

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA and the
STATE OF RHODE ISLAND AND PROVIDENCE
PLANTATIONS,

Plaintiffs,

v.

EW HOLDING CORP. and K-SEA
TRANSPORTATION CORP.,

Defendants.

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Civil Action No.

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U.S. DISTRICT COURT
DISTRICT OF R.I.

CONSENT DECREE

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ACCOUNT

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I. INTRODUCTION

A. The United States of America ("United States") and the State of Rhode Island and Providence Plantations ("State") have filed claims against defendants EW Holding Corp. (as successor to Thor Towing Corporation and Odin Marine Corporation) and K-Sea Transportation Corp. (as successor to Eklof Marine Corporation) pursuant to Section 1002(b)(2)(A) of the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702(b)(2)(A), and/or R.I.G.L. ch. 46-12.5.1, for damages for injury to natural resources and assessment costs arising from an oil spill in the waters of Block Island Sound, State of Rhode Island, on January 19, 1996, that resulted from the grounding of the barge North Cape and the tug Scandia (the "North Cape Oil Spill").

B. The United States and the State share trusteeship of the injured resources and are coordinating restoration efforts. Pursuant to this Consent Decree, the Settling Defendants agree to make certain payments and to perform certain actions to restore certain natural resources. This Consent Decree has been reached in the interest of achieving an expeditious settlement and relates

to the unique aspects of the North Cape Oil Spill; it is based upon the most cost-effective and reasonable approach to restoring the natural resources injured by the North Cape Oil Spill.

C. The Parties agree and the Court finds that settlement of these civil matters without litigation is in the public interest and that the entry of this Consent Decree is the most appropriate means of resolving these matters.

D. The Parties agree and this Court, by entering this Consent Decree, finds that settlement of this matter will avoid prolonged and complicated litigation and that this Consent Decree is fair, reasonable, and in the public interest.

E. The Settling Defendants do not admit any liability arising out of the North Cape Oil Spill.

NOW, THEREFORE, IT IS ADJUDGED, ORDERED AND DECREED THAT:

II. DEFINITIONS

1. Whenever the following terms are used in this Consent Decree, the definition specified hereinafter shall apply:

"DOI" means the United States Department of the Interior;

"Fund" means the Oil Spill Liability Trust Fund established pursuant to 26 U.S.C. §§ 4611 and 9509;

"Interest," as that term is used in Section VII (Payment by Settling Defendants), shall mean interest at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to June 1, 2000. Interest shall be computed daily to the date of payment and shall compound annually on June 1 of each year. "Interest," as that term is used in Section XI (Stipulated Penalties), shall mean interest at a rate equal to the

coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date that a demand for the payment of stipulated penalties is issued pursuant to Paragraph 34. Interest shall be computed daily to the date of payment and shall compound annually on the anniversary of the date the demand for payment of the stipulated penalties was made pursuant to Paragraph 34.

“Lobster Restoration Project” means the project described in the North Cape Lobster Restoration Statement of Work, attached hereto as Appendix B, which will be implemented by the Settling Defendants;

“Memorandum of Agreement” means the Memorandum of Agreement that the Trustees have entered into Regarding Natural Resource Damage Assessment and Restoration Arising from the Barge North Cape/Tugboat Scandia Oil Spill and Coordination of other Studies and Enforcement Activities, as well as any amendments thereof. A copy of the Memorandum of Agreement is attached hereto at Appendix A;

“Natural Resource Damages” means the damages described at Section 1002(b)(2)(A) of OPA, 33 U.S.C. § 2702(b)(2)(A);

"NOAA" means the National Oceanic and Atmospheric Administration;

"North Cape Oil Spill" means the oil spill that occurred as a result of the groundings of the barge North Cape and the tug Scandia in Block Island Sound, State of Rhode Island, on January 19, 1996;

“North Cape Oil Spill Restoration Account” means a separate project numbered account established within DOI’s Natural Resource Damage Assessment and Restoration Fund, which will be funded by the Settling Defendants in accordance with Section VII (Payment by Settling

Defendants) and used by the Trustees in accordance with Section VIII (North Cape Oil Spill Restoration Account);

"OPA" means the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq.;

"Parties" means the Plaintiffs and Settling Defendants;

"Plaintiffs" means the United States and the State;

"RIDEM" means the Rhode Island Department of Environmental Management;

"Settling Defendants" means EW Holding Corp. (as successor to Odin Marine Corporation and Thor Towing Corporation), K-Sea Transportation Corp. (as successor to Eklof Marine Corporation), West of England Ship Owners Mutual Insurance Association (Luxembourg), and Gregory R. Aitken. In addition, for the purposes of Sections XII (Covenant Not to Sue by Plaintiffs), XIII (Covenant Not to Sue by Settling Defendants), and XIV (Effect of Settlement), the term Settling Defendants shall also include the directors, officers, and employees of EW Holding Corp., K-Sea Transportation Corp., Eklof Marine Corporation, Odin Marine Corporation, Thor Towing Corporation, and West of England Ship Owners Mutual Insurance Association (Luxembourg), to the extent that their liability arises from actions taken in their official capacities as officers, directors, or employees of these entities;

"State" means the State of Rhode Island and Providence Plantations;

"Trustees" means NOAA, DOI and RIDEM;

"United States" means the United States of America.

