

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO OR OAKLAND DIVISIONS

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UNITED STATES OF AMERICA,
THE STATE OF ILLINOIS, and
ALABAMA DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT

Plaintiffs,

v.

Civil No. 3:24-cv-00274

SWINERTON BUILDERS, f/d/b/a SWINERTON
RENEWABLE ENERGY and d/b/a SWINERTON
BUILDERS, CORPORATION and SWINERTON
BUILDERS, INC.

Defendant.

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CONSENT DECREE

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1 Plaintiffs United States of America, on behalf of the United States Environmental
2 Protection Agency (“EPA”), the State of Illinois (“Illinois”), on behalf of the Illinois
3 Environmental Protection Agency (“Illinois EPA”), the State of Alabama and the
4 Alabama Department of Environmental Management (“Alabama” or “ADEM”) have
5 filed a complaint in this action concurrently with this Consent Decree, alleging that
6 Defendant, Swinerton Builders f/d/b/a Swinerton Renewable Energy and d/b/a Swinerton
7 Builders, Corporation and Swinerton Builders, Inc. (“Swinerton” or “Defendant”),
8 violated Section 301 of the Clean Water Act (“Act”), 33 U.S.C. § 1311, the terms and
9 conditions of Clean Water Act permits, the Illinois Environmental Protection Act, 415
10 ILCS 5/1 et seq., and the Alabama Water Pollution Control Act, Ala. Code §§ 22-22-1
11 through 22-22-14 as amended.

12 The Complaint against Defendant alleges that Defendant violated the
13 conditions and limitations in NPDES permits during construction of solar energy
14 facilities in White County, Illinois; Perry County, Illinois; and Chambers County,
15 Alabama, resulting in construction at those sites taking place without adequate safeguards
16 designed to prevent discharges of excess sediment in stormwater to nearby waterways. In
17 addition, the Complaint alleges that Defendant discharged sediment in stormwater
18 without authorization by a NPDES permit from the site in Alabama and an additional site
19 in American Falls, Idaho.

20 As of December 23, 2021, Defendant, and its related companies, no longer
21 construct solar energy facilities, because an unrelated third party purchased Swinerton’s
22 business unit and assets related to the construction of solar energy facilities.

23 The Consent Decree may be used in any subsequent State enforcement
24 action or State permit proceeding as proof of a past adjudication of violation of the
25 Illinois Environmental Protection Act and Illinois Pollution Control Board regulations for
26 all violations related to the Illinois sites alleged in the Complaint in this matter, for
27 purposes of Sections 39 and 42 of the Illinois Environmental Protection Act, 415 ILCS
28 5/39 and 42 (2020).

1 Defendant does not admit any liability to the United States or the States
2 arising out of the transactions or occurrences alleged in the Complaint.

3 The Parties recognize, and the Court by entering this Consent Decree finds,
4 that this Consent Decree has been negotiated by the Parties in good faith and will avoid
5 litigation between among the Parties and that this Consent Decree is fair, reasonable, and
6 in the public interest.

7 NOW, THEREFORE, before the taking of any testimony, without the
8 adjudication or admission of any issue of fact or law except as provided in Section I, and
9 with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND
10 DECREED as follows:

11 **I. JURISDICTION AND VENUE**

12 1. This Court has jurisdiction over the subject matter of this action, pursuant to
13 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and Sections 309 of the Act, 33 U.S.C.
14 § 1319(b), and over the Parties. Venue lies in this District pursuant to 33 U.S.C. §
15 1319(b), and 28 U.S.C. § 1391, because Defendant resides, is located, and conducts
16 business, in this judicial district.

17 2. For purposes of this Decree, or any action to enforce this Decree, Defendant
18 consents to the Court's jurisdiction over this Decree and any such action and over
19 Defendant and consents to venue in this judicial district.

20 3. For purposes of this Consent Decree, Defendant agrees that the Complaint
21 states claims upon which relief may be granted pursuant to Section 301 of the Act, 33
22 U.S.C. § 1311, Section 42(d) and (e) of the Illinois Environmental Protection Act, and
23 ADEM Admin. Code r. 225-6-6-.03(1), (2).

24 **II. APPLICABILITY**

25 4. The obligations of this Consent Decree apply to and are binding upon the
26 United States, the States, and upon Defendant and any successors, assigns, or other
27 entities or persons otherwise bound by law.
28

1 “EPA” means the United States Environmental Protection Agency and any of its
2 successor departments or agencies;

3 “Illinois EPA” means the State of Illinois Environmental Protection Agency;

4 “Illinois” means the State of Illinois, acting on behalf of Illinois EPA;

5 “Mitigation Actions” means all actions specified in Paragraphs 14-15 and
6 Appendix A to this Consent Decree.

7 “Paragraph” means a portion of this Decree identified by an Arabic numeral;

8 “Parties” means the United States, the States, and Defendant;

9 “Plaintiffs” means the United States and the States;

10 “Section” means a portion of this Decree identified by a Roman numeral;

11 “States” means Alabama and Illinois;

12 “United States” means the United States of America, acting on behalf of EPA.

13 **IV. CIVIL PENALTY**

14 8. Within 30 Days after the Effective Date, Defendant shall pay the sum of
15 \$2,300,000 as a civil penalty, together with interest accruing from August 23, 2023, at the
16 rate specified in 28 U.S.C. § 1961 as of August 23, 2023. The civil penalty payment will
17 be divided between the Plaintiffs as specified below.

18 9. Defendant shall pay a civil penalty of \$1,614,600, together with interest, to
19 the United States by FedWire Electronic Funds Transfer (“EFT”) to the DOJ account, in
20 accordance with instructions provided to Defendant by the Financial Litigation Unit
21 (“FLU”) of the United States Attorney’s Office for the Northern District of California
22 after the Effective Date. The payment instructions provided by the FLU will include a
23 Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to
24 identify all payments required to be made in accordance with this Consent Decree. The
25 FLU will provide the payment instructions to:

26 SheriAnn Murphy
27 Frank Foellmer
28 Swinerton Builders
2001 Clayton Road

1 7th Floor – Legal
2 Concord, CA 94520
3 shmurphy@swinerton.com
4 ffoellmer@swinerton.com
415-984-1272

5 on behalf of Defendant. Defendant may change the individual to receive payment
6 instructions on its behalf by providing written notice of such change to DOJ and EPA in
7 accordance with Section XIII (Notices).

8 10. At the time of payment, Defendant shall send notice that payment has been
9 made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov or via regular mail at EPA
10 Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268;
11 (ii) to DOJ via email or regular mail in accordance with Section XIII; and (iii) to the EPA
12 regions in accordance with Section XIII. Such notice shall state that the payment is for
13 the civil penalty owed pursuant to the Consent Decree in *United States et al. v. Swinerton*
14 *Builders*, and shall reference the civil action number, CDCS Number and DOJ case
15 number 90-5-1-1-12642.

