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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

The UNITED STATES OF AMERICA and
The STATE OF TEXAS

Plaintiffs,

v.

BROWNING-FERRIS INDUSTRIES CHEMICAL
SERVICES, INC.; CHEVRON CHEMICAL COMPANY
LLC; CHEVRON ENVIRONMENTAL MANAGEMENT
COMPANY, as successor in interest to CHEVRON
CHEMICAL COMPANY, LLC; E.I. DUPONT DE
NEMOURS & COMPANY; ENTERGY GULF STATES,
INC.; PHILLIPS PETROLEUM COMPANY; SUN
COMPANY, INC.; TEXACO INC.; MICHELIN NORTH
AMERICA, INC., successor in interest to The Uniroyal
Goodrich Tire Company and Uniroyal Goodrich Tire
Company, Inc.; ATLANTIC RICHFIELD COMPANY;
ARCO ENVIRONMENTAL REMEDIATION, L. L. C.,
as successor to ATLANTIC RICHFIELD COMPANY;
ALLIED SIGNAL, INC.; MATADOR CHEMICAL
COMPANY [a/k/a KOCH CHEMICAL COMPANY],
individually, and as successor in interest to ALLIED-
SIGNAL, INC.; KOCH INDUSTRIES, INC., KOCH
FUELS, INC., and KOCH PETROLEUM GROUP, L.P.,
as successors to ALLIED SIGNAL, INC.; THE DOW
CHEMICAL COMPANY; THE GOODYEAR TIRE &
RUBBER COMPANY; OLIN CORPORATION; MOBIL
OIL CORPORATION; PPG INDUSTRIES, INC.; UNION
OIL COMPANY OF CALIFORNIA, d/b/a UNOCAL and
UNOCAL CORPORATION; and BRIDGESTONE/
FIRESTONE, INC., f/d/b/a/ Firestone Tire and Rubber
Company, Inc.

Defendants.

1:00-ev-386

FILED
U. S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS

SEP - 5 2000

DAVID J. MALAND, CLERK
BY DEPUTY *[Signature]*

CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES

Plaintiffs, the United States of America, on behalf of the United States Department of the

Interior for the United States Fish and Wildlife Service ("DOI/USFWS") and the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce, and the State of Texas, acting on behalf of the Texas Natural Resource Conservation Commission ("TNRCC"), the Texas Parks and Wildlife Department ("TPWD"), and the Texas General Land Office ("TGLO"), have filed a Complaint in this action pursuant to Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, seeking natural resource damages, including assessment costs, related to releases of hazardous substances from a facility known as the Bailey Waste Disposal Site ("Site"), located in Orange County, approximately three miles southwest of Bridge City, Texas.

The Complaint filed by the United States and the State of Texas alleges that the Defendants named therein are persons within the meaning of CERCLA who are liable for injuries or losses of natural resources caused by releases of hazardous substances from or response actions undertaken at the Site. The Complaint seeks to impose upon the Defendants liability for natural resource damages, including for assessment costs incurred by the United States and the State of Texas, based on those injuries and losses.

The United States, the State of Texas, and the Settling Defendants (defined in Section IV), have agreed on the terms set forth in this Consent Decree to settle this action. By entering into this Consent Decree the Settling Defendants make no admission with respect to their liability for, or the amount of, any natural resource damages arising from any conditions present at or arising in connection with the Site.

The United States, the State of Texas and the Defendants agree that settlement of this action and entry of this Consent Decree without further litigation is in the public interest and is

the most appropriate means of resolving this action.

IT IS, ADJUDGED, ORDERED AND DECREED THAT:

I. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to Sections 106, 107, and 113, of CERCLA, 42 U.S.C. §§ 9606, 9607, and 9613, and pursuant to 28 U.S.C. §§ 1331 and 1345.

II. VENUE

2. Venue is proper in this district pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613, and pursuant to 28 U.S.C. §§ 1391(b) and (c), and 1395(a), as it is the judicial district in which the natural resource damages are alleged to have occurred.

III. BINDING EFFECT

3. This Consent Decree applies to and is binding upon the United States, the State of Texas and upon the Settling Defendants, and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

4. Each representative of a Defendant who signs this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Decree and to execute and legally bind such Settling Defendant to this document. The undersigned representatives of the United States and the State of Texas certify that they are each fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind their respective entities to this document.