III. JURISDICTION

2. The Parties agree and consent that this Court has jurisdiction over the subject matter of this action pursuant to Section 1017(b) of OPA, 33 U.S.C. § 2717(b), and also pursuant to 28 U.S.C. §§ 1331, 1345, and 1367. Venue is proper pursuant to Section 1017(b) of OPA,

33 U.S.C. § 2717(b) and 28 U.S.C. § 1391(b). The Settling Defendants consent to the Court's in personam jurisdiction over them in connection with these actions, but are not submitting to in personam jurisdiction for any other purpose.

IV. PARTIES BOUND

3. The provisions of this Consent Decree shall apply to and shall be binding upon the United States, the State, and upon the Settling Defendants and their respective directors, officers, employees, agents, successors, assigns and all persons acting on their behalf.

4. No change in ownership, corporate or partnership status relating to the Settling Defendants will in any way alter the responsibilities of the Settling Defendants under this Consent Decree.

V. LOBSTER RESTORATION PROJECT

5. Settling Defendants shall implement the North Cape Lobster Restoration Statement of Work ("Lobster Restoration Project") attached hereto as Appendix B, which is hereby incorporated into this Consent Decree.

6. Within 30 days of entry of this Consent Decree, Settling Defendants and the Trustees shall notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators. If a Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties in writing. The Settling Defendants' Project Coordinator shall be subject to the approval of the Trustees, which shall not be arbitrarily or capriciously withheld, and shall have the technical expertise sufficient to adequately oversee all aspects of the Lobster Restoration Project.

7. All contractors retained by and suppliers utilized by the Settling Defendants, including, without limitation, general contractors, subcontractors, and wholesalers, that will implement any

significant aspect of the Lobster Restoration Project, shall be subject to the approval of the Trustees. Settling Defendants shall notify the Trustees in writing of the name, title, and qualifications of any such contractor/supplier. The Trustees will issue a notice of disapproval or an authorization to proceed with respect to each proposed contractor/supplier.

8. If the Trustees disapprove a proposed contractor/supplier, the Trustees will notify Settling Defendants, in writing, setting forth the reason for the disapproval. If the Trustees determine that the reasons for the disapproval should be kept confidential, the Trustees may disclose the reasons for the disapproval only to counsel for the Settling Defendants, who shall not disclose the reasons for the disapproval to any other person. The Trustees shall not arbitrarily or capriciously disapprove a proposed contractor/supplier. If the Trustees disapprove a proposed contractor/supplier, Settling Defendants shall submit to the Trustees a list of alternative contractors/suppliers, including the qualifications of each contractor/supplier, that would be acceptable to them within 30 days of receipt of the Trustees' disapproval of the contractor/supplier previously proposed. The Trustees will provide written notice of the names of any contractor(s)/supplier(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor/supplier from that list that is not disapproved and shall notify the Trustees of the name of the contractor/supplier selected within 21 days of the Trustees' authorization to proceed.

9. The Trustees shall be given access at all reasonable times to the locations (including vessels) being used by the Settling Defendants to implement the Lobster Restoration Project, as well as all non-privileged documents relating to the Lobster Restoration Project, for the purpose of overseeing and/or monitoring the implementation of the Lobster Restoration Project. The Trustees may designate other representatives, including, but not limited to, federal and state

employees, and federal and state contractors and consultants, to observe and monitor the progress of the Lobster Restoration Project.

VI. TRUSTEES' APPROVAL OF REPORTS

10. After review of any report that is required to be submitted for approval pursuant to the Lobster Restoration Project, the Trustees shall: (a) approve, in whole or in part, the report; (b) approve the report upon specified conditions; (c) disapprove, in whole or in part, the report, directing that the Settling Defendants modify the report; or (d) any combination of the above.

11. Upon receipt of a notice of disapproval pursuant to Subparagraph 10(c), Settling Defendants shall, within 20 days or such longer time as specified by the Trustees in such notice, correct the deficiencies and resubmit the report. Any stipulated penalties applicable to the submission, as provided in Section XI (Stipulated Penalties), shall accrue during the 20-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved due to a material defect as provided in Paragraphs 12 and 13.

