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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, *et al.*,
 Plaintiffs, and
 PUYALLUP TRIBE OF INDIANS, *et al.*,
 Plaintiff-Intervenors,
 v.
 ELECTRON HYDRO, LLC, and
 THOM A. FISCHER,
 Defendants.

Case No. 2:20-cv-01746-JCC
[PROPOSED]
CONSENT DECREE

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1 Plaintiff United States of America (“United States”), on behalf of the United States
2 Environmental Protection Agency (“EPA”), filed a complaint in this action on November 25,
3 2020, and an amended complaint on February 28, 2022, alleging that Defendants, Electron
4 Hydro, LLC (“Electron Hydro”) and Mr. Thom A. Fischer, violated Sections 301, 402, and 404
5 of the Clean Water Act (“Act”), 33 U.S.C. §§ 1311, 1342, 1344. The amended complaint alleges
6 that Defendants discharged pollutants into waters of the United States without authorization and
7 violated permits issued by the United States Army Corps of Engineers (“Corps”) and the State of
8 Washington.

9 On May 14, 2021, Communities for a Healthy Bay and Puget Soundkeeper Alliance
10 moved to intervene in this action. On May 17, 2021, the Court granted the motion. On August
11 20, 2021, the Puyallup Tribe of Indians also moved to intervene in this action. On August 26,
12 2021, the Court granted the motion.

13 Defendants have asserted that they have a limited ability to pay the full amount of the
14 civil penalty at one time and have submitted Financial Information to the United States in
15 support of that assertion. The United States has reviewed this Financial Information and has
16 determined that Defendants have limited financial ability to pay the full amount of the civil
17 penalty at one time.

18 The United States and Defendants (“Settling Parties”) recognize, and the Court by
19 entering this Consent Decree finds, that this Consent Decree has been negotiated by the Settling
20 Parties in good faith and will avoid litigation among the Settling Parties and that this Consent
21 Decree is fair, reasonable, and in the public interest.

22 NOW, THEREFORE, with the consent of the Settling Parties, IT IS HEREBY
23 ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1
2 1. This Court has jurisdiction over the subject matter of this action, pursuant to
3 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 309(b) and (d) of the Act, 33 U.S.C.
4 §§ 1319(b) and (d), and over the Settling Parties. Venue lies in this District pursuant to Section
5 309(b) of the CWA, 33 U.S.C. § 1319(b) and 28 U.S.C. §§ 1391(b) and 1395(a), because the
6 violations alleged in the Complaint are alleged to have occurred in, and Defendants conduct
7 business in, this judicial district. For purposes of this Decree, or any action to enforce this
8 Decree, Defendants consent to the Court's jurisdiction over this Decree, over any such action,
9 and over Defendants, and Defendants consent to venue in this judicial district.

10 2. For purposes of this Consent Decree, Defendants agree that the Complaint states
11 claims upon which relief may be granted pursuant to Sections 301, 402, and 404 of the CWA, 33
12 U.S.C. §§ 1311, 1342, 1344.

13 II. APPLICABILITY

14 3. The obligations of this Consent Decree apply to and are binding upon the United
15 States, and upon Defendants and any successors, assigns, or other entities or persons otherwise
16 bound by law. The United States and Defendants agree that Defendants' obligations under this
17 Consent Decree are joint and several.

18 4. No transfer of ownership or operation of the Facility, whether in compliance with
19 the procedures of this Paragraph or otherwise, shall relieve Defendants of their obligation to
20 ensure that the terms of this Decree are implemented. At least 30 Days prior to such transfer,
21 Defendants shall provide a copy of this Consent Decree to the proposed transferee and shall
22 simultaneously provide written notice of the prospective transfer, together with a copy of the
23 proposed written agreement, to EPA and DOJ, in accordance with Section XIII (Notices).

1 Defendants may designate all or any portion of such agreement as Confidential Business
2 Information (“CBI”), in accordance with Paragraph 68. For any information that Defendants
3 seek to protect as CBI, Defendants shall follow the procedures set forth in 40 C.F.R. Part 2.
4 Defendants must provide a copy of the documents to EPA in which all of the claimed CBI
5 remains visible. Defendants may also submit a sanitized version of documents that blacks out or
6 removes the information claimed as CBI. Information claimed as CBI will be protected from
7 disclosure unless EPA makes a formal determination that the information is not entitled to
8 confidential treatment pursuant to the regulations at 40 C.F.R. Part 2. Any attempt to transfer
9 ownership or operation of the Facility without complying with this Paragraph constitutes a
10 violation of this Decree.

