

**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

UNITED STATES OF AMERICA;  
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION;  
and HERSCHEL T. VINYARD, JR., as  
Natural Resources Trustees for the State  
of Florida,

Plaintiffs,

v.

MOSAIC FERTILIZER, LLC,

Defendant,

v.

ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH  
COUNTY,

Rule 19 Party

Civil Action No.

**CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES**

This Consent Decree is made and entered into by and between the United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service ("DOI"), and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP and designated Natural Resources Trustee for the State of Florida ("State" or "State of Florida"), the Environmental Protection Commission of Hillsborough County ("EPC"), and Mosaic Fertilizer, LLC ("Mosaic"). NOAA, DOI, FDEP, and Herschel T. Vinyard, Jr., are collectively referred to as the "Trustees;" and the United States, the State, EPC and Mosaic are collectively referred to as the "Parties."

## **BACKGROUND**

1. Contemporaneously with the lodging of this Consent Decree, the United States, on behalf of DOI and NOAA, and FDEP and Herschel T. Vinyard, Jr., filed a Complaint in this matter against Mosaic pursuant to 28 U.S.C. §§ 1331, 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9613(b). FDEP also made a claim in the Complaint pursuant to §403.727, Florida Statutes. The Complaint seeks Natural Resource Damages arising from an alleged release of hazardous substances and other pollutants into South Archie Creek Canal, Hillsborough Bay, and Tampa Bay, in the State of Florida, through a spill of approximately 65 million gallons of acidic process water from a phosphoric acid/fertilizer production facility located in Riverview, Florida (the "Facility"), which occurred on or about September 5 and 6, 2004 (the "Spill"). At the time of the Spill, which coincided with severe weather conditions associated with Hurricane Frances, the Facility was owned by Cargill Fertilizer, Inc. Mosaic succeeded to the liabilities of Cargill Fertilizer, Inc. associated with the claims for Natural Resource Damages as a result of an October, 2004 merger of IMC Global Inc. and Cargill, Incorporated's Crop Nutrition Division. EPC is named in the Complaint as an indispensable party pursuant to Federal Rule of Civil Procedure 19.

2. DOI and NOAA have been designated Federal Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. *See* Executive Order 12,580 and the National Contingency Plan, 40 C.F.R. § 300.600(1) and (2). FDEP and Herschel T. Vinyard, Jr. have been designated State Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. The Trustees share trusteeship for natural resources affected by the Spill and have worked together to assess the natural resource injuries and losses caused by the Spill and to plan restoration to compensate for those losses.

3. The Trustees and Mosaic agreed to perform a cooperative, restoration-based assessment to address potential natural resource injuries caused by the Spill. After completing the cooperative assessment, the Trustees concluded that hazardous substances released at or from the Facility injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife habitat, and other natural resources.

4. The Trustees' assessment of these injuries to natural resources, including their estimates of interim losses and the Restoration Projects (as defined herein) proposed to compensate for those losses, are identified in the Final Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA") for the Facility, dated August 17, 2012, attached hereto as Appendix A, and incorporated herein by reference.

5. The DARP/EA specifies the Restoration Projects to be implemented by Mosaic to restore natural resources allegedly injured by the Spill. These Restoration Projects are as follows: 1) a previously completed Project to remove exotic and invasive species from approximately 26.46 acres of mangrove and salt marsh allegedly damaged by the Spill; 2) the Giant's Fish Camp Restoration Project, which includes reconnection of historic tidal flows and

creation of oyster habitat; 3) the Borrow Pit Restoration Project, which enhances a wetland presently covered with invasive plants; and 4) the preservation of approximately 103.76 acres of mangrove and marsh habitat adjacent to Hillsborough Bay and the Alafia River in Hillsborough County, Florida through the execution of two Conservation Easements, attached hereto as Appendix B, and incorporated herein by reference, that protect the conservation values of the properties in perpetuity. These Projects are more fully described in Section VI of this Consent Decree and in the Statement of Work, attached hereto as Appendix C, and incorporated herein by reference. When timely and successfully completed, these Projects will compensate for the loss of natural resources or natural resource services, allegedly injured, destroyed, or lost as a result of the Spill.

6. During development of the DARP/EA, the Trustees provided opportunities for public participation, including a formal public review and comment period on the proposed DARP/EA, in accordance with 43 C.F.R. §§ 11.32 and 11.81, 42 U.S.C. §§ 9607(f) and 9611(1), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*

7. This Consent Decree is a settlement of a contested matter, and, consequently, no action or lack of action by any Party, including, without limitation, participating in the cooperative assessment, developing and performing Restoration Projects, the payment or the acceptance of any consideration, represents any admission of any nature, including fact, law, liability, or responsibility by any Party. Mosaic agrees to the Court's jurisdiction to enter and enforce this Consent Decree and agrees in any such enforcement proceeding not to challenge the terms of this Consent Decree.

8. The Parties have consented to the entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that in order to resolve the issues stated in the Complaint, this Consent Decree should be entered. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, and implementation of this Consent Decree will expedite the restoration of natural resources, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as follows:

## **I. JURISDICTION AND VENUE**

9. This Court has personal jurisdiction over the Parties and has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and Sections 107 and 113(b) of CERCLA, 42 U.S.C. § 9613(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to the personal jurisdiction of the Court, to venue in this District, to enforcement of this Consent Decree by this Court, and to service of process.

## **II. PARTIES BOUND**

10. This Consent Decree applies to and is binding upon the United States, the State, EPC, Mosaic, and its successors and assigns. Any change in ownership or corporate status of

Mosaic shall in no way alter its responsibilities under this Consent Decree. Each signatory to this Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind her or his Party to it.

### III. OBJECTIVES

11. The Parties to this Consent Decree agree that settlement of this action without further litigation is in the public interest and that entry of the Consent Decree is the most appropriate means of resolving this action.

12. Mosaic does not admit any of the facts or allegations contained in the Complaint, and neither Mosaic's participation in the cooperative assessment, its development and performance of Restoration Projects, its entry into this Consent Decree, nor any provision herein shall be construed as an admission of any kind for any purpose.

13. This Consent Decree provides the terms upon which the Parties agree to settle the claims of the United States and the State of Florida pursuant to CERCLA, the CWA, and the claims of the State of Florida under § 403.727, Florida Statutes, concerning Natural Resource Damages that allegedly resulted from the Spill.

14. The Objectives of the Parties in entering into this Consent Decree are to compensate the Trustees, on behalf of the public, for alleged Natural Resource Damages by restoring, replacing, or acquiring resources that are the equivalent of the allegedly injured, destroyed, or lost natural resources, and to compensate the Plaintiffs and EPC for Past and Future Costs.

### IV. DEFINITIONS

15. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in the CWA, 33 U.S.C. § 1321(a), shall have the meaning assigned to them in the CWA, and terms that are defined in CERCLA, 42 U.S.C. § 9601 *et seq.*, and in regulations promulgated under CERCLA, 43 C.F.R. Part 11 and 40 C.F.R. Part 300, shall have the meaning assigned to them in CERCLA, or in such regulations. Whenever terms listed below are used in this Consent Decree or in the attachments hereto and incorporated hereunder the following definitions shall apply:

A. "Consent Decree" means this document entitled "Consent Decree Addressing Natural Resource Damages," including all Appendices.

B. "Conservation Easements" means the documents attached as Appendix B.

C. "DARP/EA" means the plan entitled "Final Natural Resources Damage Assessment and Restoration Plan/Environmental Assessment (DARP/EA) for the Riverview, Florida Phosphogypsum Stack Release, September 5-6, 2004," dated August 17, 2012, and attached as Appendix A to this Consent Decree.

D. "Day" means a calendar day unless expressly stated to be a business day. "Business Day" shall mean a Day other than a Saturday, Sunday, or State or Federal holiday. In



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

E. “Effective Date” means the date on which either this Consent Decree or an order entering this Consent Decree is filed with the Clerk of the Court after the United States and the State of Florida have moved for entry and the District Judge has signed the Consent Decree or an order entering this Consent Decree.

F. “Federal Trustees” means NOAA and DOI.

G. “Future Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the Trustees and EPC incur in connection with the implementation of the Restoration Projects and this Consent Decree, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree, implementing, monitoring, correcting or otherwise overseeing the Restoration Projects, or otherwise enforcing this Consent Decree commencing June 2, 2012 for the Federal Trustees and EPC, and July 3, 2012 for State Trustees. Indirect costs shall be calculated pursuant to NOAA’s established indirect cost rates for the Damage Assessment, Remediation, and Restoration Program for the fiscal year(s) in which the indirect costs were incurred.

H. “Holder” means a person or entity qualified under Florida Law that is approved by the Trustees to hold the Conservation Easement. EPC is the initial Holder.

I. “Interest” means interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

J. “Natural Resource Damages” means damages recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

K. “Paragraph” means a portion of this Consent Decree identified by an Arabic numeral.

L. “Past Costs” shall mean all costs, including, but not limited to, direct and indirect costs, incurred by the Federal Trustees between May 11, 2008 and June 1, 2012, by the State Trustees between May 1, 2010 and July 2, 2012, and by EPC between July 2, 2005 and June 1, 2012, in connection with the assessment of and response to Natural Resource Damages arising out of or resulting from the Spill, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree. All Past Costs are itemized in the invoices attached to this Consent Decree as Appendix D.

M. “Plaintiff(s)” mean the Plaintiffs in this litigation, the United States of America, the State of Florida Department of Environmental Protection, and Herschel T. Vinyard, Jr., as Natural Resource Trustees for the State of Florida.

N. “Restoration Projects” or “Projects” means the restoration actions briefly described in Section VI of this Consent Decree, and more fully described in the DARP/EA and Statement of Work. The Restoration Projects include the recorded Conservation Easements.

O. “Section” means a portion of the Consent Decree identified by an uppercase Roman numeral.

P. “State Trustees” means FDEP and Herschel T. Vinyard, Jr.

Q. “Statement of Work” means the document attached as Appendix C.

R. “Trustees” means the Federal Trustees and the State Trustees.

S. “Work” shall mean implementation by Mosaic of those activities that are described in Section VI (Natural Resource Restoration Requirements) and Appendix C of this Consent Decree (Statement of Work).

## **V. EFFECT OF THE CONSENT DECREE**

16. Copies of the Consent Decree. Mosaic shall provide a copy of this Consent Decree to each entity representing it with respect to the Restoration Projects, and to the Supervising Contractor (per Paragraph 22(A)) hired to oversee construction of the Restoration Projects who will be responsible for distributing the Consent Decree to all subcontractors. Mosaic shall nonetheless remain responsible for ensuring that its contractors and subcontractors perform the Restoration Projects in accordance with this Consent Decree.

17. Consent Decree Not a Permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal, State, or local law, regulation, rule, or ordinance. The United States and the State of Florida do not, by signing this Consent Decree, warrant or aver in any manner that Mosaic’s compliance with the Consent Decree will constitute or result in compliance with the requirements of any Federal, State, and local laws, regulations, or rules that may apply to the implementation of the Restoration Projects or other activities required by the terms of this Consent Decree. Notwithstanding this provision, implementation of the Statement of Work does not require a separate permit from FDEP, or EPC.

18. Responsibility for Compliance. Notwithstanding any action by the United States and the State, including, without limitation, their issuance of the DARP/EA or the review and approval of any design, plan, report, or other information or action formulated by Mosaic under this Consent Decree, Mosaic is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to success criteria.

19. The United States and/or the State may take any and all legal or administrative actions necessary to enforce the terms of this Consent Decree. In the event that the United States and/or the State take legal or administrative actions to enforce this Consent Decree, and such action is successful, Mosaic shall pay all reasonable costs incurred by the United States and/or the State related to this action including, but not limited to, enforcement costs, attorney’s fees and interest accruing on any balance.

20. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to the Spill against any person not a Party hereto.

## VI. NATURAL RESOURCE DAMAGE RESTORATION REQUIREMENTS

21. Mosaic shall fund, perform, and complete all work and other activities required to implement the Restoration Projects in accordance with (a) the DARP/EA; (b) the Statement of Work; (c) any other plans intended to accomplish the Restoration Projects and Statement of Work approved by the Trustees; (d) the procedures, schedules and terms set forth in this Consent Decree; and (e) all applicable laws and permits. The Projects are briefly described below. Thorough descriptions of the Projects and deadlines associated with their construction and completion are in the Statement of Work.

A. Removal of Exotic Invasive Vegetation (Emergency Primary Restoration). This Project involved the removal of exotic invasive plants from and adjacent to approximately 26 acres of mangrove and tidal marsh that allegedly were damaged by the Spill and were surrounded by exotic invasive vegetation. The exotic invasive vegetation was primarily composed of Brazilian pepper, but included other species such as chinaberry (*Melia azedarach*), lead tree (*Leucaena leucocephala*), and air potato (*Dioscorea bulbifera*). Due to their tolerance of freezing events, rapid re-growth following injury, and lack of native insect predators, these species are aggressive invaders of disturbed habitats and have a competitive advantage over many native tidal marsh, mangrove forest, and transitional zone plants. The Trustees determined that invasion by the exotic invasive vegetation into the approximately 26-acre tract of injured wetland was likely to occur without emergency action that would have resulted in an extended period of recovery for the wetland and could have lead to the complete loss of the wetland habitat and resource services. This Project has been completed in accordance with applicable requirements of this Consent Decree.

B. Giant's Fish Camp Hydrology Restoration with Oyster Reef and Tidal Creek Creation and Enhancement. This Project is located at the southwest corner of the Highway 41 Bridge at the former site of the Giant's Fish Camp. The goals of this Project are to restore and enhance mangrove habitat and associated natural resource services by improving the hydrology in the general area, and to create an oyster reef habitat to provide additional ecosystem enhancement. This Project includes (1) connecting the Giant's Camp marina basin to an existing tidal creek via creation of a new, approximately 1,003 linear feet, waterway; (2) reopening approximately 2,094 linear feet of additional remnant tidal creeks through mangrove habitat largely closed to tidal flows; (3) widening existing waterways and removing approximately 17,000 cubic yards of spoil to eliminate blockages to sheet flow; (4) improving the hydroperiod in an impounded tidal pond of approximately 0.53 acres by enhancing tidal creek connection; (5) enhancing 3,652 square feet of oyster reef habitat by placing substrate suitable for oyster larvae settlement ("cultch") along the seawall of the marina boat basin; (6) creating 2,000 square feet of oyster reef habitat within Channel B; and (7) creating 0.25 acres of wetland habitat (0.08 acres apply directly to this project as mitigation for wetland impacts and the remaining 0.17 acres will be "banked" for potential future mitigation needs, including but not limited to unanticipated wetland impacts which may occur during construction or to bolster meeting success criteria).

C. Borrow Pit Hydrological Restoration and Wetland Enhancement Project.

The Borrow Pit Hydrological Restoration and Wetland Enhancement Project is located between Old Highway 41 and Highway 41 North within a Mosaic-owned parcel. The objective of this Project is to improve habitat functionality through creation of a tidal creek (approximately 900 linear feet) and pond (approximately one acre) that will be connected to the Delaney Creek Pop-Off Canal. The mouth of the ditch that currently connects the Borrow Pit Project site to the Delaney Creek Pop-Off Canal will be widened and extended into the new tidal creek. The creek will flow into a tidal pond that will remain partially wet during all but the lowest tides of the year. Removal of invasive vegetation will allow for colonization by native wetland vegetation at low and high marsh elevations. A saltern will also be created adjacent to the wetland to provide additional habitat diversity. Wetland enhancement will comprise approximately four acres.

D. Conservation Easements over the Giant's Camp and Borrow Pit Restorations. Conservation easements totaling approximately 103.76 acres will secure the approximately 82.48 acres of mangrove forest with restored and newly created tidal creeks in the Giant's Fish Camp Restoration Project and approximately 21.28 acres of newly created tidal creek, pond and saltern in the Borrow Pit Project.

22. All Work undertaken as part of the Statement of Work shall comply with the requirements in Subparagraphs 22(A) through (D) below. The Parties recognize that the Restoration Projects will be constructed as set forth in the Statement of Work and that the times for completion of construction and compliance monitoring for each Project will be different. Mosaic shall submit a Completion of Project Construction Report and Final Report for each Project as it is completed. However, Mosaic will not receive a Certificate of Project Success for a Project until it has demonstrated that the Project meets applicable success criteria, or has performed supplemental compensatory restoration, if applicable.

A. Supervising Contractor. All aspects of the Work shall be taken under the direction and supervision of a qualified contractor, approved by the Trustees ("Supervising Contractor"). Mosaic has proposed, and the Trustees have approved John C. Landon, P.E., of Landon, Moree & Assoc., Inc., as Supervising Contractor. A replacement Supervising Contractor is subject to approval by the Trustees, which approval shall not be unreasonably withheld. If at any time Mosaic proposes to use a different Supervising Contractor for the Work, Mosaic shall notify the Trustees in writing and shall obtain from them written authorization to proceed before a new Supervising Contractor performs any Work. Any change in the Supervising Contractor shall not excuse any Work deadlines or schedules. If the Trustees do object, the work deadlines and schedules shall be extended by a time period equal to that between Mosaic's initial request for approval of a replacement Supervising Contractor and receipt of the Trustees' approval.

B. Semi-Annual Reports. Mosaic shall submit written Semi-Annual Progress Reports to the Trustees with respect to actions and activities taken pursuant to this Section. The Semi-Annual Progress Reports shall be submitted by October 15, and April 15 following the Effective Date of this Consent Decree. Mosaic's obligation to submit Semi-Annual Progress Reports for any particular Restoration Project continues until the Trustees' approval of the Project Final Report for that Project pursuant to Paragraph 25. In addition, the Trustees may request periodic briefings by Mosaic to discuss the progress of the Work.



C. Semi-Annual Report Contents. At a minimum, the Semi-Annual Progress Reports shall: (1) describe the actions that have been taken to comply with this Consent Decree during the prior six-month period; (2) include all results of construction sampling and tests and all other data received by Mosaic and not previously submitted to the Trustees; (3) include all descriptions of plans, reports, deliverables, permits and authorizations, and procedures completed under the Statement of Work during the previous six months; (4) describe the activities planned for the next six-month period; and (5) describe all significant problems encountered during the previous six months and any anticipated significant problems in future six-month periods, any actual or anticipated significant delays, and solutions developed and implemented to mitigate or address any actual or anticipated significant problems or delays. The Semi-Annual Reports shall include the information required in this Paragraph for each Restoration Project, and shall be organized in separate sections devoted to each Restoration Project.

D. Completion of Project Construction Reports. Within 60 Days after Mosaic concludes that construction of the Work on a Restoration Project is complete, Mosaic will submit a Completion of Project Construction Report for that Project to the Trustees. At a minimum, this Report shall include as-built plans and a certification from the Supervising Contractor that all of the Work has been completed for a particular Restoration Project in compliance with the requirements of the Statement of Work. Following submission of the Completion of Project Construction Report, the Trustees shall have the right to conduct an inspection of the Project to determine compliance with the Statement of Work, and to identify any additional impacts to wetlands or other natural resources resulting from construction. If, after the Trustees' receipt and review of the Completion of Project Construction Report, the Trustees determine that the Work or any portion thereof has not been completed in accordance with the Statement of Work, the Trustees shall notify Mosaic in writing of the activities that must be undertaken to complete construction of the Restoration Project, and shall include in the notice a schedule for performance of such activities. If the Trustees identify natural resource injuries resulting from construction that were not previously mitigated, the Trustees shall notify Mosaic in writing of their conclusions, and thereafter Mosaic shall perform additional projects to mitigate the injuries, on a scope and schedule proposed by Mosaic, subject to the Trustees' approval. Mosaic may contest either notice in accordance with the Dispute Resolution procedures under Section XV. Mosaic shall perform all activities described in the notice (as amended in through Dispute Resolution, if applicable) in accordance with the specifications and schedules established therein. Mosaic shall submit for approval a revised Completion of Project Construction Report with a certification from the Supervising Contractor once the additional activities have been completed. If upon review of the revised Completion of Project Construction Report, the Trustees determine that the Work has been completed in accordance with the Statement of Work, and any other subsequent construction identified pursuant to this paragraph, they shall notify Mosaic in writing that the Work has been completed in accordance with the Statement of Work. If the Trustees determine, under either of the provisions of this Paragraph, that construction of the Work has not been completed in accordance with the Statement of Work, this determination may be disputed by Mosaic in accordance with the dispute resolution procedures set forth in Section XV of this Consent Decree. If the Trustees determine that construction of the Work has not been completed, it shall again follow the procedures specified in this Paragraph until (a) construction of the Work is complete; or (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved.



