

5-19-97

## Agreement for the Coordination of Civil Claims

### I. Purpose and Scope

The Governor and Cabinet of the State of Florida, acting as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (State of Florida), and the National Oceanic and Atmospheric Administration of the U. S. Department of Commerce (NOAA) (collectively, the Co-Trustees) are committed to cooperation in the protection, restoration and management of resources of the Florida Keys National Marine Sanctuary (the Sanctuary) established on November 16, 1990 by P.L. 101-605. This Memorandum of Agreement (MOA) provides for cooperation and coordination among the Co-Trustees with respect to civil claims for response costs or damages based on injury to Sanctuary resources.

### II. Authorities

NOAA enters into this MOA pursuant to the Florida Keys National Marine Sanctuary and Protection Act (Florida Keys Act), 16 U.S.C. 1433 note, P.L. 101-605, and the National Marine Sanctuaries Act, 16 U.S.C. 1431 et. seq.

The State of Florida derives its authority from Article II, Section 7, and Article X, Section 11, of the Florida Constitution. Pursuant to these Sections of the Florida Constitution and under Chapter 253 of the Florida Statutes, the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida holds title to State lands, including State sovereign submerged lands, for the use and benefit of the citizens of the State of Florida and is charged with the duty to conserve and protect the natural resources and beauty associated with such State lands.

This MOA does not delegate, transfer, or affect the ownership by or authority of either NOAA or the State of Florida.

### III. Definitions

The following definitions apply to terms used in this MOA.

**Assessment costs** - means the costs of all actions which NOAA or the State of Florida may undertake to investigate and document any injury to Sanctuary resources and to assess any damages due thereon, including the development of plans to restore, replace or acquire equivalent Sanctuary Resources.

**Civil claims** - means claims for response costs and damages arising under Section 312 of the National Marine Sanctuaries Act or under authorities supporting state claims against any person who threatens or injures Sanctuary resources. Claims arising under Section 312 include forfeiture actions under Section 307 of the Sanctuaries Act only where the circumstances giving rise to such actions are based on claims asserted under Section 312.

**Comprehensive Management Plan** - means the plan developed by the Secretary of Commerce which becomes finally effective for the Sanctuary, pursuant to the provisions of the Florida Keys Act and the National Marine Sanctuaries Act, including all provisions therein for coordination and cooperation between Sanctuary managers and other Federal, State and local authorities with jurisdiction within or adjacent to the Sanctuary.

**Existing Management Area** - for the purposes of this MOA, means a portion of the Sanctuary that is within an existing resource management area established by NOAA or by another Federal, State, or local authority of competent jurisdiction within the Sanctuary including but not limited to the areas identified in Appendix II to Subpart P of 15 C.F.R Part 922.

**Injury** - means an adverse change in a chemical, biological, or physical attribute, or in the viability of, a Sanctuary resource, either in the long or short term. Injury includes the loss of and the destruction of Sanctuary resources.

**Response costs** - means the costs of all necessary actions, including, e.g., salvage and clean-up, which NOAA or the State of Florida may undertake to prevent or minimize the injury to Sanctuary resources, or to minimize the imminent risk of such injury.

**Restoration or restore** - means actions which are planned or undertaken by NOAA or the State of Florida to restore, replace or acquire the equivalent of injured Sanctuary resources.

**Sanctuary** - means the Florida Keys National Marine Sanctuary, as described in Section 5 of the Florida Keys Act.

**Sanctuary resource** - means any living or non-living resource of the Sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational and aesthetic value of the Sanctuary.

**State claims** - means civil claims of the State of Florida and its agencies for response costs and damages against any person who threatens or causes injury to Sanctuary resources in State waters or involving State lands. Such claims may be based on Federal or State law, whether statutory or common law. Such authorities include but are not limited to the State laws which are summarized in Volume III, Appendix C, pages C-6 through C-12 of the Comprehensive Management Plan for the Sanctuary.

