

MEMORANDUM OF AGREEMENT
CONCERNING NATURAL RESOURCE DAMAGES
IN THE MATTER OF MONTAUK OIL TRANSPORTATION CORP.
AS OWNER OF THE BARGE CIBRO SAVANNAH

90 CIV 5702 (KMW)

BETWEEN
THE UNITED STATES OF AMERICA
ACTING THROUGH THE NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION OF THE U.S. DEPARTMENT OF COMMERCE
THE STATE OF NEW JERSEY
THE STATE OF NEW YORK
AND THE CITY OF NEW YORK

WHEREAS, the United States of America, acting by and through the National Oceanic and Atmospheric Administration of the United States Department of Commerce (hereinafter, "NOAA"), the State of New Jersey (hereinafter, "New Jersey") and the State of New York (hereinafter, "New York") are trustees for, and with the City of New York (hereinafter the "City") (collectively, the "Governments") are owners of certain natural resources and other interests located within New Jersey and New York injured by a spill of oil from the barge CIBRO SAVANNAH which occurred on or about March 6, 1990 (hereinafter, the "Spill"); and

WHEREAS, in response to the September 5, 1990 complaint by Montauk Oil Transportation Corp. ("Montauk") in the United States

District Court, Southern District of New York, for limitation of liability, the Governments filed claims against Montauk under federal, New Jersey, New York and New York City law for, among other things, damages for injuries to natural resources ("NRD") located within New Jersey and New York, and response and NRD assessment costs incurred;

NOW, THEREFORE, the Governments have determined and agreed, consistent with the objectives of the National Contingency Plan, the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the New Jersey Spill Compensation and Control Act, the New Jersey Water Pollution Control Act, the New York State Navigation Law, and the New York City Administrative Code, to enter into and adopt this Memorandum of Agreement ("MOA"), as follows, in order to (A) cooperate with each other in carrying out their responsibilities for protecting and restoring natural resources; (B) establish the following allocation of funds for NRD and response and assessment costs; and (C) establish procedures for the custody, management, and disbursement of natural resource damages payable in (1) the settlement with Bouchard Transportation Co., Inc. ("Bouchard"); (2) the partial settlement with Montauk and its majority

shareholders; and (3) any future recoveries from Montauk's non-settling shareholders to the Governments.

I. ALLOCATION OF COSTS AND NATURAL RESOURCE DAMAGES FROM BOUCHARD SETTLEMENT AND MONTAUK PARTIAL SETTLEMENT

A. For injuries to natural resources under the co-trusteeship of the United States and New Jersey, \$240,000 will be deposited and held in a joint New Jersey/NOAA account hereinafter referred to as the "New Jersey Custodial Account" as specified in paragraph II.B. of this MOA.

B. New Jersey will receive \$10,000, excluding prejudgment interest, in partial payment of its costs from the partial settlement. New York, the City, and NOAA will receive (1) approximately one-half of their incurred costs, excluding prejudgment interest; and (2) a proportional amount of an additional \$100,000, prorated as provided in Paragraph IV.B., below, in partial reimbursement of their incurred costs. the costs shall be allocated as follows: New York will receive \$6,550; the City will receive \$122,880; and NOAA will receive \$56,630.

C. For injuries to natural resources under the co-trusteeship of the United States and New York, \$88,940 will be

deposited and held in a joint New York/NOAA account hereinafter referred to as the "New York Custodial Account", as specified in Paragraph II.E. of this MOA.

II. DEPOSIT AND CUSTODY OF NATURAL RESOURCE DAMAGE RECOVERY

A. Any payments from Bouchard, Montauk and any Montauk shareholders, either through the Consent Decree to which this MOA is appended or a judgment award, for natural resource damage restoration in New Jersey shall be made payable by cashier's or bank check or check drawn on an attorney's escrow account to "Treasurer, State of New Jersey," which shall be sent to the New Jersey representative designated in subparagraphs IX.A. and IX.B. of the Consent Decree entered in this case and noted above, and shall then be delivered to the following New Jersey custodial representative, or his designated successor:

James F. Hall
Assistant Commissioner
Natural & Historic Resources
Department of Environmental Protection
501 East State Street, Floor 3
P. O. Box 404
Trenton, New Jersey 08625-0404

B. Upon receipt of any payment from Bouchard, Montauk or any Montauk shareholder for natural resource damage restoration, the New Jersey custodial representative shall cause the funds to be placed into a segregated, interest-bearing bank account ("New Jersey Custodial Account") controlled by the State Department of Environmental Protection, or any successor thereto.

