

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF THE UNITED STATES VIRGIN ISLANDS  
ST. THOMAS/ST. JOHN DIVISION

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil No. 3:10-cv-00048

GOVERNMENT OF THE U.S. VIRGIN ISLANDS,  
VIRGIN ISLANDS WASTE MANAGEMENT AUTHORITY,  
VIRGIN ISLANDS PORT AUTHORITY, and  
JOSEPH AND ZULMA HODGE,

Defendants.

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**CONSENT DECREE WITH  
DEFENDANTS JOSEPH AND ZULMA HODGE**

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I. INTRODUCTION

- A. Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed a complaint in this action alleging that Defendants Government of the U.S. Virgin Islands (“GVI”) and Virgin Islands Waste Management Authority (“WMA”) (collectively, “VI Defendants”) violated Sections 111(d), 112, 114 and 503 of the Clean Air Act, 42 U.S.C. § 7401, *et seq.* (“CAA”) and Section 7003(a) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, *et seq.* (“RCRA”) at the Bovoni Municipal Solid Waste Landfill (“Bovoni”) on the island of St. Thomas in the U.S. Virgin Islands and at the Anguilla Municipal Solid Waste Landfill (“Anguilla”) on the island of St. Croix in the U.S. Virgin Islands.
- B. The United States filed an amended complaint (“Amended Complaint”) in this action, that added two defendants, Joseph and Zulma Hodge (the “Hodges”), and a claim that the GVI, WMA, and the Hodges failed to comply with an EPA administrative order on consent (Docket No. RCRA-022008-7307 (October 4, 2008) (“Bovoni Tire AOC”), issued pursuant to RCRA Section 7003(a), requiring the removal of scrap tires adjacent to Bovoni and from the Hodges’ property. The amended complaint seeks, *inter alia*, civil penalties, stipulated penalties and injunctive relief for the Hodges’ alleged failures to comply with Bovoni Tire AOC.
- C. This Consent Decree addresses the United States’ claims against only the Hodges. The United States’ claims against GVI and WMA are addressed under two settlements previously filed with the Court. A stipulation of dismissal has been filed regarding the United States’ claims against the Virgin Islands Port Authority.
- D. The Hodges have denied the allegations and the United States’ claims for relief. By entering into this Consent Decree the Hodges do not waive their denials of, or concede the United States’ allegations.
- E. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the United States and the Hodges in good faith and will avoid litigation among these parties regarding the United States’ claims, 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:

II. 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(b) of RCRA, 42 U.S.C. § 6973(b), and over the parties. Venue lies in this District pursuant to Section 6973(b) of RCRA, 42 U.S.C.

§ 6973(b) and 28 U.S.C. §§ 1391(b) and 1395(a) because the violations alleged in the Complaint and Amended Complaint are alleged to have occurred in St. Thomas and Defendants conduct business in this District. For purposes of this Decree, or any action to enforce this Decree, Defendants consent to the Court's jurisdiction over this Decree and any such action and over Defendants and consent to venue in this judicial district.

### III. APPLICABILITY

2. The obligations of this Consent Decree apply to and are binding upon the United States and upon Defendants and any successors, assigns, or other entities or persons otherwise bound by law.
3. No transfer of ownership or operation of the Property, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendants of their obligation to ensure that the terms of the Decree are implemented. At least 30 days prior to any such transfer, Defendants 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 2, the United States Attorney for the District of the Virgin Islands and the United States Department of Justice, in accordance with Section XIV (Notices).
4. Defendants shall provide a copy of the Consent Decree to all agents or contractors whose duties include work required under the Consent Decree.
5. In any action to enforce this Consent Decree, Defendants shall not raise as a defense the failure by any of its agents or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

### IV. DEFINITIONS

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

“Business day” shall mean any day Monday through Friday, except for any federal or Territory holiday.

“Amended Complaint” shall mean the amended complaint filed by the United States in this action;

“Consent Decree” or “Decree” shall mean this consent decree, entitled “Consent Decree with Defendants Joseph and Zulma Hodge;”

“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 or Territory holiday, the period shall run until the close of business of the next Business day;

“Defendants” shall mean Joseph Hodge and Zulma Hodge;

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

“Effective Date” shall have the definition provided in Section XV;

“Paragraph” shall mean a portion of this Decree identified by an arabic numeral;

“Parties” shall mean the United States and Defendants;

“Property” shall mean the parcel of property owned by Defendants and located adjacent to, and northwest of the Bovoni Municipal Solid Waste Landfill.

