

**Memorandum of Agreement between NOAA and New Jersey Regarding Natural Resource Restoration Activities Arising from the *Athos I* Spill in the Delaware River
March 3, 2010**

**Memorandum of Agreement between the National Oceanic and Atmospheric Administration and the State of New Jersey
Regarding Natural Resource Restoration Activities Arising From *Athos I* Spill in the Delaware River**

I. PURPOSE AND AUTHORITY:

(A) This Memorandum of Agreement (hereinafter referred to as the “MOA”) is between the National Oceanic and Atmospheric Administration (NOAA) acting on behalf of the U.S. Department of Commerce and the State of New Jersey (hereinafter collectively referred to as the “Trustees”). The parties to this MOA agree to coordinate and cooperate when undertaking New Jersey restoration projects to address injuries to natural resources and services caused by the 2004 *Athos* oil spill on the Delaware River (the “Incident”). This MOA outlines the following:

(1) The process that will be used by the Trustees when undertaking and overseeing the restoration projects outlined in the final Damage Assessment and Restoration Plan/ Environmental Assessment (hereinafter referred to as the “final Restoration Plan”). The Trustees have determined that the final Restoration Plan complies with applicable federal law as well as the laws of the State of New Jersey (the final Restoration Plan is incorporated here in as Attachment A); and

(2) The process that will be used to account for money received by New Jersey from the Oil Spill Liability Trust Fund (“OSLTF”), under the authority of the National Pollution Funds Center (“NPFC”).

(B) The Trustees anticipate that the NPFC will award the funds required to undertake restoration pursuant to the final Restoration Plan. Once these OSLTF funds are received, the Trustees will establish four (4) New Jersey *Athos* Accounts (the “*Athos* Accounts”) within the New Jersey Hazardous Discharge Site Cleanup Fund. Expenditures from the *Athos* Accounts will be used to restore, replace, rehabilitate, or

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acquire the equivalent of injured natural resources and/or services caused by the Incident in accordance with the requirements of the Oil Pollution Act of 1990 (OPA). When overseeing required restoration and accounting for the use of money from the NPFC, the Trustees agree to follow the processes outlined in the final Restoration Plan and this MOA.

(C) The Trustees enter into this Agreement in accordance with the natural resource Trustee authorities provided for each Trustee under § 1006 (a) (g) of the Oil Pollution Act (OPA) of 1990, 33 U.S.C. § 2706(a)-(g); § 311(c) of the Clean Water Act (CWA), 33 U.S.C. § 1321 (f); and other applicable Federal law, and State statutory and common law, including, but not limited to, the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), as amended, 40 C.F.R. Part 300, and the OPA Natural Resource Damage Assessments Final Rule, 15 C.F.R. Part 990, 61 F.R. 440 (January 6, 1996) and 91; N.J.S.A. § 13:1D .9f and 9q, N.J.S.A. § 58:10-23.11 et seq.; N.J.S.A. § 58:10A-1 et seq.

In accord with Section 1006(b) of OPA, 33 U.S.C. § 2706 (b), and Subpart G of the NCP, 40 CFR § 300.600 through 300.615, the following officials or their designees shall act on behalf of the public as Federal and State Trustees for natural resources under this Agreement:

- (1) Director, Office of Response and Restoration, NOAA, acting on behalf of the Secretary of Commerce; and
- (2) Commissioner, State of New Jersey Department of Environmental Protection by and through the New Jersey Office of Natural Resource Restoration.

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II. FACTS:

(A) The *Athos* Incident and Restoration Planning. The Incident at issue involved a ship, the *M/T Athos I* (*Athos*), which released more than 263,000 gallons of crude oil, causing injuries to fish, wildlife, and habitat along more than 115 river miles of the Delaware River and its tributaries. Under OPA, two federal government agencies—the National Oceanic and Atmospheric Administration (NOAA) and U.S. Fish and Wildlife Service (USFWS)—and the three affected states—New Jersey, Pennsylvania, and Delaware—are the trustees for and responsible for restoring natural resources injured by the Incident. The Trustees are responsible for developing and implementing a plan for the restoration of resources under their trusteeship that were injured by oil spills.

