

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

FEB 17 2009
at 11 o'clock and 15 min. A M. *AW*
SUE BEITIA, CLERK

9 RONALD J. TENPAS
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15 UNITED STATES DISTRICT COURT
16 DISTRICT OF HAWAII

17
18 UNITED STATES OF AMERICA,
19 Plaintiff,
20 v.
21 F/V NORTH WIND, Inc., *in personam*,
22 Defendant.

Civil No. 1:06-cv-00272-DAE-BMK
IN ADMIRALTY
CONSENT DECREE

23 I. INTRODUCTION

24 A. On or about July 1, 2005, the R/V CASITAS, a 145-foot research vessel owned
25 and operated by F/V North Wind, Inc. ("Defendant"), ran aground on the reef near North Island
26 at Pearl and Hermes Atoll, a part of the Hawaiian Islands National Wildlife Refuge, and which is
27 also within the Papahanaumokuakea Marine National Monument (the "Incident"). At all
28 relevant times, Defendant was the owner and operator of the CASITAS.

1 B. Defendant North Wind promptly responded to the grounding and cooperated with
2 authorities from the State of Hawaii and the United States Government through the Incident
3 Command Structure. As a result of the joint efforts of the Defendant, its insurers and
4 contractors, on the one hand, and the State and Federal authorities on the other, the R/V
5 CASITAS was removed from the reef.

6 C. The United States has filed a complaint in this civil action, alleging that the
7 Incident posed a substantial threat of discharge of oil and the actual discharge of oil into and
8 upon the navigable waters of the United States, and caused injury to, loss of, or destruction of
9 natural resources, including the reef. The United States' Complaint alleges that the Incident
10 caused the United States to incur Response Costs as defined herein. The United States also
11 alleged that Defendant is liable for all such Response Costs. In addition, the United States
12 alleged that Defendant is liable for civil penalties under the Clean Water Act ("CWA").

13 D. In addition, the United States also has potential claims for Damages, as defined
14 herein, which are recoverable under the Oil Pollution Act ("OPA") or under state law.

15 E. In addition, the State of Hawaii (the "State") has potential claims for Damages, as
16 defined herein, which are recoverable under the OPA or under state law. The State has not yet
17 filed its claims and is thus not yet a party. Under this Consent Decree, the State will become a
18 plaintiff for purposes of settling the claim.

19 F. The National Oceanic and Atmospheric Administration ("NOAA") the U.S. Fish
20 and Wildlife Service of the Department of the Interior ("USFWS"), and the State have
21 investigated the site of the Incident, as part of a Defendant-funded pre-assessment trip. Based on
22 the data gathered during that trip, Plaintiffs estimated the amount and severity of coral reef
23 harmed by the Incident, and estimated costs for monitoring recovery of the reef, and for projects
24 intended to compensate for injuries to natural resources, including to coral. NOAA, the USFWS,
25 and the State have determined that the amounts recovered as Damages under this Consent
26 Decree are sufficient to provide for compensatory restoration for injuries to the natural resources,
27 for monitoring of their recovery, and for the planning and oversight of the implementation of
28 such restoration. Based on the data it gathered during that trip, Defendant disputed those

1 amounts, disputed the causal connection between the amounts sought in compensation and
2 disputed jurisdiction for certain claims under OPA '90.

3 G. The Parties, without the necessity of trial or adjudication of any issues of fact or
4 law and without any admission of liability by Defendant agree, and the Court finds, that this
5 Consent Decree is fair, reasonable, and in the public interest.

