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Attorneys for Plaintiff State of Hawaii

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

UNITED STATES OF AMERICA and the
the STATE OF HAWAII,

Plaintiffs,

v.

DENAK SHIP MANAGEMENT and
VOGETRADER SHIPPING INC.,

Defendants.

CASE NO.

CONSENT DECREE

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I. PARTIES

This Consent Decree (“Consent Decree”) is made and entered into by and among the following parties (hereinafter referred to collectively as “the Parties” and individually as “Party”):

A. United States of America (“United States”), on behalf of the United States Department of Commerce, National Oceanic and Atmospheric Administration (“NOAA”);

B. State of Hawaii (“State”); and

C. Denak Ship Management and Vogetrader Shipping, Inc. (“Settling Defendants”).

II. INTRODUCTION

A. On February 5, 2010, the 733 foot cargo carrier M/V Vogetrader (“Vogetrader”) grounded on coral reef habitat near the entrance channel to Barbers Point Harbor, Oahu, Hawaii. The vessel was owned and/or operated at that time by Settling Defendants. The United States Coast Guard, the State and Settling Defendants developed a Salvage Plan and coordinated with oil spill response personnel due to a substantial threat of a discharge of oil as the result of the grounding. The Vogetrader was ultimately removed from the reef on the day of the grounding; however, physical injuries to coral reef habitats and associated resources resulting from response activities occurred. All of the foregoing events

1 are referred to as the “Incident.”

2 B. The participating Trustees for the Natural Resources injured by the
3 Incident include NOAA and the State. NOAA is designated as a Trustee pursuant
4 to subpart G of the National Oil and Hazardous Substances Pollution Contingency
5 Plan (“NCP”) (40 C.F.R. §§ 300.600 *et seq.*) and Executive Order 12580 (3 C.F.R.,
6 1987 Comp. 193, 52 Fed. Reg. 2923 (Jan. 23, 1987)) as amended by Executive
7 Order 12777 (56 Fed. Reg. 54757 (Oct. 18, 1991)). The State is a designated
8 Trustee pursuant to Section 1006 (b)(3) of the Oil Pollution Act of 1990 (“OPA”),
9 33 U.S.C. § 2706 and subpart G of the NCP. Additionally, the State has natural
10 resource trustee authority pursuant to Chapter 128D HRS and 11-451 Hawaii
11 Administrative Rules.

12 C. After the Incident, NOAA, in coordination with the State, as Trustees
13 for Natural Resources, (hereinafter, the “Trustees”) and Settling Defendants
14 undertook a Cooperative Natural Resource Damage Assessment, pursuant to which
15 NOAA and Settling Defendants gathered and analyzed data and other information
16 that was used to determine and quantify the resource injuries. NOAA determined
17 that the Incident had caused injury to approximately 103,027 coral colonies,
18 although Settling Defendants dispute this amount. In November 2013, under
19 NOAA oversight, Settling Defendants undertook Emergency Restoration, as
20 defined in the OPA regulations at 15 C.F.R. 990.26, in the form of rubble removal
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1 and coral reattachment at the Incident site. The Trustees also intend to publish and
 2 invite comment from the public concerning a draft Damage Assessment and
 3 Restoration Plan ("draft Plan"). The draft Plan will describe alternative restoration
 4 projects, in addition to the completed Emergency Restoration, to restore, replace,
 5 or acquire the equivalent of the resources and their services injured by the Incident.
 6
 7

8 D. The United States and the State have filed this action to recover
 9 claims for natural resource damages.
 10

11 E. The Parties agree, and the Court, by entering this Consent Decree,
 12 finds, that this Consent Decree has been negotiated by the Parties in good faith,
 13 that it is intended to avoid certain litigation among the Parties and that it is fair,
 14 reasonable, and in the public interest.
 15

