

property as set forth in Appendix A hereto. For monitoring and oversight activities undertaken by the U.S. Fish and Wildlife Service, Colonial shall pay \$48,295. This payment is for monitoring and oversight costs associated with on-the-ground oversight and monitoring by U.S. Fish and Wildlife Service personnel for the Aquatic Habitat Enhancement, the Forest Enhancement, and Wetlands enhancement projects set forth in Appendix A hereto, for a period of eight years following entry of this Decree. At the end of this eight year period, the need for additional monitoring, if any, shall be discussed by the Natural Resource Trustees and Colonial.

To the Commonwealth of Virginia: For monitoring and oversight activities undertaken by Virginia for projects set forth in Appendix A hereto, Colonial shall pay \$25,000. At the end of this eight year period, the need for additional monitoring, if any, shall be discussed by the Natural Resource Trustees and Colonial.

11b. Project Funding Contribution by Colonial Toward Notching of Little Falls Dam on the Potomac River. Within thirty (30) days of entry of this Decree, Colonial will pay \$253,314 toward the notching of Little Falls Dam project which is described in further detail in the RPL. This payment is in partial satisfaction of claims of the District for natural resource damages. Following entry of this Decree, the Natural Resource Trustees will provide payment instructions in Colonial with respect to this payment. However, in the event that entry

of this Decree does not take place before September 15, 1997, Colonial agrees to establish an escrow account in the above listed amount for purposes of matching funds for the notching of Little Falls Dam project, by no later than September 30, 1997. Such escrow account shall be maintained by Colonial and \$253,314 from this escrow account shall be made available for use for the notching of Little Falls Dam project within thirty (30) days of entry of the Decree. Following entry of the Decree, the Natural Resources Trustee will provide payment instructions to Colonial with respect to this payment. Any and all interest accruing in the escrow account shall revert to Colonial. In the event that the Court declines to enter the Decree, the escrow account shall revert to Colonial, along with any and all interest accrued in such account. In the event that this Decree is not lodged with the Court before January 1, 1998, this escrow account shall revert to Colonial.

V. GENERAL PROVISIONS

A. Objectives of the Parties

12. The objectives of the Parties in entering into this Decree are to restore, rehabilitate, replace, or acquire the equivalent of the injured or destroyed Natural Resources and to compensate the public in accordance with OPA, the CWA, the DCWPCA, and SWCL, and all applicable implementing regulations, for interim losses resulting from injury to or destruction of natural resources through implementation of the RPL projects contained in Appendix A or any substituted project or projects

providing substantially equivalent benefits selected under Section XII of this Decree, and for Colonial to reimburse the United States, Virginia, and the District, as applicable, for Damage Assessment Costs, monitoring and oversight costs associated with the RPL, and for recovery of a civil penalty for the Spill.

B. Commitments by Colonial

13. Colonial shall finance, design, plan, implement and perform the projects set forth in the RPL, at Appendix A, as described in the Work Plans under Section XII (RPL Work Plans) of this Decree, subject to any modification thereto pursuant to Section XII. Colonial shall also conduct Restoration Planning Process activities as directed by the Natural Resource Trustees. Colonial shall also reimburse the United States, Virginia and the District for Damage Assessment Costs, and oversight costs associated with the RPL as set forth in Section IV (Civil Penalty and Cost Reimbursement). Colonial shall also pay civil penalties to the United States and Virginia as set forth in Section IV (Civil Penalty and Cost Reimbursement).

14. Colonial shall achieve and ensure that the Performance Standards set forth in this Decree and the RPL Work Plans (as applicable) are met.

C. Compliance With Applicable Law

15. All activities undertaken by Colonial pursuant to this Decree and any associated Work Plans shall be performed in accordance with the requirements of applicable federal and state

laws and regulations. The Natural Resource Trustees agree to make good faith efforts to inform Colonial of any such requirements known to them.

