
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No: 2:17-cv-01244-DAK
)	
SARATOGA SPRINGS OWNERS)	
ASSOCIATION, INC., and)	
CROSS MARINE PROJECTS, INC.,)	
)	
Defendants.)	
)	

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed the Complaint herein against Defendants the Saratoga Springs Owners Association, Inc., and Cross Marine Projects, Inc. (collectively, "Defendants"), alleging that Defendants violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States at a site located in Saratoga Springs, Utah County, Utah (the “Site”) as more fully described in the Complaint, without authorization by the United States Department of the Army (the “Corps”);

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendants, at their own expense and at the direction of EPA, to restore and/or mitigate the damages caused by their alleged unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Site;

WHEREAS, Defendants deny the allegations in the Complaint and make no admission as to the validity of the United States' allegations, but admit that the Court has jurisdiction to enter this Consent Decree and to order the relief set forth in this Consent Decree;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further 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 pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of Utah pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the cause of action alleged herein arose in this District.

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

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees, and their successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, successors or assigns or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

III. SCOPE OF CONSENT DECREE

5. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants under CWA Section 301 concerning the Site.

6. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full material compliance with, and to further the purposes of, the CWA.

7. Defendants' obligations under this Consent Decree are joint and several.

8. Except as in accordance with this Consent Decree, Defendants and Defendants' agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

9. The parties acknowledge that Nationwide Permit 32, found at 82 Fed. Reg. 1,860 (Jan. 6, 2017), authorizes any fill that was placed as of the end of February 2014 in the areas identified in Appendix A, to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 (82 Fed. Reg. 1,860), authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree.

10. 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 CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

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

12. This Consent Decree in no way affects the rights of the United States against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. Except with respect to Paragraphs 1-3, nothing in this Consent Decree shall constitute an admission of fact or law by any party.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

15. Defendants shall pay a civil penalty to the United States in the amount of \$150,000 within 30 days after entry of this Consent Decree.

16. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (____), EPA Region 8 and the DOJ case number (DJ # 90-5-1-1-20715). Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the

United States Attorney's Office for the District of Utah. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty required by this Consent Decree, Defendants shall provide written notice, at the addresses specified in Section IX of this Consent Decree, that such payment was made in accordance with Paragraph 16.

18. Defendants shall not deduct any civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section VIII) in calculating federal income tax.

RESTORATION, MITIGATION AND PRESERVATION

19. Defendants shall perform restoration and mitigation under the terms and conditions stated in the Restoration and Mitigation Plan, dated September 11, 2018, attached hereto as Appendix A and incorporated herein by reference as an enforceable part of this Consent Decree. (Appendix A or Restoration and Mitigation Plan).

Until this Consent Decree is terminated in accordance with Section XIV, Defendants shall provide the United States, at the addresses specified in Section IX of this Consent Decree, with annual monitoring reports pursuant to the Restoration/Mitigation Plan on or before December 1 of each year. If, during the monitoring period, the restoration project identified in the Restoration/Mitigation Plan fails to achieve the success criteria specified therein, Defendants shall propose corrective measures and a schedule for their implementation. Such corrective measures and schedule for the implementation shall be submitted to the United States within 60 days of the earlier of (a) Defendants' discovery of the failure to meet success criteria, or (b) Defendants' receipt of the United States' written position that success criteria were not met. Defendants shall implement the corrective measures upon approval by the United States subject

to seasonal limitations as to any planting of vegetation or construction of any features. All disputes arising under this Paragraph are subject to the dispute resolution procedures in Section VI of this Consent Decree.

20. Upon completion of all work pursuant to Appendix A, Defendants shall not dredge, excavate, farm, fill, dewater, drain or otherwise disturb in any manner whatsoever any location identified in Appendix A, except as approved by EPA, or authorized by the Corps.

V. NOTICES AND OTHER SUBMISSIONS

21. Within 30 days after the deadline for completing specific work as set forth in Appendix A, Defendants shall provide the United States with written notice, at the addresses specified in Section IX of this Consent Decree, of whether or not that work has been completed. Each notice shall include documentation sufficient to fully support Defendants' conclusion that that portion of the work is complete.

22. If the required work has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

23. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendants shall, by signature of a senior management official, certify such notices, documents and reports as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

24. Until five years after termination of this Consent Decree pursuant to Section XIV, Defendants shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Appendix A, regardless of any corporate retention policy to the contrary. Until five years after termination of this Consent Decree pursuant to Section XIV, Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in Appendix A.

25. At the conclusion of the document retention period, Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Defendants shall deliver any such records or documents to EPA. The Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Defendants assert such a privilege, they shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

26. A. Until termination of this Consent Decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the Site, including entry to and access through Defendant Saratoga Springs Owners Association's premises and Defendant Cross Marine Project, Inc.'s active work areas to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples;
- 4) Inspect and evaluate Defendants' restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA.

B. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

VII. DISPUTE RESOLUTION

27. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. The period for informal negotiations shall not extend beyond 30 days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 days after the end of the informal negotiation period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the

nature of the dispute and a proposal for its resolution. The United States shall have 30 days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree and the CWA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

28. If the United States believes that either Defendant or both Defendants initiates or maintains a dispute that is not a good faith dispute, or that a delay because of a dispute would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the 30 day period for informal negotiations. The Defendants shall have 14 days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree and the CWA.

29. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 39 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

30. Defendants shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including their employees, agents,

consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of the Site, or failure to obtain federal, state or local permits.

31. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within 7 calendar days after the event at the addresses listed in Section IX. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and
- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event(s) in question.

32. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the

delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

33. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section VI of this Consent Decree.

34. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused by circumstances entirely beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

IX. STIPULATED PENALTIES

35. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree (including Appendix A), the Defendants shall pay a stipulated penalty to the United States for each violation of each requirement of this Consent Decree as follows:

- | | | |
|----|---|--------------------|
| 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
60 of non-compliance | \$1,000.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$1,500.00 per day |

Such payments shall be made without demand by the United States monthly on or before the last day of the month following the month in which the stipulated penalty accrued.

36. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VI and/or the Force Majeure provisions in Section VII shall be resolved upon motion to this Court as provided in Paragraphs 27 and 28.

37. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to 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 Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

38. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 30 above) or otherwise prevail on the disputed issue, the stipulated penalties for that delay or noncompliance shall be excused.

39. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the first calendar date after the payment is due until the date the payment is made. The interest shall also be compounded annually.

40. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (____), EPA Region 8 and the DOJ case number (DJ # 90-5-1-1-20715). Payment shall be made in

accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Utah. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section X of this Decree.

X. ADDRESSES

41. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Charles L. Figur, Senior Attorney
United States Environmental Protection Agency - Region 8
1595 Wynkoop Street (8ENF-L)
Denver, CO 80202
- (2) Barbara Conklin, Enforcement Officer
United States Environmental Protection Agency- Region 8
1595 Wynkoop Street (8ENF-W-WO)
Denver, CO 80202
conklin.barbara@epa.gov

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE

David A. Carson
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
South Terrace – Suite 370
999 18th Street
Denver, CO 80202

D. TO DEFENDANT SSOA:

- (1) Mark D. Taylor
LEWIS HANSEN
The Judge Building
Eight East Broadway, #410
Salt Lake City, UT 84111
- (2) Rebecca L. Hill
CHRISTENSEN & JENSEN
257 East 200 South, Suite 1100
Salt Lake City, Utah 84111
- (3) Saratoga Springs Owners Association, Inc.
12371 South 9900 East #200
Draper, UT 84020

E. TO DEFENDANT CROSS MARINE:

- (1) Steven R. Sumsion
SUMSION BUSINESS LAW
3651 N. 100 E., Suite 300
Provo, UT 84604
- (2) James L. Cross, Sr.
Director of Marine Operations
Cross Marine Projects, Inc.
1021 E. Pacific Dr.
American Fork, UT 84003XI.

XI. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

42. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section IV (Specific Provisions), Paragraphs 19-20, and related Appendix A; Section V (Notices and Other Submissions), Paragraphs 21-23; and Section VI (Retention of Records and Right of Entry), Paragraphs 24-26, is restitution or required to come into compliance with law.

XII. COSTS OF SUIT

43. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against Defendants for noncompliance with or enforcement of this Consent Decree.

XIII. PUBLIC COMMENT

44. 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 lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

XIV. CONTINUING JURISDICTION OF THE COURT

45. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XV. MODIFICATION

46. Upon its entry by the 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 shall not take effect unless signed by both the United States and the Defendants and approved by the Court. Notwithstanding the prior sentence, modifications of the deadlines or other obligations contained in Appendix A by a written agreement by both United States and the Defendants shall not require approval by the Court.

XVI. TERMINATION

47. Except for Paragraph 20, this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendants have obtained and maintained compliance with all provisions of this Consent Decree and the CWA for 12 consecutive months;
2. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
3. Defendants have certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and
4. within 45 days of receiving such certification from the Defendants, EPA has not contested in writing that such compliance has been achieved. If EPA

disputes Defendants full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the Parties or Defendants' motion to the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2018.

United States District Judge

ON BEHALF OF THE UNITED STATES:

JOHN W. HUBER

United States Attorney, District of Utah

JARED C. BENNETT (#9097)

Assistant United States Attorney

185 South State Street, Suite 300

Salt Lake City, Utah 84111

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JEFFREY H. WOOD

Acting Assistant Attorney General

Environment & Natural Resources Division



DAVID A. CARSON, CO Bar No. 29234

United States Department of Justice

Environment & Natural Resources Division

Suite 370 – South Terrace

999 18th Street


Denver, Colorado 80202

(303) 844-1349


david.a.carson@usdoj.gov

Date: 10 / 1 / 2018

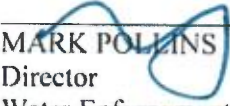
FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:


SUZANNE BOHAN
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice
U.S. Environmental Protection Agency
Region 8


Date: 9/24/18


CHARLES L. FIGUR
Senior Enforcement Attorney
Office of Enforcement, Compliance and
Environmental Justice

Date: 9/24/18

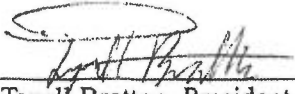

MARK POLLINS
Director
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Date: 9-25-18


JEFFREY SPEIR
Attorney-Adviser
Water Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency

Date: 9-25-18

ON BEHALF OF THE SARATOGA SPRINGS OWNERS ASSOCIATION, INC.:



Tyrell Bratton, President

Date: 9-24-18

ON BEHALF OF CROSS MARINE PROJECTS, INC.:


James L. Cross, Sr., Owner and President

Date: 9-24-18