12. In the event that a resubmitted report or portion thereof is disapproved by the Trustees, the Trustees may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs.

13. If, upon resubmission, a report is disapproved or modified by the Trustees due to a material defect, Settling Defendants shall be deemed to have failed to submit such report timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section X (Dispute Resolution) and the Trustees' action is overturned pursuant to that Section. The provisions of Section X (Dispute Resolution) and Section XI (Stipulated Penalties) shall govern the implementation of the Lobster Restoration Project and accrual and payment of any stipulated penalties during Dispute Resolution. If the Trustees' disapproval is upheld, stipulated

penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XI (Stipulated Penalties).

VII. PAYMENT BY SETTLING DEFENDANTS

14. Within 30 days after the date that the Court approves this Consent Decree, Settling Defendants shall pay \$7,800,000, plus Interest accruing from June 1, 2000, to the North Cape Oil Spill Restoration Account, a separate project numbered account established within DOI's Natural Resource Damage Assessment and Restoration Fund, Account No. 14X5198 (NRDAR) ("North Cape Oil Spill Restoration Account"). The funds in the North Cape Oil Spill Restoration Account shall be used in accordance with Section VIII (North Cape Oil Spill Restoration Account). Settling Defendants shall transfer these funds to the North Cape Oil Spill Restoration Account via an Electronic Funds Transfer ("EFT") through the Automated Clearing House in accordance with instructions to be provided by DOI. The addenda record shall be annotated "RE: North Cape Oil Spill Restoration Account" and shall list EW Holding Corp. as the responsible party. Payment shall be deemed to have been made upon receipt of these funds by EFT. A copy of the paperwork documenting the EFT and any accompanying correspondence shall be sent to the persons listed in Section XVI (Notices) for notices to the Trustees, as well as to:

Bob White
DOI Restoration Fund
NBC Division of Financial Management Services
Branch of Accounting Operations
7301 W. Mansfield Avenue, D-2960
Denver, Colorado 80235-2230

Bruce Nessler
DOI Restoration Fund
NBC/Division of Financial Services
Branch of Accounting Operations
Mail Stop 1313
1849 C Street, N.W.
Washington, D.C. 20240

Lynn Baranoff
NOAA Finance Services Division
Bills and Collection Unit, Caller Service 7025
20020 Century Boulevard
Germantown, Maryland 20874

15. NOAA acknowledges its receipt of payments in the total amount of \$3,714,940.20 from Settling Defendants in reimbursement of the costs incurred by NOAA in assessing the natural resource damages caused by the North Cape Oil Spill. NOAA also acknowledges its receipt of a payment in the amount of \$200,000 from Settling Defendants to be used by the Trustees in connection with their monitoring of the Lobster Restoration Project.

16. DOI acknowledges its receipt of a payment in the amount of \$358,474.60 from Settling Defendants in reimbursement of the costs incurred by DOI in assessing the natural resource damages caused by the North Cape Oil Spill.

17. RIDEM acknowledges its receipt of a payment in the amount of \$250,000 from Settling Defendants in reimbursement of the costs incurred by RIDEM in assessing the natural resource damages caused by the North Cape Oil Spill.

18. In the event that the payment required by Paragraph 14 is not made as required thereunder, Settling Defendants shall be required to pay Interest on the overdue amount, accruing from June 1, 2000, through the date that the payment is made. In addition, stipulated penalties will be due for such late payments pursuant to Section XI (Stipulated Penalties).

VIII. NORTH CAPE OIL SPILL RESTORATION ACCOUNT

19. The Trustees shall use the monies in the North Cape Oil Spill Restoration Account for the purposes set forth at Appendix C (Use of Funds in North Cape Oil Spill Restoration Account). The Trustees shall approve expenditures from the North Cape Oil Spill Restoration Account for these purposes in accordance with the terms of their Memorandum of Agreement.

If the funds in the North Cape Oil Spill Restoration Account are not sufficient to fully fund all of the projects/activities set forth at Appendix C or to achieve the goals of the projects, the Trustees shall not be required to expend additional funds to complete these projects/activities or achieve the goals. The Trustees may modify the projects/activities listed in Appendix C in accordance with OPA and any other applicable law.

20. DOI shall, in accordance with law, manage and invest the funds in the North Cape Oil Spill Restoration Account. DOI shall assign the funds in the North Cape Oil Spill Restoration Account a special project number to allow the funds to be maintained as a segregated account within the DOI Natural Resource Damage Assessment and Restoration Fund. DOI shall not make any charge against the North Cape Oil Spill Restoration Account for investment, management, or any other services provided with respect to operation of the account.