16 NOW, THEREFORE, IT IS HEREBY ADJUDGED, ORDERED AND
 17 DECREED as follows:
 18

19 III. JURISDICTION AND VENUE

20 1. This Court has jurisdiction over the subject matter of this action
 21 pursuant to, *inter alia*, 28 U.S.C. §§ 1331, 1345, 1355 & 1367, Sections 1002(a),
 22 (b)(1)(A) & (b)(2)(A), 1006, & 1017(b) of OPA, 33 U.S.C. §§ 2702(a), (b)(1)(A)
 23 & (b)(2)(A), 2706, 2717(b). Venue is proper in this Court pursuant to 28 U.S.C.
 24 §§ 1391 & 1395, 33 U.S.C. § 2717, because Settling Defendants do business in,
 25 and the Incident occurred in, this judicial district. The Court has personal
 26
 27
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1 jurisdiction over Settling Defendants for this particular action, and each Party does
2 not contest the Court's jurisdiction and does not contest the propriety of venue in
3 this judicial district for the purposes of this Consent Decree.
4

5 IV. APPLICABILITY

6 2. The obligations of this Consent Decree apply to and are binding upon
7 the United States, the State, and upon Settling Defendants and/or Settling
8 Defendants' successors, assigns, or other entities or persons otherwise bound by
9 law.
10

11 V. DEFINITIONS

12 3. Terms used in this Consent Decree that are defined in OPA or in the
13 natural resource damage assessment regulations promulgated pursuant to OPA, 15
14 C.F.R. Part 990, shall have the meanings assigned to them in OPA or in such
15 regulations, unless otherwise provided in this Consent Decree. Whenever the
16 terms set forth below are used in this Consent Decree, the following definitions
17 shall apply:
18

19 (a) "Complaint" shall mean the civil complaint filed in this action
20 concurrently with the lodging of this Consent Decree.
21

22 (b) "Entry of this Consent Decree" or "Entry" shall occur on the
23 date when this Consent Decree, after signing by the Judge, is entered in the civil
24 docket under Rule 79(a) of the Federal Rules of Civil Procedure.
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1 (c) "Natural Resource" and "Natural Resources" shall mean land,
2 fish, wildlife, biota, air, water, ground water, drinking water supplies, and other
3 such resources belonging to, managed by, held in trust by, appertaining to, or
4 otherwise controlled by the United States and/or the State, and shall also mean the
5 services provided by such resources to other resources or to humans.
6

7 (d) "Natural Resource Trustees" or "Trustees" shall mean those
8 federal and state agencies or officials designated or authorized pursuant to the
9 Clean Water Act (Federal Water Pollution Control Act), 33 U.S.C. §§ 1251, *et*
10 *seq.*, OPA, and/or applicable state law to act as Trustees for the Natural Resources
11 belonging to, managed by, controlled by, or appertaining to the United States or
12 the State. Specifically, as used in this Consent Decree, the participating Trustees
13 are NOAA and the State.
14

15 (e) "Paragraph" shall mean a portion of this Consent Decree
16 identified by an arabic numeral.
17

18 (f) "Plaintiffs" shall mean the United States on behalf of NOAA,
19 and the State.
20

21 (g) "Restore" or "Restoration" shall mean any action or
22 combination of actions to restore, rehabilitate, replace, or acquire the equivalent of
23 any Natural Resource or its services injured, lost, or destroyed as a result of the
24 Incident.
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1 (h) "Section" shall mean a portion of this Consent Decree
 2 identified by a roman numeral.

3 (i) "Settling Defendants" shall mean Denak Ship Management and
 4 Voetrader Shipping Inc.
 5

6 VI. SETTLEMENT PAYMENTS

7
 8 4. Within sixty (60) days after Entry of this Consent Decree, Settling
 9 Defendants shall pay the total amount of eight hundred forty thousand dollars
 10 (\$840,000) to be disbursed as follows:
 11

12 (a) The sum of six hundred ninety five thousand six hundred fifty
 13 seven dollars (\$695,657)) shall be paid to NOAA, on behalf of the Natural
 14 Resource Trustees, for the purposes set forth in Subparagraphs (iii) and (iv) below.
 15 Such payment shall be made by Electronic Funds Transfer ("EFT") to the United
 16 States Department of Justice in accordance with instructions that the Financial
 17 Litigation Unit of the United States Attorney's Office for the District of Hawaii
 18 shall provide Settling Defendants following Entry of this Consent Decree by this
 19 Court. At the time of payment, Settling Defendants shall simultaneously send
 20 written notice of payment and a copy of any transmittal documentation (which
 21 shall reference DOJ case number 90-5-1-1-11013/1, case name, and civil action
 22 number) to the Parties in accordance with Section X (Notices) of this Consent
 23 Decree and to:
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1 NOAA/NOS/OR&R
2 Damage Assessment and Restoration Revolving Fund
3 Attention: Kathy Salter
4 1305 East West Highway
5 SSMC4, Room 9331
6 Silver Spring, MD 20910-3281

