

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA, and  
THE STATE OF ILLINOIS,

Plaintiffs,

v.

BIG RIVER SOLAR, LLC,

Defendant.

Civil Action No. 3:22-cv-02659

**COMPLAINT**

Plaintiffs, the United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of Illinois (“State” or “Illinois”), by and through Kwame Raoul, Attorney General of the State of Illinois, on behalf of the People of the State of Illinois on his own motion and upon the request of the Illinois Environmental Protection Agency (“Illinois EPA”), file this Complaint and allege as follows:

**NATURE OF ACTION**

1. This is a civil action for injunctive relief and civil penalties under the Clean Water Act (“CWA”) against Big River Solar, LLC (“Big River” or “Defendant”). During construction of a solar energy facility in White County, Illinois (“the Site”), Defendant failed to comply with the conditions and limitations of a permit issued by Illinois EPA pursuant to 33 U.S.C. § 1342. Violations of such permit conditions can result in excess sediment discharging to nearby waterways, impacting aquatic life and habitats and water quality. As a result of these permit

violations, construction at the Site took place without adequate safeguards designed to prevent discharges of excess sediment to nearby waterways. This action also is brought pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/1 et seq.

### **JURISDICTION, VENUE AND NOTICE**

2. This Court has jurisdiction over the subject matter of this action. 33 U.S.C. §§ 1319(b) and (d); 28 U.S.C. §§ 1331, 1345, and 1355. This Court has jurisdiction over the State's claims pursuant to 28 U.S.C. § 1367 (supplemental jurisdiction), because they are related to the federal claims and form part of the same case or controversy.

3. Venue is proper in this district, because Defendant conducts business in this District and because the violations occurred in this District. 33 U.S.C. § 1319(b); 28 U.S.C. §§ 1391 and 1395.

4. The United States has provided notice of the commencement of this action to the State of Illinois, which is a co-plaintiff in this action, in accordance with 33 U.S.C. § 1319(b).

5. Authority to bring this action is vested in the United States Department of Justice under 28 U.S.C. §§ 516 and 519.

6. Authority to bring this action is vested in the Illinois Attorney General by Section 4 of the Illinois Attorney General Act, 15 ILCS 205/4, and Section 42(d) and (e) of the Illinois Environmental Protection Act, 415 ILCS 5/42(d) and (e).

### **PLAINTIFFS**

7. Plaintiff United States of America, by the undersigned attorneys, is acting on behalf of EPA.

8. Plaintiff State is acting through the Illinois Attorney General on his own motion and at the request of Illinois EPA.

## **DEFENDANT**

9. Defendant Big River is a limited liability company formed in Delaware, with its principal place of business in Chicago. Because it is an association, Big River is a “person” as defined in 33 U.S.C. § 1362(5), 40 C.F.R. § 122.2, 415 ILCS 5/3.315, and 35 Ill. Adm. Code 301.355.

10. Big River is registered as a foreign limited liability company in Illinois.

## **LEGAL AUTHORITY**

### **A. Statutory & Regulatory Background**

11. The Clean Water Act is designed to restore and maintain the chemical, physical and biological integrity of the nation's waters. 33 U.S.C. § 1251(a).

12. To accomplish its objectives, the CWA prohibits the “discharge of any pollutant” by any person except in certain circumstances, such as in compliance with a National Pollutant Discharge Elimination System (“NPDES”) permit issued by EPA or an authorized state. 33 U.S.C. § 1311(a).

13. The CWA defines the term “discharge of a pollutant” as, inter alia, “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12).

14. The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” 33 U.S.C. § 1362(7). “Waters of the United States” has been further defined to include, among other things, waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, and tributaries of such waters. 40 C.F.R. § 122.2 (1993).

15. The CWA defines a “point source” as “any discernable, confined and discrete conveyance... from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14).

16. The CWA requires a permit for stormwater discharges “associated with industrial activity.” 33 U.S.C. § 1342(p).

17. “Industrial activity” includes construction activity that disturbs five acres or more of total land area. 40 C.F.R. § 122.26(b)(14)(x). Construction activity includes “clearing, grading, and excavation.” *Id.*

18. States may issue their own stormwater permits for discharges into navigable waters within their jurisdiction if they are authorized by EPA to do so. 33 U.S.C. § 1342(b).

19. EPA promulgated regulations relating to the control of stormwater discharges at 40 C.F.R. § 122.26. Any state-authorized permitting authority must include such requirements in its NPDES permitting program.

