

MEMORANDUM OF AGREEMENT BETWEEN THE NATURAL RESOURCE
TRUSTEES AND KERR-MCGEE CHEMICAL CORPORATION

Dec. 1997 Draft

This Memorandum of Agreement (MOA) is between the Texas Parks and Wildlife Department (TPWD), Texas General Land Office,(GLO), Texas Natural Resource Conservation Commission (TNRCC), National Oceanic and Atmospheric Administration (NOAA), and the Department of the Interior (DOI), (collectively, "Trustees"), and KerrMcGee Chemical Corporation (KMCC). The Trustees and KMCC are hereafter collectively referred to as "Parties." This MOA shall become effective upon execution by all Parties.

I. INTRODUCTION

The International Creosoting State Superfund Site (the "Site"), including all land, appurtenances, and other improvements, is located at 1110 Pine St., Beaumont, Jefferson County, TX. In addition, the Site includes those portions of Brakes Bayou (a waterway that is adjacent to the 1110 Pine St. property) where hazardous substances came to be located as result, either directly or indirectly, of releases from the 1110 Pine St. property. Creosote constituents, some of which are toxic and/or carcinogenic, have been documented in surface water, sediments, and ground water at the Site. KMCC is potentially responsible for hazardous substance contamination at the Site and is subject to an Agreed Order with TNRCC dated September 12, 1990.

Due to releases of hazardous substances at the Site, there is a potential for injury to natural resources and their services. The execution of this MOA recognizes the Parties' common interests in (1) determining whether natural resources have been injured as result of activities at the Site, and (2) expeditiously restoring injured natural resources through coordination with the remedial actions established by the TNRCC.

II. PURPOSE AND GENERAL APPROACH

The National Contingency Plan (NCP), 40 C.F.R. 300.615 (d)(2), allows Trustees and potentially responsible parties (PRP) to negotiate agreements for PRP-financed or PRP-conducted assessments. This MOA provides the structure under which the Parties agree to undertake a cooperative assessment of natural resource injuries associated with the Site and such actions as may be necessary or appropriate to provide for the restoration, rehabilitation, replacement or acquisition of the equivalent of injured natural resources and their services. This MOA is intended to provide for the development of a cost-effective and efficient natural resource injury identification and restoration process to be jointly implemented by the Parties. More specifically, this MOA provides the framework and processes by which the Parties will endeavor to agree upon the following:

- Identification of potential natural resource injuries to be evaluated;
- Evaluation of existing data to determine suitability for injury determination and injury quantification for the identified natural resource injuries;
- Identification of potential additional data needs;

- Development of plans for obtaining necessary-additional data;
- Injury assessment sufficient to determine the appropriate type and extent of restoration that may be needed. To the extent practicable, the injury assessment will be integrated with the Agreed Order between KMCC and the TNRCC and /or under the TNRCC Voluntary Cleanup Program regulations. The injury assessment will concentrate on restoration of lost natural resource services. These services include any physical, ecological, biological, chemical, aesthetic, cultural, and public uses provided by a natural resource that have been directly or indirectly lost due to exposure to a release of hazardous substance from the Site;
- Development of appropriate restoration alternatives that will compensate the public for losses or injuries to natural resources occurring as a result of releases of hazardous substances at or from the Site;
- Identification of a process for public participation;
- Coordination by the Trustees, to the extent practicable, of restoration selection and implementation with any remedial actions required by TNRCC order or remedial actions performed under the TNRCC Voluntary Cleanup Program regulations; and a Development of a settlement agreement which shall include the restoration plan.

The detailed plans for this cost-effective and efficient natural resource injury assessment and restoration process will be described in one or more Attachments to be developed and incorporated into this MOA.

III. TRUSTEE AUTHORITY

The Trustees enter into this MOA in accordance with the legal authorities provided to each Trustee by Section 107(f) of CERCLA, 42 U.S.C. Section 9607(f); Section 311 (f) of the Clean Water Act, 33 U.S.C. Section 1321 (f); and any other applicable Federal and State laws including Subpart G of the NCP, 40 C.F.R. Section 300.600-300.615, and the Natural Resource Damage Assessment Regulations at 43 C.F.R. Part 11.

IV. INJURY ASSESSMENT AND RESTORATION PROCESS

The Parties have determined that it is appropriate to develop a focused and expedited process for assessing potential natural resource injuries resulting from releases of hazardous substances at or from the Site and for planning restoration of any injured resources/service losses. The process should follow other cooperative restoration-based approaches in that the process will consist of phased approaches: 1) Injury Determination; 2) Injury Quantification through the use of restoration-based methodologies such as Habitat Equivalency Analysis (HEA); 3) Restoration Planning; and 4) Restoration implementation. The Parties stipulate that the process for natural resource injury assessment and restoration described in this MOA, including all incorporated Attachments, shall be comprised of and shall represent appropriate and reliable scientific methodologies for determining natural resource injuries and losses attributable to KMCC actions at the site and for determining appropriate restoration measures.