7 The EFT and transmittal letter shall reflect that the payment is being made to the
8 NOAA DARRF Voetrader Grounding NRD Account ("Voetrader Grounding
9 NRD Account"). NOAA will assign these funds a special project number to allow
10 the funds to be maintained as a segregated account within the NOAA Damage
11 Assessment and Restoration Revolving Fund.
12

13 (i) NOAA shall, in accordance with law, manage funds in
14 the Voetrader Grounding NRD Account for use by the Natural Resource Trustees
15 in connection with Restoration of Natural Resources affected by the Incident.
16 NOAA shall not make any charge against the Voetrader Grounding NRD
17 Account for any management services provided.
18

19 (ii) NOAA shall hold all funds in the Voetrader Grounding
20 NRD Account subject to the provisions of this Consent Decree.
21

22 (iii) NOAA, in consultation with the State, commits to the
23 expenditure of the funds set forth in this Subparagraph (a) for the design,
24 implementation, permitting (as necessary), monitoring, and oversight of
25 Restoration projects and for the costs of complying with the requirements of the
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1 law to conduct the restoration planning and implementation process. NOAA, in
2 consultation with the State, plans to use the funds for restoration, enhancement,
3 and/or protection of coral reef habitat and associated resources and for oversight of
4 these Restoration projects.
5

6 (iv) The allocation of funds for specific projects will be
7 contained in the Damage Assessment and Restoration Plan prepared jointly by the
8 Trustees, for which public notice, opportunity for public input, and consideration
9 of public comment will be provided. NOAA, in consultation with the State, retains
10 the ultimate authority and responsibility to use the funds in the Vogetrader
11 Grounding NRD Account to Restore Natural Resources in accordance with
12 applicable law, this Consent Decree, and the Damage Assessment and Restoration
13 Plan to be prepared jointly by the Trustees.
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18 (b) The sum of one hundred forty four thousand three hundred
19 forty three dollars (\$144,343) shall be paid to NOAA for reimbursement of its
20 Natural Resource Damage Assessment costs associated with the Incident through
21 May 31, 2014. Payment shall be made by EFT to the United States Department of
22 Justice in accordance with instructions that the Financial Litigation Unit of the
23 United States Attorney's Office for the District of Hawaii shall provide to Settling
24 Defendants following Entry of this Consent Decree by this Court. At the time of
25 payment, Settling Defendants shall simultaneously send written notice of payment
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1 and a copy of any transmittal documentation (which shall reference DOJ case
2 number 90-5-1-1-11013/1, case name, and civil action number) to the Parties in
3 accordance with Section X (Notices) of this Consent Decree.
4

5 **VII. STIPULATED PENALTIES**

6 5. If Settling Defendants fail to cause any payment to be made when due
7 as required by Section VI (Settlement Payments), above, Settling Defendants shall
8 pay to the United States and to the State, respectively, a stipulated penalty of one
9 thousand dollars (\$1,000) per day each, for each day that any such payment is late.
10
11

12 6. Any stipulated penalties, as described above, owing to the United
13 States shall be paid by EFT in accordance with instructions to be provided by the
14 Financial Litigation Unit of the United States Attorney's Office for the District of
15 Hawaii, or by certified or cashier's check in the amount due, payable to the
16 "United States Department of Justice," referencing DOJ case number 90-5-1-1-
17 11013/1, and delivered to the office of the United States Attorney, Financial
18 Litigation Unit, District of Hawaii. At the time of payment of stipulated penalties,
19 Settling Defendants shall simultaneously send written notice of payment, stating
20 that such payment is for late payment of amount(s) due under this Consent Decree,
21 and a copy of any transmittal documentation (which shall reference DOJ case
22 number 90-5-1-1-11013/1, case name, and civil action number) to the Parties in
23 accordance with Section X (Notices) of this Consent Decree.
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1 7. Settling Defendants shall not deduct any stipulated penalties paid
2 under this Section in calculating their federal or state income taxes.