21. The Settling Defendants shall not have standing to challenge the Trustees' expenditure of the monies in the North Cape Oil Spill Restoration Account.

IX. FORCE MAJEURE

22. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force majeure" does not include financial inability to (a) make the payment required by

Section VII (Payment by Settling Defendants) or (b) implement the Lobster Restoration Project due to lobster price increases.

23. If any event occurs or has occurred that may delay the performance of the Lobster Restoration Project, whether or not caused by a force majeure event, the Settling Defendants shall notify orally the Trustees within 10 days of when Settling Defendants first knew that the event might cause a delay. Within 10 days thereafter, Settling Defendants shall provide in writing to the Trustees an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; and the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

24. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees do not agree that the delay or anticipated delay has been or will

be caused by a force majeure event, the Trustees will notify the Settling Defendants in writing of their decision. If the Trustees agree that the delay is attributable to a force majeure event, the Trustees will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

25. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), they shall do so no later than 10 days after receipt of the Trustees' notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 22 and 23 above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to the Trustees and the Court.

X. DISPUTE RESOLUTION

26. If, in the opinion of either the Trustees or the Settling Defendants, there is a dispute which arises under or with respect to this Consent Decree, that party shall send written notice to the other party to the dispute outlining the nature of the dispute and requesting negotiations to resolve the dispute. The parties shall endeavor to resolve the dispute through good faith negotiations. The period for informal negotiations shall not exceed 30 days from the date the notice is sent, unless this time period is modified by written agreement of the parties.

27. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, the position advanced by the Trustees shall be considered binding

unless, within 5 days of the conclusion of the informal negotiation period, the Settling Defendants send the Trustees a written notice that they intend to invoke formal dispute resolution pursuant to this Paragraph. If the Settling Defendants invoke formal dispute resolution, they shall, within 25 days of the conclusion of the informal negotiation period, file a petition with the Court seeking resolution of the dispute. In their petition, the Settling Defendants shall set forth any factual data, analysis, or opinion supporting their position and any documentation relied upon by the Settling Defendants. Within 25 days of receipt of the Settling Defendants' petition, the Trustees shall file with the Court opposition papers setting forth any factual data, analysis, or opinion supporting their position and all supporting documentation relied upon by the Trustees. The Settling Defendants shall bear the burden of proof in any such dispute.

28. The invocation of informal or formal dispute resolution pursuant to the prior Paragraphs shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless the Trustees or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 39. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

XI. STIPULATED PENALTIES

29. Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 30 to 32 to the United States and the State for failure to comply with those requirements of this Consent Decree specified below, unless excused under Section IX (Force

Majeure). "Compliance" by Settling Defendants shall mean the timely completion of the payments and activities listed below.

30. The following stipulated penalties shall accrue per violation per day for failure to meet any of the following requirements of the Lobster Restoration Project:

- a. the restocking of lobsters that do not meet the requirements of Section III.2 of the Lobster Restoration Project, and
- b. the failure to comply with the restocking procedures set forth at Sections III.4, III.5 and III.6 of the Lobster Restoration Project.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 7th day
\$1,000	8th through 30th day
\$2,500	31st day and beyond

31. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports required by the Lobster Restoration Project:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250	1st through 7th day
\$ 500	8th through 30th day
\$1000	31st day and beyond

32. In the event that the payment required by Paragraph 14 is not made in a timely manner, Settling Defendants shall, in addition to the interest required by Paragraph 18, pay a stipulated penalty of \$1,000 per day that such payment is late.

33. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue:

(a) with respect to a deficient submission under Section VI (Trustees' Approval of Reports) , during the period, if any, beginning on the 31st day after the Trustees' receipt of such submission until the date that the Trustees notify Settling Defendants of any deficiency; (b) with respect to judicial review by this Court of any dispute under Section X (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

34. Following the Trustees' determination that Settling Defendants have failed to comply with one of the requirements of this Consent Decree listed above, the Trustees may give Settling Defendants written notification of the same and describe the noncompliance. The Trustees may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether the Trustees have notified the Settling Defendants of a violation.

35. All penalties accruing under this Section shall be due and payable within 30 days of the Settling Defendants' receipt from the Trustees of a demand for payment of the penalties, unless Settling Defendants invoke the Dispute Resolution procedures under Section X (Dispute Resolution). Stipulated penalties shall be paid 50% to the United States and 50% to the State.

36. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." The payments shall be mailed to Financial Litigation Unit, United States Attorney's Office, District of Rhode Island, 50 Kennedy Plaza, 8th Floor, Providence, Rhode Island 02903, referencing United States and State of Rhode Island v. EW Holding Corp.. (D.R.I.), North Cape Oil Spill, U.S.A.O. file number 2000V00078, DOJ case

number 90-5-1-1-4337, and the name and address of the party making the payment. Copies of the check and notice shall be sent to the Trustees as specified in Section XVI (Notices).