Disputes regarding the conduct and implementation of the process shall be governed by Paragraph XII. Procedurally, each attachment and corresponding assessment/restoration plan (s), once agreed to in writing by the Trustees and KMCC, will be deemed an amendment to this MOA. Should the results of any individual component of the strategy indicate a need to modify the content, parameters, scope, or methodology of such component, a description of the additional work to be undertaken by such modification, once agreed to in writing by the Trustees and KMCC, will be deemed an amendment to this MOA

If there is an additional release of hazardous substances attributable to the Site or the extent of the injury to trust resources otherwise changes after an assessment/restoration plan is attached to this MOA, the Parties agree to undertake a good faith effort to incorporate the new information into studies subject to this MOA. If agreement is not reached regarding the new information and either the trustees or KMCC wish to conduct additional studies outside the scope of this MOA, the additional studies shall be subject to the requirements of Paragraph VIII regarding individual assessment studies,

V. PUBLIC PARTICIPATION

The Trustees are required by law to give public notice and to solicit public review and comment during certain phases of the injury assessment and restoration planning process.

VI. IMPLEMENTATION OF THE PROCESS

As may be appropriate to efficiently achieve the objectives of this MOA, the Parties agree that a Technical Committee may be formed to assist in the development of plans for use in implementing a natural resource injury assessment, quantification and restoration process pursuant to this MOA. A description of the structure and function of the Technical Committee is provided in Paragraph XVII. Further details of the roles and responsibilities of the Technical Committee may be set forth in Attachments to this MOA if necessary. The Parties agree that the technical representatives of any Party may be present at any and all locations where work that is part of the injury assessment and restoration process as described in Paragraph IV and in any Attachments incorporated herein is being performed.

The Parties will fully and freely share all data, including any data developed since the property became listed as a State Superfund Site, for the purposes of the studies as well as study design and procedures, including quality assurance/quality control procedures. The Parties' representatives shall have access to and use of all data collected relating to the site-

Each of the various work plans to be implemented under each phase of this strategy, as discussed in Paragraph IV, shall be negotiated, reviewed and approved by the Technical Committee prior to implementation. KMCC shall be responsible for the preparation and implementation of the work plans subject to the Trustees' oversight.

If the Parties are unable to agree as to the appropriate form and content of a work plan, a Notice of Dispute shall be distributed to all the Parties pursuant to the requirements in Paragraph XII. If no resolution is reached by the Parties under Paragraph XII, implementation of the work plan which is the subject of dispute may be terminated or work may continue as an independent study under Paragraph VIII. In such cases, written notice to all Parties is required defining the parameters of the work so excluded from the terms of this MOA.

The Parties will endeavor to enter into stipulations, when appropriate, during the course of the cooperative natural resource injury assessment, quantification and restoration process. Any Party may propose a stipulation at any time. A stipulation may address issues of fact or law or both. A stipulation, agreed to by all the Parties, shall be attached and incorporated into this MOA and shall survive the termination of this MOA for any reason. Any matter covered by a stipulation or other form of agreement under this MOA shall not be subject to objection or challenge by any party in any legal proceedings or any alternative dispute resolution process relating to the Trustees' claim for injuries to natural resources resulting from KMCC's activities at the Site.

VII. DISBURSEMENT OF FUNDS

KMCC agrees to pay the reasonable costs associated with natural resource damage assessment, including the development and implementation of restoration actions identified in any Attachment(s) to this MOA.

The Trustees will provide an annual statement(s) to KMCC for Trustee costs and expenses incurred within the scope of the MOA. KMCC will reimburse the Trustees for the costs and expenses set forth on such statements within 30 days of receipt of the statements, except as to any disputed portion. Any dispute concerning a statement shall be resolved pursuant to the procedures set forth in Section XI I below.

KMCC further agrees to reimburse the Trustees for past administrative costs and expenses incurred prior to the signing of this MOA, within thirty days of the presentation of a bill for such costs.