D. Monitoring and Oversight

16. The Natural Resource Trustees shall conduct monitoring and oversight of actions required of Colonial under this Decree relating to implementation of the RPL or any substitute projects thereto under Section XII. The Natural Resource Trustees shall notify Colonial in writing of the name and address of the person who will act as the Contact Person(s) for purposes of submissions relating to the RPL and notification pursuant to Section XV (Force Majeure). The Contact Person(s) may be changed by the Natural Resource Trustees at any time upon written notification to Colonial.

E. Determination of Restoration

17. Notwithstanding anything to the contrary, for purposes of this Decree, Restoration or Recovery of Natural Resources affected by the spill shall be demonstrated through attainment and maintenance of Performance Standards in accordance with the criteria set forth in the Work Plans developed under Section XII (RPL Work Plans) of this Consent Decree and the RPL, including any modifications to the RPL or Work Plans pursuant to Section XII (RPL Work Plans) of this Consent Decree.

VI. SELECTION OF CONTRACTOR

18. All components of the Work to be performed by Colonial pursuant to this Decree shall be under the direction and

supervision of a contractor, the selection of which shall be subject to approval by the Natural Resource Trustees or, subject to the approval of the Natural Resource Trustees, such Work may be performed by Colonial personnel. Within the time schedules set forth for each component of the RPL, Colonial shall notify the Natural Resource Trustees in writing of the name, title, and qualifications of any proposed contractor, and of any changes in the selection of a contractor during the time this Decree remains in effect. The Natural Resource Trustees will notify Colonial in writing of the approval or disapproval of the selection of a proposed contractor.

VII. SUBMISSIONS REQUIRING NATURAL RESOURCE TRUSTEE APPROVAL

19. After review of any Work Plan, report or other item which is required to be submitted for approval pursuant to this Decree, the Natural Resource Trustees, after reasonable opportunity for review and comment, shall: (a) approve, the submission, in whole or in part, unless it is inconsistent with the objectives of this Decree; (b) approve the submission upon specified conditions necessary to conform it to the objectives of this Decree; (c) modify the submission to cure the deficiencies to conform it to the objectives of this Decree; (d) disapprove, in whole or in part, the submission, directing Colonial to modify the submission in order to conform it to the objectives of this Decree; or (e) any combination of the above.

20. Upon receipt of a notice of disapproval pursuant to Paragraph 20 above, Colonial shall, within 14 days or such

other reasonable time as specified by the Natural Resource Trustees in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Stipulated penalties shall not accrue until after Colonial has had the opportunity to revise the submission in accordance with the Natural Resource Trustees' written comments.

21. All Work Plans, reports, and other items required to be submitted to the Natural Resource Trustees under this Decree shall be, upon approval or amendment by the Natural Resource Trustees, enforceable obligations under this Decree. In the event that the Natural Resource Trustees approve or amend a portion of a plan, report, or other item required to be submitted to the Natural Resource Trustees under this Decree, the approved or amended portion shall be enforceable under this Decree.

#### VIII. DISPUTE RESOLUTION

22. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Decree. However, the procedures set forth in this Section shall not apply to actions by the Plaintiffs to enforce Colonial's obligations that have not been disputed in accordance with this Section.

23. Any dispute which arises under or with respect to this Decree shall in the first instance be the subject of informal negotiations between the Parties for a period not to exceed 30 days from the time the dispute arises, unless it is extended by written agreement of the Parties. The dispute shall

be considered to have arisen when one Party sends the other Party a written Notice of Dispute.

24. a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Natural Resource Trustees shall be considered binding unless, within 20 days after the conclusion of the informal negotiation period referenced above, Colonial invokes the formal dispute resolution procedures of this Section by serving on the Natural Resource Trustees a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Colonial. Colonial shall simultaneously serve a copy of its Statement of Position on the Chief, Environmental Enforcement Section, United States Department of Justice at the address indicated in Section XVIII (Notices and Submissions).

b. Within 20 days of service of Colonial's Statement of Position, the Natural Resources Trustees will serve on Colonial their Statement of Position, including but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the Natural Resources Trustees. Within 14 days of service of the Natural Resources Trustees' Statement of Position, Colonial may serve on the Natural Resources Trustees a response to the Natural Resources Trustees' Statement of Position.

c. If there is disagreement between the Natural Resources Trustees and Colonial as to whether dispute resolution should proceed under Paragraph 26 or Paragraph 28, the Parties shall follow the procedures set forth in the paragraph determined by the Natural Resources Trustees to be applicable. However, if Colonial ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards identified in Paragraphs 26 and 28.

