

**SETTLEMENT AGREEMENT AMONG THE UNITED STATES
OF AMERICA, ON BEHALF OF THE UNITED STATES DEPARTMENT OF THE
INTERIOR, UNITED STATES FISH AND WILDLIFE SERVICE; THE STATE OF
GEORGIA, ON BEHALF OF THE GEORGIA DEPARTMENT OF NATURAL
RESOURCES; AND FUKUNAGA KAIUN CO., LTD.**

I. Introduction

1. The United States of America, on behalf of the U.S. Department of the Interior (“DOI”), U.S. Fish and Wildlife Service (“FWS”) and the State of Georgia, on behalf of the Georgia Department of Natural Resources (“GADNR”) (together, the “Trustees”), and Fukunaga Kaiun Co., Ltd. (“Settling Defendant”) enter into this Settlement Agreement to settle, without litigation, the Trustees’ civil claims under Section 1002 of the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. § 2702 (a) and (b), and the State Trustee’s civil claims under applicable state law, for damages for injuries to, destruction of, or loss of natural resources resulting in discharges of oil from the Motor Vessel FORTUNE EPOCH (“M/V FORTUNE EPOCH”) on or around November 17, 2004 (the “Spill”).

2. The Trustees have shared trust responsibilities for the natural resources injured or damaged as a result of the Spill and this Settlement Agreement is executed by both agencies in their capacity as Natural Resource Trustees.

3. Under OPA, each responsible party for a vessel from which oil is discharged into or upon navigable waters is liable for damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damages. 33 U.S.C. § 2702.

4. The injuries from the Spill include injuries to migratory birds, water and sediments and the public has suffered associated losses of natural resource services, including lost bird watching, and a healthy ecosystem.

5. Settling Defendant does not admit any liability to the Trustees arising from the Spill, but enters into this Settlement Agreement for the purpose of avoiding litigation.

II. Parties Bound

6. The provisions of this Settlement Agreement shall apply to and be binding upon Settling Defendant and all of its successors and assigns, and upon the Trustees.

III. Definitions

7. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in OPA or the DOI Natural Resource Damage Assessment and Restoration Regulations, 43 C.F.R. Part 11, shall have the meaning assigned to them in such statutes or regulations. Whenever the terms listed below are used in this Settlement Agreement, the following definitions shall apply.

a. "Day" means a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the close of business on the next business day.

b. "DOI" means the United States Department of the Interior and any successor departments or agencies of the United States.

c. "Effective Date" means the effective date of this Settlement Agreement as provided by Section XI (Effective Date) of this Settlement Agreement.

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- d. "FWS" means the U.S. Fish and Wildlife Service of the United States Department of the Interior.
- e. "GADNR" means the Georgia Department of Natural Resources.
- f. "Motor Vessel FORTUNE EPOCH" or "M/V FORTUNE EPOCH" or "FORTUNE EPOCH" means the motor vessel formerly owned by FSK Line, SA and operated by Fukunaga Kaiun Co Ltd. that released an estimated 6,800 gallons of fuel oil into open waters.
- g. "Natural Resource" or "Natural Resources" means land, wildlife, biota, air, water, ground water, surface water (including sediments), drinking water supplies, and other such resources, belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States or the State Trustee.
- h. "Natural Resource Damages" means damages, including costs of damages assessment, recoverable under Section 1002 of OPA, 33 U.S.C. § 2702, for injury to, destruction of, or loss of any or all natural resources resulting in whole or in part from the release or threatened release of oil from the Spill.
- i. "NRDAR Fund" means the DOI Natural Resource Damage Assessment and Restoration Fund, established pursuant to 43 U.S.C. §§ 1474b and 1474b-1.
- j. "OPA" means the Oil Pollution Act of 1990, 33 U.S.C. § 2701, *et seq.*
- k. "OPA Fund" shall mean the Oil Spill Liability Trust Fund as defined in Section 1001(11) of OPA, 33 U.S.C. § 2701(11).
- l. "Paragraph" means a portion of this Settlement Agreement identified by an arabic numeral or an upper case letter.

