

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
MAINE DEPARTMENT OF)
TRANSPORTATION,)
)
BRIDGECORP, f/k/a Bridge)
Construction Corp.,)
)
ROBERT WARDWELL & SONS, INC.,)
)
and)
)
T.Y. LIN INTERNATIONAL,)
successor to)
HUNTER BALLEW ASSOCIATES,)
)
Defendants,)
)
and)
)
SIERRA CLUB and)
CONSERVATION LAW FOUNDATION,)
)
Plaintiff-Intervenors.)

Civil Action
Docket No. 96-cv-249-b

CONSENT DECREE

WHEREAS Plaintiff, the United States of America ("United States"), on behalf of the United States Environmental Protection Agency ("EPA"), filed the Complaint herein ("Complaint") against Defendants Maine Department of Transportation ("Maine DOT"), T.Y. Lin International, Bridgecorp, and Robert Wardwell & Sons, Inc. (collectively "Defendants"),

alleging that each Defendant violated Section 301(a) of the Clean Water Act ("the Act"), 33 U.S.C. § 1311(a);

WHEREAS Plaintiff-Intervenors Sierra Club and Conservation Law Foundation ("Intervenors") have intervened in this action pursuant to Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b);

WHEREAS the Complaint filed by the United States alleges that the Defendants violated Section 301(a) of the Act by unlawfully filling and/or controlling the unlawful filling of (i) 9.25 acres of freshwater wetlands in connection with the preparation for construction of the onshore storage and support facilities on approximately 50 acres owned by Maine DOT on Sears Island in Searsport, Waldo County, Maine (the entire parcel hereafter the "Terminal Site") and (ii) .77 acres of freshwater wetlands in connection with construction of the access road ("Access Road Site") that are both part of a marine dry cargo terminal that was being developed by Maine DOT ("Maine DOT's Marine Dry Cargo Terminal Project"). Exhibit 1 attached hereto and incorporated herein by reference contains descriptions of (including a map of the areal extent of) the 9.25 acres allegedly filled at the Terminal Site and the .77 acres allegedly filled at the Access Road Site.

WHEREAS the Complaint seeks both injunctive relief and civil penalties, pursuant to Sections 309(b) and 309(d) of the Act, 33 U.S.C. §§ 1319(b) and 1319(d);

WHEREAS the Defendants expressly deny the allegations and any liability as alleged in the Complaint and assert that they have meritorious defenses to the allegations in the Complaint;

WHEREAS, on July 10, 1995, Maine DOT filed a permit application with the Army Corps of Engineers ("Corps") pursuant to 33 C.F.R. § 326.4(e), seeking, among other things,

after-the-fact authorization for the discharge of fill materials into 9.25 acres at the Terminal Site (the "Terminal Site Discharge") and into .77 acres of freshwater wetlands at the Access Road Site (the "Access Road Discharge") (collectively the "Discharge"). On May 8, 1996, Maine DOT's permit application was withdrawn. Maine DOT has stated that it presently intends to reserve the option of building a marine dry cargo port and terminal on Sears Island in the future.

WHEREAS the parties have agreed that settlement of this case is in the public interest and that entry of this Consent Decree is appropriate to resolve the United States' and Intervenors' claims against the Defendants in this case;

WHEREAS this Consent Decree is intended to constitute a complete and final settlement of the United States' and Intervenors' claims set forth in their Complaints for injunctive relief and civil penalties against the Defendants through the date of the lodging of this Consent Decree; and

WHEREAS the Court finds that this Consent Decree is a reasonable and fair settlement of this action and that it adequately protects the public interest in accordance with the Act;

THEREFORE, before the taking of any testimony upon the pleadings, without adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties consenting hereto pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

2. Venue is proper in this district pursuant to Section 309(b) of the Act, 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b).

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the Act, 33 U.S.C. §§ 1311, 1319 and 1344.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon the parties to this action, their officers, directors, agents, employees and servants, in their official capacity, and their successors and assigns. In any action to enforce this Consent Decree, no Defendant shall raise as a defense the failure of any of its officers, directors, agents, employees, servants, successors or assigns, to take any actions necessary to comply with the provisions of this Consent Decree.

5. The transfer of ownership or other interest in the Terminal Site, Access Road Site, or the Additional Restoration Site, as defined in paragraph 14.a. of this Consent Decree, shall not alter or relieve the Defendants of their respective obligations to comply with the terms of this Consent Decree as applicable to them. At least thirty (30) days prior to Maine DOT's transfer of ownership or other interest in any such property, whether by sale, lease, or otherwise, Maine DOT shall notify the EPA, the United States Department of Justice and the Intervenors in writing that a transfer is scheduled to occur. In the event such property is transferred by reverter, Maine DOT shall notify EPA, the United States Department of Justice, and the Intervenors within thirty (30) days after such transfer. As a condition of any transfer of ownership or other interest in such property, Maine DOT shall reserve all rights necessary to allow it to comply successfully with Section IV of this Consent Decree and to allow EPA to have access to such property for purposes of ensuring compliance with Section IV of this Consent Decree. MDOT shall condition such transfer on the transferee's compliance with paragraphs 16 and 39 of this Consent Decree, and shall file with the Registry of Deeds for Waldo

County a Notice with an abstract summarizing the requirements of this Decree relating to such property. In the event there is no other mechanism to assure compliance with this paragraph, Maine DOT agrees to exercise its eminent domain authority pursuant to 23 M.R.S.A. § 153 or other authority and to condition any transfer of the property on compliance with this Decree.

