

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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UNITED STATES OF AMERICA))	
and the MICHIGAN DEPARTMENT))	
OF ENVIRONMENT, GREAT LAKES,))	
AND ENERGY,))	
))	
Plaintiffs,))	
))	
v.))	Civil Action No. 23-cv-_____
))	
R.J. TORCHING, INC., d/b/a RJ))	
Industrial Recycling aka RJ Industrial,))	
))	
Defendant.))	
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CONSENT DECREE

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Plaintiffs, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and the Michigan Department of Environment, Great Lakes and Energy (“EGLE” or the “State”), have filed a complaint (“Complaint”) in this action concurrently with this Consent Decree, alleging that Defendant, R.J. Torching, Inc., a Michigan Corporation (“Defendant” or “R.J. Torching”), violated the following: (1) the State Implementation Plan adopted by the State of Michigan and approved by the EPA pursuant to Clean Air Act (the “Act”), Section 110, 42 U.S.C. § 7410 (“Michigan SIP”), Part 55, Air Pollution Controls, of the Natural Resources and Environmental Protection Act (“NREPA”), MCL 324.5501, *et seq.* (Part 55), and the Rules promulgated thereunder, specifically Rules 301 and 310 of Michigan’s Air Pollution Control Rules, Mich. Admin. Code, R 336.1301 (Standards for Density of Emissions) and R 336.1310 (Open Burning); and (2) a Consent Order between EPA and Defendant, dated March 31, 2015 (“2015 Consent Order”). Defendant is thus liable under Section 113(b) of the Act, 42 U.S.C. §7413(b) and 40 C.F.R. §19.4.

The Complaint alleges that Defendant: (1) caused or allowed visible emissions of particulate matter from the torch-cutting operations at its facilities at G-5167 North Dort Hwy in Flint Michigan (the “Flint Facility”) and 989 North Raymond Road in Battle Creek Michigan (the “Battle Creek Facility”) to exceed Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

twenty percent opacity in violation of the Michigan SIP, Mich. Admin. Code, R. 336.1301(1), on certain occasions from September 2, 2015 until present at the Flint Facility and from August 27, 2015 to May 2, 2018 at the Battle Creek Facility; (2) caused or allowed cast iron metallic and rubber material to catch fire and smolder on certain occasions from September 1, 2015 until present at the Flint Facility and from September 28, 2017 to May 8, 2019 at the Battle Creek Facility without passing through a chimney or stack, constituting open burning, in violation of the Michigan SIP, Mich. Admin. Code, R 336.1310(1); (3) failed to operate an air cleaning device in a satisfactory manner in violation of the Michigan SIP, Mich. Admin. Code, R 336.1910; and (4) violated an administrative consent order EPA issued on March 31, 2015, docket number EPA-5-15-113(a)-MI-02, documenting certain violations on certain occasions from August 27, 2015 to present at the Flint Facility and from October 25, 2016 to May 8, 2019 at the Battle Creek Facility.

During March 2020, Defendant permanently closed the Battle Creek Facility, leaving the Flint Facility as the only permanent location at which R.J. Torching conducts torch-cutting activities.

The United States has reviewed the Financial Information submitted by Defendant to determine whether and to what extent the company is financially able to pay civil penalties. Based upon this Financial Information, the United States has determined that Defendant has a limited financial ability to pay civil penalties to

resolve this civil action.

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

The United States, EGLE, and R.J. Torching (“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 among 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 Sections 113(b) and 304(a)(1) of the Act, 42 U.S.C. §§ 7413(b) and 7604(a)(1), and over the Parties. In addition, the Court has supplemental jurisdiction over the state law claims of EGLE pursuant to 28 U.S.C. § 1367. Venue lies in this District pursuant to 28 U.S.C. §§ 1391(b) and 1395(a) and Section 113(b), 42 U.S.C. § 7413(b), of the Act, because Defendant’s principal place of business is in this District and some of the alleged Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

violations occurred within this District. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree, any action to enforce the Decree, and over Defendant. Defendant further 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 113(b) of the Act.

II. APPLICABILITY

3. The obligations of this Consent Decree apply to and are binding upon the United States and the State, 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 Flint 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 a transfer of the Flint Facility, 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, DOJ, and EGLE, in accordance with Section XIII (Notices). Any attempt to transfer ownership or operation of the

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Flint 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 of Defendant 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 Defendant's 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 or in regulations promulgated pursuant to the Act have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions apply:

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“Battle Creek Facility” means Defendant’s former torch-cutting facility located at 989 North Raymond Road in Battle Creek, Michigan;

“Capture and Control System” means the enclosure, duct work, fabric filter, water cannon or other dust-suppression devices, and other components that comprise the pollution control system located at the Flint Facility, designed to capture particulate from torch-cutting operations and reduce particulate through the use of filters;

“Complaint” means the complaint filed by the United States and the State in this action;

“Consent Decree” or “Decree” means this Decree and all appendices attached hereto listed in Section XXIV;

“Date of Lodging” means the date that this Consent Decree is first lodged with the Court pursuant to Section XVIII (Public Participation) of this Consent Decree;

“Day” means a calendar day unless expressly stated to be a business day. In computing any period of time for a deadline under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period runs until the close of business of the next business day;

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“Defendant” means R.J. Torching, Inc., a Michigan corporation, doing business as R.J. Industrial Recycling and also known as R.J. Industrial;

“DOJ” means the United States Department of Justice and any of its successor departments or agencies;

“EGLE” or the “State” means the Michigan Department of Environment, Great Lakes, and Energy;

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

“Effective Date” means the definition provided in Section XIV;

“Fabric Filter” means a pollution control device which utilizes fabric filtration to remove particles from a contaminated gas stream;

“Financial Information” means those financial documents identified in Appendix B;

“Flint Facility” (or “Facility”) means Defendant’s torch-cutting facility located at G-5167 N. Dort Hwy, in Flint, Michigan;

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

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

“Permanent Compliance Measures” means the new Capture and Control System constructed in accordance with Section V of this Consent Decree;

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

“Single Opacity Reading” means a momentary observation of an emissions plume, made at a point of observation in accordance with EPA Method 9 or Alt-082, at 15-second intervals.