“RCRA” shall mean the Solid Waste Disposal Act, as amended by various laws including the Resource Conservation and Recovery Act and the Hazardous and Solid Waste Amendments of 1984, 42 U.S.C. § 6901, *et seq.*;

“Section” shall mean a portion of this Decree identified by a roman numeral;

“Territory” shall mean the territory of the United States Virgin Islands; and

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

## V. CIVIL PENALTY

### 7. Civil Penalty Amounts.

- a. Defendants shall jointly pay \$100,000 to Plaintiff as a civil penalty. Payment of the principal amount shall be made in eight consecutive equal quarterly installments of \$12,500. The first installment payment is due within 30 days after the Effective Date. The subsequent installment payments are due, respectively, 122 days, 213 days, 304 days, 365 days, 487 days, 578 days and 669 days after the Effective Date. Each such subsequent installment payment shall also include an additional sum for interest at the rate specified in 28 U.S.C. § 1961 as of the Effective Date accrued on the unpaid portion of the principal amount calculated from the Effective Date until the date of the payment. The Financial Litigation Unit (“FLU”) of the United States Attorney's Office for the

District of the Virgin Islands shall send a calculation of the interest due for each payment to Defendants with the payment instructions as provided in Paragraph 8. Defendants may pay any installment payment prior to the due date, but must contact the FLU in advance for a determination regarding the amount of Interest to be included with the payment. In the event any installment payment includes an overpayment, the amount of the overpayment shall be applied to the remaining principal.

8. Defendants shall pay the civil penalties due by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice in accordance with written instructions to be provided to Defendants, following lodging of the Consent Decree, by the FLU of the U.S. Attorney’s Office for the District of the Virgin Islands. At the time of payment, Defendants shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree, and shall reference the civil action number and DOJ case number 90-5-2-1-08776, to the United States in accordance with Section XIV (Notices), by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov); and by mail to: EPA Cincinnati Finance Office, 26 West Martin Luther King Drive, Attn: Finance, Mail Code: NWD, Cincinnati, Ohio 45268.

#### VI. SCRAP TIRE REMOVAL

9. Defendants shall commence the removal of tires from the Property by May 6, 2013. Defendants shall complete the removal of all tires from the Property by October 4, 2014. The tires shall be transported outside the Territory in accordance with applicable transport rules and management requirements of the receiving jurisdiction. The parties may agree to extend these deadlines to the extent that additional time is needed to negotiate or re-negotiate terms or conditions of the removal contract(s).
10. Defendants shall ensure that, at all times while tires are being removed from the Property, appropriate fire prevention measures are employed, in accordance with the Uniform Fire Code of the National Fire Protection Association (“NFPA”).
11. Defendants shall, for the Property, implement mosquito control measures in accordance with the requirements of the Virgin Islands Department of Health until all tires have been removed.
12. Within 30 days of completing the removal of tires from the Property, Defendants shall provide documentation, including photographs, to EPA demonstrating that all tires have been removed from the Property, and disposed of in accordance with this Consent Decree.

VII. REPORTING

13. Quarterly Reports.

- a. Defendants shall submit, through their agent A9 Trucking Enterprise, Inc. (or other agent agreed to by the Parties), quarterly reports regarding their compliance with this Consent Decree. Each report shall cover the preceding three months and shall be due 30 days after the end of each calendar quarter (*i.e.*, by April 30, July 30, October 30, and January 30). Such reports shall be submitted from the Effective Date until Termination of the Consent Decree, or as the Parties may otherwise agree in writing.
- b. The reports shall include information about the number of tires removed from the Property, the date(s) of such removal, photographs, the locations to which the tires were sent for disposal or reuse; information about mosquito control measures undertaken during the reporting period, information about problems encountered or anticipated, and information about implemented or proposed solutions to such problems.

