

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.

Civil Action No.

CONSENT DECREE

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UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA and the)	
STATE OF RHODE ISLAND AND PROVIDENCE)	
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EW HOLDING CORP. and K-SEA)	Civil Action No.
TRANSPORTATION CORP.,)	
)	
)	
Defendants.)	

CONSENT DECREE

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 ___ DAY OF _____, 2000.

UNITED STATES DISTRICT JUDGE

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 A

TRUSTEE MEMORANDUM OF AGREEMENT

MEMORANDUM OF AGREEMENT

AMONGST

DEPARTMENT OF THE INTERIOR

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

**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**

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MEMORANDUM OF AGREEMENT

AMONGST

DEPARTMENT OF THE INTERIOR

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

**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**

I. INTRODUCTION

This Memorandum of Agreement (Agreement) by and between the Department of the Interior (hereinafter "DOI"), the National Oceanic and Atmospheric Administration (hereinafter "NOAA"), and the State of Rhode Island and Providence Plantations (hereinafter "Rhode Island"), (collectively hereinafter "Trustees" and "Parties") is entered into in recognition of the common interests of the Trustees in the restoration of natural resources and associated services which have been injured, destroyed or lost as a result of the Barge North Cape/Tugboat Scandia Oil Spill which began on January 19, 1996 in Block Island Sound at and around the Trustom Pond National Wildlife Refuge in Rhode Island, and in the coordinated handling of natural resource damage claims arising therefrom.

II. AUTHORITY

A. The natural resource Trustees enter into this Agreement in accordance with the natural resource Trustee authorities provided for each Trustee under Section 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706(a)-(g); Section 107(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9607(f); Section 311(f) of the Clean Water Act (CWA), 33 U.S.C. §1321(f), and other applicable Federal law, and State statutory and common law; and authority 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 Oil Pollution Act Natural Resource Damage Assessments Final Rule, 15 C.F.R. Part 990, 61 F.R. 440 (January 6, 1996).

B. In accord with 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. The Director of the Department of Environmental Management for the State of Rhode Island,
2. The Secretary of the Interior, for the Department of the Interior,
3. The Under Secretary for Oceans and Atmosphere, Administrator of the National Oceanic and Atmospheric Administration, for the Department of Commerce.

III. DEFINITIONS

For purposes of this Agreement the following definitions shall apply:

A. "Assessment Coordinator" means the person appointed or hired by the Trustee Council to conduct activities as described at Section VIII(E).

B. "Federal Trustees" means the Secretary of Commerce, acting through NOAA, and the Secretary of the Interior or their respective authorized designees.

C. "Joint use" means use of natural resource damage recoveries by the State Trustee or the Federal Trustees, whether individually or collectively, in such a manner as is agreed upon by the Trustees in accordance with the terms of this Agreement.

D. "Natural resources" shall have the same meaning as set forth in Section 1001(20) of OPA, 33 U.S.C. §2701(20).

E. "Natural resource damage(s) recovery(ies)" means any award, judgment, settlement or other payment to the Federal Trustees or the State Trustee which is received or controlled by any of the Trustees, individually or collectively, for or as a result of claims for natural resource damages against any potentially responsible parties regarding the Spill, except any such award which is judgment, settlement, or payment in reimbursement of natural resource damage assessment costs incurred by any of the Trustees.

F. "Oversight expenses" means any costs associated with individual trustee participation in the restoration planning process, Trustee Council administrative proceedings, costs associated with the retention of consultants, coordinators, or any other technical or administrative services associated with the

development of the restoration plan, or any other costs reasonably related to the implementation of this Agreement other than the physical implementation of the final restoration plan approved by the Trustee Council.

G. "Restore" and "Restoration" mean any actions undertaken by the Trustees pursuant to OPA Section 2706(c), (d) and (f), and other applicable laws or regulations, including planning, implementation, administration and oversight, which serve to restore, rehabilitate, replace, or acquire the equivalent of natural resources or natural resource services injured, destroyed or lost as a result of the Spill.

H. "Restoration Coordinator" means the person appointed/hired by the Trustee Restoration Council to conduct activities as described at Section VIII, Paragraph D.

I. "Spill" means the Barge North Cape/Tugboat Scandia Oil Spill which began on or about January 19, 1996 in Block Island Sound at and around the Trustom Pond National Wildlife Refuge in Rhode Island, together with any and all impacts to natural resources arising from said release of oil.

J. "State Trustee" means the Director of the Rhode Island Department of Environmental Management, or the Director's trustee representative.

K. "Trustees" means the Federal Trustees and the State Trustee.

L. "Trustee Representatives" means the three (3) authorized designees appointed by the Trustees of NOAA, DOI and Rhode Island to the Trustee Council.

M. "Trustee Council" means the three Trustee Representatives appointed by the Trustees of NOAA, DOI and Rhode Island to oversee coordination of natural resource damage assessment and restoration arising from or related to the Spill.

IV. SCOPE

This Agreement is intended to cover natural resources as defined under Section 1001(20) of OPA, as amended, 33 U.S.C. 2701(20), belonging to or managed by, controlled by, or appertaining to the Trustees under OPA, CERCLA and the NCP which have been or may be affected by the Spill.

V. PURPOSE

The purpose of this Agreement is to provide a framework for intergovernmental coordination among the Trustees and for implemen-

tation of the Trustees' activities in furtherance of their natural resource trustee responsibilities under OPA and other applicable Federal law, and State statutory and common law, with respect to the Spill as regards both the handling of any claims for natural resource damages, and the development, implementation, and oversight of restoration activities relating to the Spill.

VI. OBJECTIVES

The Trustees shall coordinate their efforts to meet their respective natural resource trustee responsibilities under OPA, CERCLA and other applicable Federal law and State statutory and common law. The Trustees agree to work together to achieve the following natural resource damage claim and restoration implementation objectives:

A. Natural Resource Damage Claim Objectives.

1. Prepare a Notice of Intent to Conduct Restoration Planning and/or a Pre-assessment Screen to determine whether to conduct a full natural resource damages assessment.
2. Develop and implement a plan to assess the damages for injured, destroyed or lost natural resources resulting from the Spill.
3. Develop and implement a plan for the restoration of natural resources injured, destroyed or lost due to the Spill.
4. Determine the costs and expenses likely to be incurred for restoration of natural resources injured, destroyed or lost due to the Spill.
5. Determine the value of any loss of use of natural resources injured, destroyed or lost due to the Spill.
6. Assess, as appropriate, any other damages for any such injury, destruction or loss of natural resources resulting from the Spill.
7. If appropriate, assert claims against responsible and/or potentially responsible parties (PRPs) for damages as compensation for injury, destruction or loss of natural resources and costs incurred in carrying out Trustee responsibilities for natural resource damages resulting from the Spill.

