

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING**

UNITED STATES OF AMERICA,

Plaintiff,

v.

JIM'S WATER SERVICE, INC.

Defendant.

Civil Action No. _____

CONSENT DECREE

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WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a complaint in this action concurrently with the lodging of this Consent Decree to recover civil penalties and to seek injunctive relief under the Solid Waste Disposal Act, which is also known as the Resource Conservation and Recovery Act (“RCRA” or “Act”), 42 U.S.C. § 6901, *et seq.*;

WHEREAS, the complaint specifically alleges that Jim’s Water Service Inc. (“Defendant”) has failed to comply with an Administrative Order issued by EPA on July 31, 2008 (“Administrative Order”) after the agency determined that Defendant’s handling and disposal of solid waste at a commercial oilfield waste disposal facility it owns and operates approximately twenty-three (23) miles north of Douglas, Converse County, Wyoming (the “Werner Facility”) may present an imminent and substantial endangerment to health or the environment within the meaning of Section 7003(a) of RCRA, 42 U.S.C. § 6973(a);

WHEREAS, the Administrative Order set forth certain corrective measures that Defendant was to implement to ensure protection of public health and the environment at the Werner Facility;

WHEREAS, Defendant has since then implemented these and other corrective measures, making injunctive relief at the Werner Facility unnecessary at this time;

WHEREAS, in accordance with Section 7003 of the Act, EPA notified the State of Wyoming (“State”) of the issuance of the Administrative Order and of the filing of this civil action;

WHEREAS, in addition to paying a civil penalty, Defendant has agreed to perform, as additional injunctive relief, a wetlands enhancement project on Burlington Lake, in the City of Gillette, Wyoming, in order to mitigate the environmental harm caused by its past

non-compliance with the Administrative Order;

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

WHEREAS, The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest;

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

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), and over the Parties. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) & (c), and 1395(a), because the Defendant's principal place of business is in this judicial district; the facility at issue is located in this judicial district; and the events or omissions giving rise to the violations at issue occurred in this judicial district. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

2. For purposes of this Consent Decree, Defendant agrees that the complaint states claims upon which relief may be granted pursuant to Section 7003(a) of RCRA, 42 U.S.C. § 6973(a).

II. APPLICABILITY

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

4. No transfer of ownership or operation of the Werner Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region 8, the United States Attorney for the District Wyoming, and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any attempt to transfer ownership or operation of the Werner Facility without complying with this Paragraph constitutes a violation of this Decree.

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

6. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the Act shall have the meanings assigned to them in the Act, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Administrative Order" shall mean the Initial Administrative Order Pursuant to Section 7003 of RCRA issued to Defendant by EPA regarding the Werner Facility on July 31, 2008;

b. "Complaint" shall mean the complaint filed by the United States in this action;

c. "Consent Decree" or "Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXIII);

d. "Day" shall mean a calendar day unless expressly stated to be a "business day". In computing any period of time under this Consent Decree, where the last Day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

e. "Defendant" shall mean Jim's Water Service Inc.;

f. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

g. “Effective Date” shall mean the date upon which the motion to enter this Consent Decree is granted, as recorded on the Court’s docket;

h. “Werner Facility” shall mean Defendant’s Werner commercial oilfield waste disposal facility, located on Highway 59, in the NW Quarter of Section 28, Township 36 North, Range 70 West, approximately 23 miles north of Douglas, in Converse County, Wyoming;

i. “FWS” shall mean the United States Department of Interior, Fish and Wildlife Service;

j. “Mitigation Project” shall mean the wetland enhancement project in and around Burlington Lake in Gillette, Wyoming, consisting of island construction and other activities intended to enhance habitat for eared grebe and other migratory bird species affected by Defendant’s violations of the Administrative Order, as set forth in the Mitigation Project Work Plan at Appendix A of this Consent Decree;

k. “Mitigation Project Work Plan” shall mean the document containing the specific measures, as set forth at Appendix A of this Consent Decree, to be implemented in order to complete the Mitigation Project;

l. “Other JWS Facility Order” shall mean the administrative order issued pursuant to RCRA to Defendant or its predecessors in connection with the “Cannon” commercial oilfield waste disposal facility, located approximately twenty-four (24) miles north of Douglas, Converse County, Wyoming (Docket No. RCRA-08-2011-0002, dated June 23, 2011).

- m. “Paragraph” shall mean a portion of this Decree identified by an arabic numeral;
- n. “Parties” shall mean the United States and Defendant;
- o. “Section” shall mean a portion of this Decree identified by a roman numeral;
- p. “United States” shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

8. Within thirty (30) Days after the Effective Date of this Consent Decree, Defendant shall pay the sum of \$90,000 as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging.