25. Formal dispute resolution for disputes pertaining to the adequacy of any submittal requiring Natural Resource Trustee approval under Section VII (Submissions Requiring Natural Resource Trustee Approval), approval by the Natural Resource Trustees of the Work Plan or Plans and reports submitted pursuant thereto, whether a substituted project or projects under Section XII (RPL Work Plans) of this Decree provides substantially equivalent benefits, according to the scaling metric used to select the original project or projects, to natural resources and/or the public as the project or projects in the RPL as set forth in Appendix A, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph.

a. An administrative record of the dispute shall be maintained by the Natural Resource Trustees and shall contain all Statements of Position and responses thereto, including supporting documentation, submitted pursuant to Paragraph 25.



Where appropriate, the Natural Resource Trustees may allow submission of supplemental Statements of Position by the Parties.

b. DOI, which serves as the lead administrative trustee, or its designee will issue a final administrative decision resolving the dispute based on the administrative record described in Subparagraph a above. These decision(s) shall be binding upon Colonial and shall not be subject to judicial review, unless, within 30 days of the service upon Colonial of the decision, Colonial serves upon the Plaintiffs and files with this Court a motion challenging the decision. Such motion shall be served upon the Plaintiffs as provided in Section XVIII (Notices and Submissions). Plaintiffs shall have 30 days from the date of service to serve and file a response or responses to Colonial's motion. Colonial's motion shall inform the Court of this provision regarding the length of time allowed to the Plaintiffs for a response.

26. In any proceeding to review a determination made pursuant to Paragraph 26(b), Colonial shall have the burden of demonstrating that the decision of the designated decision-maker of the Natural Resources Trustees is arbitrary and capricious or otherwise not in accordance with law. Judicial review of the Natural Resources Trustees' decision shall be on the administrative record compiled pursuant to Paragraph 26(a) with either Party having the right to request oral argument.

27. Formal dispute resolution for disputes that are neither explicitly identified in Paragraph 26 nor are otherwise

accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Colonial's Statement of Position submitted pursuant to Paragraph 25, the designated decision-maker of the Natural Resources Trustees, will issue a final decision resolving the dispute. This decision shall be binding upon Colonial and shall not be subject to judicial review unless, within 20 days of the service upon Colonial of the decision, Colonial serves upon the Plaintiffs and files with this Court a motion challenging the decision. Such motion shall be served upon the Plaintiffs as provided in Section XVIII (Notices and Submissions). The Plaintiffs shall have 60 days from the date of service to serve and file a response to Colonial's motion, and Colonial's motion shall inform the Court of this provision regarding the length of time allowed for a response.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

28. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Colonial's under this Decree not directly in dispute, unless the obligation in question is directly dependant upon the prior performance of the obligation in dispute or unless the Natural Resource Trustees or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be

stayed pending resolution of the dispute as provided in Paragraphs 41 and 42.

29. For the purposes of this Section, service is complete when the documents are deposited for delivery with an overnight delivery service or with the United States Postal Service if sent certified mail, return receipt requested, or, if any other method is used, service is complete upon actual receipt.

#### IX. ACCESS TO INFORMATION AND PROPERTY

30. Colonial shall provide to the Natural Resource Trustees, upon written request, copies of all non-privileged documents and information within its possession or control or that of its contractors or agents (to the extent that Colonial has the authority to require its contractor or agent to produce such documents or information) relating to activities to be taken pursuant to the RPL under this Decree including, but not limited to, sampling, analysis, chain of custody records, manifests, receipts, reports, correspondence, or other documents. Colonial must provide all documents, regardless of privilege, upon which it relies to assert, support, document, and otherwise prove up its position in a dispute. Colonial shall take appropriate steps to ensure that it is contractually entitled to all documents and information which is compiled and/or produced by its agents or contractors relating to activities to be undertaken pursuant to this Decree.

