

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

NOV 18 1999

Michael N. Milby, Clerk

UNITED STATES OF AMERICA
and the STATE OF TEXAS,

Plaintiffs,

v.

BULK TRANSPORT LTD. OF BERMUDA,
and SPT MARINE, INC.,
in personam,
and

T/T BERGE BANKER and
M/T SKAUBAY, their engines, tackle,
apparel, etc. *in rem*,
Defendants.

H-99-3917

CONSENT DECREE

This Consent Decree ("Decree") is made and entered into by and between the United States, on behalf of the Department of the Interior ("DOI" or "Federal Trustee") (the National Park Service ("NPS") and the United States Fish and Wildlife Service ("FWS")); and the State of Texas on behalf of the Texas General Land Office ("TGLO"), the Texas Natural Resource Conservation Commission ("TNRCC"), and the Texas Parks and Wildlife Department ("TPWD") (collectively, "State Trustees"); and T/T Berge Banker ("Berge Banker"), Bulk Transport Ltd. of Bermuda, M/T Skaubay ("Skaubay"), and SPT Marine, Inc. (collectively, "Settling Defendants").

THEREFORE, it is ORDERED, ADJUDGED AND DECREED as follows:

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JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter and over the Parties to this action pursuant to 28 U.S.C. §§ 1331 and 1345, Section 1017(b) of the Oil Pollution Act ("OPA") at 33 U.S.C. § 2717(b), and Park System Resource Protection Act ("PSRPA"), 16 U.S.C. § 1911. Venue is proper in this Court pursuant to 28 U.S.C. § 1391. Plaintiffs' Complaint in this action states claims upon which relief may be granted. Solely for the purpose of this Decree, the parties waive all objections and defenses that they may have to the jurisdiction of the Court or to venue in this district and to service of process. The Parties agree to be bound by the terms of this Decree and not to contest its validity in any subsequent proceeding arising from it.

DEFINITIONS

2. Unless otherwise expressly provided herein, terms used in this Decree that are defined in OPA or in regulations promulgated under OPA shall have the meaning assigned to them in OPA or in such regulations. Whenever terms listed below are used in this Decree, the following definitions shall apply:

"Oil Spill" refers to the approximately 845 barrels of Bunker C fuel oil released into the environment as a result of a collision between the Berge Banker and the Skaubay on February 5, 1995 in the Galveston Lightering area in the Gulf of Mexico.

"Resources" refers to "natural resources" as defined in Section 1001(20) of OPA, 33 U.S.C. § 2701(20), and "National Park System resources" as defined in PSRPA, 16 U.S.C. § 1911.

"Trustees" refers to the designated Federal and State officials who may act on behalf of the public as trustees for the resources impacted by the Berge Banker Oil Spill. The United States Department of the Interior, represented by the National Park Service and the United States Fish and Wildlife Service, is the Federal Trustee for natural resources impacted by the Oil Spill. The Co-Trustees for natural resources impacted by the Berge Banker Oil Spill for the State of Texas are the Texas General Land Office, the Texas Natural Resource Conservation Commission, and the Texas Parks and Wildlife Department.

"Parties" shall mean the United States, Texas, T/T Berge Banker, Bulk Transport Ltd. of Bermuda, M/T Skaubay, and SPT Marine, Inc.

"Settling Defendants" refers to the vessel T/T Berge Banker, and its owner/operator Bulk Transport Ltd. of Bermuda; and the vessel M/T Skaubay, and its owner/operator SPT Marine, Inc.

"Texas State Beaches" refers to Mustang Island and Matagorda Island State Parks.

PARTIES BOUND

3. This Decree shall apply to and be binding upon and inure to the benefit of the United States, Texas, and the Defendants and their owners, operators, officers, directors, successors, underwriters, and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Defendants under this Decree.

BACKGROUND

4. On February 5, 1995, two tankers, the Berge Banker and the Skaubay, collided in the Galveston Lightering area in the Gulf of Mexico while preparing to transfer crude oil, causing the Berge Banker to discharge an estimated 845 barrels of Bunker C fuel oil.

5. A combination of wind, ocean and tidal currents began moving the oil across the Gulf of Mexico, and an offshore cleanup operation was undertaken. The oil was subsequently deposited as tar balls and tar mats on the beaches of Matagorda Peninsula, Matagorda Island, Mustang Island, and Padre Island. These publicly owned beaches comprise portions of Matagorda Island National Wildlife Refuge, Mustang Island State Park, Matagorda Island State Park, and Padre Island National Seashore.