16 11. No later than 30 Days after the Effective Date, Defendant shall pay a civil
17 penalty of \$540,500, together with interest, to Alabama by certified check, referencing
18 this civil action, to the address listed below.

19 Alabama Department of Environmental Management
20 Montgomery Office
21 Attn: Office of General Counsel
22 1400 Coliseum Boulevard
Montgomery, AL 36110-2400

23 12. No later than 30 Days after the Effective Date, Defendant shall pay a civil
24 penalty of \$144,900, together with interest, to Illinois by certified check or money order
25 payable to Illinois EPA for deposit into the Environmental Protection Trust Fund
26 (“EPTF”). Payment shall be sent by first class mail and delivered to:

27 Illinois Environmental Protection Agency
28 Fiscal Services
1021 North Grand Avenue East

1 P.O. Box 19276
2 Springfield, IL 62794-9276

3 The case name and case number shall appear on the face of the certified check or money
4 order. A copy of the certified check or money order and any transmittal letter shall be
5 sent to:

6 Rachel Medina
7 Assistant Attorney General
8 Environmental Bureau
9 500 South Second Street
10 Springfield, IL 62701

11 13. Defendant shall not deduct any penalties paid under this Decree pursuant to
12 this Section or Section VII (Stipulated Penalties) in calculating its federal or State income
13 tax.

14 V. INJUNCTIVE RELIEF

15 14. Idaho Mitigation Action. Defendant shall implement the Idaho Mitigation
16 Action in accordance with Appendix A.

17 15. Alabama Mitigation Action.

18 a. Within 60 Days of the Effective Date, Defendant shall purchase
19 14,020 stream credits from a mitigation bank approved by the U.S.
20 Army Corps of Engineers located within the State of Alabama and the
21 watersheds identified by the Hydrologic Unit Code 0313, 0314, or
22 0314 (the "Primary Area"); or, if insufficient credits are available in
23 the Primary Area elsewhere within the State of Alabama.

24 b. Within 90 Days of the Effective Date, Defendant shall submit
25 documentation to DOJ, EPA Region 4, and Alabama of Defendant's
26 purchase of stream credits consistent with this Paragraph.

27 16. Mitigation Action Certifications. With regard to each Mitigation Action,
28 Defendant certifies the truth and accuracy of each of the following:

a. That, as of the date of executing this Decree, Defendant is not

1 required to perform or develop the Mitigation Action by any federal,
2 state, or local law or regulation and is not required to perform or
3 develop the Mitigation Action by agreement, grant, or as injunctive
4 relief awarded in any other action in any forum;

5 b. That the Mitigation Action is not an action that Defendant was
6 planning or intending to construct, perform, or implement other than
7 in settlement of the claims resolved in this Decree;

8 c. That Defendant has not received and will not receive credit for the
9 Mitigation Action in any other enforcement action; and

10 d. That Defendant shall neither generate nor use any pollutant reductions
11 from the Mitigation Action as netting reductions, pollutant offsets, or
12 to apply for, obtain, trade, or sell any pollutant reduction credits.

13 e. That any funding provided by Defendants to third parties to satisfy
14 obligations of the Mitigation Action will be provided under a written
15 agreement that restricts its use to the purposes described in the
16 relevant Appendix.

17 17. In connection with any communication to the public or to shareholders
18 regarding Defendant's actions or expenditures relating in any way to the Mitigation
19 Actions in this Consent Decree, Defendant shall include prominently in the
20 communication the information that the actions and expenditures were required by this
21 Consent Decree.

22 18. Approval of Deliverables. After review of any plan, report, or other item that
23 this Decree requires to be submitted for approval pursuant to this Paragraph, EPA shall in
24 writing: a) approve the submission; b) approve the submission upon specified conditions;
25 c) approve part of the submission and disapprove the remainder; or d) disapprove the
26 submission.

27 19. If the submission is approved pursuant to Paragraph 18.a, Defendant shall
28 take all actions required by the plan, report, or other document, in accordance with the

1 schedules and requirements of the plan, report, or other document, as approved. If the
2 submission is conditionally approved or approved only in part, pursuant to Paragraph
3 18.b or 18.c, Defendant shall, upon written direction from EPA, take all actions required
4 by the approved plan, report, or other item that EPA determines are technically severable
5 from any disapproved portions.

6 20. If the submission is disapproved in whole or in part pursuant to Paragraph
7 18.c or 18.d, Defendant shall, within 45 Days or such other time as the United States and
8 Defendant agree to in writing, correct all deficiencies and resubmit the plan, report, or
9 other item, or disapproved portion thereof, for approval, in accordance with the preceding
10 Paragraphs. If the resubmission is approved in whole or in part, Defendant shall proceed
11 in accordance with the preceding Paragraph.

12 21. If a resubmitted plan, report, or other item, or portion thereof, is disapproved
13 in whole or in part, EPA may again require Defendant to correct any deficiencies, in
14 accordance with the preceding Paragraphs, or may itself correct any deficiencies.

15 22. If Defendant elects to invoke Dispute Resolution as set forth in Section IX
16 (Dispute Resolution) concerning a decision by EPA to disapprove, approve on specified
17 conditions, or modify a deliverable, Defendant shall do so by sending a Notice of Dispute
18 in accordance with Paragraph 52 within 30 Days (or such other time as the Parties agree
19 to in writing) after receipt of the applicable decision.

20 23. Any stipulated penalties applicable to the original submission, as provided in
21 Section VII, shall accrue during the 45-Day period or other specified period, but shall not
22 be payable unless the resubmission is untimely or is disapproved in whole or in part;
23 provided that, if the original submission was so deficient as to constitute a material
24 breach of Defendant's obligations under this Decree, the stipulated penalties applicable to
25 the original submission shall be due and payable notwithstanding any subsequent
26 resubmission.

27 24. Permits. Where any obligation under this Section or the Appendices
28 requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall

1 submit timely and complete applications and take all other actions necessary to obtain all
2 such permits or approvals. Defendant may seek relief under the provisions of Section
3 VIII (Force Majeure) for any delay in the performance of any such obligation resulting
4 from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill
5 such obligation, if Defendant has submitted timely and complete applications and has
6 taken all other actions necessary to obtain all such permits or approvals.