6. The transfer of ownership or other interest in Defendants T.Y. Lin International, Inc., Bridgecorp, or Robert Wardwell & Sons, Inc. (collectively "Contractor Defendants") shall not alter or relieve the Defendants of their respective obligations to comply with the terms of this Consent Decree as applicable to them.

III. SCOPE OF CONSENT DECREE

7. This Consent Decree shall constitute a complete and final settlement of all civil and administrative claims arising from the activities set forth in the Complaint that were or could have been brought through the date of lodging of this Consent Decree by or on behalf of EPA (other than claims arising under RCRA, 42 U.S.C. §§6901-6991(i), TSCA, 15 U.S.C. §§2601-2692, CERCLA, 42 U.S.C. §§9601-9675, EPCRA, 42 U.S.C. §§11001-11050, The Clean Air Act, 42 U.S.C. §§7401-7671q, and 40 C.F.R. §32.100 et seq.), or by the Intervenor (other than for attorneys' fees as set out in paragraph 40 below) against Defendants Maine DOT, T. Y. Lin International, Inc., Bridgecorp., and Robert Wardwell & Sons, Inc., and their past or current directors, officers or employees.

8. The Defendants are permanently enjoined from discharging fill materials to any waters of the United States, including wetlands, at the Terminal Site and the Access Road Site, except in compliance with the express terms of any applicable permits required to be obtained by federal, state, and local laws, rules or regulations.

9. This Consent Decree is not and shall not be interpreted to be a permit, or modification of any existing permit, issued pursuant to Sections 402 or 404 of the Act, 33 U.S.C. §§ 1342 or 1344.

10. This Consent Decree in no way affects or relieves the Defendants of their responsibilities to obtain or comply with any applicable federal, state, or local law, regulation or permit.

11. No party to this Consent Decree may seek to use in this proceeding or in any other proceeding, nor may any person draw any inference from, the terms of this Consent Decree to demonstrate the actual functions and values of the 10.1 acres of freshwater wetlands filled at the Terminal Site and the Access Road Site.

12. Except as to the past or current directors, officers, and employees of the Defendants as set forth in Paragraph 7 above, this Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

IV. RELIEF

13. Maine DOT shall conduct and complete a program of wetlands restoration of approximately 3.2 acres of fresh water wetlands at the Terminal Site where the Discharge occurred, at the locations indicated on Exhibit 2 attached hereto and incorporated herein by reference. As part of that restoration, Maine DOT shall create one or two vernal pools. The parties acknowledge and agree that the objective of the wetlands restoration program at the Terminal Site is to replace a portion of the lost and impaired functions and values of the freshwater wetlands that were filled as a result of the Terminal Site Discharge. To satisfy the obligation of this Paragraph 13, Maine DOT shall do the following:

a. Within three hundred twenty-two (322) days of entry of this Decree, Maine DOT shall prepare and submit to EPA for its review and approval a preliminary (30% design level) workplan ("the Preliminary Workplan") for the approximately 3.2 acre fill removal and wetlands restoration at the Terminal Site, as indicated on Exhibit 2 (the "Wetlands Restoration"). Maine DOT shall use the document entitled U.S. Environmental Protection Agency Region I Wetlands Program: General Guidelines for Wetland Restoration and Creation Plans (October 1996), to the extent appropriate, in preparing the Preliminary Workplan. Upon EPA approval of the Preliminary Workplan, Maine DOT shall collect final site data, conduct a boundary survey, and develop detailed construction plans, specifications, and estimates for the approximately 3.2 acre fill removal and restoration and vernal pool creation (the "Final Removal and Restoration Workplan") to be submitted to EPA within two hundred (200) days of Maine DOT's receipt of notice of EPA approval of the Preliminary Workplan. The Final Removal and Restoration Workplan shall contain a detailed schedule and measures for success. The measures of success shall be that (i) at the end of the third full growing season following Certification, as set forth in paragraph 15c, the wetland restoration area must exhibit 70% areal cover of vegetation, and the plant community that exists in the wetland restoration area must be dominated by hydrophytes (i.e., greater than 50% of the dominant plants inhabiting the newly restored wetland area must be plants typically adapted to life in saturated soil conditions); and (ii) at the end of the amphibian breeding season in each of the second, third, and fourth years following Certification, amphibian breeding, egg laying, hatching of young, and emergence and dispersal of young have occurred.

b. The Final Removal and Restoration Workplan shall show final elevations and grades to be achieved through the removal of the fill, provide for elevation spotchecks during and after construction to assure that the area is restored to the desired elevations, and provide for

plantings consisting of wetland grasses and/or herb seed mix and approximately six (6) shrub planting groups (4-5 plants per group) to be scattered throughout the restored area. The Final Removal and Restoration Plan shall provide for completion of construction work and plantings for the restoration no later than twenty-four (24) months after approval, or approval with conditions, of the Final Removal and Restoration Workplan by EPA and the issuance of any final permits needed for such construction. Maine DOT shall timely apply for, and shall use best efforts to obtain, any permits that may be needed to implement the Final Removal and Restoration Workplan. Maine DOT shall implement the Final Removal and Restoration Workplan, as approved by EPA and subject to the requirements of any necessary permits, in accordance with the schedule in that Workplan. The Final Removal and Restoration Workplan, as approved, shall be an enforceable obligation of this Consent Decree.