20. Persons who discharge or who propose to discharge stormwater “associated with industrial activity” are required to apply for an individual permit or to seek coverage under a promulgated stormwater general permit. *See* 40 C.F.R. §§ 122.21(a), 122.26(c), 122.28, 123.25.

21. Persons who discharge or who propose to discharge stormwater associated with construction activity covered by 40 C.F.R. § 122.26(b)(14)(x) must submit an application 90 days before the date construction is to commence, or by the deadlines provided by the terms of any applicable general permit. 40 C.F.R. § 122.21(c). Application under a general permit is made by submitting a Notice of Intent (“NOI”), and submission of a complete and timely NOI provides the discharger with coverage under the general permit by the date specified in the permit unless notified otherwise by EPA. *See* 40 C.F.R. § 122.28(b)(2).

22. The Illinois Environmental Protection Act prohibits causing, threatening, or allowing the discharge of any contaminant into waters of the State without an NPDES permit for

point source discharges issued by the Illinois EPA, or in violation of any term or condition imposed by such NPDES permit. 415 ILCS 5/12(f).

23. The Illinois Pollution Control Board Regulations prohibit discharge of any contaminant or pollutant by any person into the waters of the State from a point source or into a well, except as in compliance with the provisions of the Illinois Environmental Protection Act, Board regulations, the CWA, and the provisions and conditions of the NPDES permit issued to the discharger. 35 Ill. Adm. Code 309.102(a).

24. Section 3.165 of the Illinois Environmental Protection Act, 415 ILCS 5/3.165, provides that “contaminant” is any solid or gaseous matter, any odor, or any form of energy, from whatever source. Section 3.550 of the Illinois Environmental Protection Act, 415 ILCS 5/3.550, provides that “waters” means all accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon Illinois.

25. The State of Illinois has incorporated all terms, and definitions thereof, used in connection with NPDES requirements which have been defined in the CWA or regulations adopted thereunder, unless specifically noted otherwise. 35 Ill. Adm. Code 301.325.

#### B. The Illinois Construction General Permit

26. At all times relevant to this Complaint, the State of Illinois, through Illinois EPA, was authorized to issue its own permits for the discharge of stormwater associated with construction activity.

27. On August 3, 2018, Illinois EPA issued General NPDES Permit No. ILR10 for Storm Water Discharges from Construction Site Activities (“Illinois Permit”). The Illinois

Permit became effective on August 3, 2018, and expires on July 31, 2023. The Illinois Permit was applicable at all times relevant to this Complaint.

28. A person must obtain coverage under the Illinois Permit prior to discharging stormwater if that person engages in construction that meets the definition of “industrial activity” pursuant to 40 C.F.R. § 122.26(b)(14)(x) and 35 Ill. Adm. Code 301.325.

29. A permittee obtains coverage under the Illinois Permit by submitting a complete NOI to Illinois EPA. Illinois Permit, Parts I.C.1., II.A.1. The NOI must be signed and certified. *Id.*, Part II.C and Part VI.G. Unless notified to the contrary by Illinois EPA, a permittee is authorized to discharge stormwater associated with construction activity in accordance with the requirements of the Illinois Permit 30 days following Illinois EPA’s receipt of the NOI and required attachments. *Id.*

30. With the NOI, a permittee must submit a site-specific SWPPP that complies with the requirements in Part IV of the Illinois Permit. In general, the SWPPP describes how the permittee intends to comply with the terms and conditions of the Illinois Permit at its construction site. The SWPPP must be signed and certified. *Id.*, Parts IV.F and VI.G.

31. Part IV.D of the Illinois Permit sets forth the content required for a SWPPP. Among other things, each SWPPP must include: a description of the site and planned construction activities; procedures for inspections; and identification of each contractor and subcontractor responsible for implementing each measure under the SWPPP. *Id.*, Part IV.D. The SWPPP must be maintained on site at all times, along with any revisions.

32. The SWPPP must be signed in accordance with Part VI.G of the Illinois Permit, and include a signed certification statement by the general contractor and any contractor or subcontractor identified in the SWPPP as responsible for implementing a measure under the

SWPPP. *Id.*, Part IV.F & VI.G. Contractors or subcontractors must sign the certification statement prior to undertaking work at the Site. *Id.*

33. Part IV.D.2 of the Illinois Permit sets forth the minimum components for controls to be designed and included in a SWPPP, and implemented at a site, including, among others: erosion and sediment controls that control the volume and velocity of stormwater; structural practices to limit runoff and discharge of pollutants from exposed areas; pollution prevention practices to minimize exposure of waste to precipitation; and establishment of natural buffers to protect nearby waterways.

