowa Offices of Attorney General and the U.S. Department of Justice, seek compensation from PRPs for damages for restoration, assessment costs, for the Parties' costs of planning and implementing the assessment and/or restoration, and for other legally authorized expense;
 4. Participate in negotiations with PRPs;
 5. Coordinate NRDAR activities with response actions carried out by other federal and state agencies, as appropriate;

6. In accordance with applicable law, respective agency policy, and applicable delegation of authority, manage any money jointly paid to the Parties (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. In accordance with applicable law, develop contracts with professional consultants that the Parties determine are necessary to fulfill the Parties' duties and responsibilities pursuant to applicable statutes and regulations;
8. Encourage public participation and involvement in a manner consistent with applicable law and regulations;
9. Maintain an administrative record of assessment and restoration activities.
10. Each Party will review and approve draft documents to be made available for public review and comment as well as final documents (i.e., milestone documents, study plans and reports). Such approval will either be by signature on the document or written (email is acceptable) approval by the designated Party or Authorized Official for each Party;
11. Ensure federal, state, and local environmental regulatory compliance, where applicable; and
12. Authorize individual Trustees to contract as deemed necessary to achieve these objectives.

VI. FINANCIAL RESPONSIBILITY

The Parties intend to use any natural resource damages recovery obtained jointly by the Parties, and any interest earned thereon, to restore, replace, rehabilitate and/or acquire the equivalent of the natural resources or their associated services that were the basis of the claim and judgment and/or settlement. Such joint recoveries for the restoration of natural resources and their services will be deposited in an interest-bearing account to be disbursed only for the purposes described in this MOA and in accordance with the provisions of this MOA. The Parties agree that expenditures from the account should be managed in such a way to maximize restoration benefits and minimize post settlement restoration planning and administrative costs.

Damages recovered jointly for costs of the Parties related to restoration planning and oversight of implementation and monitoring (i.e., administrative costs of the Parties), and any interest earned thereon, should only be spent upon mutual, written agreement by the Parties pursuant to the provisions of this MOA. Parties that execute this MOA agree that recovered funds can be used for the administrative costs of the Parties and will endeavor to reach agreement on appropriate amounts to be spent, which may include annual documentation submitted to the Trustee Council for review.

Each Party will ensure that appropriate and reasonable practices for cost documentation, cost accounting, cost reimbursement, and expenditures are followed, in accordance with applicable law. In addition, the Parties may establish and adopt NRDAR cost accounting and reimbursement guidelines including a level of detail and a reporting schedule commensurate with the complexity and size of the recovery of damages. These guidelines ensure that recovered damages are spent only on reasonable and adequately documented costs.

Nothing in this MOA shall be construed as obligating the United States, the States of Missouri, Nebraska, or Iowa or any other public agency, their officers, agents or employees, to expend any funds in excess of appropriations authorized by law. The Trustees recognize and agree that Federal agencies must operate within specific requirements of the Federal budget process and legal restrictions concerning the obligations of funds. No provision of this MOA shall be construed to require Federal agencies to obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, in any fiscal year for actions subject to this MOA.

VII. DEPOSIT AND MANAGEMENT OF RESTORATION FUNDS

To the extent permitted by law, the Trustees agree that all jointly recovered Restoration Funds shall be deposited in the DOI Restoration Fund to be disbursed only for the purposes described in and in accord with the provisions of this MOA. The Trustees may work with the U.S. Department of the Interior NRDAR 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 Section V Paragraph F of this MOA 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.

VIII. CONFIDENTIALITY

The Trustees agree that public sharing of scientific data will be the general policy of the Trustees. Therefore, validated data shall be made public as soon as possible if it will not prejudice the NRDAR. However, nothing in this MOA is intended, nor shall it be construed, as a waiver of any attorney-client privilege, attorney work product privilege, deliberative process privilege, or any other privilege that has been or may be asserted in this or any other matter unless explicitly stated herein. The transmittal of any designated privileged documents or designated privileged communications between or among any of the Trustees (and their legal counsel, representatives, contractors, and consultants) does not waive, or imply any waiver, of any privilege or right that the transmitting government may assert with respect to that document or communication.

The Trustees further agree that whenever a request for production of such a record 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. If a question arises as to the application of federal Freedom of Information Act ("FOIA"), 5 U.S.C § 552, Iowa's public records statute, Ia. Stat. Chapter 22, Missouri's public records statute, § 610 Revised Stat. Mo, or Nebraska's public records statutes, Neb. Rev. Stat. §§ 84-712-84-712.09, to these communications, the party who has received a request for the communications shall, at a minimum, inform the other Trustees of the request and provide them a reasonable opportunity to object to the disclosure of the communication. It is understood and agreed upon that all information required to be disclosed pursuant to FOIA or the Iowa, Missouri and/or Nebraska Public Records Act shall be released. Nothing contained herein shall be

construed as prohibiting or restraining the Trustees or the Trustee Council from agreeing to release any record or from disclosing any record for which disclosure is required by law.

A Trustee shall not unilaterally disseminate any information, interpretations, or communications regarding this NRDAR publicly without the prior notification to the other parties.