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

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

19 III. DEFINITIONS

20 7. Terms used in this Consent Decree that are defined in the Act or in regulations
21 promulgated pursuant to the Act have the meanings assigned to them in the Act or such
22 regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are
23 used in this Consent Decree, the following definitions apply:

1 “Complaint” means the amended complaint filed by the United States in this action (Dkt.
2 No. 73);

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

5 “Clean Water Act,” “CWA,” or “Act” means the federal Clean Water Act, 33 U.S.C.
6 §§ 1251 *et seq.*, and its implementing regulations;

7 “Date of Lodging” means the date this Consent Decree is filed for lodging with the Clerk
8 of the Court for the United States District Court for the Western District of Washington;

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

13 “Debris” means crumb rubber, turf material (including fibers), geotextile fabric, and high
14 density polyethylene (“HDPE”) liner;

15 “Defendants” mean Electron Hydro, LLC, and Mr. Thom A. Fischer;

16 “Diversion” means the water diversion structure, spillway, and intake area of Electron
17 Hydro’s hydroelectric facility located within Section 03, Township 16N, Range 06E, Latitude
18 46.90586N, Longitude 122.03954, in Washington State, at approximately river mile 41 of the
19 Puyallup River;

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

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

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

2 “Facility” means Defendants’ hydroelectric facility located in the State of Washington
3 within Section 03, Township 16N, Range 06E, Latitude 46.90586N, Longitude 122.03954, at
4 approximately river mile 41 through river mile 31 of the Puyallup River;

5 “Financial Information” means the documentation and other information submitted by
6 Defendants to the United States on September 14, 19, 20, and 25, 2023.

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

8 “Settling Parties” means the United States and Defendants;

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

10 “Spillway Replacement Project” means the project described in the U.S. Army Corps of
11 Engineers’ August 8, 2018 verification letter to Electron Hydro authorizing Electron Hydro’s
12 proposed project for permit coverage under Section 404 of the CWA, NWS-2016-350 Electron
13 Hydro, LLC (Diversion Repair and Spillway Replacement), and any substitute project proposal
14 for construction or replacement of the existing diversion located at approximately river mile 41;
15 and

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

17 IV. CIVIL PENALTY

18 8. Defendants shall pay the sum of \$1,025,000 as a civil penalty, together with
19 interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate
20 specified in 28 U.S.C. § 1961 as of the Effective Date. The civil penalty shall be paid in two
21 equal payments of \$512,500 each (plus accrued interest), the first within 30 Days of the Effective
22 Date and the second no later than 180 Days from the Effective Date. Interest shall accrue on the
23 unpaid balance until the civil penalty is paid in full.

1 9. Defendants shall pay the civil penalty due, together with interest, by FedWire
2 Electronic Funds Transfer (“EFT”) to the DOJ account, in accordance with instructions provided
3 to Defendants by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office
4 for the Western District of Washington after the Effective Date. The payment instructions
5 provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number,
6 which Defendants shall use to identify all payments required to be made in accordance with this
7 Consent Decree. The FLU will provide the payment instructions to:

8 Steve Marmon
9 1800 James St., Suite 201
10 Bellingham, WA 98225
11 (360) 738-9999
12 invoice@electronhydro.com

13
14 on behalf of Defendants. Defendants may change the individual to receive payment instructions
15 on their behalf by providing written notice of such change to DOJ and EPA in accordance with
16 Section XIII (Notices).

17 10. At the time of payment, Defendants shall send notice that payment has been
18 made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov or via regular mail at EPA
19 Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; and (ii) to
20 DOJ via email or regular mail in accordance with Section XIII. Such notice shall state that the
21 payment is for the civil penalty owed pursuant to the Consent Decree in *United States of America*
22 *v. Electron Hydro, LLC, et al.* and shall reference the civil action number, CDCS Number, and
23 DOJ case number 90-5-1-1-12395.

24 11. Defendants shall not deduct any penalties paid under this Decree pursuant to this
25 Section or Section VII (Stipulated Penalties) in calculating their federal income tax.

V. COMPLIANCE REQUIREMENTS

12. Defendants shall comply with Section 301 of the CWA, 33 U.S.C. § 1311, and all permits obtained pursuant to Sections 402 and 404 of the CWA, 33 U.S.C. §§ 1342, 1344, with respect to the Facility. Except as in accordance with this Consent Decree, Defendants and Defendants’ agents, successors, and assigns are enjoined from discharging any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations.

13. Defendants shall comply with all Turf Management Requirements set forth in Appendix A to this Consent Decree.

14. Defendants shall comply with all Stormwater Management Requirements set forth in Appendix B to this Consent Decree.

15. As mitigation, Defendants shall, within 30 Days of the Effective Date, execute a deed restriction (“Restrictive Deed”) in the form of Appendix C attached hereto and incorporated by reference, and submit the Restrictive Deed to the Pierce County Auditor for recording in the real property records of Pierce County. The Restrictive Deed shall provide for preservation in perpetuity of the Electron Hydro property identified as Pierce County Tax Parcel Number 0617201001 (“Parcel”), which is located downstream of the existing spillway between approximately river mile 38 and 39 of the Puyallup River. Defendants shall comply with the terms and conditions of the Restrictive Deed as a requirement of this Consent Decree. Upon and after the Date of Lodging, Defendants shall ensure that all features on the Parcel, including air space and subsurface, will be preserved in their natural condition, except as expressly provided in Appendix C, and shall prevent any use of the Parcel that will impair or interfere with their natural resource functions and values.

