

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA,

Plaintiff,

v.

SMITH AND EDWARDS COMPANY
AND THE OGDEN CITY REDEVELOPMENT
AGENCY,

Defendants.

**CONSENT DECREE FOR
RECOVERY OF RESPONSE COSTS**

Case No. ~~23-cv-681~~
1:23-cv-00108-HCN

TABLE OF CONTENTS

I.	BACKGROUND	1
II.	JURISDICTION	1
III.	PARTIES BOUND.....	2
IV.	DEFINITIONS	2
V.	PAYMENT OF RESPONSE COSTS.....	5
VI.	FAILURE TO COMPLY WITH CONSENT DECREE	7
VII.	COVENANTS BY PLAINTIFF.....	9
VIII.	RESERVATION OF RIGHTS BY UNITED STATES	9
IX.	COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES	10
X.	EFFECT OF SETTLEMENT/CONTRIBUTION	15
XI.	RETENTION OF RECORDS	17
XII.	NOTICES AND SUBMISSIONS	20
XIII.	RETENTION OF JURISDICTION.....	21
XIV.	INTEGRATION/APPENDICES	21
XV.	LODGING AND OPPORTUNITY FOR PUBLIC COMMENT	21
XVI.	SIGNATORIES/SERVICE.....	22
XVII.	FINAL JUDGMENT	23

I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the U.S. Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at the Ogden Swift Building Superfund Site in Ogden, Utah (the “Site”).

B. The Defendants that have entered into this Consent Decree (“Settling Defendants”) do not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint. Settling Federal Agencies do not admit any liability arising out of the transactions or occurrences alleged in any counterclaim asserted by Settling Defendants.

C. The United States and Settling Defendants 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 without further litigation and without the admission or adjudication of any issue of fact or law is appropriate and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is 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. §§ 9607 and 9613(b), and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying

complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants 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 is binding upon the United States, and upon Settling Defendants and their successors and assigns. 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 Settling Defendants 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 meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or its appendices, the following definitions shall apply:

“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9601-75.

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

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

“DOJ” means the U.S. Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” means the date upon which the approval of this Consent Decree is recorded on the Court’s docket.

“EPA” means the U.S. Environmental Protection Agency.

“EPA Hazardous Substance Superfund” means the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

“Interest” means 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. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“National Contingency Plan” or “NCP” means the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

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

“Parties” means the United States and Settling Defendants.

“Past Response Costs” means all costs, including but not limited to direct and indirect costs, that EPA or DOJ on behalf of EPA has paid at or in connection with the Site as of June 30, 2022, plus accrued Interest on all such costs through such date.

“Plaintiff” means the United States.

“RCRA” means the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901-92 (also known as the Resource Conservation and Recovery Act).

“RDA” means the Ogden City Redevelopment Agency, a political subdivision of the City of Ogden, Utah.

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

“Settling Defendants” means Smith and Edwards and RDA.

“Settling Federal Agencies” means the Defense Logistics Agency, DLA Disposition Services, Department of the Army, Department of the Navy and Department of Air Force and their successor departments, agencies, or instrumentalities.

“Site” means the Ogden Swift Building Superfund Site, encompassing approximately 7.22 acres, located at 390 West Exchange Street in Ogden, Weber County, Utah, and as generally shown on the map included in Appendix A.

“Smith and Edwards” means the Smith and Edwards Company, a Utah corporation.

“State” means the State of Utah.

“United States” means the United States of America and each department, agency, and instrumentality of the United States, including EPA and Settling Federal Agencies.

“VCP” means the State’s Voluntary Cleanup Program, Utah Code Ann. § 19-8-101, *et seq.*

“VCP Work Costs” means all costs, past or future, direct or indirect, incurred or that will be incurred by the RDA in connection with the VCP Work.

“VCP Work” means the work, including payment of administrative costs to the State, that was carried out or that will be carried out by or on behalf of the RDA at the Site under the VCP as described in the Voluntary Cleanup Agreement between RDA and the Utah Department of Environmental Quality executed on March 5, 2020.

