

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE**

PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:15-cv-00020
)	
THE GIPSON COMPANY, and THE PADDOCKS DEVELOPMENT L.P.,)	District Judge Waverly D. Crenshaw, Jr.
)	Magistrate Judge E. Clifton Knowles
Defendants.)	

CONSENT DECREE

WHEREAS, Plaintiff Public Employees for Environmental Responsibility (“PEER”) filed its Complaint on January 7, 2015 pursuant to section 505(a) of the Clean Water Act (“CWA” or “the Act”), 33 U.S.C. § 1365(a).

WHEREAS, Plaintiff’s Complaint alleges that The Gipson Company (“Gipson”) and The Paddocks Development L.P. (“Paddocks”) (collectively, “Defendants”), failed to comply with the terms and conditions of permits issued pursuant to 33 U.S.C. § 1341 and 33 U.S.C. § 1344 of the CWA in the stream mitigation measures taken in connection with a commercial development constructed in Mount Juliet, Tennessee in an area generally known as the Paddocks.

WHEREAS, Defendants deny the allegations of the Complaint and do not admit that they have any liability to Plaintiff arising out of the transactions and occurrences alleged in the Complaint.

WHEREAS, Plaintiff and Defendants (“the Parties”) wish to effectuate a settlement of the above-captioned matter without continued litigation.

WHEREAS, the Parties consider this Consent Decree to be an adequate and equitable resolution of the above-captioned matter.

WHEREAS, the Court, by entering this Consent Decree, finds that the Decree is fair, reasonable, in the public interest, and consistent with the CWA, 33 U.S.C. § 1311 et seq.

Now therefore, without trial and with the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED that:

I. GENERAL TERMS

1. This Court has subject matter jurisdiction over the claims raised in the Complaint pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 33 U.S.C. § 1365 (the CWA citizen suit provision).
2. Venue is proper in the Middle District of Tennessee pursuant to 33 U.S.C. § 1365(c)(1) because the sources of the alleged CWA violations are located in this district.
3. For purposes of this Consent Decree, or any action to enforce this Consent Decree, the Parties consent to this Court’s jurisdiction over this Consent Decree and consent to venue in this judicial district.

II. DEFINITIONS

4. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:
 - a. “Complaint” shall mean the complaint filed by Plaintiff in this action;

- b. "Consent Decree" or "Decree" shall mean this Decree and all attachments hereto;
- c. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;
- d. "Paragraph" shall mean a portion of this Decree identified by an Arabic numeral;
- e. "Section" shall mean a portion of this Decree identified by an upper case Roman numeral.

III. TERMS OF AGREEMENT

- 5. Defendants or their contractors will perform mitigation work as detailed below at the mitigation site for the Paddocks development located in Mount Juliet, Tennessee that is the subject of Plaintiff's lawsuit (the "Paddocks Site").
- 6. The mitigation measures will encompass the following elements:
 - a. **Iron floc treatment system.** Defendants or their contractors will effectuate an on-site treatment system of the iron floc present downstream of the upper spring discharges as described below and following the treatment plans herein incorporated by reference and attached as **Exhibits 1(a) and 1(b)**.
 - i. Defendants will apply for any necessary regulatory approvals for this work from the Tennessee Department of Environment and Conservation ("TDEC") and the U.S. Army Corps of Engineers within 30 days of the signing of this agreement.
 - ii. Defendants will install the system within 45 days of obtaining all necessary regulatory approvals.

iii. “Success” of the iron floc system will be defined as meeting the following parameters:

1. No visible iron floc is present in the water discharging into the stream after passing through the treatment system, as documented by photographs. Defendants will not cause the stream to be flushed before taking such photographs, nor take them within three days of unusual weather conditions such as flooding; and
2. Total iron water test results below the treatment system are within ten percent (10%) percent of the test results for total iron from sampling taken on the same day at the upstream comparison point. The location of the upstream sampling points is shown on **Exhibit 2**, attached. The downstream sampling point shall be located 10 – 15 feet downstream of the confluence of the treatment system discharge and stream.

iv. Defendants will monitor progress with photographs, visual inspections, and samples at the frequencies listed below, beginning at least one week prior to installation and continuing through success of the iron floc system as defined in Section 6(a)(iv).

1. **Success monitoring.** Defendants will take weekly iron water test samples at the locations: (a) the upstream comparison point and (b) the area of the discharge downstream of the treatment system, shown on Exhibit 2. Samples shall be taken from the area of visible growth of iron bacteria in the water or if there is no visible

growth, samples shall be taken from the bottom of stream near the sediment. All sampling sites shall be photographed concurrent with sampling. At each sampling, Defendants shall also photograph the entry, midpoint, and exit from treatment system, as well as at three downstream points: (a) stream directly below the treatment system, (b) 50-75 meters below the treatment system and (c) just south and upstream of the Mt Juliet Road. Photographs will include downstream and upstream views.