B. Natural Resource Restoration Objectives.

1. Coordinate the efforts of the Parties in implementing the objectives of this Agreement;
2. Prepare a comprehensive Restoration Plan to address natural resource injuries resulting from the Spill.
3. Develop the Restoration Plan consistent with the federal National Environmental Policy Act, 42 U.S.C. § 4321 et seq.; the NOAA regulations at 15 C.F.R. Part 990, and Rhode Island statutory and common law.
4. Identify and evaluate a range of potential restoration alternatives and select appropriate alternatives for restoration of natural resources;
5. Determine the costs and expenses likely to be incurred for the restoration of natural resources;
6. Implement the Restoration Plan to restore natural resources injured, destroyed, or lost;
7. Fairly allocate the costs and expenses of carrying out the objectives of this Agreement among the Trustees;
8. Foster public participation in development and implementation of the Restoration Plan; and
9. Oversee and monitor any PRPs restoration activities.

VII. FUNDING

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

B. **PRP Funding.** If PRP funding of natural resource damages assessment activities becomes available, the Trustee Council may enter into an agreement with the PRPs to determine the terms of monetary disbursement and PRPs participation. Any such Trustee Council/PRPs agreement shall be consistent with subsection "A" above, and shall require that such funds be deposited in a dedicated account, preferably one which is interest bearing, and shall contain such other terms and conditions as the Trustee Council shall determine are necessary and appropriate.

C. **Governmental Funding.** Each Trustee agrees to identify and pursue funding sources, as necessary, and subject to their respective legal limitations, to provide for participation under this Agreement. Nothing in this Agreement shall be construed as

1. Coordinate the efforts of the Parties in implementing the objectives of this Agreement;
2. Prepare a comprehensive Restoration Plan to address natural resource injuries resulting from the Spill.
3. Develop the Restoration Plan consistent with the federal National Environmental Policy Act, 42 U.S.C. § 4321 et seq.; the NOAA regulations at 15 C.F.R. Part 990, and Rhode Island statutory and common law.
4. Identify and evaluate a range of potential restoration alternatives and select appropriate alternatives for restoration of natural resources;
5. Determine the costs and expenses likely to be incurred for the restoration of natural resources;
6. Implement the Restoration Plan to restore natural resources injured, destroyed, or lost;
7. Fairly allocate the costs and expenses of carrying out the objectives of this Agreement among the Trustees;
8. Foster public participation in development and implementation of the Restoration Plan; and
9. Oversee and monitor any PRPs restoration activities.

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C. **Governmental Funding.** Each Trustee agrees to identify and pursue funding sources, as necessary, and subject to their respective legal limitations, to provide for participation under this Agreement. Nothing in this Agreement shall be construed as

obligating the DOI, NOAA, or Rhode Island to expend any funds in excess of appropriations or other amounts authorized by law.

VIII. BARGE NORTH CAPE/TUGBOAT SCANDIA OIL SPILL TRUSTEE COUNCIL

A. **Composition.** Within ten (10) days of the execution of this Agreement, each Trustee, as specified under Section III, shall designate one primary voting delegate to the Barge North Cape/Tugboat Scandia Trustee Council ("Trustee Council"). Each Trustee shall also designate an alternate delegate to act in the absence of the primary voting delegate. Until such designation is made, the interim voting delegates shall be Warren Angell, with Claude Cote as alternate for Rhode Island, Willie R. Taylor for DOI, and Frank G. Csulak for NOAA. In addition, the U.S. Department of Justice, the Office of the Attorney General for the State of Rhode Island, the Office of the Governor of the State of Rhode Island, and in-house counsel for each of the Trustees, each may provide one delegate in a legal/consultative role, who shall not be a member of the Trustee Council, but who shall nonetheless be able to attend all meetings of, or organized by, the Trustee Council.

B. **Communications.** Within ten (10) days of the execution of this Agreement each Trustee shall notify all of the Trustees of the name(s), address(es), phone number(s), and facsimile number(s), of the Trustee's primary and alternate delegates to the Trustee Council who shall receive, and shall be responsible for on behalf of the Trustee, all correspondence and communications on behalf of such Trustee. In addition, the U.S. Department of Justice, the Office of the Attorney General for the State of Rhode Island, and the Office of the Governor of the State of Rhode Island shall be directly and contemporaneously provided copies of all significant and relevant documents, notices and notifications.

C. **Decisionmaking.** The 3 (three) members of the Trustee Council, NOAA, DOI, and Rhode Island, shall have equal authority, and all decisions under this Agreement shall be by unanimous agreement of all Trustee Council members.

D. **Dispute Resolution.** In the event of a dispute involving any decisions under this Agreement, the Trustee Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among the Trustees involved in the dispute and consensus by the Trustee Council as a whole. In resolving any such disputes, the Trustees shall remain cognizant of all relevant principles and concerns, including without limitation, the goals of the Oil Pollution Act of 1990, the nature and extent of each Trustee's resource concerns, and general principles of

equity. If unanimous consent cannot be reached, the matter shall be elevated to the Trustees for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. In the event of irreconcilable disputes, the disposition of funds recovered from the PRPs shall be governed by Section XII(F)(3) of this MOA.

E. Duties and Authority. The Trustee Council shall coordinate and authorize all Trustee activities and matters under this Agreement directed towards the resolution of natural resource damage claims arising from the Spill. In addition, the Trustee Council shall be responsible for restoration planning, oversight and implementation to the extent such issues arise prior to final settlement or judgment covering all Trustee natural resource damages claims arising from the Spill, or the establishment of a Trustee Restoration Council pursuant to Section IX(B), below. Prior to the establishment of the Trustee Restoration Council, to the extent the Trustee Council deems such activities or actions necessary, the Trustee Council may take all actions authorized by and for the Trustee Restoration Council, including but not limited to the creation of a Technical Advisory Committee. The Trustee Council shall have final authority to disburse any PRPs funding received pursuant to Section VII of this Agreement and to make all necessary decisions for the management and administration of projects undertaken by the PRPs to implement restoration, and/or for which PRPs funding may be used. This shall include, but is not limited to, the payment of administrative costs to individual Trustees that the Trustee Council determines are reasonable and necessary. The Trustee Council reserves the right to take such further actions as may be necessary to further the purposes and achieve the objectives set forth in this Agreement. The Trustee Council is specifically authorized to assign specific duties or functions to individual Trustees.