9. Defendant shall pay the civil penalty due at <https://www.pay.gov> to the U.S. Department of Justice account, in accordance with instructions provided to Defendant by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of Wyoming thirty (30) days after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

M. Greg Carlson
General Counsel
Jim’s Water Service Inc.

PO Box 2290
Gillette, WY 82717
307-299-2212 Direct Line
mgrog@vcn.com

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XIV (Notices).

At the time of payment, Defendant shall send notice that payment has been made: (i) to EPA via email at acctsreceivable.cinwd@epa.gov or via regular mail at EPA Cincinnati Finance Office, 26 Martin Luther King Drive, Cincinnati, Ohio 45268; and (ii) to the United States via email or regular mail in accordance with Section XIV. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States of America v. Jim's Water Service Inc.*, and shall reference the civil action number and DOJ case number 90-7-1-10446.

10. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) when calculating its federal and State tax obligations.

V. COMPLIANCE REQUIREMENTS

11. Defendant shall utilize all reasonable means to operate the Werner Facility in a manner that prevents any of the following occurrences or conditions that may constitute an imminent and substantial endangerment to public health or the environment:

a. Mortality of birds or mammals caused by operations or conditions at the site;

- b. Oil sheens on the Evaporation Pond outside the containment boom(s) at the inlet; or
- c. Holes in the protective netting attached to the roof/covered structure around the Skim Pit.

VI. ADDITIONAL INJUNCTIVE RELIEF

12. Defendant shall implement the Mitigation Project in accordance with the provisions of the Mitigation Project Work Plan within twenty four (24) months of the Effective Date. EPA may, in its sole discretion, extend the completion date deadline upon application by Defendant if reasonable grounds exist.

13. Defendant is responsible for the satisfactory completion of the Mitigation Project in accordance with the requirements of this Decree. "Satisfactory completion" means implementation of the Mitigation Project in accordance with the Mitigation Project Work Plan. Defendant may use contractors and/or consultants in planning and implementing the Mitigation Project.

14. With regard to the Mitigation Project, Defendant certifies the truth and accuracy of each of the following:

- a. that all cost information provided to EPA and FWS in connection with the Agencies' approval of the Mitigation Project is complete and accurate and that Defendant in good faith estimates that the cost to implement the Project is approximately \$50,000;

b. that, as of the date of executing this Decree, Defendant is not required to perform or develop the Mitigation Project by any federal, state, or local law or regulation and is not required to perform or develop the Mitigation Project by agreement, grant, or as injunctive relief awarded in any other action in any forum;

c. that the Mitigation Project is not a project that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Decree;

d. that Defendant has not received and will not receive credit for the Mitigation Project in any other enforcement action or other legal proceeding; and

e. that Defendant will not receive any reimbursement for any portion of the Mitigation Project from any other person; provided, however, nothing in this Paragraph 14 shall be interpreted to prevent any other person or organization from providing additional services, goods, or equipment intended to enhance wetlands and/or wildlife habitat at Burlington Lake.

15. Project Completion Report

a. Within sixty (60) days after the date set for completion of the Project, Defendant shall submit a Project Completion Report to the United States, in accordance with Section XIV of this Consent Decree (Notices). The Project Completion Report shall contain the following information:

i. a detailed description of the Mitigation Project as implemented;

- ii. a description of any problems encountered in completing the Project and the solutions thereto;
- iii. an itemized list of all eligible Project costs expended; and
- iv. certification that the Project has been fully implemented pursuant to the provisions of this Decree.

16. EPA may, in its sole discretion, require information in addition to that described in the preceding Paragraph, in order to evaluate Defendant's completion report.

17. After receiving the Project Completion Report, EPA shall notify Defendant whether or not Defendant has satisfactorily completed the Project. If Defendant has not completed the Project in accordance with this Consent Decree, stipulated penalties may be assessed under Section VIII of this Consent Decree.

18. Disputes concerning the satisfactory performance of the Project may be resolved under Section X of this Decree (Dispute Resolution).

19. Each submission required under this Section shall be signed by an official with knowledge of the Project and shall bear the certification language set forth in Paragraph 24.

20. Any public statement, oral or written, in print, film, or other media, made by Defendant making reference to the Project under this Decree shall include the following language: "This project was undertaken in connection with the settlement of an enforcement action, *United States v. Jim's Water Service Inc.*, taken on behalf of the United States Environmental Protection Agency and the United States Fish & Wildlife Service under the Resource Conservation and Recovery Act."

