

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

\_\_\_\_\_)  
UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
v. ) Civil Action No. 09-122  
 )  
GOVERNMENT OF THE U.S. VIRGIN ISLANDS, )  
 )  
Defendant. )  
\_\_\_\_\_)

**CONSENT DECREE**

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I.

## I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter, *United States of America v. Government of the U.S. Virgin Islands*, Civil Action No. 09-122, pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended (“CERCLA”), seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the Tutu Wellfield Superfund Site in St. Thomas, U.S. Virgin Islands (“the Site”).

B. On September 29, 1995, the Site was listed on the NPL. On August 5, 1996, EPA issued a Record of Decision which addressed both contaminated soil and groundwater at the Site.

C. The Settling Defendant that has entered into this Consent Decree, the Government of the U.S. Virgin Islands (“USVI”), does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment.

D. In response to the release or threatened release of hazardous substances at or from the Site, EPA performed response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and will perform additional response actions in the future.

E. In performing response actions at the Site, EPA incurred response costs and will incur additional response costs in the future.

F. The United States alleges that USVI is a potentially responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and may be liable for response costs incurred and to be incurred at the Site.

G. In its answer to the United States’ complaint, the USVI denied the allegations and claims for relief and pled a number of affirmative defenses. By entering into this Consent Decree the USVI does not waive or concede its affirmative defenses and denials of the United States’ allegations.

H. In 2002, the Parties entered into a *Superfund State Contract Between The Government of the U.S. Virgin Islands And The U.S. Environmental Protection Agency For Remedial Activities Related To The Tutu Wellfield Superfund Site In St. Thomas, U.S. Virgin Islands* (“SSC”), with an attached Statement of Work (“SOW”). The SSC and the SOW are attached as Appendix A.

I. The United States has been operating the treatment system at the Site, which became operational and functional, as defined in 40 C.F.R. Section 300.435(f)(2), on April 17,

2004. In April 2009, EPA conducted the first five-year review of the Site. The five-year review found that the implemented remedy is functioning as set forth in the decision documents and is protecting public health and the environment. Pursuant to 104(c)(3)(A) of CERCLA, 42 U.S.C. § 9604(c)(3)(A), and the SSC, the USVI is obligated to commence Operation and Maintenance of the remedial measures identified in Section K of the SSC and in the SOW on April 16, 2014.

J. The United States and USVI agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9606, 9607, and 9613(b) and also has personal jurisdiction over USVI. Solely for the purposes of this Consent Decree and the underlying complaint, USVI waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. USVI shall not challenge entry or the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States, and upon USVI. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of USVI under this Consent Decree.

## IV. DEFINITIONS

3. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in any appendix attached hereto, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

“Consent Decree” shall mean this Consent Decree and all appendices attached hereto and incorporated herein. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

The term “day” shall mean a calendar day unless expressly stated to be a working day. The term “working day” shall mean a day other than a Saturday, Sunday, or federal holiday. In

computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the United States Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall be the date upon which this Consent Decree is entered by the Court as recorded on the Court docket, or, if the Court instead issues an order approving the Consent Decree, the date such order is recorded on the Court docket.

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“Institutional Controls” shall mean Proprietary Controls and state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices that: (a) limit land, water, and/or resource use to minimize the potential for human exposure to Waste Materials at the Site; (b) limit land, water, and/or resource use to implement, ensure non-interference with, or ensure the protectiveness of the response action; and/or (c) provide information intended to modify or guide human behavior at the Site.

“Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“Operate and Maintain” shall mean (a) “Operation and Maintenance” as set forth in the SSC; and (b) all measures required to operate, monitor, and maintain the effectiveness of Tasks 2, 4, 5, and 6 as set forth in the Statement of Work attached to the SSC; and (c) “Operation and Maintenance” as set forth in the Transfer Agreement, commencing on April 16, 2013.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States and/or the USVI.

“Performance Standards” shall mean the cleanup standards and other measures of achievement of the Remedial Action Objectives as set forth in the ROD and any modified standards which maybe established pursuant to this Consent Decree.

“Plaintiff” shall mean the United States.

“Proprietary Controls” shall mean easements or covenants running with the land that (a) limit land, water, or resource use and/or provide access rights and (b) are created pursuant to common law or statutory law by an instrument that is recorded by the owner in the appropriate

land records office.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992 (also known as the Resource Conservation and Recovery Act).