34. Under the Illinois Permit, the SWPPP must also be amended to identify any new contractors or subcontractors that will implement a SWPPP measure. Illinois Permit, Part IV.C. Any revisions of the SWPPP must be signed in accordance with Part IV.G of the Illinois Permit.

35. Part IV.D.4 of the Illinois Permit sets forth requirements for site inspections. Among other requirements, site inspections must be performed by “qualified personnel” every seven days; include disturbed areas that have not been finally stabilized, structural measures, and locations where vehicles enter or exit the site; and identify whether stormwater controls are operating correctly.

36. The Illinois Permit defines “qualified personnel” as a person knowledgeable in the principles and practices of erosion and sediment control measures who possesses the skills to assess conditions at the site that could impact stormwater quality and to assess the effectiveness of control measures selected to control the quality of discharges from the construction activity, such as a licensed Professional Engineer or a Certified Professional in Erosion and Sediment Control. Part IV.D.4, Illinois Permit.

37. Each inspection must be documented in a report that includes, among others, the following information: the name and qualifications of personnel making the inspection; major observations relating to the implementation of the SWPPP; whether controls are operating correctly; and actions taken to ensure erosion and control measures are operating correctly. Each report must be retained on site and signed and certified in accordance with Section VI.G of the Illinois Permit. *Id.*

### **ENFORCEMENT AUTHORITIES**

38. If a state NPDES program is approved pursuant to 33 U.S.C. § 1342(b), the Administrator of EPA retains the authority to take enforcement action under 33 U.S.C. § 1319. *See* 33 U.S.C. § 1342(i).

39. The CWA authorizes the Administrator of EPA “to commence a civil action for appropriate relief, including a permanent or temporary injunction,” when any person is in violation of 33 U.S.C. §§ 1311, 1318, or of any condition or limitation in a permit issued pursuant to 33 U.S.C. § 1342, including state permits. 33 U.S.C. § 1319(b).

40. The CWA provides, in part, that any person who violates 33 U.S.C. §§ 1311, 1318, or any condition or limitation in a permit issued pursuant to 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$59,973 per day for each such violation occurring after November 2, 2015, where penalties are assessed on or after January 12, 2022. 33 U.S.C. § 1319(d); 87 Fed. Reg. 1676 (Jan. 12, 2022) (codified at 40 C.F.R. pt. 19).

41. The Illinois Environmental Protection Act authorizes the Illinois Attorney General to commence a civil action to recover penalties and to restrain violations of the Illinois Environmental Protection Act, any permit or term or condition of a permit, or to require such



other actions as may be necessary to address violations of any permit or term or condition of a permit. 415 ILCS 5/42(d) and (e).

42. The Illinois Environmental Protection Act provides that any person that violates Section 12(f) of the Illinois Environmental Protection Act or any NPDES permit or term or condition thereof shall be liable for a civil penalty not to exceed \$10,000 per day of violation. 415 ILCS 5/42(b)(1).

### **ALLEGATIONS**

#### **A. Construction at the Site**

43. The Site consists of over 1000 acres of previously undeveloped agricultural land, located at the intersection of County Road 1200 North and County Road 400 East in White County, Illinois.

44. Sevenmile Creek, which eventually flows to the Ohio River, is located just north of the Site.

45. Defendant is the owner of the Site, and has been the owner of the Site since at least November 1, 2020.

46. From approximately March 1, 2021 through the present, the Site is being developed into an approximately 150-megawatt solar farm consisting of solar panel arrays, inverters, transformers and other mechanical equipment, perimeter fencing, and associated roads for service, maintenance, and access.

47. Defendant retained Swinerton Builders, through its Swinerton Renewable Energy division (“Swinerton”), as the general contractor for the Site.

48. At some time best known to Defendant, SOLV Energy, LLC took over from Swinerton as the general contractor for the Site.

49. The Site project has two phases. Phase 1, which began no earlier than November 1, 2020, involves construction of an 80-megawatt single axis tracker photovoltaic site on between 500 and 600 acres. Phase 2, which began no earlier than June 2021, involves construction of a 69-megawatt solar facility on approximately 630 acres.

50. Between approximately March 1, 2021 through the present, contractors hired by Defendant (including Swinerton), and their subcontractors, performed and are performing the following activities on the Site: clearing vegetation; stumping and removing brush; grading and regrading the land; constructing solar panel arrays, a substation, roads, and perimeter fencing; installing electrical cables, inverters, and other mechanical equipment; and earthworks.