7 VI. REPORTING REQUIREMENTS

8 25. Defendant shall submit the following reports by electronic mail to DOJ and
9 EPA Region 10 at the addresses set forth in Section XIII (Notices):

- 10 a. **Semiannual Reports.** Defendant shall submit semi-annual reports for
11 the preceding six months by January 31st and July 31st of the first and
12 second calendar year following the Effective Date. Each semi-annual
13 report must include the status and progress of the Idaho Mitigation
14 Action required under Section V, including, at a minimum, the
15 following information provided to Defendant by the entity(ies)
16 implementing the Idaho Mitigation Action: a narrative description of
17 activities undertaken; the status of any design or construction work
18 undertaken as part of the Idaho Mitigation Action; and a summary of
19 Mitigation Funds expended since the previous report.
- 20 b. **Annual Reports.** After the first two years of semiannual reporting
21 under subparagraph (a), until the termination of this Consent Decree,
22 Defendant shall submit by January 31st of each year an annual report
23 for the preceding twelve months that includes the status and progress
24 of the Idaho Mitigation Action required under Section V, including, at
25 a minimum: a narrative description of activities undertaken; status of
26 any design or construction work undertaken as part of the Idaho
27 Mitigation Action; and a summary of Mitigation Funds expended
28 since the previous report.

1 c. The report shall also include a description of any non-compliance with
2 the requirements of this Consent Decree and an explanation of the
3 violation's likely cause and of the remedial steps taken, or to be taken,
4 to prevent or minimize such violation. If the cause of a violation
5 cannot be fully explained at the time the report is due, Defendant shall
6 so state in the report. Defendant shall investigate the cause of the
7 violation and shall then submit an amendment to the report, including
8 a full explanation of the cause of the violation, within 30 Days of the
9 Day Defendant becomes aware of the cause of the violation. Nothing
10 in this Paragraph or the following Paragraph relieves Defendant of its
11 obligation to provide the notice required by Section VIII (Force
12 Majeure).

13 26. Each report submitted by Defendant under this Section shall be signed by an
14 official of the submitting party and include the following certification:

15 I certify under penalty of perjury that this document and all attachments were
16 prepared under my direction or supervision in accordance with a system designed
17 to assure that qualified personnel properly gather and evaluate the information
18 submitted. Based on my inquiry of the person or persons who manage the system,
19 or those persons directly responsible for gathering the information, the information
20 submitted is, to the best of my knowledge and belief, true, accurate, and complete.
21 I have no personal knowledge that the information submitted is other than true,
22 accurate, and complete. I am aware that there are significant penalties for
23 submitting false information, including the possibility of fine and imprisonment for
24 knowing violations.

25 27. The reporting requirements of this Consent Decree do not relieve Defendant
26 of any reporting obligations required by the Act or implementing regulations, or by any
27 other federal, state, or local law, regulation, permit, or other requirement.

28 28. Any information provided pursuant to this Consent Decree may be used by
the United States or the States in any proceeding to enforce the provisions of this Consent
Decree and as otherwise permitted by law.

VII. STIPULATED PENALTIES

29. Defendant shall be liable for stipulated penalties to the Plaintiffs for violations of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any schedule or item approved under this Decree pursuant to Paragraph 18, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

30. Late Payment of Civil Penalty. If Defendant fails to pay a civil penalty required to be paid under Section IV (Civil Penalty) when due, Defendant shall pay to the recipient Plaintiff a stipulated penalty of \$18,000 per Day for each Day that the payment is late.

31. Paragraph 15 Compliance.

- a. If Defendant fails to purchase the stream credits within 60 Days from the Effective Date, in accordance with Paragraph 15.a, Defendant shall pay a stipulated penalty of \$15,000 per Day for each Day the wetland credits are not purchased.
- b. If Defendant fails to submit documentation of the stream credits purchase within 90 Days of the Effective Date, in accordance with Paragraph 15.b, Defendant shall pay a stipulated penalty of \$5,000 per Day for each Day such documentation is late.
- c. All stipulated penalties owing under this Paragraph shall be paid 50% to the United States and 50% to Alabama.

32. Appendix A Compliance.

- a. If Defendant fails to commit the Mitigation Funds within 60 Days from the Effective Date, in accordance with Paragraph 1 of Appendix A, Defendant shall pay a stipulated penalty of \$15,000 per Day for each Day the Mitigation Funds are not so committed.
- b. If Defendant fails to implement the Idaho Mitigation Action in

1 accordance with the requirements of Paragraphs 2 and 3 of Appendix
 2 A, Defendant shall pay a stipulated penalty of \$15,000 per Day per
 3 violation.

4 c. If Defendant fails to timely submit proposed alternative projects in
 5 accordance with Paragraph 4 of Appendix A, Defendant shall pay a
 6 stipulated penalty of \$5,000 per Day for each Day that the proposal is
 7 late.

8 d. If Defendant submits proposed alternative projects that do not meet
 9 the criteria in Paragraph 4 of Appendix A, Defendant shall pay a
 10 stipulated penalty of \$5,000 per Day for each Day that Defendant fails
 11 to submit adequate proposals.

12 e. If Defendant fails to implement an alternative Mitigation Action
 13 approved by EPA pursuant to Paragraph 4 of Appendix A, Defendant
 14 shall pay a stipulated penalty of \$15,000 per Day per violation.

15 f. All stipulated penalties owing under this Paragraph shall be paid to
 16 the United States.

17 33. Reporting Requirements. The following stipulated penalties shall accrue per
 18 violation per Day for each violation of the reporting requirements of Section VI:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th Day
\$4,000	15th through 30th Day
\$6,000	31st Day and beyond

23 Defendant shall pay any stipulated penalty due under this paragraph to the United States.

24 34. Other Non-Compliance. The following stipulated penalties shall accrue per
 25 violation per Day for each and any other violation of any requirement of this Consent
 26 Decree not specified in Paragraphs 30-33:

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
--------------------------------------	--------------------------------

\$2,000	1st through 14th Day
\$4,000	15th through 30th Day
\$6,000	31st Day and beyond

Defendant shall pay any stipulated penalty due under this paragraph to the United States (50%), Illinois (25%), and Alabama (25%).

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

36. Defendant shall pay any stipulated penalty within 30 Days of receiving a written demand from an affected Plaintiff. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiffs.

37. Any Plaintiff may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

38. 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 of the Parties or by a decision of EPA or the applicable State that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the relevant Plaintiffs within 30 Days of the effective date of the agreement or the receipt of EPA’s or the State’s decision or order.
- b. If the dispute is appealed to the Court and the United States or the applicable State prevails in whole or in part, Defendant shall pay all

1 accrued penalties determined by the Court to be owing, together with
2 interest, within 60 Days of receiving the Court's decision or order,
3 except as provided in subparagraph c, below.

4 c. If any Party appeals the District Court's decision, Defendant shall pay
5 all accrued penalties determined to be owing, together with interest,
6 within 15 Days of receiving the final appellate court decision.

7 39. Defendant shall pay stipulated penalties owing to the United States in the
8 manner set forth in Paragraph 8 and with the confirmation notices required by Paragraph
9 10, except that the transmittal letter shall state that the payment is for stipulated penalties
10 and shall state for which violation(s) the penalties are being paid.