“Remedial Action Objectives” shall mean the specific goals for protecting human health and the environment set forth in the ROD for the Site.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendant” shall mean the Government of the U.S. Virgin Islands.

“Shadow” shall mean all measures identified in Appendix B.

“Site” shall mean the Tutu Wellfield Superfund site, located in the upper Turpentine Run basin in eastern central St. Thomas, U.S. Virgin Islands, in the Anna’s Retreat section of the island, and generally shown on the map included as Appendix C, and all areas to which Waste Materials from the Site have migrated.

“Superfund State Contract” or “SSC” shall mean the 2002 *Superfund State Contract Between The Government of the U.S. Virgin Islands And The U.S. Environmental Protection Agency For Remedial Activities Related To The Tutu Wellfield Superfund Site In St. Thomas, U.S. Virgin Islands* and its Appendices which are attached as Appendix A.

“Transfer Agreement” is the Agreement attached as Appendix D, which sets forth the obligations of the Parties regarding the transfer of the EPA-funded remedial action responsibilities to USVI.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); and (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33).

## V. STATEMENT OF PURPOSE

4. The Parties have entered into this Consent Decree in the spirit of mutual cooperation and with the mutual objective that USVI undertake work at the Site to resolve its alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, as provided in the Covenants Not to Sue by United States in Section IX, and subject to the Reservations of Rights by United States in Section X.

## VI. WORK OBLIGATIONS

5. Beginning on April 16, 2012, USVI shall Shadow EPA and its contractors, in accordance with the terms outlined in Appendix B, while EPA continues to perform remedial activities at the Site until April 15, 2013.

6. Beginning on April 16, 2013, USVI shall Operate and Maintain the remedial action at the Site.

## VII. DISPUTE RESOLUTION

7. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes regarding this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of USVI that have not been disputed in accordance with this Section.

8. Any dispute regarding this Consent Decree shall in the first instance be the subject of informal negotiations between the Parties to the dispute. The period for informal negotiations shall not exceed 30 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute. The dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute.

9. Statements of Position.

a. In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 30 days after the conclusion of the informal negotiation period, USVI invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by USVI. The Statement of Position shall specify USVI's position as to whether formal dispute resolution should proceed under Paragraph 10 (Record Review) or Paragraph 11.

b. Within 20 days after receipt of USVI's Statement of Position, EPA will serve on USVI its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 10 (Record Review) or 11. Within 20 days after receipt of EPA's Statement of Position, USVI may submit a Reply.

c. If there is disagreement between EPA and USVI as to whether dispute resolution should proceed under Paragraph 10 (Record Review) or 11, the Parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if USVI ultimately appeals to the Court to resolve the dispute, the Court shall

determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 10 and 11.

10. Record Review. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation, the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree, and the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by USVI regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the Parties to the dispute.

b. The Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 10.a. This decision shall be binding upon USVI, subject only to the right to seek judicial review pursuant to Paragraphs 10.c. and 10.d.

c. Any administrative decision made by EPA pursuant to Paragraph 10.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by USVI with the Court and served on all Parties within 15 days after receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to USVI's motion.

d. In proceedings on any dispute governed by this Paragraph, USVI shall have the burden of demonstrating that the decision of the Director of the Emergency and Remedial Response Division is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 10.a.

11. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law shall be governed by this Paragraph.

a. Following receipt of USVI's Statement of Position submitted pursuant to Paragraph 9, the Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final decision resolving the dispute. The Emergency and Remedial Response Division Director's decision shall be binding on USVI unless, within 15 days after receipt of the



decision, USVI files with the Court and serves on the Parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to USVI's motion.

b. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

12. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone, or affect in any way any obligation of USVI under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise.

### VIII. STIPULATED PENALTIES

13. Stipulated Penalty. In the event USVI fails to Operate and Maintain the system in accordance with Paragraph 6, during the period from April 16, 2013 to April 16, 2014, USVI shall be liable for a stipulated penalties as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Non Compliance</u>
\$1,000 per day	1st through 14th Day
\$2,000 per day	15th through 31st Day
\$4,000 per day	31st Day and beyond

14. Following EPA's determination that USVI has failed to Operate and Maintain the system as set forth in Paragraph 13, EPA may give USVI written notification of the same and describe the noncompliance. Any such notice shall constitute a demand for payment.

15. Stipulated Penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (a) with respect to a decision by the Director of the Emergency and Remedial Response Division EPA Region 2, under Paragraph 10.b or 11.a of Section VII (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that USVI's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (b) with respect to judicial review by this Court of any dispute under Section VII (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute.

