

MEMORANDUM OF AGREEMENT
BETWEEN THE NATURAL RESOURCE TRUSTEES
AND
INTERCONTINENTAL TERMINALS COMPANY LLC
TO CONDUCT A
COOPERATIVE NATURAL RESOURCE DAMAGE ASSESSMENT
AND RESTORATION IDENTIFICATION PROCESS
CONCERNING THE
ITC TANK FIRE

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This Memorandum of Agreement (“MOA”) is between the Texas Parks and Wildlife Department (“TPWD”), the Texas General Land Office (“GLO”), the Texas Commission on Environmental Quality (“TCEQ”), the National Oceanic and Atmospheric Administration (“NOAA”) of the U.S. Department of Commerce, the United States Fish and Wildlife Service (“USFWS”) on behalf of United States Department of the Interior (each individually, a “Trustee” and collectively, “Trustees”), and INTERCONTINENTAL TERMINALS COMPANY LLC (“Agreeing Party”). This Agreement provides for cooperation between the Trustees and Agreeing Party in a natural resource damage assessment and restoration (“NRDAR”) for quantification and determination of injuries, damages and identification of restoration alternatives for natural resources and their associated service losses caused by releases of an unknown quantity of a mixture of substances (including hazardous substances) comprised of fire water, firefighting aqueous film-forming foams, and products from storage tanks in the 2nd 80’s tank battery, from the Intercontinental Terminals Company LLC Deer Park Terminal Facility (“ITC Facility”) that flowed into Tucker Bayou then to Buffalo Bayou, also known as the Houston Ship Channel at this location, and were carried by stream flow and tides into the San Jacinto River, Carpenters Bayou, Old River, Santa Ana Bayou, and potentially other surrounding waterbodies and their associated habitats (“Release”). The Trustees and Agreeing Party may hereinafter be collectively referred to as the “Parties” or individually as a “Party.”

I. PURPOSE

A. On March 17, 2019, the 2nd 80’s tank farm at the ITC Facility caught on fire, resulting in the use of firefighting water and foam to extinguish the fire, which collected in the tank farm’s secondary containment. On or about March 22, 2019, the secondary containment breached, resulting in the Release.

B. Due to the Release, there has been injury to, destruction of, loss of, or loss of use of natural resources. Response actions have not and are not expected to fully address these injuries. This MOA provides the structure under which the Parties agree to conduct a cooperative NRDAR,

including the determination and quantification of injuries and/or losses to natural resources and associated services and identification of actions that may be necessary or appropriate to provide for the restoration, rehabilitation, replacement, or acquisition of the equivalent of injured, destroyed, or lost natural resources and their services. The Parties desire to work in the most efficient and cost-effective manner reasonably practicable to assess the injuries caused by the Release and hope to settle the alleged natural resource damages claims without contested litigation. The Parties may jointly develop or discuss “debit” and “credit” estimates, but those estimates, and the underlying assumptions, are for settlement purposes only, and would not be binding on the Parties in any subsequent litigation, unless agreed to in writing by stipulation or otherwise (see Section V). The Parties anticipate that implementation of any agreed assessment and restoration identification actions will be undertaken pursuant to appropriate written documentation.

II. TRUSTEE AUTHORITY

The Trustees enter into this MOA in accordance with the legal authorities provided to each Trustee by the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9601 *et seq.*; Texas Hazardous Substances Spill Prevention and Control Act, Texas Water Code Ch. 26, Subchapter G; and other applicable Federal and State natural resources laws, rules and regulations.

III. ASSESSMENT AND RESTORATION PROCESS

A. The Parties shall work closely together to develop and implement a focused NRDAR process and agree that such NRDAR process will be mutually agreed upon and be based on appropriate and reliable scientific data and methodologies.

B. The Agreeing Party and the Trustees shall share information in accordance with Article VIII.

C. The Agreeing Party and the Trustees will collaboratively assess injuries to natural resources and services and discuss between them the identification of actions that may be necessary or appropriate to provide for the restoration, rehabilitation, replacement, or acquisition of the equivalent of injured, destroyed, or lost natural resources and their services.

D. The Agreeing Party and the Trustees will attempt to settle the case by first collaboratively assessing and discussing service losses and injuries resulting from the Release and then entering into good faith settlement negotiations regarding a final settlement agreement and consent decree concerning the natural resource damages resulting from the Release. The Agreeing Party and the Trustees acknowledge that, if necessary, each is willing to enter into a separate written agreement to toll any applicable statute of limitations to accommodate settlement discussions.