“State” means the State of Michigan on behalf of EGLE;

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

IV. CIVIL PENALTY

8. Defendant provided Financial Information, which is described in Appendix B, that demonstrates that Defendant has a limited ability to pay civil penalties at this time. Defendant shall pay the sum of \$150,000 as a civil penalty, to be divided between the United States and the State in the manner described in Paragraph 9, below:

9. Method of Payment of Civil Penalties.

a. Defendant shall pay \$75,000 to the United States through the Court Registry, in accordance with authorization provided by an order from the Court regarding such payment. On the Date of Lodging the United States and Defendant shall file a joint motion, in the form set forth in Appendix C, authorizing the deposit into a Court Registry account. Defendant shall make the payment within 20 days from the date the Court issues such authorization.

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b. Defendant shall pay \$75,000 to the State through the Court Registry in accordance with authorization provided by an order from the Court regarding such payment. On the Date of Lodging the State and Defendant shall file a joint motion, in the form set forth in Appendix C, authorizing the deposit into a Court Registry account. Defendant shall make the payment within 20 days from the date the Court issues such authorization.

10. If, following public comment, the United States moves for entry of the Decree and the Court grants entry, the United States, the State and Defendant shall file joint motions requesting that the Court issue Withdrawal Orders directing the disbursement of funds, including interest, from the Court Registry Account(s) to the United States and the State.

11. If, on the other hand, the United States determines, based on comments or new information received during the public comment period, that the proposed Consent Decree is not fair, reasonable, or in the public interest, or if the Court declines to enter the Consent Decree, the Parties (unless they agree otherwise) shall file a joint motion requesting that the Court issue Withdrawal Orders directing the disbursement of funds returning the settlement payments, including interest, to Defendant.

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

V. COMPLIANCE REQUIREMENTS

13. Defendant shall comply with Rule 336.1301 (Standards for Density of Emissions) and Rule 336.1310 (Open Burning) of the Michigan SIP for all torch-cutting activities at the Flint Facility. Defendant shall conduct all torch-cutting operations at the Flint Facility inside the current enclosure, or, when completed, inside the Capture and Control System.

14. Interim Compliance Measures: Beginning on the Date of Lodging, and until such time as the Permanent Compliance Measures are completed and in full operation after EPA has approved the proposed Operations, Maintenance, and Monitoring Plan as set forth in Paragraph 17, Defendant shall comply with or undertake the following, as applicable:

a. Allow access to inspectors from EPA and EGLE or their representatives to enter the Flint Facility to conduct opacity readings in a safe manner without a requirement to notify Defendant in advance, and, as reasonably able, Defendant shall continue normal operations throughout the readings. Such inspector(s), upon arrival at the Flint Facility, will first meet with R.J. Torching's

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Yard Manager before inspecting the site so that safety steps can be taken to inform operational personnel of the inspector(s)' presence. The inspector(s) shall comply with instructions provided by Defendant reasonably required to meet the safety regulations of the Michigan Occupational Safety and Health Administration and R.J. Torching's safety protocols;

- b. Perform all torch-cutting at the Flint Facility within the existing enclosure and utilize the pollution control system for torch-cutting;
- c. Limit all torch-cutting to carbon steel (no cast iron);
- d. Limit torch-cutting at the Flint Facility to a single 10-hour shift per day, and set hours of torch-cutting to begin no earlier than 6:00 a.m. and end as close as possible to sunset to prioritize torch-cutting during daylight hours;
- e. Operate a water mist cannon at the Flint Facility when feasible (i.e., not during freezing or near freezing temperatures) or an equal or greater effective dust suppression device, to suppress any emissions that escape the enclosure; and
- f. Limit torch-cutting operations at the Flint Facility to no more than two torch-cutters working simultaneously. If EGLE or EPA performs announced or unannounced opacity readings while Defendant operates under these conditions, and the readings demonstrate non-compliance with the 20% opacity

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limit set forth in Michigan Rule R 336.1301 (Standards for Density of Emissions), then Defendant shall limit torch-cutting to a one-person operation until the Permanent Compliance Measures are completed and in full operation after EPA has approved the proposed Operations, Maintenance, and Monitoring Plan as set forth in Paragraph 17.