16. Stipulated Penalties shall continue to accrue as provided in Paragraph 15 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owed shall be paid to EPA within 30 days after the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, USVI shall pay all accrued penalties determined by the Court to be owed to EPA within 90 days after receipt of the Court's decision or order, except as provided in Paragraph 16.c;

c. If the District Court's decision is appealed by any Party, USVI shall pay all accrued penalties determined by the District Court to be owed to the United States into an interest-bearing escrow account, established at a duly chartered bank or trust company that is insured by the FDIC, within 60 days after receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days after receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to USVI to the extent that they prevail.

17. Stipulated penalties are due and payable within 30 days after the date of the demand for payment of the penalties by EPA. All payments to EPA under this Section shall be identified as "stipulated penalties" and shall be made by Fedwire Electronic Funds Transfer to:

Federal Reserve Bank of New York  
ABA = 021030004  
Account =  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York NY 10045  
Field Tag 4200 of the Fedwire message should read "D68010727 Environmental Protection Agency"

and shall reference the CDCS Number, Site/Spill ID Number 021D, and DOJ Case Number 90-11-3-09838.

18. At the time of payment, USVI shall send notice that payment has been made to EPA and DOJ in accordance with Section XVI (Notices and Submissions), and to the EPA Cincinnati Finance Office by email at \_\_\_\_\_, or by mail to:

EPA Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, Ohio 45268

Such notice shall reference the CDCS Number, Site/Spill ID Number 021D, and DOJ Case Number 90-11-3-09838.

19. If USVI fails to pay stipulated penalties when due, USVI shall pay Interest on the unpaid stipulated penalties, and Interest shall accrue from the date of demand under Paragraph 14 until the date of payment. If USVI fails to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

20. If the United States brings an action to enforce the USVI's obligation to Operate and Maintain the remedial action in accordance with Paragraph 6, during the period from April 16, 2013 to April 16, 2014, the USVI shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

21. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of USVI's failure to comply with the requirements of this Consent Decree.

22. The payment of penalties and Interest, if any, shall not alter in any way USVI's obligation to complete the performance of the Work required under this Consent Decree.

23. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of USVI's violation of this Consent Decree or of the statutes and regulations upon which it is based.

24. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse USVI from performance of any other requirements of this Consent Decree.

#### IX. COVENANTS NOT TO SUE BY UNITED STATES

25. Except as specifically provided in Section X (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against USVI pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), regarding the Site. These covenants shall take effect upon the Effective Date. These covenants not to sue are conditioned upon the satisfactory performance by USVI of its obligations under this Consent Decree. These covenants not to sue extend only to USVI and do not extend to any other person.

#### X. RESERVATION OF RIGHTS BY UNITED STATES

26. The United States reserves and this Consent Decree is without prejudice to, all rights against USVI with respect to all matters not expressly included within the Covenants Not to Sue by United States in Paragraph 25. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against USVI with respect to:

- a. liability for failure of USVI to meet a requirement of this Consent Decree;
- b. criminal liability;

c. Section 104(d)(2) of CERCLA, 42 U.S.C. § 9604(d)(2), nothing herein shall affect the rights of the United States to enforce the SSC, and all obligations therein, in a separate action;

d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

e. liability based on the ownership or operation of the Site by USVI when such ownership or operation commences after signature of this Consent Decree by USVI;

f. liability based on USVI's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of a Waste Material at or in connection with the Site, after signature of this Consent Decree by USVI; and

g. liability arising from the past, present, or future disposal, release, or threat of release of a Waste Material outside of the Site.

#### XI. COVENANTS NOT TO SUE BY USVI

27. USVI covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site and this Consent Decree, provided however that to the extent USVI may have a claim against a contractor who manufactured or installed any part of the remedial action, such claim is not affected by this Consent Decree. The covenants not to sue include but are not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law, relating to the Site;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the Virgin Islands, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or territorial law, relating to the Site.

28. Except as provided in Paragraph 30 (claims against other PRPs) and Paragraph 35 (Res Judicata and Other Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section X (Reservations of Rights by United States), other than in Paragraph 26.a (claims for failure to meet a requirement of the Consent Decree) or 26.b (criminal liability), but only to the extent that USVI's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

29. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

30. USVI agrees not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that it may have for response costs relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that USVI may have against any person if such person asserts a claim or cause of action relating to the Site against USVI.

31. USVI reserves, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Settling Defendants' plans, reports, other deliverables or activities.

