MEMORANDUM OF AGREEMENT

AMONG

THE ST. REGIS MOHAWK TRIBE
THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
THE UNITED STATES DEPARTMENT OF THE INTERIOR
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGARDING NATURAL RESOURCE DAMAGE ASSESSMENT IN THE
ST. LAWRENCE, RAQUETTE AND GRASSE RIVER ENVIRONMENT
AND COORDINATION OF OTHER STUDIES AND ENFORCEMENT ACTIVITIES

I. INTRODUCTION

This Memorandum of Agreement (Agreement) by and between the St. Regis Mohawk Tribe (Tribe); the New York State Department of Environmental Conservation (DEC); the National Oceanic and Atmospheric Administration (NOAA); the United States Department of the Interior (DOI) (hereafter Trustees); and the United States Environmental Protection Agency (EPA), is entered into in recognition of the common interests of the Trustees for the restoration, replacement and/or acquisition of equivalent natural resources which have been injured, destroyed or lost by the release of hazardous substances into the St. Lawrence environment in and around the State of New York and the St. Regis Mohawk Indian Reservation.

II. AUTHORITY

A. The natural resource Trustees enter into this Agreement in accordance with the natural resource Trustee agencies authorities provided for each such Trustee by 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, 33 U.S.C. §1321(f), and other applicable Federal, State and Tribal law including, the National Contingency Plan (NCP), as amended pursuant to Section 105 of CERCLA, 42 U.S.C. §9605, and, to the extent they are appropriate, the Natural Resource Damage Assessment Regulations, 43 C.F.R. Part 11 (1989), and any amendments thereto.
B. EPA's participation in this Agreement is consistent with its coordination responsibilities under Section 104(b)(2) of CERCLA, 42 U.S.C. §9504(b)(2) as amended. EPA is not a Trustee agency. The Region II Administrator, or his designee, shall act on behalf of the EPA under this Agreement.

C. In accord with Subpart G of the NCP, 40 CFR, 300.600 through 300.615, 55 Federal Register 8857-8858 (March 8, 1990), the following officials or their designees shall act on behalf of the public as Federal, State and Tribal Trustees for natural resources under this Agreement:

Commissioner of Environmental Conservation, New York State Department of Environmental Conservation, for the State of New York,

The Tribal Council, or its designee, for the St. Regis Mohawk Tribe,

The Secretary of the Interior, and

the Under Secretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, acting on behalf of the Secretary of Commerce.

III. SCOPE

This Agreement is intended to cover natural resources as defined under Section 101(16) of CERCLA, as amended, 42 U.S.C. 9601(16), including Tribal resources as permitted by law, belonging to or managed by, controlled by, or appertaining to the Trustees under CERCLA and the NCP in the St. Lawrence, Raquette and Grasse River environment in and around the State of New York and the St. Regis Mohawk Indian Reservation (collectively described herein as the St. Lawrence Environment). The St. Lawrence Environment includes, but is not limited to, the General Motors Massena Plant National Priority List (NPL) Site, the Aluminum Company of America (ALCOA) Massena facility, and the Reynolds Metals, Inc. Massena Facility (hereinafter referred to as Facilities), and all natural resources and areas which may have been affected by polychlorinated biphenyls (PCBs) or other hazardous substances released at or from the Facilities.
IV. PURPOSE

The purpose of this Agreement is to provide a framework for intergovernmental coordination among Trustees and EPA and for implementation of the Trustees' activities in furtherance of their natural resource trustee responsibilities under CERCLA, and other applicable Federal, State and Tribal law, with respect to the St. Lawrence Environment. It is acknowledged that additional agreements may be executed among the Trustees with regard to natural resource damage claims and the restoration, replacement and/or acquisition of equivalent natural resources of the St. Lawrence Environment which have been injured, destroyed or lost by the discharge of hazardous substances from the Facilities.

V. OBJECTIVES

The Trustees shall coordinate their efforts to meet their respective natural resource trustee responsibilities under CERCLA and other applicable Federal, State and Tribal law. The Trustees agree to work together to:

A. Prepare a pre-assessment screen to determine whether to conduct a full natural resource damage assessment.

B. Develop and implement a plan to assess the damages for injured, destroyed or lost natural resources resulting from the release of hazardous substances from the Facilities into the St. Lawrence Environment.

C. Develop and implement a plan for the restoration, replacement and/or acquisition of equivalent natural resources injured, destroyed or lost due to the release of hazardous substances from the Facilities into the St. Lawrence Environment.