37. All payments to the State under this Section shall be paid by certified check made payable to "Treasurer, State of Rhode Island." The payments shall be mailed to Stephen G. Morin, Environmental Response Administrator, Rhode Island Department of Environmental Management, 235 Promenade Street, Providence, RI 02908, and shall reference United States and State of Rhode Island v. EW Holding Corp. (D.R.I.), North Cape Oil Spill, and the name and address of the party making payment. A copy of the check and any accompanying transmittal letter, shall be sent to the Trustees as specified in Section XVI (Notices).

38. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of any of its obligations under this Consent Decree.

39. Penalties shall continue to accrue as provided in Paragraph 33 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement, accrued penalties agreed to be owing shall be paid to the United States and the State within 25 days of the agreement;

b. If the dispute is appealed to this Court and the Trustees prevail in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to the United States and the State within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph 39.c below;

c. If the District Court's decision is appealed by any Party, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States and the State into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least

every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State, or to Settling Defendants to the extent that they prevail.

40. a. If Settling Defendants fail to pay stipulated penalties when due, the United States or the State may institute proceedings to collect the penalties, as well as Interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of the demand made pursuant to Paragraph 34.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree.

41. Notwithstanding any other provision of this Section, the United States and the State, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree.

XII. COVENANT NOT TO SUE BY PLAINTIFFS

42. In consideration of the payment that will be made by the Settling Defendants and the implementation of the Lobster Restoration Project by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraph 44, the United States covenants not to sue or take administrative action against the Settling Defendants pursuant to Sections 1002(b)(1) or 1002(b)(2) of OPA, 33 U.S.C. §§ 2702(b)(1) or 2702(b)(2), to recover removal costs or damages related to the North Cape Oil Spill. This covenant not to sue shall take effect upon receipt by the Trustees of the payment required by Section VII (Payment by Settling Defendants), except that the covenant not to sue with respect to natural resource damages related to the lobster injury shall be conditioned upon the complete and satisfactory

performance by the Settling Defendants of their obligations under the Lobster Restoration Project. This covenant not to sue extends only to the Settling Defendants and does not extend to any other person.

43. In consideration of the payment that will be made by the Settling Defendants and the implementation of the Lobster Restoration Project by the Settling Defendants under the terms of this Consent Decree, and except as specifically provided in Paragraph 44, the State covenants not to sue or take administrative action against the Settling Defendants pursuant to Sections 1002(b)(1) or 1002(b)(2) of OPA, 33 U.S.C. §§ 2702(b)(1) or 2702(b)(2), R.I.G.L. chs. 46-12.5.1 and 46-12.7, or otherwise, for any and all civil claims related to the North Cape Oil Spill. This covenant not to sue shall take effect upon receipt by the Trustees of the payment required by Section VII (Payment by Settling Defendants), except that the covenant not to sue with respect to natural resource damages related to the lobster injury shall be conditioned upon the complete and satisfactory performance by the Settling Defendants of their obligations under the Lobster Restoration Project. This covenant not to sue extends only to the Settling Defendants and does not extend to any other person.

44. Reservations of rights by Plaintiffs. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights against the Settling Defendants with respect to all matters other than those expressly specified in the covenants not to sue set forth in Paragraphs 42 and 43 including, but not limited to:

- a. claims based upon a failure of the Settling Defendants to meet a requirement of this Consent Decree;
- b. criminal liability; and

c. subrogated claims under Section 1015 of OPA, 33 U.S.C. § 2715, for any amounts paid or to be paid by the Fund to any person in connection with the North Cape Oil Spill including, without limitation, amounts paid or to be paid by the Fund to lobstermen in connection with claims filed under Section 1002(b)(2) of OPA, 33 U.S.C. § 2702(b)(2), and amounts paid by the Fund to the Trustees in order to reimburse assessment costs incurred by the Trustees.

XIII. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

45. The Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the Plaintiffs, their employees, agents, experts or contractors with respect to the North Cape Oil Spill including, without limitation, any potential or pending claims against the Fund relating to the North Cape Oil Spill.

46. Reservations of rights by the Defendants. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of the Settling Defendants with respect to all matters other than those expressly specified in the covenants not to sue set forth in Paragraph 45. In the event that the United States or the State exercises its rights pursuant to Paragraph 44, and except as provided in Paragraph 48, Settling Defendants reserve the right to assert any defenses that they may have with respect to the matters raised by the United States or the State pursuant to Paragraph 44 including, but not limited to, the right to assert any defenses they may have with respect to subrogation claims paid by the Fund in connection with the North Cape Oil Spill.