15. Construction of Pollution Control Devices for Permanent Injunctive Relief.

a. Defendant shall construct a “Capture and Control System” at the Flint Facility in accordance with the plans and specifications set forth in Appendix A to this Consent Decree. Defendant shall complete construction of the Capture and Control System by no later than seven months following the Effective Date, and thereafter operate the Capture and Control System at all times when torch-cutting is occurring. Defendant shall notify DOJ, EPA, and EGLE that it has completed construction of the Capture and Control System within 10 days following construction completion.

b. Between the time that construction of the Capture and Control System is completed and the time that Defendant successfully completes a Compliance Demonstration in accordance with Paragraph 16, Defendant shall comply with the following provisions for torch-cutting at the Flint Facility:

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- (1) Defendant shall take and record daily opacity readings for at least 18 continuous minutes, using EPA Method 9, at the fabric filter stack.
- (2) Defendant shall take and record daily opacity readings for at least 18 continuous minutes, using EPA Method 9, where uncaptured torch-cutting emissions are observed escaping at points other than the fabric filter stack.
- (3) If any Single Opacity reading exceeds 20 percent, then Defendant shall take immediate corrective action(s) to address the exceedance and record any such action(s) taken.
- (4) Opacity readings as recorded above shall include the date, start time, and end time for each daily set of opacity readings, and, if an exceedance occurred, the highest opacity reading recorded, the emission point, and any corrective action(s) taken.

16. Performance Test of Capture and Control System.

a. No later than 30 days following completion of construction of the Capture and Control System, Defendant shall submit to EPA for its approval,

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after a reasonable opportunity for review and comment by the State, a proposed protocol for the performance testing of the Capture and Control System. The proposed protocol shall include: (1) the name and qualifications of an emissions testing firm that Defendant proposes to conduct the performance test; (2) a description of the proposed testing methodology consistent with EPA Test Method 9 or Alt-082 for determining the opacity at the fabric filter stack and for any uncaptured torch-cutting emissions at all points of the Capture and Control System showing visible emissions; (3) a protocol for measuring pressure drop to establish pressure drop limits for operating the fabric filter; and (4) details as to how the testing shall be carried out under representative process operating conditions that are likely to most challenge the emissions control capabilities of the Capture and Control System with regard to meeting the applicable opacity standards. Such testing shall be conducted in accordance with EPA's National Stack Testing Guidance (April 27, 2009). Once EPA approves the protocol, including the proposed emissions testing firm, Defendant shall hire the emissions testing firm to conduct the performance test.

b. No later than 60 Days following Notice of EPA approval of the protocol for the performance testing of the Capture and Control System as set forth in Paragraph 16.a, Defendant shall conduct a performance test of the Capture and

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Control System to demonstrate that emissions from the Capture and Control System during the torch-cutting operation do not exceed the 10% opacity limit set forth in Section V of this Consent Decree.

c. The emissions testing firm shall conduct the performance testing using either EPA Method 9 or Method ALT-82 to measure opacity, as will be set forth in the approved testing protocol. The testing shall be performed at the fabric filter stack and at all points where visible, uncaptured torch-cutting emissions are observed from the Capture and Control System. If the emissions testing firm uses Method 9 to measure opacity, it shall also take a digital photo of the opacity being measured from each observation point—every 15 seconds to correspond to each Method 9 reading to the extent possible.

d. No later than 30 Days after completion of the performance test required by Paragraph 16, Defendant shall submit to EPA and EGLE for review and EPA approval, after a reasonable opportunity for review and comment by EGLE, a performance test report. The report shall include proposed high and low values for fabric filter pressure drop, as determined from monitoring the Capture and Control System during the testing, for use in operating the Capture and Control System, in order to demonstrate Defendant's continuous compliance with its opacity limit. The report shall include a description of the operating conditions

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during the testing, the testing results, and all steps taken to comply with the testing protocol. Defendant shall evaluate the results of the testing and, based upon those results, demonstrate that Defendant will have the capability to consistently comply with the 10% opacity requirement set forth in Paragraph 17.e(1), below. If Defendant is unable to make such a demonstration, then Defendant shall continue to comply with the Compliance Measures in Paragraph 15.b and include in the report a corrective action plan for EPA approval, identifying the deficiencies, the steps Defendant will take to correct such deficiencies, and the timeline for completing such corrections and performing an additional performance test in compliance with this Paragraph.

17. Submission of an Operations, Maintenance, and Monitoring Plan.

Within 30 Days following completion of the performance test described in Paragraph 16 above, Defendant shall submit to EPA and EGLE for review and EPA approval, after a reasonable opportunity for review and comment by EGLE, an Operation, Maintenance and Monitoring Plan (“OM&M Plan”). Once approved, Defendant shall operate the Capture and Control System in accordance with the OM&M Plan at all times that Defendant torch-cuts at the Flint Facility. Failure to comply with the provisions of the approved OM&M Plan shall constitute a violation of this Consent Decree. The OM&M Plan shall include at a minimum:

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- a. Safety practices;
- b. All monitoring requirements referred to in Paragraph 18;
- c. Inspection and maintenance schedules for the Capture and Control System as recommended by the equipment manufacturer to the extent possible, including, but not limited to, regular inspections, parts replacement schedules, and maintenance of a spare parts inventory;
- d. Requirements to submit semi-annual reports to EPA and EGLE that will include all opacity readings whether from the emissions testing firm referred to in Paragraph 16 or internal company readings; all recorded pressure drop measurements; equipment inspection logs; and
- e. The following operational restrictions:
 - (1) Limit opacity for all torch-cutting activities at the fabric filter stack, and any uncaptured torch-cutting emissions observed at the Flint Facility, to 10 percent or less on a six-minute average basis.
 - (2) Limit the number of torch-cutters allowed to simultaneously operate inside the enclosure part of the Capture and Control System to the maximum number used during the performance testing required by

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Paragraph 16.

- (3) Limit the proximity at which each torch-cutter operates from the opening in front of the enclosure, as determined from the performance test required by Paragraph 16.
- (4) Require that Defendant operates at all times consistent with safety and good air pollution control practices to minimize emissions from torch-cutting.
- (5) Set hours of torch-cutting in a manner to prioritize torch-cutting performed during daylight hours.