14. In addition to the Wetlands Restoration described in Paragraph 13 above, Maine DOT shall conduct and complete a program of wetlands restoration at the sites indicated on Exhibits 3 and 4 attached hereto and incorporated herein by reference. To satisfy the obligation of this Paragraph 14, Maine DOT shall do the following:

a. Within three hundred twenty-two (322) days of entry of this Decree, MDOT shall prepare and submit to EPA for its review and approval a preliminary (30% design level) workplan for topsoil restoration and wetland enhancement of approximately .75 acres of currently degraded wetlands at the south-central site on Sears Island, as indicated on Exhibit 3 (the "Additional Restoration"). Maine DOT shall use the document entitled the U.S. Environmental Protection Agency Region I Wetlands Program: General Guidelines for Wetland Restoration and Creation Plans (October 1996), to the extent appropriate, in preparing the Preliminary Additional Restoration Workplan. Within two hundred (200) days of Maine DOT's

receipt of notice of EPA's approval of the Preliminary Workplan, Maine DOT shall submit a Final Additional Restoration Workplan to EPA for review and approval. The Final Additional Restoration Workplan shall contain a detailed schedule and measures for success. The measures for success shall be that (i) at the end of the third full growing season following Certification, as set forth in paragraph 15.c., the wetland restoration area must exhibit 70% areal cover of vegetation, and the plant community that exists in the wetland restoration area must be dominated by hydrophytes (i.e., greater than 50% of the dominant plants inhabiting the newly restored wetland area must be plants typically adapted to life in saturated soil conditions). The Final Additional Restoration Workplan shall provide for completion of construction work and plantings for the restoration no later than twenty-four (24) months after approval, or approval with conditions, of the Final Additional Restoration Workplan by EPA and the issuance of any final permits needed for such construction. Maine DOT shall timely apply for, and shall use best efforts to obtain, any permits that may be needed to implement the Final Additional Restoration Workplan. Maine DOT shall implement the Final Additional Restoration Workplan as approved by EPA, in accordance with the schedule in that Workplan, subject to the terms of any permits required for the work. The parties acknowledge and agree that the objective of the Additional Restoration is to compensate for a portion of the wetlands functions and values that were lost and impaired as a result of the Terminal Site Discharge. The Final Additional Restoration Workplan, as approved, shall be an enforceable obligation of this Consent Decree.

b. In addition to the restoration described in Paragraphs 13 and 14a of this Consent Decree, Maine DOT shall also undertake and complete a program of streambank stabilization and restoration and wetlands enhancement at Dyer Creek in North Newcastle, Maine (the "Dyer Creek Restoration"), as indicated on Exhibit 4. The objective of the Dyer Creek Restoration shall

be to (i) exclude all livestock from the project areas; (ii) stabilize eroding streambanks; (iii) promote the development of a shrub- and emergent-dominated riparian wetland corridor along the length of the restored streambanks in the project area and a forested buffer around the corridor; and (iv) alleviate severe soil compaction to promote the return of natural vegetation. To satisfy the obligation of this Paragraph 14b., Maine DOT, within three hundred twenty-two (322) days of entry of this Decree, shall prepare and submit to EPA for its review and approval a preliminary (30% design level) workplan for the Dyer Creek Restoration ("the Preliminary Dyer Creek Workplan"). Maine DOT shall use the document entitled U.S. Environmental Protection Agency Region I Wetlands Program: General Guidelines for Wetland Restoration and Creation Plans (October 1996), to the extent appropriate, in preparing the Preliminary Dyer Creek Workplan. Upon EPA approval of the Preliminary Dyer Creek Workplan, Maine DOT shall collect final site data, conduct a boundary survey, and develop detailed construction plans, specifications, and estimates restoration for the Dyer Creek Restoration (the "Final Dyer Creek Restoration Workplan") to be submitted to EPA within two hundred (200) days of Maine DOT's receipt of notice of EPA approval of the Preliminary Workplan. The Final Dyer Creek Restoration Workplan shall contain a detailed schedule and measures for success. The Final Dyer Creek Restoration Plan shall provide for completion of construction work and plantings for the restoration no later than twenty-four (24) months after approval, or approval with conditions, of the Final Dyer Creek Restoration Workplan by EPA and the issuance of any final permits needed for such construction. Maine DOT shall timely apply for, and shall use best efforts to obtain, any permits that may be needed to implement the Final Dyer Creek Restoration Workplan. Maine DOT shall implement the Final Dyer Creek Restoration Workplan, as approved by EPA and subject to the requirements of any necessary permits, in accordance with

the schedule in that Workplan. The Final Dyer Creek Restoration Workplan, as approved, shall be an enforceable obligation of this Consent Decree. Implementation of the Final Dyer Creek Restoration Workplan shall be governed by the applicable provisions of paragraph 15.

Implementation of Workplans

15.a. Following EPA approval of the Final Removal and Restoration Workplan, the Final Additional Restoration Workplan, and the Final Dyer Creek Restoration Workplan (for purposes of this Paragraph 15, collectively the "Workplan"), Maine DOT shall provide notices and opportunity for inspection by EPA. The notices shall include a brief description of the actions taken to implement the Workplan since the previous notice or approval of the Workplan; information regarding problems or unresolved delays encountered or anticipated that may affect the schedule for implementation; and efforts made to mitigate any actual or anticipated delays. The notices shall be submitted in accordance with the following schedule, as applicable:

(i) With respect to the Terminal Site Restoration:

(A) Twenty-one (21) days before the anticipated completion of installation of all sediment and erosion controls (e.g. silt fences and hay bales), but before the removal of fill, excavation or grading has begun;

(B) Twenty-one (21) days before the anticipated completion of the removal of fill material, excavation and final grading, including the vernal pool creation, but before seeding and planting has begun; and

(C) Within two weeks after the completion of seeding and planting required by the approved Workplan.