1 16. Upon and after the Date of Lodging, Defendants shall not materially alter the
2 Parcel in a manner inconsistent with the intent of the Restrictive Deed.

3 17. Defendants shall make reasonable and good faith efforts to cooperate with any
4 organization that seeks to conduct watershed restoration, fish recovery, and/or fish protection
5 projects and associated activities on the Parcel in accordance with Paragraph 5.b of the
6 Restrictive Deed.

7 18. Defendants shall comply with all Construction Review Requirements set forth in
8 Appendix D to this Consent Decree.

9 19. Defendants shall comply with all Temporary Rock Spillway provisions set forth
10 in Appendix E to this Consent Decree. Defendants shall, within 30 Days of the Effective Date,
11 execute a performance bond in the form of Exhibit 1 to Appendix E, attached hereto and
12 incorporated by reference. Defendants shall provide notice under Paragraph 78 of the Consent
13 Decree within 15 Days of such execution.

14 20. Defendants shall comply with the independent contractor provisions set forth in
15 Appendix F, including as applicable to Appendices A and B of this Consent Decree.

16 21. Any public statement, oral or written, in print, film, or other media, made by
17 Defendants making reference to any efforts undertaken under Paragraphs 13-20 and the
18 accompanying Appendices of this Decree shall include the following language: “This project
19 was undertaken in connection with the settlement of an enforcement action, *United States of*
20 *America v. Electron Hydro, LLC, et al.*, taken on behalf of the U.S. Environmental Protection
21 Agency under the Clean Water Act.”

22 22. Approval of Deliverables. After review of any plan, report, or other item that is
23 required to be submitted pursuant to this Consent Decree, EPA will in writing: (a) approve the

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

3 23. If EPA approves the submission pursuant to Paragraph 22(a), Defendants shall
4 take all actions required by the plan, report, or other document, in accordance with the schedules
5 and requirements of the plan, report, or other document, as approved. If the submission is
6 conditionally approved or approved only in part pursuant to Paragraph 22(b) or (c), Defendants
7 shall, upon written direction from EPA, take all actions required by the approved plan, report, or
8 other item that EPA determines are technically severable from any disapproved portions, subject
9 to Defendants' right to dispute only the specified conditions or the disapproved portions, under
10 Section IX (Dispute Resolution).

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

17 25. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in
18 whole or in part, EPA may again require Defendants to correct any deficiencies, in accordance
19 with the preceding Paragraphs, subject to Defendants' right to invoke Dispute Resolution and the
20 right of EPA to seek stipulated penalties.

21 26. If Defendants elect to invoke Dispute Resolution as set forth in Paragraphs 23 or
22 25, Defendants shall do so by sending a Notice of Dispute in accordance with Paragraph 56

1 within 30 Days (or such other time as the Settling Parties agree to in writing) after receipt of the
2 applicable decision.

3 27. Any stipulated penalties applicable to the original submission, as provided in
4 Section VII, accrue during the 45-Day period or other specified period pursuant to Paragraph 24,
5 but shall not be payable unless the resubmission is untimely or is disapproved in whole or in
6 part; provided that, if the original submission was so deficient as to constitute a material breach
7 of Defendants' obligations under this Decree, the stipulated penalties applicable to the original
8 submission shall be due and payable notwithstanding any subsequent resubmission.

9 28. Permits. When any compliance obligation under this Section requires Defendants
10 to obtain a federal, state, or local permit or approval, Defendants shall submit timely and
11 complete applications and take all other actions necessary to obtain all such permits or approvals.

12 29. Mitigation Certifications. With regard to the mitigation required by Paragraph 15
13 and Appendix C, Defendants certify the truth and accuracy of each of the following:

14 a. That, as of the date of executing this Decree, Defendants are not required
15 to perform or develop the mitigation by any federal, state, or local law or regulation and
16 are not required to perform or develop the mitigation by agreement, grant, or as
17 injunctive relief awarded in any other action in any forum;

18 b. That the mitigation is not mitigation that Defendants were planning or
19 intending to construct, perform, or implement other than in settlement of the claims
20 resolved in this Decree;

21 c. That Defendants have not received and will not receive credit for the
22 mitigation in any other local, state, or federal enforcement or regulatory action; and

23 d. That Defendants shall neither generate nor use any pollutant reductions

1 from the mitigation as netting reductions, pollutant offsets, or to apply for, obtain, trade,
2 or sell any pollutant reduction credits.