6 Now, therefore, before the taking of any testimony, without the adjudication or admission
7 of any issue of fact or law, and with the consent of the Parties,

8 IT IS HEREBY ADJUDGED, ORDERED AND DECREED as follows:

9 **II. PARTIES**

10 1. This Consent Decree is made and entered into by and between Plaintiff, the
11 United States of America, on behalf of and including, but not limited to, the United States Coast
12 Guard, National Pollution Funds Center, Oil Spill Liability Trust Fund ("OSLTF"); the National
13 Oceanic and Atmospheric Administration ("NOAA") Department of Commerce; the U.S. Fish
14 and Wildlife Service ("USFWS"), Department of the Interior; and Plaintiff, the State of Hawaii;
15 and Defendant, F/V North Wind, Inc. The State, prior to entry of this Consent Decree is not a
16 party to this civil action. The Parties to this Consent Decree stipulate, and by Entry of this
17 Consent Decree the Court hereby ORDERS, that upon Entry of the Consent Decree the State
18 shall be deemed to be a plaintiff in this civil action.

19 **III. JURISDICTION AND VENUE**

20 2. The United States is authorized to bring suit and the Court has jurisdiction
21 pursuant to 28 U.S.C. §§ 1331 (Federal question) 28 U.S.C. § 1333 (Admiralty), and 1345
22 (United States as plaintiff), 33 U.S.C. §§ 1321 (CWA) and 2717 (OPA), and 42 U.S.C. § 9613(b)
23 (CERCLA). The States's claims are also brought pursuant to federal law, and so raise a federal
24 question. 28 U.S.C. § 1331.

25 3. Venue is properly in this Court pursuant to 28 U.S.C. §§ 1391 and 1395, 33
26 U.S.C. § 2717, and 42 U.S.C. § 9613(b).

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IV. APPLICABILITY

4. The obligations of this Consent Decree apply to and are binding upon Plaintiffs, including agencies, departments and political subdivisions thereof, and upon Defendant, and any of Defendant's successors, assigns, subrogees, subrogors, insurers, or other entities or persons otherwise bound by law. Any change in ownership or corporate status of Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Defendant's responsibilities under this Consent Decree.

V. DEFINITIONS

5. Unless otherwise specified, terms used in this Consent Decree shall have the meaning assigned to them in OPA, CWA, and CERCLA, as applicable. Whenever the following terms are used in this Consent Decree, the definitions specified hereinafter shall apply.

a. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9001, *et seq.*

b. "Consent Decree" means this Decree herein.

c. "CWA" means the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*

d. "Damages" means any damages recoverable by the United States for injury to, destruction of, loss of, loss of use of, or impairment of natural resources as a result of the Incident, including, but not limited to: (i) the costs of assessing such injury, destruction, or loss or impairment arising from or relating to the Incident; (ii) the costs of restoration, rehabilitation, or replacement of injured or lost natural resources or of acquisition of equivalent resources; (iii) the costs of planning and overseeing implementation of such restoration activities; and (iv) compensation for injury, destruction, loss, loss of use, or impairment of natural resources.

e. "Defendant" means F/V North Wind, Inc., *in personam.*

f. "Entry of the Consent Decree" means the date when this Decree, after signing by the Judge, is entered in the civil docket under Rule 79(a) of the Federal Rules of Civil Procedure.

g. "Incident" means the grounding of the M/V CASITAS on approximately July 1, 2005, on the reef near North Island at Pearl and Hermes Atoll.

- 1 h. "NRDAR Fund" means DOI's Natural Resource Damage Assessment and
2 Restoration Fund.
- 3 i. "OPA" means the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.*
- 4 j. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral.
- 5 k. "Parties" means the Defendant, the United States, and the State.
- 6 l. "Plaintiffs" shall mean the United States and the State.
- 7 m. "Response Costs" includes both "removal costs" as defined in Sections 1001(31)
8 and 1002(b) of OPA, 33 U.S.C. §§ 2701(31) and 2702(b); and costs of "response" as defined in
9 Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).
- 10 n. "Section" shall mean a portion of this Decree identified by a roman numeral.
- 11 o. "State" means the State of Hawaii.
- 12 p. "Trustees" means NOAA, the USFWS, and the State, acting as trustees for natural
13 resources impacted by the discharge and/or substantial threat of discharges of oil, under 40
14 C.F.R. Part 300.
- 15 q. "United States" shall mean the United States of America including its
16 departments, agencies and instrumentalities, including, but not limited to, the United States
17 Coast Guard, National Pollution Funds Center, Oil Spill Liability Trust Fund ("OSLTF"); the
18 National Oceanic and Atmospheric Administration ("NOAA"), Department of Commerce; the
19 U.S. Fish and Wildlife Service ("USFWS"), Department of the Interior; and the U.S. Coast
20 Guard.