18. Opacity Monitoring. No later than 30 days following EPA's Notice to Defendant that EPA has approved the performance test report, Defendant shall begin to monitor opacity at the Capture and Control System on a monthly basis:

a. Defendant shall submit to EPA and EGLE for EPA approval, after a reasonable opportunity for review and comment by the State, the name and qualifications of a third-party emissions testing firm that Defendant proposes to use to take the readings. If Defendant decides to use the emissions testing firm that it used during the performance test required by Paragraph 16, it shall state so in its submission.

b. Opacity readings shall be taken in accordance with either EPA Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

Method 9 or Alternative Method ALT-082. Opacity readers must be certified under Method 9 or be certified to take photographs in accordance with ALT-082.

c. Defendant shall require the representative of the emissions testing firm to contact Defendant the day before the planned monthly observations to confirm whether and at what time torch-cutting will take place on the following day. If Defendant does not plan to torch-cut on such date, then the emission testing firm shall plan to conduct opacity readings during the next Day that Defendant plans to torch-cut, using the procedures described in this Paragraph.

d. Defendant shall require the opacity reader to observe and record the opacity readings. Defendant shall report in the pertinent semi-annual report required by Paragraph 28 such observations and recordings, including, but not limited to, the individual 15-second opacity readings, the operating conditions during the test, the size and material of scrap being cut, the number of employees simultaneously cutting, and the approximate distance into the enclosure where each torch-cutter is working.

e. For any uncaptured torch-cutting emissions, opacity readings must be taken at the point of highest opacity during times of continuous torch-cutting operations at intervals of 15 seconds each for a total of 24 minutes. Six-minute averages must be computed on a rolling basis, every 15 seconds, and all

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non-overlapping six-minute averages that exceed 10 percent must be identified.

f. After taking any opacity readings of uncaptured torch-cutting emissions, opacity readings must be taken at the fabric filter stack during times of continuous torching operations at intervals of 15 seconds each for a total of 24 minutes. Six-minute averages must be computed on a rolling basis, every 15 seconds, and all non-overlapping six-minute averages that exceed 10 percent must be identified.

g. If any emissions exceedance of the 10 percent opacity limit set forth in Section V is observed, then Defendant must perform the following tasks:

(1) within two Days of the exceedance, not counting days that Defendant has idled torch-cutting, determine the root cause(s) of the emissions exceedance and complete corrective actions to address the root cause of the exceedance;

(2) within two business days after completing the corrective actions, direct the third-party emissions testing firm to take additional readings to verify compliance with the opacity limit set forth in Section V of this Decree;

(3) notify EPA and EGLE of the exceedance within two business days after the exceedance is first discovered; and

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(4) report to EPA and EGLE the corrective actions Defendant has taken pursuant to Paragraph 18.g.(1), and the additional opacity readings pursuant to Paragraph 18.g.(2), within five Days after the exceedance is first discovered, not counting days that Defendant has idled torch-cutting. The report shall include the dates of the exceedance; that the corrective actions were completed and the date of completion; if corrective actions were not completed, the reasons why they were not completed; whether the corrective actions were successful, and, if not, the reasons why the corrective actions were not successful; and the dates the opacity readings were taken.

(5) EPA may, in its unreviewable discretion, grant a request by Defendant for a reasonable extension for performance of corrective action, where additional time is necessary to procure parts, material, or labor.

(6) Nothing in Paragraph 18.g limits Defendant's ability to claim Force Majeure under Section VIII.

h. EPA and EGLE reserve the right to take readings in addition to those taken by the emissions testing firm at any time. If a representative of EPA or EGLE arrives at the Flint Facility to conduct readings, Defendant shall cooperate

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with the representative in the same manner as set forth in Paragraph 14.

19. Limits and Monitoring of Pressure Drop.

a. Once EPA approves the performance test report required by Paragraph 16, Defendant shall maintain the pressure drop across the fabric filter at the Flint Facility within the high/low limits set forth in the EPA-approved performance test report at all times that torch-cutting is taking place, and monitor the pressure drop continuously during all torch-cutting.

b. On days in which torch-cutting occurs at the Flint Facility, Defendant shall record the pressure drop during torch-cutting at least twice daily. Defendant shall note each day that torch-cutting does not occur.

c. Defendant shall install and operate visual and audio alarms for any time the pressure drop is outside the EPA-approved limits for torch-cutting at the Flint Facility. If the alarm is triggered, then Defendant shall record the pressure drop at such time, stop any ongoing torch-cutting, extinguish any residual burning, and take any other immediate appropriate corrective actions. Defendant shall also record any corrective actions taken.

20. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Decree, EPA, after consultation with the State, will in writing: (a) approve the submission; Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

(b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

21. If the submission is approved pursuant to Paragraph 20(a), Defendant shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 20(b) or (c), Defendant shall, upon written direction from EPA after consultation with the State, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions.

22. If the submission is disapproved in whole or in part pursuant to Paragraph 20(c) or (d), Defendant shall, within 45 Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Defendant shall proceed in accordance with the preceding Paragraph.

23. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA after consultation with the State may again require Defendant to correct any deficiencies.

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24. If, in response to EPA's decision to disapprove (in whole or part) Defendant's plan, report or other item (or portion thereof), Defendant elects to invoke Dispute Resolution as set forth in Section IX (Dispute Resolution), Defendant shall do so by sending a Notice of Dispute in accordance with Paragraph 54 within 30 Days (or such other time as the Parties agree to in writing) after receipt of the applicable decision.