D. Determine the costs and expenses likely to be incurred for restoration, replacement and/or acquisition of equivalent natural resources injured, destroyed or lost due to the release of hazardous substances from the Facilities into the St. Lawrence Environment.

E. Determine the value of any loss of use of natural resources injured, destroyed or lost due to the release of hazardous substances from the Facilities into the St. Lawrence Environment.

F. Assess, as appropriate, any other damages for any such injury, destruction or loss of natural resources resulting from the release of hazardous substances from the Facilities into the St. Lawrence Environment.

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G. Coordinate all activities undertaken pursuant to this Agreement with EPA's ongoing response actions in the St. Lawrence Environment.

H. If appropriate, assert claims against responsible and/or potentially responsible parties for damages as compensation for injury, destruction or loss of natural resources and costs incurred in carrying out Trustee responsibilities for natural resource damages resulting from releases of hazardous substances from the Facilities into the St. Lawrence Environment.

VI. FUNDING

A. Trustee Cooperation. Each Trustee agrees to cooperate in the administration of any private funding source or sources that may become available to the Trustees from PRPs or others in the furtherance of this Agreement. Such funds shall be administered through the Trustee Council established pursuant to this Agreement.

B. PRP Funding. If Potentially Responsible Party (PRP) funding of natural resource damage assessment activities becomes available, the Trustee Council may enter into an agreement with the PRP(s) to determine the terms of monetary disbursement and PRP participation. Any such Trustee Council/PRP agreement shall include, at a minimum, the following:

1. A provision establishing an account(s) in an appropriate financial institution or State, Federal or Tribe treasury which is specifically for assessment of natural resource damages related to the St. Lawrence River Environment.

2. A provision which requires the PRPs to deposit an agreed upon amount into the specified account(s).

3. A provision which authorizes the disbursement of sums of money from the account(s) to Trustees to cover expenses associated with the Trustees' participation under this Agreement and as a member of the Trustee Council.

4. A provision which authorizes the Trustee Council to draw and disburse sums of money from the account as are deemed reasonable and appropriate by the Trustee Council for the purposes of natural resource damage assessment and for such other purposes as are determined by the Trustee Council to be in accordance with applicable law.
C. **Governmental Funding.** Each agrees to identify and pursue funding sources, as necessary, and subject to their respective legal limitations, to provide for participation under this Agreement. Nothing in this Agreement shall be construed as obligating the United States Government, the State of New York, the St. Regis Mohawk Tribe, the Department of the Interior, the National Oceanic and Atmospheric Administration, their officers, agents or employees, to expend any funds in excess of appropriations or other amounts authorized by law.

VII. **ST. LAWRENCE ENVIRONMENT TRUSTEE COUNCIL**

A. **Composition.** Within ten (10) days of the execution of this Agreement, each Trustee, as specified under Section II.C., shall designate one primary delegate to the St. Lawrence Environment Trustee Council (hereinafter Trustee Council). Each Trustee shall also designate an alternate delegate. In addition, the U.S. Department of Justice, the Office of the Attorney General for the State of New York, the Mohawk Tribe, NOAA, DOI, EPA, and such other Federal, State and Tribal agencies as the Trustee Council deems appropriate, each may provide one delegate in a legal/consultative role, who shall not be a member of the Trustee Council. All other representatives of the Parties to this Agreement not designated members of the Trustee Council may serve as *ex-officio* (non-voting) members of the Trustee Council.

B. **Communications.** Within ten (10) days of the execution of this Agreement each Trustee shall notify the Administrative Trustee of the name(s), address(es), phone number(s), and facsimile number(s), of the Trustee's primary and alternate delegates to the Trustee Council who shall receive correspondence and communications on behalf of such Trustee.

C. **Decisionmaking.** The four (4) members of the Trustee Council (State of New York, Tribe, DOI, NOAA) shall have equal authority, and all decisions under this Agreement shall be by unanimous agreement of all four Trustees.

D. **Dispute Resolution.** In the event of a dispute involving any decisions under this Agreement, the Trustee Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among Trustees involved in the dispute and consensus by the Trustee Council as a whole. In the event agreement cannot be reached, the matter may be presented to the *ex-officio* members of the Trustee Council for advice or a recommended decision. Such recommended decision, if made, is advisory only and shall not bind any Trustee. If unanimous consent still cannot be reached after consultation with the *ex-officio* members of the Trustee Council, the matter shall be elevated to the Trustees for
decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved.