6. The discharge of fuel oil is covered by the provisions of OPA, 33 U.S.C. §§ 2701 - 2761, and the Texas Oil Spill Prevention Response Act ("OSPRA"), Tex. Nat. Res. Code § 40.0001 *et seq.* (Vernon 1978 and Supp. 1997).

7. DOI, TGLO, TNRCC, and TPWD are designated as Trustees for the natural resources affected by the discharge of fuel oil from the Berge Banker pursuant to authority granted by OPA, 33 U.S.C. § 2706.

RESOURCE DAMAGES

8. This Consent Decree provides the terms upon which the Parties agree to settle all claims of the Federal and State Trustees under OPA, OSPRA, and PSRPA, for resource damages against the Settling Defendants as a consequence of the injuries to, destruction of, or loss of resources and the services they

provideresulting from the Oil Spill. It is understood by all parties that the Settling Defendants, while they have agreed to the terms and amounts of this settlement, have not by implication endorsed any particular methodology for the measurement of natural resource damages and lost recreational use.

9. The Oil Spill occurred in a biologically diverse barrier island system in the Gulf of Mexico. Resources found in this system include saltwater fish; crustaceans, including crabs and shrimp; mammals; amphibians; reptiles; migratory birds, including gulls, herons, egrets, and terns and other waterfowl and shorebirds; lands, including beaches, dunes, grasslands, and intertidal flats; wild shore plants, including Sea Oats; and coastal waters and air. Services provided by these resources to the public include habitat for the variety of plant and animal species in the area, sport fisheries, and recreational uses (including fishing, swimming, hiking, camping, and nature observation).

COMMITMENTS BY THE SETTLING DEFENDANTS

A. Primary Restoration.

10. The Settling Defendants shall finance, design, plan, implement, and perform a project in accordance with National Park Service specifications to replace at least 15,480 cubic yards of fine, white Galveston-Mustang Complex Sand or an equivalent sand of the same grain size, quality, color and consistency at Padre Island National Seashore, as directed by the Superintendent of Padre Island National Seashore. This will restore the quantity of sand removed from the National Seashore to the sensitive barrier island littoral system during emergency response actions in February and March, 1995. This

project and the timing, method and location of sand placement shall be subject to the approval of the Superintendent of Padre Island National Seashore, in accordance with any permits issued.

11. The Settling Defendants shall finance, design, plan, implement, and perform a project, subject to the approval of the Superintendent of Padre Island National Seashore, and in accordance with a permit, to replace about 2,136 square meters of dune along an existing road as directed by the Superintendent of Padre Island National Seashore. This project shall be accomplished either by direct remounding, or by installation of 854.3 linear feet of sand fencing to promote natural accretion of sand. If direct remounding is chosen, the Settling Defendants agree to pay \$40,044 to compensate the National Seashore for the costs associated with that project. If the sand fencing project is chosen, the Settling Defendants agree to pay \$40,044 to the National Seashore less any additional cost of the sand fencing project over and above the estimated cost of the remounding project.

12. a. Should the Trustees and the Settling Defendants agree that implementation of any component of the projects, described in Paragraphs 10 and 11 above, is not feasible, the Trustees shall identify to the Settling Defendants substitute projects at comparable cost which would provide substantially equivalent services to natural resources as those that would have been provided by the project component deemed infeasible. Settling defendants shall then implement the substitute projects, subject to subparagraph 12 b.

b. If Settling Defendants dispute the substitute projects identified in subparagraph 12 a., they shall notify the Trustees in writing and identify why the project is not of comparable value and/or

why it does not provide substantially equivalent natural resource damage services. After receipt of such notification, the parties shall engage in informal negotiations for not more than 20 days. If informal negotiations fail, the parties shall either:

(i) choose a mutually acceptable neutral to mediate the dispute, which mediation shall not extend beyond 30 days (unless extended by mutual agreement of the parties); or

(ii) petition the Court to resolve the dispute, i.e., to decide whether the projects are of comparable value and/or whether they provide substantially equivalent natural resource damage services.

If the parties choose mediation under (i) above, and mediation is not successful in resolving the dispute, the parties shall petition the Court to resolve the dispute as set forth in (ii) above.