(ii) With respect to the Additional Restoration Site:

(A) Twenty-one (21) days before the anticipated completion of installation of all sediment and erosion controls (e.g. silt fences and hay bales), but before excavation or grading has begun;

(B) Twenty-one (21) days before the anticipated completion of excavation and final grading, but before seeding and planting has begun; and

(C) Within two weeks after the completion of seeding and planting required by the approved Workplan.

(iii) With respect to the Dyer Creek Restoration:

(A) Twenty-one (21) days before the anticipated completion of installation of all sediment and erosion controls (e.g. silt fences and hay bales), livestock exclusion controls, and streambank stabilization, but before seeding and planting has begun; and

(B) Within two weeks after the completion of seeding and planting required by the approved Workplan.

b. Following EPA's receipt of a notice of completion of a milestone event as required in Paragraph 15.a., EPA shall have thirty (30) days to conduct an inspection. Maine DOT agrees that it will not continue with any subsequent steps required by the Workplan until EPA has performed its inspection and has approved the work; provided, however, that if EPA has not conducted an inspection or has not notified Maine DOT in writing of rejection of any of the work within thirty (30) days of its receipt of the notice, then Maine DOT may proceed to the next step of the approved Workplan.

c. Following EPA's inspection after the completion of seeding and planting, if EPA agrees that the Workplan has been completed as approved, EPA will issue a Certification of Completion. Following Certification, EPA shall conduct inspections near the end of the first full

growing season and for four (4) successive growing seasons to monitor the progress of the wetland restoration. The monitoring inspection which occurs near the end of the third full growing season following Certification will also be used to determine whether the measures of success for the Terminal Restoration Site, the Additional Restoration Site and the Dyer Creek Restoration Project have been achieved, except for the vernal pools; whether the measures of success for the vernal pools have been achieved shall be determined during the monitoring inspection that occurs in the fourth year following Certification. Defendant Maine DOT shall perform all operation and maintenance activities required under the Workplan as approved for a period not to exceed five years following Certification.

d. If the measures of success identified in the Workplan are not achieved (although Maine DOT complies with all of the terms and conditions of the applicable Workplan), EPA shall notify Maine DOT of the need for subsequent steps no later than June 1 of the year of the fourth full growing season following Certification. Within 30 days of receiving such notice from EPA, Maine DOT and the United States shall meet to develop the subsequent steps necessary to achieve the objectives of the applicable Workplan and a schedule for completing the subsequent steps ("Subsequent Steps"). If Maine DOT and the United States are able to establish mutually agreeable Subsequent Steps, then within ninety (90) days of such notice from EPA, Maine DOT shall incorporate the Subsequent Steps into an amended Workplan. Maine DOT shall implement the amended Workplan, as approved by EPA, in accordance with the schedule in that Workplan, and the amended Workplan shall be an enforceable obligation of this Consent Decree. If Maine DOT and the United States are unable to establish mutually agreeable Subsequent Steps within the time frame set forth above, then either party may petition the Court for resolution in

accordance with the dispute resolution provision in Section IX (Dispute Resolution) of this Consent Decree.

Subsequent Permit Applications:

Preservation of Restoration Properties

16a. Nothing in this Decree requires Maine DOT to undertake a program of removal and restoration at the Access Road Site. Maine DOT, EPA and the Intervenors agree that, in any future section 404 permit application to discharge additional dredged or fill materials into wetlands or other waters of the United States at Sears Island in connection with a project that includes use of any property where fill remains in place at the Terminal Site, MDOT or its successors will, as part of such permit application, seek after-the-fact authorization for the Discharge at the Terminal Site and Access Road Site. In such a future permit application process, the determination of whether the overall impacts of the project would comply with the Section 404(b)(1) Guidelines (40 C.F.R. Part 230) (or the then applicable comparable provisions of law) will include an evaluation of the impacts of the fill that remains in place on the functions and values of the original (pre-filled) wetlands at the Terminal Site and Access Road, along with the restoration work that is performed pursuant to paragraphs 13 and 14 of this Decree. Maine DOT reserves the right to argue to the Corps that no additional compensatory mitigation should be required with respect to offsetting the impacts of the fill that remains in place. EPA reserves the right to argue to the Corps that additional compensatory mitigation with respect to offsetting the impacts of the fill that remains in place is necessary to ensure compliance with the Guidelines. The parties agree that nothing in this Decree shall be interpreted or construed as changing any party's position, as previously expressed during the marine cargo terminal permit application process, regarding the impacts of and mitigation requirements for filling waters of the United

States at Sears Island, nor shall it be construed as limiting the parties' positions on impacts and mitigation requirements in future permit proceedings.

b. Maine DOT or its successors may submit a subsequent permit application (a "Subsequent Application") seeking authorization for the discharge of dredged or fill material at the approximately 3.2 acres at the Terminal Site after they have been restored. Maine DOT agrees that, for any Subsequent Application filed within thirty (30) years after issuance of the Certificate of Completion pursuant to paragraph 15.c., such application shall propose compensatory mitigation designed to replace or compensate for the functions and values of the forested wetland that originally existed prior to the Discharge which is the subject of this action. No inference shall be drawn from this paragraph 16.b. regarding the analysis of alternatives for any Subsequent Application under 40 C.F.R. 230.10(a) of the guidelines under 404(b)(1) of the Clean Water Act.