F. Administrative Trustee. The Trustees hereby agree to designate one trustee to act as Administrative Trustee under this Agreement for the purpose of directing and coordinating trustee activities towards resolution of claims arising from the Spill. The initial responsibilities of the Administrative Trustee include: scheduling of meetings; preparation of agendas for those meetings; acting as a central contact point and spokesperson for the Trustees; maintenance of records and relevant documents; circulation of documents among Parties; and such other duties as are agreed upon and assigned to the Administrative Trustee by the Trustee Council pursuant to Section VIII E. The Administrative Trustee shall fully coordinate its activities with and only act under the direction of the Trustee Council. Other duties of the Administrative Trustee and/or the other Trustee entities shall be arrived at by resolution of the Trustee Council.

G. Meetings. Any member of the Trustee Council may, upon reasonable notice through the Administrative Trustee, call a

meeting of the 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 among the Trustees to this Agreement. Members of the Council may invite their respective staffs or attorneys to attend.

H. Trustee Council Termination. The Trustee Council created pursuant to this Section shall terminate upon final settlement or judgment covering all Trustee natural resource damages claims arising from the Spill. Upon such event, the members of the Trustee Council shall serve as the interim members of the Trustee Restoration Council described hereinafter.

IX. RESTORATION COORDINATION AND IMPLEMENTATION

A. Joint Use Of Natural Resource Damage Recoveries.

1. State and Federal Trusteeships. The Trustees recognize that each of them has trusteeship, through their respective natural resource Trustees, under OPA and CERCLA over natural resources affected by the Spill, and that the scopes of their respective trusteeships overlap.

2. Joint Use of Natural Resource Damage Recoveries. The Trustees agree that any natural resource damage recoveries, as defined in Section III(E) of this Agreement, obtained or received by the Trustees, individually or collectively, and any interest earned thereon, shall be jointly used to restore natural resources which have been injured, destroyed or lost as a result of the Spill.

B Barge North Cape/Tugboat Scandia Oil Spill Trustee Restoration Council.

1. Composition. Within ten (10) days of final settlement or judgment covering all Trustee natural resource damages claims arising from the Spill, each Trustee, as specified under Section III, shall designate one primary voting delegate to the Barge North Cape/Tugboat Scandia Trustee Restoration Council ("Trustee Restoration Council"). Each Trustee shall also designate an alternate delegate to act in the absence of the primary voting delegate. Until such designation is made, the interim voting delegates as designated pursuant to Section VIII.E. shall be the representatives on the Trustee Restoration Council. In addition, the U.S. Department of Justice, the Office of the Attorney General for the State of Rhode Island, the Office of the Governor of the State of Rhode Island, and in-house counsel for each of the Trustees, each

may provide one delegate in a legal/consultative role, who shall not be a member of the Trustee Restoration Council, but who shall nonetheless be able to attend all meetings of, or organized by, the Trustee Restoration Council.

2. Communications. Within ten (10) days of the creation of the Trustee Restoration Council, each Trustee shall notify all of the Trustees of the name(s), address(es), phone number(s), and facsimile number(s), of the Trustee's primary and alternate delegates to the Trustee Restoration Council who shall receive, and shall be responsible for on behalf of the Trustee, all correspondence and communications on behalf of such Trustee. In addition, the U.S. Department of Justice, the Office of the Attorney General for the State of Rhode Island, and the Office of the Governor of the State of Rhode Island shall be directly and contemporaneously provided copies of all significant and relevant documents, notices and notifications.

3. Decisionmaking. The 3 (three) members of the Trustee Restoration Council, NOAA, DOI, and Rhode Island, shall have equal authority, and all decisions under this Agreement shall be by unanimous agreement of all Trustee Restoration Council members.

4. Dispute Resolution. In the event of a dispute involving any decisions under this Agreement, the Trustee Restoration Council shall initially attempt to resolve the dispute through good faith discussions directed toward obtaining consensus among the Trustees involved in the dispute and consensus by the Trustee Restoration Council as a whole. In resolving any such disputes, the Trustees shall remain cognizant of all relevant principles and concerns, including without limitation, the goals of the Oil Pollution Act of 1990, the nature and extent of each Trustee's resource concerns, and general principles of equity. If unanimous consent cannot be reached, the matter shall be elevated to the Trustees for decision or further instructions. If necessary, the Trustees may establish other mechanisms by which disputes may be resolved. In the event of irreconcilable disputes, the disposition of funds recovered from the PRPs shall be governed by Section XIII(F)(3) of this MOA.

5. Duties. The Trustee Restoration Council shall coordinate all Trustee activities and matters under this Agreement. The Trustee Restoration Council's duties, subject to review and direction by the Trustees, shall include, but not be limited to, the following:

a. The Trustee Restoration Council shall coordinate to

make all decisions and to take any actions that are reasonably necessary to carry out the purposes of this Agreement. All decisions shall be issued in writing and signed by all three members of the Trustee Restoration Council, as representatives of their respective Trustees.

- b. The Trustee Restoration Council shall coordinate on all decisions relating to restoration activities or the use of any natural resource damage recoveries, and any interest earned thereon, for restoration activities, including, but not limited to, the payment of reasonable and necessary costs for each Trustee's participation in the Trustee Restoration Council process and for the planning, implementation, administration and oversight of any activities that are reasonably necessary to carry out the purposes of this Agreement.
- c. Reasonable Trustee oversight expenses may be reimbursed and or directly paid out of funds recovered from the PRPs as natural resource damages. The Trustee Restoration Council shall establish by resolution reasonable limits to the reimbursement of oversight expenses.
- d. The Trustee Restoration Council may establish a committee known as the Barge North Cape/ Tugboat Scandia Technical Advisory Committee (hereinafter the "Technical Advisory Committee").
- e. The Trustee Restoration Council shall have the duty to provide for reasonable public involvement, including notice and comment, in accordance with applicable law and regulations, for all restoration projects under this Agreement.
- f. The Trustee Restoration Council may invite representatives of other public agencies and members of the public to its meetings unless, subject to applicable law, the Trustee Restoration Council determines that the subject of the meeting is privileged or that public disclosure of the Trustee Restoration Council's work would prejudice the effectiveness of the Trustee Council and the Trustees' responsibilities under applicable law.
- g. The Trustee Restoration Council may contract with consultants to provide such technical services as the Trustee Restoration Council determines are necessary and as permissible under applicable state or federal law.