IV. WORKING COMMITTEE

A. To efficiently achieve the objectives of this MOA, a Working Committee (“Committee”) shall be formed to implement the NRDAR process. The Committee will be comprised of the designated representatives identified herein. The Parties shall designate representatives who are able to consistently attend or participate in the Committee meetings and

telephone conferences and who have the appropriate type and level of expertise to address the issues of concern. Each Party shall designate in writing a representative who will be the point of contact on the Committee. Additionally, technical specialists representing any Party may be designated by such Party to participate on the Committee.

B. The Committee shall meet, as necessary, to determine and mutually approve appropriate cooperative actions; to collaborate on evaluation and analysis of information; negotiate, review and approve any work plans or other necessary planning or implementation documents; decide upon appropriate documentation for the cooperative assessment; and seek resolution of disputes pursuant to Section XI.

C. The Parties agree that all identified representatives and technical representatives of any Party will be provided timely notice prior to any Cooperative Activities being performed pursuant to this MOA and may be present at any and all locations where a Cooperative Activity is undertaken. Access shall not include inter- or intra-agency meetings among the Trustees, including their assessment/restoration contractors, internal meetings of employees and/or technical specialist(s), and/or assessment/restoration contractors of the Agreeing Party, meetings between a Party and its respective legal consultants or legal representatives or activities associated with independent studies.

D. Any mutually agreed-upon activity approved by the Committee in writing (including e.g., email) will be considered a “Cooperative Activity” or “Cooperative Activities” under this MOA.

V. STIPULATIONS AND OTHER AGREEMENTS

The Parties may enter into stipulations or other types of agreements, whenever appropriate, during the course of the cooperative NRDAR process governed by this MOA. Any Party may propose a stipulation or other type of agreement at any time. Any stipulation or other agreement, agreed to by all the Parties, shall be in writing and attached and incorporated into this MOA, and shall survive the termination of this MOA for any reason unless the agreement expressly states to the contrary. Any matter covered by a stipulation or other form of agreement under this MOA shall not be subject to objection or challenge by any Party in any legal proceedings or any alternative dispute resolution process relating to the Trustees’ claim for injured, destroyed, or lost natural resources or services. Any stipulations must be approved by the U.S. Department of Justice and, if necessary, by the Texas Attorney General’s Office. Stipulations or other types of agreements entered into under this MOA may be signed by the authorized official of a Party or by its designated representative.

VI. PUBLIC PARTICIPATION

A. The Trustees are required by law to give public notice and to solicit public review and comment during certain phases of the NRDAR process. The Agreeing Party shall provide reasonable and necessary information and assistance to the Trustees in their public participation obligations.

B. The Agreeing Party shall prominently and clearly mark any documents provided to the Trustees that may contain “Confidential Business Information” (“CBI”) with the terms

“Confidential Business Information.” The Agreeing Party shall highlight the confidential nature of the contents of any document(s) prior to providing the marked documents to the Trustees. The obligation to assert CBI rests solely with the Agreeing Party. In the event the Trustees receive a request under the Public Information Act (Texas Government Code Chapter 552) or Freedom of Information Act (54 U.S.C. §552 (“FOIA”)) for information marked as CBI by the Agreeing Party, the Trustees shall promptly notify the Agreeing Party and the Agreeing Party is responsible for submitting arguments in support of nondisclosure of the CBI to the agency official responsible for determining whether or not an exemption from disclosure applies.

C. The Trustees may provide information about the Release and the NRDAR process to other third parties, federal and state agencies, and the public in accordance with federal and state law.

VII. FUNDING

A. Funding. The Agreeing Party agrees to fund the Trustees’ reasonable costs associated with the NRDAR process for the Release in accordance with the terms and processes set forth in this MOA. Trustee costs and expenses funded under this MOA include costs for the following activities: Trustee coordination; public outreach and information dissemination; administrative logistical and technical tasks; damage assessment studies; restoration planning; legal work; salaries, indirect rates and overhead; travel, transportation, lodging and meals; equipment rental; printing; assessment support, data management and coordination; contractors, supplies and materials; and such other activities that the Agreeing Party and Trustees agree on and their reasonable associated costs. Trustees shall notify the Agreeing Party in advance of the Trustees’ retention of contractors or experts that the Trustees will rely on for any Cooperative Activities in the NRDAR for the Release. Costs incurred for independent studies are not reimbursable under this MOA.