E. **Duties and Authority.** The Trustee Council shall coordinate and authorize all Trustee activities and matters under this Agreement. The Trustee Council shall have final authority to disburse any PRP funding received pursuant to Section VI of this Agreement and to make all necessary decisions for the management and administration of projects for which PRP funding may be used. This shall include, but is not limited to, the payment of administrative costs to individual Trustees that the Trustee Council determines are reasonable and necessary. The Trustee Council reserves the right to take such further actions as may be necessary to further the purposes and achieve the objectives set forth in this Agreement. The Trustee Council is specifically authorized to assign specific duties or functions to individual Trustees.

F. **Administrative Trustee.** The Trustees hereby agree to designate the Tribe to act as Administrative Trustee under this Agreement. The initial responsibilities of the Administrative Trustee include: scheduling of meetings; preparation of agendas for those meetings; acting as a central contact point for the Trustees; maintenance of records and relevant documents; circulation of documents among Parties; and such other duties as are agreed upon by the Trustee Council pursuant to Section VII C. The Administrative Trustee shall fully coordinate its activities with and act under the direction of the Trustee Council.

G. **The U.S. Environmental Protection Agency.** EPA is an ex-officio member of the Trustee Council. Consistent with its coordination responsibilities under CERCLA, EPA agrees to:

1. Provide notice to the Trustees of any CERCLA related negotiations with, or enforcement action taken against, any PRP or other person with regard to the release or threat of release of hazardous substances or pollutants or contaminants into the St. Lawrence Environment.

2. Coordinate its CERCLA investigative and response actions with the Trustees pursuant to this Agreement.

3. Provide project status reports as they are developed for programs, negotiations, and enforcement actions within the St. Lawrence Environment, under CERCLA, the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, or the Clean Water Act (CWA), 33 U.S.C. §§ 1251-1387.

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H. **Meetings.** Any member of the Trustee Council or EPA may, upon reasonable notice through the Administrative Trustee, call a meeting of the Council to be conducted either in person or by telephone conference call. Such meetings shall generally be held in conjunction with other set meetings among the Trustees to this Agreement. Ex Officio members of the Trustee Council shall be advised by the Administrative Trustee and may attend all meetings and members of the Council may invite their respective staffs or attorneys to attend.

**VIII. NOTIFICATION OF NEGOTIATIONS WITH PRPs**

It is recognized that each Party to this Agreement has and reserves all rights, powers and remedies now or hereafter existing at law or in equity, or by statute or otherwise, and that nothing in this Agreement waives or forecloses the exercise of any such rights, powers or remedies. However, each Party to this Agreement agrees to the extent practicable to provide twenty (20) days prior written notice to each of the other Parties to this Agreement of its intent to participate in negotiations with any Potentially Responsible Party (PRP) or other entity regarding settlement or other disposition of natural resource damage claims in the St. Lawrence Environment.

The Parties agree to inform each other within five (5) working days of any oral or written communications to or from the PRPs regarding settlement or other disposition of natural resource damage claims in the St. Lawrence Environment. The substance of any such communications shall be shared with the Parties.

The Parties further agree to provide copies of any agreements or other documents reflecting settlement or other disposition of such claims. If the Party refuses to do so for any reason, that Party shall no longer be a Party to this Agreement unless all remaining Parties request in writing within ten days (10) that such Party remain a Party.

**IX. CONFIDENTIALITY**

A. **Need for Confidentiality Among Parties.** As a result of the releases of hazardous substances from the Facilities, the Trustees have potential claims for damages and anticipate possible litigation with the PRPs, and in furtherance of their common interests the parties to this Agreement have been meeting to discuss matters of common interest, including the possible litigation by the Trustees against the PRPs.
B. Terms of Confidentiality Agreement. The Parties to this Agreement believe that the sharing of information has furthered their common interests with respect to the St. Lawrence Environment and believe that continued sharing of information will be useful and hereby agree as follows:

1. As a matter of policy, the Parties wish to disclose information to the public consistent with the Trustees' interests in prosecuting claims for damage to public resources pursuant to this Agreement. Except as provided in Paragraphs 2 through 6 below, factual information, including factual data and accepted technical data, relating to releases of hazardous substances in the St. Lawrence Environment shall be made available to the public upon request and in accordance with applicable law.

2. All documents and other communications, whether written or oral, which are to be provided by any party to another party in their joint effort relating to natural resources damages as described above, shall be treated by the recipient Party as confidential. Among the documents and communications which are confidential and are subject to the terms and conditions of this Agreement are documents and other communications relating to technical opinions, legal opinions, expressions of expert opinions, and proposed settlement offers. Unless release is ordered by a court of competent jurisdiction, such documents and communications shall not be released, disclosed or discussed by the recipient Party in any manner whatsoever with persons other than Parties to this Agreement, their attorneys, and consultants who have need for such documents and who agree to be bound by the terms of this Agreement.