#### **IV. Statement of Objectives**

The Co-Trustees have the following general objectives with respect to civil claims within the scope of this MOA:

1. To recover response costs and assessment costs incurred by NOAA and the State of Florida in addressing threats and injuries to Sanctuary resources;
2. To restore Sanctuary resources as expeditiously as possible following their injury;
3. To cooperatively assess such injuries and any damages due thereon in a prompt and reliable manner, including the development of plans to restore Sanctuary resources;
4. To employ assessment strategies and methods which are appropriate considering the nature and scope of the specific resource injury, the nature of the incident resulting in the injury, the opportunities for basing compensation on resource restoration activities, technical accuracy, feasibility and cost-effectiveness.
5. To avoid unnecessary duplication in State and Federal efforts, and to ensure claims have a reasonable likelihood of success on their merits.

This MOA provides guidance and a framework for timely consultation and coordination between Co-Trustee representatives in order to achieve these objectives.

#### **V. Initial Notification, Response, and General Coordination**

**Notification and Response** - The Co-Trustees recognize that coordination in matters related to civil claims is facilitated by effective initial notification procedures and early coordination of operational activities undertaken to address threats or injuries to Sanctuary resources. These goals have been codified in the "Protocol for Emergency Response Notification" (Response Protocol). Operational Components of the Response Protocol will be subsequently developed and entered into by NOAA, the State and the U.S. Coast Guard. The procedures identified in the Response Protocol and operational components thereof will provide the foundation for the earliest coordination on matters related to civil claims within the scope of the present MOA. Current documentation of the Response Protocol and the operational components thereof shall be maintained in Sanctuary field offices.

**General Coordination** - The objectives of this MOA will also require on-going coordination between NOAA and the State of Florida to address issues or problems which recur in connection with common or frequent injuries to Sanctuary resources or which may otherwise have a general bearing on civil claims within the scope of this MOA. NOAA and the State will be responsible for initiating such consultations, meetings or other general coordination practices which they determine necessary to ensure appropriate NOAA and State personnel cooperatively address these matters in a timely fashion and to preplan or initiate any other activity necessary to implement the level of coordination contemplated by this MOA. The following are examples of matters which are intended for future coordination under this section:

1. Development of an Environmental Impact Statement (EIS) for Restoration of Coral Reef and Seagrass Habitats within the Sanctuary - These documents will evaluate current alternatives and identify the best options for restoration of these important habitats in the Sanctuary. This document is intended to provide the framework for restoration planning for the vast majority of sanctuary resource injuries which may occur.

2. Development of standard field, analytical and presentation protocols for assessing ecological injuries to coral reef and other FKNMS habitats - The identification and implementation of reliable assessment procedures in a uniform fashion will ensure litigation-quality assessments, facilitate cooperative and cost-effective assessments, facilitate efficient use of limited State and Federal assessment personnel and resources and promote consistency between Co-Trustee claims.

3. Development of a compensation table, formula, or other simplified procedure(s) for assessing restoration-based damages - Simplified assessment procedures are needed to support claims and fund restoration actions to address the smaller Sanctuary resource injury scenarios which are frequent in the Sanctuary, particularly in the State water areas.

4. Development of standard protocols for tracking and documentation of response and assessment costs incurred by Federal and State Sanctuary personnel - Well defined costs documentation procedures will ensure that all response and assessment costs incurred by the Co-Trustees are documented and are recoverable.

## VI. Protocols for Coordination Relating to Civil Claims

**Incident Screening** - For every incident of threat or injury to Sanctuary resources, NOAA and the State shall review the readily available information and make a threshold determination as to whether emergency restoration actions may be required and/or whether costs incurred or apparent injuries to Sanctuary resources may be sufficient to warrant pursuing civil claims for damages under Section 312 and/or State authority as defined herein. NOAA and the State may develop a set of agreed criteria for use to aid them in making this determination. In the event emergency restoration may be necessary or costs and/or injuries are deemed sufficient to warrant actions to seek reimbursement or damages, NOAA and the State will immediately refer the matter to appropriate NOAA and State of Florida legal offices for further coordination pursuant to this MOA. The potential for other NOAA or State actions, such as an enforcement action under section 307 of the National Marine Sanctuaries Act or under state law, may be considered coincident with the incident screening process under this section.