23. Certification of Semi-Annual Progress Reports and Final Report. In addition to any other certifications required by this Consent Decree, the Semi-Annual Reports and the Completion of Project Construction Reports submitted by Mosaic shall be certified by a responsible corporate official of Mosaic and accompanied by the following certification:

“I certify under penalty of law that, based upon the procedures described below, the information contained in or accompanying this submission is true, accurate and complete. This certification is based on my review or analysis of the submission, and/or supervision of persons who, acting on my instructions, made the verification that the submitted information is this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

24. Restoration Project Performance Monitoring. Following the Trustees’ acceptance of the Completion of Project Construction Report for a particular Restoration Project submitted pursuant to Paragraph 22(D), Mosaic shall initiate performance monitoring for that Project, as required in the Statement of Work, and submit Performance Monitoring Reports to the Trustees as required therein. As an alternative to the submission of separate Performance Monitoring Reports, Mosaic may include results of performance monitoring in the Semi-Annual Reports.

25. Demonstration of Restoration Project Success. Once Mosaic believes that it has met all of the requirements set forth in this Consent Decree, including the success criteria contained in the Statement of Work, for a particular Project, it shall submit a Final Report to the Trustees for that Restoration Project. The Trustees shall review the Final Report and determine whether the success criteria for that particular Restoration Project have been met. If the Trustees find that the success criteria have been met, then they shall issue and provide to Mosaic a dated “Project Success Certificate,” certifying that the particular Restoration Project is successful. If the Trustees find that any of the success criteria have not been met, the Trustees shall identify and notify Mosaic of those further actions that are needed for the Restoration Project to meet the success criteria. The procedures specified in Paragraph 22(D) for resubmitting the Completion of Project Construction Report shall be followed for the Final Report until (a) the success criteria have been met; (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved; or (c) the Trustees determine that the success criteria for that Project cannot be met within a reasonable time period.

A. Establishing Alternative Compliance Criteria or Additional Compensatory Restoration. The Parties believe that the Restoration Projects will timely meet the success criteria in the Statement of Work, but they also recognize that success is not guaranteed. If a Project does not timely meet the success criteria, then the time for compliance can be extended, the Project modified, or Mosaic can undertake or pay for additional compensatory

restoration sufficient to compensate for the difference between the actual services provided by the Project and services the Parties anticipated the Project would provide. If the Trustees determine that the success criteria for a particular Project cannot be met within a reasonable time period, they shall notify Mosaic of that determination in writing. The Parties shall meet to seek resolution of the matter. If the Parties resolve the matter, Mosaic shall comply with the resolution in the time period established in the resolution. If the Parties cannot resolve the matter, the Trustees shall send Mosaic written notification of what it must do to either meet the alternative compliance criteria or the additional compensation requirements. Mosaic may contest that notice pursuant to Section XV (Dispute Resolution), subject to the rights granted thereunder. The Parties shall comply with any orders issued pursuant to the Dispute Resolution process,

B. Project Final Completion Certificate. Once Mosaic has completed all its obligations with regard to a particular Restoration Project under this Consent Decree, the Statement of Work, and any orders issued pursuant to Section XV (Dispute Resolution) with respect to that Restoration Project, the Trustees shall issue a Project Final Completion Certificate for that Project.

26. All Work undertaken by Mosaic shall be performed in compliance with the requirements of all applicable federal, state, and local laws and regulations. Where any portion of the Work requires a federal, state, or local permit, certification or approval, Mosaic shall submit timely and complete applications and take all other actions necessary to obtain all such permits, certifications, or approvals. Notwithstanding the foregoing statements, environmental resource permits from the FDEP and authorizations for construction in wetlands from the EPC are not required for any portion of the Work.

## **VII. CONSERVATION EASEMENTS**

27. The Conservation Easements will be granted with warranty covenants, free and clear of all prior liens and encumbrances, except as otherwise provided in the Conservation Easements. Within 90 Days of the Effective Date, Mosaic will submit for recording to the Clerk of the Court for Hillsborough County, Florida the Conservation Easements and provide the Trustees and EPC with a certified copy of the original recorded Conservation Easements showing the clerk's recording stamps, upon receipt of same from the Clerk of the Court of Hillsborough County, Florida.

## **VIII. REIMBURSEMENT OF PAST COSTS**

28. The United States, FDEP and EPC have expended time, funds, and resources in assessing Natural Resource Damages alleged to have resulted from the Spill. Mosaic has made payments to the Trustees and EPC in reimbursement for some of these Past Costs. Within 90 Days of the Effective Date, Mosaic shall make additional payments to the United States, FDEP and EPC in the amounts of \$122,749.78, \$9,777.20 and \$8,200.00, respectively, in reimbursement of Past Costs. Invoices for these additional Past Costs have been provided to Mosaic.

29. Payment of Past Costs to the United States shall be made by electronic funds transfer in accordance with current electronic funds transfer procedures and instructions for same

to be provided to Mosaic by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida following the entry of this Consent Decree. At the time of payment, Mosaic shall provide notice of payment, referencing DOJ Case Number 90-5-1-1-08961 and this civil action case name and number to the United States, NOAA and DOI at the addresses set forth in Section XI (Notices).

30. Payment of Past Costs to the State shall be made by certified check to "The Department of Environmental Protection" and shall include thereon OGC Case Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to the Department of Environmental Protection. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

31. Payment of Past Costs to EPC shall be made as follows: Mosaic shall mail a certified check made payable to "The Environmental Protection Commission" to Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

#### **IX. REIMBURSEMENT OF FUTURE COSTS**

32. The United States, FDEP and EPC have incurred and will incur Future Costs in connection with assessing the alleged damages, oversight of this Consent Decree, the implementation of the Statement of Work, and monitoring of the Conservation Easement. Mosaic shall pay all Future Costs as follows: Either separately, or together, the Trustees and EPC may submit to Mosaic, on a periodic basis, an invoice for Future Costs which will include an itemized cost summary. The itemized cost summary for Future Costs will include all direct and indirect costs, including, but not limited to, personnel billing rates, hours applied against each Project, a narrative description of work performed, time and travel costs of the personnel, and associated indirect costs, contractor costs, inspection of work activities, visits to observe the Work, discussions regarding disputes that may arise during the conduct of the Work, and review and approval or disapproval of reports. Such accounting shall specify the amount and method of payment. Within 60 Days of receipt of an accounting, Mosaic shall pay such costs in a manner to be specified by the Party or Parties submitting the accounting. Mosaic may dispute Future Costs pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

33. Notice of Payment. Upon making any payment under this Section, Mosaic shall send written notice that payment has been made to the United States, NOAA, DOI, EPC, FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

#### **X. LATE PAYMENTS OF PAST AND FUTURE COSTS**

34. Interest. Interest shall accrue on the unpaid balance through the date of payment for any payment owed by Mosaic under Sections VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) that is not received when due. Accrued interest shall be paid

by Mosaic within 60 Days of receipt of a written request from a Party in the manner specified in the request.

35. Stipulated Penalties. In addition to the interest required to be paid under the preceding subparagraph, if any amounts to be paid under Section VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) are not paid by the required date, Mosaic shall pay a stipulated penalty for every Day that such payment is late to the affected Party, as provided in Section XVI (Stipulated Penalties). Mosaic may dispute any claim for Stipulated Penalties pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

## **XI. NOTICE**

36. Each Party hereby respectively designates the following person(s) for receipt of notices required under this Consent Decree, including, but not limited to, notices pertaining to the payment of Past or Future Costs, and notices invoking force majeure or dispute resolution. Whenever notice is required by this Consent Decree, it shall be addressed to the persons listed below.

### United States:

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DOJ Case No. 90-5-1-1-08961

### NOAA:

Sheila O'Brien  
NOAA, Office of the General Counsel, SE  
263 13<sup>th</sup> Ave. S. Suite 177  
Saint Petersburg, FL: 33701

NOAA Project Coordinator

DOI:

Brigette J. Beaton  
Attorney Advisor  
U.S. Department of Interior  
Office of the Regional Solicitor  
75 Spring Street, Suite 304  
Atlanta, GA 30303

FDEP and/or Vinyard:

Larry Morgan  
Chief Deputy General Counsel  
Office of General Counsel  
Department of Environmental Protection  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32399-3000

EPC:

Richard Tschantz  
General Counsel  
Environmental Protection Commission of Hillsborough County  
3629 Queen Palm Drive  
Tampa FL 33619

Mosaic:

Patrick van der Voorn  
Senior Environmental Counsel  
Mosaic Fertilizer, LLC  
3033 Campus Drive, Suite E490  
Plymouth, MN 55441

and

David B. Weinstein  
Greenberg Traurig  
625 East Twiggs Street  
Suite 100  
Tampa, FL 33602

37. Any Party may change its designated person or address as set forth in this Section by communicating such changes in writing to the other Parties. If a contact person initially designated is changed, the identity of the successor will be provided at least 10 Days before the change occurs, unless impracticable.



38. All notices shall be considered effective upon receipt, unless otherwise provided. All notices shall be sent by first class United States Mail, with the exception of notices of meetings, which may be sent by electronic mail. Submission of written notice by mail as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree.

39. Submission of technical documents, including Semi-Annual Reports, Completion of Project Construction Reports, Performance Monitoring Reports, and Final Reports, need not be sent to the notice recipients identified by the Parties pursuant to this Section. Such documents shall be transmitted electronically to the recipients designated by each Party pursuant to this Paragraph, with trailing paper copies by U.S. Mail if requested.

## **XII. PLAINTIFFS NOT LIABLE**

40. The United States and the State of Florida, including all of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments, assume no liability for any injuries or damages to persons or property resulting from acts or omissions by Mosaic, or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree. The United States, the State of Florida, or any of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments may not be deemed a party to any contract entered into by Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree.

## **XIII. INDEMNIFICATION BY MOSAIC**

41. The United States and the State of Florida do not assume any liability by entering into this agreement. Mosaic shall indemnify, save, and hold harmless the United States and the State of Florida and their officials, agents, employees, contractors, subcontractors, representatives, agencies, and departments for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Mosaic, its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, Mosaic agrees to pay the United States and the State of Florida all costs incurred including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State Plaintiffs based on negligent or other wrongful acts or omissions of Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out activities pursuant to this Consent Decree. Neither Mosaic nor any of its contractors shall be considered agents of the United States or the State of Florida. This indemnification obligation does not include any claim, cause of action, or cost arising from, or on account of, a negligent or wrongful act or omission of the United States or the State. Mosaic may dispute any claim for indemnification pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

42. The United States and the State of Florida shall give Mosaic notice of any third party claim for which the United States or the State of Florida plans to seek indemnification from Mosaic pursuant to this Section and shall attempt to consult with Mosaic at least 30 Days prior to settling such claim.

43. Mosaic waives all claims against the United States and the State of Florida for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State of Florida arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects, including, but not limited to, claims on account of delays. In addition, Mosaic shall indemnify and hold harmless the United States and the State of Florida with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects including, but not limited to, claims on account of delays.

#### **XIV. FORCE MAJEURE**

44. "Force majeure," for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Mosaic, of any entity controlled by Mosaic, or of its contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Mosaic's best efforts to fulfill the obligation, except the obligations to make payments described in Sections VIII, IX, X and XVI of this Consent Decree, for which force majeure may not be claimed. The requirement that Mosaic exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event, and best efforts to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent reasonably possible. "Force majeure" does not include Mosaic's financial inability to perform any obligation under this Consent Decree.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Mosaic shall provide notice orally or by electronic or facsimile transmission to the NOAA Project Coordinator within 5 Business Days of when Mosaic first learns that the event might cause a delay. Within 30 Days thereafter, Mosaic shall provide in writing to the persons identified in Section XI (Notice), an explanation and description of the reasons for the delay; the anticipated duration of the delay, all actions taken or to be taken to prevent or minimize the delay, a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay, Mosaic's rationale for attributing such delay to a force majeure event if it intends to assert such a claim, and a statement as to whether, in Mosaic's opinion, such circumstances may cause or contribute to an endangerment to public health and/or the environment. Mosaic shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Mosaic from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Mosaic shall be deemed to know of any circumstance of which Mosaic, any entity controlled by Mosaic, or its contractors knew or should have known.

46. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees agree that the delay is attributable or potentially attributable to a force majeure event, the Trustees shall notify Mosaic in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

47. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, they will notify Mosaic in writing of their decision. Mosaic may dispute any force majeure determination by the Trustees pursuant to the dispute resolution procedures set forth in Section XV and Paragraph 48 of this Consent Decree.

48. If Mosaic elects to invoke the dispute resolution procedures set forth in Section XV ("Dispute Resolution") regarding the Trustees' notice under Paragraph 46 or 47, it shall do so no later than 15 Days after receipt of the Trustees' notice. In any such proceeding, Mosaic shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Mosaic complied with the requirements of Paragraphs 44 and 45, above. If Mosaic carries this burden, the delay at issue shall be deemed not to be a violation by Mosaic of the affected obligation(s) of this Consent Decree.

## **XV. DISPUTE RESOLUTION**

49. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the Trustees and EPC to enforce obligations of Mosaic under this Consent Decree that have not been disputed in accordance with this Section.

50. Informal Dispute Resolution. Mosaic may initiate dispute resolution under this Section by sending a written notice to all Parties. The notice shall identify the issue in dispute and Mosaic's position concerning the issue. The Parties shall attempt to resolve the dispute by consensus by engaging in good faith informal negotiations. Each Party agrees that it will devote reasonable time and effort to such informal negotiations. The period for informal negotiations shall not exceed 20 Days from the date the notice is sent, unless this time period is modified by written agreement of the Parties. In the event the Parties are unable to reach agreement during such informal negotiation period, the Plaintiff(s) or EPC (if the dispute involves EPC) shall provide Mosaic with a written summary of their position regarding the issues in dispute within 45 Days from the end of the informal negotiations. The Plaintiff(s) and EPC may provide a joint summary or individual summaries. In the event that a party takes more than 45 Days to provide its summary, stipulated penalties shall not accrue under this Consent Decree from the 46<sup>th</sup> Day through the date that party issues its summary. Once all parties involved in the dispute have

issued written summaries, stipulated penalties shall once again accrue, and shall continue to accrue during the remainder of the dispute resolution process.

51. Formal Dispute Resolution In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Plaintiff(s), individually or jointly, or by EPC shall be considered binding on Mosaic unless, within 30 Days after Mosaic receives the Plaintiff(s)' or EPC's written summary, Mosaic invokes the formal dispute resolution procedures of this Section by serving the Plaintiff or EPC with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by Mosaic.

52. Within 60 Days after receipt of Mosaic's Statement of Position, the Plaintiff(s) or EPC shall serve on Mosaic their Statement of Position, including any factual data, analysis, or opinion supporting each position and all supporting documentation relied upon by the Plaintiff(s) or EPC. Within 15 Days after receipt of the Statement of Position, Mosaic may submit a Reply.

53. A record of the dispute shall be maintained by the Plaintiff(s) or EPC and shall contain all Statements of Position, including supporting documentation, and any Reply. Where appropriate, the Plaintiff(s) or EPC may allow submission of supplemental Statements of Position by the Parties.

54. The Plaintiff(s) or EPC shall issue a final decision resolving the dispute based on the record. This decision shall be binding on Mosaic, subject only to the right to seek judicial review pursuant to Paragraph 55. Decisions for the Florida Trustees will be made by the Secretary of FDEP or his designee.

55. Any decision made by the Plaintiff(s) or EPC pursuant to this Section shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Mosaic with the Court and served on all Parties within 45 Days of receipt of the Plaintiff(s)' or EPC's final decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiff(s) and EPC may file a joint response or individual response to Mosaic's motion. In the event that the Court takes more than 45 Days to rule on Mosaic's motion, stipulated penalties shall cease to accrue on the 46<sup>th</sup> Day.

56. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by the Trustees under this Consent Decree; the adequacy of the performance of Work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the record under applicable principles of administrative law, which the parties agree apply. Mosaic shall have the burden of demonstrating, based on the record maintained by the Trustees, that the position of the Plaintiff(s) is arbitrary and capricious or

otherwise not in accordance with law. Mosaic may move the Court to supplement the record. Plaintiffs and EPC reserve the right to take the position that the record should not be supplemented.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, Mosaic shall bear the burden of demonstrating that its position complies with this Consent Decree and better achieves the objectives of the Consent Decree.

57. The invocation of informal or formal dispute resolution procedures pursuant to this Section shall not extend, postpone, or affect in any way any obligation of Mosaic under this Consent Decree that is not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first Day of noncompliance with any applicable provision of this Consent Decree. In the event that Mosaic does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI ("Stipulated Penalties").

## **XVI. STIPULATED PENALTIES**

58. Mosaic shall be liable for stipulated penalties to the United States, the State of Florida and EPC in the amounts set forth in Paragraph 59 for failure to comply with the requirements of this Consent Decree specified below. "Compliance" by Mosaic shall include completion of the activities identified in Paragraph 59 within the schedules established by and approved in compliance with the Consent Decree, the Statement of Work and any work plans or other documents approved by the Trustees pursuant to the Statement of Work.

59. The following stipulated penalties shall accrue per violation per Day for Mosaic's failure to comply with the time schedules established for the following implementation requirements:

A. Failure to timely submit any draft or revised work plan required under the Statement of Work:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$250	1 <sup>st</sup> through 7 <sup>th</sup> day
\$500	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> day and beyond

B. Failure to comply with schedules for Restoration Project implementation set forth in the Statement of Work, including for monitoring and for any other activities approved under the Statement of Work to complete the Restoration Project, or failure to meet the deadlines established in Section VII (Conservation Easements):

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
--------------------------------------	--------------------------------



\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,250	31 <sup>st</sup> day and beyond

C. Failure to make the payments required by Section VIII (Reimbursement of Past Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$1,000	8 <sup>th</sup> through 30 <sup>th</sup> day
\$2,500	31 <sup>st</sup> day and beyond

D. Failure to make a payment required by Section IX (Reimbursement of Future Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$100	1 <sup>st</sup> through 7 <sup>th</sup> day
\$175	8 <sup>th</sup> through 30 <sup>th</sup> day
\$250	31 <sup>st</sup> day and beyond

60. All penalties shall begin to accrue on the Day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Separate penalties will accrue for separate violations of this Consent Decree. Notwithstanding any other provision of this Section, Plaintiffs and EPC, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State, or EPC to seek any other remedies or sanctions available by virtue of Mosaic's violation of this Consent Decree or of the statutes and regulations upon which it is based, provided, however, that the United States, the State and EPC shall not seek civil penalties for any violation for which a stipulated penalty is collected pursuant to this Consent Decree.

61. Following the determination by Plaintiffs and EPC, individually or jointly, that Mosaic failed to comply with one of the requirements of this Consent Decree listed above, the Party may give Mosaic written notification of the same and describe the noncompliance. The Party may send Mosaic a written demand for the payment of penalties. Penalties shall accrue and are due as provided in this Section regardless of whether Party has notified Mosaic of a violation. All stipulated penalties due under this Section shall be due and payable within 30 Days of Mosaic's receipt of a demand for payment from Party, unless Mosaic invokes dispute resolution under Section XV of this Consent Decree. If Mosaic invokes dispute resolution under

Section XV, then stipulated penalties shall be due at the time specified in Paragraph 65, unless Mosaic prevails in the dispute resolution process. Interest shall accrue on unpaid stipulated penalties beginning on the 31st Day after Mosaic's receipt of the demand for stipulated penalties. Penalties assessed by the Plaintiffs, individually or jointly, shall be paid 50 percent to the United States and 50 percent to the State, regardless of whether the demand is made individually or jointly.

62. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." This payment shall be mailed to the U.S. Attorney's Office, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, referencing "United States and the State of Florida v. Mosaic, DOJ Case Number 90-5-2-1-08961" and the name and address of the Party making payment. Copies of the check and notice shall be sent to the Parties as specified in Section XI (Notice).

63. All payments made to the State of Florida under this Section shall be paid by certified check made payable to "The Department of Environmental Protection" and shall include thereon OGC Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to FDEP's contact designated in paragraph 36.

64. All payments made to EPC under this Section shall be paid by certified check made payable to "The Environmental Protection Commission." This payment shall be mailed to the Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

65. In the event Mosaic fails to pay stipulated penalties when due, the United States, the State of Florida and EPC may institute a legal proceeding to collect such penalties, as well as interest accruing on any unpaid balance, as provided by law. Stipulated penalties continue to accrue during dispute resolution, but need not be paid until the following:

A. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid within 30 Days of the agreement;

B. If the dispute is appealed to this Court and the Plaintiff(s) or EPC prevails in whole or in part, Mosaic shall pay all accrued penalties determined by the Court to be owed within 60 Days of receipt of the Court's decision or order, except as provided by Paragraph 65(C) below. Mosaic shall not be required to pay any stipulated penalties or court costs if it prevails on the disputed issue;

C. If the District Court's decision is appealed by any Party, Mosaic shall pay all accrued penalties determined by the District Court to be owed into an interest-bearing escrow account within 60 Days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 Days. Within 15 Days of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State of Florida, EPC, or to Mosaic to the extent that it prevails.

**XVII. COVENANTS NOT TO SUE  
BY THE UNITED STATES, THE STATE OF FLORIDA AND EPC**

66. Covenant by the United States. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the United States covenants not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the United States under Section XVI (Stipulated Penalties), and to pay any interest owed to the United States due to the failure to timely pay any amount owed to the United States.

67. Covenant by the State of Florida and EPC. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the State of Florida and EPC covenant not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Chapters 376 and 403, Florida Statutes, to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the State under Section XVI (Stipulated Penalties), and to pay any interest owed to the State due to the failure to timely pay any amount owed to the State.

68. These covenants not to sue by the United States, the State of Florida and EPC extend only to Mosaic: provided, however, that these covenants not to sue (and the reservations thereto) shall also apply to: (a) the successors and assigns of Mosaic, but only to the extent that the alleged liability of the successor or assign is based on the alleged liability of Mosaic; and (b) the officers, directors, agents, and employees of Mosaic, but only to the extent that the alleged liability of the officer, director, agent, or employee is based on said person's status as an officer, director, agent, or employee of Mosaic, or as a result of conduct within the scope of such person's employment or authority.

**XVIII. RESERVATION OF RIGHTS BY THE UNITED STATES  
AND THE STATE OF FLORIDA**

69. Notwithstanding any other provision of this Consent Decree, the United States and the State of Florida reserve, and this Consent Decree is without prejudice to all rights against Mosaic with respect to all matters not expressly included within Section XVII (Covenant Not to Sue by the United States and the State of Florida). Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Mosaic with respect to:

A. claims based on a failure by Mosaic to meet a material requirement of this Consent Decree;

B. liability for any costs incurred or to be incurred by the Plaintiffs that are not within the definitions of Natural Resource Damages, Past Costs or Future Costs;

C. liability for damages for any injury to, destruction of, or loss of natural resources resulting from any event or releases or threatened releases of hazardous substances or oil, other than the hazardous substances known to have been released in the Spill;

D. any and all criminal liability; and

E. violation of any Federal or State law during the implementation of Restoration Projects or monitoring of such Project.

70. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this consent Decree, the United States and the State of Florida reserve the right to institute proceedings in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damage assessment: (a) based on conditions caused by the Spill, unknown to the Trustees as of the date when this Consent Decree is lodged with the Court, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources; or (b) based on information received by the Trustees after the date when this Consent Decree is lodged with this Court indicating that the Spill has resulted in injury to, destruction of, or loss of natural resources of a type or magnitude unknown to the Trustees as of the date of this Consent Decree is lodged with the Court. For purposes of this provision, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the DARP/EA and the administrative record supporting the DARP/EA.

71. The covenants not to sue set forth above do not pertain to any matters other than those expressly set forth in the Consent Decree.

72. The failure of the Trustees to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the United States' and the State of Florida's right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by the United States and the State of Florida to enforce such a provision.

73. In any subsequent administrative or judicial proceeding initiated by the United States or the State of Florida for injunctive relief, recovery of response costs, or other appropriate relief relating to the Spill, Mosaic 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 to any claim brought pursuant to Paragraph 69, above, based upon any contention that the claim raised by the United States or the State of Florida in subsequent proceedings was or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVII (Covenants Not to Sue by the United States and the State), nor does it preclude Mosaic from raising other available defenses in any such subsequent proceedings.

74. The United States and the State of Florida retain all authority and reserve all rights to take any and all action authorized by law, to the extent not in conflict with the terms of this Consent Decree.

## **XIX. COVENANT OF MOSAIC**

75. Mosaic covenants not to sue and agrees not to assert any claims or causes of action against the Trustees, their employees agents, experts, or contractors, with respect to the Spill, including but not limited to:

A. Any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. §9507) 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 State or Federal law;

B. Any claim against the Trustees, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, relating to Natural Resource Damages resulting from the Spill;

C. Any claims arising out of activities related to the Restoration Projects, including, without limitation, claims based on the Trustees' selection of the Restoration Projects, oversight of the Restoration Projects, and/or the approval of plans for such activities;

D. Any claims under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law relating to Natural Resource Damages resulting from the Spill.

76. 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).

77. Mosaic reserves its right to contest any claim allowed by Sections XVII (Covenant Not to Sue by the United States and the State) and/or XVIII (Reservation of Rights by the United States and the State) of this Consent Decree, and Mosaic does not by entering into this Consent Decree waive or release any defenses whatsoever to any such claims, except that Mosaic covenants not to assert, and may not maintain, any defense based upon the principles of waiver, res judicata, collateral estoppels, issue preclusion, claim splitting, or any other defense based upon the contention that the claims were or should have been brought in the instant case.

78. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of Mosaic with respect to all matters other than those expressly specified in the covenants set forth in Paragraphs 76.

## **XX. CERTIFICATION**

79. Mosaic hereby certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Trustees all information requested by the Trustees regarding alleged Natural Resource Damages associated with the Spill, which are currently in the possession of its officers, employees, contractors, and agents that relate in any way to the alleged release of hazardous substances at or from the Facility associated with the Spill.



## XXI. ACCESS

80. Upon reasonable notice, Mosaic shall provide to the Trustees and EPC, and their designated representatives, access at reasonable times to all locations used in implementing the Restoration Projects, including to all areas of the Restoration Projects as well as to all vessels used by Mosaic, or their contractors, for any purpose relating to the implementation and oversight of the Restoration Projects, to future monitoring activity at Restoration Project Sites, or to corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree, including but not limited to:

A. Interviewing Mosaic's personnel involved in field work conducted pursuant to the Statement of Work provided, however, that Mosaic and its personnel shall have the right to have legal counsel present;

B. Inspecting records, and/or operating logs related to implementation of the Restoration Projects;

C. Reviewing the progress of Mosaic in implementing the Restoration Projects;

D. Conducting such sampling, tests or other actions as the Trustees and/or their representatives deem appropriate for implementation and oversight of the Restoration Projects, for future monitoring, for corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree;

E. Using a camera, sound recording, or other documentary equipment to make or preserve observations or measurements; and

F. Verifying any reports or data that the Mosaic submits to the Trustees.

G. During any site visits to or inspections of the Restoration Projects, the Trustees and EPC, their representatives, and contractors must comply with reasonable health and safety instructions given by Mosaic at the time of the site visit or inspection, including applicable OSHA requirements.

81. Pursuant to the above requirements, Mosaic acknowledges the right of the Trustees and EPC, and their designated representatives, to be present at all times that Mosaic, including its contractor(s) or subcontractor(s), are performing any work or activity involved in implementing the Restoration Projects. The Trustees and EPC may designate other representatives, including, but not limited to, federal and state employees, contractors, and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Restoration Projects. All Parties recognize that employees and contractors of FDEP are subject to Florida Statutes pertaining to confidential business information.

82. Mosaic representatives may accompany the Trustees, EPC and/or their representatives whenever and wherever they are present at the Restoration Projects sites, but may not delay or impede any access or activities of the Trustees and EPC authorized under this Section. Further, with respect to any samples taken by Mosaic from the Restoration Projects

sites, copies of the results of any analyses or tests on such samples shall be provided to the Trustees and EPC, or their designated representatives, upon request.

83. When requested and upon reasonable advance notice by the Trustees, Mosaic shall make available to the Trustees, at an appropriate location, any of its employees, agents, or representatives with knowledge of material facts concerning the implementation of the Restoration Projects for purposes of investigations, information gathering, or interviews by the Trustees provided, however, that a Mosaic representative and Mosaic's or its employees', agents' or representatives' legal counsel are present at any such meeting(s).

## **XXII. RETENTION OF RECORDS AND ACCESS TO INFORMATION**

84. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), Mosaic shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the Spill and/or the materials related to alleged Natural Resource Damages, which may have been associated with the alleged release of hazardous materials during the Spill.

85. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), and excepting records, documents, and other information prepared in anticipation of litigation, protected by the attorney-client privilege or any other privilege recognized by federal law, Mosaic shall make available to the Trustees and EPC, or their representatives, within 30 Days of a written request, copies of any records, documents, data, or information not covered in paragraph 86, whether in written or electronic form, maintained by or in the possession of Mosaic, their contractors, agents or representatives, which relate to any work or activity involved with alleged Natural Resource Damages associated with the Spill and/or any such records associated with implementing any portion of the Restoration Projects that is reasonably requested by the Trustees, EPC, or their representatives under this Decree.

86. Any record, document, data, and other information that Mosaic is required by this Consent Decree to provide directly to the Trustees, EPC, or their representatives, shall be considered a public record and shall not be withheld or protected from release. No claim of privilege or confidentiality shall be made with respect to any sampling, analytical, monitoring, hydrologic, hydrogeologic, scientific, chemical, or engineering data generated through any work or activity undertaken in implementing any portion of the Restoration Projects pursuant to this Consent Decree. Such non-privileged records, documents, data and other information include those used in surveying, design, construction, analysis of data, chain of custody records, receipts, final reports, correspondence, or other records or materials related to the Restoration Projects. Notwithstanding any other provision of this Consent Decree, however, no record, document, data or other information of Mosaic's, its counsel, or its experts which is entitled to privilege or work product protection relative to the putative class action litigation styled *Curd, et al. v. Mosaic Fertilizer, LLC*, Thirteenth Judicial Circuit Court, Hillsborough County, Florida (Case No. 04-8653) shall lose such protections or otherwise be subject to discovery or production to the plaintiffs in that action, the United States, the State of Florida, EPC, or any other person as a result of any term or condition of this Consent Decree or any related document, except that

Mosaic recognizes that the State of Florida is subject to the requirements of Florida Law in regards to public records.

87. Mosaic may assert that certain records, documents or other information provided to the Trustees include or constitute confidential business information that is subject to legal protection under federal or state law ("CBI"). Whenever Mosaic submits a record, document or other information to the Trustees or EPC which Mosaic asserts includes or constitutes CBI, Mosaic shall identify the record, document, or information, or portion thereof, which is asserted to be CBI with particularity and demonstrate a proper basis in fact and law why the information is considered to be CBI. Records, documents or information, or portions thereof, that the Trustees determine to be CBI under applicable federal or state laws or regulations will be protected from further release to the extent and in the manner afforded by such laws. If CBI is not identified by Mosaic at the time a record, document, or information is submitted to the Trustees or EPC, or if the Trustees notify Mosaic that the record, document or information is not determined to be CBI under applicable federal or state laws or regulations, the public may be given access to such documents or information without further notice to Mosaic.

88. In the event that Mosaic believes that the records, documents, data, or information requested by the Trustees, EPC, and/or their representatives under paragraph 85 of this Consent Decree is privileged or subject to work product protection, Mosaic may assert that claim by providing to the Trustees and EPC within 60 Days after the request the following information for each item as to which a privilege is claimed:

A. A description of the information, data, or other material which contains sufficient information to allow the District Court to determine whether the claimed privilege or work product protection applies. If the material at issue is a document, Mosaic shall, at a minimum, provide the following information in as much detail as possible without revealing any information claimed privileged or protected: (i) the title of the document; (ii) the date of the document; (iii) the name and title of the author of the document; (iv) the name and title of each addressee and recipient; and (v) a description of the contents of the document; and

B. A statement of the specific privilege(s) or protection(s) claimed and the basis for the claim. If Mosaic fails without good cause to timely provide the information required by this Subparagraph, the Trustees shall interpret such failure as a waiver of any claim of privilege with respect to the specific information, data, or other material for which it failed to timely provide the information. If the Trustees or EPC object to Mosaic's claim that the information, data, or other material is privileged or protected, Trustees or EPC may file a motion with the Court to compel access to the material.

C. Notwithstanding the provisions of this Paragraph and its Subparagraphs, Mosaic must meet all statutory requirements to sustain a claim of privilege under Florida Law.

89. At the conclusion of the required information-retention period, Mosaic shall notify the Trustees and EPC at least 60 Days prior to the destruction of any documents, records, or other information subject to the requirements of this Consent Decree.

90. This Consent Decree in no way limits or affects any right to obtain information held by the United States, the State of Florida, or EPC pursuant to applicable state or federal laws, rules, regulations, or permits, nor does it limit or affect any duty or obligation of Mosaic to maintain documents, records, or other information imposed by applicable federal or state laws, regulations or permits.

91. The Parties recognize that documents submitted to the State Trustees and EPC are subject to provisions of Chapter 119, Florida Statutes, unless otherwise exempt from disclosure per Florida Statutes.

### **XXIII. MODIFICATION**

92. The terms of this Consent Decree, including the work or deadlines in the Statement of Work, may be modified only by a subsequent written agreement signed by the Parties, or as ordered by the Court upon the noticed motion of any Party. Where any modification constitutes a material change to any terms of this Consent Decree, it shall be effective only upon approval by the Court. Changes to the Appendices to this Consent Decree, agreed to by the Parties in writing, shall be deemed not to be material.

93. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon entry of the Consent Decree in its entirety, without modification, addition, or deletion except as agreed to in writing by the Parties.

94. Economic hardship or changed financial circumstances of Mosaic shall not serve as a basis for modification of this Consent Decree.

### **XXIV. COMPLIANCE WITH OTHER LAWS**

95. This Consent Decree shall not be construed in any way to relieve Mosaic or any other person or entity from the obligation to comply with any Federal, State, or local law, except that, as previously provided in Paragraph 26 of this Consent Decree, permits from FDEP and EPC will not be required for the Work.

### **XXV. TERMINATION**

96. This Consent Decree shall terminate upon granting of a motion duly filed by Mosaic, demonstrating that Mosaic has received a Project Final Completion Certificate for each of the Restoration Projects from the Trustees, paid the amounts required by Section VIII (Reimbursement of Past Costs) and Section IX (Reimbursement of Future Costs), and any outstanding stipulated penalties or interest under Sections XVI (Stipulated Penalties). Before Mosaic files any such motion, it shall meet and confer with the Plaintiffs and EPC, to ensure that all Parties agree that Mosaic has satisfied its obligations under the Consent Decree.

### **XXVI. LODGING AND PUBLIC NOTICE**

97. The Parties agree and acknowledge that final approval by the United States and the State of Florida and entry of this Consent Decree is subject to a 30 Day period for public notice and comment in accordance with Section 122 of CERCLA, 42 U.S.C. § 9622(d)(2)(B),

and U.S. Department of Justice policy. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment. The United States and the State of Florida each reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Mosaic and EPC consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States or the State of Florida have notified them in writing that there is no longer unanimous support for the entry of the Consent Decree. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, 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.

## **XXVII. SIGNATORIES AND SERVICE**

98. Each undersigned representative of Mosaic, the State of Florida, EPC and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

99. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. With regard to matters relating to this Consent Decree and its enforcement and the filing of the Complaint, Mosaic shall identify on the attached signature page the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that entity with respect to all matters arising under or relating to this Consent Decree and the filing of the Complaint. Mosaic agrees to accept service of process by mail with respect to all matters arising 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.

## **XXVIII. INTEGRATION**

100. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent 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 Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

## **XXIX. RETENTION OF JURISDICTION**

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



**XXVIII. FINAL JUDGMENT**

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

FOR THE PLAINTIFF UNITED STATES:

DATED: 2/8/13




IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

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FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By:   
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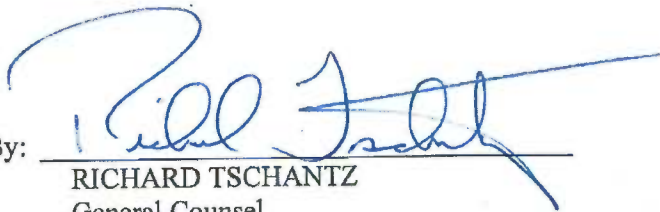
FOR RULE 19 PARTY ENVIRONMENTAL  
PROTECTION COMMISSION OF HILLSBOROUGH  
COUNTY

By: \_\_\_\_\_  
RICHARD TSCHANTZ  
General Counsel  
Environmental Protection Commission of  
Hillsborough County  
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813-627-2600 Ext. 1056

FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By: \_\_\_\_\_  
LARRY MORGAN  
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By:  \_\_\_\_\_  
RICHARD TSCHANTZ  
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Environmental Protection Commission of  
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3629 Queen Palm Drive  
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FOR DEFENDANT, MOSAIC FERTILIZER, LLC

By: 

RICHARD L. MACK  
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**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

UNITED STATES OF AMERICA;  
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION;  
and HERSCHEL T. VINYARD, JR., as  
Natural Resources Trustees for the State  
of Florida,

Plaintiffs,

v.

MOSAIC FERTILIZER, LLC,

Defendant,

v.

ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH  
COUNTY,

Rule 19 Party

Civil Action No.

**CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES**

This Consent Decree is made and entered into by and between the United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service ("DOI"), and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP and designated Natural Resources Trustee for the State of Florida ("State" or "State of Florida"), the Environmental Protection Commission of Hillsborough County ("EPC"), and Mosaic Fertilizer, LLC ("Mosaic"). NOAA, DOI, FDEP, and Herschel T. Vinyard, Jr., are collectively referred to as the "Trustees;" and the United States, the State, EPC and Mosaic are collectively referred to as the "Parties."



## **BACKGROUND**

1. Contemporaneously with the lodging of this Consent Decree, the United States, on behalf of DOI and NOAA, and FDEP and Herschel T. Vinyard, Jr., filed a Complaint in this matter against Mosaic pursuant to 28 U.S.C. §§ 1331, 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9613(b). FDEP also made a claim in the Complaint pursuant to §403.727, Florida Statutes. The Complaint seeks Natural Resource Damages arising from an alleged release of hazardous substances and other pollutants into South Archie Creek Canal, Hillsborough Bay, and Tampa Bay, in the State of Florida, through a spill of approximately 65 million gallons of acidic process water from a phosphoric acid/fertilizer production facility located in Riverview, Florida (the "Facility"), which occurred on or about September 5 and 6, 2004 (the "Spill"). At the time of the Spill, which coincided with severe weather conditions associated with Hurricane Frances, the Facility was owned by Cargill Fertilizer, Inc. Mosaic succeeded to the liabilities of Cargill Fertilizer, Inc. associated with the claims for Natural Resource Damages as a result of an October, 2004 merger of IMC Global Inc. and Cargill, Incorporated's Crop Nutrition Division. EPC is named in the Complaint as an indispensable party pursuant to Federal Rule of Civil Procedure 19.

2. DOI and NOAA have been designated Federal Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. *See* Executive Order 12,580 and the National Contingency Plan, 40 C.F.R. § 300.600(1) and (2). FDEP and Herschel T. Vinyard, Jr. have been designated State Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. The Trustees share trusteeship for natural resources affected by the Spill and have worked together to assess the natural resource injuries and losses caused by the Spill and to plan restoration to compensate for those losses.