2. Macroinvertebrate sampling will be conducted (a) before installation in the spring of 2016 and (b) one year later in the same month of 2017 utilizing the most current TDEC BMI Standard Operating Procedures for stream comparison and organisms will be processed to the Family level. On these occasions, Defendants shall also measure pH and conductivity.
 3. **Transmission of monitoring results.** Defendants will provide all monitoring results to Plaintiff via email to peerdc@gmail.com. Each time Defendants send such results, they will separately send a message to Laura Dumais at ldumais@peer.org with the subject line “Paddocks monitoring results sent to PEER gmail account.”
- v. In the event that success of the iron floc system as defined in Section 6(a)(iv) does not occur within 90 days of installation of the system, Defendants will adjust systems by changing flow pattern and/or adding additional channel to the system.

- vi. In the event that success of the iron floc system as defined in Section 6(a)(iv) does not occur within 6 months of installation of the system, Defendants will, within 30 days, propose an alternate treatment plan or compensatory measure for Plaintiff's approval, and complete the measures in paragraph 6(a) of this agreement.
 - vii. In the event that success of the iron floc system as defined in Section 6(a)(iv) does occur, Defendants will continue monitoring once per quarter for one year from the date that success of the iron floc system as defined in Section 6(a)(iv) is achieved to ensure no reoccurrence of iron floc.
- b. **Stream 7 stabilization:** Within three months of the signing of this agreement, Defendants will implement bank stabilization along Stream 7, where structures have not performed or have under-performed as identified in the "Paddocks Field Survey 9/24/2015." The work will be in accordance with the "Paddocks Str 7 Restoration Plan Updates 11/15/2015," herein incorporated by reference and attached as **Exhibit 3**. Defendants will monitor Stream 7 quarterly for eighteen months following completion of repairs, to ensure that the plan functions as designed and will remedy any problems that occur.
- c. **Tree/shrub survival rate:** On August 28, 2015 Defendants performed a tree/shrub survey, attached at **Exhibit 4**, demonstrating that the biodiversity element of the initial mitigation plan was met when including "volunteers" (vegetation that grew on its own and was not specifically installed). Some of the trees and shrubs counted in this survey were those that Defendants installed in the "Paddocks" area in March of 2015 ("Paddocks area plantings"). This survey shows that survival in the Paddocks area planting was at

83%. Defendants will ensure 75% survival rate for the Paddocks area plantings for three years from planting (i.e., through March of 2018). Defendants will provide PEER a tree/shrub survival survey for the Paddocks area at least once per year. Where the 75% success rate is not met in the Paddocks area, Defendants or their contractors will, within one month of the tree/shrub survival survey that demonstrated a deficiency, install and properly care for, following TN Department of Agriculture Guidelines, appropriate replacement trees or shrubs.

- d. **Supplemental Environmental Project:** Defendants will provide \$27,000 to the Cumberland River Compact (“the Compact”), a 501(c)(3) nonprofit conservation organization located at 2 Victory Ave Suite 300, Nashville, TN 37213 to fund conservation projects that the Compact and PEER have collaborated to plan within the area near the Paddocks site and that the Compact will develop and implement. A summary is attached as **Exhibit 5**. All aspects of the projects, including without limitation project identification, design, implementation, and monitoring, will be carried out exclusively by the Compact. Defendants shall have no responsibility for, involvement in, or liability for any activities of the Compact whatsoever, including claims of any third party alleging injury or damage to person or property as a result of actions of the Compact. Defendants shall provide the funds to the Compact by check to the Cumberland River Compact, c/o McKayle Houghton, 2 Victory Ave Suite 300, Nashville, TN 37213, within thirty (30) days of the Effective Date of this Consent Decree.

IV. PLAINTIFF'S FEES AND COSTS

7. Within thirty (30) days of the Effective Date of this Consent Decree, Defendants will pay PEER \$30,000 in attorneys' fees and costs. Payment shall be made by bank check or money transfer to PEER. PEER's mailing address is 962 Wayne Ave, Suite 610 / Silver Spring, MD 20910. If the money is to be wired, PEER's counsel will provide the relevant financial information to effectuate payment.
8. If Defendants fail to comply with the terms of this agreement, they will pay all reasonable legal and technical fees and costs that Plaintiff expends to enforce this Consent Decree.
9. If any independent verifications of monitoring reports reveals that Defendants or their contractors falsified information, Defendants shall pay all technical and legal fees incurred by Plaintiff related thereto.