14. Notification of Non-Compliance, Violations or Other Events That May Pose a Threat to Public Health or Welfare or the Environment. Whenever any non-compliance or violation of the Decree occurs, or any other event affecting Defendants' performance under the Decree occurs, which may pose an immediate threat to the public health or welfare or the environment, Defendants shall notify EPA by telephone and confirm (via email with a copy to the EPA ORC contact) as soon as possible, but no later than 24 hours after Defendants first knew of the non-compliance, violation or event. The notification shall include an explanation of the likely duration of the non-compliance; an explanation of the likely cause of the non-compliance; and an explanation of the remedial steps taken, or to be taken, to prevent or minimize such non-compliance. If the cause of a non-compliance cannot be fully explained at the time the report is due, Defendants shall so state in the notification. Defendants shall investigate the cause of the non-compliance and shall then submit an amendment to the notification, including a full explanation of the cause of the non-compliance, within 30 days of the day Defendants became aware of the cause of the non-compliance. Nothing in this or the following Paragraph relieves Defendants of their obligation to provide the notice required by Section IX (Force Majeure).

15. Each report submitted by Defendants under this Section, other than emergency or similar notifications where compliance would be impractical, shall be signed by one of the Defendants and shall 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.

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

VIII. STIPULATED PENALTIES

- 17. Defendants shall be liable for stipulated penalties to the United States for non-compliance with or violation of this Consent Decree as specified below, unless excused under Section X (Dispute Resolution), or unless reduced or waived pursuant to Paragraph 24, or paid pursuant to Paragraph 22. Non-compliance or violation includes failing to perform any obligation required by the terms of this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.
- 18. Late Payment of Civil Penalty. If Defendants fail to pay the civil penalty required to be paid under Section V (Civil Penalty) when due, Defendants shall pay a stipulated penalty of \$500 per day for each day that their payment is late.
- 19. The following stipulated penalties shall accrue per violation per day for the failure to comply with the deadline for removal of tires under Section VI.

<u>Penalty Per Violation Per day</u>	<u>Period of Noncompliance</u>
\$300 .....	1st through 30th day
\$500 .....	31st through 90th day
\$750 .....	91st day and beyond

- 20. 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.
- 21. Stipulated penalties shall continue to accrue as provided in Paragraph 38 during any Dispute Resolution proceeding regarding such stipulated penalties but need not be paid until the following:
  - a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties determined to be



owing, together with interest, to the United States within 45 days of the effective date of the agreement or the receipt of EPA's written decision or order unless a later date is agreed to by the parties.

- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendants shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 days of receiving the Court's decision or order unless a later date is agreed to by the parties, except as provided in the next subparagraph.
  - c. If any Party appeals the District Court's decision, Defendants shall pay all accrued penalties determined by the final appellate court to be owing, together with interest, within 45 days of receiving the final appellate court decision, unless a later date is agreed to by the parties.
- 22. Defendants shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 8, 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.
  - 23. If Defendants fail to pay stipulated penalties according to the terms of this Consent Decree, Defendants 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 Defendants' failure to pay any stipulated penalties.
  - 24. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Section.
  - 25. Subject to the provisions of Section XII (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 Defendants' violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of RCRA, or its implementing regulations, Defendants shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

#### IX. FORCE MAJEURE

- 26. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendants, of any entity controlled by Defendants, or of Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendants' best efforts to fulfill the obligation. The requirement in this Paragraph that Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure 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" may not include Defendants' failure to obtain funding necessary to perform such obligations.

27. 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, Defendants shall provide notice by telephone, with confirmation by facsimile transmission, to the EPA contacts in accordance with Section XIV (Notices) (and to any other persons that EPA may later designate in writing) within 72 hours of when Defendants first knew that the event might cause a delay. The United States may, in its unreviewable discretion, extend the time within which notice must be given. Such extension shall be effective only if in writing. Within seven days thereafter, Defendants 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; Defendants' rationale for attributing such delay to a force majeure if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. If, despite good faith efforts, Defendants have not determined all actions to be taken to prevent or minimize delay, then they shall identify in the notice the date by which Defendants anticipate that they will determine the actions to be taken to prevent or minimize delay. Defendants 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 Defendants 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. Defendants shall be deemed to know of any circumstance of which Defendants, any entity controlled by Defendants, or Defendants' contractors knew or reasonably should have known.
28. 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 Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.
29. 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 Defendants in writing of its decision.