1. Advance Funding. A Trustee or Trustees may request advanced funding at any time with a reasonably detailed description of the activity to be covered by such funding and the anticipated costs and timing. If Agreeing Party agrees, any such advanced funding will be deposited into an appropriate fund of the requesting Trustee’s choice (e.g., the Department of the Interior’s Natural Resource Damage Assessment and Restoration Fund [NRDAR Fund] or the Texas Treasury Safekeeping Trust Company), where it will be deposited into a segregated subaccount that the Trustees may draw upon to fund their reasonable costs.
2. Reimbursable Funding. In lieu of advance funding, a Trustee may request reimbursement of its reasonable costs. Each Trustee shall submit to the Agreeing Party an accounting of costs incurred when seeking reimbursement.

B. Timing of Trustee Reporting and Reimbursement Requests. Trustees will make requests for reimbursement and report on the use of advance funding on a semi-annual basis as

outlined below. Upon a request for advance funding from the Trustee(s), the Agreeing Party may request a report on the use of advance funding to date.

1. Costs Prior to MOA. Within ninety (90) days after the effective date of this MOA, each Trustee shall submit a cost package to Agreeing Party, as described herein, requesting reimbursement for costs incurred prior to the effective date of this MOA.
2. Costs Under MOA. Prior to September 1, 2020, the Trustees shall submit to the Agreeing Party a cost package requesting reimbursement and documenting any advanced funding expended, as described herein, for the period from the effective date of the MOA through June 2020. Thereafter, the Trustees shall submit such cost packages each March 1 (for the period of July-December) and September 1 (for the period of January-June).
3. Timing. During the life of this MOA, if Trustees become aware of any reimbursable costs under this MOA that were not included in the cost packages described above, the Trustees shall include and specifically identify such costs in the next cost package. If a Trustee identifies any otherwise reimbursable costs that were not submitted to the Agreeing Parties within 12 months from when the cost was incurred, Agreeing Party shall not be required to reimburse such costs pursuant to this MOA but the Trustees shall present those late-identified costs for consideration in the next cost package and if not reimbursed, Agreeing Party acknowledges that the Trustees may present such costs for consideration in connection with a final settlement of any liability by Agreeing Party.

C. Contents of Trustee Cost Packages. Cost packages must include accounting reports illustrating the use of advanced funds or reimbursement requests that include a summary of labor (name, position, date or date range of service, hours, rates, and total cost), a summary description of overall work performed (which at a minimum would include an explanation of the scope and general nature of the work performed, noting any significant meetings or field work but not necessarily documenting activities to the individual level), travel costs, equipment costs, contractor costs, and miscellaneous expenses (e.g., supplies, overnight mail). The cost package must also include appropriate documentation for all costs and expenses through receipts and/or other appropriate records. The Agreeing Party recognizes that each Trustee has different accounting processes and understands that the accounting from each Trustee will not be in the same format.

D. Payment of Cost Packages. No later than forty-five (45) days after receipt of a cost package, the Agreeing Party shall notify the Trustee in writing to specifically identify additional information needed to review and approve in whole or in part or object to the cost package and provide the Trustee an opportunity to complete the submission. Cost packages that do not contain the information described under Section VII.E may, in Agreeing Party's sole discretion exercised in good faith, be deemed incomplete and will not be reviewed for approval in whole or in part until complete information is submitted. The Agreeing Party shall notify the specific Trustee in writing of any objections to any costs or expenses, specifying the basis for each objection, or approve the cost package in whole or in part no later than forty-five (45) calendar days after receipt of a

completed cost package. The Agreeing Party will pay invoices within forty-five (45) days of cost package approval in accordance with each Trustee's written directive. If Agreeing Party objects to costs that the Trustees have already expended from advance funding and either the Trustees concur with the objection or the dispute process under Section E below establishes the cost was unreasonable or in error, Trustees shall return such funds to ITC through a credit against the next reimbursement request or, if no future cost package is expected, through resolution upon final settlement.