3. The Trustees and Mosaic agreed to perform a cooperative, restoration-based assessment to address potential natural resource injuries caused by the Spill. After completing the cooperative assessment, the Trustees concluded that hazardous substances released at or from the Facility injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife habitat, and other natural resources.

4. The Trustees' assessment of these injuries to natural resources, including their estimates of interim losses and the Restoration Projects (as defined herein) proposed to compensate for those losses, are identified in the Final Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA") for the Facility, dated August 17, 2012, attached hereto as Appendix A, and incorporated herein by reference.

5. The DARP/EA specifies the Restoration Projects to be implemented by Mosaic to restore natural resources allegedly injured by the Spill. These Restoration Projects are as follows: 1) a previously completed Project to remove exotic and invasive species from approximately 26.46 acres of mangrove and salt marsh allegedly damaged by the Spill; 2) the Giant's Fish Camp Restoration Project, which includes reconnection of historic tidal flows and

creation of oyster habitat; 3) the Borrow Pit Restoration Project, which enhances a wetland presently covered with invasive plants; and 4) the preservation of approximately 103.76 acres of mangrove and marsh habitat adjacent to Hillsborough Bay and the Alafia River in Hillsborough County, Florida through the execution of two Conservation Easements, attached hereto as Appendix B, and incorporated herein by reference, that protect the conservation values of the properties in perpetuity. These Projects are more fully described in Section VI of this Consent Decree and in the Statement of Work, attached hereto as Appendix C, and incorporated herein by reference. When timely and successfully completed, these Projects will compensate for the loss of natural resources or natural resource services, allegedly injured, destroyed, or lost as a result of the Spill.

6. During development of the DARP/EA, the Trustees provided opportunities for public participation, including a formal public review and comment period on the proposed DARP/EA, in accordance with 43 C.F.R. §§ 11.32 and 11.81, 42 U.S.C. §§ 9607(f) and 9611(1), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*

7. This Consent Decree is a settlement of a contested matter, and, consequently, no action or lack of action by any Party, including, without limitation, participating in the cooperative assessment, developing and performing Restoration Projects, the payment or the acceptance of any consideration, represents any admission of any nature, including fact, law, liability, or responsibility by any Party. Mosaic agrees to the Court's jurisdiction to enter and enforce this Consent Decree and agrees in any such enforcement proceeding not to challenge the terms of this Consent Decree.

8. The Parties have consented to the entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that in order to resolve the issues stated in the Complaint, this Consent Decree should be entered. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, and implementation of this Consent Decree will expedite the restoration of natural resources, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as follows:

## **I. JURISDICTION AND VENUE**

9. This Court has personal jurisdiction over the Parties and has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and Sections 107 and 113(b) of CERCLA, 42 U.S.C. § 9613(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to the personal jurisdiction of the Court, to venue in this District, to enforcement of this Consent Decree by this Court, and to service of process.

## **II. PARTIES BOUND**

10. This Consent Decree applies to and is binding upon the United States, the State, EPC, Mosaic, and its successors and assigns. Any change in ownership or corporate status of

Mosaic shall in no way alter its responsibilities under this Consent Decree. Each signatory to this Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind her or his Party to it.

### III. OBJECTIVES

11. The Parties to this Consent Decree agree that settlement of this action without further litigation is in the public interest and that entry of the Consent Decree is the most appropriate means of resolving this action.

12. Mosaic does not admit any of the facts or allegations contained in the Complaint, and neither Mosaic's participation in the cooperative assessment, its development and performance of Restoration Projects, its entry into this Consent Decree, nor any provision herein shall be construed as an admission of any kind for any purpose.

13. This Consent Decree provides the terms upon which the Parties agree to settle the claims of the United States and the State of Florida pursuant to CERCLA, the CWA, and the claims of the State of Florida under § 403.727, Florida Statutes, concerning Natural Resource Damages that allegedly resulted from the Spill.

14. The Objectives of the Parties in entering into this Consent Decree are to compensate the Trustees, on behalf of the public, for alleged Natural Resource Damages by restoring, replacing, or acquiring resources that are the equivalent of the allegedly injured, destroyed, or lost natural resources, and to compensate the Plaintiffs and EPC for Past and Future Costs.

### IV. DEFINITIONS

15. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in the CWA, 33 U.S.C. § 1321(a), shall have the meaning assigned to them in the CWA, and terms that are defined in CERCLA, 42 U.S.C. § 9601 *et seq.*, and in regulations promulgated under CERCLA, 43 C.F.R. Part 11 and 40 C.F.R. Part 300, shall have the meaning assigned to them in CERCLA, or in such regulations. Whenever terms listed below are used in this Consent Decree or in the attachments hereto and incorporated hereunder the following definitions shall apply:

A. "Consent Decree" means this document entitled "Consent Decree Addressing Natural Resource Damages," including all Appendices.

B. "Conservation Easements" means the documents attached as Appendix B.

C. "DARP/EA" means the plan entitled "Final Natural Resources Damage Assessment and Restoration Plan/Environmental Assessment (DARP/EA) for the Riverview, Florida Phosphogypsum Stack Release, September 5-6, 2004," dated August 17, 2012, and attached as Appendix A to this Consent Decree.

D. "Day" means a calendar day unless expressly stated to be a business day. "Business Day" shall mean a Day other than a Saturday, Sunday, or State or Federal holiday. In

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

E. “Effective Date” means the date on which either this Consent Decree or an order entering this Consent Decree is filed with the Clerk of the Court after the United States and the State of Florida have moved for entry and the District Judge has signed the Consent Decree or an order entering this Consent Decree.

F. “Federal Trustees” means NOAA and DOI.

G. “Future Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the Trustees and EPC incur in connection with the implementation of the Restoration Projects and this Consent Decree, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree, implementing, monitoring, correcting or otherwise overseeing the Restoration Projects, or otherwise enforcing this Consent Decree commencing June 2, 2012 for the Federal Trustees and EPC, and July 3, 2012 for State Trustees. Indirect costs shall be calculated pursuant to NOAA’s established indirect cost rates for the Damage Assessment, Remediation, and Restoration Program for the fiscal year(s) in which the indirect costs were incurred.

H. “Holder” means a person or entity qualified under Florida Law that is approved by the Trustees to hold the Conservation Easement. EPC is the initial Holder.

I. “Interest” means interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

J. “Natural Resource Damages” means damages recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

K. “Paragraph” means a portion of this Consent Decree identified by an Arabic numeral.

L. “Past Costs” shall mean all costs, including, but not limited to, direct and indirect costs, incurred by the Federal Trustees between May 11, 2008 and June 1, 2012, by the State Trustees between May 1, 2010 and July 2, 2012, and by EPC between July 2, 2005 and June 1, 2012, in connection with the assessment of and response to Natural Resource Damages arising out of or resulting from the Spill, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree. All Past Costs are itemized in the invoices attached to this Consent Decree as Appendix D.

M. “Plaintiff(s)” mean the Plaintiffs in this litigation, the United States of America, the State of Florida Department of Environmental Protection, and Herschel T. Vinyard, Jr., as Natural Resource Trustees for the State of Florida.

N. “Restoration Projects” or “Projects” means the restoration actions briefly described in Section VI of this Consent Decree, and more fully described in the DARP/EA and Statement of Work. The Restoration Projects include the recorded Conservation Easements.

O. “Section” means a portion of the Consent Decree identified by an uppercase Roman numeral.

P. “State Trustees” means FDEP and Herschel T. Vinyard, Jr.

Q. “Statement of Work” means the document attached as Appendix C.

R. “Trustees” means the Federal Trustees and the State Trustees.

S. “Work” shall mean implementation by Mosaic of those activities that are described in Section VI (Natural Resource Restoration Requirements) and Appendix C of this Consent Decree (Statement of Work).

## **V. EFFECT OF THE CONSENT DECREE**

16. Copies of the Consent Decree. Mosaic shall provide a copy of this Consent Decree to each entity representing it with respect to the Restoration Projects, and to the Supervising Contractor (per Paragraph 22(A)) hired to oversee construction of the Restoration Projects who will be responsible for distributing the Consent Decree to all subcontractors. Mosaic shall nonetheless remain responsible for ensuring that its contractors and subcontractors perform the Restoration Projects in accordance with this Consent Decree.

17. Consent Decree Not a Permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal, State, or local law, regulation, rule, or ordinance. The United States and the State of Florida do not, by signing this Consent Decree, warrant or aver in any manner that Mosaic’s compliance with the Consent Decree will constitute or result in compliance with the requirements of any Federal, State, and local laws, regulations, or rules that may apply to the implementation of the Restoration Projects or other activities required by the terms of this Consent Decree. Notwithstanding this provision, implementation of the Statement of Work does not require a separate permit from FDEP, or EPC.

18. Responsibility for Compliance. Notwithstanding any action by the United States and the State, including, without limitation, their issuance of the DARP/EA or the review and approval of any design, plan, report, or other information or action formulated by Mosaic under this Consent Decree, Mosaic is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to success criteria.

19. The United States and/or the State may take any and all legal or administrative actions necessary to enforce the terms of this Consent Decree. In the event that the United States and/or the State take legal or administrative actions to enforce this Consent Decree, and such action is successful, Mosaic shall pay all reasonable costs incurred by the United States and/or the State related to this action including, but not limited to, enforcement costs, attorney’s fees and interest accruing on any balance.



20. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to the Spill against any person not a Party hereto.

## VI. NATURAL RESOURCE DAMAGE RESTORATION REQUIREMENTS

21. Mosaic shall fund, perform, and complete all work and other activities required to implement the Restoration Projects in accordance with (a) the DARP/EA; (b) the Statement of Work; (c) any other plans intended to accomplish the Restoration Projects and Statement of Work approved by the Trustees; (d) the procedures, schedules and terms set forth in this Consent Decree; and (e) all applicable laws and permits. The Projects are briefly described below. Thorough descriptions of the Projects and deadlines associated with their construction and completion are in the Statement of Work.

A. Removal of Exotic Invasive Vegetation (Emergency Primary Restoration). This Project involved the removal of exotic invasive plants from and adjacent to approximately 26 acres of mangrove and tidal marsh that allegedly were damaged by the Spill and were surrounded by exotic invasive vegetation. The exotic invasive vegetation was primarily composed of Brazilian pepper, but included other species such as chinaberry (*Melia azedarach*), lead tree (*Leucaena leucocephala*), and air potato (*Dioscorea bulbifera*). Due to their tolerance of freezing events, rapid re-growth following injury, and lack of native insect predators, these species are aggressive invaders of disturbed habitats and have a competitive advantage over many native tidal marsh, mangrove forest, and transitional zone plants. The Trustees determined that invasion by the exotic invasive vegetation into the approximately 26-acre tract of injured wetland was likely to occur without emergency action that would have resulted in an extended period of recovery for the wetland and could have lead to the complete loss of the wetland habitat and resource services. This Project has been completed in accordance with applicable requirements of this Consent Decree.

B. Giant's Fish Camp Hydrology Restoration with Oyster Reef and Tidal Creek Creation and Enhancement. This Project is located at the southwest corner of the Highway 41 Bridge at the former site of the Giant's Fish Camp. The goals of this Project are to restore and enhance mangrove habitat and associated natural resource services by improving the hydrology in the general area, and to create an oyster reef habitat to provide additional ecosystem enhancement. This Project includes (1) connecting the Giant's Camp marina basin to an existing tidal creek via creation of a new, approximately 1,003 linear feet, waterway; (2) reopening approximately 2,094 linear feet of additional remnant tidal creeks through mangrove habitat largely closed to tidal flows; (3) widening existing waterways and removing approximately 17,000 cubic yards of spoil to eliminate blockages to sheet flow; (4) improving the hydroperiod in an impounded tidal pond of approximately 0.53 acres by enhancing tidal creek connection; (5) enhancing 3,652 square feet of oyster reef habitat by placing substrate suitable for oyster larvae settlement ("cultch") along the seawall of the marina boat basin; (6) creating 2,000 square feet of oyster reef habitat within Channel B; and (7) creating 0.25 acres of wetland habitat (0.08 acres apply directly to this project as mitigation for wetland impacts and the remaining 0.17 acres will be "banked" for potential future mitigation needs, including but not limited to unanticipated wetland impacts which may occur during construction or to bolster meeting success criteria).

C. Borrow Pit Hydrological Restoration and Wetland Enhancement Project.

The Borrow Pit Hydrological Restoration and Wetland Enhancement Project is located between Old Highway 41 and Highway 41 North within a Mosaic-owned parcel. The objective of this Project is to improve habitat functionality through creation of a tidal creek (approximately 900 linear feet) and pond (approximately one acre) that will be connected to the Delaney Creek Pop-Off Canal. The mouth of the ditch that currently connects the Borrow Pit Project site to the Delaney Creek Pop-Off Canal will be widened and extended into the new tidal creek. The creek will flow into a tidal pond that will remain partially wet during all but the lowest tides of the year. Removal of invasive vegetation will allow for colonization by native wetland vegetation at low and high marsh elevations. A saltern will also be created adjacent to the wetland to provide additional habitat diversity. Wetland enhancement will comprise approximately four acres.

D. Conservation Easements over the Giant's Camp and Borrow Pit Restorations. Conservation easements totaling approximately 103.76 acres will secure the approximately 82.48 acres of mangrove forest with restored and newly created tidal creeks in the Giant's Fish Camp Restoration Project and approximately 21.28 acres of newly created tidal creek, pond and saltern in the Borrow Pit Project.

22. All Work undertaken as part of the Statement of Work shall comply with the requirements in Subparagraphs 22(A) through (D) below. The Parties recognize that the Restoration Projects will be constructed as set forth in the Statement of Work and that the times for completion of construction and compliance monitoring for each Project will be different. Mosaic shall submit a Completion of Project Construction Report and Final Report for each Project as it is completed. However, Mosaic will not receive a Certificate of Project Success for a Project until it has demonstrated that the Project meets applicable success criteria, or has performed supplemental compensatory restoration, if applicable.

A. Supervising Contractor. All aspects of the Work shall be taken under the direction and supervision of a qualified contractor, approved by the Trustees ("Supervising Contractor"). Mosaic has proposed, and the Trustees have approved John C. Landon, P.E., of Landon, Moree & Assoc., Inc., as Supervising Contractor. A replacement Supervising Contractor is subject to approval by the Trustees, which approval shall not be unreasonably withheld. If at any time Mosaic proposes to use a different Supervising Contractor for the Work, Mosaic shall notify the Trustees in writing and shall obtain from them written authorization to proceed before a new Supervising Contractor performs any Work. Any change in the Supervising Contractor shall not excuse any Work deadlines or schedules. If the Trustees do object, the work deadlines and schedules shall be extended by a time period equal to that between Mosaic's initial request for approval of a replacement Supervising Contractor and receipt of the Trustees' approval.

B. Semi-Annual Reports. Mosaic shall submit written Semi-Annual Progress Reports to the Trustees with respect to actions and activities taken pursuant to this Section. The Semi-Annual Progress Reports shall be submitted by October 15, and April 15 following the Effective Date of this Consent Decree. Mosaic's obligation to submit Semi-Annual Progress Reports for any particular Restoration Project continues until the Trustees' approval of the Project Final Report for that Project pursuant to Paragraph 25. In addition, the Trustees may request periodic briefings by Mosaic to discuss the progress of the Work.

C. Semi-Annual Report Contents. At a minimum, the Semi-Annual Progress Reports shall: (1) describe the actions that have been taken to comply with this Consent Decree during the prior six-month period; (2) include all results of construction sampling and tests and all other data received by Mosaic and not previously submitted to the Trustees; (3) include all descriptions of plans, reports, deliverables, permits and authorizations, and procedures completed under the Statement of Work during the previous six months; (4) describe the activities planned for the next six-month period; and (5) describe all significant problems encountered during the previous six months and any anticipated significant problems in future six-month periods, any actual or anticipated significant delays, and solutions developed and implemented to mitigate or address any actual or anticipated significant problems or delays. The Semi-Annual Reports shall include the information required in this Paragraph for each Restoration Project, and shall be organized in separate sections devoted to each Restoration Project.

D. Completion of Project Construction Reports. Within 60 Days after Mosaic concludes that construction of the Work on a Restoration Project is complete, Mosaic will submit a Completion of Project Construction Report for that Project to the Trustees. At a minimum, this Report shall include as-built plans and a certification from the Supervising Contractor that all of the Work has been completed for a particular Restoration Project in compliance with the requirements of the Statement of Work. Following submission of the Completion of Project Construction Report, the Trustees shall have the right to conduct an inspection of the Project to determine compliance with the Statement of Work, and to identify any additional impacts to wetlands or other natural resources resulting from construction. If, after the Trustees' receipt and review of the Completion of Project Construction Report, the Trustees determine that the Work or any portion thereof has not been completed in accordance with the Statement of Work, the Trustees shall notify Mosaic in writing of the activities that must be undertaken to complete construction of the Restoration Project, and shall include in the notice a schedule for performance of such activities. If the Trustees identify natural resource injuries resulting from construction that were not previously mitigated, the Trustees shall notify Mosaic in writing of their conclusions, and thereafter Mosaic shall perform additional projects to mitigate the injuries, on a scope and schedule proposed by Mosaic, subject to the Trustees' approval. Mosaic may contest either notice in accordance with the Dispute Resolution procedures under Section XV. Mosaic shall perform all activities described in the notice (as amended in through Dispute Resolution, if applicable) in accordance with the specifications and schedules established therein. Mosaic shall submit for approval a revised Completion of Project Construction Report with a certification from the Supervising Contractor once the additional activities have been completed. If upon review of the revised Completion of Project Construction Report, the Trustees determine that the Work has been completed in accordance with the Statement of Work, and any other subsequent construction identified pursuant to this paragraph, they shall notify Mosaic in writing that the Work has been completed in accordance with the Statement of Work. If the Trustees determine, under either of the provisions of this Paragraph, that construction of the Work has not been completed in accordance with the Statement of Work, this determination may be disputed by Mosaic in accordance with the dispute resolution procedures set forth in Section XV of this Consent Decree. If the Trustees determine that construction of the Work has not been completed, it shall again follow the procedures specified in this Paragraph until (a) construction of the Work is complete; or (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved.

23. Certification of Semi-Annual Progress Reports and Final Report. In addition to any other certifications required by this Consent Decree, the Semi-Annual Reports and the Completion of Project Construction Reports submitted by Mosaic shall be certified by a responsible corporate official of Mosaic and accompanied by the following certification:

“I certify under penalty of law that, based upon the procedures described below, the information contained in or accompanying this submission is true, accurate and complete. This certification is based on my review or analysis of the submission, and/or supervision of persons who, acting on my instructions, made the verification that the submitted information is this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

24. Restoration Project Performance Monitoring. Following the Trustees' acceptance of the Completion of Project Construction Report for a particular Restoration Project submitted pursuant to Paragraph 22(D), Mosaic shall initiate performance monitoring for that Project, as required in the Statement of Work, and submit Performance Monitoring Reports to the Trustees as required therein. As an alternative to the submission of separate Performance Monitoring Reports, Mosaic may include results of performance monitoring in the Semi-Annual Reports.

25. Demonstration of Restoration Project Success. Once Mosaic believes that it has met all of the requirements set forth in this Consent Decree, including the success criteria contained in the Statement of Work, for a particular Project, it shall submit a Final Report to the Trustees for that Restoration Project. The Trustees shall review the Final Report and determine whether the success criteria for that particular Restoration Project have been met. If the Trustees find that the success criteria have been met, then they shall issue and provide to Mosaic a dated “Project Success Certificate,” certifying that the particular Restoration Project is successful. If the Trustees find that any of the success criteria have not been met, the Trustees shall identify and notify Mosaic of those further actions that are needed for the Restoration Project to meet the success criteria. The procedures specified in Paragraph 22(D) for resubmitting the Completion of Project Construction Report shall be followed for the Final Report until (a) the success criteria have been met; (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved; or (c) the Trustees determine that the success criteria for that Project cannot be met within a reasonable time period.