**Joint NOAA/State Case Team** - The Co-Trustees agree that in instances in which both NOAA and the State of Florida have civil claims based on threats or injuries to Sanctuary resources, the federal and state claims should be managed and coordinated as a joint claim and, wherever possible, joined in a single civil action. Accordingly, upon referral of such claims, the attorneys whom NOAA and the State of Florida assign to the referral will coordinate the formation of a NOAA/State case team. The NOAA/State case team will include such NOAA and State personnel as are appropriate, given the nature of the injuries to Sanctuary resources and the restoration planning and other assessment actions that may be required, to further review, manage, develop and coordinate on civil claims in accordance with this MOA. The

NOAA and the State of Florida attorneys assigned to the referral shall serve as ad hoc coordinators for the case team until that role is reassigned by the case team. A Florida attorney assigned to the referral shall serve as lead for coordination of case team activities where claims are based on injury to Sanctuary resources within State jurisdiction.

**Coordination of Joint Civil Claims** - Actions and decisions on joint civil claims should be managed and coordinated expeditiously and by consensus of the NOAA/State case team. Coordination should address but is not limited to matters such as:

1. The conduct of investigations, the collection or handling of evidence, and the timely exchange of information bearing on such civil claims;
2. Determining whether joint civil claims exist and whether Sanctuary resource injuries underlying such claims warrant assessment actions and restoration planning to support such claims;
3. Determining the need for, nature and manner of implementation of emergency restoration actions that may be required;
4. Determining the appropriate administrative or judicial forum and/or procedures for presentation of joint civil claims;
5. Determining the strategies, methods or plans to be used to assess the compensation due for Sanctuary resource injuries, including the identification and selection of appropriate restoration actions to address or compensate for resource injuries;
6. Reaching consensus on restoration options and preferred restoration strategies necessary to support restoration-based assessments as early as possible in the assessment process;
7. Addressing scientific or other issues associated with injury assessment, restoration or compensation strategies or actions, including but not limited to such issues as may arise in litigation;
8. Communications and negotiations with potentially liable parties;
9. Providing for the confidentiality of information for exchange between or as necessary to protect the interests of the Co-Trustees, consistent with applicable State and Federal laws;
10. Identifying and arranging for the professional or expert services, technical or otherwise, which may be necessary or appropriate to support injury assessment, restoration, and compensation planning or actions in a timely manner;
11. Providing for the coordination among consultants, experts and other professionals as necessary or appropriate to the coordination of any assessment or litigation activity related to joint civil claims;
12. Providing for efficient discovery processes;
13. Deciding on actions by or use of funds from potentially liable parties in advance of a final settlement, where such actions or funds may be applied to support or implement injury assessment, restoration or other activities as whole or partial compensation of civil claims within the scope of this MOA;
14. Encouraging understanding of all strategies and decisions related to such civil claims and promoting timely resolution of such issues by and between NOAA and the State of Florida;
15. Identifying appropriate terms and coordination required to negotiate and settle such civil claims;

16. Coordinating appropriate communications with the media and the public;
17. Providing for monitoring of recovery and restoration actions; and
18. Providing for the development and maintenance of an administrative record, as appropriate to the case.

**Case-Specific Agreements** - In implementing this MOA, additional case-specific agreements may be used to identify further procedures or terms which may facilitate cooperation and coordination of the NOAA/State case team with respect to specific civil claims.

**Joint Litigation** - Decisions of Co-Trustee representatives on matters in joint litigation, including settlement, shall be based on consensus and be focused on meeting the mutual objectives of the Co-Trustees stated herein.