VII. REPORTING REQUIREMENTS

21. Commencing no later than six (6) months after the Effective Date, Defendant shall provide EPA and FWS with quarterly progress reports which shall include, at a minimum, the following information:

- a. Activities conducted at the Werner Facility in the previous quarter;
- b. Summaries of problems encountered during the previous quarter and how the problems were or are being addressed;
- c. Changes in work performed at the Werner Facility from that projected in previous quarterly progress reports;
- d. Projected work for the next reporting period; and
- e. Information as to the status of any construction or other activities related to implementation of the Mitigation Project Work Plan, including, but not limited to, a narrative description of activities undertaken in the previous three (3) months, the status of any ongoing construction or restoration measures, and the completion of any milestones set forth in the Mitigation Project Work Plan.
- f. The report shall also include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States of such violation and its likely duration, in writing, within two (2) working Days of the Day Defendant first becomes aware of the violation,

with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall so state in the report. Defendant shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within thirty (30) Days of the Day Defendant becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section IX of this Consent Decree (Force Majeure).

22. Whenever any violation of this Consent Decree or any other event affecting Defendant's performance under this Decree, or the performance of the Werner Facility, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than twenty-four (24) hours after Defendant first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

23. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).

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

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the

information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

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

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

VIII. STIPULATED PENALTIES

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

28. Late Payment of Civil Penalty

If Defendant fails to pay the civil penalty required to be paid under Section IV of this Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$2,000 per Day for each Day that the payment is late.

29. Endangering Conditions

If Defendant violates Section V, Paragraph 11, it shall pay a penalty in the following amounts:

a. For violations of subparagraph 11.a, \$2,000 per mortality; provided, however, that if Defendant notifies EPA of the mortality within forty-eight (48) hours of its discovery, the penalty shall be \$200 per mortality.

b. For violations of subparagraphs 11.b-c, \$2,000 per violation per Day; provided, however, that if Defendant notifies EPA of the violation within forty-eight (48) hours of its discovery, the penalty shall be \$200 per violation per Day for the first seven (7) Days, and \$2,000 per Day for the eighth and subsequent Days that Defendant remains in violation.

30. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VII of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 100	1st through 14th Day
\$ 200	15th through 30th Day
\$ 500	31st Day and beyond

31. Mitigation Project Completion

If Defendant fails to satisfactorily complete the Mitigation Project by the deadline set forth in Paragraph 12, Defendant shall pay stipulated penalties for each Day for which it fails to satisfactorily complete the Mitigation Project, as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 500	1st through 14th Day
\$ 1,000	15th through 30th Day
\$ 2,000	31st Day and beyond.

32. 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.

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

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

35. Stipulated penalties shall continue to accrue as provided in Paragraph 32, during any Dispute Resolution or court proceeding, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the United States that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within thirty (30) Days of the effective date of the agreement or the receipt of the decision or order of the United States.

b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within sixty (60) Days of receiving the Court's decision or order, except as provided in subparagraph c, below.

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

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

37. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall

be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

38. Subject to the provisions of Section XII of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of RCRA Section 7003(a), 42 U.S.C. § 6973(a), Defendant shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

IX. FORCE MAJEURE

39. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice orally or by

electronic or facsimile transmission to the EPA contact designated pursuant to Paragraph 64 below, within seventy-two (72) hours of when Defendant first knew that the event might cause a delay. Within seven (7) Days thereafter, Defendant shall provide in writing to EPA an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

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

obligation. EPA will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

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

42. If Defendant elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than fifteen (15) Days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 39 and 40, above. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree.

X. DISPUTE RESOLUTION

43. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree.

44. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal

negotiations shall not exceed twenty (20) Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within ten (10) Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

45. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

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

47. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on

the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

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

49. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law. The administrative record shall comprise all communications pertaining to the dispute as well as any documents relied upon by the parties in those communications. The administrative record shall be closed after the United States issues its Statement of Position pursuant to Paragraph 49.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 46 Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree.

50. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance,

but payment shall be stayed pending resolution of the dispute as provided in Paragraph 35. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

51. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into the Werner Facility at all reasonable times, upon presentation of credentials.

52. Until two (2) years after the termination of this Consent Decree, Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

53. Defendant may assert that information required to be provided under this Section is, and thus deserves to be protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall

follow the procedures set forth in 40 C.F.R. Part 2. Defendant understands and agrees that all such claims must be made properly and at the time of submittal.

54. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

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

56. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 55. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified herein. The United States further reserves all legal and equitable remedies to address any circumstances which may present an imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Defendant's Werner Facility, whether related to the violations addressed in this Consent Decree or otherwise.

57. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Facility,

Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 56 of this Section.

58. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, 42 U.S.C. § 6973(a) *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

59. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree, against Defendant, except as otherwise provided by law.

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

61. In consideration of the obligations assumed by Defendant under this Consent Decree and Defendant's efforts to come into compliance with RCRA and other environmental laws at the Werner Facility and other commercial oilfield waste disposal facilities that it owns and operates, the Administrative Order and the Other JWS Facility Order shall be terminated as of the Effective Date.

XIII. COSTS

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

XIV. NOTICES

63. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the Department of Justice:

By email:

eescdcopy.enrd@usdoj.gov

Re: DOJ No. 90-7-1-10446

Or, by 1st Class mail:

EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DOJ No. 90-7-1-10446

To EPA:

Ms. Annette Maxwell
EPA Region 8, 8ENF-RC
1595 Wynkoop Street
Denver, Colorado 80202
(303) 312-6068
maxwell.annette@epa.gov

To FWS:

Ms. Kimberly Dickerson
Ecological Services
Wyoming Field Office
U.S. Fish & Wildlife Service
5353 Yellowstone Road, Suite 308A
Cheyenne, Wyoming 82009
kimberly_dickerson@fws.gov

To Defendant:

Mr. M. Greg Carlson, Esq.
General Counsel
Jim's Water Service Inc.
P.O. Box 2290
Gillette, Wyoming 82717
mgrog@vcn.com

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

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

XV. EFFECTIVE DATE

66. The Effective Date of this Consent Decree shall be the date upon which the motion to enter the Consent Decree is granted, as recorded on the Court's docket.

XVI. RETENTION OF JURISDICTION

67. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X (Dispute Resolution) and XVII (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

68. Except as otherwise expressly stated herein, the terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court. Amendments to the Mitigation Project Work Plan shall not be deemed "material" unless they fundamentally alter the Mitigation Project goal of enhancing wetlands and/or wildlife habitat at Burlington Lake.

69. Any disputes concerning modification of this Decree shall be resolved pursuant to Section X of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 50, the Party seeking the modification bears the

burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XVIII. TERMINATION

70. This Consent Decree may be terminated when the United States determines that Defendant has satisfactorily completed performance of its compliance and injunctive relief obligations required by this Decree, provided that Defendant has fulfilled all other obligations of this Decree, including payment of the civil penalty under Section IV and any outstanding stipulated penalties under Section VIII. In the event that a dispute arises as to whether Defendant has satisfactorily completed performance of its compliance, injunctive relief, and other obligations under this Decree, the provisions of Section X (Dispute Resolution) shall apply. The Parties shall file with the Court an appropriate stipulation reciting that the requirements of the Consent Decree have been met and requesting termination of the Decree.

XIX. PUBLIC PARTICIPATION

71. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. This Consent Decree is also subject to the requirement to provide an opportunity for public meeting under RCRA Section 7003(d), 42 U.S.C. § 6973(d). Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision

of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

XX. SIGNATORIES/SERVICE

72. Each undersigned representative of Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

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

XXI. INTEGRATION

74. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes any and all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, no other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XXII. FINAL JUDGMENT

75. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

XXIII. APPENDICES

76. The following appendix is attached to and part of this Consent Decree:

“Appendix A” is the Mitigation Project Work Plan.

Dated and entered this ___ day of _____, 2016.

UNITED STATES DISTRICT JUDGE
District of Wyoming

FOR PLAINTIFF UNITED STATES OF AMERICA:

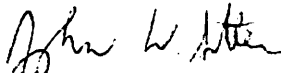
Date



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

11/15/16

Date



JOHN W. SITHER
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-5484
John.Sither@usdoj.gov

CHRISTOPHER A. CROFTS
United States Attorney
District of Wyoming

12/2/16
Date

By:



NICHOLAS VASSALLO (Wyo. Bar 5-2443)
Assistant United States Attorney
District of Wyoming
Post Office Box 668
Cheyenne, Wyoming 82003
(307) 772-2124
Nick.Vassallo@usdoj.gov

FOR DEFENDANT JIM'S WATER SERVICE, INC.:

10-21-2015
Date

Signature: John R. Rodgers
Name (print): John R. Rodgers
Title: President
Address: Jim's Water Service Inc
PO Box 2290
Gillette, WY 82717

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name M Greg Carlson (print):
Title: General Counsel
Address: PO Box 2290
Gillette, WY 82717
Ph. Number: 307-299-2212

APPENDIX A

**Burlington Pond
Mitigation Project Work Plan
Island Construction**

September, 2016

Purpose:

The objective is to construct an island for nesting and breeding of eared grebes and possibly other waterfowl at Burlington pond in Gillette, Wyoming.