- h. To the extent permitted by applicable law, the Trustee Restoration Council may collectively or through individual Trustees, receive grants or donations to be applied to the restoration of natural resources related to injuries arising from the Spill.

6. Restoration Coordinator. The Trustee Restoration Council may designate a Restoration Coordinator whose work shall be directed exclusively by the Trustee Restoration Council. The responsibilities of the Restoration Coordinator may include:

- a. preparation of a Restoration Plan;
- b. coordination, management, reporting and monitoring of the natural resource restoration process;
- c. scheduling of meetings of the Trustee Restoration Council and the Technical Advisory Committee and preparation of agendas for those meetings and the recording of all actions taken at such meetings;
- d. preparing and issuing, from time to time, public reports on the work of the Trustee Restoration Council;
- e. conducting public outreach and fostering public participation in the development and implementation of the Restoration Plan;
- f. to the extent permitted by applicable law, identify and secure, wherever possible, other financial resources such as, but not limited to, grants that may be available to the Trustee Restoration Council individual trustees for use according to the terms of this Agreement.
- g. such other duties as are unanimously agreed upon by the Trustee Restoration Council;

7. Administrative Restoration Trustee. The Trustee Restoration Council shall designate a Administrative Restoration Trustee (ART). The ART may delegate responsibilities to the Restoration Coordinator with the prior approval of the Trustee Council except that item (d) below shall at all times remain the exclusive responsibility of the ART. The responsibilities of the ART may include:

- a. coordination and monitoring of the natural resource restoration process;

- b. scheduling of meetings of the Trustee Restoration Council and the Technical Advisory Committee and preparation of agendas for those meetings and the recording of all actions taken at such meetings;
- c. acting as a central contact for the Trustee Restoration Council and the Technical Advisory Committee;
- d. maintenance of all records and relevant documents received or generated by the Trustee Restoration Council or the Technical Advisory Committee;
- e. contracting with consultants to provide such technical services to the Trustee Restoration Council as the Technical Advisory Committee may advise or as the Trustee Council determines are necessary;
- f. preparing and issuing, from time to time, public reports on the work of the Trustee Restoration Council;
- g. such other duties as are unanimously agreed upon by the Trustee Restoration Council.

8. Meetings. Any member of the Trustee Restoration Council may, upon reasonable notice through the RAT, call a meeting of the Trustee Restoration Council to be conducted either in person or by telephone conference call. Such meetings shall generally be held in conjunction with other set meetings among the Trustees to this Agreement. Members of the Council may invite their respective staffs or attorneys to attend.

9. Trustee Council Termination The Trustee Council created pursuant to this Section shall terminate upon the completion of all restoration activities undertaken related to the Spill, or otherwise in accord with the provisions of Section XIII (F) of this MOA.

C. The Barge North Cape/ Tugboat Scandia Technical Advisory Committee.

1. Designation. The Trustee Restoration Council may establish a committee known as the Barge North Cape/ Tugboat Scandia Technical Advisory Committee (hereinafter the "Technical Advisory Committee").

2. Composition. The State Trustee and the Federal Trustees

each may designate up to three (3) members from their respective State or Federal agencies or sub-divisions to serve on the Technical Advisory Committee. The Trustee Restoration Council may designate individuals from the public or non-government environmental organizations to serve on the Technical Advisory Committee. The Technical Advisory Committee may invite representatives of other public agencies and members of the public to its meetings unless, subject to applicable law, the Trustee Restoration Council determines that the subject of the meeting is privileged or that public disclosure of the Trustee Restoration Council's work would prejudice the effectiveness of the Trustee Restoration Council and the Trustees' responsibilities under applicable law. The Trustee Restoration Council may limit or expand the size of the Technical Advisory Committee as necessary to meet the objectives of this Agreement and the responsibilities of the Trustees under applicable law.

3. Duties. At the request of the Trustee Restoration Council, the Technical Advisory Committee may review and provide technical comment to the Trustee Restoration Council on the Restoration Plan and on proposals for natural resource restoration. If requested, the Technical Advisory Committee may also review and comment upon work that is in progress or that has been completed under contract or other agreement for the Trustee Restoration Council to ensure its compliance with such contract or other agreement.

D. Technical Services.

1. The Trustee Council and/or the Trustee Restoration Council (hereinafter "Councils") may determine that they need technical advisors, consultants or other service providers to assist in carrying out their responsibilities under this Agreement. The Councils, through their individual members or collectively, may expend natural resource damage recoveries for service providers to perform the following services:

- a. provide project design and technology review, Spill related analysis, restoration planning or services, testing, sampling, and other services related to the development or implementation of a restoration plan for the Spill;
- b. provide the Councils with logistical support and coordination;
- c. organize and prepare for Council meetings;
- d. provide technical advice to the Councils during Council meetings;

- e. provide technical or other advice to the Councils and the Technical Advisory Committee as required to carry out the purposes of this Agreement;
- f. provide such other services, consistent with applicable law, as requested by the Councils.
- g. To obtain technical services, the Councils may agree to designate the Restoration Coordinator designated pursuant to section IX.B.6 or any one or more Trustee(s) as authorized to enter into intergovernmental personnel transfers, one or more contracts, or other lawful agreements with professional consultants, advisors, or other service providers that the Councils determines are qualified to provide services to the Councils.

X. NOTIFICATION OF NEGOTIATIONS WITH PRPs

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

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

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

XI. CONFIDENTIALITY

- A. The Parties recognize and agree that their interests in the

recovery of certain claims and natural resource damages associated with the Spill are co-extensive and have agreed to coordinate negotiation and, if necessary, litigation of their claims and damages that arise out of the Spill.

