

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

**UTILITY BOARD OF THE CITY OF
KEY WEST, FLORIDA,**

Defendant.

CIVIL NO. 4:22-cv-10070-JLK

CONSENT DECREE

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I. BACKGROUND

A. Contemporaneously with the lodging of this Consent Decree, the United States of America (“United States” or “Plaintiff”), on behalf of the National Oceanic and Atmospheric Administration (“NOAA”) of the United States Department of Commerce, has filed a Complaint in this matter against Utility Board of the City of Key West, Florida d/b/a Keys Energy Services (“Keys Energy Services”) pursuant to Section 312 of the National Marine Sanctuaries Act, 16 U.S.C. § 1443.

B. The United States’ Complaint alleges that Keys is liable for Damages resulting from any destruction, loss or injury to Sanctuary Resources due to the utility work at Keys Energy Services Line 4 between October 14 and December 20, 2017 near Rockland Key, Florida (the “Incident”). The site of the Incident is within the boundaries of the Florida Keys National Marine Sanctuary. Michels Corporation and Michels Power, Inc. were contractors hired by Keys to perform the utility work.

C. The Secretary of Commerce, acting through NOAA, is the Trustee for Sanctuary Resources for the United States. 16 U.S.C. § 1443(c).

E. In 2018, Keys Energy Services submitted a post-construction benthic survey documenting impacts to the seafloor and habitat resulting from the relevant utility work. Subsequently, NOAA and Keys jointly visited the site on two occasions: first to visually confirm the documented impacts and second for NOAA to measure the impacts to Sanctuary Resources as a result of the Incident. NOAA assessed impacts to habitat dominated by *Thalassia testudinum* (Turtle Grass) seagrasses. During the 2018 joint assessment, NOAA also documented shoal grass, various fish species, macroalgae, sponges, and other invertebrates in

this seagrass community. Aerial imagery from 2019 and 2020 as well as a benthic survey in 2021 provide additional data regarding the status of seagrass at the site.

F. Based on this existing data and considering the availability of funding for monitoring and restoration provided through this settlement, NOAA believes that Settlor's obligations under this Consent Decree constitute a reasonable compromise for the disposition of the claims of the United States in this matter.

G. By entry of this Consent Decree, Settlor do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the Complaint. The terms of this Consent Decree shall not be used to demonstrate any violation of the National Marine Sanctuaries Act ("NMSA," as defined herein) or any other Federal or other regulation by Settlor.

H. The Parties to this Consent Decree recognize, and the Court by entering this Consent Decree finds, that this Consent Decree: (i) has been negotiated by the Parties at arms' length and in good faith; (ii) will avoid prolonged and complicated litigation among the Parties; and (iii) is fair, reasonable, and in the public interest consistent with the statutory purposes of the National Marine Sanctuaries Act.

NOW, THEREFORE, with the consent of the Parties to the Decree, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action pursuant to 16 U.S.C. § 1443(c) and also pursuant to 28 U.S.C. §§ 1331, 1345. The Court also has personal jurisdiction over the Settlor. Venue is proper in the U.S. District Court pursuant to 28 U.S.C. § 1391(b) and 16 U.S.C. § 1443(c). Solely for the purposes of this Consent Decree and the

underlying Complaint, Settlers waive all objections and defenses that they may have to jurisdiction of this Court or to venue in this District. Settlers shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon the Settlers and their successors and assigns. Any change in ownership or corporate status of a Settlor including, but not limited to, any transfer of assets or real or personal property, shall in no way alter responsibilities of such Settlor under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in NMSA, 16 U.S.C. § 1432, or in regulations promulgated under NMSA shall have the meanings assigned to them in NMSA or in such regulations. Whenever the terms set forth below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

- a. "Complaint" means the Complaint filed by the United States in this action.
- b. "Consent Decree" or "Decree" means this Consent Decree and all appendices attached hereto. All appendices are incorporated herein by reference.
- c. "Damages" means that definition as provided in 16 U.S.C. § 1432(6).
- d. "Day" means a calendar day unless expressly stated to be a Working Day.
- e. "Effective Date" means the effective date of this Consent Decree as provided in Section XII of this Consent Decree.

- f. "FKNMS" means the Florida Keys National Marine Sanctuary, with boundaries defined by regulation at 15 C.F.R. § 922.161.
- g. "Incident" means the utility work relating to Keys Energy Services Line 4 conducted near Rockland Key, Florida between October 14 and December 20, 2017.
- h. "Interest" means interest calculated in the manner specified under Section 2705 of title 33.
- i. "NMSA" means the National Marine Sanctuaries Act, 16 U.S.C. § 1431, *et seq.*
- j. "NOAA" means the National Oceanic and Atmospheric Administration of the United States Department of Commerce.
- k. "Paragraph" means a portion of this Decree identified by an Arabic numeral or an upper-case letter.
- l. "Parties" means the United States and Settlers, and "Party" means any one of the named "Parties."
- m. "Plaintiff" means the United States.
- n. "Sanctuary Resource" shall have the meaning provided in 16 U.S.C. § 1432(8).
- o. "Section" means a portion of this Decree identified by a Roman numeral.
- p. "Settlers" means Keys Energy Services, Michels Corporation and Michels Power, Inc.
- q. "Subparagraph" means a portion of this Consent Decree identified by a lower case letter or an Arabic number in parenthesis.

r. “Subsection” means a portion of this Consent Decree identified by a Roman numeral and an upper-case letter.

s. “United States” means the United States of America including all of its departments, agencies, and instrumentalities.

t. “Working Day” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree where the last day would fall on a Saturday, Sunday, or federal or state holiday, the period shall run until the close of business of the next Working Day.