Permit and Conditions City of Gillette:

JWS shall seek and obtain an appropriate permit from the City of Gillette prior to the commencement of any construction or activities set forth herein. JWS shall access the Lake via route approved by the City. JWS shall repair or replace any City or public and private property damaged or disturbed by the construction activities, including but not limited to the concrete pathway surrounding the Lake. JWS shall reclaim any disturbed area of the shoreline or public parkway to original condition.

Island Size, Shape and Characteristics:

The minimum surface area at Normal High Water Level (NHWL) is expected to be 0.25 acre with a peanut shape, with length of approximately 200 feet and average width of 60 feet; dimensions being from NHWL to NHWL.

The island will be situated midway between the north shore and the spit, with minimum distance from both the north shore and the spit of 250 feet. It will also be approximately midway between the northwest shore and southwest shore.

NHWL is an elevation delineating the highest water level that has been maintained for a sufficient period of time to leave evidence upon the landscape, and commonly is the point where the natural vegetation changes from predominantly aquatic to predominantly terrestrial. Here NHWL can be observed at the existing islands on opposite side of the spit. The constructed elevation of the island shall be the sum of the following: NHWL, elevation of existing islands, and allowance for settlement. This level will be mutually determined by EPA, or EPA's authorized representative(s), and JWS and documented in the field for reference during construction. It is understood that there is no outlet for water level control. Water level is determined or controlled by natural precipitation and the City's management of storm runoff. Therefore it is possible that the water level may on occasion exceed the reference NHWL depending on precipitation and storm water runoff management by the City of Gillette.

Fill will be placed at 10:1 slope below the HWL and 5:1 slope above HWL until matching the mutually-determined top elevation, at which point the island will be constructed with a nearly constant elevation. Fill material will be excavated from the pond bottom around the perimeter of the island. The excavation slope will be at 10:1 for a distance of 30 feet out from the edge (HWL) of the island. Beyond 30 feet the excavation slope will be no less than 5:1. Maximum depth of excavation is expected to be no more than 5 feet. The opposite wall of the excavation shall be sloped at no less than 4:1. The opposite wall of the excavation is expected to be at least 125 feet from the shore line.

The soils information provided by the City and NRCS indicates the borrow/fill material will be sandy clay or clayey sand classification, with courser materials increasing with depth. After island construction completion, the borrow area shall be impervious enough to prevent excessive seepage losses, or shall be sealed or lined with clay material found onsite. Variation of the suitability of borrow/fill material may vary considerably throughout the borrow region. Zones with preferable quality for fill will be most thoroughly utilized to maximize the durability of the island. If this requires going beyond the limits of 5-foot excavation indicated above approval of EPA will be requested before doing so.

The construction operation must take place in the winter, while the deep frost is in the ground. JWS will use heavy construction mat boards for access and a base for a Long Reach Excavator. JWS will pull up material from the lake bed to form the island. It is known from the other islands created by dredge that the lakebed material will form up into an island. JWS will pull up most of the material from the south and west sides (unless otherwise directed) of the island toward the center of the lake. Once a base of material is established the excavator will move up on top of the island to work from there, bringing about some compaction, and building it out to the desired size. Then JWS will work back to the construction mats, cleaning up the material and shaping the island as may be specified by EPA, or its authorized representatives.

Settlement shall be based on an analysis of the fill material, foundation material and condition, and compaction methods. In lieu of a formal analysis, the allowance for settlement shall be a minimum of 5 percent of island height if constructed using compacted earth fill material (6" lifts, roller compacted or comparable compaction rate using a rubber tired vehicle of sufficient weight, such as front end loader) or minimum of 15 percent if constructed with only tracked equipment. It is assumed that the fill will be compacted, primarily by wheel or track rolling, during construction. This will provide a firm base for operation of construction equipment and minimize the need for placing a large amount of material to offset settlement. JWS proposes, and EPA, after consultation with FWS agrees, that determination of overfill required be made by JWS and a representative of EPA based upon the observed results of compaction obtained during the placement operation. Overfill shall be placed before topsoil is placed.

