

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. _____
)	
Dion Cumbie,)	
)	
Defendant.)	
_____)	

CONSENT DECREE

WHEREAS, the Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), has filed a Complaint in this action concurrently with this Consent Decree ("Decree"), alleging that Defendant Dion Cumbie ("Defendant") discharged pollutants into waters of the United States without permits issued pursuant to Clean Water Act ("CWA") Section 404, 33 U.S.C. § 1344, in violation of CWA Section 301, 33 U.S.C. § 1311.

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into waters of the United States without authorization by a required United States Department of Army Corps of Engineers (the "Corps" or "COE") CWA Section 404 permit, at an approximately 224-acre property in Berkeley County, South Carolina, more particularly described in the Complaint and on the location maps and aerial photographs attached as Appendices 1 and 2 to this Consent Decree (the "Site");

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WHEREAS, Defendant is a person who resides in Berkeley County, South Carolina;

WHEREAS, the Complaint alleges that Defendant personally operated mechanical earthmoving equipment such as trackhoes and bulldozers to discharge dredged and/or fill material into waters of the United States at the Site;

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to require Defendant, at his own expense and at the direction of EPA, to restore and/or mitigate the damages caused by his unlawful activities; and (3) to require Defendant to pay civil penalties to the United States as provided in 33 U.S.C. § 1319(d);

WHEREAS, EPA is charged with the statutory duty of enforcing the CWA pursuant to 33 U.S.C. §1251 et. seq. and the regulations promulgated pursuant thereto;

WHEREAS, the Defendant does not admit any of the allegations of the Complaint or any liability to the United States arising out of the occurrences alleged in the Complaint;

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the Complaint regarding the Site;

WHEREAS, the United States and Defendant recognize that this Consent Decree has been negotiated by the Parties in good faith and agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA against Defendant in this case; and

WHEREAS, the Court finds that this Consent Decree was negotiated by the parties in good faith, is a reasonable and fair settlement of the United States' claims against Defendant in this case,

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and that this Consent Decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

NOW, THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

2. Venue is proper in the District of South Carolina pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the subject property is located in this District, and the causes of action alleged herein arose in this District and Defendant resides in and conducts business in this District. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

3. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief can be granted pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon the United States, and upon Defendant, his successors and assigns. In any action to enforce this Consent Decree against Defendant, Defendant shall not raise as a defense the failure of any of his agents, employees, successors or assigns or any person, firm or corporation acting in concert or

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participation with Defendant, to take any actions necessary to comply with the provisions hereof. Defendant shall provide a copy of this Consent Decree to all employees and agents whose duties might reasonably include compliance with any provision of this Consent Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

5. The Site is currently owned by CFT12 Holding 2, LLC, a South Carolina limited liability company. Defendant's brother, Dana Cumbie, is President of CFT12 Holding 2, LLC, and Defendant certifies to the United States that he has obtained the consent and authorization of CFT12 Holding 2, LLC, for Defendant to implement the restoration work required under Section IV of this Consent Decree, and the agreement of CFT12 Holding 2, LLC, to cooperate with, and not to interfere with, the implementation of the restoration work required under Section IV of this Consent Decree. Defendant further certifies that he has obtained consent and authorization from CFT12 Holding 2, LLC, to allow EPA and the Corps of Engineers, upon prior notification, and at reasonable times with proper identification, to enter onto the Site for purposes of monitoring and measuring compliance with the terms and conditions of this Consent Decree.

6. The transfer of ownership or other interest in the Site shall not alter or relieve Defendant of his obligation to comply with all of the terms of this Consent Decree.

7. Except as in accordance with this Consent Decree, Defendant and Defendant's agents, successors and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

8. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law, except as expressly provided herein.

9. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c), except as expressly provided herein.

10. This Consent Decree in no way affects or relieves Defendant of his responsibility to comply with any applicable federal, state, or local law, regulation or permit.

11. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

12. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

13. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

III. DEFINITIONS

14. Terms used in this Consent Decree that are defined in the CWA or in regulations promulgated pursuant to the CWA shall have the meanings assigned to them in the CWA or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Act" or "Clean Water Act" shall mean the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251-1387.
- b. "Calendar Quarter" shall mean the three (3)-Month periods ending on March 31, June 30, September 30, and December 31.
- c. "Complaint" shall mean the complaint filed by the United States in this action.
- d. "Consent Decree" or "Decree" shall mean this Decree and all Appendices attached hereto (listed in Section XX).
- e. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day.
- f. "Defendant" shall mean Dion Cumbie.
- g. "Effective Date" shall mean the date on which this Consent Decree is entered by the Court.
- h. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.
- i. "Month" shall mean one (1) calendar month running from the numbered day to the same numbered day of the following calendar month, regardless of whether the particular month has 28, 29, 30 or 31 days. In the event a triggered event would occur on a day of the month which does not exist (for example, on February 30), then the event shall be due on the first day of the following month (for example, March 1).

- j. "Paragraph" shall mean a portion of this Decree identified by an Arabic numeral.
- k. "Parties" shall mean the United States and Defendant.
- l. "Section" shall mean a portion of this Decree identified by a Roman numeral.
- m. "Site" shall mean an approximately 224-acre property in Berkeley County, South Carolina, more particularly described in the Complaint and on the location maps and aerial photographs attached as Appendices 1 and 2 to this Consent Decree.
- n. "State" shall mean the State of South Carolina.
- o. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. SPECIFIC PROVISIONS

CIVIL PENALTY

15. Defendant shall pay a civil penalty to the United States in the amount of ten thousand Dollars (\$10,000), within 30 days of Entry of this Consent Decree.

16. Defendant shall make the above-referenced payment by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number (_____). EPA Region 4 and the DOJ case number (90-5-1-1-18616). Payment shall be made in accordance with instructions provided to Defendant by the Financial Litigation Unit ("FLU") of the United States Attorney's Office for the District of South Carolina. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify its payment. The FLU will provide the payment instructions to:

Dion Cumbie
[address and email]

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Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Upon payment of the civil penalty required by this Consent Decree, Defendant shall provide written notice (1) to EPA at the address specified in Section V (Notices) of this Consent Decree, and (2) to EPA's Cincinnati Finance Office at 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268, that such payment was made in accordance with Paragraph 15.

18. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) in calculating his federal income tax.

RESTORATION

19. Defendant shall restore and revegetate 10 acres of filled wetlands in the portion of the Site identified on Appendix 3 to this Consent Decree. Restoration and revegetation shall include removal of fill material to approximate pre-violation wetland elevation, reestablishment of native wetland vegetation, and three years of monitoring to document wetland status and survival of plantings. During restoration, removed fill material may be pushed into the existing borrow pit identified on Appendix 3 to this Consent Decree, placed in upland portions of the Site, or removed from the Site.

20. Defendant shall accomplish restoration in the following manner:

a. Within 30 days of Entry of This Consent Decree by the Court Defendant shall retain a qualified wetland consultant to prepare a Restoration Plan and oversee the restoration work;

b. Within sixty (60) days of Entry of this Consent Decree by the Court, Defendant shall submit for EPA review and approval a Restoration Plan ("Restoration Plan") which meets the requirements of Paragraph 19, describes all work that will be carried out to restore the Site,

includes criteria for determining the success of the restoration (“success criteria”), and establishes a timeline for a one-year schedule for Defendant’s performance of the restoration work:

c. Defendant shall make revisions to the Restoration Plan to address any comments by EPA within thirty (30) days of receipt of such comments;

d. Upon receipt of EPA approval, Defendant will within one year of EPA’s approval of the Restoration Plan implement the Restoration Plan and complete all restoration work (other than monitoring and any work determined to be necessary during the monitoring period to achieve success criteria in the Restoration Plan);

e. Monitoring shall occur for three successive years following completion of restoration work in accordance with subparagraph 20.d. Following the third year of monitoring, and upon achievement of the success criteria in the approved Restoration Plan, Defendant will notify EPA that the restoration is complete and EPA will schedule an inspection to confirm that the Restoration is complete.

f. Following inspection by EPA, EPA will either confirm that Restoration is complete or identify any additional work that is necessary to achieve success criteria. If EPA notifies Defendant that additional work is necessary to achieve success criteria, Defendant will complete such additional work described by EPA in its notification within the time frame identified by EPA and contact EPA to schedule an inspection to confirm that the additional work has been completed.

21. Upon completion of the restoration and achievement of the success criteria, Defendant shall not disturb in any manner whatsoever the restoration area as identified on Appendix 3 to this Consent Decree except in compliance with all requirements of the CWA.