VIII. THE PARTIES' INDEPENDENT FINDINGS AND RIGHTS

The Parties will negotiate in good faith toward a consensus about the interpretation of data generated during the injury identification and quantification processes described in Paragraph IV and any Attachments hereto. The Parties will endeavor to jointly conduct all injury assessment studies. Unless otherwise agreed to in this MOA or in an Attachment or stipulation incorporated into this MOA, however, the Parties expressly reserve and maintain the right to join or not join in a timely manner in the interpretation of data resulting from any study. Alternatively, the Parties expressly reserve and maintain the right to, produce separate and independent findings and conclusions; provided, however, that if one or more of the Trustees declines to participate in the injury assessment studies, the scope of which has been agreed to by the majority of the Trustees, any independent injury assessment studies will be performed by the nonparticipating Trustee.

The Parties agree that independent injury assessment studies under this MOA will not be undertaken unless such study proposals have first been presented to all the Parties for joint consideration. Further, the conduct and implementation of an independent study shall be in accordance with the access, observation and data sharing requirements of Paragraph VI.

IX. RESFRVATION OF RIGHTS AND CLAIMS

Except as specifically provided in this MOA or in any Attachments or stipulations incorporated into this MOA, the Parties agree that none of them is making any admission of fact or law by entering into this MOA. This MOA shall not be admissible as evidence or proof of liability or non-liability. Except as provided in this MOA or in any Attachments or stipulations incorporated into this MOA, this MOA shall not be admissible as to the validity or non-validity of any claim or defense in any proceeding relating to this matter. Nothing in this MOA is to be construed to abrogate the right of any Party to pursue contribution from another Party. Except as provided in this MOA or in any Attachments or stipulations entered into pursuant to this MOA, nothing in this MOA is intended nor shall be construed as a waiver by any of the Parties of any defenses or affirmative claims, including statute of limitations defenses, in any proceedings relating to KMCC's operations as a potentially responsible party at the site or of any other rights or remedies.

Nothing in this agreement is intended, nor shall be interpreted, to limit the scope of the natural resource damage assessment appropriate for this Site or to otherwise restrict or abrogate the authority or discretion of the Trustees to determine the scope of that assessment. Nothing in this agreement is intended, nor shall it be construed as a waiver of any attorney client privilege, work product privilege, or any other privilege that has been or may be asserted in this or any other matter unless explicitly stated herein. Raw or factual data collected pursuant to this MOA shall not be considered work product or attorney-client privileged.

By entering into this MOA, KMCC is not released from any liability, including but not limited to claims for damage, injury, loss or destruction of natural resources or their services, claims for the costs of assessing damage, injury, loss or destruction of natural resources or their services, claims for restoration, rehabilitation, replacement or acquisition of the equivalent of natural resources or lost services of those resources, or any other causes of action or requests for relief, either administratively or judicially, under either state or federal law, as well as any claims, causes of action, or requests for relief in admiralty, arising from the releases described above; provided, however, KMCC shall be released from liability for any administrative costs and expenses reimbursed to the Trustees by KMCC pursuant to Section VII of this MOA.

IX. SETTLEMENT NEGOTIATIONS

Upon completion of the cooperative natural resource assessment, the Parties will employ good faith efforts to resolve any outstanding issues necessary for settlement of all natural resource damages associated with KMCC's operations as a potentially responsible party at the Site. These may include but are not limited to: 1) the location and scope of any natural resource restoration, replacement, and/or acquisition of equivalent natural resources to be undertaken and assessment costs to be paid by KMCC; 2) the amount of any natural resource damages and assessment costs to be paid to the Trustees by KMCC; and (3) the contents and details of the final settlement agreement.

The Parties agree that the final settlement will include a release of natural damage liability or covenant not to sue for natural resource damages pursuant to all applicable Federal and Texas laws, as well as provisions that ensure the successful implementation of the selected restoration project. Subject to the requirements of Paragraph IX, any negotiations regarding the final settlement and details of the settlement negotiations, whether a settlement is reached or not, shall remain completely confidential between the Parties, unless all Parties consent to release such information or unless the release of such information is required by law or compelled by court order.

X. GENERAL

This MOA does not affect or relieve the Parties of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

XI. PROCEDURE UPON DISAGREEMENTS

The Parties will try to resolve any disputes concerning the implementation of this agreement through good faith informal negotiations between KMCC and trustee representatives. Any disputes arising from the conduct or implementation of study plans shall be addressed first by the Technical Committee responsible for study plan formulation. The period for informal negotiations shall not exceed 30 days from the time the dispute arises unless otherwise agreed in writing among all Parties involved. A dispute shall be considered to have arisen when one Party sends the other Parties a written Notice of Dispute. The notice shall describe the dispute with enough specificity to allow the other Parties to identify the issues involved and to respond effectively.

To the extent practicable, such notice will be provided at least 30 days prior to the initiation of any field, analytical, or other assessment work which is the subject of the disagreement or upon such other period for notice as may be agreed upon by the Parties. If the dispute cannot be resolved through informal negotiations as set forth in the preceding paragraph, KMCC agrees to pay the reasonable costs associated with any mediation proceedings which are agreed to by the Parties and which follow 31 TAC §20.43 for guidance.