21 **VI. SETTLEMENT PAYMENTS**

22 6. Within thirty (30) days after this Decree has been lodged with this Court, the
23 Defendant shall deposit the amount of three million eight hundred thousand dollars (\$3,800,000)
24 into an account bearing interest on commercially reasonable terms, in a federally-chartered bank
25 (hereinafter, the "CASITAS Account"). If the Decree is not entered by this Court, and the time
26 for any appeal of that decision has run, or if this Court's denial of Entry is upheld on appeal, the
27 monies placed in the CASITAS Account, together with accrued interest thereon, shall be
28 returned to the Defendant. If the Decree is entered by this Court, the Defendant shall, within

1 fifteen (15) Days of the date of Entry of the Consent Decree, cause the monies in the CASITAS
2 Account, and all accrued interest thereon, to be released and disbursed in accordance with the
3 separate payments specified in the immediately following sub-paragraphs.

4 (a) Payment for Coast Guard Response Costs. Within 15 days of the Entry of the
5 Consent Decree \$818,334.17 shall be transferred via Electronic Funds Transfers (EFTs) through
6 the United States Department of Justice for disbursement to the OSLTF (FPN Number H05013)
7 according to instructions to be obtained by defendants from the Dept. of Justice, Torts Branch,
8 Civil Division. A copy of the paperwork documenting the EFTs, and any accompanying
9 correspondence shall reference DOJ # 62-939 and shall be sent to:

10 R.SCOTT BLAZE
11 Senior Admiralty Counsel
12 West Coast Office
13 Torts Branch, Civil Division
14 U.S. Department of Justice
15 7-5395 Federal Bldg., Box 36028
16 450 Golden Gate Avenue
17 San Francisco, California 94102-3463
18 Telephone: (415) 436-6648, (415) 436-6635
19 scott.blaze@usdoj.gov

20 (b) Payment for Trustee-Sponsored Restoration. Within 15 days of the Entry of the
21 Consent Decree, the sum of \$2,857,626.48, together with all the accrued interest on the total
22 amount of the monies deposited in the CASITAS Account, shall be paid to the Department of the
23 Interior (DOI), on behalf of the Trustees, for the purposes set forth in Subparagraphs (iii) and
24 (iv) below. Such payment shall be made by Electronic Funds Transfer ("EFT") to the U.S.
25 Department of Justice in accordance with instructions that the Financial Litigation Unit of the
26 U.S. Attorney's Office for the District of Hawaii shall provide to the Defendant following Entry
27 of this Decree by this Court. The Defendant shall send a transmittal letter, indicating that the
28 EFT has occurred, to the Parties in accordance with Section IX of this Decree ("Notices") and to:

Department of the Interior
Natural Resource Damage Assessment and Restoration Program
Attention: Restoration Fund Manager
1849 "C" Street, N.W., Mail Stop 4449
Washington, D.C. 20240

The EFT and transmittal letter shall reflect that the payment is being made to the "Natural
Resources Damage Assessment and Restoration Fund, Account No. 14X5198 – CASITAS OPA

1 Incident.” DOI will assign these funds a special project number to allow the funds to be
2 maintained as a segregated account within the Department of Interior Natural Resource Damage
3 Assessment and Restoration Fund (the “CASITAS OPA Incident NRD Account”).

4 (i) DOI shall, in accordance with law, manage and invest funds in the
5 CASITAS OPA Incident NRD Account and any return on investments or interest accrued on the
6 Account for use by the Trustees in connection with the further assessment and restoration of
7 Natural Resources affected by the Incident. DOI shall not make any charge against the
8 CASITAS OPA Incident NRD Account for any investment or management services provided.