**Responsibility for Costs** - NOAA and the State will each be individually responsible for the costs of their own participation in response and assessment planning and actions. The responsibility for any additional or extraordinary costs, such as costs associated with hiring contractors or experts, will be negotiated and determined in advance by the case team.

**Incident Liaison for Other Incidents** - For any incident or occurrence which is determined not to involve joint civil claims, an Incident Liaison may be designated to the NOAA or State case team, whichever the case may be, to serve as the case team's point-of-contact with the other Trustee. The NOAA or State case team will provide the Incident Liaison with timely and periodic reports on the status of case actions, consult with the Incident Liaison on technical, legal or policy issues as may arise, and allow the Incident Liaison an opportunity to comment on any proposed restoration plan or settlement before such plan or settlement is finalized. The Incident Liaison will be responsible for coordinating and providing such informed technical or policy advice and counsel to the NOAA or State case team, as may be appropriate to the case. The Incident Liaison will be responsible for taking such actions within its own agency as are required to provide a timely response to the NOAA or State case team on any actions, issues or plans which are the subject of joint interest or shared consideration. Together with the Incident Liaison, the NOAA or State case team may identify additional procedures to facilitate coordination and communication as are appropriate to the circumstances of the case.

**Coordination Policy** - The Co-Trustees agree not to act to the prejudice of one another and to protect the confidentiality of information for exchange between or as necessary to protect the interests of the Co-Trustees, consistent with applicable State and Federal laws.

## VII. Use of Recovered Sums

In accordance with Section 312(d) of the National Marine Sanctuaries Act, NOAA will receive and distribute all sums recovered in satisfaction of civil claims under section 312 of the Act based on injuries to Sanctuary resources. To the maximum extent not inconsistent with Section 312(d) of the National Marine Sanctuaries Act, any monetary recovery that may result from any civil claim will be used for the exclusive benefit of the Sanctuary.

Sums recovered under the Act with respect to Sanctuary resources lying within the jurisdiction of Florida shall be used, pursuant to section 312(d)(3) of the Act, in accordance with an agreement entered into by the Co-Trustees. Approval by the Board of Trustees is required for use of funds recovered by NOAA under section 312 of the National Marine Sanctuaries Act for injury to state resources. Such agreements shall be documented prior to the receipt of any funds in a form and manner appropriate to the case, such as in the terms of settlement agreements, restoration plans, case-specific MOA's, case-specific spending plans or combinations thereof. Such agreements on the use of recovered sums shall be consistent with such provisions and plans for the restoration, replacement or acquisition of Sanctuary resources which were used to determine the civil claims due for the injuries to Sanctuary resources or

were otherwise included in any assessment of damages with respect to joint civil claims. The following guidelines are applicable to the development of such agreements:

1. The primary use of sums recovered for injury to Sanctuary resources should be to provide for actions necessary or appropriate to restore the injured resource(s).
2. Whenever sums recovered are insufficient to fully implement the restoration plan for injured Sanctuary resources as well as provide for full reimbursement of all response and assessment costs incurred by NOAA and the State, amounts available to reimburse such costs should be reduced as necessary to ensure or maximize funding available for planned restoration actions. Any such reduction should be based on documented costs and proportionate for each Co-Trustee.
3. Funds not expended on the restoration of injured Sanctuary resource(s) or to reimburse response and assessment costs are to be used to manage and improve the Sanctuary. Such use includes but is not limited to restoring injured Sanctuary resources where such injuries are not actionable or damages for same are otherwise not recoverable.
4. Further, if the injured Sanctuary resource(s) was located in an Existing Management Area (EMA), funds not expended on the restoration of the injured resources within the EMA or to reimburse costs, will be used to manage and improve the EMA, unless NOAA and the State agree that such funds would be better applied to manage and improve other areas of the Sanctuary. Use within the EMA includes but is not limited to restoring injured Sanctuary resources where such injuries are not actionable or damages for same are otherwise not recoverable.