V. EFFECTIVE DATE

10. This Consent Decree shall become effective upon the date of its entry by the Court or if a motion to enter the Consent Decree is granted, whichever occurs first. If for any reason the District Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.

VI. EFFECT OF SETTLEMENT/RELEASE OF THE PARTIES

11. This Consent Decree shall constitute a complete and final settlement of all claims that were asserted, or could have been asserted, by PEER against Defendants.
12. Upon dismissal of this case, PEER hereby releases and discharges any and all claims, causes of action, suits, or demands of any kind that it may have had, or now has, against Defendants. Claims that PEER may have regarding enforcing this Consent Decree will continue until Defendants fulfill their obligations pursuant to this Consent Decree.

13. Nothing in this Consent Decree shall prevent PEER from challenging activity by Defendants that is not the subject of this complaint.
14. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.
15. The parties hereby covenant and represent to each other that they have the sole right, full power, and exclusive authority to enter into and execute this Consent Decree, and that they have not assigned or otherwise transferred to any other person or entity any interest in the claims, remedies and causes of action that are the subject of this Consent Decree. The parties hereto further represent and warrant that all the Recitals in this Consent Decree are true and correct in all respects.

VII. DISPUTE RESOLUTION AND RETENTION OF JURISDICTION

16. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed upon resolution within ninety (90) days after receipt of the notice, the Party may move the Court to resolve the dispute.
17. The Court shall retain jurisdiction for purposes of resolving any disputes arising under this Consent Decree, and for taking such actions as necessary or appropriate to construe, implement, or enforce the terms of the Consent Decree.
18. PEER and Defendants reserve all legal and equitable rights and defenses available to them to enforce or defend provisions of this Consent Decree.

VIII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

19. When the Court enters this Consent Decree, it will dismiss the case without prejudice to reopen to enforce the terms of this Consent Decree.

IX. NOTICE

20. All notices and communications required under this Consent Decree shall be made to the Parties through each of the following persons and addresses:

a. TO PEER

Public Employees for Environmental Responsibility
Laura Dumais
962 Wayne Avenue, Suite 610
Silver Spring MD 20910
ldumais@peer.org

Richard C. Mangelsdorf
McAngus Goudelock & Courie
PO Box 198349
Nashville, TN 37219
chuck.mangelsdorf@mgclaw.com

b. TO DEFENDANTS

Colin Barker
Vice President
The Gipson Company
480 East Paces Ferry Road
Suite #8
Atlanta, GA 30305

J. Greer Cummings, Jr.
Bradley Arant Boult Cummings LLP
Roundabout Plaza
1600 Division Street, Suite 700
Nashville, TN 37203
gcummings@babco.com

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

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

X. MODIFICATION

23. The terms of this Consent Decree may be modified only by a subsequent written agreement by all Parties or upon a motion properly presented to the Court. Where the modification results in a material change to the Consent Decree, it shall be effective upon approval by the Court.

24. Any disputes concerning modification of this Decree shall be resolved pursuant to Section VII of this Decree (Dispute Resolution).

XI. GOVERNMENT COMMENT OR INTERVENTION; ENTRY

25. Within ten (10) days of the Execution Date, PEER will, pursuant to 33 U.S.C. § 1365(c)(3), serve this consent Decree on the Attorney General for the United States and the Administrator of the United States Environmental Protection Agency. If the United States does not comment or intervene within forty-five (45) days of receipt, the Parties shall submit this Consent Decree to the Court together with a joint motion for its entry as an Order of this Court. If the United States comments or intervenes in this proceeding, the Parties will work together and with the United States to determine if the matter can still be resolved without further litigation.

XII. SIGNATORIES/SERVICE

26. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Consent Decree.

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

XIII. INTEGRATION

28. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

XIV. NON-SEVERABILITY ABSENT RE-ADOPTION BY THE PARTIES

29. This Consent Decree shall constitute a binding agreement among the Parties. If for some reason the Court should decline to approve the proposed Consent Decree on any ground except one related to form, this Consent Decree is voidable at the option of any party to this Consent Decree within fourteen (14) days of the Court's decision. If for any reason the Court should determine prior to entry of the proposed Consent Decree that substantive modifications are necessary prior to approving the proposed Consent Decree, the Parties shall enter into good faith discussions of potential modifications, and this Consent Decree shall be void unless the Parties agree otherwise within fourteen (14) days of the Court's determination.

XV. FINAL JUDGMENT

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

District Judge Waverly D. Crenshaw, Jr.

Date

Respectfully submitted on May 16, 2016,

/s/ Richard C. Mangelsdorf, Jr.

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