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

26. Permits. Where any compliance obligation under this Section requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. Defendant may seek relief under the provisions of Section VIII (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any

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permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

27. Defendant may not shut down—by permanently ceasing—torch-cutting operations at the Flint Facility until it has installed the Capture and Control System required in Paragraph 15.a. Following installation of the Capture and Control System, Defendant may shut-down torch-cutting operations at the Flint Facility, or idle—by temporarily ceasing—torch-cutting operations at the Flint Facility.

a. If Defendant, following installation of the Capture and Control System required in Paragraph 15.a, shuts down its torch-cutting operations at the Flint Facility, it must provide Notice to DOJ, EPA, and the State within seven days of permanent shutdown. Once Defendant has completed the shutdown of its torch-cutting operations, it shall notify EPA and describe those steps it took to perform the shutdown. Once shut down, Defendant may no longer torch-cut at the Flint Facility while the Consent Decree is in operation, and will no longer need to undertake the opacity monitoring requirements in 15.b, the performance test requirements in Paragraph 16 (if the requirements have not been met at the time of shutdown), or provide the information required under Paragraphs 17(a)-(c) and (e),

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18, 19, and 28.a(1-5).

b. If Defendant idles torch-cutting operations at the Flint Facility for one or more entire days, Defendant shall record that fact in the semi-annual report covering the date(s) in question.

c. If torch-cutting at the Flint Facility is idled beginning within the first 14 days of a calendar month and continuing for the remainder of that month, Defendant may omit the monthly opacity monitoring and reporting requirements set forth in Paragraphs 18(c)-(g) and the pressure limit requirements set forth in Paragraph 19 for that month, provided that, within the first 14 days of the month, it provides EPA and EGLE with Notice that it will idle its torch-cutting operations for the remainder of the month, including the planned dates of idling. If this omission from the opacity monitoring and reporting requirements set forth in Paragraph 18(c)-(g) applies in a calendar month, it will not apply to the next calendar month unless Defendant idles torch-cutting for the entire subsequent month and submits Notice for that subsequent month no later than the first day of that subsequent month that Defendant remains idled. If Defendant resumes torch-cutting during such subsequent month after giving such notice, Defendant shall comply with Paragraph 18(c)-(g).

d. If torch-cutting at the Flint Facility was idled for the entire
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month, then the opacity information specified by Paragraph 18 to be included in the semi-annual report need only confirm that torch-cutting was idled for that entire month.

VI. REPORTING REQUIREMENTS

28. Defendant shall submit the following reports to EPA, DOJ, and the State at the addresses set forth Section XIII (Notices):

a. By July 31st and January 31st of each year after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XVII, Defendant shall submit by electronic means a semi-annual report for the preceding six months (January 1st through June 30, and July 1st through December 31) that includes the following:

- (1) the status of construction of the Capture and Control System;
- (2) the status of the performance test and the performance test report required by Paragraph 16;
- (3) All opacity readings taken during the reporting period, including the opacity information specified by Paragraph 18 to be included in the semi-annual report;
- (4) status of compliance for the six-month reporting period, including the OM&M plan described in Section V, and the information required by Paragraph 28.b with respect to any violations;
- (5) all information required under the OM&M plan, as described in Paragraph 17.d; and
- (6) For any month in which torch-cutting operations have

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been shut down or idled in accordance with Paragraph 27, Defendant shall identify in the report those calendar months in which torch-cutting did not occur.

b. In addition to those requirements set forth in Paragraph 28.a, if Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, including the requirements of the OM&M Plan, Defendant shall notify DOJ, EPA, and EGLE of such violation and its likely duration, within 10 business 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 and investigate the cause of the violation. Defendant shall then submit an amendment to the original 10-day report, including a full explanation of the cause of the violation, within 30 Days of the Day Defendant becomes aware of the cause of the violation or within such other period of time as the Parties agree to in writing, but no later than an additional 30 days. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the Notice required by Section VIII (Force Majeure).

29. Whenever any violation of this Consent Decree or any other event affecting Defendant's performance under this Decree may pose an immediate

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threat to the public health or welfare or the environment, Defendant shall notify EPA and the State as set forth in Section XIII (Notices), as well as by contacting the State's Pollution Emergency Alert System (PEAS) Hotline at 800-292-4706, as soon as possible, but no later than 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.

30. 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 perjury 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 have no personal knowledge that the information submitted is other than 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.

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

32. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing

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regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

33. 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.

VII. STIPULATED PENALTIES

34. Defendant shall be liable for stipulated penalties, which shall be split evenly between the United States and the State 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 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. Unless otherwise noted below, stipulated penalties shall accrue per violation per day; provided, however, that a continuous violation of the same parameter over multiple averaging periods during a single day—for example, an exceedance of an opacity limit for three six-minute periods—shall be considered a single event or violation, and not three separate violations.

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35. Late Payment of Civil Penalty. If Defendant fails to pay the civil penalty required to be paid to the Registry of the Court under Section IV (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$1,000 per Day for each Day that the payment is late.