13. The Settling Defendants shall pay the Trustees \$25,000 for any excess wear that may have occurred at a paved parking lot at Padre Island National Seashore that was used by heavy equipment during the cleanup of the Oil Spill.

14. The Settling Defendants shall pay the Trustees \$122,082 to fund projects to restore, rehabilitate, replace or acquire the equivalent of injured migratory birds and their habitats in the vicinity of the impacted coastal areas.

B. Compensatory Restoration

15. The Settling Defendants agree to pay the Trustees \$14,292 for restoration projects to compensate the public for the lost ecological services claimed for the dunes on Padre Island National Seashore.

16. The Settling Defendants agree to pay the Trustees \$115,000 for dune reconstruction on Texas State Beaches.

17. The Settling Defendants agree to pay the Trustees \$205,766 for compensatory restoration projects for claimed lost recreational use services at Padre Island National Seashore.

18. The Settling Defendants agree to pay the Trustees \$890,893 for compensatory restoration projects for claimed lost recreational use services at the Texas State Beaches.

19. The Settling Defendants agree to pay the Trustees \$155,000 to conduct Restoration Planning, to identify appropriate projects to compensate the public for the claimed resource injuries and service losses (including impacts on beach recreation) caused by the Oil Spill.

20. The total monetary amount of natural resource damages outlined in Paragraphs 13-19 above, totals \$1,568,077 (in addition to the work and payments required in Paragraphs 10-12 above). The Trustees have determined to use these funds jointly to restore, replace, or acquire the equivalent of resources and/or their services claimed injured by the Oil Spill.

PAYMENT INSTRUCTIONS

A. **Reimbursement of Assessment Costs**

21. Within thirty (30) days of entry of this Decree, Settling Defendants shall make separate payments for the following amounts as reimbursement for costs incurred by the Trustees in assessing the damages to natural resources resulting from the Oil Spill:

\$69,212 to the United States

\$32,924 to the Texas General Land Office

\$17,345 to the Texas Natural Resource Conservation Commission

\$12,611 to the Texas Parks and Wildlife Department

22. Payments shall be deemed made upon receipt of check or wire transfer by the specified recipient.

Payments shall be made as provided below and sent to the following addresses:

United States: Payment totaling SIXTY-NINE THOUSAND, TWO HUNDRED, TWELVE DOLLARS AND NO CENTS (\$69,212.00) shall be sent to the Department of Justice in accordance with current electronic funds transfer procedures to be provided by the United States at least five (5) business days before such payment is due.

State of Texas: Payment totaling SIXTY-TWO THOUSAND, EIGHT HUNDRED, EIGHTY DOLLARS AND NO CENTS (\$62,880.00) shall be made by cashiers check made payable to the State of Texas and delivered to the Chief, Natural Resources Division, Office of the Attorney General of Texas, P.O. Box 12548, Capitol Station, Austin, Texas, 78711-2548. Said cashiers check shall bear the identifying number(s) AG 99-1096777, AG 99-1119298, and AG 98-1080625. A copy of this check shall also be delivered to each of the following:

Andrew Neblett
Deputy Commissioner
Resource Management Division
Texas General Land Office
1700 North Congress Avenue
Austin, TX 78701-1495

Kay Hiscoe
Cashier & Revenue Control
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, TX 78744

Richard Seiler, MC142
TNRCC
P.O. Box 13087
Austin, TX 78701-3087

B. Joint Monetary Damages

23. Within 30 days of entry of this Decree, Settling Defendants shall transfer ONE-MILLION, FIVE HUNDRED, SIXTY EIGHT THOUSAND, SEVENTY SEVEN DOLLARS AND NO CENTS (\$1,568,077.00) into the Court Registry Account established for this matter. All funds and all interest accrued in the Court Registry Account shall be held in the name of the "Clerk, United States District Court" for the benefit of the Trustees.

24. This payment is made without apportionment or division among the Trustees. The Trustees have determined to use these funds jointly to restore, replace, or acquire the equivalent of resources and/or their services claimed injured by the oil spill for administrative costs associated with identifying, implementing, and monitoring appropriate projects to compensate the public for the resource injuries claimed to be caused by the Oil Spill.

25. A Trustee Council has been established in accordance with a Memorandum of Agreement among the Trustees. The amount deposited into the Court Registry Account, and any interest thereon, will be available for use by the Trustees in accordance with Appendix A ("Use of Funds").