3 8. If Settling Defendants fail to make any payments required by Section
4 VI (Settlement Payments), Settling Defendants shall also be liable for interest on
5 such payment, as provided for in 28 U.S.C. § 1961, accruing as of the date
6 payment became due.
7

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9 **VIII. EFFECT OF SETTLEMENT**
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11 9. Effective upon Settling Defendants' performance of their payment
12 obligations as set forth in Section VI (Settlement Payments) of this Consent
13 Decree, this Consent Decree shall resolve any and all civil claims of Plaintiffs, and
14 any of them for damages for injury to, destruction of, loss of, or loss of use of
15 Natural Resources arising from the Incident, including natural resource damage
16 assessment and restoration monitoring costs associated with the Incident, as
17 provided for by Section 1002(b) of OPA, 33 U.S.C. § 2702(b).
18

19 10. Notwithstanding any other provision of this Consent Decree, the
20 United States and the State reserve the right to institute proceedings against the
21 Settling Defendants in this action or in a new action seeking recovery of Natural
22 Resource Damages: (1) based on injury to, destruction of, or loss of natural
23 resources as a result of the Incident which resulted from conditions that were
24 unknown to the Trustees as of the date when this Consent Decree is lodged with
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1 this Court; or (2) based on information received by the Trustees after the date when
2 this Consent Decree is lodged with this Court that indicates that there was injury
3 to, destruction of, or loss of natural resources as a result of the Incident which was
4 of a type or magnitude unknown to the Trustees as of the said date.
5

6 11. Settling Defendants hereby covenant not to sue and agree not to assert
7 any claims or causes of action of any nature against the United States or the State
8 under federal, state, or local law, arising out of or relating to this Consent Decree
9 or to the Incident.
10

11 12. This Consent Decree does not limit or affect the rights of Settling
12 Defendants or of the Plaintiffs against any third parties, not party to this Consent
13 Decree, nor does it limit the rights of third parties, not party to this Consent
14 Decree, against Settling Defendants, except as otherwise provided by law.
15

16 13. This Consent Decree shall not be construed to create rights in, or grant
17 any cause of action to, any third party not party to this Consent Decree.
18

19 IX. COSTS

20 14. Plaintiffs shall be entitled to collect the costs (including reasonable
21 attorneys' fees) incurred in any action necessary to collect any portion of the
22 amounts due under Section VI (Settlement Payments) or any stipulated penalties
23 due but not paid under Section VII (Stipulated Penalties), above.
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X. NOTICES

15. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611
Re: DOJ No. 90-5-1-1-11013/1

To NOAA:

Christopher J. Plaisted
Attorney-Advisor
Natural Resources Section
Office of General Counsel
501 W. Ocean Boulevard, Suite 4470
Long Beach, California 90802-4213

To State:

Amanda J. Weston
Deputy Attorney General
Land Transportation Division
465 S. King Street, 3rd Floor
Honolulu, Hawaii 96813

1 To Settling Defendants:

2 Eugene J. O'Connor
3 Montgomery McCracken Walker & Rhoads LLP
4 437 Madison Avenue
5 29th Floor
6 New York, New York 10022

7 16. Any Party may, by written notice to the other Parties, change its
8 designated notice recipient or notice address provided above.

9 17. Notices submitted pursuant to this Section shall be deemed submitted
10 upon mailing, unless otherwise provided in this Consent Decree or by mutual
11 agreement of the Parties in writing.
12

13 **XI. EFFECTIVE DATE**

14
15 18. The Effective Date of this Consent Decree shall be the date of the
16 Entry of this Consent Decree by the Court.
17

18 **XII. RETENTION OF JURISDICTION**

19 19. The Court shall retain jurisdiction over this case until termination of
20 this Consent Decree, for the purpose of effectuating or enforcing compliance with
21 the terms of this Consent Decree.
22

23 **XIII. MODIFICATION**

24
25 20. The terms of this Consent Decree may be modified only by a
26 subsequent written agreement signed by all Parties. Where the modification
27 constitutes a material change to any term of this Consent Decree, it shall be
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1 effective only upon approval by the Court.