17. With respect to the restoration sites restored under paragraph 14 , Maine DOT agrees to preserve such sites in perpetuity and shall protect in perpetuity the wetlands functions and values restored and/or created there. Maine DOT shall include in the Workplans submitted for EPA review and approval effective measures to ensure such preservation and protection.

Cash Penalty

18. Defendants shall pay a civil penalty in the amount of Ten Thousand Dollars (\$10,000.00) to the United States of America. In order to satisfy this obligation, the Contractor Defendants have already forwarded to James T. Kilbreth, counsel for Maine DOT, a

certified check (or checks) in this amount made payable to "Treasurer of the United States of America," to be held pending entry of this Consent Decree. Once this civil penalty has been paid to the United States, the Contractor Defendants shall not have any further obligations under this Consent Decree, except with respect to their obligations under Paragraph 8.

Supplemental Environmental Project

19. Maine DOT shall spend at least \$100,000 on a Supplemental Environmental Project at the Ducktrap River (the "Ducktrap River SEP"). The Ducktrap River SEP shall consist of the acquisition and conservation of one or more properties approved by EPA in accordance with the terms of this Decree, as listed in Exhibit 5 attached hereto and incorporated herein by reference (the "Ducktrap River SEP" Property(ies)"). Each of the Ducktrap River SEP Properties is located in the Ducktrap River watershed, which provides valuable habitat for the Atlantic Salmon, and each of these properties consists of a valuable complex of freshwater wetlands and upland habitat. To satisfy the obligations of this Paragraph 19, Maine DOT shall do the following:

a. Simultaneously with the entry of this Decree, Maine DOT shall pay to the Land for Maine's Future Fund ("LMFF"), established in 5 M.R.S.A. Chapter 353, Section 6203, the sum of \$100,000, said funds to be used for the sole purpose of acquiring one or more of the Ducktrap River SEP Properties (or an alternative SEP property(ies) which have been approved in advance by EPA). Provided, that if the Land for Maine's Future Board ("LMFB") has not made a decision in public session authorizing the distribution of proceeds from LMFF to acquire one or more of the Ducktrap River SEP Properties listed in Exhibit 5 by the date of the entry of this

Decree, then Maine DOT will hold the funds until such vote has occurred and in such event .
Maine DOT shall place the SEP funds in an encumbered account and transfer the SEP funds to LMFF within twenty-one (21) days after LMFB has made a decision in public session authorizing the distribution of proceeds from LMFF to acquire one or more of the Ducktrap River SEP Property(ies) as contemplated by this Decree. The funds shall be placed in a separate, interest-bearing account and any interest accrued shall be added to the SEP funds and paid to LMFF. Further provided, that if the acquisition(s) result in a SEP fund balance of less than \$10,000 and it does not appear likely that such funds can be used reasonably for acquisition purposes, then the remaining balance may be paid by LMFB to any land-owning state agency(ies) ("Managing Agency(ies)") holding property acquired with the SEP funds for use in the management of the SEP property(ies).

b. No more than \$10,000 of the SEP funds shall be expended for legal or administrative costs associated with the acquisition(s).

c. Upon certification by EPA after the third and fourth full growing seasons of the success of the restorations described in paragraphs 13, 14a and 14b, Maine DOT shall provide EPA with an accounting of expenditures incurred in carrying out its obligations under those paragraphs. To the extent the accounting shows that Maine DOT has expended less than \$700,000, Maine DOT at the time of the accounting shall pay the difference between \$700,000 and those expenditures to the LMFF for the sole purpose of acquisition of one or more of the Ducktrap River SEP Properties (or an alternative SEP property(ies) approved in advance by EPA) (collectively the "SEP Properties"), in accordance with the procedures set out in this Paragraph 19.

CONF w/ Tom R
5.29.07 (1)

deed:
pursuant to
Consent
deed

that's
it

d. The parties agree that the purpose of the acquisition of any SEP Property(ies) shall be the protection and conservation in perpetuity of valuable freshwater wetlands and upland that support Atlantic Salmon habitat. Maine DOT agrees to use best efforts to ensure that the purpose of the acquisition of any SEP Property(ies) as stated in this paragraph shall be reflected in the appropriate deeds as an enforceable restriction. Such deed restriction shall include, without limitation, a requirement that the SEP Property(ies) be managed in a manner consistent with the purpose of the acquisition. If such a restriction is not included in the deed conveying the SEP Property(ies) to the Managing Agency(ies), then the Managing Agency(ies) shall impose such a restriction in any deed conveying the SEP Property(ies) to any other party. Maine DOT shall consult with EPA concerning the form and content of the restrictions described in this paragraph 19.d.

e. Maine DOT shall ensure the performance by LMFB and any Managing Agency(ies) holding any SEP Property(ies) of the obligations specified in subparagraph 19(a) through (d). Failure to fulfill those obligations shall be governed by the applicable terms of this Decree, including Section VIII. A memorandum of agreement, dated November 8, 1996 and approved by EPA, has been executed by Maine DOT and LMFB concerning LMFB's performance of the obligations specified in subparagraphs 19(a) through (d). Administrative details pertaining to the procedures for acquisition(s) (including required notice(s) to EPA of each acquisition(s), inspection by EPA of accounting records relating to the expenditure of the SEP funds and an approval process for alternate SEP Property(ies)) will be set forth in a mutually agreed-upon letter of understanding from LMFB to EPA, to be counter-signed by EPA. Those activities will be governed by the terms of that letter.