V. PAYMENT OF RESPONSE COSTS

4. **Payment by Smith and Edwards for Past Response Costs.** Within 30 days after the Effective Date, Smith and Edwards shall pay to EPA \$2,290,065, plus an additional sum for Interest on that amount calculated from the date on which the Consent Decree is lodged with the Court through the date of payment.

5. **Payment by RDA for Past Response Costs.** Within 30 days after the Effective Date, RDA shall pay to EPA \$300,000, plus an additional sum for Interest on that amount calculated from the date on which the Consent Decree is lodged with the Court through the date of payment.

6. **Payment Instructions.** Settling Defendants shall make payment by Fedwire Electronic Funds Transfer (EFT) in accordance with instructions provided to Settling Defendants by the Financial Litigation Unit (FLU) of the U.S. Attorney's Office for the District of Utah after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (CDCS) number, Site/Spill ID Number B804, and DJ Number 90-11-3-12449, which shall be used to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Smith and Edwards Company
c/o Mr. Craig Smith, President
3936 N Highway 126
Ogden, Utah 84404
P: (801)731-1120 / E: craig@smithandedwards.com

Ogden Redevelopment Agency:
c/o: Mr. Mike Caldwell, Mayor Ogden City
2549 Washington Blvd.
Ogden, Utah 84401
P: (801) 629-8111 / E: mikecaldwell@ogdencity.com

on behalf of Settling Defendants. Settling Defendants may change the individual to receive payment instructions on their behalf by providing written notice of such change to DOJ and EPA in accordance with Section XII (Notices and Submissions).

7. **Deposit of Payment.** The total amount to be paid pursuant to Paragraphs 4 and 5 shall be deposited by EPA in the EPA Hazardous Substance Superfund.

8. **Notice of Payment.** At the time of payment, Settling Defendants shall send to EPA and DOJ, in accordance with Section XII (Notices and Submissions), a notice of this payment including references to the CDCS Number, Site/Spill ID Number B804 and DJ Number 90-11-3-12449.

9. **Payment by Settling Federal Agencies.**

a. As soon as reasonably practicable after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay to EPA \$2,290,065. The total amount to be paid on behalf of Settling Federal Agencies pursuant to this Paragraph shall be deposited by EPA in the EPA Hazardous Substance Superfund.

b. **Interest.** In the event that any payment required by Paragraph 9.a is not made within 120 days after the Effective Date, the United States, on behalf of Settling Federal Agencies, shall pay Interest on the unpaid balance, with such Interest commencing on the 121st day after the Effective Date and accruing through the date of the payment.

c. The Parties to this Consent Decree recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Consent Decree can only be paid from appropriated funds legally available for such purpose. Nothing in this Consent Decree shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

VI. FAILURE TO COMPLY WITH CONSENT DECREE

10. **Interest on Late Payments.** If either Settling Defendant fails to make payment under Paragraph 4 or 5 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

11. **Stipulated Penalty**

a. If any amounts due to EPA under Paragraphs 4 and 5 are not paid by the required date, the Settling Defendant that failed to make the payment shall be in violation of this

Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraphs 4 and 5, \$500 per violation per day for the first 30 days and \$1,000 per day thereafter that such payment is late.

b. Stipulated penalties are due and payable within 30 days after the date of the demand for payment of the penalties by EPA. Settling Defendants shall make all payments at <https://www.pay.gov> using the “EPA Miscellaneous Payments Cincinnati Finance Center” link, including references to the Site/Spill ID and DJ numbers listed in Paragraph 6 and send notice of this payment in accordance with Paragraph 8 (Notice of Payment). Settling Defendants shall indicate in the comment field on the <https://www.pay.gov> payment form that the payment is for stipulated penalties.

c. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendants of the violation or made a demand for payment but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing in this Consent Decree shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

12. If the United States brings an action to enforce this Consent Decree, the Settling Defendant that is in violation of the Consent Decree shall reimburse the United States for all costs of such action, including but not limited to, costs of attorney time.

13. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of such Settling Defendant’s failure to comply with the requirements of this Consent Decree.

14. 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 Settling Defendants from payment as required by Section V (Payment of Response Costs) or from performance of any other requirements of this Consent Decree.

VII. COVENANTS BY PLAINTIFF

15. **Covenants for Settling Defendants by United States.** Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person.

16. **Covenant for Settling Federal Agencies by EPA.** Except as specifically provided in Section VIII (Reservation of Rights by United States), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant shall take effect upon the Effective Date. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Decree. This covenant extends only to Settling Federal Agencies and does not extend to any other person.

VIII. RESERVATION OF RIGHTS BY UNITED STATES

17. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within

Paragraph 15 (Covenants for Settling Defendants by United States). EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies, with respect to all matters not expressly included within Paragraph 16 (Covenant for Settling Federal Agencies by EPA). Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Settling Defendants, and EPA and the federal natural resource trustees reserve, and this Consent Decree is without prejudice to, all rights against Settling Federal Agencies, with respect to:

- a. liability for failure of Settling Defendants or Settling Federal Agencies to meet a requirement of this Consent Decree;
- b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;
- c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;
- d. criminal liability; and
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

IX. COVENANTS BY SETTLING DEFENDANTS AND SETTLING FEDERAL AGENCIES

18. **Covenants by Settling Defendants as to the United States.** Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Past Response Costs, the VCP Work, the VCP Work Costs, and this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA 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;

b. any claim arising out of the response actions at the Site for which Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Utah, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; or

c. any claim pursuant to Section 107 or 113 of CERCLA, 42 U.S.C. § 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law for Past Response Costs.

19. Covenants by Settling Defendants as to Each Other.

a. *Definitions:* The following definitions apply to this Paragraph 19:

“CAP” means the Swift Building Corrective Action Plan, approved by the Utah Department of Environmental Quality (on February 24, 2021, relating to Utah Facility Identification No. 1200655, Release Site NVV).

“CAP Work Costs” means all costs, past or future, direct or indirect, incurred or that will be incurred by the RDA or its affiliates in connection with the CAP Work.

“CAP Work” means the work, including payment of administrative costs to the State, carried out or that will be carried out by or on behalf of the RDA or its affiliates at the Site pursuant to the State of Utah’s Administrative Code R311-211 and R311-202 as described in the CAP.

“Excluded Person” means Utah-Smith LC, and its members, managers, affiliates, and its predecessors in interest and successors or assigns, under that certain Real Estate Purchase Agreement dated April 10, 2017, as amended by the First Amendment to Real Estate Purchase Contract dated July 18, 2017, by and between Utah-Smith LC as seller and Ogden City Redevelopment Agency, as buyer, but does not include RDA or its successors and assigns.

b. Covenants by RDA as to Smith and Edwards

- (1) RDA waives, releases, discharges, covenants not to sue and agrees not to assert any claims with respect to Past Response Costs, VCP Work Costs and the CAP Work Costs against Smith and Edwards.
- (2) RDA covenants not to sue and agrees not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs against any other person or entity, except as otherwise set forth in Subparagraph 19.b.4.
- (3) The covenant not to sue and agreement not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs in Subparagraph 19.b.3 shall not apply with respect to any defense, claim, or cause of action that RDA may have against any person or entity if such person or entity asserts a claim against RDA.

- (4) The RDA and Smith and Edwards have made certain other agreements related to the VCP Work and the CAP Work as set forth in Exhibit A to this Consent Decree.
- (5) The Covenants in Subparagraph 19.b shall not be construed as releasing RDA from any obligations under this Consent Decree.