Accordingly, the Trustees signed the 2005 *Athos* Trustee MOA (http://www.darrp.noaa.gov/northeast/athos/pdf/Final_MOA_with_NOAA-DE-NJ-PA_from_Athos_I.pdf), outlining the framework for Trustee cooperation and establishing a Trustee Council, while providing a process for underwriting the costs of natural resource damage assessment and related actions. (See, Attachment A.) The Trustees undertook an extensive assessment of the injuries caused by the *Athos* Incident and considered a wide range of possible restoration options, which were identified in a draft Damage Assessment and Restoration Plan/Environmental Assessment (“draft Restoration Plan”). This draft Restoration Plan was made available for public review, pursuant to the requirements of OPA and the National Environmental Policy Act (NEPA). With the assistance of scientific experts and the public, the Trustees selected certain proposed restoration projects outlined in the final Restoration Plan and summarized herein at Section IV. (See, Attachment A.)

(B) Trustees’ Claim for Restoration Funding. Since the U.S. Coast Guard determined that the Responsible Party met the limit of its liability for the Incident, the Trustees submitted their natural resource damage (NRD) claim to the OSLTF, pursuant to 33 U.S.C. § 2712(a)(4). The claim focused on the cost of restoring natural resources injured as a result of the Incident, and redressing the public’s loss of use of those resources. The amount of restoration funding sought by the Trustees included:

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- (1) Injury assessment costs;
- (2) The cost of implementing the ten selected projects outlined in the final Restoration Plan, three of which are located in New Jersey and are the subject of this MOA;
- (3) Project administration and oversight costs, including the costs incurred by the Trustees; and
- (4) Contingency funds to provide for unknown, uncertain, and/or unanticipated conditions. (A summary of project costs is given in Attachment B.)

Money received from the OSLTF claim will be deposited into the *Athos* Accounts. (Requirements relating to use of the *Athos* Accounts are outlined at Section V.) NPFC finalization of the Trustees' claim will be documented in the *Athos* Restoration Administrative Record.

III PARTIES:

(A) Federal and State Trustees. The natural resource Trustees who are parties to this MOA are:

- (1) The Director, Office of Response and Restoration, NOAA, acting on behalf of the Secretary of Commerce; and
- (2) Commissioner, State of New Jersey¹ Department of Environmental Protection by and through the New Jersey Office of Natural Resource Restoration.

¹ New Jersey is a party to the 2005 *Athos* MOA, but is also a party to this MOA with NOAA, acting in its capacity as Lead Administrative Trustee ("LAT"), to manage and implement the three restoration projects identified in the final Restoration Plan for which New Jersey is acting as Lead Implementing Trustee ("LIT"). The other Trustees (NOAA, DOI, PA, and DE) are acting under an addendum to the 2005 *Athos* MOA for restoration implementation, which may be found at: <http://www.darrp.noaa.gov/northeast/athos/index.html>.

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(B) Trustee Representatives. The Trustee Representatives are the authorized designees appointed by the Trustees of NOAA and New Jersey. Each Trustee will designate one representative to serve on the Restoration Trustee Council. Each Trustee representative shall have one Council vote each, and all decisions under this MOA shall be by unanimous agreement. The Restoration Trustee Council's activities will be overseen by the LAT pursuant to Section VII below.

(C) Restoration Trustee Council. Within ten (10) business days of the execution of this MOA, each Trustee shall designate a Primary Trustee Representative to the Restoration Trustee Council, which is formed for the purposes of implementing the three (3) restoration projects listed in Section IV (A) below. The Restoration Trustee Council will oversee coordination of restoration activities arising from the Incident. The duties of the Restoration Trustee Council are outlined at Section VI below.

(D) Lead Implementing Trustees and Lead Administrative Trustee. Except as otherwise provided by the Restoration Trustee Council, each of the selected restoration projects listed at Section IV will be managed by a Lead Implementing Trustee (LIT) who will be responsible for overseeing specific restoration and other work related to the designated restoration project. The actions of the LIT will be overseen by the Restoration Trustee Council. NOAA will carry out the duties of the Lead Administrative Trustee (LAT), outlined at Section VII below.