## XII. EFFECT OF SETTLEMENT/CONTRIBUTION

32. Except as provided in Paragraph 30 (claims against other PRPs), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 30 (claims against other PRPs), each of the Parties expressly reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

33. The Parties agree, and by entering this Consent Decree this Court finds, that this settlement constitutes a judicially-approved settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that USVI is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States

or any other person; provided, however, that if the United States exercises rights under the reservations in Section X (Reservations of Rights by United States), other than in Paragraphs 26.a (claims for failure to meet a requirement of the Decree) or 26.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

34. USVI shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA and DOJ in writing within 10 days after service of the complaint or claim upon it. In addition, USVI shall notify EPA and DOJ within 10 days after service or receipt of any Motion for Summary Judgment, and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

35. Res Judicata and Other Defenses. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, USVI shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue 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; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants Not to Sue by United States set forth in Section IX.

### XIII. ACCESS

36. If the Site, or any other real property where access or land/water use restrictions are needed, is owned or controlled by USVI, USVI shall, commencing on the Effective Date, provide the United States and its representatives, contractors, and subcontractors, with access at all reasonable times to the Site, or such other real property, to conduct any activity relating to response action at the Site, including, but not limited to, the following activities:

- a. Monitoring, investigation, removal, remedial, or other activities at the Site;
- b. Verifying any data or information submitted to the United States;
- c. Conducting investigations regarding contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site;
- f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by USVI or its agents, consistent with Section XV (Access to Information);
- g. Assessing compliance by USVI with this Consent Decree;

h. Determining whether the Site or other real property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Consent Decree; and

i. Implementing, monitoring, maintaining, reporting on, and enforcing any Institutional Controls.

37. Commencing on the date of lodging of the Consent Decree, USVI shall not use the Site, or such other real property, in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material related to the Site or interfere with or adversely affect the implementation, integrity, or protectiveness of the removal or remedial measures to be performed at the Site.

38. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, as well as all of its rights to require Institutional Controls, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statute or regulations.

#### XIV. FORCE MAJEURE

39. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of USVI, of any entity controlled by USVI, or of USVI's contractors that delays or prevents the performance of any obligation under this Consent Decree despite USVI's best efforts to fulfill the obligation. The requirement that USVI 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 potential force majeure (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 to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work or a failure to achieve the Performance Standards.

40. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree for which USVI intend or may intend to assert a claim of force majeure, USVI shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Emergency and Remedial Response Division, EPA Region 2, within 72 hours of when USVI first knew that the event might cause a delay. Within 20 days thereafter, USVI 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; USVI's rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of USVI, such event may cause or contribute to an endangerment to public health or welfare, or the environment. USVI shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. USVI shall be deemed to know of any circumstance of which USVI, any entity controlled by USVI, or USVI's contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude USVI from

asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 39 and whether USVI has exercised its best efforts under Paragraph 39, EPA may, in its unreviewable discretion, excuse in writing USVI's failure to submit timely notices under this Paragraph.

41. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Consent Decree that are affected by the force majeure 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 shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure, EPA will notify USVI in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify USVI in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

42. If USVI elects to invoke the dispute resolution procedures set forth in Section VII (Dispute Resolution), it shall do so no later than 25 days after receipt of EPA's notice. In any such proceeding, USVI 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, 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 USVI complied with the requirements of Paragraphs 39 and 40. If USVI carries this burden, the delay at issue shall be deemed not to be a violation by USVI of the affected obligation of this Consent Decree identified to EPA and the Court.

## XV. ACCESS TO INFORMATION

43. USVI shall provide to EPA, upon request, copies of all records, reports, or information (including records, reports, documents and other information in electronic form) (hereinafter referred to as "Records") within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

44. Confidential Business Information and Privileged Documents. USVI may assert business confidentiality claims covering part or all of the Records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified USVI that the Records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such Records without further notice to USVI.

45. USVI may assert that certain Records are privileged under the attorney-client



privilege or any other privilege recognized by federal law. If USVI asserts such a privilege in lieu of providing Records, it shall provide Plaintiff with the following: (1) the title of the Record; (2) the date of the Record; (3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the Record; (4) the name and title of each addressee and recipient; (5) a description of the subject of the Record; and (6) the privilege asserted. If a claim of privilege applies only to a portion of a Record, the Record shall be provided to the United States in redacted form to mask the privileged portion only. USVI shall retain all Records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in USVI's favor. However, no Records created or generated pursuant to the requirements of this or any other settlement with EPA pertaining to the Site shall be withheld from the United States on the grounds that they are privileged or confidential.