These covenants (1) through (5) are enforceable only by Smith and Edwards.

c. Covenants by Smith and Edwards as to RDA

- (1) Smith and Edwards waives, releases, discharges, covenants not to sue and agrees not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs against RDA.
- (2) Smith and Edwards covenants not to sue and agrees not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs against any other person or entity, except as set forth in Subparagraphs 19.c.3 and 19.c.4.
- (3) The covenant not to sue and agreement not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs in Subparagraph 19.c.2 applies to and is inclusive of any claim (including by way of counterclaim) Smith and Edwards may have against any Excluded Persons if such Excluded Person asserts a claim against Smith and Edwards.

- (4) Except as set forth in Subsection 19.c.3, the covenant not to sue and agreement not to assert any claims with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs in Subparagraph 19.c.2 shall not apply with respect to any defense, claim or cause of action that Smith and Edwards may have against a person or entity if such person or entity asserts a claim with respect to Past Response Costs, the VCP Work Costs and the CAP Work Costs against Smith and Edwards.
- (5) The Covenants in Subparagraph 19.c shall not be construed as releasing Smith and Edwards from any obligations under this Consent Decree.

These covenants (1) through (5) are enforceable only by RDA.

20. **Covenant by Settling Federal Agencies as to EPA.** Settling Federal Agencies agree not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through CERCLA §§ 106(b)(2), 107, 111, 112, 113 or any other provision of law with respect to Past Response Costs and this Consent Decree. This covenant does not preclude demand for reimbursement from the Superfund of costs incurred by a Settling Federal Agency in the performance of its duties (other than pursuant to this Consent Decree) as lead or support agency under NCP.

21. 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).

22. **Waiver of De Micromis Claims by Settling Defendant**

a. Settling Defendants agree 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 they may have for all matters relating to the Site against any person where the person's liability to Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

b. **Exceptions to Waiver.** The waiver under this Paragraph 22 shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person otherwise covered by such waiver if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

X. EFFECT OF SETTLEMENT/CONTRIBUTION

23. Except as provided in Paragraph 22 (Waiver of De Micromis Claims by Settling Defendants), 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 Section IX (Covenants by Settling Defendants and Settling Federal Agencies), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that 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).

24. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Settling Defendant and each Settling Federal Agency has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and 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 the Matters Addressed in this Consent Decree. The Matters Addressed in this Consent Decree are Past Response Costs and the VCP Work Costs.

25. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed by the United States in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which each Settling Defendant and each Settling Federal Agency has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

26. Each Settling Defendant shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Each Settling Defendant also 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, each Settling Defendant 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.

27. 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, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-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 by Plaintiff set forth in Section IX.

XI. RETENTION OF RECORDS

28. Until five years after the Effective Date, each Settling Defendant shall preserve and retain all non-identical copies of records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) now in its possession or control or that come into its possession or control, that relate in any manner to its liability under CERCLA with respect to the Site, provided, however, that Settling Defendants who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

29. At the conclusion of the record retention period, Settling Defendants shall notify EPA and DOJ at least 90 days prior to the destruction of any such Records, and, upon request by EPA or DOJ, and except as provided in Paragraph 30 (Privileged and Protected Claims), Settling Defendants shall deliver any such Records to EPA.

30. Privileged and Protected Claims

a. Settling Defendants may assert that all or part of a Record is privileged or protected as provided under federal law, provided they comply with Paragraph 30.b, and except as provided in Paragraph 30.c.

b. If Settling Defendants assert a claim of privilege or protection, they shall provide Plaintiff with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Settling Defendants shall provide the Record to Plaintiff in redacted form to mask the privileged or protected information only. Settling Defendants shall retain all Records that they claim to be privileged or protected until the United States has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in the Settling Defendants' favor.

c. Settling Defendants may make no claim of privilege or protection regarding:

- (1) any data regarding the Site, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or
- (2) the portion of any Record that Settling Defendants are required to create or generate pursuant to this Consent Decree.