In addition, such agreements may:

1. Identify any special procedures needed to coordinate the implementation of restoration plans, including procedures to review and approve work plans or to address any unanticipated expenditures required to implement the restoration plan;
2. Provide for periodic reporting on expenditures to implement agreed restoration actions sufficient to allow NOAA and the State of Florida to track such actions and the use of recovered sums;
3. Specify procedures appropriate to expedite the receipt or reimbursement of costs incurred by NOAA or the State of Florida.
4. Specify procedures to comply with any State or Federal laws applicable to the post-recovery actions, including but not limited to compliance with NEPA, permitting laws and regulations, or other laws pertaining to restoration plan implementation; and
5. Include such other provision which is considered necessary or appropriate to facilitate post-recovery actions.

### **VIII. Dispute Resolution**

The Co-Trustees recognize that disputes may arise in the implementation of this MOA, however, it is anticipated that such disputes will, in almost every instance, be capable of resolution at the NOAA/State case team level. Consequently, disputes which arise should first be addressed by the NOAA/State case team members. In the event that a disagreement arises which cannot be resolved by consensus among the NOAA/State case team within 30 days, the matter in dispute will be elevated for resolution, as necessary, to successively higher decision levels within NOAA and the relevant State agencies. In elevating a disputed matter, the NOAA/State case team members will identify for each other the particular succession of decision levels within NOAA and the State that are applicable to elevating the matter at issue and will also expeditiously provide such information as is necessary to explain the matter in dispute, the views of both NOAA and State on the issue, efforts to resolve it at the case team

level, and the timeframe within which the dispute must be resolved to meet case objectives. In seeking to resolve any disputes under this MOA, deliberations within NOAA and the State should focus on achieving the mutual objectives of the Co-Trustees as stated in Section IV.

#### **IX. Co-Trusteeship**

In all matters within the scope of this MOA, the Co-Trustees and their representatives shall act with due regard for the concurrent trusteeship of NOAA and the State of Florida with respect to Sanctuary resources which are subject to State jurisdiction and for their shared interest in the protection, restoration and management of all Sanctuary resources.

#### **X. Reservation of Rights**

The Co-Trustees each retain full authority and reserve all rights to take whatever actions are deemed necessary to pursue, preserve or protect any legal right, interest or remedy available with respect to any civil claim. Nothing contained in this MOA is intended nor shall be construed to waive or foreclose any such authority, right, interest or remedy.

#### **XI. Third Party Rights**

This MOA encompasses agreements of the Co-Trustees and is intended to guide relevant State of Florida and NOAA personnel in implementing their assigned responsibilities. Nothing in this MOA is intended or shall be construed to create or affect any legal rights or obligations between either Co-Trustee and any third persons. This MOA does not provide the basis of any third party challenges or appeals.

#### **XII. Other Provisions**

Nothing herein is intended to conflict with current NOAA or State of Florida directives. If the terms of this MOA are inconsistent with existing directives of either of the parties entering into this MOA, then those portions of this MOA which are determined to be inconsistent shall be invalid; but the remaining terms and conditions not affected by the inconsistency shall remain in full force and effect. At the first opportunity for review of this MOA, all necessary changes will be accomplished by either an amendment to this MOA or by entering into a new agreement, whichever is deemed expedient to the interest of both parties.

All requirements of this agreement are subject to the availability of funds of the parties.

#### **XIII. Modification**

This MOA may be modified by agreement of the Co-Trustees. All modifications must be in writing and executed by the Co-Trustees in the same manner as this agreement.

#### **XIV. Period**

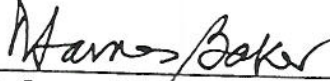
This MOA shall be effective upon execution by all signatories hereto and shall remain in effect, including as it may be modified from time to time, until terminated as provided in Section XV. The MOA shall be reviewed every five years incident to the periodic review of the Comprehensive Management Plan for the Sanctuary.