V. PAYMENT BY SETTLORS

4. Within 30 days after the Effective Date, the Settlers shall pay a total of \$1,800,000 to the Plaintiff, together with Interest accrued from the date this Consent Decree is Lodged with the Court under Section XI.

5. **Payment Instructions.** Payment shall be made by FedWire EFT to the U.S. Department of Justice in accordance with current EFT procedures, referencing DOJ Case Number “90-5-1-1-12301,” and the Office of National Marine Sanctuaries case name, “ONMS: Keys Energy.” Payment shall be made in accordance with instructions provided to Settlers by the Financial Litigation Unit of the United States Attorney’s Office for the Southern District of Florida following lodging of this Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

6. **Notice of Payment.** Upon making any payment under this Section, Settlers shall send written notice that payment has been made to the United States, with a duplicate notice to NOAA, in accordance with Section IX (“Notice”). Upon receipt of payment under this Section,

Plaintiff shall provide prompt written acknowledgment to Settlers that payment has been received.

7. Non-compliance with Payment Obligations.

a. Interest. In the event any payment required in Paragraph 4 is not made when due, Settlers shall pay Interest on the unpaid balance commencing on the payment due date and accruing through the date of full payment. Payment of Interest under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Settlers' failure to make timely payments under this Section, including, but not limited to, payment of stipulated penalties.

b. Stipulated Penalties. In addition to the Interest required to be paid under the preceding Subparagraph, if any payment required by Paragraph 4 is not made when due, Settlers shall also pay stipulated penalties of \$5,000 per day from the date payment is due through the date of full payment.

c. Payment of Interest and Stipulated Penalties. Any Interest payments under Subparagraph 7.a shall be paid in the same manner as the overdue principle amount, and shall be directed to the same fund or account as the overdue principle amount. Any Stipulated Penalty payments under Subparagraph 7.b shall be paid to the United States in accordance with payment instructions provided by the Financial Litigation Unit of the United States Attorney's Office for the Southern District of Florida and shall be deposited in the United States Treasury.

8. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions

available by virtue of a violation of this Consent Decree by Settlers. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties owed pursuant to this Consent Decree.

VI. COVENANT NOT TO SUE BY PLAINTIFF

9. Except as specifically provided by Paragraph 10 (General Reservations) and Paragraph 11 (Special Reservations Regarding Damages), the United States covenants not to sue or to take administrative action against Settlers for Damages resulting from the Incident, pursuant to the NMSA. This covenant not to sue shall take effect upon the complete payment of all funds as required by Section V of this Consent Decree. This Covenant Not to Sue is conditioned upon the satisfactory performance by Settlers of all their obligations under this Consent Decree. This Covenant Not to Sue extends only to Settlers and does not extend to any other person.

VII. RESERVATION OF RIGHTS BY PLAINTIFF

10. General Reservations. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settlers with respect to all matters not expressly included within Section VI (Covenant Not to Sue by Plaintiff). Notwithstanding any other provisions of this Consent Decree, the United States reserves all rights against Settlers with respect to:

- a. liability for failure by Settlers to meet a requirement of this Consent Decree;
- b. liability for any injury to, destruction of, loss of, or loss of use of Sanctuary Resources resulting from any event or releases or threatened releases of

hazardous substances or oil unrelated to the Incident; and

c. criminal liability.

Nothing in this Paragraph shall be interpreted as an admission of liability by Settlers as to any matter referenced herein, nor shall this Paragraph obviate the duty of Plaintiff to prove liability in order to obtain judgment against Settlers.

11. Special Reservations Regarding Damages. Notwithstanding any other provision of this Consent Decree, the United States reserves the right to institute proceedings against the Settlers in this action or in a new action for recovery of Damages, including reasonable response and/or assessment costs, based on: (i) conditions, factors, or information with respect to the Incident previously unknown to the Plaintiff that contribute to the injury, destruction, or loss of Sanctuary Resources; or (ii) information received after the date of lodging which indicate that the Incident has resulted in impacts to Sanctuary Resources of a type unknown, or of a magnitude or duration greater than was known, by the Plaintiff as of the date of filing the Complaint.

VIII. COVENANT NOT TO SUE BY SETTLORS

12. Settlers hereby covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Damages under the NMSA resulting from the Incident, and this Consent Decree, pursuant to any federal, state, or common law, including but not limited to any claims against Plaintiff for costs, attorneys' fees, other fees, or expenses incurred in connection with this Incident, but reserve all other civil or administrative claims.