20. Maine DOT hereby agrees that in any official written or oral statement discussing the settlement set forth in this Decree, any reference to the SEP or any SEP Property(ies) shall include a statement that the SEP funds will be (or were) transferred to the LMFF in connection with the settlement of an enforcement action taken by EPA against Maine DOT for alleged violations of the Clean Water Act. In the event that EPA has reason to believe that Maine DOT has failed to fulfill this obligation, EPA shall give notice to Maine DOT of such failure and Maine DOT shall have seven (7) days to issue a curative announcement which includes the required statement.

21. No party to this Consent Decree may seek to use in this proceeding or in any other proceeding, nor may any person draw any inference from, the expenditure by Maine DOT of any funds on the Ducktrap River SEP to demonstrate the value of resources on Sears Island. Nor shall the expenditure by Maine DOT of funds on any SEP Property affect in any way, or otherwise be relied upon to reduce, any mitigation otherwise appropriate in any Clean Water Act Section 404 proceeding.

General Provisions

22. The parties recognize that extension of the deadlines set out in paragraphs 13 through 15 may be necessary from time to time. EPA and Maine DOT agree to negotiate in good faith over such extensions. Extension of any deadline hereunder shall not be considered a modification of the Consent Decree requiring Court approval.

23. Maine DOT is prohibited from using any monies that may be available from any Federal source, including the Federal Highway Administration, U.S. Fish & Wildlife, and EPA, for meeting the obligations of Paragraphs 13, 14 and 19 of this Consent Decree.

V. SUBMITTAL, REVIEW AND APPROVAL OF WORKPLANS AND PROPOSALS

24. The review and approval/disapproval process for each Workplan or Proposal (the "deliverable") identified in Paragraphs 13, 14 and 19 of this Consent Decree shall be as set forth in this Paragraph 24.

a. EPA shall either (i) approve the deliverable as submitted, (ii) approve the deliverable with conditions, or (iii) return it to Maine DOT with comments, specifying a reasonable time, in light of the nature of the comments, by which Maine DOT must submit a revised deliverable.

b. In the event that EPA returns the deliverable to Maine DOT with comments, Maine DOT shall incorporate the comments and shall resubmit the deliverable; or, in the event Maine DOT disagrees with EPA's comments, Maine DOT may enter the dispute resolution process in Section IX (Dispute Resolution) within twenty (20) days after receipt of EPA's comments. Failure to enter the dispute resolution process within such time frame shall constitute a waiver of Maine DOT's right to dispute the comments. In the event that Maine DOT neither incorporates the comments and resubmits the deliverable nor enters the dispute resolution process in a timely manner, Maine DOT shall be deemed to have failed to submit the deliverable timely and adequately, and that failure shall constitute a violation of this Consent Decree.

c. If Maine DOT resubmits the deliverable, EPA shall review the resubmitted deliverable. EPA may (i) approve the resubmitted deliverable, (ii) approve it with conditions, or (iii) disapprove it. In the event that EPA disapproves the resubmitted deliverable, stipulated penalties shall begin to run from the date of EPA's disapproval of the resubmitted deliverable, subject to Maine DOT's invocation of the dispute resolution process in Section IX (Dispute

Resolution) of this Consent Decree. The United States may also take any other action available to it to enforce the requirements of this Consent Decree.

VI. NOTICES

25. Any written notice or deliverable required by this Decree shall include a certification by a responsible official for the Defendant. Such certifications shall be made in the following form:

I certify that the information contained in or accompanying this submission is true, accurate and complete to the best of my knowledge and belief after reasonably diligent inquiry.

If the document is prepared by a contractor or consultant retained by the Defendant, the certification shall consist of two parts: first, a statement in the above form signed by an officer of the contractor or consultant; and, second, a statement signed by a responsible official of the Defendant which shall state as follows:

As the official having responsibility for the oversight of the (contractor) (consultant) who prepared this document, I certify that I have made a reasonably diligent effort to verify the truth and accuracy of the document and that it is, to the best of my knowledge, true, accurate, and complete.

26. If a required task has not been completed, the Defendant shall submit the notice required by Paragraph 28, Section VII (Force Majeure) of this Consent Decree, along with the certification required by Paragraph 25 of this Consent Decree.

27. Written notification pursuant to this Section VI shall not relieve the Defendants of their obligation to comply with any requirement of this Consent Decree.

VII. FORCE MAJEURE

28. If Maine DOT fails to comply with the requirements of paragraphs 13, 14, 15, and 19 of this Consent Decree, Maine DOT shall, within fifteen days of that failure to comply, notify

the EPA and the United States Department of Justice in writing of any event or events which have caused the failure. The notice shall specifically reference this Section VII and shall describe in detail the anticipated length of time the noncompliance may persist; the precise cause or causes of the noncompliance; the measures taken or to be taken by Maine DOT to prevent or minimize the noncompliance; and the timetable by which those measures will be implemented. Maine DOT shall adopt all reasonable measures to avoid or minimize any such noncompliance. Failure by Maine DOT to comply with the notice requirements of this Section VII shall render Paragraphs 29 and 30 of this Consent Decree void and of no effect as to the particular incident involved, and shall constitute a waiver of Maine DOT's right to obtain an extension of time for their obligations under this Section VII based on the incident. Maine DOT shall also so notify the EPA and the United States Department of Justice in writing as soon as Maine DOT has reason to believe that an event has occurred that will cause a failure to comply with any provision of this Consent Decree.