11 40. Defendant shall pay stipulated penalties owing to Alabama in accordance
12 with the procedures in Paragraph 11.

13 41. Defendant shall pay stipulated penalties owing to Illinois in accordance with
14 the procedures in Paragraph 12.

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

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

23 44. Non-Exclusivity of Remedy. Stipulated penalties are not the United States'
24 exclusive remedy for violations of this Consent Decree. Subject to the provisions of
25 Section XI (Effect of Settlement/Reservation of Rights), the United States expressly
26 reserves the right to seek any other relief it deems appropriate for Defendant's violation
27 of this Decree or applicable law, including but not limited to an action against Defendant
28 for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or

1 contempt. However, the amount of any statutory penalty assessed for a violation of this
2 Consent Decree shall be reduced by an amount equal to the amount of any stipulated
3 penalty assessed and paid pursuant to this Consent Decree.

4 **VIII. FORCE MAJEURE**

5 45. “Force majeure,” for purposes of this Consent Decree, means any event
6 arising from causes beyond the control of Defendant, of any entity controlled by
7 Defendant, or of Defendant’s contractors, that delays or prevents the performance of any
8 obligation under this Consent Decree despite Defendant’s best efforts to fulfill the
9 obligation. Given the need to protect public health and welfare and the environment, the
10 requirement that Defendant exercise “best efforts to fulfill the obligation” includes using
11 best efforts to anticipate any potential force majeure event and best efforts to address the
12 effects of any potential force majeure event (a) as it is occurring and (b) following the
13 potential force majeure, such that any delay or non-performance is, and any adverse
14 effects of the delay or non-performance are, minimized to the greatest extent possible.
15 “Force majeure” does not include financial inability to perform any obligation under this
16 Consent Decree.

17 46. If any event occurs for which Defendant will or may claim a force majeure,
18 Defendant shall provide notice by email to the relevant EPA region as set forth in Section
19 XIII and, if applicable, to the State. The deadline for the initial notice is three days after
20 Defendant first knew or should have known that the event would likely delay or prevent
21 performance. Defendant shall be deemed to know of any circumstance of which any
22 contractor of, subcontractor of, or entity controlled by Defendant knew or should have
23 known.

24 47. If Defendant seeks to assert a claim of force majeure concerning the event,
25 within seven Days after the notice under Paragraph 46, Defendant shall submit a further
26 notice based on all information available to Defendant at the time to the relevant EPA
27 region and any relevant State that includes (a) an explanation and description of the event
28 and its effect on Defendant’s completion of the requirements of the Consent Decree; (b) a

1 description and schedule of all actions taken or to be taken to prevent or minimize the
2 delay and/or other adverse effects of the event on performance of Defendant's obligations
3 under the Decree; (c) if applicable, the proposed extension of time for Defendant to
4 complete the requirements of the Consent Decree; (d) Defendant's rationale for
5 attributing such delay to a force majeure if it intends to assert such a claim; (e) a
6 statement as to whether, in the opinion of Defendant, such event may cause or contribute
7 to an endangerment to public health or welfare or the environment; and (f) all available
8 proof supporting any claim that the delay was attributable to a force majeure.

9 48. Failure to submit a timely or complete notice or claim under Paragraph 46 or
10 47 regarding an event precludes Defendant from asserting any claim of force majeure
11 regarding that event, provided, however, that EPA may, in its unreviewable discretion,
12 excuse such failure if it is able to assess to its satisfaction whether the event is a force
13 majeure, and whether Defendant has exercised its best efforts, under Paragraph 45.

14 49. After receipt of any claim of force majeure, EPA, after a reasonable
15 opportunity for review and comment by any applicable State, will notify Defendant of its
16 determination whether Defendant is entitled to relief under Paragraph 45, and, if so, the
17 excuse of, or the extension of time for, performance of the obligations affected by the
18 force majeure. An excuse of, or extension of the time for performance of, the obligations
19 affected by the force majeure does not, of itself, excuse or extend the time for
20 performance of any other obligation.

21 50. If Defendant elects to invoke the dispute resolution procedures set forth in
22 Section IX (Dispute Resolution), it shall do so no later than 15 Days after receipt of
23 EPA's notice. In any such proceeding, Defendant has the burden of proving that it is
24 entitled to relief under Paragraph 45, that its proposed excuse or extension was or will be
25 warranted under the circumstances, and that it complied with the requirements of
26 Paragraphs 45 - 47. If Defendant carries this burden, the delay or non-performance at
27 issue shall be deemed not to be a violation by Defendant of the affected obligation of this
28 Consent Decree identified to EPA and the Court.

IX. DISPUTE RESOLUTION

1
2 51. Unless otherwise expressly provided for in this Consent Decree, the dispute
3 resolution procedures of this Section shall be the exclusive mechanism to resolve disputes
4 arising under or with respect to this Consent Decree. Defendant's failure to seek
5 resolution of a dispute under this Section concerning an issue of which it had notice and
6 an opportunity to dispute under this Section prior to an action by any Plaintiff to enforce
7 any obligation of Defendant arising under this Decree.

8 52. Informal Dispute Resolution. Any dispute subject to Dispute Resolution
9 under this Consent Decree shall first be the subject of informal negotiations. The dispute
10 shall be considered to have arisen when Defendant sends DOJ, any relevant EPA region,
11 and any relevant State a written Notice of Dispute. Such Notice of Dispute shall state
12 clearly the matter in dispute. The period of informal negotiations shall not exceed 20
13 Days from the date the dispute arises, unless that period is modified by written
14 agreement. If the Parties cannot resolve a dispute by informal negotiations, then the
15 position advanced by the United States, after consultation with relevant States, shall be
16 considered binding unless, within 30 Days after the conclusion of the informal
17 negotiation period, Defendant invokes formal dispute resolution procedures as set forth
18 below.

19 53. Formal Dispute Resolution. Defendant shall invoke formal dispute
20 resolution procedures, within the time period provided in the preceding Paragraph, by
21 sending DOJ, any relevant EPA region, and any relevant State a written Statement of
22 Position regarding the matter in dispute. The Statement of Position shall include, but
23 need not be limited to, any factual data, analysis, or opinion supporting Defendant's
24 position and any supporting documentation relied upon by Defendant.

25 54. After consultation with relevant State(s), the United States will send
26 Defendant its Statement of Position within 45 Days of receipt of Defendant's Statement
27 of Position. The United States' Statement of Position shall include, but need not be
28 limited to, any factual data, analysis, or opinion supporting that position and any

1 supporting documentation relied upon by the United States. The United States’
2 Statement of Position is binding on Defendant, unless Defendant files a motion for
3 judicial review of the dispute in accordance with the following Paragraph.