m. "Parties" refers collectively to the United States, the State Trustee, and Settling Defendant.

n. "Section" means a portion of this Settlement Agreement identified by a roman numeral.

o. "Settling Defendant" means Fukunaga Kaiun Co., Ltd., and its associated, interrelated, subsidiary, and successor companies, its COFR (Certificate of Financial Responsibility under OPA-90) guarantors, and the present and former officers, directors, agents, and employees of the foregoing parties to the extent their liability arises from actions taken in their official capacities as officers, directors, agents and employees of the Settling Defendant, as well as the Motor Vessel FORTUNE EPOCH, its owners, operators, managers, agents, charterers, officers, and crew to the extent their liability arises from actions taken in the official capacities as owners, operators, managers, agents, charterers, officers, and crew.

p. "Spill" means the occurrence on November 17, 2004, in which the vessel M/V FORTUNE EPOCH released an estimated 6,800 gallons of fuel oil into the Savannah River and other areas along the coast.

q. "State" means the State of Georgia, on behalf of GADNR.

r. "State Trustee" means the GADNR as the authorized representative for the State of Georgia on behalf of the public to recover costs of restoring natural resources under Section 311(f)(5) of the Clean Water Act, 33 U.S.C. § 1321(f)(5).

s. "Subparagraph" means a portion of this Settlement Agreement identified by a lower case letter.

t. "Trustees" means the United States Department of the Interior, acting through FWS, and the State of Georgia, acting through GADNR.

u. "United States" means the United States of America, on behalf of DOI.

IV. Payments by Settling Defendant

8. Within 30 days after the Effective Date of this Settlement Agreement, Settling Defendant shall pay a total amount of \$775,000 as payment for Natural Resource Damages for all alleged injuries resulting from the Spill. This payment shall be used exclusively to pay the costs of assessing Natural Resource Damages caused by the Spill, investigating potential restoration projects, and implementing and monitoring restoration projects selected by the Trustees. Payment shall be in the form of electronic transfer as follows:

a. Payment to United States. Settling Defendant shall pay \$752,067.41 to the United States for Natural Resource Damages assessment costs incurred by DOI, and for the joint use of the Trustees to pay for Trustee-sponsored natural resource restoration projects. Of the total amount paid by the Settling Defendant under this subparagraph, \$131,172.77 shall be applied to reimburse Natural Resource Damage assessment costs incurred by DOI through December 31, 2012. Such payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with current EFT procedures, referencing DOJ Case Number 90-5-1-1-10825, NRDAR Account No. 14X5198, and "Natural Resource Damages for M/V FORTUNE EPOCH Spill." Payment shall be made in accordance with instructions provided to Settling Defendant by the United States. Any payments received by the Department of Justice after 4:00pm (Eastern Time) will be credited on the next business day.

b. Payment to State Trustee. Settling Defendant shall pay \$22,932.59 to the State of Georgia for Natural Resource Damages assessment costs resulting from the Spill. Such payment shall be made by certified or cashier's check and should be made payable to "State of Georgia." The check shall reference "Past Assessment Costs for M/V FORTUNE EPOCH Oil Spill" and shall be delivered to:

Chief, Environmental Section
Division 1
Georgia Department of Law
40 Capital Square, S.W.
Atlanta, Georgia 30334

c. Notice of Payment. Upon making payments required under this Section, Settling Defendant shall send written notice of payment and a copy of any transmittal documentation to the United States and State Trustee in accordance with Paragraph 26 (Notice). Settling Defendant shall also send written notice of payment made to the United States and a copy of any transmittal documentation to:

Bruce A. Nessler
Budget Office/Fund Manager
U.S. Department of the Interior
Office of Restoration and Damage Assessment
1849 C Street, NW
Mailstop 3548
Washington, DC 20240

9. If Settling Defendant fails to make either of the payments specified in Paragraph 8 when due, Settling Defendant shall pay interest on those payments at the rate specified in 28 U.S.C. § 1961(a) and (b) on the amount due.