5. The unwillingness to pay or the insolvency of any Settling Defendant, whether or not it is through formal bankruptcy proceedings, shall not affect or change the obligations of the remaining signatories to this Consent Decree. The remaining Settling Defendants shall be jointly and severally responsible to the United States and the State of Texas for performing all of the obligations of Settling Defendants set forth herein.

IV. DEFINITIONS

6. Unless otherwise expressly provided herein, terms used in this Consent Decree shall have the meanings assigned to them in CERCLA, 42 U.S.C. 9601 et seq., or in regulations promulgated under CERCLA at 43 C.F.R. Part 11 or 40 C.F.R. Part 300. The following definitions also apply to terms used in this Consent Decree:

a. "Bailey Waste Disposal Site", "Bailey Site" or the "Site" refers to the inactive waste disposal facility located in Orange County, approximately three miles southwest of Bridge City, west of Texas State Highway 87, at the north end of the Rainbow Bridge and along the north bank of the Neches River. The Site is accessible via a short bridge spanning a drainage channel adjacent and parallel to the highway. The Site is situated within an estuarine marsh, bounded by undeveloped lands and agricultural tracts. The Site is approximately 2 miles from the nearest residential area and the nearest developed industrial property is across the Neches River, as more fully described in Section V, hereto.

b. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq., as amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

c. "Day" means calendar day.

- d. "Trustees" means the DOI/USFWS, NOAA, TNRCC, TPWD and TGLO, collectively.
- e. "Parties" means the United States, the State of Texas and the Settling Defendants.
- f. "Settling Defendants" means those parties whose representatives have signed the Consent Decree, namely; Browning-Ferris Industries Chemical Services, Inc.; Chevron Chemical Company LLC; Chevron Environmental Management Company, as successor in interest to Chevron Chemical Company, LLC; E.I. Dupont De Nemours & Company, Entergy Gulf States, Inc.; Phillips Petroleum Company; Sun Company, Inc.; Texaco Inc.; Michelin North America, Inc., successor in interest to the Uniroyal Goodrich Tire Company and Uniroyal Goodrich Tire Company, Inc.; Allied Signal, Inc.; Matador Chemical Company [a/k/a Koch Chemical Company] individually, and as successor in interest to Allied-Signal, Inc.; Koch Industries, Inc., Koch Fuels, Inc., and Koch Petroleum, Group, L.P., as successors in interest to Allied Signal, Inc.; Atlantic Richfield Company; ARCO Environmental Remediation, L. L. C., as successor in interest to Atlantic Richfield Company; The Dow Chemical Company; The Goodyear Tire & Rubber Company; Mobil Oil Corporation; Olin Corporation; PPG Industries, Inc.; Union Oil Company of California, d/b/a Unocal and Unocal Corporation; and Bridgestone/ Firestone, Inc., f/d/b/a Firestone Tire and Rubber Company, Inc.

V. SITE DESCRIPTION AND REMEDIAL HISTORY

7. The Bailey Waste Disposal Site encompasses approximately 280 acres located 3 miles southwest of Bridge City, Orange County, Texas, west of Texas Highway 87, and along the north bank of the Neches River. The Site is accessible via a short bridge spanning a drainage channel adjacent and parallel to the highway. The Site is situated within an estuarine marsh, bounded by undeveloped lands and agricultural tracts. The Site is approximately 2 miles from the nearest

residential area and the nearest developed industrial property is across the Neches River.

8. The Site originally consisted of, *inter alia*, two ponds - Pond A (approx. 52 hectares) and Pond B (approximately 30 hectares) - constructed before 1950 in a salt marsh adjacent to the Neches River. The ponds were originally used for freshwater recreational fishing. The ponds were created by dredging sediments from the salt marsh to form the ponds' perimeter levees.

9. Beginning in the 1950's and until about 1971, the Site was used for disposal of industrial and municipal wastes. These wastes were deposited in a series of pits excavated along the northern and eastern levees of Pond A and in a drum disposal area on the southern levee of Pond A. The waste pits were originally connected, allowing for the bi-directional flow of wastes.