4 55. Judicial Dispute Resolution. Defendant may seek judicial review of the
5 dispute by filing with the Court and serving on the United States a motion requesting
6 judicial resolution of the dispute. The motion (a) must be filed within ten Days of receipt
7 of the United States’ Statement of Position pursuant to the preceding Paragraph; (b) may
8 not raise any issue not raised in informal dispute resolution pursuant to Paragraph 52,
9 unless the Plaintiffs raise a new issue of law or fact in the Statement of Position; (c) shall
10 contain a written statement of Defendant’s position on the matter in dispute, including
11 any supporting factual data, analysis, opinion, or documentation, and (d) shall set forth
12 the relief requested and any schedule within which the dispute must be resolved for
13 orderly implementation of the Consent Decree.

14 56. The United States, after consultation with relevant State(s), shall respond to
15 Defendant’s motion within the time period allowed by the Federal Rules of Civil
16 Procedure and the Local Rules of this Court. Defendant may file a reply memorandum,
17 to the extent permitted by the Local Rules.

18 57. Standard of Review

- 19 a. Disputes Concerning Matters Accorded Record Review. Except as
20 otherwise provided in this Consent Decree, in any dispute brought
21 under Paragraph 53 pertaining to the adequacy or appropriateness of
22 plans, procedures to implement plans, schedules or any other items
23 requiring approval by EPA under this Consent Decree; the adequacy
24 of Swinerton’s performance, including with respect to the Mitigation
25 Actions, undertaken pursuant to this Consent Decree; and all other
26 disputes that are accorded review on the administrative record under
27 applicable principles of administrative law, Defendant shall have the
28 burden of demonstrating, based on the administrative record, that the

1 position of the United States is arbitrary and capricious or otherwise
2 not in accordance with law.

- 3 b. Other Disputes. Except as otherwise provided in this Consent Decree,
4 in any other dispute brought under Paragraph 53, Defendant shall bear
5 the burden of demonstrating that its position complies with this
6 Consent Decree and better furthers the objectives of this Consent
7 Decree and the Mitigation Actions.

8 58. The invocation of dispute resolution procedures under this Section shall not,
9 by itself, extend, postpone, or affect in any way any obligation of Defendant under this
10 Consent Decree, unless and until final resolution of the dispute so provides. Stipulated
11 penalties with respect to the disputed matter shall continue to accrue from the first Day of
12 noncompliance, but payment shall be stayed pending resolution of the dispute as
13 provided in Paragraph 38. If Defendant does not prevail on the disputed issue, stipulated
14 penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

15 **X. INFORMATION COLLECTION AND RETENTION**

16 59. Upon request, Defendant shall provide the Plaintiffs and their
17 representatives, including attorneys, contractors, and consultants, any documentation
18 needed to:

- 19 a. monitor the progress of activities required under this Consent Decree;
20 b. verify any data or information submitted to the Plaintiffs in
21 accordance with the terms of this Consent Decree;
22 c. obtain documentary evidence, including photographs, videos, and
23 similar data; and
24 d. assess Defendant's compliance with this Consent Decree.

25 60. Until five years after the termination of this Consent Decree, Defendant shall
26 retain, and shall instruct its contractors and agents to preserve, all non-identical copies of
27 all documents, records, or other information (including documents, records, or other
28 information in electronic form) in its or its contractors' or agents' possession or control,

1 or that come into its or its contractors' or agents' possession or control, and that relate in
2 any manner to Defendant's performance of its obligations under this Consent Decree.
3 This information-retention requirement shall apply regardless of any contrary corporate
4 or institutional policies or procedures. At any time during this information-retention
5 period, upon request by a Plaintiff, Defendant shall provide copies of any documents,
6 records, or other information required to be maintained under this Paragraph.

7 61. At the conclusion of the information-retention period provided in the
8 preceding Paragraph, Defendant shall notify the Plaintiffs at least 90 Days prior to the
9 destruction of any documents, records, or other information subject to the requirements of
10 the preceding Paragraph and, upon request by any Plaintiff, Defendant shall deliver any
11 such documents, records, or other information to that Plaintiff. Defendant may assert that
12 certain documents, records, or other information is privileged under the attorney-client
13 privilege or any other privilege recognized by federal law. If Defendant asserts such a
14 privilege, it shall provide the following: (a) the title of the document, record, or
15 information; (b) the date of the document, record, or information; (c) the name and title
16 of each author of the document, record, or information; (d) the name and title of each
17 addressee and recipient; (e) a description of the subject of the document, record, or
18 information; and (f) the privilege asserted by Defendant. However, no documents,
19 records, or other information created or generated pursuant to the requirements of this
20 Consent Decree shall be withheld on grounds of privilege.

21 62. Defendant may also assert that information required to be provided under
22 this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R.
23 Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall
24 follow the procedures set forth in 40 C.F.R. Part 2.

25 63. This Consent Decree in no way limits or affects any right of entry and
26 inspection, or any right to obtain information, held by the Plaintiffs pursuant to applicable
27 federal or state laws, regulations, or permits, nor does it limit or affect any duty or
28

1 obligation of Defendant to maintain documents, records, or other information imposed by
2 applicable federal or state laws, regulations, or permits.

3 **XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

4 64. This Consent Decree resolves only the civil claims of the Plaintiffs for the
5 violations alleged in the Complaint filed in this action through the date of lodging.

6 65. The Plaintiffs reserve all legal and equitable remedies available to enforce
7 the provisions of this Consent Decree. This Consent Decree shall not be construed to
8 limit the rights of the Plaintiffs to obtain penalties or injunctive relief under the Act or
9 implementing regulations, or under other federal or state laws, regulations, or permit
10 conditions, except as expressly specified in Paragraph 64.

11 66. In any subsequent administrative or judicial proceeding initiated by any
12 Plaintiff for injunctive relief, civil penalties, other appropriate relief relating to the
13 Defendant's violations, Defendant shall not assert, and may not maintain, any defense or
14 claim based upon the principles of waiver, res judicata, collateral estoppel, issue
15 preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention
16 that the claims raised by the Plaintiff(s) in the subsequent proceeding were or should have
17 been brought in the instant case, except with respect to claims that have been specifically
18 resolved pursuant to Paragraph 64.

19 67. This Consent Decree is not a permit, or a modification of any permit, under
20 any federal, State, or local laws or regulations. Defendant is responsible for achieving
21 and maintaining complete compliance with all applicable federal, state, and local laws,
22 regulations, and permits; and Defendant's compliance with this Consent Decree shall be
23 no defense to any action commenced pursuant to any such laws, regulations, or permits,
24 except as set forth herein. The Plaintiffs do not, by their consent to the entry of this
25 Consent Decree, warrant or aver in any manner that Defendant's compliance with any
26 aspect of this Consent Decree will result in compliance with provisions of the Act, 33
27 U.S.C. § 1251, et seq., or with any other provisions of federal, State, or local laws,
28 regulations, or permits.