Topsoil:

Topsoil may be obtained from the lake bottom and if necessary the wetland area northwest of the island. Topsoil taken from the wetland area northwest of the island will be stripped to approximately half- depth and stockpiled on the island during the winter. The topsoil material stockpile is expected to be a windrow along the center of the island to minimize further movement when the thaw conditions will allow spreading. Topsoil will be spread on all areas above the NHWL to a depth of 4 to 6 inches. At the high water line the topsoil will be tapered to zero at a depth 1 foot below the NHWL. The topsoil will be left in a groomed condition so that it does not require further treatment before seeding. At the topsoil excavation area the remaining topsoil will be left in a condition that will promote re-growth, based on the advice of the NRCS.

Re-Vegetation:

A vegetation plan will be developed for the island in consultation with NRCS, and subject to approval by EPA, after consultation with FWS, both for wetland and upland areas, by March 31, 2017. Measurements will be conducted by JWS to determine vegetation success or if re-establishment is

required for any particular area. JWS does not have the required expertise and will therefore rely upon NRCS. JWS's consultant has previous experience with this office and has made preliminary contact to confirm that these services will be available to develop plans to meet the intended purpose(s) of the vegetation plan. It is understood that the local NRCS office may call upon other NRCS offices for assistance with specialty issues such as specific bird species habitat. It is understood that the following elements will be included in the vegetation plan: site preparation; topsoil requirements; fertilizer application – if any; seedbed preparation; seeding and planting methods; selection of species; seed and plant sources; seed analysis; seeding rate/plant spacing; and inspections.

Reseeding or replanting, and fertilization may be needed to ensure that the vegetation functions as intended throughout its expected life. Observation of establishment progress and success will be performed at regular intervals by JWS until the practice has met the criteria for successful establishment and implementation.

Wetland Planting: (NHWL and below)

Hydrophytic vegetation planned to meet the selected wetland functions shall be compatible with the planned soil and hydrologic conditions. Preference shall be given to native wetland plants with localized genetic material to minimize the adverse effects of climate, disease, and other limiting factors, several species adapted to the site will be established.

Where natural colonization of acceptable species can realistically be expected to occur within five years, the site may be left to revegetate naturally. If not, the appropriate species will be established by seeding or planting. Select wetland species based on 1) the wetland mixes provided in NRCS Biology Technical Note; 2) The plant community found on an established reference wetland site for the hydric soil on the restored site; or 3) the plant community found in the Historic Climax Plant Community in the Ecological Site Description.

Upland Planting: (Above NHWL)

Species selected for seeding or planting shall be suited to local site conditions and intended uses, and be common to the site or location. Selected species will have the capacity to achieve adequate density and vigor to stabilize the site within an appropriate period. Only viable, high quality seed or planting stock will be used. Seeding or planting shall be done at a time and in a manner that best ensures establishment and growth of the selected species. Planting shall be done during approved times for the species to be used.

Dominant vegetation will consist of existing natural or planted herbaceous cover suited to the ecological site and the intended purpose. Plantings will consist of three or more native grass or sedge species and one or more forb species suited to the ecological site. At least 50 percent of each planting mix (seed or propagule count) shall be rhizomatous or moderately rhizomatous grass or sedge species. In areas where native seeds and propagules are present, natural regeneration can be used in lieu of planting. However, it is anticipated that no native seed bank is present since material is coming from the lake bottom that planting will be necessary.

Measurements:

A simple frequency grid method will be used to measure seedling or plant establishment success for a single species, mixtures of species, or single species of a mixture. The frequency grid will be a metal frame containing 25 squares (5 x 5) or cells and can be made from concrete reinforcing sheets that have 15 x 15 cm squares. The frequency grid may be either randomly or systematically placed within a seeded area. The numbers of cells containing 1 or more seeded plants then are counted. The grid is then flipped, end-over-end, and the counts repeated. The process will be repeated until a total of 100 cells have been counted per sampling location within a seeded area. Counts can be directly converted into frequency of occurrence or stand percentages by dividing the number of cells that contain a seeded plant by 100. The process can be repeated at several locations within a seeded area to characterize establishment success. Multiplying frequency of occurrence percentages by 0.4 provides a conservative estimate of plant density (plants m⁻²).

Frequency grid values of 50% or higher (20 or more plants m⁻²) will be classified as fully successful stands. Frequencies of 25 (10 plants m⁻²) to 50% will indicate marginal to adequate stands; while stands of less than 25% will be regarded as requiring partial re-establishment or unsuccessful.