B. The Parties recognize that, in order to effectively and efficiently negotiate and litigate their claims, their counsel, employees and consultants may, at each Party's discretion, exchange documents and information including draft reports, analyses, opinions, conclusions, and advice prepared in anticipation of litigation, and/or subject to attorney-client privilege or other forms of privilege. The Parties therefore hereby agree as follows:

1. Except as provided by law or otherwise provided herein, the Parties shall treat all designated privileged documents generated, and designated privileged communications, by, between or among the Parties as privileged attorney-client communications, attorney work product or protected by other applicable privileges (or as a combination thereof), and shall protect such documents and communications from disclosure to the maximum extent possible under applicable Federal and State law. A "designated privileged document" is one identified on its cover page or elsewhere as subject to one or more privileges or forms of immunity. A "designated privileged communication" is one which occurs with an expectation of confidentiality and includes, but is not limited to, communications between the Governments' attorneys or their staff, agents, and/or experts in anticipation of litigation, in the seeking or giving of legal advice, and/or in the context of pre-decisional government deliberations.
2. The transmittal of a privileged document to, or a privileged communication between or among any of the Parties (and their counsel, representatives, contractors and consultants) does not waive, or imply any waiver, of any privilege or right which the transmitting government may assert with respect to that document or communication.
3. Unless otherwise specifically provided, the Parties shall each be entitled to assert an applicable privilege with respect to any document or communication jointly transmitted, prepared, or funded by the Parties. Each Party shall be entitled to assert an applicable privilege with respect to any document or communication transmitted, prepared, or funded solely by that Party.

4. If a subpoena, discovery request, or other request in any form, for a privileged document or information is received by any Party, a copy of the subpoena or request will be immediately forwarded to counsel for the Party or Parties to which the privilege applies and to the government representative(s) who originally generated the document or communication requested. The Party who receives such a request shall also provide a draft of the Party's intended response to such request not less than ten (10) days prior to the date that the Party intends to issue its response. To the extent that applicable law may require a response more promptly than is consistent with the above temporal requirement, the Parties agree to act in good faith to meet any such requirements.
5. Only by specific written agreement among the Parties or pursuant to Court Order shall disclosure of a privileged document or communication be made public or disclosed to a party-opponent or non-party. Such agreement shall not be construed as a waiver of privilege or confidentiality regarding any other documents or communications.
6. Nothing herein in any way affects or limits the authority of any Party to waive any privilege and release any documents, information, analysis, opinion, conclusion, or advice that are subject to privileges held exclusively by that Party.
7. Designated privileged documents shall be maintained in such a manner as to insure that no intentional or unintentional disclosure is made which would compromise any asserted privilege, including segregating designated privileged documents in files that are identified as containing privileged documents that are not to be disclosed publicly or in response to a discovery request in this or any other case.
8. At the request and option of any Party, designated privileged documents shall be returned to the originating Party or destroyed.

C. The Parties agree that, to the extent consistent with the effective and efficient negotiation and litigation of their claims, public dissemination of final data and studies related to injuries arising from the Spill is in the best interests of the public and the Parties. Such final data and studies shall be made available to the public upon request to the extent consistent with the foregoing confidentiality provisions. In addition, the Parties shall open and maintain a publicly available administrative record to the extent required by, and

consistent with the requirements of, the Federal Natural Resource Damage Regulations that the Parties select for use in connection with the Spill.

XII. GENERAL PROVISIONS

A. Reservations. Neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Party named herein (or any government) of (nor be construed as precedent for) any legal responsibility under federal law or state statutory and common law to protect, restore, or enhance any natural resources affected by the Spill over which any other Trustee asserts trusteeship. Furthermore, neither execution of this Agreement nor performance of any activities pursuant to this Agreement shall constitute an admission by any Trustee named herein (or any government) of (nor be construed as precedent for) any liability for damage or injury to any natural resources affected by the Spill over which any other Trustee asserts trusteeship.

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

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

D. Effective Date. This Agreement shall be effective when executed by all of the Parties. The effective date of this agreement will be the date on which the last signature is entered.

This Agreement can be executed in one or more counterparts, each of which will be considered an original document.

E. Amendment.

1. This Agreement may be amended by agreement of the Parties if it is determined that an amendment is necessary to accomplish the objectives of this Agreement, or is necessary to modify the objectives of this Agreement consistent with the requirements of OPA, CERCLA, any amendments thereto, or other applicable Federal law or State common or statutory law.

2. Any amendment of this Agreement shall be effective only if it is in writing and executed by all parties to this

Agreement.

F. Termination.

1. This Agreement shall be in effect from the day of execution until the Trustee Council determines that the restoration plan or plans implemented under this Agreement have been completed, except that this Agreement may be extended by written agreement, as provided in Section XII of this Agreement.

2. Any Party may withdraw from this Agreement, but only after efforts have been made to resolve any dispute in accordance with paragraph B of Section VIII of this Agreement. Such withdrawal shall only be effective upon thirty (30) days written notice upon all Parties to this Agreement.

3. In the event that this Agreement is terminated or one of the Parties withdraws, the Trustees expressly agree that they will continue to coordinate their activities to the greatest extent practicable to restore the natural resources affected by the Spill, and that they will be guided by the objectives set forth in Section VI of this Agreement. The disposition of any unobligated sums recovered from PRPs as natural resource damages, and any interest earned thereon, shall be determined by further agreement of the Trustees or, if an agreement cannot be reached, upon application by a party to this MOA to the United States District Court (R.I.), by allocation of such recoveries and interest by the Court. In making a fair and reasonable allocation of these monies among the Trustees, the Court shall consider primarily the need to achieve, to the maximum extent practicable, the Natural Resource Objectives of this MOA and shall further consider the overlapping jurisdictions of the federal and state trustees. In any event, the Trustees further expressly agree that any unobligated funds recovered from PRPs as natural resource damages, and any interest earned thereon, shall be expended solely to develop and implement a plan to restore injured natural resources under their trusteeship, as mandated by Section 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706.

4. The withdrawal of any Party to this Agreement for whatever reason, shall not affect the subsequent validity of this Agreement among the remaining Parties. A party that has withdrawn from this agreement shall have no further obligations under this agreement except for the obligations under Section XII(F)(3), above, to continue to coordinate activities to the greatest extent practicable, and to expend unobligated funds recovered for natural resource damages solely to develop and implement a plan to restore injured natural resources under their trusteeship, as mandated by Section 1006 of the Oil Pollution Act (OPA), 33 U.S.C. § 2706.

G. Federal Natural Resource Damages Regulations. It is the intention of the Trustees to follow the NOAA natural resource damage regulations, 15 CFR Part 990 in matters relating to the Spill.

H. Antideficiency. Nothing in this Agreement shall be construed as obligating the United States or Rhode Island, their officers, agents or employees, to expend any funds in excess of appropriations or other amounts authorized by law.

The GOVERNMENTS, through their designated representatives, have signed this Agreement on the day and year appearing opposite their signatures.