IX. GENERAL PROVISIONS

Reservation of Rights and Authority. Nothing in this MOA is intended or shall be construed to be an admission by the Trustees in any dispute or action among the Trustees or between the Trustees and a third party. Nothing in this MOA 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. This Reservation of Rights applies to comments provided by all Trustees to this MOA on any documents prepared by, or exchanged among, the Trustees in connection with this MOA.

Neither execution of this MOA nor performance of any activities pursuant to this MOA shall constitute an admission by any Trustee or government named herein of (nor be construed as precedent for) any legal responsibility under federal, state or other applicable law, to protect, restore, or enhance any natural resources associated with the Spill over which any other Trustee or non-party asserts trusteeship, standing, or jurisdiction. Furthermore, neither execution of this MOA nor performance of any activities pursuant to this MOA shall be precedent or constitute an admission by any Trustee or government named herein of any liability for damage or injury possibly caused by NRDAR activities under this MOA, to any natural resources associated with the Spill over which any other Trustee or non-party asserts trusteeship, standing or jurisdiction.

Nothing in this MOA is meant to imply, or operate in a manner, that any natural resource trustee with an interest in the Spill, whether a Trustee under this MOA or not, is in any way abrogating or ceding any natural resource trustee responsibility or authority over natural resources of the Spill.

Nothing in this MOA shall be construed as a waiver of, or foreclosing the exercise of, any rights, powers, remedies or privileges of the individual Trustees now or hereafter existing at law or in equity, by statute or otherwise.

Third Parties. This MOA is not intended to, nor shall it, vest rights in persons who do not represent the Trustees to this MOA or who are not parties to this MOA.

Modification. This MOA may be amended by written agreement of all the Trustees if the Trustees determine an amendment is necessary to accomplish the objectives of this MOA consistently with the requirements of applicable law.

Effective Date. This MOA shall be effective when executed by all of the Trustees and can be executed in one or more counterparts, each of which will be considered an original document.

Term. This MOA shall continue in effect until the Trustees determine that the restoration plan or plans implemented under this MOA have been completed, unless terminated before that time or extended beyond that time by written agreement of all the Trustees.

Termination. Any Trustee may terminate its participation in the MOA upon giving thirty (30) days written notice to all other Trustees or as otherwise provided for herein. The withdrawal of any Trustee to this MOA for whatever reason, shall not affect the subsequent validity of this MOA among the remaining Trustees. A Trustee that has withdrawn from this MOA shall have no further obligations under this MOA except for (1) the obligations to continue to coordinate activities, to the greatest extent practicable, with the Trustee Council, and (2) to provide the LAT documents relevant to the NRDAR claim maintained by the withdrawing Trustee. For confidential documents pursuant to Section VIII, such confidentiality survives any termination of or withdrawal from this MOA.

The Trustees have executed this Memorandum of Agreement on the dates attested to below. --

MEMORANDUM OF AGREEMENT

**AMONG THE MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IOWA DEPARTMENT OF NATURAL RESOURCES,
NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY AND
THE U.S. DEPARTMENT OF THE INTERIOR**

**REGARDING
COORDINATION OF NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION FOR THE
NISHNABOTNA FERTILIZER SPILL MARCH 9-11, 2024**

Signature Page

United States Department of the Interior

By: **WILLIAM MEEKS**
Will Meeks,
Regional Director, Midwest Region
US Fish and Wildlife Service
Date: **10/31/2024**

Digitally signed by
WILLIAM MEEKS
Date: 2024.10.31
15:06:33 -05'00'

MEMORANDUM OF AGREEMENT

**AMONG THE MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IOWA DEPARTMENT OF NATURAL RESOURCES,
NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY AND
THE U.S. DEPARTMENT OF THE INTERIOR**

**REGARDING
COORDINATION OF NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION FOR THE
NISHNABOTNA FERTILIZER SPILL MARCH 9-11, 2024**

Signature Page

Iowa Department of Natural Resources

By:  Digitally signed by Kayla Lyon
Date: 2024.10.28 15:43:11
-05'00'

Kayla Lyon, Director

Date: _____

MEMORANDUM OF AGREEMENT

**AMONG THE MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IOWA DEPARTMENT OF NATURAL RESOURCES,
NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY AND
THE U.S. DEPARTMENT OF THE INTERIOR**

**REGARDING
COORDINATION OF NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION FOR THE
NISHNABOTNA FERTILIZER SPILL MARCH 9-11, 2024**

Signature Page

Missouri Department of Natural Resources

By:  Digitally signed by Dru Buntin
Date: 2024.11.21 12:11:35
-06'00'

Dru Buntin, Director

Date: 11/21/2024

MEMORANDUM OF AGREEMENT

**AMONG THE MISSOURI DEPARTMENT OF NATURAL RESOURCES,
IOWA DEPARTMENT OF NATURAL RESOURCES,
NEBRASKA DEPARTMENT OF ENVIRONMENT AND ENERGY AND
THE U.S. DEPARTMENT OF THE INTERIOR**

**REGARDING
COORDINATION OF NATURAL RESOURCE DAMAGE ASSESSMENT AND
RESTORATION FOR THE
NISHNABOTNA FERTILIZER SPILL MARCH 9-11, 2024**

Signature Page

Nebraska Department of Environment and Energy

By:


Kara Valentine, Interim Director

Date:

November 7th, 2024