XIV. EFFECT OF SETTLEMENT

47. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right of contribution), defenses,

claims, demands, and causes of action which each Party may have with respect to the North Cape Oil Spill against any person not a Party hereto.

48. In any subsequent administrative or judicial proceeding initiated by Plaintiffs with respect to the North Cape Oil Spill, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Plaintiffs in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Section XII (Covenant Not to Sue by Plaintiffs).

XV. MODIFICATION

49. Modifications of the Consent Decree and Appendix B (Lobster Restoration Project) that are not material may be made by written agreement of the parties. The Trustees may modify Appendix A (Memorandum of Agreement) pursuant to the terms of that agreement. The Trustees may modify Appendix C (Use of Funds in North Cape Restoration Account) in accordance with the requirements of OPA and any other applicable laws.

XVI. NOTICES

50. Whenever under the terms of this Consent Decree notice is required to be given by one Party to another, it shall be directed to the following individuals at the addresses specified below, unless it is otherwise specifically provided in this Consent Decree. Any change in the individuals designated by any Party must be made in writing to the other Parties. Any correspondence submitted to the Plaintiffs shall include a reference to the case caption and index number of this court action. All notices shall be sent by first-class mail.

As to the Trustees:

Donald G. Frankel, Esq.
Trial Attorney
Environmental Enforcement Section - Boston Field Office
Environmental and Natural Resources Division
U.S. Department of Justice
One Gateway Center - Suite 616
Newton Corner, MA 02458

Marguerite Matera, Esq.
Attorney - Natural Resources
U.S. Department of Commerce/NOAA
NOAA Office of General Counsel
One Blackburn Drive
Gloucester, MA 01930

Mark Barash, Esq.
Senior Attorney
U.S. Department of the Interior/NOAA
Office of the Solicitor - N.E. Region
One Gateway Center - Suite 612
Newton Corner, MA 02458

Stephen G. Morin
Environmental Response Administrator
Rhode Island Department of Environmental Management
235 Promenade Street
Providence, Rhode Island 02908

As to Settling Defendants EW Holding Corp. and K-Sea Transportation Corp.

Eugene J. O'Connor, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759

and

Deming E. Sherman, Esq.
Richard A. Sherman, Esq.
Edwards & Angell, LLP
2800 BankBoston Plaza
Providence, RI 02903

As to Settling Defendant Gregory R. Aitken

Thomas M. Russo, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759

As to Settling Defendant West of England Ship Owners Mutual Insurance Association
(Luxembourg):

Eugene J. O'Connor, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759

XVII. ACTIONS OF TRUSTEES

51. All actions taken by the Trustees pursuant to this Consent Decree shall be in accordance with the terms of their Memorandum of Agreement, attached hereto at Appendix A.

XVIII. EFFECTIVE DATE

52. This Consent Decree shall be effective upon the date of its entry by the Court.

XIX. RETENTION OF JURISDICTION

53. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or material modification of this Consent Decree, or to effectuate or enforce compliance with its terms.

XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

54. In accordance with Department of Justice policy, this Consent Decree shall be lodged with the Court for a period of 30 days for public notice and comment. The United States and the State reserve the right to withdraw or withhold their consent if the comments regarding the

Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. In order to begin implementation of the Lobster Restoration Project as soon as possible, the Settling Defendants will begin implementation of this project prior to expiration of the public comment period and Court approval of the Consent Decree. In addition, as acknowledged in Paragraphs 15 - 17 of this Consent Decree, the Settling Defendants made certain payments to the Trustees prior to the lodging of the Decree with respect to assessment costs and lobster monitoring. The commencement of the Lobster Restoration Project, and the making of these payments, prior to expiration of the public comment period and Court approval of the Consent Decree, shall not impact on the right of the United States and the State to withdraw from the Consent Decree if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

55. If, for any reason, the Court should decline to approve this Consent Decree in the form presented, or if the United States or the State withdraws or withholds its consent pursuant to Paragraph 54, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXI. APPENDICES

56. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the Memorandum of Agreement that the Trustees have entered into Regarding Natural Resource Damage Assessment and Restoration Arising from the Barge North Cape/Tugboat Scandia Oil Spill and Coordination of other Studies and Enforcement Activities .

“Appendix B” is the Lobster Restoration Project.

“Appendix C” is Use of Funds in North Cape Oil Spill Restoration Account.

XXII. FINAL JUDGMENT

57. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States, the State, and the Settling Defendants.

XXIII. COSTS

58. Each Party shall bear its (or his) own litigation costs, including attorneys' fees, in the actions resolved by this Consent Decree.

XXIV. SIGNATORIES/SERVICE

59. The undersigned representatives of the Settling Defendants and the Trustees, as well as the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

60. Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree.