2 **XIV. TERMINATION**

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4 21. This Consent Decree shall be terminated when the Plaintiffs
5 determine that Settling Defendants have satisfactorily completed performance of
6 its obligations required by this Consent Decree, including payment of the amounts
7 required under Section VI (Settlement Payments) and any outstanding stipulated
8 penalties due under Section VII (Stipulated Penalties). Upon such termination, the
9 Parties shall file with the Court an appropriate stipulation reciting that the
10
11 Parties shall file with the Court an appropriate stipulation reciting that the
12 requirements of this Consent Decree have been met.

13 **XV. PUBLIC PARTICIPATION**

14
15 22. This Consent Decree shall be lodged with this Court for a period of
16 not less than thirty (30) days to allow the opportunity for public notice and
17 comment. The Plaintiffs reserve the right to withdraw from or withhold their
18 consent to this Consent Decree if the comments from the public regarding this
19 Consent Decree disclose facts or considerations indicating that this Consent Decree
20 is inappropriate, improper, or inadequate. Settling Defendants consent to Entry of
21 this Consent Decree without further notice.
22
23

24 **XVI. SIGNATORIES/SERVICE**

25
26 23. Each undersigned representative of Settling Defendants, the State, and
27 the United States, certifies that he or she is fully authorized to enter into the terms
28

1 and conditions of this Consent Decree and to execute and legally bind the Party or
2 Parties he or she represents to this document.

3 24. This Consent Decree may be signed in counterparts, and its validity
4 shall not be challenged on that basis.

5
6 25. Settling Defendants agree not to oppose the Entry of this Consent
7 Decree by the Court or to challenge any provision of this Consent Decree, unless
8 the consent of Plaintiffs, or any of them, has been withdrawn or withheld under the
9 circumstances set forth in Paragraph 22, or Plaintiffs, or any of them have notified
10 Settling Defendants in writing that such Plaintiff no longer supports or agrees to
11 the Entry of this Consent Decree.
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14

15 **XVII. INTEGRATION**

16 26. This Consent Decree constitutes the final, complete, and exclusive
17 agreement and understanding among the Parties with respect to the settlement
18 embodied in this Consent Decree and supersedes all prior agreements and
19 understandings, whether oral or written, concerning the settlement embodied
20 herein. No other document, nor any representation, inducement, agreement,
21 understanding, or promise, constitutes any part of this Consent Decree or the
22 settlement it represents, nor shall it be used in construing the terms of this Consent
23 Decree.
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XVIII. FINAL JUDGMENT

27. Upon approval and Entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court, in accordance with Rules 54 and 58 of the Federal Rules of Civil Procedure, as among the Parties.

SO ORDERED

Dated and entered this ____ day of _____, _____.

United States District Judge

1 We hereby consent to the Entry of the foregoing Consent Decree, subject to the
2 Notice and Comment provisions of Section XV (Public Participation) of this
3 Consent Decree.

4
5 FOR THE UNITED STATES:

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7
8
9 DATED: 10/23/14



ELLEN M. MAHAN
Deputy Chief
Environmental Enforcement Section
Environment & Natural Resources
Division
United States Department of Justice

10
11
12
13
14 DATED: 11/14/14



BRADLEY R. O'BRIEN
Senior Attorney
Environment and Natural Resources
Division
Environmental Enforcement Section
United States Department of Justice

1 We hereby consent to the Entry of the foregoing Consent Decree, subject to the
2 Notice and Comment provisions of Section XV (Public Participation) of this
3 Consent Decree.

4
5 FOR THE STATE OF HAWAII:

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8
9 DATED: November 3, 2014


AMANDA J. WESTON
Deputy Attorney General
Department of the Attorney General

1 We hereby consent to the Entry of the foregoing Consent Decree, subject to the
2 Notice and Comment provisions of Section XV (Public Participation) of this
3 Consent Decree.

4
5 FOR SETTLING DEFENDANTS Denak Ship Management and Vogetrader
6 Shipping Inc.:

7
8
9
10 DATED: _____



EUGENE J. O'CONNOR
Montgomery McCracken Walker
& Rhoads LLP
437 Madison Avenue
29th Floor
New York, New York 10022