[Memorandum of Agreement Concerning Natural Resource Damages in the Matter of THE BARGE NORTH CAPE/ TUGBOAT SCANDIA OIL SPILL

THE FEDERAL NATURAL RESOURCE TRUSTEES

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATURAL RESOURCE TRUSTEE
AUTHORIZED OFFICIAL

C. Ehler

06/06/1996

Charles N. Ehler
Director, Office of Ocean Resource Conservation and Assessment

**[Memorandum of Agreement Concerning Natural Resource Damages in
the Matter of THE BARGE NORTH CAPE/ TUGBOAT SCANDIA OIL SPILL**

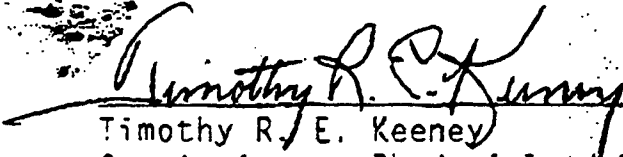
**FOR THE DEPARTMENT OF THE INTERIOR
NATURAL RESOURCE TRUSTEE
AUTHORIZED OFFICIAL**

 8/2/1996

**Willie R. Taylor
Director, Office of Environmental Policy and Compliance**

[Memorandum of Agreement Concerning Natural Resources Damages in
the Matter of THE BARGE NORTH CAPE/ TUGBOAT SCANDIA OIL SPILL

FOR THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

 Oct 16 1996

Timothy R. E. Keeney
Commissioner, Rhode Island Department of Environmental Management
State Trustee of Natural Resources

Amendment 96-1

of the

Memorandum of Agreement Between

Department of the Interior

National Oceanic and Atmospheric Administration

State of Rhode Island and Providence Plantations

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

AMENDMENT 96-1

On October 16, 1996, the Department of the Interior, the National Oceanic and Atmospheric Administration, and the State of Rhode Island (collectively, the Trustees) entered into a Memorandum of Agreement (MOA) in recognition of their common interests in the restoration of natural resources and associated services which were injured, destroyed or lost as a result of the Barge North Cape/Tug Scandia Oil Spill which began on January 19, 1996 in Block Island Sound at and around the Trustom Pond National Wildlife Refuge in Rhode Island, and in the coordinated the handling of natural resource damage claims arising therefrom. These agencies have the authority, under 40 C.F.R. Sections 300.600 through 300.615, to act on behalf of the public as Federal and State Trustees for natural resources.

Article XII. Section E. of the MOA provides that the MOA may be amended by agreement of the Trustees if it is determined, *inter alia*, that an amendment is necessary to accomplish the objectives of the MOA.

The Trustees have determined that amendment of the MOA is necessary to accomplish the objectives of the MOA. The Trustees therefore agree that the MOA will be amended as follows:

1. Article VI. Section B. 3 shall be changed to read:

Develop a Restoration Plan consistent with the federal National Environmental Policy Act, 42 U.S.C. Section 4321 et seq.; the NOAA regulations at 15 C.F.R. Part 990; and Rhode Island statutory law, common law, and resource management policies.

2. Article IX. Section B.4. - The last sentence shall be changed to read:

In the event of irreconcilable disputes, the disposition of funds recovered from the PRPs shall be governed by Section XII(F)(3).

3. Article IX. Section B.8. - The first sentence shall be changed to read:

Any member of the Trustee Restoration Council may, upon reasonable notice through the ART, call a meeting of the Trustee Restoration Council to be conducted either in person or by telephone conference call.

4. Article IX. Section B.9. The first sentence shall be changed to read:

The Trustee Council created pursuant to this Section shall terminate upon the completion of all restoration activities undertaken related to the Spill, or otherwise in accord with the provisions of Section XII(F) of this MOA.

5. Article XII. Section G. The first sentence shall be changed to read:

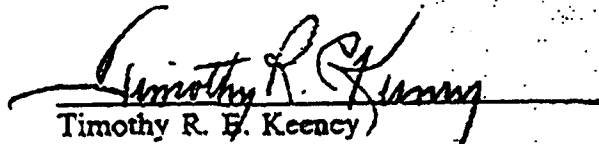
It is the intention of the Trustees to follow as guidance the NOAA natural resource damage regulations, 15 C.F.R. Part 990, in matters relating to the Spill.

The Trustees, through the delegates designated pursuant to Article VIII. Section A. of the MOA, have signed Amendment 96-1 on the date appearing opposite their signatures.

Amendment 96-1
Memorandum of Agreement Between
Department of the Interior
National Oceanic and Atmospheric Administration
State of Rhode Island and Providence Plantations

Barge North Cape/Tugboat Scandia
Oil Spill

FOR THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
NATURAL RESOURCE TRUSTEE
TRUSTEE DELEGATE


Timothy R. E. Keency
Commissioner

Oct 11, 1996
Date

Amendment 96-1
Memorandum of Agreement Between
Department of the Interior
National Oceanic and Atmospheric Administration
State of Rhode Island and Providence Plantations

Barge North Cape/Tugboat Scandia
Oil Spill

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
NATURAL RESOURCE TRUSTEE

C. Ehler
Charles N. Ehler
Director, Office of Ocean
Resources Conservation
and Assessment

2/10/77
Date

APPENDIX B

LOBSTER RESTORATION PROJECT

APPENDIX B

Statement of Work

North Cape Lobster Restoration

Section I. Introduction

This *North Cape* lobster restoration Statement of Work ("SOW") sets forth a plan for lobster restoration, as required by Section V (Lobster Restoration Project) of the consent decree in United States and State of Rhode Island v. EW Holding Corp. (D.R.I.) ("Consent Decree"). This SOW is incorporated into, and is a requirement of, the Consent Decree.

The Settling Defendants shall restock 1.248 million female legal-size lobsters with v-notches into the waters of Block Island Sound over a period of a minimum of 3 years and a maximum of 5 years beginning in 2000. The purpose of this SOW is to specify a work plan to accomplish this objective.

The Settling Defendants shall purchase lobsters from wholesalers and restock a minimum of 150,000 lobsters and a maximum of 500,000 lobsters per year depending on supply, market conditions, and weather. In year one the project shall begin in the spring of 2000 and may operate through December 1, 2000. In subsequent years, the project shall operate from May 1 through December 1 ("Annual Project Period"), and shall be completed no later than December 31, 2004. The Annual Project Period (May 1 to December 1) may be extended if mutually agreed to by both the Trustees and the Settling Defendants. If the Settling Defendants have not purchased, v-notched and released 1.248 million female lobsters by December 31, 2004, the remaining balance of lobsters to be restocked shall be increased by 3% per year until the project is completed. This 3% increase shall not apply to any changes in the project schedule as a result of lobster disease as described in Section II.