51. The activities described in Paragraph 50 are “construction” and “construction activity” within the meaning of 40 C.F.R. § 122.26(b)(14)(x), 35 Ill. Adm. Code 301.265, 35 Ill. Adm. Code 301.325, and the Illinois Permit, Part VIII.

52. From approximately March 1, 2021 through the present, Defendant directed and controlled construction activity at the Site.

53. At the Site, Defendant engaged in construction activities that resulted in the disturbance of at least five acres.

#### B. Permit Coverage for the Site

54. On or about December 30, 2020, an NOI was submitted to Illinois EPA for coverage under the Illinois Permit for construction activity during Phase 1 at the Site (“the December 2020 NOI”), along with a SWPPP dated December 22, 2020 (“the December 2020 SWPPP”).

55. The December 2020 NOI identified approximately 500 acres to be disturbed. The December 2020 NOI stated the closest receiving water body to which the Site would discharge was Sevenmile Creek.

56. The December 2020 NOI listed Swinerton as the contractor/operator for the Site and a Swinerton employee as the “SWPPP contact.”

57. The December 2020 SWPPP listed Swinerton as the contractor for the Site and identified a Swinerton employee based in California as the “erosion control supervisor” and the 24-hour contact for the Site. Swinerton is the only contractor or party identified as responsible for implementing SWPPP measures in the December 2020 SWPPP.

58. The December 2020 SWPPP identified wetlands on the Site.

59. A representative of Defendant electronically signed and certified the December 2020 NOI and the December 2020 SWPPP.

60. In a letter dated January 29, 2021, Illinois EPA granted coverage and assigned Permit # ILR10ZA5C for the Site.

61. On or about June 1, 2021, an NOI was submitted to Illinois EPA for coverage under the Illinois Permit for construction activity during Phases 1 and 2 at the Site (“the June 2021 NOI”), along with a revised SWPPP, with the last revision dated May 24, 2021 (“the May 2021 SWPPP”).

62. The June 2021 NOI identified approximately 1129 acres to be disturbed and stated that the construction period is expected to conclude no later than June 30, 2023.

63. The June 2021 NOI listed Swinerton as the contractor/operator for the Site and a Swinerton employee as the “SWPPP contact.”

64. The May 2021 SWPPP included the information identified in Paragraphs 57-58.

65. A representative of Defendant electronically signed and certified the June 2021 NOI and the May 2021 SWPPP.

66. Neither the December 2020 SWPPP nor the May 2021 SWPPP included certification statements by a contractor or subcontractor.

67. Based on the information reported in the June 2021 NOI and available on Illinois EPA's website, and on information and belief, construction is ongoing at the Site.

68. On March 23, 2022, Defendant submitted a new NOI for the Site identifying SOLV Energy, LLC as a contractor.

69. From at least January 29, 2021 through the present, Defendant has been a "permittee" within the meaning of the Illinois Permit, responsible for compliance with the Illinois Permit, and implementation of the SWPPP, at the Site.

#### C. Investigations of the Big River Site

70. On April 20, 2021, EPA personnel and contractors ("EPA inspectors") inspected the Site to determine its compliance with the Illinois Permit and the CWA. During the inspection, EPA inspectors did a walk-through of the Site and reviewed and obtained copies of Site documentation, including the on-Site SWPPP, records of amendments to the SWPPP, and self-inspection reports.

71. At the time of the inspection, the SWPPP maintained on the Site, and provided to the EPA inspectors as the current SWPPP, had a last revision date of January 12, 2021 ("January 2021 SWPPP"). An Erosion Control Plan, a BMP Installation Log, and a SWPPP Amendment Log were attached, among other things, to the January 2021 SWPPP.

72. At the time of the inspection, the January 2021 SWPPP maintained on the Site did not include any certification statements by contractors or subcontractors.

73. During the inspection, the EPA inspectors observed sediment track-out from construction entrances onto county roads with drainage ditches alongside them.

74. During the inspection, EPA inspectors observed evidence that installed structural controls, including silt fences identified in the January 2021 SWPPP, had failed to prevent concentrated stormwater flows into a conveyance that drains to Sevenmile Creek.

75. During the inspection, EPA inspectors observed that dumpsters containing construction waste did not have covers to limit exposure to precipitation.

76. During the inspection, EPA inspectors observed evidence of soil disturbance within a buffer between a wetland area and disturbed areas of the Site, as well as truck and machinery tire tracks in the wetland area.

77. During the inspection, EPA inspectors were informed by on-Site personnel that self-inspections were conducted by personnel who did not have required qualifications.