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22. Defendant certifies that he has obtained consent and authorization from CFT12 Holding 2, LLC, to allow EPA and the Corps of Engineers, upon prior notification, and at reasonable times with proper identification, to enter onto the Site for purposes of monitoring and measuring compliance with the terms and conditions of this Consent Decree.

MITIGATION

23. To mitigate for the impacts to wetlands at the Site resulting from the alleged violations, including temporal impacts to the wetland that will be restored pursuant to this Decree and any impacts from previously unauthorized discharges of fill that will remain in place at the Site, Defendant shall purchase, within ninety (90) days of Entry of this Consent Decree by the Court, two-hundred forty thousand dollars (\$240,000) of mitigation credits from the Congaree Carlton mitigation bank. Within two weeks of such purchase, Defendant shall submit to EPA and the United States, to the addresses specified in Section V (Notices) of this Decree, documentation of his compliance with this Paragraph 21.

24. Those mitigation credits purchased pursuant to Paragraph 21 satisfy all mitigation requirements under State and Federal laws for the Alleged Violations to the extent that wetlands have been filled as part of the activities which are the subject of the alleged violations.

25. Defendant's obligations under this Consent Decree are intended to resolve Defendant's liability for alleged violations of the CWA, and are not intended to be used or credited as mitigation for impacts resulting from Defendant's activities at the Site pursuant to any CWA Section 404 permit from the Corps for future development of the Site. Defendant acknowledges that, if he applies for a CWA Section 404 individual or nationwide permit for development of the Site, he will be required to avoid and minimize impacts to waters of the United States, and to

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mitigate for unavoidable impacts to waters of the United States, in accordance with Section 404(b)(1) of the Act and that Section's implementing regulations.

AUTHORIZATION OF DISCHARGES

26. The fill resulting from the discharges identified in the Complaint in this matter and required under this Section IV of the Consent Decree shall be authorized under Nationwide 32 permit authority. See 33 C.F.R. Part 330. The terms and conditions of the Nationwide 32 permit are set forth in Appendix 4, which is incorporated herein by reference. Defendant shall comply with all conditions of Nationwide 32 permit. 33 C.F.R. Part 300, Section 330.5 providing for modification, suspension and revocation of nationwide permits, is specifically applicable to this Nationwide 32 permit. Notification of any modification, suspension or revocation of this Nationwide 32 permit shall be filed with this Court. The authorization provided in NWP 32 shall terminate if Defendant violates any term of this Consent Decree.

MINING PERMIT

27. Within thirty (30) days of Entry of this Consent Decree, EPA will in writing inform the South Carolina Department of Health and Environmental Control that its Clean Water Act enforcement case related to unauthorized discharges of dredged and fill material at the Site has been settled and that EPA has no objection to the closure of the state mining permit issued for the Site.

V. NOTICES

28. Unless otherwise specified in this Decree, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed in the manner specified in this Section.

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29. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided in this Section.

30. Notices submitted pursuant to this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

31. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Paul Schwartz
Associate Regional Counsel
United States Environmental Protection Agency
Region 4
61 Forsyth St., SW
Atlanta, GA 30303
Schwartz.Paul@epa.gov

- (2) Mike Wylie
Marine Regulatory and Wetlands Enforcement Section
United States Environmental Protection Agency
Region 4
61 Forsyth St., SW
Atlanta, GA 30303
Wylie.Mike@epa.gov

B. TO THE UNITED STATES:

Letitia J. Grishaw, Section Chief
Environmental Defense Section
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044
Letitia.Grishaw@usdoj.gov

C. TO DEFENDANT:

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Dion Cumbie
C/O Cumbie Realty
108A South Hwy 52
Moncks Corner, SC 29461
dioncumbie71@gmail.com

VI. DISPUTE RESOLUTION

32. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Decree.

33. Informal Dispute Resolution. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations among the parties to this Consent Decree affected by the dispute to attempt to resolve such dispute. The period for negotiations shall not extend beyond thirty (30) days beginning with written notice by one Party to the other Party that a dispute exists, unless agreed to in writing by the parties. The written notice (Notice of Dispute) shall state clearly the matter in dispute and the position of the party providing the Notice of Dispute. Following the 30-day negotiation period, if the Parties are unable to agree upon the meaning or the requirements of this Consent Decree, the position advanced by the United States shall be considered binding unless, within fifteen (15) days after the conclusion of the information negotiation period, the Defendant invokes formal dispute resolution procedures as set forth below.

34. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United

States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

35. The United States shall serve its Statement of Position within forty-five (45) Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

36. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section V (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

37. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

38. Standard of Review

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a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 33 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 33, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree.

39. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 33. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

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VII. FORCE MAJEURE

40. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, and of Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

41. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice orally or by electronic or facsimile transmission to EPA as set forth in Section V (Notices), within seven (7) days of when Defendant first knew that the event might cause a delay. Within fourteen (14) days thereafter, Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant shall include discussion of Defendant's rationale for attributing such delay to a force majeure event if he intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the

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delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

42. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. EPA will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

43. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant in writing of its decision.

44. If Defendant elects to invoke the dispute resolution procedures set forth in Section VI (Dispute Resolution), he shall do so no later than fifteen (15) days after receipt of EPA's notice per § 42. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 39 and 40.

If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

VIII. STIPULATED PENALTIES

45. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section VII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Consent Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

46. After the entry of this Consent Decree, if Defendant fails to timely fulfill any requirement of the Consent Decree, then Defendant shall pay a stipulated penalty to the United States as follows:

- A. For Day 1 up to and including Day 30 of non-compliance \$50.00 per day
- B. For Day 31 up to and including 60 of non-compliance \$100.00 per day
- C. For Day 61 and beyond of non-compliance \$200.00 per day

47. Defendant shall pay any stipulated penalty within thirty (30) Days of receiving the United States' written demand.

48. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

49. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to

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accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

50. Stipulated penalties shall continue to accrue as provided in Paragraph 35 during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within thirty (30) Days of the effective date of the agreement or the receipt of EPA's decision or order.
- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within sixty (60) Days of receiving the Court's decision or order, except as provided in subparagraph c, below.
- c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) Days of receiving the final appellate court decision.

51. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Section IV, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

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52. If Defendant fail to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

53. The payment of penalties and interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

54. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section IX (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendant's violation of this Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

54. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

55. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions. The United States further reserves

all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by the Site, whether related to the violations addressed in this Consent Decree or otherwise.

56. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Site and/or Additional Sites, Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 40.

57. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CWA, 33 U.S.C. § 1251 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

58. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights

of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

59. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XII. COSTS

60. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to the costs incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XIII. PUBLIC PARTICIPATION

61. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. Defendant agrees to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree.

XIV. RETENTION OF JURISDICTION

62. This Court shall retain jurisdiction over this action until termination of this Consent Decree in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or

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execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XV. MODIFICATION

63. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by both Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

XVI. TERMINATION

64. After Defendant has completed the requirements of Section IV (Specific Provisions), and is in satisfactory compliance with all requirements of this Consent Decree and have paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

65. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, such agreement not to be unreasonably withheld, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

XVII. SIGNATORIES/SERVICE

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66. Each undersigned representative of each Defendant and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

67. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XVIII. INTEGRATION

68. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, the Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XIX. FINAL JUDGMENT

69. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant pursuant to Fed. R. Civ. P. 54 and 58.

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XX. APPENDICES

70. The following Appendices are attached to and part of this Consent Decree:

“Appendix 1” is the Site Map;

“Appendix 2” is the Aerial Photograph of the Site;

“Appendix 3” is the Site Diagram Showing Restoration Area and Borrow Pit

“Appendix 4” is Nationwide Permit 32, including Applicable Conditions

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2018.

United States District Judge

ON BEHALF OF THE UNITED STATES:

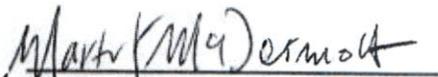
Jeffrey H. Wood
Acting Assistant Attorney General

(Roe)

ON BEHALF OF THE UNITED STATES:

Jeffrey H. Wood
Acting Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

By:



Dated: 8/24-18

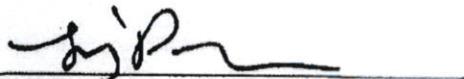
Martin F. McDermott, Attorney
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
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Dated: 8/21/18

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Dated: 7/18/18

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FOR DEPENDANT
[Signature]
Dion Cumber

[Signature]

Dated: 7/26/18

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