E. Disputed Costs. The Agreeing Party may dispute a Trustee cost on the basis that any portion of an accounting is unreasonable or contains an error through the process described above in paragraph D of this section or during its review of a Trustee's cost package. Additionally, Trustees may dispute Agreeing Party's determination that a cost package is incomplete. Any such dispute shall be resolved pursuant to the procedures set forth in Section XI below. If the dispute cannot be resolved, and should a Trustee subsequently prevail in any action to collect any disputed or other such unpaid amounts, the Agreeing Party shall pay, in addition to the amount determined to be owed, interest on said amount calculated from the date that the reimbursement was payable under this Agreement. Any such interest payable by the Agreeing Party must be calculated in accordance with the Debt Collection Act, 31 U.S.C. § 3717.

F. Recoverable Costs. While costs incurred for independent studies are not directly reimbursable under the processes established in this MOA, such costs may be recoverable under another agreement or through other legal actions. Trustees do not waive recovery of any costs incurred by the Trustees in the natural resource damage process through this MOA.

VIII. INFORMATION AND WORK

The Agreeing Party and Trustees shall fully and freely share all information related to the response, removal, and remedial actions and Cooperative Activities for the NRDAR process for the Release, including information gathered prior to the effective date of the MOA. Agreeing Party and the Trustees will endeavor to agree to the means and method of future information collection and to perform all Cooperative Activities together. Parties will coordinate the schedule for such information collection to maximize the availability of all Parties. Where feasible, all data collected will be shared as quickly as reasonably possible after collection and in a format that is usable by all Parties. To the extent that samples cooperatively collected can be shared without compromising the integrity of the samples, the Parties also agree to promptly share or split samples.

A. "Information" is data, documents, necropsy reports, animal counts (live and dead), photographs, videos, data compilations, GIS information, samples, final reports and other similar items collected or generated during any response, removal or remedial process and the cooperative NRDAR process. Information from the cooperative NRDAR process shall be shared among the Parties as it is generated. For purposes of this MOA, "information" does **not** include data, documents, photographs, videos, data compilations, samples, reports, memoranda and other similar items constituting attorney-client communications, attorney work product, confidential business information that is clearly marked as CBI or that is otherwise considered confidential or privileged. Data from the cooperative NRDAR process that is shared among the Parties shall be marked, as applicable, "Raw/Unvalidated Draft Data" or "Final Validated Data." Draft reports

prepared during settlement discussions among the Parties or by the Technical Committee shall be marked "Draft Report for Settlement" or "Draft Settlement Document."

B. The Agreeing Party and Trustees will collaborate and negotiate toward a consensus about the interpretation of information, timely providing rationales for their respective positions. The Parties will endeavor to jointly conduct all work related to the cooperative NRDAR process. However, unless otherwise agreed to and reflected by a stipulation or other agreement, the Parties expressly reserve and maintain the right to join or not join in another Party's interpretation of information and to produce separate and independent findings and conclusions. The Parties shall notify each other of the intent to conduct any separate and independent studies in advance of conducting such studies and provide timely notice of the opportunity for the other Parties to participate or observe the separate or independent study. Independent interpretations or findings and conclusions must be communicated in a timely manner to the other Parties. All independent studies and interpretations may be submitted to the Trustees for possible inclusion in the NRDA Administrative Record for the Release. The decisions concerning what information, including interpretations, findings and conclusions, to include in the NRDA Administrative Record for this Release rests solely with the Trustees.

IX. RESERVATION OF RIGHTS AND CLAIMS

A. This MOA shall not be admissible as evidence of proof of liability or non-liability or as evidence of the validity or non-validity of any claim or defense in any proceeding relating to this matter. Nothing in this MOA abrogates the right of any Party to pursue contribution from another Party or third party. Nothing in this MOA is intended as a waiver by any of the Parties of any defenses or affirmative claims in any proceedings relating to the Release or of any other rights or remedies. No Party is making an admission of fact or law by entering this MOA.

B. Nothing in this MOA is intended to limit the scope of the natural resource damage assessment and restoration appropriate for the Release or to otherwise restrict or abrogate the authority or discretion of the Trustees to determine the scope of that assessment and restoration. The Trustees reserve the right to seek any assessment costs not paid pursuant to this MOA.