29. If the United States and Maine DOT agree that the failure to comply with a provision of this Consent Decree has been or will be caused by circumstances beyond the control of Maine DOT and of any entity controlled by Maine DOT, including its consultants and contractors, and that Maine DOT and such entities could not have reasonably foreseen and prevented such noncompliance, the time for performance of such provision shall be extended in writing by EPA for a period equal to the actual delay resulting from such circumstances, and stipulated penalties shall not be due for the delay.

30. If, after invoking the provisions of Section IX (Dispute Resolution), the United States and Maine DOT are unable to agree whether the failure to comply was caused by circumstances beyond the control of Maine DOT or any entity controlled by Maine DOT, or

whether the length of time for fulfilling the provision should be extended, the matter may be submitted by any party to the Court for resolution. If the failure to comply is then determined to have been caused by circumstances beyond the control of Maine DOT and of any entity controlled by Maine DOT, including its consultants and contractors, and it is determined that Maine DOT could not have reasonably foreseen and prevented such noncompliance, Maine DOT shall be excused as to that noncompliance for the period of time the noncompliance continues due to such circumstances.

31. Maine DOT shall bear the burden of proving (1) that the failure to comply was caused by circumstances beyond the control of Maine DOT and any entity controlled by it, including its contractors and consultants; (2) that Maine DOT or any entity controlled by it could not have foreseen and prevented such failure to comply; and (3) the number of days of noncompliance that were caused by such circumstances. If Maine DOT fails to sustain its burden of proof under this Paragraph 31, stipulated penalties shall be paid for each day of noncompliance beginning with the first day of such noncompliance.

32. Neither reasonably foreseeable technical problems nor unanticipated or increased costs or expenses associated with the implementation of actions called for by this Consent Decree, nor lack of funding, shall serve as the basis for changes in this Consent Decree or extensions of time for the performance of the requirements of this Consent Decree.

VIII. STIPULATED PENALTIES

33. Unless excused pursuant to the provisions set forth in Section VII (Force Majeure) or as a result of the dispute resolution provisions of Section IX, in the event of any failure by a

Defendant to comply with any requirement of this Consent Decree (except with respect to payments of civil penalties in Paragraph 18 of this Consent Decree), that Defendant or group of Defendants shall pay the United States stipulated penalties for each day of failure of compliance with each requirement according to the following table:

- | | | |
|-----|---|--------------------|
| (a) | For day 1 up to and including day 30 of non-compliance | \$500.00/per day |
| (b) | For day 31 up to and including day 60 of non-compliance | \$1,000.00/per day |
| (c) | For day 61 and beyond of non-compliance | \$2,000.00/per day |

Each Defendant is liable for stipulated penalties for each day it fails to comply with any requirement of this Consent Decree. Except as provided in Paragraph 36, such payments shall be made without demand by the United States on or before the 30th day of the month following the month in which the violation(s) occurred.

34. Nothing in this Consent Decree shall be construed to limit any other remedies available to the United States for violations of this Consent Decree, such as the institution of contempt proceedings, or of any provisions of law.

IX. DISPUTE RESOLUTION

35. Any dispute that arises between Maine DOT and the United States with respect to the meaning or application of any of the requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between those parties to attempt to resolve such disputes. Such period of informal negotiations shall not extend beyond thirty (30) days of the date when notice of a dispute is given by one party to the other, unless both parties have agreed in writing to extend that period. After informal negotiations, if Maine DOT and the United

States are unable to agree upon the meaning or application of the requirements of this Consent Decree, either party may petition the Court within thirty (30) days of the end of the informal negotiations period for resolution of the dispute. The petition shall set forth the nature of the dispute and proposal for its resolution. The other party shall have thirty (30) days to respond to the petition and propose an alternate resolution. In any such dispute, Maine DOT shall bear the burden of proving that EPA's action in reviewing any Removal and Restoration Workplan, Additional Restoration Workplan, Dyer Creek Restoration Workplan, alternative SEP Property, or any report with respect to implementation or completion of any Workplan was arbitrary or capricious, an abuse of discretion or not in accordance with law.

36. The filing of a petition asking the Court to resolve a dispute shall not in and of itself extend or postpone any obligation of Maine DOT under this Consent Decree, provided, however, that payment of any stipulated penalties with respect to the disputed matter shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Maine DOT does not prevail on the disputed issue, stipulated penalties, if applicable, shall be assessed and paid as provided in Section VIII (Stipulated Penalties). If MDOT prevails, no penalties shall be assessed.

X. ADDRESSES FOR SUBMISSIONS

37. All Workplans, Proposals, written reports or notices required by Section II (Applicability), Section IV (Relief), or Section VI (Notices) of this Consent Decree shall be submitted to the following persons:

a. TO EPA:

1. Margery Adams
Senior Assistant Counsel
United States EPA - Region I (SEL)
John F. Kennedy Federal Building
Boston, MA 02203
2. Matthew Schweisberg
Senior Wetlands Ecologist
Water Quality Management Unit (CWQ)
United States EPA - Region I
John F. Kennedy Federal Building
Boston, MA 02203

b. To The United States Department of Justice:

1. Daniel Pinkston
Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

c. To Maine DOT:

1. John G. Melrose, Commissioner
Maine Department of Transportation
State House Station 16
Augusta, ME 04333
2. Thomas G. Reeves, Chief Counsel
Maine Department of Transportation
Legal Division, State House Station 16
Augusta, ME 04333

d. To CLF (as to Section II):