36. Compliance Requirements:

a. Interim Compliance Measures. The following stipulated penalties shall accrue per violation per Day for each violation of a requirement of Paragraph 14, provided that stipulated penalties shall accrue for violations of subparagraph 14.e. when feasible (i.e., not during freezing or near freezing temperatures):

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

b. Failure to complete construction of Capture and Control System within seven months following the Effective Date as set forth in Paragraph 15:

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

c. Failure to (1) submit a complete protocol for the performance testing of the Capture and Control System within 30 days of completion of construction of Capture and Control System or (2) perform the performance test within 60 Days following Notice of approval of protocol for performance testing in the manner required in Paragraph 16:

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

d. During the initial or subsequent performance test required by Paragraph 16, failure to achieve 20 percent opacity as a 6-minute average:

\$5,000.....	First performance test
\$10,000.....	Any subsequent performance test

e. Upon failure by Defendant to demonstrate in Paragraph 16.d that it can consistently comply with the 10 percent opacity limit set forth Paragraph 17.e(1), the following stipulated penalties shall accrue for any failure to comply

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with the 20 percent opacity limit set forth in Paragraph 15.b, or any failure to comply with the EPA-approved corrective action plan described in Paragraph 16.d:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1st through 14th Day
\$ 1,500.....	15th through 30th Day
\$ 2,500.....	31st Day and beyond

f. Failure to submit a complete performance test report in accordance with Paragraph 16.d. within 30 days following the date of the performance test:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1st through 14th Day
\$ 1,000.....	15th through 30th Day
\$ 1,500.....	31st Day and beyond

g. Failure to submit a complete OM&M plan in accordance with Paragraph 17 within 30 Days following completion of the performance test described in Paragraph 16:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1st through 14th Day
\$ 1,000.....	15th through 30th Day
\$ 1,500.....	31st Day and beyond

h. Failure to comply with the requirements of the OM&M Plan not otherwise addressed in this Paragraph 36:

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<u>Penalty Per Violation Per Day</u>	<u>.Period of Noncompliance</u>
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\$ 750	1st through 14th Day
\$ 1,500.....	15th through 30th Day
\$ 2,500.....	31st Day and beyond

i. \$1,000 for each failure to monitor opacity on a monthly basis or otherwise in accordance with Paragraph 18, unless torch-cutting is idled or shut down pursuant to Paragraph 27.a., c., and d.

j. Failure to monitor pressure drop, maintain pressure drop within the high/low limits, and/or record the results in accordance with Paragraph 19:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
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\$ 500	1st through 14th Day
\$ 750	15 th through 30th Day
\$1,000	31st Day and beyond

k. Failure to meet the opacity limit set forth in Paragraph 17.e(1) based on a six-minute opacity reading following successful completion of the performance test and EPA approval of the performance test report. The number of Days of a particular violation is calculated as the total Days on which torch-cutting takes place until such time as the third-party emissions testing firm or a representative of EPA or EGLE performs additional testing and confirms compliance. EPA and EGLE are not obligated to perform such additional testing to confirm compliance. Once compliance is achieved, a further opacity exceedance

due to a cause different from the previous violation would be deemed a new violation for purposes of Period of Noncompliance:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000.....	1st through 14th Day
\$ 2,000.....	15th through 30th Day
\$ 3,000.....	31st Day and beyond

1. Failure to comply with any of the monitoring requirements set forth in Paragraph 18(g):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1st through 14th Day
\$ 1,000.....	15th through 30th Day
\$ 1,500.....	31st Day and beyond

m. Failure to comply with any requirement in Sections V (Compliance Requirements) or VI (Reporting Requirements), not otherwise set forth in this Section:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500.....	1st through 14th Day
\$750.....	15th through 30th Day
\$1,000	31st Day and beyond

37. Transfer of Ownership: If Defendant fails to: (a) provide a copy of this Consent Decree to any proposed transferee; (b) provide written Notice to the United States at least 30 Days prior to any transfer of any portion of the Flint

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Facility; or (c) provide a copy of the proposed written agreement with the transferee as required by Paragraph 5, Defendant shall pay a stipulated penalty of \$2,500 per occurrence.

38. 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.

39. Defendant shall pay stipulated penalties to the United States and the State within 30 Days of a written demand by either Plaintiff. Defendant shall pay fifty percent of the total stipulated penalty amount due to the United States and fifty percent to the State. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

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

41. Stipulated penalties shall continue to accrue as provided in Paragraph 38 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 Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

decision of EPA or the State that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States or the State 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 District Court and the United States or the State prevails in whole or in part, Defendant shall pay all accrued penalties determined by the District Court to be owing, together with interest, within 60 Days of receiving the District 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 15 Days of receiving the final appellate court decision.

42. Obligations Prior to the Effective Date. Upon the Effective Date, the stipulated penalty provisions of this Decree shall be retroactively enforceable with regard to any and all violations of Paragraph 14 that have occurred prior to the Effective Date and after the Date of Lodging, provided that stipulated penalties that may have accrued prior to the Effective Date may not be collected unless and until this Consent Decree is entered by the Court.

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43. Defendant shall pay stipulated penalties owing to the United States in the manner set forth as follows:

a. Defendant shall pay the stipulated penalties owing to the United States by FedWire Electronic Funds Transfer (“EFT”) to the DOJ account, in accordance with instructions provided to Defendant by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the Eastern District of Michigan. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all stipulated penalty payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Jason Roughton, President
RJ Torching, Inc.
5061 Energy Drive
Flint, MI 48505
jason@rjind.com

and

Kurt Kissling
Warner Norcross + Judd, LLP
2715 Woodward Ave, Ste 300
Detroit, MI 48201
kkissling@wnj.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 DOJ and

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EPA in accordance with Section XIII (Notices).

b. At the time of payment, Defendant shall send Notice that payment has been made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov; (ii) to DOJ via email in accordance with Section XIII; and (iii) to EPA in accordance with Section XIII. Such Notice shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid pursuant to the Consent Decree in United States of America and Michigan Department of the Environment, Great Lakes, and Energy v. R.J. Torching, Inc, and shall reference the civil action number, CDCS Number, and DOJ case number 90-5-2-1-12118.

c. Defendant shall pay the stipulated penalties owing to the State of Michigan to the General Fund of the State of Michigan in the form of a check made payable to the “State of Michigan” and mailed to the Michigan Department of Environment, Great Lakes, and Energy, Accounting Services Division, Cashier’s Office, P.O. Box 30657, Lansing, Michigan 48909-8157. To ensure proper credit, all payments made to the State of Michigan pursuant to this Consent Decree shall include “Payment Identification Number AQD40299” on the front of the check and/or in the cover letter with the payment.