IV. RESTORATION PROJECTS:

The final Restoration Plan outlined injuries to shorelines, aquatic resources, birds, wildlife and their associated habitats, as well as recreational resources that were caused by the Incident. After assessing these injuries and reviewing project alternatives, the Trustees developed a draft Restoration Plan that was made available for public review and comment. After reviewing all comments received, the Trustees developed a final

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Restoration Plan that contained ten restoration projects selected for funding via their OSLTF claim. The three (3) New Jersey projects that are the subject of this MOA are identified below:

- (1) Creation of oyster reefs (LIT is N.J.);
- (2) Habitat restoration (marsh, grassland, and meadow) at Mad Horse Creek Wildlife Management Area (LIT is N.J.); and
- (3) Improving the Stow Creek boat ramp (LIT is N.J.);

Should unforeseen problems arise in undertaking the above-specified restoration projects, the *Athos* 2005 MOA Trustee Council will consider substituting them with appropriate alternatives that meet the goals outlined in the final Restoration Plan.

V. *ATHOS* ACCOUNTS AND FUNDING ISSUES:

(A) The *Athos* Accounts. When NPFC grants its award of the Trustees' NRD claim, the Restoration Trustee Council shall instruct NPFC to send the portion of the funds allocated for implementation of the restoration projects identified in Section IV above to the New Jersey Hazardous Discharge Site Cleanup Fund. Upon receipt of the *Athos* NPFC claim funds, the Restoration Trustee Council shall instruct the New Jersey Hazardous Discharge Site Cleanup Fund Manager to deposit the funds received from the NPFC, in amounts as specified by the Restoration Trustee Council, into the four (4) segregated accounts described below:

- (1) the "*Athos* Mad Horse Creek Restoration Project Account (The funds in this account shall be used for implementation, administration, monitoring, and oversight of the Mad Horse Creek Restoration project);
- (2) the "*Athos* Oyster Reef Creation Project Account (The funds in this account shall be used for implementation, administration, monitoring, and oversight of the Oyster Reef Creation Project)";

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(3) the *Athos* Stow Creek Boat Ramp Project Account (The funds in this account shall be used for implementation, administration, monitoring, and oversight of the Stow Creek Boat Ramp Project; and

(4) the *Athos* New Jersey Restoration Trustee Council Administrative Costs Account” (The funds in this account shall be used to pay for oversight and administration costs incurred by New Jersey for its Restoration Trustee Council duties).

(B) Use of the *Athos* Accounts.

(1) Funds in the *Athos* Accounts shall be used only for the implementation, administration, monitoring, and oversight of the New Jersey restoration projects identified in the Trustees’ final Restoration Plan or Restoration Trustee Council’s authorized alternative projects, as appropriate for the following purposes:

- a. The monies in the *Athos* Mad Horse Creek Restoration Project Account shall be used only for implementation of the Mad Horse Creek Project;
- b. The monies in the *Athos* Oyster Reef Creation Project shall be used only for implementation of the Oyster Reef Creation Project;
- c. The Restoration Trustee Council will oversee the progress of ongoing restoration projects and expenditures from the *Athos* New Jersey Restoration Trustee Council Administrative Costs Account in accordance with the terms of this MOA. New Jersey may use money from the appropriate *Athos* New Jersey Restoration Trustee Council Administrative Costs Account to pay/reimburse direct and/or indirect administrative costs and expenses incurred by New Jersey. Such costs may include, but are not limited to:

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- i. the preparation or review of documents pertaining to the selected restoration projects;
 - ii. direct and indirect costs related to restoration project implementation, administration, monitoring, and oversight; and
 - iii. other related costs, including travel expenses and/or the cost of managing contracts/projects.

- d. Recreational Projects are subject to specific funding and reimbursement requirements outlined at Section V (F).

(2) Pursuant to NPFC guidance and OPA, 33 U.S.C. at §2706(f), any funds remaining in the *Athos* Accounts that are not used for the purposes of implementation, administration, monitoring, and oversight of restoration projects must be returned to the OSLTF. Earned interest must also be returned to the NPFC's OSLTF, unless the Restoration Trustee Council requests and receives concurrence from NPFC to allow for specific amounts of interest to be used for specified project expenses.