3. Any Party who receives a request from a non-party to release or have access to any of the aforementioned confidential documents and communications shall notify every other Party in writing of receipt of such request whether or not the intended response is to release documents or other communications subject to this Agreement or a portion thereof. The Party who receives a request shall also provide a copy of the request and a draft of the Party's intended response thereto not less than ten (10) days prior to the date that the Party intends to issue its response. If another Party objects to such release, such release shall not take place, except as otherwise required by law.

4. Where otherwise permitted by law, all the Parties may agree to release documents or other communications subject to non-disclosure under
this Agreement. Such agreement to release documents or other communications shall not be unreasonably withheld, nor shall it be construed as a waiver of confidentiality regarding the release of other documents or communications subject to non-disclosure under this Agreement.

5. This Confidentiality Agreement does not apply to documents or communications previously released to the PRPs or other members of the public in accordance with applicable law.

6. The transmission of information or documents between or among the Parties by whatever means shall not constitute waiver of any discovery privilege, immunity or exemption from disclosure applicable to requests by any person not a Party to this Agreement for the release or production of any document or information subject to non-disclosure hereunder.

X. MISCELLANEOUS PROVISIONS

A. Reservations. Neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Party named herein (or any government) of (nor be construed as precedent for) any legal responsibility under federal, state or tribal law to protect, restore, or enhance any natural resources located within the St. Lawrence Environment over which any other Trustee asserts jurisdiction. Furthermore, neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any liability for damage or injury (which may be shown to have occurred by the natural resource damage assessment to be performed under this MOA) to any natural resources located within the St. Lawrence Environment over which any other Trustee asserts jurisdiction.

B. Limitation of Authority. The Trustees and the Administrative Trustee are not authorized to enter into settlements on behalf of the other trustees and a Trustee or the Administrative Trustee does not represent another trustee in any litigation that may be commenced by the other trustees.

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

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D. **Effective Date: Amendment and Termination.** This Agreement shall be effective when executed by all of the Parties and may not be amended except by written agreement of all the Parties. This Agreement can be executed in one or more counterparts, each of which will be considered an original document. This Agreement shall continue in effect until terminated by agreement of all the Parties, provided, however, that any party may terminate its participation in the Agreement upon giving thirty (30) days written notice to all other Parties or as otherwise provided for herein. The withdrawal of any Party to this Agreement for whatever reason, shall not affect the subsequent validity of this Agreement among the remaining Parties, and the remaining parties agree to use remaining PRP funds to assess natural resources damages in the St. Lawrence Environment.

E. **DOI Regulations.** While the Trustees expect that the procedural aspects of the proposed damage assessment will be carried out in a manner generally consistent with the federal regulations for "Type B" full-field assessments, the Trustee agencies have not yet made a final decision as to whether or not they wish to utilize these regulations in conducting the assessment.

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

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THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

**BY: [Signature]**

Commissioner Thomas Jorling

**8/20/91**

(Date)

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THE ST. REGIS MOHAWK TRIBE

BY: [Signature]
Head Chief L. David Jacobs
3/18/91 (Date)

BY: [Signature]
Chief Lincoln C. White
3/18/91 (Date)

BY: [Signature]
Chief Norman Tarbell
3/19/91 (Date)

THE U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: [Signature]
Regional Administrator
(Date)

THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATURAL RESOURCE TRUSTEE AUTHORIZED OFFICIAL

BY: Charles N. Ehler,
Director of Oceanography and Marine Assessment
(Date)

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THE ST. REGIS MOHAWK TRIBE

BY: Head Chief L. David Jacobs (Date)

BY: Chief Lincoln C. White (Date)

BY: Chief Norman Tarbell (Date)

THE U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: Regional Administrator (Date)

THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATURAL RESOURCE TRUSTEE AUTHORIZED OFFICIAL

BY: Charles N. Ehler, Director of Oceanography and Marine Assessment (Date)

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THE ST. REGIS MOHAWK TRIBE

BY: ___________________________ (Date)
     Head Chief L. David Jacobs

BY: ___________________________ (Date)
     Chief Lincoln C. White

BY: ___________________________ (Date)
     Chief Norman Tarbell

THE U.S. ENVIRONMENTAL PROTECTION AGENCY

BY: ___________________________ (Date)
     Regional Administrator

THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATURAL RESOURCE TRUSTEE
AUTHORIZED OFFICIAL

BY: ___________________________ (Date)
     Charles N. Ehler,
     Director, Office of Oceanography and
     Marine Assessment

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