61. Settling Defendants shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service of process, if served by mail, on behalf of Settling Defendants with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in this manner and to waive

the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS 6th DAY OF October, 2000.

Ernest C Jones
UNITED STATES DISTRICT JUDGE

Attest to
True Copy

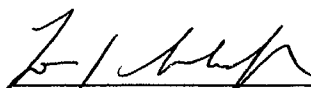
DAVID A. DIMARZIO

By [Signature]
Deputy Clerk

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States and the State of Rhode Island v. EW Holding Corp., relating to claims for natural resource damages in connection with the North Cape Oil Spill.

FOR THE UNITED STATES OF AMERICA,

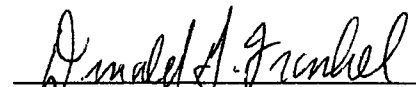
Date: 6/16/00



LOIS J. SCHIFFER

Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Date: 7/5/00



DONALD G. FRANKEL

Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
One Gateway Center
Suite 616
Newton, MA 02458
617- 450-0442

MARGARET E. CURRAN
United States Attorney
District of Rhode Island

MICHAEL IANNOTTI
Assistant United States Attorney
50 Kennedy Plaza
8th Floor
Providence, Rhode Island 02903
401- 528-5477

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States and the State of Rhode Island v. EW Holding Corp., relating to claims for natural resource damages in connection with the North Cape Oil Spill.

FOR THE STATE OF RHODE ISLAND,

Date: 6/13/2000

Mary E. Kay

MARY E. KAY

Deputy Chief Legal Counsel

Rhode Island Department of Environmental
Management

235 Promenade Street

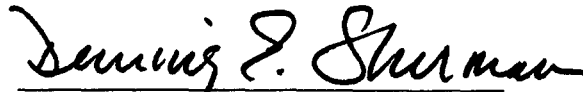
Providence, R.I. 02908

401-222-6607

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States and the State of Rhode Island v. EW Holding Corp., relating to claims for natural resource damages in connection with the North Cape Oil Spill.

FOR: EW HOLDING CORP. and K-SEA TRANSPORTATION CORP.

Date: 6/12/00



DEMING E. SHERMAN, ESQ.
Edwards & Angell, LLP
2800 BankBoston Plaza
Providence, RI 02903
401-274-9200

Agents Authorized to Accept Service on Behalf of Above-signed Parties:

Eugene J. O'Connor, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759
212-427-1900

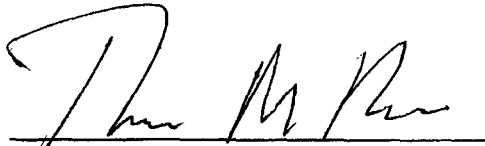
or

Deming E. Sherman, Esq.
Edwards & Angell, LLP
2800 BankBoston Plaza
Providence, RI 02903
401-274-9200

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States and the State of Rhode Island v. EW Holding Corp., relating to claims for natural resource damages in connection with the North Cape Oil Spill.

FOR: GREGORY R. AITKEN

Date: June 13 2000



THOMAS M. RUSSO, ESQ.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759
212-427-1900

Agents Authorized to Accept Service on Behalf of Above-signed Party:

Thomas M. Russo, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759
212-427-1900

THE UNDERSIGNED PARTY enters into this Consent Decree in the matters of United States and the State of Rhode Island v. EW Holding Corp., relating to claims for natural resource damages in connection with the North Cape Oil Spill.

FOR: WEST OF ENGLAND SHIP OWNERS MUTUAL
INSURANCE ASSOCIATION (LUXEMBOURG)

Date:

6/13/00



EUGENE J. O'CONNOR, ESQ.

Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759
212-427-1900

Agents Authorized to Accept Service on Behalf of Above-signed Party:

Eugene J. O'Connor, Esq.
Freehill, Hogan & Mahar, LLP
80 Pine Street
New York, New York 10005-1759
212-427-1900

or

Deming E. Sherman, Esq.
Edwards & Angell, LLP
2800 BankBoston Plaza
Providence, RI 02903
401-274-9200

APPENDIX C

USE OF FUNDS IN NORTH CAPE OIL SPILL RESTORATION ACCOUNT

APPENDIX C

Use of Funds in North Cape Oil Spill Restoration Account

Pursuant to Section VIII (North Cape Oil Spill Restoration Account) of the Consent Decree, the Trustees shall use the funds in the North Cape Oil Spill Restoration Account ("Restoration Account"), including all interest earned on such funds, for the following projects/activities. The goals of the projects are based on what the Trustees believe is attainable with the funds allocated for each project based on current market conditions. As set forth in Section VIII (North Cape Oil Spill Restoration Account) of the Consent Decree, if the goals of these projects are not attainable with the monies allocated to each project, the Trustees shall not be required to expend additional monies to achieve these goals.