1 As to EPA Region 5:

2 By email only: jones.william@epa.gov

3
4 As to EPA Region 10:

5 By email only: gebhardt.chris@epa.gov

6 As to Alabama:

7
8 By mail: Anthony Scott Hughes,
9 Chief Field Operations Division
10 Alabama Department of Environmental
11 Management
12 Post Office Box 301463
13 Montgomery, AL 36130-1463

14 As to Illinois:

15 Rachel Medina
16 Christina Nannini
17 Assistant Attorneys General
18 Environmental Bureau
19 Illinois Attorney General's Office
20 500 South Second Street
21 Springfield, Illinois 62701
22 Rachel.Medina@ilag.gov
23 Christina.Nannini@ilag.gov

24 Grace McCarten
25 Assistant Counsel, Division of Legal Counsel
26 Illinois Environmental Protection Agency
27 1021 North Grand Avenue East
28 P.O. Box 19276
Springfield, Illinois 62794-9276
Grace.McCarten@illinois.gov

As to Defendant:

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Swinerton Builders
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7th Floor – Legal
Concord, CA 94520
shmurphy@swinerton.com

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2 With Copy to:

3 Andrew C. Sifton
4 Richard S. Davis
5 Beveridge & Diamond, P.C.
6 1900 N Street NW
7 Suite 100
8 Washington, DC 20036
9 asifton@bdlaw.com
10 rdavis@bdlaw.com

11 72. Unless specified otherwise in this Decree, whenever notifications,
12 submissions, or communications are required to be submitted to EPA by this Consent
13 Decree, they shall be submitted to EPA Region 4, EPA Region 5, and EPA Region 10 at
14 the addresses provided in this Section.

15 73. Any Party may, by written notice to the other Parties, change its designated
16 notice recipient or notice address provided above.

17 74. Notices submitted pursuant to this Section shall be deemed submitted upon
18 mailing or transmission by email, unless otherwise provided in this Consent Decree or by
19 mutual agreement of the Parties in writing.

20 **XIV. EFFECTIVE DATE**

21 75. The Effective Date of this Consent Decree shall be the date upon which this
22 Consent Decree is entered by the Court or a motion to enter the Consent Decree is
23 granted, whichever occurs first, as recorded on the Court's docket.

24 **XV. RETENTION OF JURISDICTION**

25 76. The Court shall retain jurisdiction over this case until termination of this
26 Consent Decree, for the purpose of resolving disputes arising under this Decree or
27 entering orders modifying this Decree, pursuant to Sections IX and XVI, or effectuating
28 or enforcing compliance with the terms of this Decree.

XVI. MODIFICATION

1
2 77. The terms of this Consent Decree, including any attached appendices, may
3 be modified only by a subsequent written agreement signed by all the Parties. Where the
4 modification constitutes a material change to this Decree, it shall be effective only upon
5 approval by the Court.

6 78. Any disputes concerning modification of this Decree shall be resolved
7 pursuant to Section IX (Dispute Resolution), provided, however, that, instead of the
8 burden of proof provided by Paragraph 57, the Party seeking the modification bears the
9 burden of demonstrating that it is entitled to the requested modification in accordance
10 with Federal Rule of Civil Procedure 60(b).

XVII. TERMINATION

11
12 79. After Defendant has completed the requirements of Section V (Injunctive
13 Relief), including full implementation of the Mitigation Actions in accordance with
14 Paragraph 15 and Appendix A, and has paid the civil penalty and any accrued stipulated
15 penalties as required by this Consent Decree, Defendant may serve upon the Plaintiffs a
16 Request for Termination, stating that Defendant has satisfied those requirements, together
17 with all necessary supporting documentation.

18 80. Following receipt by the Plaintiffs of Defendant's Request for Termination,
19 the Parties shall confer informally concerning the Request and any disagreement that the
20 Parties may have as to whether Defendant has satisfactorily complied with the
21 requirements for termination of this Consent Decree. If the United States, after
22 consultation with the States, agrees that the Decree may be terminated, the Parties shall
23 submit, for the Court's approval, a joint stipulation terminating the Decree.

24 81. If the United States, after consultation with the States, does not agree that the
25 Decree may be terminated, Defendant may invoke Dispute Resolution under Section IX.
26 However, Defendant shall not seek Dispute Resolution of any dispute regarding
27 termination until 60 Days after service of its Request for Termination.
28

XVIII. PUBLIC PARTICIPATION

1
2 82. This Consent Decree shall be lodged with the Court for a period of not less
3 than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The
4 United States reserves the right to withdraw or withhold its consent if the comments
5 regarding the Consent Decree disclose facts or considerations indicating that the Consent
6 Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this
7 Consent Decree without further notice and agrees not to withdraw from or oppose entry
8 of this Consent Decree by the Court or to challenge any provision of the Decree, unless
9 the United States has notified Defendant in writing that it no longer supports entry of the
10 Decree.

XIX. SIGNATORIES/SERVICE

11
12 83. Each undersigned representative of Defendant, the States, and the Assistant
13 Attorney General for the Environment and Natural Resources Division of the Department
14 of Justice identified on the DOJ signature page below, certifies that that person is fully
15 authorized to enter into the terms and conditions of this Consent Decree and to execute
16 and legally bind the Party that person represents to this document.

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

XX. INTEGRATION

24
25 85. This Consent Decree, including deliverables that are subsequently approved
26 pursuant to this Decree, constitutes the entire agreement among the Parties regarding the
27 subject matter of the Decree and supersedes all prior representations, agreements and
28

1 understandings, whether oral or written, concerning the subject matter of the subject
2 matter of the Decree herein.

3 **XXI. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION**

4 86. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of
5 the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2),
6 performance of Section II (Applicability), Paragraph 5; Section V (Injunctive Relief),
7 Paragraphs 14 (and related Appendix A), 15-19 and 24; Section VI (Reporting
8 Requirements), Paragraphs 25-26; Section X (Information Collection and Retention),
9 Paragraphs 59-61, is restitution, remediation, or required to come into compliance with
10 law.

11 **XXII. HEADINGS**

12 87. Headings to the Sections and Subsections of this Consent Decree are
13 provided for convenience and do not affect the meaning or interpretation of the provisions
14 of this Consent Decree.

15 **XXIII. FINAL JUDGMENT**

16 88. Upon approval and entry of this Consent Decree by the Court, this Consent
17 Decree shall constitute a final judgment of the Court as to the United States, the States,
18 and Defendant.

19 **XXIV. APPENDICES**

20 89. The following Appendices are attached to and part of this Consent Decree:
21 “Appendix A” is the Idaho Mitigation Action.