A. Establishing Alternative Compliance Criteria or Additional Compensatory Restoration. The Parties believe that the Restoration Projects will timely meet the success criteria in the Statement of Work, but they also recognize that success is not guaranteed. If a Project does not timely meet the success criteria, then the time for compliance can be extended, the Project modified, or Mosaic can undertake or pay for additional compensatory



restoration sufficient to compensate for the difference between the actual services provided by the Project and services the Parties anticipated the Project would provide. If the Trustees determine that the success criteria for a particular Project cannot be met within a reasonable time period, they shall notify Mosaic of that determination in writing. The Parties shall meet to seek resolution of the matter. If the Parties resolve the matter, Mosaic shall comply with the resolution in the time period established in the resolution. If the Parties cannot resolve the matter, the Trustees shall send Mosaic written notification of what it must do to either meet the alternative compliance criteria or the additional compensation requirements. Mosaic may contest that notice pursuant to Section XV (Dispute Resolution), subject to the rights granted thereunder. The Parties shall comply with any orders issued pursuant to the Dispute Resolution process,

B. Project Final Completion Certificate. Once Mosaic has completed all its obligations with regard to a particular Restoration Project under this Consent Decree, the Statement of Work, and any orders issued pursuant to Section XV (Dispute Resolution) with respect to that Restoration Project, the Trustees shall issue a Project Final Completion Certificate for that Project.

26. All Work undertaken by Mosaic shall be performed in compliance with the requirements of all applicable federal, state, and local laws and regulations. Where any portion of the Work requires a federal, state, or local permit, certification or approval, Mosaic shall submit timely and complete applications and take all other actions necessary to obtain all such permits, certifications, or approvals. Notwithstanding the foregoing statements, environmental resource permits from the FDEP and authorizations for construction in wetlands from the EPC are not required for any portion of the Work.

## **VII. CONSERVATION EASEMENTS**

27. The Conservation Easements will be granted with warranty covenants, free and clear of all prior liens and encumbrances, except as otherwise provided in the Conservation Easements. Within 90 Days of the Effective Date, Mosaic will submit for recording to the Clerk of the Court for Hillsborough County, Florida the Conservation Easements and provide the Trustees and EPC with a certified copy of the original recorded Conservation Easements showing the clerk's recording stamps, upon receipt of same from the Clerk of the Court of Hillsborough County, Florida.

## **VIII. REIMBURSEMENT OF PAST COSTS**

28. The United States, FDEP and EPC have expended time, funds, and resources in assessing Natural Resource Damages alleged to have resulted from the Spill. Mosaic has made payments to the Trustees and EPC in reimbursement for some of these Past Costs. Within 90 Days of the Effective Date, Mosaic shall make additional payments to the United States, FDEP and EPC in the amounts of \$122,749.78, \$9,777.20 and \$8,200.00, respectively, in reimbursement of Past Costs. Invoices for these additional Past Costs have been provided to Mosaic.

29. Payment of Past Costs to the United States shall be made by electronic funds transfer in accordance with current electronic funds transfer procedures and instructions for same



to be provided to Mosaic by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida following the entry of this Consent Decree. At the time of payment, Mosaic shall provide notice of payment, referencing DOJ Case Number 90-5-1-1-08961 and this civil action case name and number to the United States, NOAA and DOI at the addresses set forth in Section XI (Notices).

30. Payment of Past Costs to the State shall be made by certified check to "The Department of Environmental Protection" and shall include thereon OGC Case Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to the Department of Environmental Protection. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

31. Payment of Past Costs to EPC shall be made as follows: Mosaic shall mail a certified check made payable to "The Environmental Protection Commission" to Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

#### **IX. REIMBURSEMENT OF FUTURE COSTS**

32. The United States, FDEP and EPC have incurred and will incur Future Costs in connection with assessing the alleged damages, oversight of this Consent Decree, the implementation of the Statement of Work, and monitoring of the Conservation Easement. Mosaic shall pay all Future Costs as follows: Either separately, or together, the Trustees and EPC may submit to Mosaic, on a periodic basis, an invoice for Future Costs which will include an itemized cost summary. The itemized cost summary for Future Costs will include all direct and indirect costs, including, but not limited to, personnel billing rates, hours applied against each Project, a narrative description of work performed, time and travel costs of the personnel, and associated indirect costs, contractor costs, inspection of work activities, visits to observe the Work, discussions regarding disputes that may arise during the conduct of the Work, and review and approval or disapproval of reports. Such accounting shall specify the amount and method of payment. Within 60 Days of receipt of an accounting, Mosaic shall pay such costs in a manner to be specified by the Party or Parties submitting the accounting. Mosaic may dispute Future Costs pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

33. Notice of Payment. Upon making any payment under this Section, Mosaic shall send written notice that payment has been made to the United States, NOAA, DOI, EPC, FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

#### **X. LATE PAYMENTS OF PAST AND FUTURE COSTS**

34. Interest. Interest shall accrue on the unpaid balance through the date of payment for any payment owed by Mosaic under Sections VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) that is not received when due. Accrued interest shall be paid

by Mosaic within 60 Days of receipt of a written request from a Party in the manner specified in the request.

35. Stipulated Penalties. In addition to the interest required to be paid under the preceding subparagraph, if any amounts to be paid under Section VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) are not paid by the required date, Mosaic shall pay a stipulated penalty for every Day that such payment is late to the affected Party, as provided in Section XVI (Stipulated Penalties). Mosaic may dispute any claim for Stipulated Penalties pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

## **XI. NOTICE**

36. Each Party hereby respectively designates the following person(s) for receipt of notices required under this Consent Decree, including, but not limited to, notices pertaining to the payment of Past or Future Costs, and notices invoking force majeure or dispute resolution. Whenever notice is required by this Consent Decree, it shall be addressed to the persons listed below.

### United States:

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DOJ Case No. 90-5-1-1-08961

### NOAA:

Sheila O'Brien  
NOAA, Office of the General Counsel, SE  
263 13<sup>th</sup> Ave. S. Suite 177  
Saint Petersburg, FL: 33701

NOAA Project Coordinator

DOI:

Brigette J. Beaton  
Attorney Advisor  
U.S. Department of Interior  
Office of the Regional Solicitor  
75 Spring Street, Suite 304  
Atlanta, GA 30303

FDEP and/or Vinyard:

Larry Morgan  
Chief Deputy General Counsel  
Office of General Counsel  
Department of Environmental Protection  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32399-3000

EPC:

Richard Tschantz  
General Counsel  
Environmental Protection Commission of Hillsborough County  
3629 Queen Palm Drive  
Tampa FL 33619

Mosaic:

Patrick van der Voorn  
Senior Environmental Counsel  
Mosaic Fertilizer, LLC  
3033 Campus Drive, Suite E490  
Plymouth, MN 55441

and

David B. Weinstein  
Greenberg Traurig  
625 East Twiggs Street  
Suite 100  
Tampa, FL 33602

37. Any Party may change its designated person or address as set forth in this Section by communicating such changes in writing to the other Parties. If a contact person initially designated is changed, the identity of the successor will be provided at least 10 Days before the change occurs, unless impracticable.

38. All notices shall be considered effective upon receipt, unless otherwise provided. All notices shall be sent by first class United States Mail, with the exception of notices of meetings, which may be sent by electronic mail. Submission of written notice by mail as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree.

39. Submission of technical documents, including Semi-Annual Reports, Completion of Project Construction Reports, Performance Monitoring Reports, and Final Reports, need not be sent to the notice recipients identified by the Parties pursuant to this Section. Such documents shall be transmitted electronically to the recipients designated by each Party pursuant to this Paragraph, with trailing paper copies by U.S. Mail if requested.

## **XII. PLAINTIFFS NOT LIABLE**

40. The United States and the State of Florida, including all of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments, assume no liability for any injuries or damages to persons or property resulting from acts or omissions by Mosaic, or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree. The United States, the State of Florida, or any of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments may not be deemed a party to any contract entered into by Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree.

## **XIII. INDEMNIFICATION BY MOSAIC**

41. The United States and the State of Florida do not assume any liability by entering into this agreement. Mosaic shall indemnify, save, and hold harmless the United States and the State of Florida and their officials, agents, employees, contractors, subcontractors, representatives, agencies, and departments for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Mosaic, its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, Mosaic agrees to pay the United States and the State of Florida all costs incurred including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State Plaintiffs based on negligent or other wrongful acts or omissions of Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out activities pursuant to this Consent Decree. Neither Mosaic nor any of its contractors shall be considered agents of the United States or the State of Florida. This indemnification obligation does not include any claim, cause of action, or cost arising from, or on account of, a negligent or wrongful act or omission of the United States or the State. Mosaic may dispute any claim for indemnification pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

42. The United States and the State of Florida shall give Mosaic notice of any third party claim for which the United States or the State of Florida plans to seek indemnification from Mosaic pursuant to this Section and shall attempt to consult with Mosaic at least 30 Days prior to settling such claim.

43. Mosaic waives all claims against the United States and the State of Florida for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State of Florida arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects, including, but not limited to, claims on account of delays. In addition, Mosaic shall indemnify and hold harmless the United States and the State of Florida with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects including, but not limited to, claims on account of delays.

#### **XIV. FORCE MAJEURE**

44. "Force majeure," for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Mosaic, of any entity controlled by Mosaic, or of its contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Mosaic's best efforts to fulfill the obligation, except the obligations to make payments described in Sections VIII, IX, X and XVI of this Consent Decree, for which force majeure may not be claimed. The requirement that Mosaic exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event, and best efforts to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent reasonably possible. "Force majeure" does not include Mosaic's financial inability to perform any obligation under this Consent Decree.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Mosaic shall provide notice orally or by electronic or facsimile transmission to the NOAA Project Coordinator within 5 Business Days of when Mosaic first learns that the event might cause a delay. Within 30 Days thereafter, Mosaic shall provide in writing to the persons identified in Section XI (Notice), an explanation and description of the reasons for the delay; the anticipated duration of the delay, all actions taken or to be taken to prevent or minimize the delay, a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay, Mosaic's rationale for attributing such delay to a force majeure event if it intends to assert such a claim, and a statement as to whether, in Mosaic's opinion, such circumstances may cause or contribute to an endangerment to public health and/or the environment. Mosaic shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Mosaic from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Mosaic shall be deemed to know of any circumstance of which Mosaic, any entity controlled by Mosaic, or its contractors knew or should have known.



46. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees agree that the delay is attributable or potentially attributable to a force majeure event, the Trustees shall notify Mosaic in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

47. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, they will notify Mosaic in writing of their decision. Mosaic may dispute any force majeure determination by the Trustees pursuant to the dispute resolution procedures set forth in Section XV and Paragraph 48 of this Consent Decree.

48. If Mosaic elects to invoke the dispute resolution procedures set forth in Section XV ("Dispute Resolution") regarding the Trustees' notice under Paragraph 46 or 47, it shall do so no later than 15 Days after receipt of the Trustees' notice. In any such proceeding, Mosaic shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Mosaic complied with the requirements of Paragraphs 44 and 45, above. If Mosaic carries this burden, the delay at issue shall be deemed not to be a violation by Mosaic of the affected obligation(s) of this Consent Decree.

## **XV. DISPUTE RESOLUTION**

49. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the Trustees and EPC to enforce obligations of Mosaic under this Consent Decree that have not been disputed in accordance with this Section.

50. Informal Dispute Resolution. Mosaic may initiate dispute resolution under this Section by sending a written notice to all Parties. The notice shall identify the issue in dispute and Mosaic's position concerning the issue. The Parties shall attempt to resolve the dispute by consensus by engaging in good faith informal negotiations. Each Party agrees that it will devote reasonable time and effort to such informal negotiations. The period for informal negotiations shall not exceed 20 Days from the date the notice is sent, unless this time period is modified by written agreement of the Parties. In the event the Parties are unable to reach agreement during such informal negotiation period, the Plaintiff(s) or EPC (if the dispute involves EPC) shall provide Mosaic with a written summary of their position regarding the issues in dispute within 45 Days from the end of the informal negotiations. The Plaintiff(s) and EPC may provide a joint summary or individual summaries. In the event that a party takes more than 45 Days to provide its summary, stipulated penalties shall not accrue under this Consent Decree from the 46<sup>th</sup> Day through the date that party issues its summary. Once all parties involved in the dispute have

issued written summaries, stipulated penalties shall once again accrue, and shall continue to accrue during the remainder of the dispute resolution process.

51. Formal Dispute Resolution In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Plaintiff(s), individually or jointly, or by EPC shall be considered binding on Mosaic unless, within 30 Days after Mosaic receives the Plaintiff(s)' or EPC's written summary, Mosaic invokes the formal dispute resolution procedures of this Section by serving the Plaintiff or EPC with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by Mosaic.

52. Within 60 Days after receipt of Mosaic's Statement of Position, the Plaintiff(s) or EPC shall serve on Mosaic their Statement of Position, including any factual data, analysis, or opinion supporting each position and all supporting documentation relied upon by the Plaintiff(s) or EPC. Within 15 Days after receipt of the Statement of Position, Mosaic may submit a Reply.

53. A record of the dispute shall be maintained by the Plaintiff(s) or EPC and shall contain all Statements of Position, including supporting documentation, and any Reply. Where appropriate, the Plaintiff(s) or EPC may allow submission of supplemental Statements of Position by the Parties.

54. The Plaintiff(s) or EPC shall issue a final decision resolving the dispute based on the record. This decision shall be binding on Mosaic, subject only to the right to seek judicial review pursuant to Paragraph 55. Decisions for the Florida Trustees will be made by the Secretary of FDEP or his designee.

55. Any decision made by the Plaintiff(s) or EPC pursuant to this Section shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Mosaic with the Court and served on all Parties within 45 Days of receipt of the Plaintiff(s)' or EPC's final decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiff(s) and EPC may file a joint response or individual response to Mosaic's motion. In the event that the Court takes more than 45 Days to rule on Mosaic's motion, stipulated penalties shall cease to accrue on the 46<sup>th</sup> Day.

56. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by the Trustees under this Consent Decree; the adequacy of the performance of Work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the record under applicable principles of administrative law, which the parties agree apply. Mosaic shall have the burden of demonstrating, based on the record maintained by the Trustees, that the position of the Plaintiff(s) is arbitrary and capricious or

otherwise not in accordance with law. Mosaic may move the Court to supplement the record. Plaintiffs and EPC reserve the right to take the position that the record should not be supplemented.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, Mosaic shall bear the burden of demonstrating that its position complies with this Consent Decree and better achieves the objectives of the Consent Decree.

57. The invocation of informal or formal dispute resolution procedures pursuant to this Section shall not extend, postpone, or affect in any way any obligation of Mosaic under this Consent Decree that is not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first Day of noncompliance with any applicable provision of this Consent Decree. In the event that Mosaic does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI ("Stipulated Penalties").

## **XVI. STIPULATED PENALTIES**

58. Mosaic shall be liable for stipulated penalties to the United States, the State of Florida and EPC in the amounts set forth in Paragraph 59 for failure to comply with the requirements of this Consent Decree specified below. "Compliance" by Mosaic shall include completion of the activities identified in Paragraph 59 within the schedules established by and approved in compliance with the Consent Decree, the Statement of Work and any work plans or other documents approved by the Trustees pursuant to the Statement of Work.

59. The following stipulated penalties shall accrue per violation per Day for Mosaic's failure to comply with the time schedules established for the following implementation requirements:

A. Failure to timely submit any draft or revised work plan required under the Statement of Work:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$250	1 <sup>st</sup> through 7 <sup>th</sup> day
\$500	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> day and beyond

B. Failure to comply with schedules for Restoration Project implementation set forth in the Statement of Work, including for monitoring and for any other activities approved under the Statement of Work to complete the Restoration Project, or failure to meet the deadlines established in Section VII (Conservation Easements):

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
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\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,250	31 <sup>st</sup> day and beyond

C. Failure to make the payments required by Section VIII (Reimbursement of Past Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$1,000	8 <sup>th</sup> through 30 <sup>th</sup> day
\$2,500	31 <sup>st</sup> day and beyond

D. Failure to make a payment required by Section IX (Reimbursement of Future Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$100	1 <sup>st</sup> through 7 <sup>th</sup> day
\$175	8 <sup>th</sup> through 30 <sup>th</sup> day
\$250	31 <sup>st</sup> day and beyond

60. All penalties shall begin to accrue on the Day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Separate penalties will accrue for separate violations of this Consent Decree. Notwithstanding any other provision of this Section, Plaintiffs and EPC, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State, or EPC to seek any other remedies or sanctions available by virtue of Mosaic's violation of this Consent Decree or of the statutes and regulations upon which it is based, provided, however, that the United States, the State and EPC shall not seek civil penalties for any violation for which a stipulated penalty is collected pursuant to this Consent Decree.

61. Following the determination by Plaintiffs and EPC, individually or jointly, that Mosaic failed to comply with one of the requirements of this Consent Decree listed above, the Party may give Mosaic written notification of the same and describe the noncompliance. The Party may send Mosaic a written demand for the payment of penalties. Penalties shall accrue and are due as provided in this Section regardless of whether Party has notified Mosaic of a violation. All stipulated penalties due under this Section shall be due and payable within 30 Days of Mosaic's receipt of a demand for payment from Party, unless Mosaic invokes dispute resolution under Section XV of this Consent Decree. If Mosaic invokes dispute resolution under

Section XV, then stipulated penalties shall be due at the time specified in Paragraph 65, unless Mosaic prevails in the dispute resolution process. Interest shall accrue on unpaid stipulated penalties beginning on the 31st Day after Mosaic's receipt of the demand for stipulated penalties. Penalties assessed by the Plaintiffs, individually or jointly, shall be paid 50 percent to the United States and 50 percent to the State, regardless of whether the demand is made individually or jointly.

62. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." This payment shall be mailed to the U.S. Attorney's Office, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, referencing "United States and the State of Florida v. Mosaic, DOJ Case Number 90-5-2-1-08961" and the name and address of the Party making payment. Copies of the check and notice shall be sent to the Parties as specified in Section XI (Notice).

63. All payments made to the State of Florida under this Section shall be paid by certified check made payable to "The Department of Environmental Protection" and shall include thereon OGC Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to FDEP's contact designated in paragraph 36.

64. All payments made to EPC under this Section shall be paid by certified check made payable to "The Environmental Protection Commission." This payment shall be mailed to the Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

65. In the event Mosaic fails to pay stipulated penalties when due, the United States, the State of Florida and EPC may institute a legal proceeding to collect such penalties, as well as interest accruing on any unpaid balance, as provided by law. Stipulated penalties continue to accrue during dispute resolution, but need not be paid until the following:

A. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid within 30 Days of the agreement;

B. If the dispute is appealed to this Court and the Plaintiff(s) or EPC prevails in whole or in part, Mosaic shall pay all accrued penalties determined by the Court to be owed within 60 Days of receipt of the Court's decision or order, except as provided by Paragraph 65(C) below. Mosaic shall not be required to pay any stipulated penalties or court costs if it prevails on the disputed issue;

C. If the District Court's decision is appealed by any Party, Mosaic shall pay all accrued penalties determined by the District Court to be owed into an interest-bearing escrow account within 60 Days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 Days. Within 15 Days of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State of Florida, EPC, or to Mosaic to the extent that it prevails.



**XVII. COVENANTS NOT TO SUE  
BY THE UNITED STATES, THE STATE OF FLORIDA AND EPC**

66. Covenant by the United States. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the United States covenants not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the United States under Section XVI (Stipulated Penalties), and to pay any interest owed to the United States due to the failure to timely pay any amount owed to the United States.

67. Covenant by the State of Florida and EPC. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the State of Florida and EPC covenant not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Chapters 376 and 403, Florida Statutes, to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the State under Section XVI (Stipulated Penalties), and to pay any interest owed to the State due to the failure to timely pay any amount owed to the State.

68. These covenants not to sue by the United States, the State of Florida and EPC extend only to Mosaic: provided, however, that these covenants not to sue (and the reservations thereto) shall also apply to: (a) the successors and assigns of Mosaic, but only to the extent that the alleged liability of the successor or assign is based on the alleged liability of Mosaic; and (b) the officers, directors, agents, and employees of Mosaic, but only to the extent that the alleged liability of the officer, director, agent, or employee is based on said person's status as an officer, director, agent, or employee of Mosaic, or as a result of conduct within the scope of such person's employment or authority.