C. As custodian and co-trustee, New Jersey shall not withdraw, pledge, hypothecate, or apply the natural resource damage recovery funds, or interest thereon, from the New Jersey Custodial Account, except (1) upon prior consultation with, and agreement of, NOAA and (2) in accordance with this MOA. It is understood that NOAA, as co-trustee for natural resources shared by the United States and New Jersey, enjoys an undetermined and undifferentiated interest in the custodial account.

D. Payments from Montauk or any Montauk shareholder, either through the Consent Decree to which this MOA is appended, or judgement award, for natural resource damage restoration in

New York, shall be by cashier's or bank check or check drawn on an attorney's escrow account check made payable to "State of New York", as provided in paragraph IX.A. of the consent decree entered in this case, and shall be delivered to:

Gordon J. Johnson, Esq.
New York Department of Environmental Conservation
Department of Law - Environmental Protection Bureau
120 Broadway - 26th Floor
New York, New York 10271

E. Upon receipt of any payment from Montauk or any Montauk shareholder for natural resource damage restoration, New York, as custodian, shall cause the funds to be placed into a segregated, interest-bearing bank account ("New York Custodial Account") controlled and maintained by the New York State Office of the Attorney General, or any successor thereto.

F. As custodian and co-trustee, New York shall not withdraw, pledge, hypothecate, or apply the natural resource damage restoration funds, or interest thereon, from the New York Custodial Account, except in accordance with this MOA. It is

understood that NOAA, as co-trustee for natural resources shared by the United States and New York, enjoys an undetermined and undifferentiated interest in the custodial account. New York shall not withdraw, pledge, hypothecate, or apply the natural resource damage restoration funds, or interest thereon, from the New York Custodial Account, without prior consultation with, and agreement of the City and NOAA.

III. USE OF NATURAL RESOURCE DAMAGE RECOVERY

A. All sums deposited in the separate State custodial accounts, and the interest thereon, shall be expended on projects benefiting natural resources injured by this Spill within the State in which the funds are held and in accordance with the Natural Resource Restoration Plan for Oil and Chemical Releases in the New York/New Jersey Harbor Estuary dated May, 1996, prepared by the New York/New Jersey Harbor Spill Restoration Committee, for:

(1) the restoration, replacement, rehabilitation, protection or acquisition of the equivalent of lands (including tidal and intertidal wetlands and waterways) and natural resources and related ecosystems impacted or affected by the Spill, including the establishment, maintenance and provision of public access;

(2) the acquisition of fee title of, or conservation easements on, lands or property in the New York/New Jersey Harbor and related ecosystems constituting natural resources equivalent to any affected by the Spill;

(3) performance of studies and undertaking of projects in the New York/New Jersey Harbor and related ecosystems necessary and appropriate to the planning, implementation, or monitoring of the natural resources, or the restoration, rehabilitation, replacement or acquisition process; and

(4) planning, oversight and administrative costs, operation and maintenance costs required for any of the foregoing activities. Except with the written consent of the governments

having an interest in the respective State custodial account, expenses for planning, oversight and administrative costs shall not exceed 10% of the total amount placed into such custodial account.

B. Prior to any withdrawal, pledge, hypothecation, or application of sums deposited in a custodial account, or any interest thereon, New Jersey shall obtain the written concurrence of NOAA, and New York shall obtain the written concurrence of the City and NOAA. To facilitate this process, each State shall provide to NOAA, and/or to the City as required, reasonable advance notice of, and an opportunity to consult with, participate in, and comment upon the planning, development, implementation, and monitoring of all projects to be performed pursuant to Paragraph III.B. Within 30 days of receiving a request for concurrence, NOAA and/or the City as required, shall in writing approve or reject the request, or specify any additional information necessary or helpful to its determination.

If NOAA and/or the City does not respond in writing within thirty (30) days of receiving either the request for concurrence or any specified information, the concurrence shall be deemed granted.

C. Requests for NOAA's concurrence shall be sent to, and concurrence by NOAA for any proposed project under the MOA shall be issued by, the following person or his or her designee or successor:

John Catena
Restoration Center
National Marine Fisheries Service, NOAA
One Blackburn Drive
Gloucester, MA 01930

D. Requests for the City's concurrence shall be sent to, and concurrence by the City for any proposed project under the MOA shall be issued by, the following person or his or her designee or successor:

Susan Amron
New York City Law Department
100 Church Street, Room 3-136
New York, NY 10007

E. Each State shall submit to the addressee in Paragraphs III.C. and D., as required, or their designees or successors, copies of draft and final work plans and contracts for projects on which NOAA, and the City as required, have concurred and for which funds are being disbursed from the custodial account(s) under this MOA.