3 VI. REPORTING REQUIREMENTS

4 30. Defendants shall submit the following reports to EPA at the addresses set forth in
5 Section XIII (Notices):

6 a. Within 45 Days of completing each instance of Semi-Annual Monitoring
7 in Appendix A after the lodging of this Consent Decree, until termination of this Decree
8 pursuant to Section XVII, Defendants shall submit by e-mail a semi-annual report for the
9 preceding six months that includes:

- 10 (1) A list of the names and titles of all employees and contractors
11 performing obligations under this Consent Decree;
- 12 (2) The Semi-Annual Reports required under Appendix A (Turf
13 Management Requirements);
- 14 (3) Notice of any Debris disposed of as required under Section III.C of
15 Appendix A;
- 16 (4) The status of best management practices implemented under
17 Appendix B (Stormwater Management Requirements), including a
18 statement as to whether specific dates and/or deadlines were met
19 during the preceding six months, unless Electron Hydro (i) meets
20 the eligibility requirements in Special Condition S10.A of the 2020
21 Construction Stormwater General Permit (“CSWGP”) or any
22 equivalent provision of a future permit; (ii) has submitted a Notice
23 of Termination (“NOT”) in accordance with Special Condition

1 S10.B of the 2020 CSWGP or any equivalent provision of a future
2 permit; and (iii) the termination of its permit coverage is effective
3 consistent with the CSWGP provisions for termination in Special
4 Condition S10 of the 2020 CSWGP or any equivalent provision of
5 a future permit; and

6 (5) The status of permit applications submitted by Electron Hydro.
7 This status update shall include either (i) a statement that Electron
8 Hydro is no longer seeking permit coverage for the Spillway
9 Replacement Project (as defined in Appendix E), or (ii) a statement
10 that Electron Hydro is diligently seeking permit coverage for the
11 Spillway Replacement Project, along with sufficient detail of the
12 status of the permitting process for EPA to conclude that Electron
13 Hydro has not abandoned seeking permit coverage for the Spillway
14 Replacement Project.

15 b. The semi-annual report is subject to EPA's Approval of Deliverables
16 process (Paragraphs 22 through 27 of the Consent Decree). The semi-annual report shall
17 also include a description of any non-compliance with the requirements of this Consent
18 Decree and an explanation of the violation's likely cause and of the remedial steps taken,
19 or to be taken, including dates, to prevent or minimize such violation. If Defendants
20 violate, or have reason to believe that they may violate, any requirement of this Consent
21 Decree, Defendants shall notify DOJ and EPA in accordance with Section XIII (Notices)
22 of such violation and its likely duration, in writing, within ten business days of the Day
23 either Defendant first becomes aware of the violation, with an explanation of the

1 violation's likely cause and of the remedial steps taken, or to be taken, including dates, to
2 prevent or minimize such violation. If the cause of a violation cannot be fully explained
3 at the time the report is due, Defendants shall so state in the report. Defendants shall
4 investigate the cause of the violation and shall then submit an amendment to the report,
5 including a full explanation of the cause of the violation, within 30 Days of the Day
6 either Defendant becomes aware of the cause of the violation. Nothing in this Paragraph
7 or the following Paragraph relieves Defendants of their obligation to provide the notice
8 required by Section VIII (Force Majeure).

9 31. Whenever any violation of this Consent Decree or of any applicable permits or
10 any other event affecting Defendants' performance under this Decree may pose an immediate
11 threat to the public health or welfare or the environment, Defendants shall notify EPA in
12 accordance with Section XIII (Notices) as soon as possible, but no later than 24 hours after either
13 Defendant first knew of the violation or event. This procedure is in addition to the requirements
14 set forth in the preceding Paragraph.

15 32. Any notice required by Paragraphs 30 or 31 shall simultaneously be provided to
16 the Puyallup Tribe of Indians by email at: Lisa.Anderson@PuyallupTribe-nsn.gov and
17 Russ.Ladley@PuyallupTribe-nsn.gov.

18 33. Each report submitted by Defendants under this Section shall be signed by Mr.
19 Thom Fischer and an official of Electron Hydro and both signatories must include the following
20 certification:

21 I certify under penalty of perjury that this document and all attachments were prepared
22 under my direction or supervision in accordance with a system designed to assure that
23 qualified personnel properly gather and evaluate the information submitted. Based on my
24 inquiry of the person or persons who manage the system, or those persons directly
25 responsible for gathering the information, the information submitted is, to the best of my
26 knowledge and belief, true, accurate, and complete. I have no personal knowledge that

1 the information submitted is other than true, accurate, and complete. I am aware that
2 there are significant penalties for submitting false information, including the possibility
3 of fine and imprisonment for knowing violations.
4

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

7 35. The reporting requirements of this Consent Decree do not relieve Defendants of
8 any reporting obligations required by the Act or implementing regulations, or by any other
9 federal, state, or local law, regulation, permit, or other requirement.

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

13 VII. STIPULATED PENALTIES

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

20 38. Late Payment of Civil Penalty. If Defendants fail to pay the civil penalty required
21 to be paid under Section IV (Civil Penalty) when due, Defendants shall pay a stipulated penalty
22 of \$2,500 per Day for each Day that the payment is late.