10. EPA proposed to include the Site on the National Priorities List ("NPL") in October 1984 due to the release or threatened release of hazardous substances. The NPL listing became final in 1986. A Remedial Investigation ("RI") was completed at the Site in October 1987, a Final Draft Feasibility Study Report ("FS") recommending an on-site *in-situ* stabilization remedy was completed in April 1988, and a Record of Decision ("ROD") based thereon was signed in June 1988. Investigations of Site wastes and conditions incident to the RI/FS process found hazardous substances at the Site, including metals, arsenic compounds, phenols, pyridenes, naphthalenes and chlorinated hydrocarbons in soils, and estimated the volume of wastes to be 156,000 cubic yards.

11. On-site *in-situ* stabilization of wastes began in September 1993. However, due to difficulties in meeting stabilization requirements for this remedy, the remedial approach was subsequently re-evaluated and other remedy alternatives considered. In February 1996, EPA issued an Explanation of Significant Differences ("February 1996 ESD") to address wastes that

were found to have migrated into the north marsh adjacent to the Site's north levee. The February 1996 ESD required wastes and marsh sediments in that area to be excavated and removed for off-Site disposal. EPA issued another ESD in May 1996, requiring approximately 12,000 cubic yards of wastes and affected sediments which had previously been contained in an adjacent waste disposal pit ("Pit B") to be excavated and removed for off-Site disposal to eliminate what was considered to be the source of the waste found in the north marsh.

12. An Amended ROD was issued in December 1996. In addition to actions specified in the two ESDs, the remedy approved in the Amended ROD included waste consolidation, grading and light weight capping within the Site's waste areas; installation of a water collection system to intercept and remove groundwater rising during construction of the cap; installation of storm-water management controls to treat storm-water runoff during construction and to divert storm-water from inactive or completed areas of the Site; and adjustments to existing dike elevations and slopes to link to the cap, address areas with excessive settlement and provide for erosion/slope protection. Construction activities to implement the Amended ROD began in January 1997, and were completed in August 1997.

13. The Settling Defendants have previously entered into a Consent Decree to address and resolve their liability under CERCLA for response activities performed and costs incurred in connection with the Site, with certain Defendants' liability being resolved by the terms of a Consent Decree entered on April 30, 1990, in Civil Action No. B89-00859-CA and other Defendants' liability being resolved by the terms of a Consent Decree entered on July 21, 1995, in Civil Action No. 1-95CV085. Both Consent Decrees reserved all claims of the United States for damages for injury to, destruction of or loss of natural resources associated with the Site.

VI. STATEMENT OF FACTS RELATING TO NATURAL RESOURCE DAMAGES

14. DOI/USFWS, NOAA, TGLO, TPWD and TNRCC are each designated under CERCLA as a trustee for natural resources which have been actually or potentially affected by hazardous substances at the Bailey Site.

15. Based on investigations of Site wastes and conditions during the RI/FS process or undertaken to assist in assessing the Site's impacts on surrounding estuarine resources, the Trustees found that natural resources or resource services were lost due to the placement of hazardous substances in certain areas of the Site, were injured due to the migration of hazardous substances into the northern salt marsh, were likely harmed by exposure to surface waters contaminated by Site releases, and were also injured or destroyed by the excavation and capping undertaken to implement remedial actions at the Site.

16. The remedial actions selected to address the contamination at the Site, including cap maintenance as required by EPA, are expected to protect natural resources from further or future injury but do not restore, replace or otherwise compensate for the injuries or losses of natural resources which may be attributed to the Site contamination, including the remedial actions undertaken.

17. To calculate what the Trustees determined to be appropriate compensation for these injuries or losses, information available from the Site investigations was used to evaluate the extent of natural resource injuries and service losses attributable to the Site. That evaluation considered (i) the area of each habitat type covered by wastes containing hazardous substances, covered by the migration of wastes containing hazardous substances or disturbed by remedial activities, (ii) whether habitat service losses in these areas were total or partial, (iii) whether the

service losses in these areas were permanent or would recover with time, and (iv) the duration of any service losses. Aided by a methodology known as Habitat Equivalency Analysis ("HEA"), the Trustees then used this information to estimate the total potential loss of wetland acre-years represented by the natural resource injuries associated with the Site and to identify the amount of estuarine marsh creation necessary to compensate for those habitat service losses. The Trustees have determined that HEA is a valid and reliable scientific methodology used to define the scale of restoration actions needed to restore or replace ecological services comparable in value to resource services lost.