10. In addition, if Settling Defendant fails to make either of the payments specified in Paragraph 8 when due, it shall pay the following stipulated penalties for each day or portion thereof that each payment is overdue until all overdue payments (including stipulated penalties) are paid in full:

<u>Days Late</u>	<u>Penalty</u>
1-10	\$2,000/day
11-59	\$3,000/day
Beyond 60 days	\$4,000/day

11. Stipulated penalties and interest shall be paid in accordance with the payment instructions in Paragraph 8. Stipulated penalties and interest are due within thirty (30) Days following receipt of the date of a written demand by either of the Trustees. All payments of stipulated penalties and interest owed by Settling Defendant shall be paid to the Trustees in equal amounts (i.e., half of such amounts owed paid to each Trustee).

12. Penalties and interest shall accrue regardless of whether Trustees have notified Settling Defendant of its late payment or made a demand for payment, but need only be paid on demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the day that payment of amounts owed is made.

13. Settling Defendant shall be liable for attorneys' fees and costs incurred by the Trustees to collect any amount due under this Settlement Agreement that is not timely paid.

V. Completion of the DARP and Identification of Restoration Projects

14. At no further cost to Settling Defendant, the Trustees will finalize the *Restoration Plan and Environmental Assessment for the M/V FORTUNE EPOCH Oil Spill Savannah*,

Georgia, and conduct the public review processes required by OPA, the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”), and the Georgia Environmental Policy Act of 1991, O.C.G.A. 12-16-1 (“GEPA”). The Trustees will include in the draft Restoration Plan/Environmental Assessment made available for public review and comment each of the projects the Trustees determine to be feasible and desirable. Once the applicable public processes of OPA, NEPA, and GEPA have been completed, the Trustees will implement the compensated restoration project(s) with any revisions that the Trustees may deem appropriate after considering public comment from such process.

**VI. Covenant Not to Sue and Reservation of Rights by
the United States and State**

15. In consideration of the payment to be made by Settling Defendant, the United States and the State covenant not to sue or take any administrative action against Settling Defendant for Natural Resource Damages related to or associated with the Spill under OPA, except as specifically reserved in Paragraph 16 below. In addition, the State covenants not to sue or take any administrative action against Settling Defendant for Natural Resource Damages related to or associated with the Spill under the Georgia Water Quality Control Act, O.C.G.A. § 12-5-20, *et seq.*, except as specifically reserved in Paragraph 16 below. This covenant not to sue is conditioned upon satisfactory performance by Settling Defendant of its obligations under this Settlement Agreement.

16. Notwithstanding any other provision of this Settlement Agreement, the covenant not to sue in Paragraph 15 shall not apply to any other claims, causes of action or matters, including:

- a. claims or causes of action based upon Settling Defendant's failure to satisfy any requirement of this Settlement Agreement;
- b. claims or causes of action brought against Settling Defendant by the United States or the State of Georgia for criminal liability associated with the Spill; and
- c. claims or causes of action for releases other than those as resulting from the Spill.

VII. Covenant Not to Sue by Settling Defendant

17. Except as provided in Paragraph 18 below, Settling Defendant hereby covenants not to sue or to assert any claims or causes of action against the Trustees (including all employees, agents, contractors, departments, agencies, administrations, and bureaus of either of them), related to Natural Resource Damages associated with the Spill, and any claims against the OPA Fund relating to the Spill.

18. Settling Defendant reserves the right to defend itself against any future claim(s) or cause(s) of action brought by either of the Trustees and/or the OPA Fund related to the Spill.

19. In this or any or any other action brought by the United States or the State of Georgia, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon the contention that the claims raised by the United States or the

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State of Georgia 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 by the United States and the State of Georgia set forth in Paragraph 15.

VIII. Claims against the OPA Fund

20. All Parties covenant not to present any claim to the OPA Fund for Natural Resource Damages arising from the Spill, pursuant to OPA, 33 U.S.C. §§ 2708 and 2713.