78. At the time of the EPA inspection, on-Site personnel carrying out stormwater self-inspections intended to comply with measures in the SWPPP were employed by Live Action, a contractor or subcontractor that was not identified in the SWPPP.

79. At the time of the inspection, EPA inspectors informed Site representatives of their preliminary observations.

80. On May 19, 2021, EPA requested that Defendant and Swinerton provide additional information regarding stormwater compliance at the Site for the purpose of determining compliance with the CWA and the Illinois Permit, including all SWPPPs and SWPPP revisions as of that date. This request was pursuant to EPA's authority under 33 U.S.C. § 1318.

81. Defendant and Swinerton provided EPA with additional information regarding the Site in response to those requests, including SWPPPs, SWPPP amendments, self-inspection reports, aerial and Site photos, corrective action logs, rainfall logs, written correspondence, and NOIs.

82. None of the SWPPPs or SWPPP amendments provided by Defendant or Swinerton in response to those requests contained certification statements by Swinerton prior to May 6, 2021.

83. The self-inspection reports provided by Defendant and Swinerton in response to those requests, and obtained by EPA during its April inspection, showed that in many instances the inspectors at the Site were not “qualified personnel” within the definition of the Illinois Permit; were employed by Live Action, a contractor or subcontractor that was not identified in the SWPPP; or both. None of the self-inspection reports included the qualifications of the personnel conducting the inspection, and some did not document actions taken to ensure that control measures were operating correctly. None of the reports were signed and certified in the manner required by Part VI.G of the Illinois Permit.

#### D. Permit Violations

84. On at least April 20, 2021, Defendant failed to design, install or maintain effective stormwater controls that complied with the requirements of Part IV.D.2 of the Illinois Permit. Silt fences at the Site were insufficient to minimize stormwater flow from leaving exposed areas of the Site; the natural buffer between the wetland and disturbed areas of the Site was disturbed and not maintained; sediment track-out was not minimized or removed; and construction waste was not maintained to minimize exposure to precipitation.

85. Between at least March 1, 2021 and May 2021, Defendant failed to identify in the SWPPP all contractors or subcontractors responsible for implementing each measure in the SWPPP as required by Part IV.F of the Illinois Permit, because it did not identify Live Action in the SWPPP. In addition, between at least March 1, 2021 and May 6, 2021, Defendant failed to include a certification statement from Swinerton in the SWPPP, as required by Part IV.F of the Illinois Permit.

86. On numerous occasions since March 1, 2021, Defendant failed to meet conditions and limitations related to inspections and inspection reports in Part IV.D.4 of the Illinois Permit. Inspectors at the Site were not “qualified personnel” within the definition of the Illinois Permit, self-inspection reports did not include all the information required by Part IV.D.4.d, and those reports were not signed and certified in compliance with Part VI.G of the Illinois Permit.

#### **CLAIM FOR RELIEF**

87. Plaintiffs reallege and incorporate by reference the allegations in Paragraphs 1 through 86.

88. As described in Paragraphs 84 through 86, Defendant failed to comply with the conditions and limitations of the Illinois Permit at the Site.

89. Each failure to comply with the Illinois Permit is a separate violation of the conditions or limitations of the Illinois Permit by Defendant.

90. Unless enjoined, Defendant will continue to violate the conditions and limitations of the Illinois Permit at the Site.

91. As described in Paragraphs 38 - 40, for each day of violation of a condition or limitation of the Illinois Permit referred to in this Claim for Relief, the United States is entitled to civil penalties and injunctive relief, pursuant to 33 U.S.C. § 1319.

92. As described in Paragraphs 41 - 42, for each day of violation of a condition or limitation of the Illinois Permit referred to in this Claim for Relief, the State is entitled to civil penalties and injunctive relief, pursuant to 415 ILCS 5/42(b)(1), (d) and (e).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, the United States of America and the State of Illinois, respectfully request that the Court grant the following relief:

1. Order Defendant to comply with the terms of the CWA, the Illinois Environmental Protection Act and Illinois Pollution Control Board regulations, and the conditions of any applicable General Permits for Discharge of Stormwater Associated with Construction Activities at the Site;
2. Permanently enjoin Defendant from discharging pollutants into any water of the United States except in compliance with a permit issued pursuant to 33 U.S.C. § 1342;
3. Order Defendant to pay civil penalties to the United States, pursuant to 33 U.S.C. § 1319(d), for each day of violation of the CWA;
4. Order Defendant to pay civil penalties to the State for each day of violation of the Illinois Environmental Protection Act;
5. Award the United States and the State their costs and disbursements in this action; and
6. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

TODD KIM  
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/s/ Sheila McAnaney

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