9 (ii) DOI shall hold all funds in the CASITAS OPA Incident NRD Account,
10 including return on investments or accrued interest, subject to the provisions of this Decree.

11 (iii) The Trustees commit to the expenditure of the funds set forth in this
12 Subparagraph (b) for further assessment and for the design, implementation, permitting (as
13 necessary), monitoring, and oversight of restoration projects and for the costs of complying with
14 the requirements of the law to conduct a restoration planning and implementation process.

15 (iv) The allocation of funds for specific restoration projects will be contained in
16 a Restoration Plan prepared and implemented jointly by the Trustees, for which public notice,
17 opportunity for public input, and consideration of public comment will be provided. The
18 Trustees jointly retain the ultimate authority and responsibility to use the funds in the CASITAS
19 OPA Incident NRD Account to Restore Natural Resources in accordance with applicable law,
20 this Consent Decree, and any Memorandum of Understanding among them. Decisions regarding
21 any use or expenditure of funds under this Section shall be made by the Trustees, and Defendants
22 shall not be entitled to dispute, in any forum or proceeding, any decision relating to use of funds
23 or restoration efforts under this Section.

24 (c) Payment for DOI Assessment Costs. The sum of \$14,018 to DOI, Natural Resource
25 Damage Assessment and Restoration Fund, Account No. 14X5198- CASITAS OPA Incident
26 NRD Account, for reimbursement of its unpaid Natural Resource Damage Assessment costs
27 through June 7, 2008, associated with the Incident. Payment shall be made by EFT to the U.S.
28 Department of Justice in accordance with instructions that the Financial Litigation Unit of the

1 U.S. Attorney's Office for the District of Hawaii shall provide to the Defendant. At the time of
2 payment, the Defendant shall simultaneously send written notice of payment and a copy of any
3 transmittal documentation (which shall reference DOJ case number 90-5-1-1-09389) to the
4 Parties in accordance with Section IX of this Decree ("Notices").

5 (d) Payment for NOAA Assessment Costs. The sum of \$70,021.35 to NOAA for
6 reimbursement of its unpaid Natural Resource Damage Assessment costs through June 7, 2008,
7 associated with the Incident. Payment shall be made by EFT to the U.S. Department of Justice
8 in accordance with instructions that the Financial Litigation Unit of the U.S. Attorney's Office
9 for the District of Hawaii shall provide to the Defendant. At the time of payment, the Defendant
10 shall simultaneously send written notice of payment and a copy of any transmittal documentation
11 (which shall reference DOJ No. 90-5-1-1-09389) to the Parties in accordance with Section IX of
12 this Decree ("Notices").

13 (e) Payment for NOAA Response Costs. The sum of forty thousand dollars (\$40,000) to
14 NOAA for reimbursement of its unpaid Response Costs associated with the Incident. Payment
15 shall be made by EFT to the U.S. Department of Justice in accordance with instructions that the
16 Financial Litigation Unit of the U.S. Attorney's Office for the District of Hawaii shall provide to
17 the Defendant. At the time of payment, the Defendant shall simultaneously send written notice
18 of payment and a copy of any transmittal documentation (which shall reference DOJ No.
19 90-5-1-1-09389) to the Parties in accordance with Section IX of this Decree ("Notices").

20 7. In the event that the Defendant fails to make any of the payments referred to in
21 Paragraph 6 on time, compound interest shall be assessed on such unpaid payment(s) at the
22 annual rate established pursuant to 28 U.S.C. § 1961 for each day that the payment is late.

23 8. In the event that Defendant fails to make the payments referred to in Paragraph 6
24 on time, and in addition to any interest accrued thereon, Defendants shall pay a stipulated
25 penalty of \$1,000 per day of non-payment.