1. Daniel L. Sosland
Carol Blasi
Conservation Law Foundation
119 Tillson Avenue
Rockland, ME 04841

e. To Sierra Club (as to Section II):

Edward F. Lawson
Weston, Patrick, Willard & Redding
84 State Street
Boston, MA 02109

XI. PAYMENT OF CIVIL OR STIPULATED PENALTIES

38. Payment of civil penalties pursuant to Paragraph 18 or stipulated penalties pursuant to Paragraph 33 of this Consent Decree shall be made in accordance with this Section XI. Payment of civil penalties pursuant to Paragraph 18 shall be made promptly upon entry of this Consent Decree. Payment of stipulated penalties pursuant to Paragraph 33 shall be made within the time frame specified in Paragraph 33. Payment shall be made by certified check or checks payable to the "Treasurer of the United States of America," and shall be delivered by certified mail with return receipt requested to the following:

Daniel Pinkston, Attorney
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

The Defendant or group of Defendants making payment shall include, along with payment of the civil or stipulated penalty, a transmittal letter identifying the consent decree and the Department of Justice Case Number 90-5-1-1-4184. Concurrent with delivery of this civil or stipulated penalty, the Defendant or group of Defendants making payment shall notify the EPA by sending a photocopy of the certified check and the transmittal letter to the following:

Margery Adams
Senior Assistant Counsel
United States EPA - Region I (SEL)
John F. Kennedy Federal Building
Boston, MA 02203

Defendants are not entitled to deduct for federal tax purposes any civil or stipulated penalty paid in this case. In the event that a civil or stipulated penalty payment is not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961 from the time the payment is due until such payment is made.

XII. ACCESS AUTHORITY

39. For the purpose of monitoring the progress of restoration required by this Consent Decree or verifying any data or information submitted to the United States or taking samples, all in connection with such restoration, the United States by its contractors, consultants, attorneys, or other employees or representatives shall have the authority to use the Access Road and enter the Terminal Site or any area within 500 feet of the outside boundary of the Terminal Site, the Additional Restoration Site, the Dyer Creek Restoration Site, and any site at which an SEP is undertaken at all reasonable times and with proper identification. The United States specifically reserves the right to enter upon such areas or sites without advance notice if the United States deems such entry necessary to effectively monitor the progress of activities required by this Consent Decree. The authority of the United States to enter, conduct inspections, have access to records, and monitor compliance pursuant to any statute or other court order is in no way limited by this Consent Decree.

XIII. COSTS OF SUIT

40. Each party shall bear its own costs and attorney's fees in this action.

Notwithstanding the foregoing, Intervenors reserve whatever rights they may have to seek costs,

including attorneys fees, pursuant to 33 U.S.C. § 1365(d), against Defendants only. Defendants reserve whatever rights they may have to defend against any such claims for costs, including but not limited to a defense that the 11th Amendment of the United States Constitution bars such claims. Should any of the Defendants subsequently be determined by the Court to have violated the terms and conditions of this Consent Decree, that Defendant, to the extent authorized by federal law, shall be liable to the United States for any costs and attorney's fees incurred by the United States in any action against that Defendant for noncompliance with this Consent Decree. Contractor Defendants expressly reserve their rights to seek costs and attorneys fees under the Equal Access to Justice Act, 28 U.S.C. §2412, should they prevail in any such action brought by the United States.

XIV. PUBLIC COMMENT

41. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which indicate that the proposed judgment is inappropriate, improper, or inadequate.

XV. CONTINUING JURISDICTION OF THE COURT

42. The Court shall retain jurisdiction over this action in order to enforce or modify this Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

During the pendency of this Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate this Consent Decree.

XVI. MODIFICATION

43. Upon its entry by this Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing and, except for extensions of time pursuant to Paragraphs 22 and 29 of this Consent Decree, shall not take effect unless signed by the United States, and Maine DOT and the Intervenors and approved by the Court.

XVII. TERMINATION

44. The obligations of this Decree and this Court's jurisdiction over this matter shall terminate upon completion of all requirements of this Decree or the passage of five (5) years, whichever is later. The parties shall file the appropriate notice with the Court so that the Clerk may close the file.

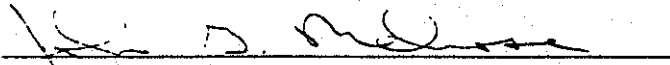
Dated and entered this ____ day of _____, 1996

United States District Judge
United States District Court
for the District of Maine

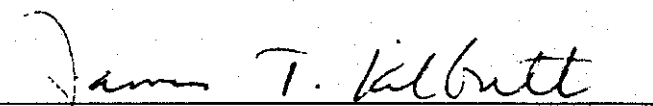
CONSENTED TO:

FOR THE DEFENDANTS:

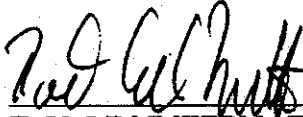
Dated: *November 8, 1996*


MAINE DEPARTMENT OF TRANSPORTATION
John G. Melrose, Commissioner
State House Station 16
Augusta, Maine 04333-0016

Dated: *November 13, 1996*


JAMES T. KILBRETH
Counsel for Maine Department of Transportation
Verrill & Dana
One Portland Square
P.O. Box 586
Portland, ME 04112-0586
Bar No. 1349

Dated: *Nov 13, 1996*

 *ATTORNEY FOR*
T. Y. LIN INTERNATIONAL
(on its own behalf and as successor to
Hunter-Ballew Associates)
5 Fundy Road
Falmouth, Maine 04105
BAR No 95