31. **Business Confidential Claims.** Settling Defendants may assert that all or part of a Record submitted to Plaintiffs under this Section is business confidential 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). Settling Defendants shall segregate and clearly identify all Records or parts thereof submitted under this Consent Decree for which Settling Defendants assert a business confidentiality claim. Records that Settling Defendants claim to be confidential business information 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 Settling Defendants 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 Settling Defendants.

32. Each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any Records (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e), and 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

33. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has certified that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e) (3)(B), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XII. NOTICES AND SUBMISSIONS

34. 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 Parties in writing. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Decree regarding such Party.

As to DOJ by email:

eescdcopy.enrd@usdoj.gov
Re: DJ# 90-11-3-12449

As to DOJ by mail:

EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-11-3-12449

and:

Section Chief
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 20044-7611
MailProcessing_EDS.ENRD@usdoj.gov

As to EPA:

William Lindsey
Senior Assistant Regional Counsel
CERCLA Enforcement Section
Office of Regional Counsel (8ORC-C)
USA EPA Region 8
1595 Wynkoop Street
Denver, Colorado 80202-1129
Lindsey.William@epa.gov

As to Settling Defendants:

Smith and Edwards Company
c/o Mr. Craig Smith, President
3936 N Highway 126
Ogden, Utah 84404
craig@smithandedwards.com

Ogden City Redevelopment Agency
c/o: Mr. Mike Caldwell, Executive Director
2549 Washington Blvd
Ogden, Utah 84401
mikecaldwell@ogdencity.com

with a copy to:

Agency Attorney
2549 Washington Boulevard, Suite 840
Ogden, Utah 84401
garywilliams@ogdencity.com

XIII. RETENTION OF JURISDICTION

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

XIV. INTEGRATION/APPENDICES

36. This Consent Decree and its appendix constitute the final, complete and exclusive agreement and understanding among 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 appendix is attached to and incorporated into this Consent Decree: “Appendix A” the map of the Site.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

37. This Consent Decree shall be lodged with the Court for a period of at least 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 that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

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

XVI. SIGNATORIES/SERVICE

39. Each undersigned representative of a Settling Defendant and the Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, 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.

40. Each Settling Defendant 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 Settling Defendants in writing that it no longer supports entry of the Consent Decree.

41. Each Settling Defendant 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 behalf of that Party with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree 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. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XVII. FINAL JUDGMENT

42. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States and the Settling Defendants.

The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ___ DAY OF _____, 2023.

United States District Judge

Signature Page for Consent Decree Regarding Ogden Swift Building Superfund Site

FOR THE UNITED STATES OF AMERICA:

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

September 29, 2023

Dated



JEANNE T. COHN
Trial Attorney
Environment and Natural Resources Division
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-4160
jeanne.cohn@usdoj.gov

TRINA A. HIGGINS
United States Attorney
District of Utah

AMANDA A. BERNDT
Assistant United States Attorney
District of Utah
111 South Main Street, Suite 1800
Salt Lake City, Utah 84111

Signature Page for Consent Decree Regarding Ogden Swift Building Superfund Site

September 29, 2023

Dated

/s/ Daniel Pinkston

DANIEL PINKSTON
Senior Trial Attorney
Environmental Defense Section
Environment & Natural Resources Division
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 829-9506
Daniel.pinkston@usdoj.gov

Signature Page for Consent Decree Regarding Ogden Swift Building Superfund Site

9/13/23
Dated

 (for)
Kenneth M. Schefski, Regional Counsel
U.S. EPA
Region 8 1595
Wynkoop Street
Denver, CO 80202

 9/6/23
Ben Bielenberg, Acting Director
Superfund and Emergency Management Division
U.S. EPA
Region 8 1595
Wynkoop Street
Denver, CO 80202

 9/6/23
William Lindsey
Senior Assistant Regional Counsel
U.S. EPA
Region 8 1595
Wynkoop Street
Denver, CO 80202

Signature Page for Consent Decree Regarding the Ogden Swift Building Superfund Site