**XVIII. RESERVATION OF RIGHTS BY THE UNITED STATES  
AND THE STATE OF FLORIDA**

69. Notwithstanding any other provision of this Consent Decree, the United States and the State of Florida reserve, and this Consent Decree is without prejudice to all rights against Mosaic with respect to all matters not expressly included within Section XVII (Covenant Not to Sue by the United States and the State of Florida). Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Mosaic with respect to:

A. claims based on a failure by Mosaic to meet a material requirement of this Consent Decree;

B. liability for any costs incurred or to be incurred by the Plaintiffs that are not within the definitions of Natural Resource Damages, Past Costs or Future Costs;

C. liability for damages for any injury to, destruction of, or loss of natural resources resulting from any event or releases or threatened releases of hazardous substances or oil, other than the hazardous substances known to have been released in the Spill;

D. any and all criminal liability; and

E. violation of any Federal or State law during the implementation of Restoration Projects or monitoring of such Project.

70. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this consent Decree, the United States and the State of Florida reserve the right to institute proceedings in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damage assessment: (a) based on conditions caused by the Spill, unknown to the Trustees as of the date when this Consent Decree is lodged with the Court, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources; or (b) based on information received by the Trustees after the date when this Consent Decree is lodged with this Court indicating that the Spill has resulted in injury to, destruction of, or loss of natural resources of a type or magnitude unknown to the Trustees as of the date of this Consent Decree is lodged with the Court. For purposes of this provision, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the DARP/EA and the administrative record supporting the DARP/EA.

71. The covenants not to sue set forth above do not pertain to any matters other than those expressly set forth in the Consent Decree.

72. The failure of the Trustees to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the United States' and the State of Florida's right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by the United States and the State of Florida to enforce such a provision.

73. In any subsequent administrative or judicial proceeding initiated by the United States or the State of Florida for injunctive relief, recovery of response costs, or other appropriate relief relating to the Spill, Mosaic 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 to any claim brought pursuant to Paragraph 69, above, based upon any contention that the claim raised by the United States or the State of Florida in subsequent proceedings was or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVII (Covenants Not to Sue by the United States and the State), nor does it preclude Mosaic from raising other available defenses in any such subsequent proceedings.

74. The United States and the State of Florida retain all authority and reserve all rights to take any and all action authorized by law, to the extent not in conflict with the terms of this Consent Decree.

## **XIX. COVENANT OF MOSAIC**

75. Mosaic covenants not to sue and agrees not to assert any claims or causes of action against the Trustees, their employees agents, experts, or contractors, with respect to the Spill, including but not limited to:

A. Any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. §9507) 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 State or Federal law;

B. Any claim against the Trustees, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, relating to Natural Resource Damages resulting from the Spill;

C. Any claims arising out of activities related to the Restoration Projects, including, without limitation, claims based on the Trustees' selection of the Restoration Projects, oversight of the Restoration Projects, and/or the approval of plans for such activities;

D. Any claims under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law relating to Natural Resource Damages resulting from the Spill.

76. 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).

77. Mosaic reserves its right to contest any claim allowed by Sections XVII (Covenant Not to Sue by the United States and the State) and/or XVIII (Reservation of Rights by the United States and the State) of this Consent Decree, and Mosaic does not by entering into to this Consent Decree waive or release any defenses whatsoever to any such claims, except that Mosaic covenants not to assert, and may not maintain, any defense based upon the principles of waiver, res judicata, collateral estoppels, issue preclusion, claim splitting, or any other defense based upon the contention that the claims were or should have been brought in the instant case.

78. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of Mosaic with respect to all matters other than those expressly specified in the covenants set forth in Paragraphs 76.

## **XX. CERTIFICATION**

79. Mosaic hereby certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Trustees all information requested by the Trustees regarding alleged Natural Resource Damages associated with the Spill, which are currently in the possession of its officers, employees, contractors, and agents that relate in any way to the alleged release of hazardous substances at or from the Facility associated with the Spill.

## XXI. ACCESS

80. Upon reasonable notice, Mosaic shall provide to the Trustees and EPC, and their designated representatives, access at reasonable times to all locations used in implementing the Restoration Projects, including to all areas of the Restoration Projects as well as to all vessels used by Mosaic, or their contractors, for any purpose relating to the implementation and oversight of the Restoration Projects, to future monitoring activity at Restoration Project Sites, or to corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree, including but not limited to:

A. Interviewing Mosaic's personnel involved in field work conducted pursuant to the Statement of Work provided, however, that Mosaic and its personnel shall have the right to have legal counsel present;

B. Inspecting records, and/or operating logs related to implementation of the Restoration Projects;

C. Reviewing the progress of Mosaic in implementing the Restoration Projects;

D. Conducting such sampling, tests or other actions as the Trustees and/or their representatives deem appropriate for implementation and oversight of the Restoration Projects, for future monitoring, for corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree;

E. Using a camera, sound recording, or other documentary equipment to make or preserve observations or measurements; and

F. Verifying any reports or data that the Mosaic submits to the Trustees.

G. During any site visits to or inspections of the Restoration Projects, the Trustees and EPC, their representatives, and contractors must comply with reasonable health and safety instructions given by Mosaic at the time of the site visit or inspection, including applicable OSHA requirements.

81. Pursuant to the above requirements, Mosaic acknowledges the right of the Trustees and EPC, and their designated representatives, to be present at all times that Mosaic, including its contractor(s) or subcontractor(s), are performing any work or activity involved in implementing the Restoration Projects. The Trustees and EPC may designate other representatives, including, but not limited to, federal and state employees, contractors, and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Restoration Projects. All Parties recognize that employees and contractors of FDEP are subject to Florida Statutes pertaining to confidential business information.

82. Mosaic representatives may accompany the Trustees, EPC and/or their representatives whenever and wherever they are present at the Restoration Projects sites, but may not delay or impede any access or activities of the Trustees and EPC authorized under this Section. Further, with respect to any samples taken by Mosaic from the Restoration Projects

sites, copies of the results of any analyses or tests on such samples shall be provided to the Trustees and EPC, or their designated representatives, upon request.

83. When requested and upon reasonable advance notice by the Trustees, Mosaic shall make available to the Trustees, at an appropriate location, any of its employees, agents, or representatives with knowledge of material facts concerning the implementation of the Restoration Projects for purposes of investigations, information gathering, or interviews by the Trustees provided, however, that a Mosaic representative and Mosaic's or its employees', agents' or representatives' legal counsel are present at any such meeting(s).

## **XXII. RETENTION OF RECORDS AND ACCESS TO INFORMATION**

84. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), Mosaic shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the Spill and/or the materials related to alleged Natural Resource Damages, which may have been associated with the alleged release of hazardous materials during the Spill.

85. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), and excepting records, documents, and other information prepared in anticipation of litigation, protected by the attorney-client privilege or any other privilege recognized by federal law, Mosaic shall make available to the Trustees and EPC, or their representatives, within 30 Days of a written request, copies of any records, documents, data, or information not covered in paragraph 86, whether in written or electronic form, maintained by or in the possession of Mosaic, their contractors, agents or representatives, which relate to any work or activity involved with alleged Natural Resource Damages associated with the Spill and/or any such records associated with implementing any portion of the Restoration Projects that is reasonably requested by the Trustees, EPC, or their representatives under this Decree.

86. Any record, document, data, and other information that Mosaic is required by this Consent Decree to provide directly to the Trustees, EPC, or their representatives, shall be considered a public record and shall not be withheld or protected from release. No claim of privilege or confidentiality shall be made with respect to any sampling, analytical, monitoring, hydrologic, hydrogeologic, scientific, chemical, or engineering data generated through any work or activity undertaken in implementing any portion of the Restoration Projects pursuant to this Consent Decree. Such non-privileged records, documents, data and other information include those used in surveying, design, construction, analysis of data, chain of custody records, receipts, final reports, correspondence, or other records or materials related to the Restoration Projects. Notwithstanding any other provision of this Consent Decree, however, no record, document, data or other information of Mosaic's, its counsel, or its experts which is entitled to privilege or work product protection relative to the putative class action litigation styled *Curd, et al. v. Mosaic Fertilizer, LLC*, Thirteenth Judicial Circuit Court, Hillsborough County, Florida (Case No. 04-8653) shall lose such protections or otherwise be subject to discovery or production to the plaintiffs in that action, the United States, the State of Florida, EPC, or any other person as a result of any term or condition of this Consent Decree or any related document, except that



Mosaic recognizes that the State of Florida is subject to the requirements of Florida Law in regards to public records.

87. Mosaic may assert that certain records, documents or other information provided to the Trustees include or constitute confidential business information that is subject to legal protection under federal or state law ("CBI"). Whenever Mosaic submits a record, document or other information to the Trustees or EPC which Mosaic asserts includes or constitutes CBI, Mosaic shall identify the record, document, or information, or portion thereof, which is asserted to be CBI with particularity and demonstrate a proper basis in fact and law why the information is considered to be CBI. Records, documents or information, or portions thereof, that the Trustees determine to be CBI under applicable federal or state laws or regulations will be protected from further release to the extent and in the manner afforded by such laws. If CBI is not identified by Mosaic at the time a record, document, or information is submitted to the Trustees or EPC, or if the Trustees notify Mosaic that the record, document or information is not determined to be CBI under applicable federal or state laws or regulations, the public may be given access to such documents or information without further notice to Mosaic.

88. In the event that Mosaic believes that the records, documents, data, or information requested by the Trustees, EPC, and/or their representatives under paragraph 85 of this Consent Decree is privileged or subject to work product protection, Mosaic may assert that claim by providing to the Trustees and EPC within 60 Days after the request the following information for each item as to which a privilege is claimed:

A. A description of the information, data, or other material which contains sufficient information to allow the District Court to determine whether the claimed privilege or work product protection applies. If the material at issue is a document, Mosaic shall, at a minimum, provide the following information in as much detail as possible without revealing any information claimed privileged or protected: (i) the title of the document; (ii) the date of the document; (iii) the name and title of the author of the document; (iv) the name and title of each addressee and recipient; and (v) a description of the contents of the document; and

B. A statement of the specific privilege(s) or protection(s) claimed and the basis for the claim. If Mosaic fails without good cause to timely provide the information required by this Subparagraph, the Trustees shall interpret such failure as a waiver of any claim of privilege with respect to the specific information, data, or other material for which it failed to timely provide the information. If the Trustees or EPC object to Mosaic's claim that the information, data, or other material is privileged or protected, Trustees or EPC may file a motion with the Court to compel access to the material.

C. Notwithstanding the provisions of this Paragraph and its Subparagraphs, Mosaic must meet all statutory requirements to sustain a claim of privilege under Florida Law.

89. At the conclusion of the required information-retention period, Mosaic shall notify the Trustees and EPC at least 60 Days prior to the destruction of any documents, records, or other information subject to the requirements of this Consent Decree.

90. This Consent Decree in no way limits or affects any right to obtain information held by the United States, the State of Florida, or EPC pursuant to applicable state or federal laws, rules, regulations, or permits, nor does it limit or affect any duty or obligation of Mosaic to maintain documents, records, or other information imposed by applicable federal or state laws, regulations or permits.

91. The Parties recognize that documents submitted to the State Trustees and EPC are subject to provisions of Chapter 119, Florida Statutes, unless otherwise exempt from disclosure per Florida Statutes.

### **XXIII. MODIFICATION**

92. The terms of this Consent Decree, including the work or deadlines in the Statement of Work, may be modified only by a subsequent written agreement signed by the Parties, or as ordered by the Court upon the noticed motion of any Party. Where any modification constitutes a material change to any terms of this Consent Decree, it shall be effective only upon approval by the Court. Changes to the Appendices to this Consent Decree, agreed to by the Parties in writing, shall be deemed not to be material.

93. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon entry of the Consent Decree in its entirety, without modification, addition, or deletion except as agreed to in writing by the Parties.

94. Economic hardship or changed financial circumstances of Mosaic shall not serve as a basis for modification of this Consent Decree.

### **XXIV. COMPLIANCE WITH OTHER LAWS**

95. This Consent Decree shall not be construed in any way to relieve Mosaic or any other person or entity from the obligation to comply with any Federal, State, or local law, except that, as previously provided in Paragraph 26 of this Consent Decree, permits from FDEP and EPC will not be required for the Work.

### **XXV. TERMINATION**

96. This Consent Decree shall terminate upon granting of a motion duly filed by Mosaic, demonstrating that Mosaic has received a Project Final Completion Certificate for each of the Restoration Projects from the Trustees, paid the amounts required by Section VIII (Reimbursement of Past Costs) and Section IX (Reimbursement of Future Costs), and any outstanding stipulated penalties or interest under Sections XVI (Stipulated Penalties). Before Mosaic files any such motion, it shall meet and confer with the Plaintiffs and EPC, to ensure that all Parties agree that Mosaic has satisfied its obligations under the Consent Decree.

### **XXVI. LODGING AND PUBLIC NOTICE**

97. The Parties agree and acknowledge that final approval by the United States and the State of Florida and entry of this Consent Decree is subject to a 30 Day period for public notice and comment in accordance with Section 122 of CERCLA, 42 U.S.C. § 9622(d)(2)(B),

and U.S. Department of Justice policy. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment. The United States and the State of Florida each reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Mosaic and EPC consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States or the State of Florida have notified them in writing that there is no longer unanimous support for the entry of the Consent Decree. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, 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.

## **XXVII. SIGNATORIES AND SERVICE**

98. Each undersigned representative of Mosaic, the State of Florida, EPC and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

99. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. With regard to matters relating to this Consent Decree and its enforcement and the filing of the Complaint, Mosaic shall identify on the attached signature page the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that entity with respect to all matters arising under or relating to this Consent Decree and the filing of the Complaint. Mosaic agrees to accept service of process by mail with respect to all matters arising 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.

## **XXVIII. INTEGRATION**

100. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent 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 Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

## **XXIX. RETENTION OF JURISDICTION**

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

**XXVIII. FINAL JUDGMENT**

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

FOR THE PLAINTIFF UNITED STATES:

DATED: 2/8/13




IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

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FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By:   
LARRY MORGAN  
Florida Department of Environmental Protection  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32301  
(850) 245-2202

FOR RULE 19 PARTY ENVIRONMENTAL  
PROTECTION COMMISSION OF HILLSBOROUGH  
COUNTY

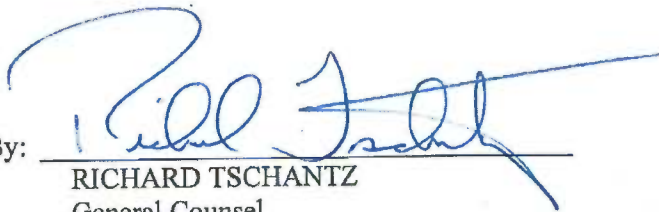
By: \_\_\_\_\_  
RICHARD TSCHANTZ  
General Counsel  
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813-627-2600 Ext. 1056



FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By: \_\_\_\_\_  
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FOR RULE 19 PARTY ENVIRONMENTAL  
PROTECTION COMMISSION OF HILLSBOROUGH  
COUNTY

By:  \_\_\_\_\_  
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FOR DEFENDANT, MOSAIC FERTILIZER, LLC

By: 

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**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

UNITED STATES OF AMERICA;  
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION;  
and HERSCHEL T. VINYARD, JR., as  
Natural Resources Trustees for the State  
of Florida,

Plaintiffs,

v.

MOSAIC FERTILIZER, LLC,

Defendant,

v.

ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH  
COUNTY,

Rule 19 Party

Civil Action No.

**CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES**

This Consent Decree is made and entered into by and between the United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service ("DOI"), and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP and designated Natural Resources Trustee for the State of Florida ("State" or "State of Florida"), the Environmental Protection Commission of Hillsborough County ("EPC"), and Mosaic Fertilizer, LLC ("Mosaic"). NOAA, DOI, FDEP, and Herschel T. Vinyard, Jr., are collectively referred to as the "Trustees;" and the United States, the State, EPC and Mosaic are collectively referred to as the "Parties."

## **BACKGROUND**

1. Contemporaneously with the lodging of this Consent Decree, the United States, on behalf of DOI and NOAA, and FDEP and Herschel T. Vinyard, Jr., filed a Complaint in this matter against Mosaic pursuant to 28 U.S.C. §§ 1331, 1345, the Clean Water Act (“CWA”), 33 U.S.C. § 1321(n), and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §9613(b). FDEP also made a claim in the Complaint pursuant to §403.727, Florida Statutes. The Complaint seeks Natural Resource Damages arising from an alleged release of hazardous substances and other pollutants into South Archie Creek Canal, Hillsborough Bay, and Tampa Bay, in the State of Florida, through a spill of approximately 65 million gallons of acidic process water from a phosphoric acid/fertilizer production facility located in Riverview, Florida (the “Facility”), which occurred on or about September 5 and 6, 2004 (the “Spill”). At the time of the Spill, which coincided with severe weather conditions associated with Hurricane Frances, the Facility was owned by Cargill Fertilizer, Inc. Mosaic succeeded to the liabilities of Cargill Fertilizer, Inc. associated with the claims for Natural Resource Damages as a result of an October, 2004 merger of IMC Global Inc. and Cargill, Incorporated’s Crop Nutrition Division. EPC is named in the Complaint as an indispensable party pursuant to Federal Rule of Civil Procedure 19.

2. DOI and NOAA have been designated Federal Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. *See* Executive Order 12,580 and the National Contingency Plan, 40 C.F.R. § 300.600(1) and (2). FDEP and Herschel T. Vinyard, Jr. have been designated State Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. The Trustees share trusteeship for natural resources affected by the Spill and have worked together to assess the natural resource injuries and losses caused by the Spill and to plan restoration to compensate for those losses.

3. The Trustees and Mosaic agreed to perform a cooperative, restoration-based assessment to address potential natural resource injuries caused by the Spill. After completing the cooperative assessment, the Trustees concluded that hazardous substances released at or from the Facility injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife habitat, and other natural resources.

4. The Trustees’ assessment of these injuries to natural resources, including their estimates of interim losses and the Restoration Projects (as defined herein) proposed to compensate for those losses, are identified in the Final Damage Assessment and Restoration Plan/Environmental Assessment (“DARP/EA”) for the Facility, dated August 17, 2012, attached hereto as Appendix A, and incorporated herein by reference.

5. The DARP/EA specifies the Restoration Projects to be implemented by Mosaic to restore natural resources allegedly injured by the Spill. These Restoration Projects are as follows: 1) a previously completed Project to remove exotic and invasive species from approximately 26.46 acres of mangrove and salt marsh allegedly damaged by the Spill; 2) the Giant’s Fish Camp Restoration Project, which includes reconnection of historic tidal flows and

creation of oyster habitat; 3) the Borrow Pit Restoration Project, which enhances a wetland presently covered with invasive plants; and 4) the preservation of approximately 103.76 acres of mangrove and marsh habitat adjacent to Hillsborough Bay and the Alafia River in Hillsborough County, Florida through the execution of two Conservation Easements, attached hereto as Appendix B, and incorporated herein by reference, that protect the conservation values of the properties in perpetuity. These Projects are more fully described in Section VI of this Consent Decree and in the Statement of Work, attached hereto as Appendix C, and incorporated herein by reference. When timely and successfully completed, these Projects will compensate for the loss of natural resources or natural resource services, allegedly injured, destroyed, or lost as a result of the Spill.

6. During development of the DARP/EA, the Trustees provided opportunities for public participation, including a formal public review and comment period on the proposed DARP/EA, in accordance with 43 C.F.R. §§ 11.32 and 11.81, 42 U.S.C. §§ 9607(f) and 9611(1), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*

7. This Consent Decree is a settlement of a contested matter, and, consequently, no action or lack of action by any Party, including, without limitation, participating in the cooperative assessment, developing and performing Restoration Projects, the payment or the acceptance of any consideration, represents any admission of any nature, including fact, law, liability, or responsibility by any Party. Mosaic agrees to the Court's jurisdiction to enter and enforce this Consent Decree and agrees in any such enforcement proceeding not to challenge the terms of this Consent Decree.