13. In any subsequent administrative or judicial proceeding initiated by the Plaintiff for injunctive relief, recovery of Response Costs or Damages, or other relief relating to the

Incident, Settlers shall not assert, and may not maintain, any defense or claim based on the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or any other defenses based upon the contention that the claims raised by the Plaintiff in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Section VI (Covenant Not to Sue by Plaintiff).

IX. NOTICE

14. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be sent electronically or by mailing, unless otherwise requested. It shall be directed to the individuals at the addresses set forth below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the Plaintiff and Settlers, respectively.

As to the United States:
Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-1-1-12301

As to NOAA:
NOAA Office of Response and Restoration
ATTN: Vernee Holley, DARRF Manager
1305 East-West Highway
Silver Spring, MD 20910

Britta Hinrichsen
NOAA Office of General Counsel
55 Great Republic Drive
Gloucester, MA 01930
Britta.hinrichsen@noaa.gov

As to Settlers:
Nick Batty, Esq.
Director of Legal & Regulatory Services
1001 James Street
Key West, FL 33040
Nick.batty@keysenergy.com

X. MODIFICATION

15. Any material modification of this Consent Decree shall be made in writing, signed by the Parties, and shall be effective upon approval by the Court. Any non-material modification of this Consent Decree shall be in writing, signed by the Parties, and shall be effective when filed with the Court.

16. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon the entry of the Consent Decree in its entirety without modification, addition, or deletion except as agreed to by the Parties.

XI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

17. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States reserves the right to withdraw or withhold their consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate.

18. The Settlers waive all objection to, and consent to, the entry of this Consent Decree without further notice, and agree not to withdraw or oppose entry of the Consent Decree or to challenge any provision of the Consent Decree.

19. If for any reason the Court declines to approve this Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, this Decree may be voided at the sole discretion of any Party, and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XII. EFFECTIVE DATE AND RETENTION OF JURISDICTION

20. This Consent Decree will be effective upon the approval and entry of the Decree by the Court.

21. This Court shall retain jurisdiction over both the subject matter of this Consent Decree and the Parties for the duration of the performance of this Consent Decree for the purpose of modifying or enforcing the terms and conditions of this Consent Decree, and to resolve disputes arising hereunder as may be necessary or appropriate for the construction or execution of this Consent Decree.

XIII. SIGNATORIES/SERVICE

22. Each undersigned representative of the Settlers and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document. This Consent Decree may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, taken together, shall constitute one and the same instrument.

23. The Settlers shall identify, on the attached signature page, the name, address, and telephone number of an agent who is authorized to accept service by mail on behalf of that Party with respect to the service of the Complaint, Consent Decree, and any related filings with the Court. Settlers hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to service of a summons. The Parties agree that Settlers do not need to file an answer to the Complaint in this action unless or until twenty-one (21) days after: (i) the United States has notified the Settlers in writing that it no longer supports entry of this Consent Decree; or (ii) the Court expressly declines to enter this Consent Decree.

XIV. FINAL JUDGMENT

24. This Consent Decree and its appendices constitute the final, complete, and exclusive understanding among the Parties with respect to the terms thereof. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

25. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States and the Settlers under Fed. R. Civ. P. 54 and 58.

SO ORDERED this 7th day of October, 2022.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Utility Board of the City of Key West, Florida

FOR THE UNITED STATES OF AMERICA:

TODD KIM
Assistant Attorney General

/s/ Steven O'Rourke
Steven O'Rourke
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
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NOAA

OF COUNSEL:
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Attorney Advisor
Natural Resources Section
NOAA Office of General Counsel
55 Great Republic Drive
Gloucester, MA 01930


THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Utility Board of the City of Key West, Florida

FOR UTILITY BOARD OF THE CITY OF KEY WEST, FLORIDA (D/B/A KEYS ENERGY SERVICES):

Name: Mona C. Clark, Utility Board Chair

Date: August 10, 2022

Signature:



Agent Authorized to Accept Service on Behalf of the Above-Signed Party:


Name: Nick Batty

Title: Director of Legal + Regulatory Services

Address and/or E-mail: nick.batty@keysenergy.com

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Utility Board of the City of Key West, Florida

FOR MICHELS CORPORATION:

Name: 
Date: August 11, 2022
Signature: A. DAVID STEGEMAN

Agent Authorized to Accept Service on Behalf of the Above-Signed Party:

Name: A. David Stegeman
Title: Chief Legal Officer & Senior Vice President
Address and/or E-mail: 817 W. Main St., PO Box 128
Brownsville, WI 53006

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Utility Board of the City of Key West, Florida

FOR MICHELS POWER, INC.:

Name: *Mark Harksha*

Date: *8.12.22*

Signature: *Mark Harksha*

Agent Authorized to Accept Service on Behalf of the Above-Signed Party:

Name: *Donald F. Kinsling, Jr.*

Title: *Attorney for Michels Power, Inc.*

Address and/or E-mail:

*817 W. Main St., PO Box 128
Brownsville, WI 53006*