(C) Distribution of Restoration Funds. The LITs will submit Disbursement Requests ("Requests") for projects for which they are responsible to all Trustees. Requests shall contain cost documentation related to specific restoration projects and may include labor reports, designs, scopes of work, cost estimates and/or construction bid packages. Project funds will be disbursed pursuant to an approved Disbursement Resolution which shall be signed by the LAT and New Jersey as the LIT responsible for the project. If New Jersey or NOAA fails to submit a written objection within thirty (30) days of receipt of a Request, the Disbursement Resolution based on that Request will presume to have been approved. Trustees may establish additional procedures, consistent with this MOA Addendum, regarding the expenditure of money from the Restoration Account, as they deem necessary.

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(D) Cost Deviations. During restoration implementation phase, the LIT shall not obligate any funds from any project account if it determines that actual itemized costs for planning and design, implementation, administration, monitoring, and/or oversight exceed the estimated itemized costs submitted to the OSLTF with the NRD claim by ten (10) per cent or more. In this event, the LIT will notify the LAT as expeditiously as possible, but in no event more than ten (10) business days after discovery of the discrepancy. The LAT will review the facts and notify all members of the Restoration Trustee Council and NPFC about the situation, and, with the Trustee Council, determine whether or not the use of Contingency Funds is warranted.

(E) Use of Contingency Funds. The Trustees' NRD claim to the OSLTF outlined project costs, addressing identified risks within a defined project scope. Contingency funds were also requested to cover unknown, uncertain, and/or unanticipated conditions. However, if a LIT determines that additional funds will be needed to address costs that were unknown, uncertain, and/or unanticipated at the time the NRD claim was made, it shall request that a supplemental claim be made in accordance with NPFC guidance. The requesting LIT will need to demonstrate the reasonableness of its request, outlining why an allocation of additional funds is needed.

(F) Recreational Project Costs.

(1) Cost Allocation. The New Jersey recreational project described in Section IV above is the Stow Creek Boat Ramp. The monies in the Athos Stow Creek Boat Ramp Project Account shall be used only for the implementation of the Stow Creek Boat Ramp Project, subject to subparagraph (3) of this paragraph.

(2) Contingency Funds. The LIT may request contingency funds for the Stow Creek Boat Ramp Project only if the project cost is increased due to unknown or

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unforeseen circumstances or events that were not accounted for in initial cost estimates; provided, however, no contingency funds will be paid to the LIT unless the NPFC gives prior written approval allowing the Restoration Trustee Council to use contingency funds for this purpose.

(3) Unused Funds. If funds remain after completion of the Stow Creek Boat Ramp Project, the Restoration Trustee Council will ask the NPFC to review a revised plan to use this money on another existing or new recreation project. As part of the submission of such a revised plan, the Trustees shall affirm that they are in compliance with any and all requirements under the law, including but not limited to, the public review process. The Trustees shall likewise affirm that monies received cannot be transferred to fund other non-recreational projects, such as shoreline, aquatic, or bird and wildlife restoration.

VI. *ATHOS* ACCOUNTS – ROLE OF RESTORATION TRUSTEE COUNCIL:

The Restoration Trustee Council will oversee the progress of ongoing restoration and review expenditures from the *Athos* Accounts. The Restoration Trustee Council will also be responsible for the following:

(A) The Restoration Trustee Council will oversee the implementation, administration, monitoring, and oversight of the New Jersey Stow Creek Boat Ramp Project identified in Section IV of this MOA, undertaking the necessary decisions to manage and administer monies from the *Athos* Accounts for this purpose.

(B) If the Restoration Trustee Council determines that any of the New Jersey restoration projects identified in Section IV of this MOA is infeasible, impractical, or otherwise not in the public interest, it will determine if a significant modification of the project or a new project is required. If so, the 2005

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MOA Trustee Council will select an appropriate modification or develop a project alternative that meets the OPA criteria and other applicable legal requirements. The 2005 MOA Trustee Council shall also provide for public notice and comment for any significant project modification or any new restoration project. Notice of such project changes shall also be provided to NPFC. Should any additional funds be needed, the 2005 MOA Trustee Council will submit a supplemental claim to the OSLTF.