DEFAULT

26. If the Settling Defendants fail to perform any obligation established by this Decree, the Settling Defendants shall be deemed to be in default under this Decree. If the Settling Defendants fail to pay settlement moneys as outlined in Paragraph 23, the Settling Defendants shall be liable for interest on the unpaid balance at the rate specified in Section 1005 of OPA, 33 U.S.C. § 2705. The interest shall be calculated from the first day following the date payment is due until the entire outstanding balance has been received. The Trustees may take any and all legal or administrative enforcement actions appropriate to enforce the payment terms of this Decree. In the event the Trustees take legal or administrative enforcement action, the Settling Defendants must pay all costs incurred by the Trustees related to such action, including, but not limited to, enforcement and collection costs, attorney fees and Court costs, and interest accruing on any unpaid balance.

INDEMNIFICATION

27. The Settling Defendants shall indemnify, save and hold harmless the United States and the State of Texas from any and all claims, causes of action, or liabilities arising from the negligent acts or omissions or willful misconduct of the Settling Defendants in complying with the terms of this Decree.

COVENANTS NOT TO SUE

28. Except as specifically provided in this Decree, the United States hereby covenants not to sue or take any other civil or administrative action against the Settling Defendants for any civil cause of action under OPA and PRSPA for damages for injury to, destruction of, loss of or loss of use of natural resources and park system resources caused by the Oil Spill which is the subject of this Decree.

29. Except as specifically provided in this Decree, the State of Texas hereby covenants not to sue or take any other civil or administrative action against the Settling Defendants for any civil cause of action under OPA, OSPRA, or any other applicable state law for damages for injury to, destruction of, loss of or loss of use of natural resources caused by the Oil Spill which is the subject of this Decree.

RESERVATION OF RIGHTS

30. Notwithstanding any other provision of this Decree, the United States and the State of Texas reserve the right to institute proceedings against the Settling Defendants in this action or in a new action seeking recovery of resource damages resulting from the Oil Spill, based on (1) conditions unknown to the United States or the State of Texas on or before the date of execution of this Decree that contribute to injury to, destruction of, or loss of resources ("Unknown Conditions"); or (2) new information received by the United States or the State of Texas after the date of execution of this Decree which indicates there is injury to, destruction of, or loss of resources, of a type unknown to the United States or the State of Texas as of the date of execution of this Decree ("New Information").

31. Notwithstanding any other provision of this Decree, the covenants not to sue in Paragraphs 28-29 shall apply only to matters addressed in this Decree and specifically shall not apply to the following claims:

- A. Claims based on a failure by the Settling Defendants to satisfy the requirements of this Decree.
- B. Claims for criminal liability; and,
- C. Claims for resource damages from the past, present, or future disposal, release or threat of release of oil that does not arise from the Oil Spill that occurred in the Galveston Lightering Area on or about February 5, 1995.

COMPLIANCE WITH OTHER LAWS

32. This Decree shall not be construed in any way to relieve the Settling Defendants or any other person or entity from the obligation to comply with any federal, state, or local law.

33. The Trustees agree to use their best efforts to expedite the processing of any necessary permits for the work to be undertaken by the Settling Defendants pursuant to this Consent Decree.

RETENTION OF JURISDICTION

34. The Court shall retain jurisdiction of this matter for the purpose of entering such further order, direction, or relief as may be necessary or appropriate for the construction, implementation, or enforcement of this Decree.

35. The terms of this Decree may be modified only by a subsequent written agreement signed by all of the Parties who are signatories hereto, and approved by the Court as a modification of this Decree.

FORCE MAJEURE

36. Upon the fulfillment of their obligations under the Consent Decree, Settling Defendants shall not have any obligation with regard to natural resource damages caused by a subsequent natural phenomenon, Act of God, force majeure, civil unrest, strike or armed conflict, or other event solely outside of the control of the Settling Defendants, which may occur and which may render the restoration activities done, or to be done, ineffective, impractical, infeasible or impossible.

PUBLIC COMMENT

37. The Parties agree that this Decree will be subject to a 30-day public comment period. The United States and the State of Texas, on behalf of the Natural Resource Trustees, reserve the right to withdraw their consent to this Decree if comments received disclose facts or considerations which show that the terms of this Decree are inappropriate, improper, inadequate, or fail to provide a substantially adequate restoration of the described resources. The Settling Defendants consent to the entry of this Decree by the Court without further notice.