- F. All documents, notices and requests provided to NOAA, and to the City as required, under this MOA shall be accompanied by a cover letter indicating that the submission relates to "Barge CIBRO SAVANNAH, In the Matter of Montauk Oil Transportation Corp. - Natural Resource Damage Restoration Project(s)."

G. Written communications to New Jersey shall bear the reference in Paragraph III.F. and shall be sent to the addressee in Paragraph II.A., or his designee or successor.

H. Written communications to New York shall be sent to:

Steve Sanford (or his designee or successor)
NRD Unit, New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233

and shall bear the reference in Paragraph III.F.

IV. SUBSEQUENT RECOVERIES

A. For any subsequent recovery(ies) from the non-settling Montauk shareholders, New Jersey shall not receive any additional funds until two conditions are met:

(1) New York State, the City and NOAA recover all remaining unsatisfied costs, which total \$4,069.24 for New York; \$139,380.47 for the City; and \$49,092.00 for NOAA, including prejudgement interest; and

(2) New York recovers an additional \$71,060 in NRD funds, so that NRD funds are distributed 60% to New Jersey and 40% to New York.

B. The first \$263,601.71 of any recovery from the non-settling 20% shareholders shall be divided among New York, the City, and NOAA, based upon prorated shares of the total judgment

as follows: New York, unsatisfied costs - 1.55%; the City, unsatisfied costs - 52.88%; NOAA, unsatisfied costs - 18.63%; and New York/NOAA NRD - 26.94%.

C. After New York, the City, and NOAA recover their unsatisfied costs, and New York and NOAA together recover an additional \$71,060 in NRD funds (which together total \$263,601.71) then New Jersey shall be entitled to recover its remaining costs of \$5,129.85.

D. Thereafter, all funds recovered shall be allocated 60% to the New Jersey Custodial Account, and 40% to the New York Custodial Account.

V. VALIDITY, DURATION AND AMENDMENT OF MOA

A. In the event that any provision of this MOA relating to custody or disbursement of the natural resource damage restoration funds, or any activity undertaken thereunder, is declared invalid by a court of competent jurisdiction, then any funds relating to the provision or activity in question, to the

extent not already expended, shall be kept or deposited in an interest-bearing account pending an order by a court of competent jurisdiction providing for a disposition of the funds that is consistent with applicable law and the purposes of this MOA as expressed *inter alia* in Paragraphs III. A and B.

B. This MOA shall be effective upon entry of the Consent Decree to which this MOA is attached as an Order of the United States District Court. The MOA shall remain in full force and effect until the State(s) notify the United States, and New York City as required, that all sums in the custodial account have been exhausted and until the Governments agree that no other natural resource damage recovery or costs will be obtained from Montauk or its shareholders, including non-settling shareholders.

C. This MOA may be amended by written agreement by the Governments through their authorized representatives.

VI. AUTHORIZED SIGNATORIES

Each of the undersigned certifies that he or she is fully authorized to enter into the terms and conditions of this MOA, and to execute and legally bind his or her Government as a party to this document.

VII. COUNTERPARTS

This MOA may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument.

[First signature page of four signature pages for Memorandum of Agreement in the matter of Montauk Oil Transportation]

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION:

DATE:

1/2/99



Craig O'Connor
Deputy General Counsel

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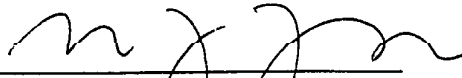
FOR THE STATE OF NEW YORK:

Eliot Spitzer
Attorney General

DATE:

1/4/99

By:



Gordon J. Johnson
Deputy Bureau Chief
Environmental Protection Bureau
New York State Department of Law

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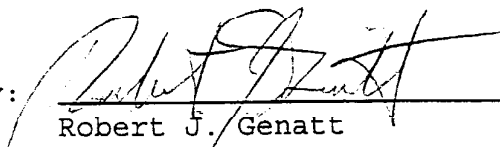
FOR THE STATE OF NEW JERSEY:

PETER VERNIERO
Attorney General

DATE:

1/13/99

By:



Robert J. Genatt
Deputy Attorney General

[Fourth signature page of four signature pages for Memorandum of Agreement in the matter of Montauk Oil Transportation]

FOR THE CITY OF NEW YORK:

Michael D. Hess
Corporation Counsel

DATE: 12/21/98

By: Marjorie Fox
Marjorie Fox
Assistant Corporation Counsel
Environmental Law Division