XII. MODIFICATION AND TERMINATION

Any modification of this MOA or its attachment(s) must be in writing and executed by all of the Parties. Any Party may terminate its participation in this MOA at any time by giving 30 days written notice to all Parties. Notice of intent to terminate participation in the MOA must clearly state the reasons for such termination and must be signed by an authorized official of the terminating Party(ies). Termination by a single Trustee Party shall not void the agreement as to the remaining Parties. The decision of any Party(ies) to conduct independent studies pursuant to Paragraph VIII shall not, in and of itself, be deemed to constitute termination of participation in the MOA.

Termination of this MOA, either as between the Trustees and KMCC or by a single Trustee Party, is prospective only, in that any stipulations incorporated prior to the effective date of termination survive and will remain in effect following any termination, except that KMCC will not be required to complete any work set forth in the Attachments or otherwise agreed to under this MOA that was scheduled to be performed or completed after the effective date of termination.

XIII. NATURAL RESOURCE TRUSTEE CONTACT PERSONNEL

This MOA establishes that TNRCC will serve as the Lead Administrative Trustee (LAT) for this matter. Duties of the LAT include, but are not limited to, the following: scheduling of meetings between the Parties-, acting as the central point of contact for the Parties; maintaining records and documents relating to the injury assessment; and preparing, issuing or arranging for public notices or reports as determined necessary by the Trustees or by the Parties.

Each Trustee agency hereby respectively designates the following person(s) to implement this MOA:

1. For TPWD: Mr. Don Pitts
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744
Phone: (512) 389-4640
Fax: (512) 389-4394

2. For GLO: Ms. Diane B. Hyatt
Texas General Land Office
Natural Resource Damage Assessment
1700 N. Congress Ave., Rm. 630
Austin, Texas 78701-1495
Phone: (512) 475-1395
Fax: (512) 463-5367

3. For TNRCC: Ms. Ginny King
Texas Natural Resource Conservation Commission
Emergency Response & Assessment
Natural Resource Trustee Program
P.O. Box 13087, Capitol Station Austin, Texas 78711-3087
Phone: (512) 239-2152
Fax: (512) 239-2527
4. For DOI: Dr. Stephen Spencer
Office of the Secretary
Office of Environmental Policy and Compliance
P.O. Box 649
Albuquerque, New Mexico 87103
Phone: (505) 766-3595
Fax (505) 766-1059
5. For NOAA: Mr. Ron Gouguet
NOAA Coastal Resource Coordinator (6SF-L)
Office of Ocean Resources Conservation and Assessment
U.S. Environmental Protection Agency Region VI
1445 Ross Avenue
Dallas, Texas 75202
Phone: (214) 665-2232
Fax: (214) 665-6460

XIV. KERR MCGEE CONTACT PERSONNEL

Keith Watson
Project Manager
Kerr-McGee Chemical Corporation
P.O. Box 25681
Oklahoma City, OK 73125
Phone: (405) 270-3747
Fax: (405) 270-3123

XV. TECHNICAL COMMITTEE

The Technical Committee (the "Committee") will be comprised of technical specialists who represent each Party to this MOA. The Committee will meet, as necessary, to negotiate, review and approve work plans and, pursuant to Paragraph XII, to seek resolution of disputes that may-arise from time to time. Technical specialists representing the Trustees' agencies or KMCC and its assessment/restoration contractor, may participate in or contribute to the Committee's discussion and/or activities. Any technical specialist representing KMCC or KMCC's assessment/restoration contractor on the Committee must be an employee of either KMCC or KMCC's assessment/restoration contractor and shall be subject to the confidentiality requirement as described in Paragraph X.

XVI. SIGNATURES

IN WITNESS WHEREOF, the Agreement is executed by each of the Parties as of the dates written below.

TEXAS NATURAL RESOURCE CONSERVATION COMMISSION (TNRCC)
Authorized Official

Dan Pearson
Executive Director

Date: _____

TEXAS PARKS AND WILDLIFE DEPARTMENT (TPWD)
Authorized Official

Andrew Samson
Executive Director

Date: _____

TEXAS GENERAL LAND OFFICE (GLO)
Authorized Official

Spencer Reid
Senior Deputy Commissioner Date:

Date: _____

DEPARTMENT OF THE INTERIOR
Authorized Official

Willie R. Taylor
Director, Office of Environment and Compliance Date:

Date: _____

KERR-MCGEE CHEMICAL CORPORATION (KMCC)
Authorized Official

Date: _____