Section II. Lobster Disease Contingency

Lobsters in Block Island Sound and surrounding waters have been infected with shell disease and lobsters from Long Island Sound are dying apparently as a result of a parasitic amoeboid protozoan. Increases in shell disease or the spread of the parasitic disease to Block Island Sound may affect the availability of Southern New England lobsters for purchase, or may otherwise negatively impact this lobster restoration project. If the Trustees determine that lobster disease is adversely affecting the success of the restocking project, the Trustees shall have the discretion to delay the project until such time that the Trustees determine the disease problem has abated. The Trustees shall notify the Settling Defendants' Project Coordinator in writing of such a decision at which time the Settling Defendants shall cease all operations of the project. After the Trustees determine that the disease problem has abated, they shall notify the Settling Defendants, in writing, when the

project may be reinitiated. A delay implemented pursuant to this section of one Annual Project Period shall result in an extension of the project completion date beyond December 31, 2004 of one additional Annual Project Period. A delay of a portion of a full Annual Project Period (e.g. less than one Annual Project Period or greater than one but less than two annual project periods) shall result in an extension commensurate with the delay unless the Trustees determine that a longer extension is necessary.

If the Trustees require the Settling Defendants to delay the project subject to this Section, and if this delay prevents the Settling Defendants from completing the project by December 31, 2004, then the Settling Defendants may elect, on or before February 1, 2005, via written notice, to provide to the Trustees the necessary funding to complete the project. If the project cannot be completed by December 31, 2006, because of the implementation of a delay pursuant to this Section, then, upon the request of the Trustees, the Settling Defendants shall provide to the Trustees the necessary funding to complete the project. Funding needed to complete the project shall be based on the Settling Defendants' total costs to implement the project through December 31, 2004 (or December 31, 2006) divided by the number of lobsters stocked by December 31, 2004 (or December 31, 2006) to derive a unit cost (\$/lobster) to complete the project. To calculate the funding to be provided to the Trustees, this unit cost shall be multiplied by the remaining number of lobsters to be stocked to complete the project. Total costs shall include the purchase price of lobsters, contract amounts for the operations contractor and purchasing agent(s), lease and operating costs for the lobster distribution facility, boat related expenses, all personnel costs, and any and all other costs borne by the Settling Defendants to implement the project. If the Settling Defendants elect to provide the Trustees with funding in lieu of performing the project, the Settling Defendants shall provide documentation of such expenses to the Trustees by March 1, 2005 for review and approval. This documentation shall include purchase receipts, contractor invoices, copies of contracts and leases and other similar proof of expenditures. If the Trustees elect to receive funding to complete the project, similar documentation shall be provided for the Trustees' review and approval. Within 30 days of the Trustees' approval of the amount of funding, the Settling Defendants shall deposit such funds in the *North Cape* Oil Spill Restoration Account as described in Section VII, Paragraph 14 and Section VIII of the Consent Decree. If the Settling Defendants elect not to provide funding to the Trustees to complete the project, the Settling Defendants shall complete the project pursuant to this SOW, unless the Trustees subsequently elect to receive funding to complete the project.

Section III. Methods

1. The Settling Defendants shall establish a single lobster distribution facility with holding tanks and waterfront dock in the Port of Galilee. This facility will be operated by the representative of the Settling Defendants or contracted for by the Settling Defendants. The Settling Defendants shall purchase lobsters from wholesale suppliers in Rhode Island and southern New England. The lobsters will be held in the facility's tanks, inspected for conformity with agreed upon specifications as noted below, and loaded directly onto the restocking vessel for distribution into Block Island Sound waters after a sufficient quantity of lobsters is acquired.

2. Lobsters purchased by the Settling Defendants for the restocking program shall include the following:

- a. Only legal-sized female lobsters harvested from Nearshore Lobster Management Area 2 as defined in 50 CFR Section 697.18 shall be purchased.
- b. No soft-shell lobsters will be purchased, thus excluding post-molt stages A and B to C1 and the premolt stage. Restoration lobsters will include post molt stages C2, C3, and inter-molt stages C4 to D. (See the attached guide to lobster stage identification.)
- c. Lobsters with obvious visible signs of shell disease will be excluded.
- d. Culls (only single claw missing) may be included but only to the extent found in the natural population, that is, about 15%.
- e. Double culls (no claws) will be excluded.
- f. Lobsters harvested from Long Island Sound will be excluded.

3. The Settling Defendants shall provide documentation to the Trustees that the lobsters purchased were harvested from Nearshore Lobster Management Area 2. The Settling Defendants shall require signed documentation reflecting the location of harvest of the lobsters from lobster harvesters and wholesalers as a condition of purchase. The documentation shall state that lobsters purchased for this project were harvested from Nearshore Lobster Management Area 2 as defined in 50 CFR Section 697.18. Copies of the documentation shall be provided to the Trustees as a part of the weekly reports required pursuant to Section III, Paragraph 7. In addition, the Settling Defendants shall provide to the Trustees, for review and approval pursuant to Section V (Lobster Restoration Project) of the Consent Decree, a list of lobster wholesalers from whom they expect to purchase lobsters. These wholesalers must be capable of and willing to separate and hold Nearshore Lobster Management Area 2 lobsters for purchase by the Settling Defendants. Only after the Trustees have approved this list of wholesalers will the Settling Defendants be able to begin the project. Any subsequent changes to this list will be submitted to the Trustees for review and approval pursuant to Section V (Lobster Restoration Project) of the Consent Decree.

4. Prior to being released, all lobsters will be v-notched by the Settling Defendants and a subset will be tagged by the Trustees. Both the v-notching and tagging shall be conducted on the vessel operated by the Settling Defendants. However, at the Trustees' discretion, the v-notching and tagging may occur within the confines of the lobster distribution facility.

The v-notch cut will be straight-sided, triangular-shaped, tapering to a sharp point, and penetrating at least $\frac{1}{4}$ inch into the right tail flipper. The Settling Defendants shall use a

disinfectant solution on the v-notching tool after each lobster is v-notched to prevent the direct spread of gaffkemia.

5. The Settling Defendants shall contract a vessel or vessels capable of carrying and distributing 1,500 – 5,000 lobsters per trip into the waters of Block Island Sound. The lobsters will be stored on deck in plastic totes, coolers, or other containers (50 – 100 lobsters per container), and transported so as to keep the lobsters cool and maintain them in a high humidity/moisture environment. The transport system shall maintain the lobsters in healthy and vigorous condition. The vessel will be operated by a US Coast Guard licensed Captain, and crewed by two deck hands. These two individuals will be responsible for de-banding and v-notching the lobsters during the release. The vessel will also be capable of carrying two Trustee observers.