31. Commencing on the date of lodging of this Decree, Colonial agrees to provide the Natural Resource Trustees, and their representatives, including their contractors, access at all reasonable times to any property in or adjacent to the location of all projects identified in the RPL that are owned or controlled by Colonial for the purposes of:

- a. Monitoring and overseeing implementation of the RPL;
- b. Verifying any data or information submitted to the Natural Resource Trustees, including any data collected pursuant to the RPL Work Plan;
- c. Conducting investigations relating to the RPL;
- d. Obtaining samples; and
- e. Assessing the need for, or planning the implementation of, the RPL.

Colonial further agrees to use its best efforts to obtain access to property not owned by Colonial necessary to implement the RPL. Failure to obtain access after exercise of best efforts shall relieve Colonial only of its obligations to perform that restoration project or part thereof on the RPL for which access to the property is necessary. This does not release Colonial from the requirement of implementing substitute projects in accordance with Section XII (RPL Work Plans).

32. Notwithstanding any provision of this Decree, the United States, Virginia and the District retain all of their

access authorities and rights, including enforcement authorities related thereto, under any applicable statute or regulations.

**X. REPORTING REQUIREMENTS**

33. In addition to any other requirement of this Decree, Colonial shall submit to DOI, Virginia and the District written progress reports every 3 months that: (a) describe the actions which have been taken pursuant to the RPL during the previous 3 months, (b) identify all work plans, plans and other deliverables required by the RPL completed and submitted during the previous 3 months; (c) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next 3 months; and (d) include any modifications to the work plans or other schedules that Colonial has proposed to DOI, Virginia, and the District under the RPL or this Decree. Colonial shall submit these progress reports to DOI, Virginia, and the District of Columbia by the tenth day of January, April, July, and October of each year following the entry of this Decree until the Natural Resource Trustees have informed Colonial that it has completed the implementation of the Work and the RPL pursuant to Section V of this Consent Decree. In the event that no reportable events have occurred within any three month period, the report shall so state.

34. All reports and other documents submitted by Colonial to DOI, Virginia and the District that purport to document Colonial's compliance with the terms of this Decree shall be signed by an authorized representative of Colonial. The

person signing such report or document shall make the following certification:

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 the 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.

#### XI. STIPULATED PENALTIES

35. Colonial shall be liable to the Plaintiffs for stipulated penalties in the amounts set forth below in this Paragraph for failure to comply with the requirements of this Decree specified below, unless excused under Section XV (Force Majeure). Colonial shall pay one third of any penalty accrued under this Section to the United States, one third to Virginia, and one third to the District. Colonial shall make such payment by forwarding a check payable to the United States Treasury to the Assistant Attorney General, Environment and Natural Resources Division, and by forwarding check to Virginia and the District as per the instructions set forth in Paragraph 10 of this Decree (Section IV). "Compliance" shall include completion of the activities required under this Decree or any work plan approved under this Decree in accordance with the terms of this Decree or the approved plan.

a. The following stipulated penalties shall be payable per violation per day to the Plaintiffs:

Penalty Per Violation  
Per Day

- a. \$300
- b. \$750
- c. \$3,000

Period of Noncompliance

- a. Day 1 through 10
- b. Day 11 through 20
- c. Day 21 and each day thereafter

36. All stipulated penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

37. Following the Natural Resource Trustees' determination that Colonial has failed to comply with a requirement of this Decree, the Natural Resource Trustees shall give Colonial written notification of the same and describe the noncompliance. The Natural Resource Trustees may send Colonial a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether the Natural Resource Trustees have notified Colonial of a violation.

38. All penalties owed to the Plaintiffs under this Section shall be due and payable within 30 days of receipt from the Natural Resource Trustees of a demand for payment of the penalties, unless Colonial invokes the Dispute Resolution procedures under Section VIII (Dispute Resolution). All payments under this Section shall be made in the same manner as the payment required by Paragraph 10.