18. Using this approach, the Trustees determined that approximately 28 acres (11.3 hectares) of estuarine marsh habitat would have to be created to adequately compensate for the natural resource injuries and service losses attributable to hazardous substance releases and response actions at the Bailey Site.

19. The Trustees estimated the cost for the Trustees to implement this type and scale of restoration project in the vicinity of the Bailey Site.

20. The Trustees have determined, pursuant to Section 122 (j) of CERCLA, 42 U.S.C. 9622(j), that the Settling Defendants, by providing the funds outlined in this Consent Decree, are providing funds sufficient to allow the Trustees, on behalf of the public, to plan and implement restoration actions sufficient to compensate the public for the injuries and losses of natural resources or resource services attributable to the Bailey Site and to reimburse each agency for its past assessment costs and future operating costs.

VII. PAYMENT OF NATURAL RESOURCE DAMAGES

21. Within 45 days of the entry of this Consent Decree, the Settling Defendants shall pay

to the Trustees the sum of \$605,000.00, which shall be used to plan and implement one or more estuarine marsh restoration projects in the estuary or watershed encompassing the Bailey Site and to reimburse the Trustees for past assessment costs. On or before the 45th day after entry of this Consent Decree, the payment shall be made as follows:

a. Restoration Funds: The Settling Defendants shall transfer \$522,065.85 into an account established within the Court Registry, to be referred to as the "Bailey Waste Disposal Site Restoration Account", in accordance with procedures acceptable to the Court Registry for effecting such transfer. These funds will be held in this account solely for use by the Trustees to plan, implement and oversee the creation or enhancement of estuarine wetlands in the Neches River basin in accordance with a restoration plan to be developed by the Trustees to restore, replace or acquire the equivalent of natural resources or resource services injured or lost due to the Site. Such restoration plan shall include the opportunity for public review and comment and will otherwise be developed in accordance with the federal and state law, including requirements applicable to restoration planning as may be found within CERCLA, 43 C.F.R. Part 11.

b. State Trustee(s) Past Costs Reimbursement: The TGLO incurred costs in the amount of \$6,665.31. TPWD incurred costs in the amount of \$8,669.00. The TNRCC incurred costs in the amount of \$16,058.39. In total, State Trustees incurred costs in the amount of \$31,392.70. Such costs shall be paid by cashier's check made payable to the State of Texas and delivered to the Chief, Natural Resources Division, Office of Attorney General of Texas, P.O. Box 12548, Capital Station, Austin, Texas, 78711-2548. Said cashier's check shall bear the identifying number(s) "AG 98-971447, AG 98-944165, and AG 98-944156".

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, Texas 78701-1495

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

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

c. DOI/USFWS Past Costs Reimbursement: A certified check in the amount of \$4,486.72 payable to the "United States Treasury", with the additional notation, "NRDAR Account No. 14X5198, payment for Bailey Waste Disposal Site", and shall be delivered to:

J. Michael Bradford, Esq.
United States Attorney
Eastern District of Texas
350 Magnolia Street, Suite 150
Beaumont, TX 77701

A copy of this check shall also be delivered to each of the following:

Chief, Division of Finance
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Room 380
Arlington, VA 22230

Steve Spencer
DOI Office of Environmental Policy and Compliance
P.O. Box 649
Albuquerque, NM 87103

United States Department of Justice

Chief, Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20005

d. NOAA Past Costs Reimbursement: A certified check in the amount of \$47,054.72

payable to the "United States Treasury" and referencing the "Bailey Waste Disposal Site", shall
be delivered to:

J. Michael Bradford, Esq.
United States Attorney
Eastern District of Texas
350 Magnolia Street, Suite 150
Beaumont, TX 77701

A copy of the check shall also be delivered to each of the following:

NOAA Finance Services Division
Bills and Collections Unit, Caller Service 7025
20020 Century Boulevard
Germantown, MD 20874

NOAA Office of General Counsel
9721 Executive Center Dr. N.
Suite 137
St. Petersburg, FL 33702
Attn: Stephanie Fluke, Esq.

United States Department of Justice
Chief, Environment and Natural Resources Division
Environmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20005

VIII. INTEREST

22. In the event that the Defendants fail to timely pay any amount specified in Section VII, Paragraph 21, the Settling Defendants shall then pay interest on any balance due in the amount prescribed in Section 107(a), 42 U.S.C. § 9607(a) to the Bailey Waste Disposal Site