23 39. Compliance Milestones.

24 a. Excepting reporting violations addressed in Paragraph 40 below, the
25 following stipulated penalties shall accrue per violation per Day for each violation of the

1 requirements identified in subparagraph 39.b (1)-(8):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$2,000	1st through 14th Day
\$3,000	15th through 30th Day
\$5,000	31st Day and beyond

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7 b.

8 (1) Transfer Provisions in Paragraph 4, specifically the failure to: (a)
9 provide a copy of this Consent Decree to any proposed transferee;

10 (b) provide written notice to the United States at least 30 Days
11 prior to any transfer of ownership or operation of the Facility; or

12 (c) provide a copy of the proposed written agreement with the
13 transferee;

14 (2) Compliance requirements as set forth in Paragraph 12 in any way
15 regarding the Spillway Replacement Project and construction
16 staging areas adjacent to or used to further the Spillway
17 Replacement Project;

18 (3) Turf Management Requirements as set forth in Paragraph 13 and
19 Appendix A;

20 (4) Stormwater Management Requirements as set forth in Paragraph
21 14 and Appendix B;

22 (5) Mitigation and Restrictive Deed provisions as set forth in
23 Paragraphs 15 to 17 and Appendix C;

24 (6) Construction Review Requirements as set forth in Paragraph 18
25 and Appendix D;

- 1 (7) Temporary Rock Spillway Requirements as set forth in Paragraphs
- 2 1 and 2 of Appendix E; and
- 3 (8) Independent Contractor Requirements as set forth in Paragraph 20
- 4 and Appendices A, B, and F.

5 40. Reporting Requirements. The following stipulated penalties shall accrue per
 6 violation per Day for each violation of the reporting requirements of Section VI and any
 7 reporting violations included in Appendices A-E:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
9 \$1,500	1st through 14th Day
10 \$2,000	15th through 30th Day
11 \$3,000	31st Day and beyond
12	

13 41. For all other violations of this Consent Decree not addressed by Paragraphs 38-40
 14 above, Defendants shall pay a stipulated penalty of \$500 that accrues on a per violation, per Day
 15 basis.

16 42. Stipulated penalties under this Section shall begin to accrue on the Day after
 17 performance is due or on the Day a violation occurs, whichever is applicable, and shall continue
 18 to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated
 19 penalties shall accrue simultaneously for separate violations of this Consent Decree.

20 43. Defendants shall pay any stipulated penalty within 30 Days of receiving the
 21 United States' written demand.

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

24 45. Stipulated penalties shall continue to accrue as provided in Paragraph 41, during
 25 any Dispute Resolution, but need not be paid until as follows:

1 a. If the dispute is resolved by agreement of the Settling Parties or by a
2 decision of EPA that is not appealed to the Court, Defendants shall pay accrued penalties
3 determined to be owing, together with interest, to the United States within 30 Days of the
4 effective date of the agreement or the receipt of EPA's decision or order.

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

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

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

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

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

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

9 VIII. FORCE MAJEURE

10 50. “Force majeure,” for purposes of this Consent Decree, is defined as any event
11 arising from causes beyond the control of Defendants, of any entity controlled by Defendants, or
12 of Defendants’ contractors, that delays or prevents the performance of any obligation under this
13 Consent Decree despite Defendants’ best efforts to fulfill the obligation. The requirement that
14 Defendants exercise “best efforts to fulfill the obligation” includes using best efforts to anticipate
15 any potential force majeure event and best efforts to address the effects of any potential force
16 majeure event (a) as it is occurring and (b) following the potential force majeure, such that the
17 delay and any adverse effects of the delay are minimized. “Force Majeure” does not include
18 Defendants’ financial inability to perform any obligation under this Consent Decree.

19 51. If any event occurs or has occurred that may delay the performance of any
20 obligation under this Consent Decree, whether or not caused by a force majeure event,
21 Defendants shall provide notice by telephone and by email to EPA, in accordance with the
22 Notice provisions in Section XIII below, within 72 hours of when Defendants first knew or
23 should have known that the event might cause a delay. Within seven Days thereafter,

1 Defendants shall provide in writing to EPA, in accordance with Section XIII (Notices), an
2 explanation and description of the reasons for the delay; the anticipated duration of the delay; all
3 actions taken, including dates, or to be taken to prevent or minimize the delay; a schedule for
4 implementation of any measures to be taken to prevent or mitigate the delay or the effect of the
5 delay; Defendants' rationale for attributing such delay to a force majeure event if they intend to
6 assert such a claim; and a statement as to whether, in the opinion of Defendants, such event may
7 cause or contribute to an endangerment to public health, welfare, or the environment.