(C) The Restoration Trustee Council will transfer funds from the *Athos* Accounts to implement the New Jersey restoration projects identified in Section IV of this MOA or appropriate alternatives developed and approved by the Restoration Trustee Council. The LAT will assist the Restoration Trustee Council by developing procedures for and preparing appropriate forms for disbursements (either reimbursements or advance payments) from the *Athos* Accounts for the Restoration Trustee Council.

(D) New Jersey will be responsible for providing all required documentation demonstrating that monies withdrawn from the *Athos* Accounts were used for the purposes authorized by the Restoration Trustee Council and that these expenses were accounted for. Such an accounting may include, but is not limited to, the provision of receipts, contracting information, or other documentation requested by the Restoration Trustee Council. The Restoration Trustee Council will maintain responsibility for providing any accounting documentation that may be required by NPFC.

VII. LEAD ADMINISTRATIVE TRUSTEE (LAT):

(A) NOAA shall serve as the LAT and be responsible for:

- (1) Serving as a central point of contact;

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- (2) Convening Restoration Trustee Council meetings;
- (3) Producing agendas and action items;
- (4) Overseeing action items;
- (5) Providing reports to the Restoration Trustee Council;
- (6) Developing and disseminating budgetary information;
- (7) Maintaining the Restoration Administrative Record;
- (8) Convening a meeting of the full 2005 MOA Trustee Council, at least once a year, before annual or final reports are due to the NPFC, for progress reports from each member of the 2005 MOA Trustee Council; and
- (9) Notifying the 2005 MOA Trustee Council if a project is infeasible, impractical, or otherwise not in the public interest pursuant to the conditions of Section VI (B).

(B) The LAT's duties also include:

- (1) Preparing draft procedures for disbursements and advance payments from the *Athos* Accounts for the review and written approval of the Restoration Trustee Council;
- (2) Certifying and submitting Annual and Final Reports to the NPFC in accordance with Section VIII of this MOA; and
- (3) Providing any necessary coordination with NPFC to address outstanding issues regarding the OSLTF claim.

VIII. ANNUAL AND FINAL ACCOUNTING FOR FUNDS RECEIVED:

(A) Annual Reporting Process. The NPFC requires the submission of Annual Progress Reports on the progress of projects funded via the OSLTF. (For information on NPFC forms and requirements, *see* Attachment C.) Annual Progress Reports will be submitted to the NPFC by the LAT, beginning one year from the date of receipt of OSLTF funds and annually thereafter. The LAT is responsible for completing the

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“Natural Resources Damage Claim: Annual Report” in accordance with NPFC requirements and submitting it to the LAT within sixty (60) calendar days of the last day of the reporting period. The LAT is responsible for certifying that all restoration activities have been conducted in accordance with the claim funded by the OSLTF. After this certification process is complete, the LAT will submit the Annual Progress Report to the NPFC within ninety (90) calendar days of the last day of the reporting period.

Annual reports will include:

(1) a description of the work accomplished, a timeline for future activities, and a narrative describing any unexpected problems encountered during implementation;

(2) a summary of specific expenditures by category, including direct and indirect costs related to restoration project implementation, administration, monitoring and oversight, as well as other related costs, including travel expenses and/or the cost of managing contracts/projects; and

(3) a narrative description of the work accomplished that year by each Trustee and how such work fits into the overall progress of the project.

(B) Final Reporting Process. Final Project Reports will be submitted to the NPFC to certify that actions taken were in accordance with the final Restoration Plan and to document the completion of each restoration project. A project will be considered complete at either the close-out of construction or upon the completion of short-term monitoring or maintenance (defined as less than five (5) years from the date of completion of construction). Such Final Project Reports and related cost documentation will follow the format described in the “Natural Resource Damage Claim: Final Report,” developed by NPFC. (*See Attachment C.*) The LIT is responsible for developing the Final Project Report(s), which will be submitted to the LAT within ninety (90) calendar days after the completion of each individual restoration project. The LAT is responsible for certifying that all restoration activities have been conducted in accordance with the claim funded by the OSLTF. The LAT will submit its final report to the NPFC within

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one hundred twenty (120) calendar days after the completion of the restoration project. Should a project require monitoring and/or maintenance for a period that exceeds five years, the LAT shall develop a Supplemental Report for submission to the NPFC that addresses these long-term requirements.