8. The Parties have consented to the entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that in order to resolve the issues stated in the Complaint, this Consent Decree should be entered. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, and implementation of this Consent Decree will expedite the restoration of natural resources, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as follows:

## **I. JURISDICTION AND VENUE**

9. This Court has personal jurisdiction over the Parties and has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and Sections 107 and 113(b) of CERCLA, 42 U.S.C. § 9613(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to the personal jurisdiction of the Court, to venue in this District, to enforcement of this Consent Decree by this Court, and to service of process.

## **II. PARTIES BOUND**

10. This Consent Decree applies to and is binding upon the United States, the State, EPC, Mosaic, and its successors and assigns. Any change in ownership or corporate status of



Mosaic shall in no way alter its responsibilities under this Consent Decree. Each signatory to this Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind her or his Party to it.

### III. OBJECTIVES

11. The Parties to this Consent Decree agree that settlement of this action without further litigation is in the public interest and that entry of the Consent Decree is the most appropriate means of resolving this action.

12. Mosaic does not admit any of the facts or allegations contained in the Complaint, and neither Mosaic's participation in the cooperative assessment, its development and performance of Restoration Projects, its entry into this Consent Decree, nor any provision herein shall be construed as an admission of any kind for any purpose.

13. This Consent Decree provides the terms upon which the Parties agree to settle the claims of the United States and the State of Florida pursuant to CERCLA, the CWA, and the claims of the State of Florida under § 403.727, Florida Statutes, concerning Natural Resource Damages that allegedly resulted from the Spill.

14. The Objectives of the Parties in entering into this Consent Decree are to compensate the Trustees, on behalf of the public, for alleged Natural Resource Damages by restoring, replacing, or acquiring resources that are the equivalent of the allegedly injured, destroyed, or lost natural resources, and to compensate the Plaintiffs and EPC for Past and Future Costs.

### IV. DEFINITIONS

15. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in the CWA, 33 U.S.C. § 1321(a), shall have the meaning assigned to them in the CWA, and terms that are defined in CERCLA, 42 U.S.C. § 9601 *et seq.*, and in regulations promulgated under CERCLA, 43 C.F.R. Part 11 and 40 C.F.R. Part 300, shall have the meaning assigned to them in CERCLA, or in such regulations. Whenever terms listed below are used in this Consent Decree or in the attachments hereto and incorporated hereunder the following definitions shall apply:

A. "Consent Decree" means this document entitled "Consent Decree Addressing Natural Resource Damages," including all Appendices.

B. "Conservation Easements" means the documents attached as Appendix B.

C. "DARP/EA" means the plan entitled "Final Natural Resources Damage Assessment and Restoration Plan/Environmental Assessment (DARP/EA) for the Riverview, Florida Phosphogypsum Stack Release, September 5-6, 2004," dated August 17, 2012, and attached as Appendix A to this Consent Decree.

D. "Day" means a calendar day unless expressly stated to be a business day. "Business Day" shall mean a Day other than a Saturday, Sunday, or State or Federal holiday. In

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

E. “Effective Date” means the date on which either this Consent Decree or an order entering this Consent Decree is filed with the Clerk of the Court after the United States and the State of Florida have moved for entry and the District Judge has signed the Consent Decree or an order entering this Consent Decree.

F. “Federal Trustees” means NOAA and DOI.

G. “Future Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the Trustees and EPC incur in connection with the implementation of the Restoration Projects and this Consent Decree, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree, implementing, monitoring, correcting or otherwise overseeing the Restoration Projects, or otherwise enforcing this Consent Decree commencing June 2, 2012 for the Federal Trustees and EPC, and July 3, 2012 for State Trustees. Indirect costs shall be calculated pursuant to NOAA’s established indirect cost rates for the Damage Assessment, Remediation, and Restoration Program for the fiscal year(s) in which the indirect costs were incurred.

H. “Holder” means a person or entity qualified under Florida Law that is approved by the Trustees to hold the Conservation Easement. EPC is the initial Holder.

I. “Interest” means interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

J. “Natural Resource Damages” means damages recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

K. “Paragraph” means a portion of this Consent Decree identified by an Arabic numeral.

L. “Past Costs” shall mean all costs, including, but not limited to, direct and indirect costs, incurred by the Federal Trustees between May 11, 2008 and June 1, 2012, by the State Trustees between May 1, 2010 and July 2, 2012, and by EPC between July 2, 2005 and June 1, 2012, in connection with the assessment of and response to Natural Resource Damages arising out of or resulting from the Spill, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree. All Past Costs are itemized in the invoices attached to this Consent Decree as Appendix D.

M. “Plaintiff(s)” mean the Plaintiffs in this litigation, the United States of America, the State of Florida Department of Environmental Protection, and Herschel T. Vinyard, Jr., as Natural Resource Trustees for the State of Florida.

N. “Restoration Projects” or “Projects” means the restoration actions briefly described in Section VI of this Consent Decree, and more fully described in the DARP/EA and Statement of Work. The Restoration Projects include the recorded Conservation Easements.

O. “Section” means a portion of the Consent Decree identified by an uppercase Roman numeral.

P. “State Trustees” means FDEP and Herschel T. Vinyard, Jr.

Q. “Statement of Work” means the document attached as Appendix C.

R. “Trustees” means the Federal Trustees and the State Trustees.

S. “Work” shall mean implementation by Mosaic of those activities that are described in Section VI (Natural Resource Restoration Requirements) and Appendix C of this Consent Decree (Statement of Work).

## **V. EFFECT OF THE CONSENT DECREE**

16. Copies of the Consent Decree. Mosaic shall provide a copy of this Consent Decree to each entity representing it with respect to the Restoration Projects, and to the Supervising Contractor (per Paragraph 22(A)) hired to oversee construction of the Restoration Projects who will be responsible for distributing the Consent Decree to all subcontractors. Mosaic shall nonetheless remain responsible for ensuring that its contractors and subcontractors perform the Restoration Projects in accordance with this Consent Decree.

17. Consent Decree Not a Permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal, State, or local law, regulation, rule, or ordinance. The United States and the State of Florida do not, by signing this Consent Decree, warrant or aver in any manner that Mosaic’s compliance with the Consent Decree will constitute or result in compliance with the requirements of any Federal, State, and local laws, regulations, or rules that may apply to the implementation of the Restoration Projects or other activities required by the terms of this Consent Decree. Notwithstanding this provision, implementation of the Statement of Work does not require a separate permit from FDEP, or EPC.

18. Responsibility for Compliance. Notwithstanding any action by the United States and the State, including, without limitation, their issuance of the DARP/EA or the review and approval of any design, plan, report, or other information or action formulated by Mosaic under this Consent Decree, Mosaic is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to success criteria.

19. The United States and/or the State may take any and all legal or administrative actions necessary to enforce the terms of this Consent Decree. In the event that the United States and/or the State take legal or administrative actions to enforce this Consent Decree, and such action is successful, Mosaic shall pay all reasonable costs incurred by the United States and/or the State related to this action including, but not limited to, enforcement costs, attorney’s fees and interest accruing on any balance.

20. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to the Spill against any person not a Party hereto.

## VI. NATURAL RESOURCE DAMAGE RESTORATION REQUIREMENTS

21. Mosaic shall fund, perform, and complete all work and other activities required to implement the Restoration Projects in accordance with (a) the DARP/EA; (b) the Statement of Work; (c) any other plans intended to accomplish the Restoration Projects and Statement of Work approved by the Trustees; (d) the procedures, schedules and terms set forth in this Consent Decree; and (e) all applicable laws and permits. The Projects are briefly described below. Thorough descriptions of the Projects and deadlines associated with their construction and completion are in the Statement of Work.

A. Removal of Exotic Invasive Vegetation (Emergency Primary Restoration). This Project involved the removal of exotic invasive plants from and adjacent to approximately 26 acres of mangrove and tidal marsh that allegedly were damaged by the Spill and were surrounded by exotic invasive vegetation. The exotic invasive vegetation was primarily composed of Brazilian pepper, but included other species such as chinaberry (*Melia azedarach*), lead tree (*Leucaena leucocephala*), and air potato (*Dioscorea bulbifera*). Due to their tolerance of freezing events, rapid re-growth following injury, and lack of native insect predators, these species are aggressive invaders of disturbed habitats and have a competitive advantage over many native tidal marsh, mangrove forest, and transitional zone plants. The Trustees determined that invasion by the exotic invasive vegetation into the approximately 26-acre tract of injured wetland was likely to occur without emergency action that would have resulted in an extended period of recovery for the wetland and could have lead to the complete loss of the wetland habitat and resource services. This Project has been completed in accordance with applicable requirements of this Consent Decree.

B. Giant's Fish Camp Hydrology Restoration with Oyster Reef and Tidal Creek Creation and Enhancement. This Project is located at the southwest corner of the Highway 41 Bridge at the former site of the Giant's Fish Camp. The goals of this Project are to restore and enhance mangrove habitat and associated natural resource services by improving the hydrology in the general area, and to create an oyster reef habitat to provide additional ecosystem enhancement. This Project includes (1) connecting the Giant's Camp marina basin to an existing tidal creek via creation of a new, approximately 1,003 linear feet, waterway; (2) reopening approximately 2,094 linear feet of additional remnant tidal creeks through mangrove habitat largely closed to tidal flows; (3) widening existing waterways and removing approximately 17,000 cubic yards of spoil to eliminate blockages to sheet flow; (4) improving the hydroperiod in an impounded tidal pond of approximately 0.53 acres by enhancing tidal creek connection; (5) enhancing 3,652 square feet of oyster reef habitat by placing substrate suitable for oyster larvae settlement ("cultch") along the seawall of the marina boat basin; (6) creating 2,000 square feet of oyster reef habitat within Channel B; and (7) creating 0.25 acres of wetland habitat (0.08 acres apply directly to this project as mitigation for wetland impacts and the remaining 0.17 acres will be "banked" for potential future mitigation needs, including but not limited to unanticipated wetland impacts which may occur during construction or to bolster meeting success criteria).

C. Borrow Pit Hydrological Restoration and Wetland Enhancement Project.

The Borrow Pit Hydrological Restoration and Wetland Enhancement Project is located between Old Highway 41 and Highway 41 North within a Mosaic-owned parcel. The objective of this Project is to improve habitat functionality through creation of a tidal creek (approximately 900 linear feet) and pond (approximately one acre) that will be connected to the Delaney Creek Pop-Off Canal. The mouth of the ditch that currently connects the Borrow Pit Project site to the Delaney Creek Pop-Off Canal will be widened and extended into the new tidal creek. The creek will flow into a tidal pond that will remain partially wet during all but the lowest tides of the year. Removal of invasive vegetation will allow for colonization by native wetland vegetation at low and high marsh elevations. A saltern will also be created adjacent to the wetland to provide additional habitat diversity. Wetland enhancement will comprise approximately four acres.

D. Conservation Easements over the Giant's Camp and Borrow Pit Restorations. Conservation easements totaling approximately 103.76 acres will secure the approximately 82.48 acres of mangrove forest with restored and newly created tidal creeks in the Giant's Fish Camp Restoration Project and approximately 21.28 acres of newly created tidal creek, pond and saltern in the Borrow Pit Project.

22. All Work undertaken as part of the Statement of Work shall comply with the requirements in Subparagraphs 22(A) through (D) below. The Parties recognize that the Restoration Projects will be constructed as set forth in the Statement of Work and that the times for completion of construction and compliance monitoring for each Project will be different. Mosaic shall submit a Completion of Project Construction Report and Final Report for each Project as it is completed. However, Mosaic will not receive a Certificate of Project Success for a Project until it has demonstrated that the Project meets applicable success criteria, or has performed supplemental compensatory restoration, if applicable.

A. Supervising Contractor. All aspects of the Work shall be taken under the direction and supervision of a qualified contractor, approved by the Trustees ("Supervising Contractor"). Mosaic has proposed, and the Trustees have approved John C. Landon, P.E., of Landon, Moree & Assoc., Inc., as Supervising Contractor. A replacement Supervising Contractor is subject to approval by the Trustees, which approval shall not be unreasonably withheld. If at any time Mosaic proposes to use a different Supervising Contractor for the Work, Mosaic shall notify the Trustees in writing and shall obtain from them written authorization to proceed before a new Supervising Contractor performs any Work. Any change in the Supervising Contractor shall not excuse any Work deadlines or schedules. If the Trustees do object, the work deadlines and schedules shall be extended by a time period equal to that between Mosaic's initial request for approval of a replacement Supervising Contractor and receipt of the Trustees' approval.

B. Semi-Annual Reports. Mosaic shall submit written Semi-Annual Progress Reports to the Trustees with respect to actions and activities taken pursuant to this Section. The Semi-Annual Progress Reports shall be submitted by October 15, and April 15 following the Effective Date of this Consent Decree. Mosaic's obligation to submit Semi-Annual Progress Reports for any particular Restoration Project continues until the Trustees' approval of the Project Final Report for that Project pursuant to Paragraph 25. In addition, the Trustees may request periodic briefings by Mosaic to discuss the progress of the Work.



C. Semi-Annual Report Contents. At a minimum, the Semi-Annual Progress Reports shall: (1) describe the actions that have been taken to comply with this Consent Decree during the prior six-month period; (2) include all results of construction sampling and tests and all other data received by Mosaic and not previously submitted to the Trustees; (3) include all descriptions of plans, reports, deliverables, permits and authorizations, and procedures completed under the Statement of Work during the previous six months; (4) describe the activities planned for the next six-month period; and (5) describe all significant problems encountered during the previous six months and any anticipated significant problems in future six-month periods, any actual or anticipated significant delays, and solutions developed and implemented to mitigate or address any actual or anticipated significant problems or delays. The Semi-Annual Reports shall include the information required in this Paragraph for each Restoration Project, and shall be organized in separate sections devoted to each Restoration Project.

D. Completion of Project Construction Reports. Within 60 Days after Mosaic concludes that construction of the Work on a Restoration Project is complete, Mosaic will submit a Completion of Project Construction Report for that Project to the Trustees. At a minimum, this Report shall include as-built plans and a certification from the Supervising Contractor that all of the Work has been completed for a particular Restoration Project in compliance with the requirements of the Statement of Work. Following submission of the Completion of Project Construction Report, the Trustees shall have the right to conduct an inspection of the Project to determine compliance with the Statement of Work, and to identify any additional impacts to wetlands or other natural resources resulting from construction. If, after the Trustees' receipt and review of the Completion of Project Construction Report, the Trustees determine that the Work or any portion thereof has not been completed in accordance with the Statement of Work, the Trustees shall notify Mosaic in writing of the activities that must be undertaken to complete construction of the Restoration Project, and shall include in the notice a schedule for performance of such activities. If the Trustees identify natural resource injuries resulting from construction that were not previously mitigated, the Trustees shall notify Mosaic in writing of their conclusions, and thereafter Mosaic shall perform additional projects to mitigate the injuries, on a scope and schedule proposed by Mosaic, subject to the Trustees' approval. Mosaic may contest either notice in accordance with the Dispute Resolution procedures under Section XV. Mosaic shall perform all activities described in the notice (as amended in through Dispute Resolution, if applicable) in accordance with the specifications and schedules established therein. Mosaic shall submit for approval a revised Completion of Project Construction Report with a certification from the Supervising Contractor once the additional activities have been completed. If upon review of the revised Completion of Project Construction Report, the Trustees determine that the Work has been completed in accordance with the Statement of Work, and any other subsequent construction identified pursuant to this paragraph, they shall notify Mosaic in writing that the Work has been completed in accordance with the Statement of Work. If the Trustees determine, under either of the provisions of this Paragraph, that construction of the Work has not been completed in accordance with the Statement of Work, this determination may be disputed by Mosaic in accordance with the dispute resolution procedures set forth in Section XV of this Consent Decree. If the Trustees determine that construction of the Work has not been completed, it shall again follow the procedures specified in this Paragraph until (a) construction of the Work is complete; or (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved.

23. Certification of Semi-Annual Progress Reports and Final Report. In addition to any other certifications required by this Consent Decree, the Semi-Annual Reports and the Completion of Project Construction Reports submitted by Mosaic shall be certified by a responsible corporate official of Mosaic and accompanied by the following certification:

“I certify under penalty of law that, based upon the procedures described below, the information contained in or accompanying this submission is true, accurate and complete. This certification is based on my review or analysis of the submission, and/or supervision of persons who, acting on my instructions, made the verification that the submitted information is this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

24. Restoration Project Performance Monitoring. Following the Trustees' acceptance of the Completion of Project Construction Report for a particular Restoration Project submitted pursuant to Paragraph 22(D), Mosaic shall initiate performance monitoring for that Project, as required in the Statement of Work, and submit Performance Monitoring Reports to the Trustees as required therein. As an alternative to the submission of separate Performance Monitoring Reports, Mosaic may include results of performance monitoring in the Semi-Annual Reports.

25. Demonstration of Restoration Project Success. Once Mosaic believes that it has met all of the requirements set forth in this Consent Decree, including the success criteria contained in the Statement of Work, for a particular Project, it shall submit a Final Report to the Trustees for that Restoration Project. The Trustees shall review the Final Report and determine whether the success criteria for that particular Restoration Project have been met. If the Trustees find that the success criteria have been met, then they shall issue and provide to Mosaic a dated “Project Success Certificate,” certifying that the particular Restoration Project is successful. If the Trustees find that any of the success criteria have not been met, the Trustees shall identify and notify Mosaic of those further actions that are needed for the Restoration Project to meet the success criteria. The procedures specified in Paragraph 22(D) for resubmitting the Completion of Project Construction Report shall be followed for the Final Report until (a) the success criteria have been met; (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved; or (c) the Trustees determine that the success criteria for that Project cannot be met within a reasonable time period.

A. Establishing Alternative Compliance Criteria or Additional Compensatory Restoration. The Parties believe that the Restoration Projects will timely meet the success criteria in the Statement of Work, but they also recognize that success is not guaranteed. If a Project does not timely meet the success criteria, then the time for compliance can be extended, the Project modified, or Mosaic can undertake or pay for additional compensatory

restoration sufficient to compensate for the difference between the actual services provided by the Project and services the Parties anticipated the Project would provide. If the Trustees determine that the success criteria for a particular Project cannot be met within a reasonable time period, they shall notify Mosaic of that determination in writing. The Parties shall meet to seek resolution of the matter. If the Parties resolve the matter, Mosaic shall comply with the resolution in the time period established in the resolution. If the Parties cannot resolve the matter, the Trustees shall send Mosaic written notification of what it must do to either meet the alternative compliance criteria or the additional compensation requirements. Mosaic may contest that notice pursuant to Section XV (Dispute Resolution), subject to the rights granted thereunder. The Parties shall comply with any orders issued pursuant to the Dispute Resolution process,

B. Project Final Completion Certificate. Once Mosaic has completed all its obligations with regard to a particular Restoration Project under this Consent Decree, the Statement of Work, and any orders issued pursuant to Section XV (Dispute Resolution) with respect to that Restoration Project, the Trustees shall issue a Project Final Completion Certificate for that Project.

26. All Work undertaken by Mosaic shall be performed in compliance with the requirements of all applicable federal, state, and local laws and regulations. Where any portion of the Work requires a federal, state, or local permit, certification or approval, Mosaic shall submit timely and complete applications and take all other actions necessary to obtain all such permits, certifications, or approvals. Notwithstanding the foregoing statements, environmental resource permits from the FDEP and authorizations for construction in wetlands from the EPC are not required for any portion of the Work.

## **VII. CONSERVATION EASEMENTS**

27. The Conservation Easements will be granted with warranty covenants, free and clear of all prior liens and encumbrances, except as otherwise provided in the Conservation Easements. Within 90 Days of the Effective Date, Mosaic will submit for recording to the Clerk of the Court for Hillsborough County, Florida the Conservation Easements and provide the Trustees and EPC with a certified copy of the original recorded Conservation Easements showing the clerk's recording stamps, upon receipt of same from the Clerk of the Court of Hillsborough County, Florida.