26 9. Any stipulated penalty owing to the United States shall be paid by EFT in
27 accordance with instructions to be provided by the Financial Litigation Unit of the U.S.
28 Attorney's Office for the District of Hawaii, or by certified or cashier's check in the amount due,

1 payable to the "U.S. Department of Justice," referencing DOJ No. 90-5-1-1-09389, and delivered
2 to the office of the United States Attorney, Financial Litigation Unit, District of Hawaii, PJKK
3 Federal Building, 300 Ala Moana Blvd., #6-100, Honolulu, HI 96850, Phone: (808) 541-2850.
4 Payment of stipulated penalties shall be accompanied by transmittal correspondence stating that
5 any such payment is for late payment of amount(s) due under this Decree and shall reference
6 DOJ No. 90-5-1-1-09389 and the civil action name and number.

7 10. Defendant shall not deduct any stipulated penalty paid under this Section in
8 calculating its federal income taxes.

9 **VII. EFFECT OF SETTLEMENT**

10 11. In consideration of the payments that will be made by Defendant pursuant to this
11 Consent Decree, and effective solely upon Defendant's performance of its payment obligations
12 as set forth in Section VI of this Decree, Plaintiffs covenant not to sue and agree not to assert any
13 civil claims or causes of action against the Defendant pertaining to the Incident for (a) Damages
14 or Response Costs under OPA, CERCLA, or state law, and (b) civil penalties under Section
15 311(b)(7) of the CWA, 33 U.S.C. § 1321(b)(7). Plaintiffs reserve, and this Consent Decree is
16 without prejudice to, all rights against the Defendant with respect to all matters not expressly
17 included within this Paragraph.

18 12. Notwithstanding any other provision of this Consent Decree, Plaintiffs reserve the
19 right to institute proceedings against Defendant in this action or in a new action seeking recovery
20 of Response Costs, Damages, or injunctive relief based on: (I) conditions caused by the
21 Incident, unknown to Plaintiff as of the date of lodging of this Consent Decree; or (ii)
22 information received by Plaintiff after the date of lodging of this Consent Decree, and such
23 conditions or information indicate that the Incident has resulted in injury to, destruction of, or
24 loss of Natural Resources of a type or future persistence that was unknown to Plaintiffs as of the
25 date of lodging of this Consent Decree, or that these previously unknown conditions or new
26 information indicate that the Response Actions taken to date are not protective of human health
27 or the environment.

28

1 To the State:

2 Kathleen Ho
3 Deputy Attorney General
4 Department of the Attorney General
5 State of Hawaii
6 465 S. King Street, Room 200
7 Honolulu, Hawaii 96813
8 Telephone: (808) 587-3050
9 Kathleen.S.Ho@hawaii.gov

6 To Defendants:

7 Michael A. Barcott
8 Holmes Weddle & Barcott
9 Wells Fargo Center
10 999 Third Avenue, Ste. 2600
11 Seattle, Washington 98104
12 Telephone: (206) 292-8008
13 Fax: (206) 340-0289
14 Mbarcott@hwb-law.com

12 Albert E. Peacock III
13 Keesal, Young & Logan
14 400 OceanGate
15 P.O. Box 1730
16 Long Beach, CA 90801-1730
17 Telephone: (562) 436-2000
18 Fax: (562) 436-7416
19 al.peacock@kyl.com.

16 **X. RETENTION OF JURISDICTION**

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

19 **XI. MODIFICATION**

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

23 **XII. PUBLIC PARTICIPATION**

24 21. This Decree shall be lodged with this Court for a period of not less than thirty
25 (30) days to allow the opportunity for public notice and comment. The United States reserves
26 the right to withdraw from or withhold their consent to this Decree if the comments from the
27 public regarding the Decree disclose facts or considerations indicating that the Decree is
28 inappropriate, improper, or inadequate.