30. If any of the Defendants elect to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), they shall do so no later than 30 days after receipt of EPA's notice under Paragraph 29. In any such proceeding, Defendants 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 Defendants complied with the requirements of Paragraphs 26 and 27. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

X. DISPUTE RESOLUTION

31. 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. Defendants' failure to seek resolution of a dispute under this Section shall preclude Defendants from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendants arising under this Decree.
32. 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 Defendants send 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 45 days from the date the dispute arises, unless that period is modified by the parties 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 45 days after the conclusion of the informal negotiation period, Defendants invoke formal dispute resolution procedures as set forth below.
33. Formal Dispute Resolution. Defendants 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 Defendants' position and any supporting documentation relied upon by Defendants.
34. The United States shall serve its Statement of Position within 45 days of receipt of Defendants' 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 Defendants, unless Defendants

file a motion for judicial review of the dispute in accordance with the following Paragraph.

35. Defendants may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIV (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendants' 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.
36. The United States shall respond to Defendants' motion within the time period allowed by the Local Rules of this Court. Defendants may file a reply memorandum, to the extent permitted by the Local Rules.
37. Standard of Review
  - a. Disputes Concerning Matters Accorded Record Review. Except as otherwise may be provided in this Consent Decree, Defendants 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, in any dispute brought under Paragraph 33 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, reports, schedules or any other items requiring approval by EPA under this Consent Decree, or pertaining to the adequacy of the performance of work undertaken pursuant to this Consent Decree, and all other disputes that are accorded review on the administrative record under applicable principles of administrative law.
  - b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under this Section, Defendants shall bear the burden of demonstrating that their position complies with this Consent Decree.
38. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent Decree, except as provided in Paragraph 21, and unless and until final resolution of the dispute so provides.

#### XI. INFORMATION COLLECTION AND RETENTION

39. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry onto the Property and other locations where any activities are being performed pursuant to this Consent Decree, 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 in accordance with the terms of this Consent Decree;
  - c. obtain samples and, upon request, splits of any samples taken by Defendants or its representatives, contractors, or consultants;
  - d. obtain documentary evidence, including photographs and similar data; and
  - e. assess Defendants' compliance with this Consent Decree.
40. Until five years after the termination of this Consent Decree, Defendants 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 Defendants' performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary government, corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendants shall provide copies of any documents, records, or other information required to be maintained under this Paragraph within 30 days of receipt of such request by the United States.
41. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendants shall notify the United States 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, Defendants shall deliver any such documents, records, or other information to EPA. Defendants may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If a 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 the 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.
42. Defendants 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 Defendants seek to protect as CBI, Defendants shall follow the procedures set forth in 40 C.F.R. Part 2. Any assertion of confidentiality shall be

accompanied by sufficient documentation to satisfy the requirements of 40 C.F.R. § 2.204(e)(4). Information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies this information when it is submitted to EPA, it may be made available to the public by EPA, without further notice to Defendants. No confidentiality claim shall be made with respect to any analytical data required pursuant to RCRA and this Consent Decree.

43. 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 EPA pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendants to maintain documents, records, or other information imposed by applicable federal or territorial laws, regulations, or permits.

## XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

44. This Consent Decree resolves the civil claims of the United States for the violations by Defendants alleged in the Amended Complaint through the Effective Date.
45. Reservations. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, and to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by any conditions of the Property, whether related to the violations addressed in this Consent Decree or otherwise. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under RCRA or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraph 44.
46. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, and/or other appropriate relief relating to the Property, Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 44.
47. This Consent Decree is not a permit, or a modification of any permit, under any federal, territorial, or local laws or regulations. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendants' compliance with any aspect of this Consent Decree will result in compliance with provisions of RCRA, or with any other provisions of federal, territorial, or local laws, regulations, or permits.

48. This Consent Decree does not limit or affect the rights of Defendants or of the United States against any person who is not a party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise provided by law.
49. 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.

XIII. COSTS

50. 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 regarding any action to enforce this Consent Decree, including to collect any portion of the civil penalty or of any stipulated penalties due but not paid by Defendants, or to obtain an order requiring performance of any activity required by this Consent Decree

XIV. NOTICES

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

To the United States:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-2-1-08776

EPA contact:

George C. Meyer P.E., Chief  
RCRA Compliance Branch  
Division of Enforcement and Compliance Assistance  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 21<sup>st</sup> Floor  
New York, New York 10007-1866  
Phone: 212-637-4070  
Fax: 212-637-4478  
meyer.george@epa.gov

EPA ORC contact: Robert Hazen  
U.S. Environmental Protection Agency, Region 2  
Office of Regional Counsel  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007-1866  
Phone: 212-637-3215  
Fax: 212-637-3199  
[hazen.robert@epa.gov](mailto:hazen.robert@epa.gov)

Defendants: Kyle Waldner  
Smock & Moorehead  
11A Norre Gade, Kongens Quarter, P.O. Box 1498,  
Charlotte Amalie, St. Thomas  
U.S. Virgin Islands  
Phone: 340-777-5737  
[kwaldner@smvilaw.com](mailto:kwaldner@smvilaw.com)

52. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above, or may add an additional notice recipient.
53. 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

54. 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 Defendants hereby agree that they shall be bound to perform duties scheduled to occur prior to the Effective Date. In the event 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 not be enforceable under this Consent Decree.