1. Lobster Monitoring and Oversight: The Trustees will use approximately \$600,000 of the funds in the Restoration Account, plus accrued interest on this amount, as well as the \$200,000 paid by the Settling Defendants directly to NOAA on or about May 19, 2000, to (a) oversee the implementation of the Lobster Restoration Project by the Settling Defendants and (b) monitor the success of the Lobster Restoration Project by implementing a tag and recapture program.

2. Shellfish Restoration: The Trustees will use approximately \$1.5 million of the funds in the Restoration Account, plus accrued interest on this amount, to implement a quahog restoration project. The Trustees will transplant adult quahogs to designated sanctuaries in the waters of Narragansett Bay and the coastal salt ponds. These quahogs will be transplanted from an area proposed for dredging within the Federal Navigation Channel in the Providence River. If necessary, additional quahogs will be purchased from the market for transplanting. The goal is to transplant approximately 10.2 million quahogs. To the extent that the Federal Navigation Channel and the shellfish market cannot supply an adequate number of quahogs, the Trustees will implement additional shellfish restoration projects, such as, for example, the remote setting of oysters and/or quahog seeding.

3. Salt Pond Land Acquisition: The Trustees will use approximately \$1.6 million of the funds in the Restoration Account, plus accrued interest on this amount, to acquire land, or a conservation easement, near or adjacent to one or more of Rhode Island's salt ponds. The purpose of this acquisition is to reduce the ecological impacts of future land development, benefiting salt pond water column and benthic resources, and the biota dependent on them, by preventing increases in nutrient loading caused by septic discharges. The goal is to prevent the development of approximately 42 house lots.

4. Loon Restoration: The Trustees will use approximately \$3 million of the funds in the Restoration Account, plus accrued interest on this amount, to implement one or more loon restoration projects. The Trustees will use these funds to acquire/protect loon nests and associated territories and to ensure the success of these projects through efforts to protect/monitor the loon nests, such as hiring a field biologist to monitor the loon nests and providing information to the public concerning the project. The Trustees currently expect to

contribute a portion of the \$3 million toward an approximately \$4 million purchase of an easement along large portions of the shoreline of a lake in Maine, which is expected to protect loon nests and associated loon territories. The remaining portion of the \$4 million is expected to be provided by another party. The Trustees will use the remaining funds for protection/monitoring as well as to acquire additional land, or easements, to protect as many additional loon nests and associated territories as possible. The goal is to protect a total of approximately 20 loon nests and associated loon territories.

5. Sea Bird Restoration: The Trustees will use approximately \$400,000 of the funds in the Restoration Account, plus accrued interest on this amount, to implement a project to restore the injury caused to sea birds (other than loons). The Trustees will acquire land, or a conservation easement, on an island off the coast of Maine in order to protect eider habitat from future development, which would most likely eliminate the eider nests. The Trustees will also use these funds to ensure the success of this project through efforts to protect/monitor the eider nests. The goal of the project is to protect approximately 315 eider nests. If such property does not become available within five years, the Trustees will consider the implementation of an alternative restoration project for sea birds (other than loons).

6. Piping Plover Restoration: The Trustees will use approximately \$140,000 of the funds in the Restoration Account, plus accrued interest on this amount, to implement a piping plover protection project. The Trustees plan to implement a project that will enhance the productivity of piping plovers. The Trustees will hire a biologist, during the piping plover nesting season, to help reduce disturbance and predation at piping plover nests. The biologist will identify piping plover nesting areas, construct predator barriers around the nests, and reduce human disturbance by educational outreach to the public at nesting sites.

7. Fish Run Project: The Trustees will use approximately \$160,000 of the funds in the Restoration Account, plus accrued interest on this amount, to implement one or more anadromous fish run projects intended to provide compensation for lost recreational fishing. This project will involve removing or modifying existing obstructions to fish passages on rivers or brooks that connect to the salt ponds.

8. General Oversight: The Trustees will use approximately \$400,000 of the funds in the Restoration Account, plus accrued interest on this amount, for general oversight (as opposed to direct implementation costs) of the non-lobster restoration projects listed at numbers 2 through 7 above and the performance of Trustee responsibilities as described in their Memorandum of Agreement.

9. Lobster Restoration: If, as a result of delays in the Lobster Restoration Project caused by lobster disease, the Settling Defendants make a payment to the Trustees pursuant to Section II of the North Cape Lobster Restoration Plan Statement of Work, the Trustees shall use such payment to complete the Lobster Restoration Project or to implement an alternative project to complete the lobster restoration.