8 Defendants shall include with any notice all available documentation supporting the claim that
9 the delay was attributable to a force majeure event. Failure to comply with the above
10 requirements shall preclude Defendants from asserting any claim of force majeure for that event
11 for the period of time of such failure to comply, and for any additional delay caused by such
12 failure. Defendants shall be deemed to know of any circumstance of which Defendants, any
13 entity controlled by Defendants, or Defendants' contractors knew or should have known.

14 52. If EPA agrees that the delay or anticipated delay is attributable to a force majeure
15 event, the time for performance of the obligations under this Consent Decree that are affected by
16 the force majeure event will be extended by EPA for such time as is necessary to complete those
17 obligations. An extension of the time for performance of the obligations affected by the force
18 majeure event shall not, of itself, extend the time for performance of any other obligation. EPA
19 will notify Defendants in writing of the length of the extension, if any, for performance of the
20 obligations affected by the force majeure event.

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

1 54. If Defendants elect to invoke the dispute resolution procedures set forth in
2 Section IX (Dispute Resolution), they shall do so no later than 15 Days after receipt of EPA’s
3 notice. In any such proceeding, Defendants shall have the burden of demonstrating by a
4 preponderance of the evidence that the delay or anticipated delay has been or will be caused by a
5 force majeure event; that the duration of the delay or the extension sought was or will be
6 warranted under the circumstances; that best efforts were exercised to avoid and mitigate the
7 effects of the delay; and that Defendants complied with the requirements of Paragraphs 50 and
8 51. If Defendants carry this burden, the delay at issue shall be deemed not to be a violation by
9 Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

10 IX. DISPUTE RESOLUTION

11 55. Unless otherwise expressly provided for in this Consent Decree, the dispute
12 resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising
13 under or with respect to this Consent Decree. Defendants’ failure to seek resolution of a dispute
14 under this Section shall preclude Defendants from raising any such issue as a defense to an
15 action by the United States to enforce any obligation of Defendants arising under this Decree.

16 56. Informal Dispute Resolution. Any dispute subject to dispute resolution under this
17 Consent Decree shall first be the subject of informal negotiations. The dispute shall be
18 considered to have arisen when Defendants send DOJ and EPA a written Notice of Dispute.
19 Such Notice of Dispute shall state clearly the matter in dispute. The period of informal
20 negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is
21 modified by written agreement. If the Settling Parties cannot resolve a dispute by informal
22 negotiations, then the position advanced by the United States shall be considered binding unless,

1 within 30 Days after the conclusion of the informal negotiation period, Defendants invoke formal
2 dispute resolution procedures as set forth below.

3 57. Formal Dispute Resolution. Defendants shall invoke formal dispute resolution
4 procedures within the time period provided in the preceding Paragraph by sending DOJ and EPA
5 a written Statement of Position regarding the matter in dispute. The Statement of Position shall
6 include, but need not be limited to, any factual data, analysis, or opinion supporting Defendants'
7 position and any supporting documentation relied upon by Defendants.

8 58. The United States will send Defendants its Statement of Position within 45 Days
9 of receipt of Defendants' Statement of Position. The United States' Statement of Position shall
10 include, but need not be limited to, any factual data, analysis, or opinion supporting that position
11 and any supporting documentation relied upon by the United States. The United States'
12 Statement of Position is binding on Defendants, unless Defendants file a motion for judicial
13 review of the dispute in accordance with the following Paragraph.

14 59. Judicial Dispute Resolution. Defendants may seek judicial review of the dispute
15 by filing with the Court and serving on the United States a motion requesting judicial resolution
16 of the dispute. The motion (a) must be filed within fourteen Days of receipt of the United States'
17 Statement of Position pursuant to the preceding Paragraph; (b) may not raise any issue not raised
18 in informal dispute resolution pursuant to Paragraph 56, unless the United States raises a new
19 issue of law or fact in the Statement of Position; (c) shall contain a written statement of
20 Defendants' position on the matter in dispute, including any supporting factual data, analysis,
21 opinion, or documentation, and (d) shall set forth the relief requested and any schedule within
22 which the dispute must be resolved for orderly implementation of the Consent Decree.

1 60. The United States shall respond to Defendants’ motion within the time period
2 allowed by the Local Rules of this Court. Defendants may file a reply memorandum, to the
3 extent permitted by the Local Rules.

4 61. Standard of Review

5 a. Disputes Concerning Matters Accorded Record Review. Except as
6 otherwise provided in this Consent Decree, in any dispute brought under Paragraph 57
7 pertaining to the adequacy or appropriateness of plans, procedures to implement plans,
8 schedules, or any other items requiring approval by EPA under this Consent Decree; the
9 adequacy of the performance of work undertaken pursuant to this Consent Decree; and all
10 other disputes that are accorded review on the administrative record under applicable
11 principles of administrative law, Defendants shall have the burden of demonstrating,
12 based on the administrative record, that the position of the United States is arbitrary and
13 capricious or otherwise not in accordance with law.