22
23
24 Dated and entered this ___ day of _____, 20__

25
26 _____
27 UNITED STATES DISTRICT JUDGE
28

1 FOR THE UNITED STATES OF AMERICA:

2
3
4 TODD KIM
Assistant Attorney General
5 Environment and Natural Resources Division
6 U.S. Department of Justice

7
8 1/8/24
Date

9 
SHEILA McANANEY (IL Bar# 6309635),
Trial Attorney
10 DANICA ANDERSON GLASER (DC Bar #1005853)
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1 FOR THE UNITED STATES ATTORNEY’S OFFICE FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA:

3
4
5 ISMAIL J. RAMSEY
6 United States Attorney

7
8 12/15/23

Michael T. Pyle

9 Date

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1 FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, OFFICE OF
2 ENFORCEMENT AND COMPLIANCE ASSURANCE:

3
4 DAVID UHLMANN
Digitally signed by DAVID UHLMANN
Date: 2024.01.12 11:54:14 -05'00'

5 Date

6 DAVID M. UHLMANN
7 Assistant Administrator
8 Office of Enforcement and Compliance Assurance
9 United States Environmental Protection Agency

10 OF COUNSEL:

11 BRUCE FERGUSON
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2
3
4 **Leif Palmer** Digitally signed by Leif
Palmer
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5 Date

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Office of Regional Counsel
U.S. Environmental Protection Agency
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11 OF COUNSEL:

12 MICHELE WETHERINGTON
13 Associate Regional Counsel
14 Office of Water Legal Support
15 U.S. Environmental Protection Agency
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17 61 Forsyth Street, S.W.
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1 FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 5:

2 Kaplan,
3 Robert

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Kaplan, Robert
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Date

ROBERT A. KAPLAN
Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

9
10 OF COUNSEL:

11 CHARLES V. MIKALIAN
12 Associate Regional Counsel
13 U.S. Environmental Protection Agency
14 Region 5
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16 Chicago, Illinois 60604

1 FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 10:
2

3
4 12/14/2023

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BEVERLY LI
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5 Date

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Regional Counsel
U.S. Environmental Protection Agency
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1200 Sixth Avenue, Suite 155
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11 OF COUNSEL:

12 PATRICK JOHNSON
13 Associate Regional Counsel
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17 Anchorage, Alaska 99513
18 (907) 271-3914
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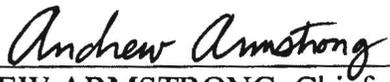
1 FOR THE STATE OF ILLINOIS:

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. KWAME RAOUL
Attorney General of the
State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/
Asbestos Litigation Division

12/21/2023
Date

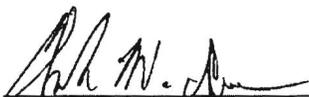


ANDREW ARMSTRONG, Chief
Assistant Attorney General
Environmental Bureau

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

JOHN J. KIM, Director
Illinois Environmental Protection Agency

12/21/23
Date

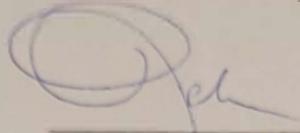
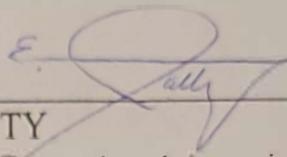


CHARLES W. GUNNARSON
Chief Legal Counsel

1 FOR ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT:

2 STEVE MARSHALL
3 Alabama Attorney General

4
5 1/3/2024
6 Date

7 
8 
9 _____

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11 Assistant Attorney General and Associate General
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18 E-mail: rep@adem.alabama.gov
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1 FOR DEFENDANT SWINERTON BUILDERS:
2

3 12/8/23

4 Date



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Frank Foellmer
Executive Vice President

Appendix A

APPENDIX A

IDAHO MITIGATION ACTION

This Appendix A defines Defendant's obligations under Paragraph 14 of the Decree with respect to the Idaho Mitigation Action. The United States contends that Defendant violated the Clean Water Act during the construction of a solar energy facility near American Falls, Idaho, as alleged in the Complaint. The United States further contends that Defendant's violations caused excess discharges of sediment to the local watershed, which caused harm to the environment. Defendant does not admit these allegations or any liability arising therefrom. The Parties were unable to find appropriate mitigation projects that could be completed fully and immediately with the amount of funding provided herein. Therefore, Defendant agrees to undertake the following actions to remedy, reduce, or offset the alleged harm caused by the alleged violations:

1. No later than 60 Days from the Effective Date, Defendant will commit \$600,000 to be spent on actions with the purposes of reducing or controlling sedimentation in the watershed of the American Falls site ("Mitigation Funds"), in one of the following ways: (i) establishing a dedicated escrow account for the Mitigation Funds, (ii) segregating the Mitigation Funds in a separate bank account, or (iii) directing the Mitigation Funds to a third party to be used in the implementation of one or more of the projects described in Paragraph 3 below.
2. Any portion of the Mitigation Funds directed to third parties will be provided under a written agreement that restricts its use to the purposes described in Paragraph 1 above. Any third party to whom funds are directed shall not, for purposes of the Consent Decree, be deemed a contractor, subcontractor, or entity under the control of Defendant solely by virtue of entering into a written agreement with Defendant as described in this Paragraph.
3. Defendant shall ensure that, for at least three (3) years from the Effective Date, the Mitigation Funds are committed to use for Phase One of the Oxbow Project or for the Centennial Park Project, as set forth in this Paragraph. Defendant shall ensure that Mitigation Funds are not expended unless and until funding sufficient to design and construct either of the projects specified in this Paragraph is secured by the entity(ies) developing the projects.
 - a. Phase One of the Oxbow Project (Attachment 1). The design and construction of culverts underneath railroad tracks to divert water under the tracks as part of the "Historic Meanders" project to restore historic oxbows and a floodplain on the Portneuf River, detailed in the Portneuf River Vision Study.
 - b. The Centennial Park Project (Attachment 2). Wetland construction or floodplain restoration activities associated with the "Rainey/Centennial Parks" project at Centennial Park.