FOR  :
Smith and Edwards Company

9/4/23
Dated

SMITH AND EDWARDS COMPANY
Name (print): CRAIG JAMES SMITH
Title: PRESIDENT
Address: 3936 N HWY 126
OGDEN, UT 84404

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: CRAIG JAMES SMITH
Title: PRESIDENT
Address: 3936 N HWY 126, OGDEN UT. 84404
Phone: 801 731 1120
email: CRAIG@SMITHANDEDWARDS.COM

Signature Page for Consent Decree Regarding the Ogden Swift Building Superfund Site

FOR [Signature]:
Ogden City Redevelopment Agency

9-5-23
Dated

[Signature]
Name (print): Michael P. Caldwell
Title: Mayor / Executive Director
Address: 2549 Washington Blvd.
Ogden UT 84401

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Tracy Hansen
Title: City Recorder
Address: 2549 Washington Blvd, Ogden UT 84401
Phone: 801-629-8156
email: tracyhansen@ogden-city.com

21486422_v8

Attest:
[Signature]
Chief Deputy City Recorder



Appendix A

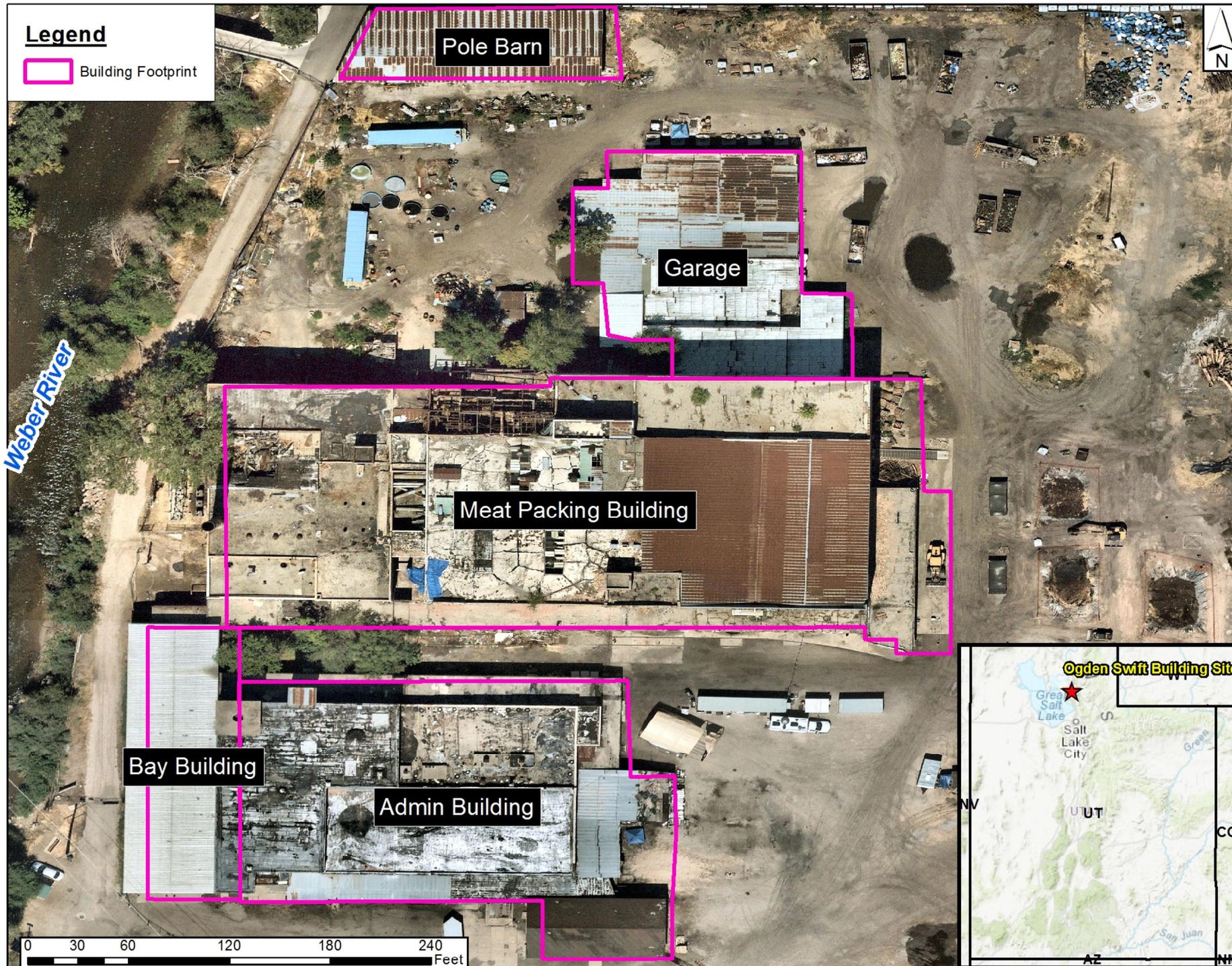


Exhibit A

Agreement Between RDA and Smith and Edwards

This Agreement (“Agreement”) is made solely by and between Ogden City Redevelopment Agency (“RDA”) and Smith and Edwards Company (“Smith and Edwards”) in connection with Paragraph 19 of the Consent Decree For Recovery of Response Costs entered in the United States District Court for the District of Utah in the action styled United States of America, Plaintiff, v. Smith and Edwards Company and The Ogden City Redevelopment Agency, Defendants, Case No. _____ (“Consent Decree”).

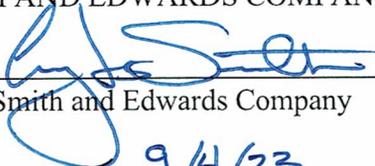
RDA and Smith and Edwards agree as follows:

1. Terms used in this Agreement are as defined in the Consent Decree.
2. RDA covenants to complete the VCP Work and the CAP work.
3. This Agreement is enforceable only by RDA and Smith and Edwards.
4. This Agreement is for the sole benefit of the RDA and Smith and Edwards. Nothing expressed or implied in this Agreement shall give or be construed to give any other person any legal or equitable rights.