14 b. Other Disputes. Except as otherwise provided in this Consent Decree, in
15 any other dispute brought under Paragraph 57, Defendants shall bear the burden of
16 demonstrating that their position complies with this Consent Decree and better furthers
17 the objectives of the Consent Decree.

18 62. The invocation of dispute resolution procedures under this Section shall not, by
19 itself, extend, postpone, or affect in any way any obligation of Defendants under this Consent
20 Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with
21 respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but
22 payment shall be stayed pending resolution of the dispute as provided in Paragraph 45. If

1 Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as
2 provided in Section VII (Stipulated Penalties).

3 X. INFORMATION COLLECTION AND RETENTION

4 63. Defendants hereby certify that, to the best of their knowledge and belief, after
5 thorough inquiry, they have submitted to the United States Financial Information that fairly,
6 accurately, and materially sets forth their financial circumstances, and that those circumstances
7 have not materially changed between the time the Financial Information was submitted to United
8 States and the time Defendants execute this Consent Decree.

9 64. The United States and its representatives, including attorneys, contractors, and
10 consultants, shall have the right of entry into any facility covered by this Consent Decree, at all
11 reasonable times, upon presentation of credentials, to:

- 12 a. monitor the progress of activities required under this Consent Decree;
- 13 b. verify any data or information submitted to the United States in
14 accordance with the terms of this Consent Decree;
- 15 c. obtain samples and, upon request, splits of any samples taken by
16 Defendants or their representatives, contractors, or consultants;
- 17 d. obtain documentary evidence, including photographs and similar data; and
- 18 e. assess Defendants' compliance with this Consent Decree.

19 65. Upon request, Defendants shall provide EPA or its authorized representatives
20 splits of any samples taken by Defendants. Upon request, EPA shall provide Defendants splits
21 of any samples taken by EPA.

22 66. Until five years after the termination of this Consent Decree, Defendants shall
23 retain, and shall instruct their contractors and agents to preserve, all non-identical copies of all

1 documents, records, or other information (including documents, records, or other information in
2 electronic form) in their or their contractors' or agents' possession or control, or that come into
3 their or their contractors' or agents' possession or control, and that relate in any manner to
4 Defendants' performance of their obligations under this Consent Decree. This information-
5 retention requirement shall apply regardless of any contrary corporate or institutional policies or
6 procedures. At any time during this information-retention period, upon request by the United
7 States, Defendants shall provide copies of any documents, records, or other information required
8 to be maintained under this Paragraph.

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

22 68. Defendants may also assert that information required to be provided under this
23 Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to

1 any information that Defendants seek to protect as CBI, Defendants shall follow the procedures
2 set forth in 40 C.F.R. Part 2.

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

8 XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

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

11 71. The United States reserves all legal and equitable remedies available to enforce
12 the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the
13 rights of the United States to obtain penalties or injunctive relief under the Act or implementing
14 regulations, or under other federal laws, regulations, or permit conditions, except as expressly
15 specified in Paragraph 70. The United States further reserves all legal and equitable remedies to
16 address any imminent and substantial endangerment to the public health or welfare or the
17 environment arising at, or posed by, the Facility, whether related to the violations addressed in
18 this Consent Decree or otherwise.

19 72. Notwithstanding any other provision of this Consent Decree, the United States
20 reserves, and this Consent Decree is without prejudice to, the right to reinstitute or reopen this
21 action, or to commence a new action seeking relief in addition to that provided in this Consent
22 Decree, if the Financial Information provided by Defendants, or the certification made by
23 Defendants in Paragraph 63, is false or, in any material respect, inaccurate.

1 73. In any subsequent administrative or judicial proceeding initiated by the United
2 States for injunctive relief, civil penalties, other appropriate relief relating to the Facility or
3 Defendants' violations, Defendants shall not assert, and may not maintain, any defense or claim
4 based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim
5 preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by
6 the United States in the subsequent proceeding were or should have been brought in the instant
7 case, except with respect to claims that have been specifically resolved pursuant to Paragraph 70.

8 74. This Consent Decree is not a permit, or a modification of any permit, under any
9 federal, State, or local laws or regulations. Defendants are responsible for achieving and
10 maintaining complete compliance with all applicable federal, State, and local laws, regulations,
11 and permits, and Defendants' compliance with this Consent Decree shall be no defense to any
12 action commenced pursuant to any such laws, regulations, or permits, except as set forth herein.
13 The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in
14 any manner that Defendants' compliance with any aspect of this Consent Decree will result in
15 compliance with provisions of the Act, or with any other provisions of federal, State, or local
16 laws, regulations, or permits. Nothing in this Consent Decree shall limit the ability of the Corps
17 to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional
18 general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority
19 pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

20 75. This Consent Decree does not limit or affect the rights of Defendants or of the
21 United States against any third parties not party to this Consent Decree, nor does it limit the
22 rights of third parties, not party to this Consent Decree, against Defendants, except as otherwise
23 provided by law.