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44. 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 or the State from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

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

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

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VIII. FORCE MAJEURE

47. “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 potential force majeure event: (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. “Force Majeure” does not include Defendant’s financial inability to perform any obligation under this Consent Decree.

48. 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 to EPA and the State. The deadline for the initial Notice is three days after Defendant first knew or should have known that the event would likely delay or prevent performance. Defendant shall be deemed to know of any circumstance of which any contractor or subcontractor of Defendant, or entity controlled by Defendant, knew or should have known.

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Defendant shall provide Notice by telephone to EPA and to the State by email as set forth in Section XIII (Notices), within 72 hours of when Defendant first knew that the event might cause a delay. Within seven Days thereafter, Defendant shall provide to EPA and the State 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.

49. If EPA, after a reasonable opportunity for review and comment by the State, 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, after a reasonable

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opportunity for review and comment by the State, 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, in and 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.

50. If EPA, after a reasonable opportunity for review and comment by the State, 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.

51. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than 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 47 and 48. If Defendant carries this burden, the delay at issue shall be deemed not to be a

violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

IX. DISPUTE RESOLUTION

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

Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Decree.

53. 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 DOJ, EPA, and EGLE a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 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 30 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

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54. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by sending DOJ, EPA, and EGLE 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.

55. The United States, after consultation with the State, will send Defendant its Statement of Position within 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 is binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

56. Judicial Dispute Resolution. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States a motion requesting judicial resolution of the dispute. The motion: (a) must be filed within 30 Days of Defendant's receipt of the United States' Statement of Position pursuant to the preceding Paragraph; (b) may not raise any issue not raised in

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informal dispute resolution pursuant to Paragraph 53, unless the United States raises a new issue of law or fact in the Statement of Position; (c) shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and (d) shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

57. 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.

58. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review.

Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 54 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law. This subparagraph does not govern disputes purely of fact,

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which are addressed under the following subparagraph.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 54, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree.

59. 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 41. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

X. INFORMATION COLLECTION AND RETENTION

60. The United States, the State, and their representatives, including attorneys, contractors, and consultants, shall have the right of entry onto the Flint Facility, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States or

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the State in accordance with the terms of this Consent Decree;

- c. obtain samples and, upon request, splits of any samples taken by Defendant or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant's compliance with this Consent Decree.

61. Upon request, Defendant shall provide EPA and the State or their authorized representatives splits of any samples taken by Defendant. Upon request, EPA and the State shall provide Defendant splits of any samples taken by EPA or the State.

62. Until four 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-

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retention period, upon request by the United States or the State, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

63. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States and the State at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States or the State, Defendant shall deliver any such documents, records, or other information to EPA or the State. Defendant may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

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64. Defendant may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that Defendant seek to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

65. 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 or the State pursuant to applicable federal or state 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.

XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

66. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaint filed in this action through the Date of Lodging. Resolution of the claims of the United States and the State are conditioned upon the veracity and completeness of the Financial Information provided to the United States by Defendant and the financial certification made by Defendant in Paragraph 67.

67. Defendant certifies that, to the best of its knowledge and belief, after thorough inquiry, it has submitted to the United States Defendant’s Financial

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Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to the United States and the time Defendant executes this Consent Decree. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if the Financial Information provided by Defendant, or the financial certification made by Defendant in this Paragraph, is false or, in any material respect, inaccurate.

68. The United States and the State reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 66. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or

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posed by, the Flint Facility, whether related to the violations addressed in this Consent Decree or otherwise.

69. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, civil penalties, other appropriate relief relating to the Flint Facility or its violations, 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 or the State 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 66.

70. 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 and the State do not, by their 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

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will result in compliance with provisions of the Act, 42 U.S.C. § 7401 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

71. This Consent Decree does not limit or affect the rights of Defendant or of the United States or the State 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.

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

XII. COSTS

73. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State 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.

XIII. NOTICES

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

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As to DOJ by email only: eescdcopy.enrd@usdoj.gov
Re: DJ # 90-5-2-1-12118

As to EPA by email only:

Louise C. Gross
Associate Regional Counsel
Office of Regional Counsel
E-mail: gross.louise@epa.gov

David Sutlin
Environmental Engineer
U.S. Environmental Protection Agency, Region 5
E-mail: sutlin.david@epa.gov

Compliance Tracker
U.S. Environmental Protection Agency
Region 5, Chicago
E-mail: R5airenforcement@epa.gov

As to the State and EGLE mcgeend@michigan.gov
by email: (preferred)

As to the State and EGLE Michigan Department of Environment,
by mail: Great Lakes, and Energy
Attn: Dan McGeen
Air Quality Division
Lansing District Office
Constitution Hall – First Floor South
P.O. Box 30242
Lansing, MI 48909

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As to Defendant:

Jason Roughton, President
RJ Torching, Inc.
5061 Energy Drive
Flint, MI 48505
jason@rjind.com and

Kurt Kissling
Warner Norcross + Judd, LLP
2715 Woodward Ave, Ste 300
Detroit, MI 48201
kkissling@wnj.com

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

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

XIV. EFFECTIVE DATE

77. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket; provided, however, that Defendant hereby agrees that it shall be bound to perform duties in Paragraph 14 scheduled to occur prior to the Effective Date. In the event

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the United States withdraws or withholds consent to this Consent Decree before entry, or the Court declines to enter the Consent Decree, then the preceding requirement to perform duties scheduled to occur before the Effective Date shall terminate.