46. No claim of confidentiality or privilege shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other records evidencing conditions at or around the Site.

#### XVI. NOTICES AND SUBMISSIONS

47. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to EPA, DOJ, and USVI, respectively.

As to the DOJ:

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-3-09838

As to EPA:

Andrew Praschak  
Office of Regional Counsel  
New York/Caribbean Superfund Branch  
U.S. Environmental Protection Agency  
Attn: Tutu Wellfield Superfund Site Attorney  
290 Broadway, 17th Floor  
New York, NY 10007-1866

Caroline Kwan  
Remedial Project Manager  
New York Remediation Branch  
Emergency and Remedial Response Division  
U.S. E.P.A. Region II

290 Broadway  
New York, NY 10007-1866  
(212) 637-4275

As to USVI:

Attorney General Vincent F. Grazer  
Government of the U.S. Virgin Islands  
Department of Justice  
Office of Attorney General  
34-38 Kronrindens Gade  
GER Complex, 2<sup>nd</sup> Floor  
Charlotte Amalie, St. Thomas  
Virgin Islands 00802

H. Marc Tepper, Esquire  
Buchanan Ingersoll & Rooney PC  
Two Liberty Place  
50 S. 16<sup>th</sup> Street, Suite 3200  
Philadelphia, PA 19102-2555

#### XVII. RETENTION OF JURISDICTION

48. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

#### XVIII. INTEGRATION/APPENDICES

49. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached to and incorporated into this Consent Decree: "Appendix A" is the State Superfund Contract "SSC" and the Statement of Work "SOW"; "Appendix B" is the Terms of Shadowing; "Appendix C" is a map of the Site; "Appendix D" is the Transfer Agreement.

#### XIX. MODIFICATION

50. Material modifications to this Consent Decree, including the Appendices, shall be in writing, signed by the United States and USVI, and shall be effective upon approval by the Court. Non-material modifications to this Consent Decree, including the Appendices, shall be in writing and shall be effective when signed by duly authorized representatives of the United States and USVI. A modification shall be considered material if it fundamentally alters the basic features of the obligations of this Consent Decree.

51. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise, or approve modifications to this Consent Decree.

## XX. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

52. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. USVI consents to the entry of this Consent Decree without further notice.

53. If for any reason this Court should decline to approve this Consent Decree in the form presented, this Consent Decree is voidable at the sole discretion of any Party and the terms of the Consent Decree may not be used as evidence in any litigation between the Parties.

## XXI. SIGNATORIES/SERVICE

54. The Assistant Attorney General of the United States Department of Justice and the Attorney General of the Government of the Virgin Islands each certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

55. USVI agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified USVI in writing that it no longer supports entry of the Consent Decree.

56. USVI shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. USVI agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons.

## XXII. FINAL JUDGMENT

57. This Consent Decree and its Appendices constitute the final, complete, and exclusive agreement and understanding among the Parties regarding the settlement embodied in the Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

58. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and the Government of the U.S. Virgin Islands. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 2012.

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Curtis V. Gomez  
United States District Judge

Signature Page for Consent Decree Regarding Tutu Wellfield Superfund Site

**FOR THE UNITED STATES OF AMERICA:**

4/27/12  
Date

IGNACIA MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

6/12/12  
Date

MYLES E. FLINT, II  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

RONALD W. SHARPE  
United States Attorney  
United States Virgin Islands

JOYCELYN HEWLETT  
Assistant United States Attorney  
United States Virgin Islands

Signature Page for Consent Decree Regarding Tutu Wellfield Superfund Site

June 14, 2012

Date

WALTER E. MUGDAN  
Director  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

June 14, 2012

Date


ANDREW PRASCHAK  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 2  
290 Broadway  
New York, New York 10007-1866

Signature Page for Consent Decree Regarding Tutu Wellfield Superfund Site

**FOR THE GOVERNMENT OF THE U.S. VIRGIN  
ISLANDS**

*June 12, 2012*

Date

VINCENT F. ~~RAZER~~   
Attorney General  
Government of the U.S. Virgin Islands  
Department of Justice  
Office of Attorney General  
34-38 Kronrindens Gade  
GER Complex, 2<sup>nd</sup> Floor  
Charlotte Amalie, St. Thomas  
Virgin Islands 00802