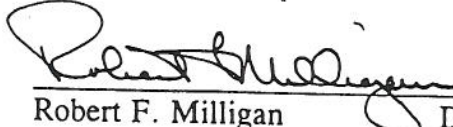
#### **XV. Termination**

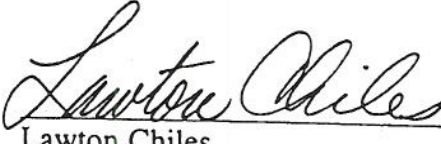
This MOA may be terminated by (1) mutual written agreement of the Co-Trustees, or (2) by either Co-Trustee by communicating to the other in writing, executed in the same manner as this MOA, at least 90 days in advance of the effective date of the withdrawal.

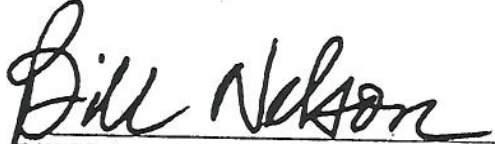
**XVI. Execution by Counterpart**

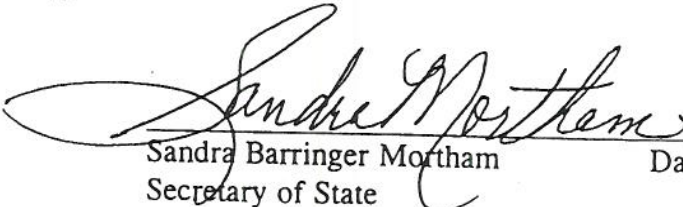
This MOA may be executed in one or more counterparts, all of which shall be considered the original.

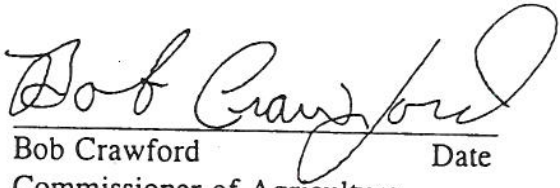
  
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D. James Baker Date  
MAY 19 1997  
U. S. Department of Commerce  
Under Secretary for Oceans and Atmosphere  
Administrator, National Oceanic and  
Atmospheric Administration

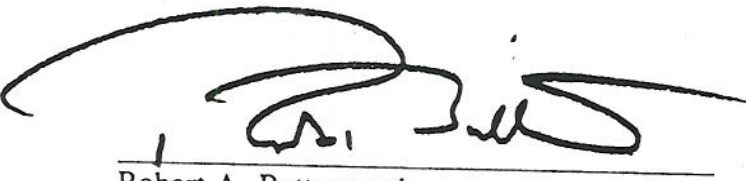
  
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Robert F. Milligan Date  
State Comptroller

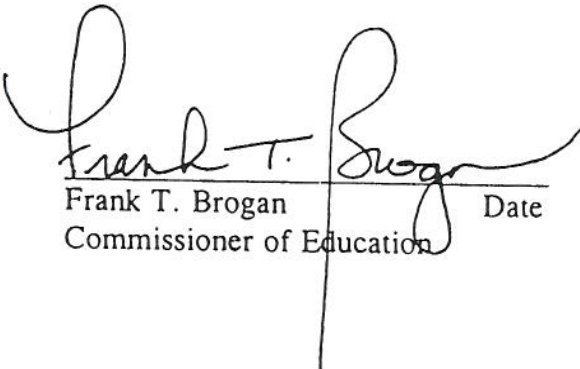
  
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Lawton Chiles Date  
Governor of Florida

  
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Bill Nelson Date  
State Treasurer and Insurance  
Commissioner

  
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Sandra Barringer Mortham Date  
Secretary of State

  
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Bob Crawford Date  
Commissioner of Agriculture

  
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Robert A. Butterworth Date  
Attorney General

  
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Frank T. Brogan Date  
Commissioner of Education