IX. Effect of Settlement

21. Nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement Agreement. In addition, nothing in this Settlement Agreement shall limit, enlarge, or otherwise affect the private rights or claims of any person not a Party to this Settlement Agreement, except as may be determined otherwise by a court of competent jurisdiction.

22. Nothing in this Settlement Agreement shall be construed as limiting, barring, or otherwise prejudicing claims, demands, or causes of action Settling Defendant may have arising from this settlement, or the Spill, against any person or entity not a party to the Settlement Agreement with the exception of the OPA Fund for Natural Resource Damages arising from the Spill.

X. Public Comment

23. The Parties acknowledge that final approval by the United States and the effectiveness of this Settlement Agreement are subject to public notice and comment for a period of not less than 30 days after publication of notice of this Settlement Agreement in the Federal

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Register. The Parties further acknowledge that the United States reserves the right to withdraw from this Settlement Agreement if the comments regarding this Settlement Agreement disclose facts or considerations which indicate that the Settlement Agreement is inappropriate, improper, or inadequate.

XI. Effective Date

24. The Effective Date of this Settlement Agreement shall be the date upon which the United States issues written notice to Settling Defendant that the public comment period pursuant to Section X has closed, and that comments received, if any, do not require modification of or withdrawal of the United States from this Settlement Agreement.

25. If the United States withdraws from this Settlement Agreement, then this Settlement Agreement will be considered null and void.

XII. Notices

26. Except as otherwise set forth in this Settlement Agreement, whenever, under the terms of this Settlement Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Notice to a Party by electronic mail (if that option is provided below) or by regular mail in accordance with this Paragraph satisfies any notice requirement of this Settlement Agreement regarding such Party. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Settlement Agreement.

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
eesdcopy.enrd@usdoj.gov
Re: DJ # 90-5-1-1-10825

Brigette J. Beaton
Attorney Advisor
U.S. Department of the Interior
Office of the Regional Solicitor
75 Ted Turner Drive, S.W., Suite 304
Atlanta, GA 30303
brigette.beaton@sol.doi.gov

Greg R. Masson, Ph.D.
Regional Environmental Quality/Spill/NRDA Coordinator
Southeast Region
U.S. Fish and Wildlife Service
1875 Century Boulevard, Suite 200
Atlanta, GA 30345
greg_masson@fws.gov

As to the State:

Timothy J. Ritzka
Senior Assistant Attorney General
Georgia Department of Law
40 Capitol Square S.W.
Atlanta, GA 30334-1300
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As to the Settling Defendant:

David F. Sipple
Hunter, Maclean, Exley & Dunn, P.C.
P.O. Box 9848
200 E. Saint Julian Street
Savannah, GA 31412-0048
dsipple@huntermaclean.com

XIII. Signatories

27. Each undersigned representative of the United States, the State of Georgia, and Settling Defendant certifies that she or he is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind such party to this document.

XIV. Entire Agreement

28. This Settlement Agreement constitutes the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in the Settlement Agreement and supersedes all prior agreements and understandings, whether oral or written. No other document nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Settlement Agreement or the settlement it represents, nor should it be used in construing the terms of this Settlement Agreement.

XV. Modification

29. The terms of this Settlement Agreement may be modified only by a subsequent written agreement signed by the Parties.

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30. This Settlement Agreement may be executed in counterparts, each of which shall constitute an original, all of which shall constitute one and the same instrument.

FOR THE UNITED STATES OF AMERICA

On Behalf of the Department of the Interior, Fish
and Wildlife Service

Dated: 1/9/18



ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530


Dated: 12/28/17



SHEILA McANANEY
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division U.S.
Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

FOR THE STATE OF GEORGIA, DEPARTMENT
OF NATURAL RESOURCES:

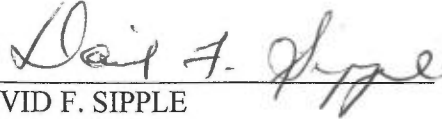
Dated: 12/15/2017



TIMOTHY J. RITZKA
Senior Assistant Attorney General
Office of the Attorney General
State of Georgia

FOR SETTLING DEFENDANT:

Dated: December 15, 2017



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