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

3 XII. COSTS

4 77. The Settling Parties shall bear their own costs of this action, including attorneys'
5 fees. Should Defendants subsequently be determined by the Court to have violated the terms or
6 conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees
7 incurred by the United States in any action against Defendants for noncompliance with or
8 enforcement of this Consent Decree.

9 XIII. NOTICES

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

- 13 As to DOJ by email: eescdcopy.enrd@usdoj.gov
- 14 Re: DJ # 90-5-1-1-12395
- 15 As to EPA by email: soden.caitlin@epa.gov
- 16 bujak.charissa@epa.gov
- 17 R10enforcement@epa.gov
- 18
- 19 As to Defendants: Thom A. Fischer
- 20 thom@tollhouseenergy.com
- 21 Svend Brandt-Erichsen
- 22 sbrandterichsen@nossaman.com

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

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

4 XIV. EFFECTIVE DATE

5 81. The Effective Date of this Consent Decree shall be the date upon which this
6 Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted,
7 whichever occurs first, as recorded on the Court’s docket.

8 XV. RETENTION OF JURISDICTION

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

13 XVI. MODIFICATION

14 83. The terms of this Consent Decree, including any attached appendices, may be
15 modified only by a subsequent written agreement signed by all the Settling Parties. Where the
16 modification constitutes a material change to this Decree, it shall be effective only upon approval
17 by the Court. Written agreements by the Settling Parties to changes in schedule of less than one
18 year are not material changes.

19 84. Application for construction grants, State Revolving Loan Funds, or any other
20 grants or loans, or other delays caused by inadequate facility planning or plans and specifications
21 on the part of Defendants shall not be cause for extension of any required compliance date in this
22 Consent Decree.

1 85. Any disputes concerning modification of this Decree shall be resolved pursuant to
2 Section IX (Dispute Resolution), provided, however, that, instead of the burden of proof
3 provided by Paragraph 61, the Party seeking the modification bears the burden of demonstrating
4 that it is entitled to the requested modification in accordance with Federal Rule of Civil
5 Procedure 60(b).

6 XVII. TERMINATION

7 86. Either:
8 a. five years after the Effective Date of this Consent Decree; or
9 b. after Defendants have completed the requirements of Section V
10 (Compliance Requirements), have thereafter maintained satisfactory
11 compliance with this Consent Decree, the CWA, and any permits issued
12 under Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342, 1344, for a
13 period of one year, whichever time period is longer,
14 and Defendants have paid the civil penalty and any accrued stipulated penalties as required by
15 this Consent Decree, Defendants may serve upon the United States a Request for Termination,
16 stating that Defendants have satisfied those requirements, together with all necessary supporting
17 documentation.

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

1 requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any
2 applicable Local Rules of this Court including, but not limited to, service of a summons.

3 XX. INTEGRATION

4 92. This Consent Decree, including deliverables that are subsequently approved
5 pursuant to this Decree, constitutes the entire agreement among the Settling Parties regarding the
6 subject matter of the Decree and supersedes all prior representations, agreements and
7 understandings, whether oral or written, concerning the subject matter of the subject matter of
8 the Decree herein.

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

10 93. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the
11 Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2),
12 performance of Section II, Paragraph 5; Section V, Paragraphs 12-23 & 28; Section VI,
13 Paragraphs 30, 31, & 33, Section X, Paragraphs 63-67, and Appendices A-F, is restitution,
14 remediation, or required to come into compliance with law.

15 XXII. HEADINGS

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

19 XXIII. FINAL JUDGMENT

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

XXIV. APPENDICES

- 1
- 2 96. The following Appendices are attached to and part of this Consent Decree:
- 3 “Appendix A” are the Turf Management Requirements;
- 4 “Appendix B” are the Stormwater Management Requirements;
- 5 “Appendix C” is the Restrictive Deed to be recorded in the real property records
- 6 of Pierce County;
- 7 “Appendix D” are the Construction Review Requirements;
- 8 “Appendix E” are the Temporary Rock Spillway Requirements; and
- 9 “Appendix F” is the Independent Contractor Certification.

10

11 Dated and entered this __ day of _____, 20__

12

13 _____

14 UNITED STATES DISTRICT JUDGE

15

FOR THE UNITED STATES OF AMERICA:

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

LETITIA GRISHAW
Section Chief
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice

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

JOHN
BRODERICK



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JOHN BRODERICK
Date: 2023.11.20
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11/20/23

JOHN BRODERICK
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FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

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FOR ELECTRON HYDRO, LLC:

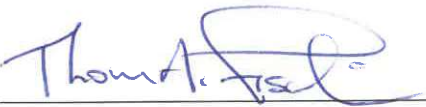
NOV 7, 2023
Date



Thom A. Fischer
Manager and Chief Operating Officer

FOR THOM A. FISCHER:

NOV 7, 2023
Date



Thom A. Fischer