4. In the event that the Mitigation Funds are not fully expended on either of the projects identified in Paragraph 3 within three (3) years of the Effective Date, Defendant shall, within six (6) months of the expiration of the three-year period, submit to DOJ and EPA Region 10 for review and approval pursuant to Paragraph 18 of the Consent Decree one or more alternative projects that meet the purposes described in Paragraph 1 of this Appendix on which the remaining balance of the Mitigation Funds could be expended in lieu of the Oxbow Project and Centennial Park Project. Defendant's proposal must include details establishing the sedimentation reduction and/or control benefits of the proposed alternative project(s), the specific components to be funded by the balance of the Mitigation Funds and the cost of each component, and the timeline for completion of such project(s).
 - a. In accordance with the provisions of Paragraphs 18 – 23 of the Consent Decree, the United States will review and approve any of Defendant's proposed alternative project(s) that meet the purposes described in Paragraph 1 of this Appendix and otherwise comply with all relevant United States rules and policies regarding mitigation actions.
 - b. Upon approval by the United States, Defendant shall implement approved alternative project(s) consistent with the approved terms and schedule until the full balance of the Mitigation Funds is expended.
 - c. If Defendant cannot identify one or more alternative project(s) that meet the criteria in this Paragraph by four (4) years from the Effective Date, Defendant shall:
 - i. Direct the balance of the Mitigation Funds to purchase wetlands credits from a mitigation bank approved by the U.S. Army Corps of Engineers that is in the primary service area of the American Falls site, or in the secondary service area if insufficient credits are available in the primary service area, or elsewhere in the State of Idaho if insufficient credits are available at both the primary service area and secondary service area; and
 - ii. Submit documentation of Defendant's direction of the balance of the Mitigation Funds to a mitigation bank consistent with this Paragraph 4.c. Defendant's documentation must demonstrate that no alternative project(s) that meet the criteria in this Paragraph were available.
5. Defendant is ultimately responsible for ensuring that Mitigation Funds are spent in accordance with the requirements of this Appendix. No disposition of the Mitigation Funds, including but not limited to transfer of the Mitigation Funds to any third party for any purpose, in any way relieves Defendant of its obligations under the Consent Decree

to implement the requirements of this Appendix.

6. Reporting.

- a. Within 30 Days of committing the Mitigation Funds, Defendant shall send notice to EPA Region 10 and DOJ that such funds have been committed in accordance with Paragraph 1 of this Appendix, and provide supporting documentation.
- b. Defendant shall provide reports on the implementation of this Appendix, including the status of any mitigation activities funded or to be funded, in accordance with Section VII of the Consent Decree.
- c. Any additional notices, reports, or submissions required to be made to EPA or the United States under the Consent Decree that pertain only to this Appendix should be sent only to EPA Region 10 and DOJ as set forth in Section XIV of the Consent Decree (Notices).

Appendix A:

Attachment 1

Oxbow Restoration Project Pocatello, Idaho

The proposed Portneuf River Oxbow Restoration project (the Project) seeks to reactivate the Portneuf River floodplain and restore wetlands in the Portneuf Valley of Southeast Idaho. Much of this valley was disconnected from the Portneuf River by the railroad in the late 1800s and by 6.2 miles of U.S. Army Corps of Engineers flood control channel and levees in 1968, which eliminated wetlands and diminished fish and other aquatic organism habitat.

To restore the historic oxbows and floodplain, the Project will entail installing culverts under railroad tracks to reconnect the Portneuf River to the historic oxbows on the east side of the tracks at appropriate flows. Adjacent land will be graded and planted to reactivate as much as over 100 acres of floodplain, including approximately 75 acres of seasonally-flooded wetlands along roughly one and a half (1 ½) miles of historical stream channel. The completed project will span approximately 240 acres and entails the following:

1. Restoring a wetland and stream channel through the historic oxbows and adjacent City land to the Portneuf River that is bisected by the railroad tracks, by installing one or more culverts under the railroad tracks to direct high flows from the Portneuf River into these historic oxbows and former gravel pits on the east side of the tracks.
2. Settling out sediment in defined areas and allowing for sediment filtration with wetland vegetation.
3. Installing an Americans with Disabilities Act (ADA)-compliant pedestrian/bicycle pathway (Portneuf Greenway) through the area.
4. Preserving cultural resources in conjunction with the Shoshone Bannock Tribes.

The Project's restoration of aquatic and ecological resources is expected to generate an array of environmental benefits. The Project is projected to achieve an immediate improvement in water quality in the Portneuf River by capturing sediment at high flows. The total amount of sediment captured will be dependent on project design and maintenance objectives, but is anticipated to be a significant load for a river where the high flow total suspended solids (TSS) load is approximately 143 lbs/day and low-flow (~50 to ~250 cfs) TSS load is 14 lbs/day (Portneuf River TMDL, 2010). This sediment capture will improve habitat for Yellowstone cutthroat trout, Northern leopard frog, Monarch butterfly, and the Yellow-billed cuckoo.

The Project is a direct outcome and top priority of the [Portneuf River Vision Study \(2016\)](#), which worked across jurisdictions to develop a community-based river restoration vision and to prioritize projects to revitalize environmental, recreational and economic opportunities associated with the Portneuf River.

Partners: The Project will be implemented by the City of Pocatello, which has been working with the Portneuf Watershed Partnership and associated watershed partners to develop this conceptual plan.

Appendix A:

Attachment 2

Centennial and Rainey Parks Wetland Creation Project Pocatello, Idaho

The proposed Centennial and Rainey Park Wetland Creation Project (the Project) seeks to restore a wetland and side channel to the channelized Portneuf River within downtown Pocatello. Within Pocatello, the health of the Portneuf River has been severely compromised by the historical construction of flood protection levees and a concrete channel, which removed hundreds of acres of wetlands. The project is a direct outcome and top priority of the [Portneuf River Vision Study \(2016\)](#), which worked across jurisdictions to develop a community-based river restoration vision and prioritize projects to revitalize environmental, recreational, and economic opportunities associated with the Portneuf River.

The Project will accomplish wetland restoration by moving the river's existing riprapped levee, constructed in 1968 by the U.S. Army Corps of Engineers, to enclose an area of City-owned property within Rainey Park. A wetland and side channel will be installed within the levee, along with a stormwater pond to capture the first flush of sediment-laden waters off of City streets. In total, the Project will entail the following:

1. Creating a wetland and stream channel within the flood control levees.
2. Moving riprapped levees to create room for proposed wetland and floodplain.
3. Constructing a stormwater pond to settle out sediment from the river and stormwater in defined areas.
4. Installing Americans with Disabilities Act (ADA)-compliant access down to the river for paddlers and anglers, as well as a pathway through the wetland.
5. Preserving cultural resources (working with the Shoshone Bannock Tribes).
6. Restoring wetlands, streambanks and upland levee areas.
7. Enhancing aesthetics.

Because so much of the habitat along the Portneuf River is degraded within the 6.2 miles of levees and concrete channel, the habitat lift provided by the Project will greatly improve the ecosystem health along the entire river corridor through Pocatello. The project will improve habitat for Yellowstone cutthroat trout, Northern leopard frog, Monarch butterfly, and the Yellow-billed cuckoo. Many of these species are known to use riparian habitats up and downstream of Pocatello, and this project has the potential to create an island of habitat for them within the urban zone. The stormwater pond will create the further benefit of reducing sediment loading into the Portneuf River by approximately two tons per year.

Partners: The proposed project will be implemented by the City of Pocatello, which has been working with the Portneuf Watershed Partnership and associated watershed partners to develop this conceptual plan. The Project is part of a larger park project, which includes a parking lot and park improvements on both sides of the river.