#### XVI. RETENTION OF JURISDICTION

55. 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 and XVII, or effectuating or enforcing compliance with the terms of this Decree.



XVII. MODIFICATION

56. This Consent Decree 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.
57. Any disputes concerning modification of this Decree shall be resolved pursuant to Section X (Dispute Resolution), provided, however, that instead of the burden of proof provided by Paragraph 37 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

58. Termination. After the Defendants complete all the tire removal and reporting requirements of this Consent Decree under Sections VI and VII, the Defendants may submit to the United States a written request for termination of the Consent Decree. Any such request under this Paragraph shall include: (a) a certification that Defendants have satisfied all tire removal and reporting requirements of this Consent Decree under Sections VI and VII; and (b) all necessary supporting documentation.
59. Following receipt by the United States of Defendants' request(s) for termination, the Parties shall confer informally concerning the request and any disagreement that the Parties may have as to whether Defendants have satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation for termination of the Decree.
60. If the United States does not agree to Defendants' request for termination, Defendants may invoke Dispute Resolution under Section X. However, the Defendants shall not seek Dispute Resolution of any dispute regarding termination, under Paragraph 33, until 120 days after submission to the United States of their request for termination.
61. After termination of the Consent Decree, the Defendants shall continue to meet their record retention obligations under Paragraphs 40 and 41 and any applicable requirements under law.

XIX. PUBLIC PARTICIPATION

62. 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. Defendants consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this

Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States has notified Defendants in writing that it no longer supports entry of the Consent Decree.

XX. SIGNATORIES/SERVICE

63. Each undersigned representative of Defendants 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 that he or she represents to this document.
64. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendants agree 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

65. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree, and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. 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

66. 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 Defendants. 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.

Dated and entered this \_\_ day of \_\_\_\_\_, 2013

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UNITED STATES DISTRICT JUDGE

**FOR THE UNITED STATES OF AMERICA:**

4/9/13

Date

/s/ Ellen M. Mahan

ELLEN M. MAHAN

Deputy Section Chief

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

MARK A. GALLAGHER, Senior Attorney

MYLES FLINT, Senior Counsel

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

Washington, DC 20044-7611

202-514-5405

mark.gallagher1@usdoj.gov

RONALD W. SHARPE

United States Attorney

District of the Virgin Islands

JOYCELYN HEWLETT

Assistant United States Attorney

District of the Virgin Islands

Federal Building and U.S. Courthouse

5500 Veterans Drive, Room 260

St. Thomas, USVI 00802

340-774-5757

joycelyn.hewlett@usdoj.gov

**FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:**

/s/ Eric Schaaf

ERIC SCHAAF  
Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16th Floor  
New York, NY 10007

/s/ Robert Hazen

ROBERT HAZEN  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
Office of Regional Counsel  
290 Broadway, 16th Floor  
New York, NY 10007-1866

Of Counsel:

WILLIAM SAWYER  
Chief, Waste and Toxic Substances Branch  
U.S. Environmental Protection Agency, Region 2  
Office of Regional Counsel  
290 Broadway, 16th Floor  
New York, NY 10007-1866

**FOR JOSEPH AND ZULMA HODGE:**

4/12/13  
Date

/s/ Joseph Hodge  
JOSEPH HODGE  
6-1 Estate Thomas  
P.O. Box 305048  
St. Thomas, U.S.V.I. 00803

4/12/13  
Date

/s/ Zulma Hodge  
ZULMA HODGE  
6-1 Estate Thomas  
P.O. Box 305048  
St. Thomas, U.S.V.I. 00803

KYLE WALDNER, ESQ.  
Smock & Moorehead  
11A Norre Gade, Kongens Quarter  
P.O. Box 1498,  
Charlotte Amalie, St. Thomas  
U.S. Virgin Islands