IX. MEETINGS:

Any member of the Restoration Trustee Council may, upon reasonable notice through the LAT, call a meeting of the Restoration Trustee Council to be conducted either in person or by telephone conference call. Such meetings shall generally be held in conjunction with other set meetings between the Trustees.

X. CONFLICTS WITH OTHER DIRECTIVES:

Nothing in this MOA is intended to conflict with the lawful directives of any Trustee or any other applicable requirement of law or regulation. If any such conflicts are identified by the Restoration Trustee Council, the relevant section(s) of this MOA may be amended, as the Trustees determine appropriate. Likewise, any issues relating to: (a) Trustee withdrawal; (b) modification/termination of this MOA; (c) disputes among Trustees; or (d) related matters shall be addressed in accordance with Section XI of this MOA.

XI. GENERAL PROVISIONS

- (A) Reservations. Nothing in this Agreement shall constitute:
- (1) An abrogation or ceding of any Trustee responsibility or authority over natural resources affected by the Incident;
 - (2) An admission by the Trustees in any dispute or action between the Trustees or between the Trustees and a third party; or
 - (3) A waiver of any Trustee claims or defenses in any legal action, or of any

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rights or remedies.

(B) Third Parties. This Agreement shall not vest rights in persons who do not represent the Trustees.

(C) Amendment. This Agreement may be amended by agreement of the Trustees. Any amendment of this Agreement shall be effective only if it is in writing and executed by all parties to this Agreement.

(D) Anti-deficiency. Nothing in this Agreement shall be construed as obligating the United States or the State of New Jersey, their officers, agents or employees, to expend any funds in excess of appropriations or other amounts authorized by law.

(E) Dispute Resolution. In the event of a dispute involving any decision under this MOA, the Restoration Trustee Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining unanimity between the Trustees. If unanimous consent cannot be reached, the Trustees shall elevate the matter to a senior official for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved.

(F) Records. All records created by the Restoration Trustee Council in support of this MOA (e.g., meeting agendas, meeting minutes, resolutions, etc.) shall be considered "Draft" unless approved as a "Final" record by the Restoration Trustee Council.

XII. EFFECTIVE DATE:

This MOA shall be in effect from the date of execution until termination by written agreement of the Trustees by Restoration Trustee Council Resolution. The date

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of the Agreement's execution shall be the date of the signature of the last Trustee to sign this MOA. A copy of this MOA, with all original signatures affixed, shall be maintained by the LAT in the *Athos* Restoration Administrative Record. Copies of this MOA will be sent to the Trustees by the LAT.

XIII. AUTHORIZED SIGNATURES:

The following officials, or their respective designees, are executing this MOA on behalf of their respective agencies:

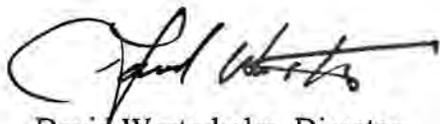
(1) Director, Office of Response and Restoration, National Oceanic and Atmospheric Administration; and

(2) Assistant Commissioner, Natural and Historic Resources, New Jersey Department of Environmental Protection.

The undersigned representatives of the Trustees acknowledge that they have authority to execute this MOA on behalf of their respective agencies. Signatures below constitute acceptance of the terms and conditions of this MOA.

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FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

A handwritten signature in black ink, appearing to read "David Westerholm", with a large, stylized initial "D" and a long horizontal stroke extending to the right.

David Westerholm, Director

Office of Response and Restoration

National Oceanic and Atmospheric Administration

Federal Trustee for Natural Resources

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A handwritten signature in black ink, appearing to read 'Amy Cradic', written in a cursive style.

FOR THE STATE OF NEW JERSEY

Amy Cradic, Assistant Commissioner

Natural and Historic Resources

**Acting on behalf of the Commissioner of the New Jersey Department of Environmental
Protection**

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Attachment A: *Final Restoration Plan and Environmental Assessment for the November 26, 2004, M/T Athos I Oil Spill on the Delaware River*

Attachment B: *Summary of Final Project Cost Estimates*

Attachment C.: *Information on how to find OSLTF Forms for Cost Accounting/Annual/Final Reports*