C. Nothing in this MOA is intended as a waiver of any attorney-client privilege, work product privilege, or any other privilege that has been or may be asserted in this or any other matter. Validated data and factual information collected pursuant to this MOA shall not be considered privileged unless agreed to by the Parties in accordance with applicable laws and regulations.

D. This MOA does not release the Agreeing Party from any potential liability except for the liability for assessment costs and expenses that are reimbursed or funded pursuant to Section VII. The Trustees reserve all other claims, including claims for injury, loss, or destruction of natural resources and/or their services; claims for the costs of assessing injury to, destruction of, loss of, or loss of use of natural resources and their services; claims for restoration, rehabilitation, replacement or acquisition of the equivalent of natural resources or lost services of those resources; or any other causes of action or requests for relief, either administratively or judicially, under either State or Federal law arising from the Release. The Agreeing Party reserves its right to assert that: 1) any costs and expenses incurred by Trustees and not reimbursed by Agreeing Party under this MOA; or 2) any payments made by the Trustees from an advance funded

account and subject to an objection by the Agreeing Party do not constitute reasonable costs of NRDAR activities unless explicitly agreed to by the Parties in writing.

X. LAWS, RULES, REGULATIONS, AND PERMITS

This MOA does not affect or relieve the Parties of their responsibility to comply with any applicable Federal, State, or local law, rule, regulation, or permit.

XI. PROCEDURE UPON DISPUTE

A. The Parties will attempt in good faith to resolve all disputes arising out of this MOA through informal negotiations.

B. All disputes arising from planning, conducting or implementing work related to the cooperative NRDAR process shall be addressed first by the Committee responsible for the work.

C. The Parties agree that work that is not linked to or not affected by the dispute will continue uninterrupted during the informal negotiations.

D. If the dispute cannot be resolved through informal negotiations, as set forth in this Section, the Parties shall attempt to resolve the dispute through discussions among senior representatives of the Parties. Should those discussions fail, any Party may request mediation to resolve the dispute upon providing written notice to the remaining Parties. This written notice must contain the specific issue(s) in dispute and detailed facts and opinions relevant to resolution of the dispute. The Agreeing Party agrees to pay the reasonable costs associated with any such mediation proceedings, and any mediator shall be selected by unanimous agreement of the Parties to the dispute.

XII. MODIFICATION

Any modification or addition to this MOA must be in writing and signed by all Parties. Such modification or addition shall be an Attachment to this MOA and incorporated as part of this MOA for all purposes. Any references in this document to the "MOA" shall be deemed to include any such Attachments.

XIII. TERMINATION

A. Any Party may terminate its participation in this MOA at any time by giving thirty (30) days written notice to all Parties. Notice of intent to terminate participation in the MOA must be signed by an appropriate representative of the terminating Party. Termination by a single Trustee will not void the agreement as to the remaining Parties. The decision of any Party to conduct independent work will not, in and of itself, be deemed to constitute termination of participation in the MOA. Termination of this MOA by any Party is prospective only. Any stipulations or other agreements executed prior to the effective date of termination will survive

and remain in effect following termination, unless the stipulation or other agreement expressly states otherwise.

B. If the Agreeing Party terminates its participation in this MOA and work previously agreed to by the Agreeing Party is underway at the time of the Agreeing Party's notice of intent to terminate and that work is a Cooperative Activity, being conducted pursuant to an approved work plan (and any agreed modifications thereto), the Agreeing Party shall continue to perform or fund such work plan through to completion, unless the Parties agree in writing to the contrary or the work plan calls for discontinuation upon the occurrence of a specified event. However, the Agreeing Party will not be required to complete any work agreed to under this MOA that was scheduled to be initiated or performed and completed after the effective date of termination.

C. This MOA terminates upon entry of a final settlement agreement and consent decree, or upon adjudication by a court of competent jurisdiction.

XIV. DESIGNATED REPRESENTATIVES AND NOTICES

A. This MOA establishes that the Texas Commission on Environmental Quality will serve as Lead Administrative Trustee ("LAT") for this Release. The LAT will serve as the Trustees' point of contact for the Agreeing Party in implementation of this MOA.