5. This Agreement and the rights and obligations under this Agreement are not assignable or transferable without the prior written consent of each signatory to this Agreement.
6. This Agreement may not be amended except by an instrument in writing signed by each signatory to this Agreement.
7. This Agreement shall be governed by and construed in accordance with the laws of the State of Utah, without giving effect to conflict of laws rules. Any action arising out of or relating in any respect to this Agreement or the rights and obligations hereunder shall be filed exclusively in either the United States District Court for the District of Utah or the Third Judicial District Court in and for Salt Lake County, State of Utah. Each signatory to this Agreement irrevocably consents to the jurisdiction of such court over any action pertaining to this Agreement and will not contest venue.

This Agreement shall become effective on the Effective Date of the Consent Decree.

SMITH AND EDWARDS COMPANY

OGDEN CITY REDEVELOPMENT AGENCY

FOR  _____

FOR _____

Smith and Edwards Company

Ogden City Redevelopment Agency

Dated: 9/4/23

Dated: _____

Name (print): CRAIG JAMES SMITH

Name (print): _____

Title: PRESIDENT

Title: _____

Address: 3936 N HWY 126

Address: _____

OGDEN, UT. 84404

This Agreement shall become effective on the Effective Date of the Consent Decree.

SMITH AND EDWARDS COMPANY

OGDEN CITY REDEVELOPMENT AGENCY

FOR _____
Smith and Edwards Company

FOR *[Signature]*
Ogden City Redevelopment Agency

Dated: _____

Dated: 9-5-23

Name (print): _____

Name (print): Michael P. Caldwell

Title: _____

Title: Mayor / Executive Director

Address: _____

Address: 2549 Washington Blvd.
Ogden UT 84401

30216408_v1

Attest:

[Signature]
Chief Deputy City Recorder