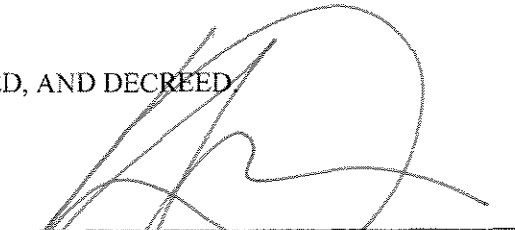
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XV. FINAL JUDGMENT

28. Upon approval and Entry of this Decree by the Court, this 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.

IT IS SO ORDERED, ADJUDGED, AND DECREED

Dated: FEB 17 2009



DAVID ALAN EZRA
UNITED STATES DISTRICT JUDGE

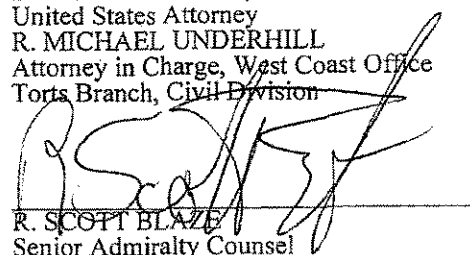
1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of
2 America v. F/V North Wind, Inc.:

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FOR THE UNITED STATES OF AMERICA:

GREGORY G. KATSAS
Acting Assistant Attorney General
EDWARD H. KUBO, JR.
United States Attorney
R. MICHAEL UNDERHILL
Attorney in Charge, West Coast Office
Torts Branch, Civil Division

Date: 11/13/08




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scott.blaze@usdoj.gov

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of
2 America v. F/V North Wind, Inc.:

3
4 FOR THE UNITED STATES OF AMERICA:

5
6
7 Date: 8 November 2008



8 RONALD J. TENPAS
9 Assistant Attorney General
10 Environment and Natural Resources Division
11 U.S. Department of Justice
12 Washington, D.C.

13
14 Date: Oct 17 2008

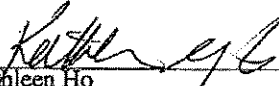


15 STEVE O'ROURKE
16 Environmental Enforcement Section
17 Environment and Natural Resources Division
18 U.S. Department of Justice
19 P.O. Box 7611, Washington, D.C. 20044
20 Telephone: (202) 514-2779
21 steve.o'rourke@usdoj.gov
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of
2 America v. F/V North Wind, Inc.:

3 FOR THE STATE OF HAWAII:

4
5 Date: 10/27/08

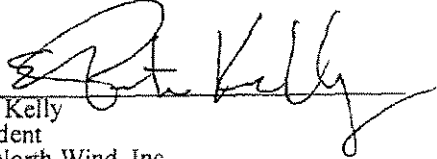
6 
7 Kathleen Ho
8 Deputy Attorney General
9 Department of the Attorney General
10 State of Hawaii
11 465 S. King Street, Room 200
12 Honolulu, Hawaii 96813
13 (808) 587-3050
14 Kathleen.S.Ho@hawaii.gov

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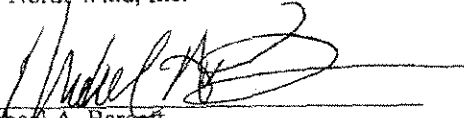
1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of
2 America v. F/V North Wind, Inc.:

3 FOR THE DEFENDANT F/V NORTH WIND, Inc.:


4
5 Date: Sept 30, 2008

6 
7 Peter Kelly
8 President
9 F/V North Wind, Inc.

10 Date: 9/30/08

11 
12 Michael A. Barcott
13 Holmes Weddle & Barcott
14 Wells Fargo Center
15 999 Third Avenue, Ste. 2600
16 Seattle, Washington 98104
17 Telephone: 206-292-8008
18 Fax: 206-340-0289
19 Mbarcott@hwb-law.com

20 Date: 10/10/08

21 
22 Albert E. Peacock III
23 Keesal, Young & Logan
24 400 Oceangate
25 P.O. Box 1730
26 Long Beach, CA 90801-1730
27 Telephone: 562-436-2000
28 Fax: 562-436-7416
al.peacock@kyl.com.