38. By signature below, all Parties agree to this Consent Decree.

SO ORDERED THIS th 30 DAY OF December, 19 77.

M. L. Ham

United States District Judge

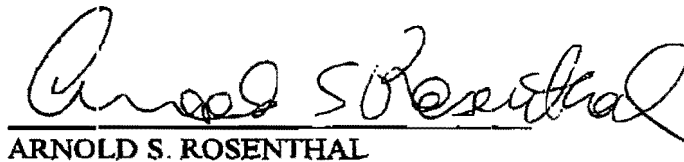
FOR THE UNITED STATES:

Date:

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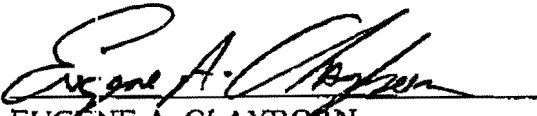
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DATE: November 5, 1999


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ON BEHALF OF THE TEXAS NATURAL RESOURCE
CONSERVATION COMMISSION, THE TEXAS GENERAL
LAND OFFICE AND THE TEXAS PARKS AND WILDLIFE
DEPARTMENT

FOR THE DEFENDANTS:

For Bulk Transport Ltd.:

DATE: 16 Sept 99

FRANK J. GONYNOR
FRANK J. GONYNOR, ESQ.
EASTHAM, WATSON, DALE & FORNEY, L.L.P.
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For SPT Marine, Inc.:

DATE: 16 Sept 99

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EASTHAM, WATSON, DALE & FORNEY, L.L.P.

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APPENDIX A

USE OF FUNDS

The \$1,568,077.00 in natural resource damages jointly recovered by the Trustees for the February 5, 1995 Skaubay oil discharge will be deposited into a Court Registry Account established by the Clerk of the United States District Court for the Southern District of Texas-- Houston Division-- on behalf of the Trustees. After this money is deposited into the Court Registry Account, DOI may transfer \$285,102.00, less any money credited to the Settling Parties from the \$40,044.00 for costs associated with dune repair set forth in Paragraph 11 of this Consent Decree. (This credit may not exceed \$40,044.00, and will only be used if the Settling Parties are required to undertake a project that is more expensive than actual physical remounding of injured sand dunes on Padre Island National Seashore.) This money will be used to fund projects to compensate for injuries at Padre Island National Seashore to the Department of the Interior Restoration fund (hereinafter the "Restoration Fund"). The Superintendent of Padre Island National Seashore will propose projects to be undertaken with these funds to compensate for injuries at Padre Island National Seashore. The Trustees will review these projects and incorporate them into their Restoration Plan if appropriate. Both the Court Registry Account and the Restoration Fund (hereinafter the "Trustee accounts") will serve as a repository for funds pending joint decisions regarding the use of these funds by the Trustees.

The recovered funds may be used only to plan and implement appropriate actions to restore, replace, rehabilitate and/or acquire the equivalent of natural resources or resource services injured, destroyed or lost as a result of the February 5, 1995 discharge of oil into the Gulf of Mexico. Such uses will include Trustee administrative costs or expenses in coordinating and effecting the development or implementation of the Restoration Plan. The Trustees intend that the total amount of expenditures for that purpose would not exceed \$155,000.00. Interest accrued on this amount may be used for Trustee administrative costs upon consensus of the Trustee Council. Trustee administrative costs or expenses include but are not limited to costs, both direct and indirect, associated with preparation or review of documents pertinent to the development or implementation of the Restoration Plan, administration, management or oversight of contracts or projects, and travel. The Trustees intend that at least \$122,082.00 would be used to fund projects to restore injured migratory birds and their habitats; at least \$115,000.00 would be used for dune reconstruction on Texas State Beaches; at least \$14,292.00 would be used to compensate for lost ecological services related to the dunes on Padre Island National Seashore; at least \$25,000.00 would be used to compensate for excess wear at the paved parking lots used by heavy response equipment at Padre Island National Seashore; at least \$40,044.00 would be used for costs associated with designing, planning, and monitoring the sand mounding project at Padre Island National Seashore; at least \$205,765.00 would be used for compensatory restoration projects for lost recreational use at Padre Island National Seashore; and at least \$890,893.00 would be used for compensatory restoration projects for lost recreational use on Texas State Beaches. Disbursement of all funds from the Trustee accounts will be by unanimous written agreement of all Trustee Council members.