B. Each Trustee agency hereby designates the following person to act as its representative in implementing this MOA and as a member of the Committee:

For TCEQ:

Michael Cave
Texas Commission on Environmental Quality
Natural Resource Trustee Program, MC 142
P.O. Box 13087
Austin, Texas 78711-3087
Phone: (512) 239-4772
Fax: (512) 239-4814
Email: michael.cave@tceq.texas.gov

For TPWD:

Angela Schrift
Texas Parks and Wildlife Department
Natural Resource Damage Assessment Team
4200 Smith School Road
Austin, Texas 78744
Phone: (512) 389-8755
Fax: (512) 389-8160
Email: angela.schrift@tpwd.texas.gov

For GLO:

Angela Sunley
Texas General Land Office
Coastal Resources Division
Stephen F. Austin Bldg.
1700 N Congress Avenue
Austin, Texas 78701-1495
Phone: (512) 463-9309
Fax: (512) 475-0680
Email: angela.sunley@glo.texas.gov

For U.S. Department of the Interior and USFWS:

Chip Wood
Restoration Support Unit
Office of Restoration and Damage Assessment
U.S. Department of the Interior
P.O. Box 25007 (D-110)
Denver, CO 80225
Phone: (303) 445-3889
Cell: (720) 413-9833
Email: charles.wood@ios.doi.gov

For NOAA:

Troy Baker
NOAA Office of Response & Restoration
Assessment & Restoration Division
7600 Sand Point Way NE
Seattle, WA 98115
Phone: (206) 526-6606
Email: troy.baker@noaa.gov

C. The Agreeing Party hereby designates the following person to act as its representative in implementing this MOA:

Ralph Markarian
Technical Director – NRDA/Senior Principal
Cardno
504 Beechwood Drive
Kennett Square, PA 19348
Phone: (610) 715-5330
Fax: (610) 444-3244
Email: ralph.markarian@cardno.com

D. This MOA contains requirements for notices to be provided by and among the Parties. All notices required by this MOA, including approvals or objections to invoices, invocation of dispute resolution, deposits to the Account, execution of stipulations or other agreements, must be sent to all Parties. If different from the designated representatives above, the Parties designate the following representative(s) to receive notices under this MOA:

Paulina Williams
Baker Botts LLP
98 San Jacinto Blvd. Suite 1500
Austin, Texas 78701
Phone: (512) 322-2543
Fax: (512) 322-3643
Email: paulina.williams@bakerbotts.com

Courtesy copy to:

Robert Bell
ITC General Counsel
1943 South Independence Parkway
LaPorte, TX 77571
Phone: (281) 884-0279
Email: rbell@iterm.com

E. Any change in the designated representative or recipient of notices must be provided in writing to all Parties. The affected Party may notify the other Parties via electronic mail and must include the date on which the change will take effect. The notification to the Parties of a change shall become an Attachment to the MOA.

XV. EFFECTIVE DATE

This MOA shall become effective upon the date of the last signature below.

XVI. COUNTERPARTS

This MOA may be signed in two or more counterparts which together shall constitute one and the same document.

XVII. THIRD-PARTY RIGHTS

This MOA is not intended to create any rights or causes of action enforceable by third persons not Parties to this MOA. Nothing in this MOA may be the basis of any third-party challenges or appeals. This provision does not affect the public participation provisions discussed in Section VI.

**SIGNATURE PAGE FOR MEMORANDUM OF AGREEMENT BETWEEN THE
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COMPANY LLC TO CONDUCT A COOPERATIVE NATURAL RESOURCE
DAMAGE ASSESSMENT AND RESTORATION IDENTIFICATION PROCESS
CONCERNING THE ITC TANK FIRE**

For Intercontinental Terminals Company LLC:



Robert F. Bell
General Counsel



Date

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For Texas Commission on Environmental Quality:



Toby Baker
Executive Director



Date

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For United States Department of the Interior:



Amy Lueders
Regional Director
U.S. Fish and Wildlife Service

FEB - 7 2020

Date

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For Texas Parks and Wildlife Department:



Carter Smith
Executive Director



Date

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For National Oceanic and Atmospheric Administration:

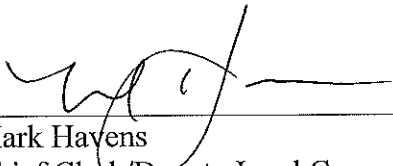
Chauncey Kelly
Section Chief
Office of the General Counsel, Natural Resources Section

January 31, 2020


Date

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For Texas General Land Office:



Mark Havens
Chief Clerk/Deputy Land Commissioner



Date