XV. RETENTION OF JURISDICTION

78. 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 IX (Dispute Resolution) and XVI (Modification), or effectuating or enforcing compliance with the terms of this Decree.

XVI. MODIFICATION

79. 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.

80. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 58, the Party seeking the modification

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

XVII. TERMINATION

81. After Defendant has completed the requirements of Paragraph 15.a and thereafter maintained satisfactory compliance with this Consent Decree, including the OM&M Plan required by Paragraph 17, for a period of five years following EPA approval of the OM&M Plan described in Paragraph 17, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may submit to the United States and the State a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

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

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83. If the United States after consultation with the State does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section IX. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 90 Days after service of its Request for Termination.

84. If Defendant permanently shuts down torch-cutting operations at the Flint Facility in accordance with Paragraph 27, Defendant may submit to DOJ and EPA and the State a Request for Termination provided that it maintains satisfactory compliance with the applicable requirements of the Consent Decree for five years following the shutdown or EPA's approval of the OM&M Plan, described in Paragraph 17, whichever is earlier.

XVIII. PUBLIC PARTICIPATION

85. This Consent Decree shall be lodged with the Court for a period of not less than 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. 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

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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.

XIX. SIGNATORIES/SERVICE

86. Each undersigned representative of the Defendant, the State, and the Department of Justice identified on the DOJ signature page below, 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.

87. 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. Defendant need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XX. INTEGRATION

88. This Consent Decree, including deliverables that are subsequently approved pursuant to this Decree, constitutes the entire agreement among the

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Parties regarding the subject matter of the Decree and supersedes all prior representations, agreements, and understandings, whether oral or written, concerning the subject matter of the Decree herein.

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

89. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of Section II (Applicability), Paragraph 5; Section V (Compliance Requirements); Paragraphs 13-21 and related Appendix A; Section VI (Reporting Requirements); Paragraphs 28 and 30; Section X (Information Collection and Retention); and Paragraphs 61-63 is restitution, remediation, or required to come into compliance with law.

XXII. HEADINGS

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

XXIII. FINAL JUDGMENT

91. 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, the State, and Defendant.

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XXIV. APPENDICES

92. “Appendix A,” the “Plans and Specifications for the Capture and Control System at the Flint Facility” is attached to and is a part of this Consent Decree.

93. “Appendix B” is a description of the Financial Information that Defendant submitted to the United States.

94. “Appendix C” contains sample motions requesting the Court issue orders directing payment of funds from the CRIS to the United States and State of Michigan.

Dated and entered this ___ day of _____, 2023

UNITED STATES DISTRICT JUDGE

Consent Decree, United States and Michigan Department of Environment, Great Lakes, and Energy v. R.J. Torching, Inc.

FOR THE UNITED STATES OF AMERICA:

Date

SUSAN M. AKERS
Deputy Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

December 3, 2023
Date

STEVEN ELLIS Digitally signed by STEVEN ELLIS
Date: 2023.12.03 12:16:12 -05'00'

STEVEN D. ELLIS
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20044-7611

DAWN N. ISON
United States Attorney
Eastern District of Michigan

JOHN POSTULKA
Assistant United States Attorney
Eastern District of Michigan

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FOR THE U.S. ENVIRONMENTAL
PROTECTION AGENCY:


ROBERT
KAPLAN

 Digitally signed by ROBERT KAPLAN
Date: 2023.11.22 12:27:01 -06'00'

Date

ROBERT A. KAPLAN
Regional Counsel
Region 5
U.S. Environmental Protection Agency

Louise Gross

 Digitally signed by Louise
Gross
Date: 2023.11.15
16:43:04 -06'00'


Date

LOUISE GROSS
Associate Regional Counsel
U.S. Environmental Protection Agency, Region 5_
Office of Regional Counsel

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FOR THE MICHIGAN DEPARTMENT OF
ENVIRONMENT, GREAT LAKES, AND
ENERGY


12/1/2023
Date



PHILLIP D. ROGOS
Director
Michigan Department of Environment,
Great Lakes, and Energy

APPROVED AS TO FORM:

12/1/2023
Date

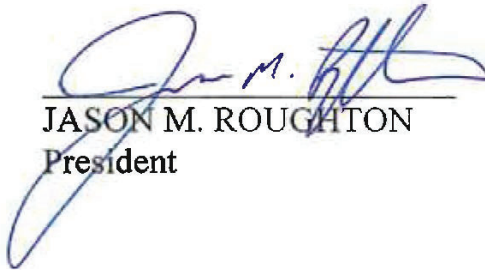


ELIZABETH A. MORRISSEAU
Assistant Attorney General
For: Polly A. Synk, Division Chief
Environment, Natural Resources, and
Agriculture Division
Michigan Department of Attorney General

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FOR R.J. TORCHING, INC:

11/8/23
Date/



JASON M. ROUGHTON
President

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