6. Each operating day, the restocking vessel will load lobsters to be restocked in containers at the dock facility. The Settling Defendants shall navigate the vessel out from Pt. Judith Harbor on randomly selected compass headings at 5° intervals between 090° (East) and 270° (West), with the reciprocal courses navigated on the return. The Settling Defendants will use a random number generator or random number table to select compass bearings. Voyage headings will be predetermined and supplied to the Trustees in advance. On each voyage it is anticipated that the restocking vessel shall deliver approximately 2,500 lobsters. The actual number of lobsters may range from 1,500 to 5,000 per voyage. These lobsters shall be released at the following rates: from 0-3 miles from the initial release point 18 percent of the lobster load will be released at a steady rate, and from 3 to 10 miles from the initial release point the remaining 82 percent of the lobster load will be released at a steady rate. The initial release point shall be outside the Harbor of Refuge.

With the vessel cruising at 5 kts, the restocking will be completed in 4 hours with the start and end points outside the Harbor of Refuge and the turn around point located 10 miles offshore. Upon return to the dock facility, the vessel will offload the containers, clean up, refuel and possibly make a second trip if lobsters are available.

7. On a weekly basis the Settling Defendants shall submit reports to the Trustees' Project Coordinator that are accompanied by signed and dated purchase receipts from wholesalers and documentation required pursuant to Section III, Paragraph 3. The weekly reports will document: (1) the number of lobsters purchased from wholesalers; (2) the number of v-notched lobsters released per trip per mile; (3) the number of lobsters that were purchased, but not released due to lack of vigor, mortality, disease, or did not otherwise meet the standards listed in Section III, Paragraph 2; (4) the number of culls purchased, v-notched and released; (5) the daily location of vessel runs including initial release locations, furthest point traveled from initial release location, ending release location and any deviations from the established protocol (the Settling Defendants will use latitude and longitude coordinates to note these locations); and (6) any delays or problems that occurred during the operation of the program and how they were addressed. On or before December 31 of each year, the Settling Defendants shall submit to the Trustees an annual summary report

that will document the activities completed during each release season. This annual report will summarize each of the items described in the weekly reports.

8. The Settling Defendants will provide to the Trustees' Project Coordinator a weekly schedule of planned vessel runs (departure times and compass headings) at least one week (seven days) in advance. The Settling Defendants will notify Trustees within 24 hours of sailing, or as soon as possible of any deviation in the schedule due to the supply of lobsters. The Settling Defendant may rely on the judgement of the Captain of the restocking vessel to cancel any scheduled trip at any time due to adverse weather conditions. The Settling Defendants will notify the Trustees as soon as possible of any adverse weather cancellations.

9. The Settling Defendants have the responsibility to restock healthy, vigorous lobsters within the context and the methods described herein. The Trustees will provide oversight and verification that the Settling Defendants are meeting the specifications of the agreement. The Trustees will provide reasonable notice of any corrective measures deemed required and will work with the Settling Defendants and their representatives to affect reasonable modifications.

Section IV. Trustee Observers and Monitoring

The restocking vessel will provide space for two technically qualified Trustee observers to conduct the Trustee tagging program and to generally monitor the implementation of the Lobster Restoration Project. The Settling Defendants may allow up to two additional Trustee representatives as space allows. The Trustee observers will be insured, trained, and equipped with survival suits consistent with the National Marine Fisheries Service's Fisheries Observer Program contract or State and Federal government insurance policies. The Trustee tagging program shall not unreasonably hinder or impede the Settling Defendants' restocking schedule. All lobsters tagged by Trustee representatives will be considered part of the total quantity of lobsters to be released by the Settling Defendants. The Settling Defendants are not responsible for any tag-induced mortality and any such mortality will not require further compensatory action by the Settling Defendants.

The Trustees, Trustee observers, and the Trustees' Project Coordinator shall have the authority to determine if the lobsters purchased from wholesalers meet the standards in Section III, Paragraph 2, to determine if Settling Defendants are in compliance with this SOW, and to reject any lobster not in compliance with this SOW.

Guide to Lobster Stage Identification

Terminology:

A staging system is used to describe the morphological and physiological changes associated with molting in lobsters. This staging system divides the molt cycle into four periods (A to D) with numerous subdivisions.

Postmolt (or postecdysis) encompasses stages A, B and C₁ through C₃.
Intermolt (metaecdysis) usually refers to molt stage C₄.

External Criteria (after Waddy *et al.* 1995; Aiken 1980):

Aiken, D.E. 1980. Chapter 2, Molting and Growth. In: The Biology and Management of Lobsters. J.S. Cobb and B.F. Phillips (eds.). Academic Press. p. 91-163.
Waddy, S.L., D.E. Aiken & D.P.V. DeKleijn. Chapter 10, Control of Growth and Molting. In: Biology of the Lobster, *Homarus americanus*. J.R. Factor (ed). Academic Press. p. 217-265.

Postmolt

Stage A

A newly emerged animal, the carapace is flaccid and wrinkled. The lobster is uniformly soft except for mouth parts, tips of chelipeds and other essential parts.

Stage B to C₁

The lobster is progressively hardening through these stages. A lobster is considered to be in stage B or C₁ if the anteriodorsal region of the carapace can be depressed by light finger pressure. (Area A)

Stage C₂

The anteriodorsal region of the carapace is rigid, but the dorsolateral portion of the posterior carapace can be depressed. (Area B)

Stage C₃

The anteriodorsal and the dorsolateral regions of the carapace are rigid. Only the ventrolateral portion of the carapace can be depressed. (Area C)

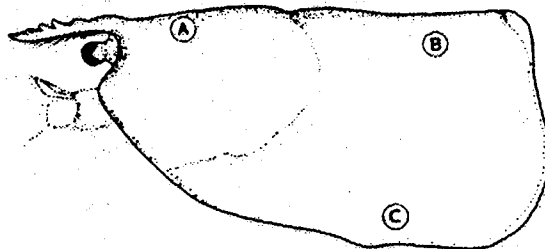
Intermolt

Stage C₄ to D

All areas of the carapace are hard.

Premolt

Evidence of water absorption, sutures beginning to open, body rupturings.



(Source: Aiken, D.E. 1980)

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.