## **VIII. REIMBURSEMENT OF PAST COSTS**

28. The United States, FDEP and EPC have expended time, funds, and resources in assessing Natural Resource Damages alleged to have resulted from the Spill. Mosaic has made payments to the Trustees and EPC in reimbursement for some of these Past Costs. Within 90 Days of the Effective Date, Mosaic shall make additional payments to the United States, FDEP and EPC in the amounts of \$122,749.78, \$9,777.20 and \$8,200.00, respectively, in reimbursement of Past Costs. Invoices for these additional Past Costs have been provided to Mosaic.

29. Payment of Past Costs to the United States shall be made by electronic funds transfer in accordance with current electronic funds transfer procedures and instructions for same

to be provided to Mosaic by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida following the entry of this Consent Decree. At the time of payment, Mosaic shall provide notice of payment, referencing DOJ Case Number 90-5-1-1-08961 and this civil action case name and number to the United States, NOAA and DOI at the addresses set forth in Section XI (Notices).

30. Payment of Past Costs to the State shall be made by certified check to "The Department of Environmental Protection" and shall include thereon OGC Case Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to the Department of Environmental Protection. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

31. Payment of Past Costs to EPC shall be made as follows: Mosaic shall mail a certified check made payable to "The Environmental Protection Commission" to Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

#### **IX. REIMBURSEMENT OF FUTURE COSTS**

32. The United States, FDEP and EPC have incurred and will incur Future Costs in connection with assessing the alleged damages, oversight of this Consent Decree, the implementation of the Statement of Work, and monitoring of the Conservation Easement. Mosaic shall pay all Future Costs as follows: Either separately, or together, the Trustees and EPC may submit to Mosaic, on a periodic basis, an invoice for Future Costs which will include an itemized cost summary. The itemized cost summary for Future Costs will include all direct and indirect costs, including, but not limited to, personnel billing rates, hours applied against each Project, a narrative description of work performed, time and travel costs of the personnel, and associated indirect costs, contractor costs, inspection of work activities, visits to observe the Work, discussions regarding disputes that may arise during the conduct of the Work, and review and approval or disapproval of reports. Such accounting shall specify the amount and method of payment. Within 60 Days of receipt of an accounting, Mosaic shall pay such costs in a manner to be specified by the Party or Parties submitting the accounting. Mosaic may dispute Future Costs pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

33. Notice of Payment. Upon making any payment under this Section, Mosaic shall send written notice that payment has been made to the United States, NOAA, DOI, EPC, FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

#### **X. LATE PAYMENTS OF PAST AND FUTURE COSTS**

34. Interest. Interest shall accrue on the unpaid balance through the date of payment for any payment owed by Mosaic under Sections VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) that is not received when due. Accrued interest shall be paid

by Mosaic within 60 Days of receipt of a written request from a Party in the manner specified in the request.

35. Stipulated Penalties. In addition to the interest required to be paid under the preceding subparagraph, if any amounts to be paid under Section VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) are not paid by the required date, Mosaic shall pay a stipulated penalty for every Day that such payment is late to the affected Party, as provided in Section XVI (Stipulated Penalties). Mosaic may dispute any claim for Stipulated Penalties pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

## **XI. NOTICE**

36. Each Party hereby respectively designates the following person(s) for receipt of notices required under this Consent Decree, including, but not limited to, notices pertaining to the payment of Past or Future Costs, and notices invoking force majeure or dispute resolution. Whenever notice is required by this Consent Decree, it shall be addressed to the persons listed below.

### United States:

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DOJ Case No. 90-5-1-1-08961

### NOAA:

Sheila O'Brien  
NOAA, Office of the General Counsel, SE  
263 13<sup>th</sup> Ave. S. Suite 177  
Saint Petersburg, FL: 33701

NOAA Project Coordinator



DOI:

Brigette J. Beaton  
Attorney Advisor  
U.S. Department of Interior  
Office of the Regional Solicitor  
75 Spring Street, Suite 304  
Atlanta, GA 30303

FDEP and/or Vinyard:

Larry Morgan  
Chief Deputy General Counsel  
Office of General Counsel  
Department of Environmental Protection  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32399-3000

EPC:

Richard Tschantz  
General Counsel  
Environmental Protection Commission of Hillsborough County  
3629 Queen Palm Drive  
Tampa FL 33619

Mosaic:

Patrick van der Voorn  
Senior Environmental Counsel  
Mosaic Fertilizer, LLC  
3033 Campus Drive, Suite E490  
Plymouth, MN 55441

and

David B. Weinstein  
Greenberg Traurig  
625 East Twiggs Street  
Suite 100  
Tampa, FL 33602

37. Any Party may change its designated person or address as set forth in this Section by communicating such changes in writing to the other Parties. If a contact person initially designated is changed, the identity of the successor will be provided at least 10 Days before the change occurs, unless impracticable.

38. All notices shall be considered effective upon receipt, unless otherwise provided. All notices shall be sent by first class United States Mail, with the exception of notices of meetings, which may be sent by electronic mail. Submission of written notice by mail as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree.

39. Submission of technical documents, including Semi-Annual Reports, Completion of Project Construction Reports, Performance Monitoring Reports, and Final Reports, need not be sent to the notice recipients identified by the Parties pursuant to this Section. Such documents shall be transmitted electronically to the recipients designated by each Party pursuant to this Paragraph, with trailing paper copies by U.S. Mail if requested.

## **XII. PLAINTIFFS NOT LIABLE**

40. The United States and the State of Florida, including all of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments, assume no liability for any injuries or damages to persons or property resulting from acts or omissions by Mosaic, or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree. The United States, the State of Florida, or any of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments may not be deemed a party to any contract entered into by Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree.

## **XIII. INDEMNIFICATION BY MOSAIC**

41. The United States and the State of Florida do not assume any liability by entering into this agreement. Mosaic shall indemnify, save, and hold harmless the United States and the State of Florida and their officials, agents, employees, contractors, subcontractors, representatives, agencies, and departments for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Mosaic, its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, Mosaic agrees to pay the United States and the State of Florida all costs incurred including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State Plaintiffs based on negligent or other wrongful acts or omissions of Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out activities pursuant to this Consent Decree. Neither Mosaic nor any of its contractors shall be considered agents of the United States or the State of Florida. This indemnification obligation does not include any claim, cause of action, or cost arising from, or on account of, a negligent or wrongful act or omission of the United States or the State. Mosaic may dispute any claim for indemnification pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

42. The United States and the State of Florida shall give Mosaic notice of any third party claim for which the United States or the State of Florida plans to seek indemnification from Mosaic pursuant to this Section and shall attempt to consult with Mosaic at least 30 Days prior to settling such claim.

43. Mosaic waives all claims against the United States and the State of Florida for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State of Florida arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects, including, but not limited to, claims on account of delays. In addition, Mosaic shall indemnify and hold harmless the United States and the State of Florida with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects including, but not limited to, claims on account of delays.

#### **XIV. FORCE MAJEURE**

44. "Force majeure," for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Mosaic, of any entity controlled by Mosaic, or of its contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Mosaic's best efforts to fulfill the obligation, except the obligations to make payments described in Sections VIII, IX, X and XVI of this Consent Decree, for which force majeure may not be claimed. The requirement that Mosaic exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event, and best efforts to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent reasonably possible. "Force majeure" does not include Mosaic's financial inability to perform any obligation under this Consent Decree.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Mosaic shall provide notice orally or by electronic or facsimile transmission to the NOAA Project Coordinator within 5 Business Days of when Mosaic first learns that the event might cause a delay. Within 30 Days thereafter, Mosaic shall provide in writing to the persons identified in Section XI (Notice), an explanation and description of the reasons for the delay; the anticipated duration of the delay, all actions taken or to be taken to prevent or minimize the delay, a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay, Mosaic's rationale for attributing such delay to a force majeure event if it intends to assert such a claim, and a statement as to whether, in Mosaic's opinion, such circumstances may cause or contribute to an endangerment to public health and/or the environment. Mosaic shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Mosaic from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Mosaic shall be deemed to know of any circumstance of which Mosaic, any entity controlled by Mosaic, or its contractors knew or should have known.

46. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees agree that the delay is attributable or potentially attributable to a force majeure event, the Trustees shall notify Mosaic in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

47. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, they will notify Mosaic in writing of their decision. Mosaic may dispute any force majeure determination by the Trustees pursuant to the dispute resolution procedures set forth in Section XV and Paragraph 48 of this Consent Decree.

48. If Mosaic elects to invoke the dispute resolution procedures set forth in Section XV ("Dispute Resolution") regarding the Trustees' notice under Paragraph 46 or 47, it shall do so no later than 15 Days after receipt of the Trustees' notice. In any such proceeding, Mosaic shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Mosaic complied with the requirements of Paragraphs 44 and 45, above. If Mosaic carries this burden, the delay at issue shall be deemed not to be a violation by Mosaic of the affected obligation(s) of this Consent Decree.

## **XV. DISPUTE RESOLUTION**

49. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the Trustees and EPC to enforce obligations of Mosaic under this Consent Decree that have not been disputed in accordance with this Section.

50. Informal Dispute Resolution. Mosaic may initiate dispute resolution under this Section by sending a written notice to all Parties. The notice shall identify the issue in dispute and Mosaic's position concerning the issue. The Parties shall attempt to resolve the dispute by consensus by engaging in good faith informal negotiations. Each Party agrees that it will devote reasonable time and effort to such informal negotiations. The period for informal negotiations shall not exceed 20 Days from the date the notice is sent, unless this time period is modified by written agreement of the Parties. In the event the Parties are unable to reach agreement during such informal negotiation period, the Plaintiff(s) or EPC (if the dispute involves EPC) shall provide Mosaic with a written summary of their position regarding the issues in dispute within 45 Days from the end of the informal negotiations. The Plaintiff(s) and EPC may provide a joint summary or individual summaries. In the event that a party takes more than 45 Days to provide its summary, stipulated penalties shall not accrue under this Consent Decree from the 46<sup>th</sup> Day through the date that party issues its summary. Once all parties involved in the dispute have

issued written summaries, stipulated penalties shall once again accrue, and shall continue to accrue during the remainder of the dispute resolution process.

51. Formal Dispute Resolution In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Plaintiff(s), individually or jointly, or by EPC shall be considered binding on Mosaic unless, within 30 Days after Mosaic receives the Plaintiff(s)' or EPC's written summary, Mosaic invokes the formal dispute resolution procedures of this Section by serving the Plaintiff or EPC with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by Mosaic.

52. Within 60 Days after receipt of Mosaic's Statement of Position, the Plaintiff(s) or EPC shall serve on Mosaic their Statement of Position, including any factual data, analysis, or opinion supporting each position and all supporting documentation relied upon by the Plaintiff(s) or EPC. Within 15 Days after receipt of the Statement of Position, Mosaic may submit a Reply.

53. A record of the dispute shall be maintained by the Plaintiff(s) or EPC and shall contain all Statements of Position, including supporting documentation, and any Reply. Where appropriate, the Plaintiff(s) or EPC may allow submission of supplemental Statements of Position by the Parties.

54. The Plaintiff(s) or EPC shall issue a final decision resolving the dispute based on the record. This decision shall be binding on Mosaic, subject only to the right to seek judicial review pursuant to Paragraph 55. Decisions for the Florida Trustees will be made by the Secretary of FDEP or his designee.

55. Any decision made by the Plaintiff(s) or EPC pursuant to this Section shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Mosaic with the Court and served on all Parties within 45 Days of receipt of the Plaintiff(s)' or EPC's final decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiff(s) and EPC may file a joint response or individual response to Mosaic's motion. In the event that the Court takes more than 45 Days to rule on Mosaic's motion, stipulated penalties shall cease to accrue on the 46<sup>th</sup> Day.

56. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by the Trustees under this Consent Decree; the adequacy of the performance of Work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the record under applicable principles of administrative law, which the parties agree apply. Mosaic shall have the burden of demonstrating, based on the record maintained by the Trustees, that the position of the Plaintiff(s) is arbitrary and capricious or



otherwise not in accordance with law. Mosaic may move the Court to supplement the record. Plaintiffs and EPC reserve the right to take the position that the record should not be supplemented.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, Mosaic shall bear the burden of demonstrating that its position complies with this Consent Decree and better achieves the objectives of the Consent Decree.

57. The invocation of informal or formal dispute resolution procedures pursuant to this Section shall not extend, postpone, or affect in any way any obligation of Mosaic under this Consent Decree that is not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first Day of noncompliance with any applicable provision of this Consent Decree. In the event that Mosaic does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI ("Stipulated Penalties").

## **XVI. STIPULATED PENALTIES**

58. Mosaic shall be liable for stipulated penalties to the United States, the State of Florida and EPC in the amounts set forth in Paragraph 59 for failure to comply with the requirements of this Consent Decree specified below. "Compliance" by Mosaic shall include completion of the activities identified in Paragraph 59 within the schedules established by and approved in compliance with the Consent Decree, the Statement of Work and any work plans or other documents approved by the Trustees pursuant to the Statement of Work.

59. The following stipulated penalties shall accrue per violation per Day for Mosaic's failure to comply with the time schedules established for the following implementation requirements:

A. Failure to timely submit any draft or revised work plan required under the Statement of Work:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$250	1 <sup>st</sup> through 7 <sup>th</sup> day
\$500	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> day and beyond

B. Failure to comply with schedules for Restoration Project implementation set forth in the Statement of Work, including for monitoring and for any other activities approved under the Statement of Work to complete the Restoration Project, or failure to meet the deadlines established in Section VII (Conservation Easements):

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
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\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,250	31 <sup>st</sup> day and beyond

C. Failure to make the payments required by Section VIII (Reimbursement of Past Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$1,000	8 <sup>th</sup> through 30 <sup>th</sup> day
\$2,500	31 <sup>st</sup> day and beyond

D. Failure to make a payment required by Section IX (Reimbursement of Future Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$100	1 <sup>st</sup> through 7 <sup>th</sup> day
\$175	8 <sup>th</sup> through 30 <sup>th</sup> day
\$250	31 <sup>st</sup> day and beyond

60. All penalties shall begin to accrue on the Day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Separate penalties will accrue for separate violations of this Consent Decree. Notwithstanding any other provision of this Section, Plaintiffs and EPC, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State, or EPC to seek any other remedies or sanctions available by virtue of Mosaic's violation of this Consent Decree or of the statutes and regulations upon which it is based, provided, however, that the United States, the State and EPC shall not seek civil penalties for any violation for which a stipulated penalty is collected pursuant to this Consent Decree.

61. Following the determination by Plaintiffs and EPC, individually or jointly, that Mosaic failed to comply with one of the requirements of this Consent Decree listed above, the Party may give Mosaic written notification of the same and describe the noncompliance. The Party may send Mosaic a written demand for the payment of penalties. Penalties shall accrue and are due as provided in this Section regardless of whether Party has notified Mosaic of a violation. All stipulated penalties due under this Section shall be due and payable within 30 Days of Mosaic's receipt of a demand for payment from Party, unless Mosaic invokes dispute resolution under Section XV of this Consent Decree. If Mosaic invokes dispute resolution under

Section XV, then stipulated penalties shall be due at the time specified in Paragraph 65, unless Mosaic prevails in the dispute resolution process. Interest shall accrue on unpaid stipulated penalties beginning on the 31st Day after Mosaic's receipt of the demand for stipulated penalties. Penalties assessed by the Plaintiffs, individually or jointly, shall be paid 50 percent to the United States and 50 percent to the State, regardless of whether the demand is made individually or jointly.

62. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." This payment shall be mailed to the U.S. Attorney's Office, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, referencing "United States and the State of Florida v. Mosaic, DOJ Case Number 90-5-2-1-08961" and the name and address of the Party making payment. Copies of the check and notice shall be sent to the Parties as specified in Section XI (Notice).

63. All payments made to the State of Florida under this Section shall be paid by certified check made payable to "The Department of Environmental Protection" and shall include thereon OGC Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to FDEP's contact designated in paragraph 36.

64. All payments made to EPC under this Section shall be paid by certified check made payable to "The Environmental Protection Commission." This payment shall be mailed to the Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

65. In the event Mosaic fails to pay stipulated penalties when due, the United States, the State of Florida and EPC may institute a legal proceeding to collect such penalties, as well as interest accruing on any unpaid balance, as provided by law. Stipulated penalties continue to accrue during dispute resolution, but need not be paid until the following:

A. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid within 30 Days of the agreement;

B. If the dispute is appealed to this Court and the Plaintiff(s) or EPC prevails in whole or in part, Mosaic shall pay all accrued penalties determined by the Court to be owed within 60 Days of receipt of the Court's decision or order, except as provided by Paragraph 65(C) below. Mosaic shall not be required to pay any stipulated penalties or court costs if it prevails on the disputed issue;

C. If the District Court's decision is appealed by any Party, Mosaic shall pay all accrued penalties determined by the District Court to be owed into an interest-bearing escrow account within 60 Days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 Days. Within 15 Days of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State of Florida, EPC, or to Mosaic to the extent that it prevails.

**XVII. COVENANTS NOT TO SUE  
BY THE UNITED STATES, THE STATE OF FLORIDA AND EPC**

66. Covenant by the United States. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the United States covenants not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the United States under Section XVI (Stipulated Penalties), and to pay any interest owed to the United States due to the failure to timely pay any amount owed to the United States.

67. Covenant by the State of Florida and EPC. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the State of Florida and EPC covenant not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Chapters 376 and 403, Florida Statutes, to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the State under Section XVI (Stipulated Penalties), and to pay any interest owed to the State due to the failure to timely pay any amount owed to the State.

68. These covenants not to sue by the United States, the State of Florida and EPC extend only to Mosaic: provided, however, that these covenants not to sue (and the reservations thereto) shall also apply to: (a) the successors and assigns of Mosaic, but only to the extent that the alleged liability of the successor or assign is based on the alleged liability of Mosaic; and (b) the officers, directors, agents, and employees of Mosaic, but only to the extent that the alleged liability of the officer, director, agent, or employee is based on said person's status as an officer, director, agent, or employee of Mosaic, or as a result of conduct within the scope of such person's employment or authority.

**XVIII. RESERVATION OF RIGHTS BY THE UNITED STATES  
AND THE STATE OF FLORIDA**

69. Notwithstanding any other provision of this Consent Decree, the United States and the State of Florida reserve, and this Consent Decree is without prejudice to all rights against Mosaic with respect to all matters not expressly included within Section XVII (Covenant Not to Sue by the United States and the State of Florida). Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Mosaic with respect to:

A. claims based on a failure by Mosaic to meet a material requirement of this Consent Decree;

B. liability for any costs incurred or to be incurred by the Plaintiffs that are not within the definitions of Natural Resource Damages, Past Costs or Future Costs;

C. liability for damages for any injury to, destruction of, or loss of natural resources resulting from any event or releases or threatened releases of hazardous substances or oil, other than the hazardous substances known to have been released in the Spill;

D. any and all criminal liability; and

E. violation of any Federal or State law during the implementation of Restoration Projects or monitoring of such Project.

70. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this consent Decree, the United States and the State of Florida reserve the right to institute proceedings in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damage assessment: (a) based on conditions caused by the Spill, unknown to the Trustees as of the date when this Consent Decree is lodged with the Court, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources; or (b) based on information received by the Trustees after the date when this Consent Decree is lodged with this Court indicating that the Spill has resulted in injury to, destruction of, or loss of natural resources of a type or magnitude unknown to the Trustees as of the date of this Consent Decree is lodged with the Court. For purposes of this provision, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the DARP/EA and the administrative record supporting the DARP/EA.

71. The covenants not to sue set forth above do not pertain to any matters other than those expressly set forth in the Consent Decree.

72. The failure of the Trustees to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the United States' and the State of Florida's right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by the United States and the State of Florida to enforce such a provision.

73. In any subsequent administrative or judicial proceeding initiated by the United States or the State of Florida for injunctive relief, recovery of response costs, or other appropriate relief relating to the Spill, Mosaic 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 to any claim brought pursuant to Paragraph 69, above, based upon any contention that the claim raised by the United States or the State of Florida in subsequent proceedings was or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVII (Covenants Not to Sue by the United States and the State), nor does it preclude Mosaic from raising other available defenses in any such subsequent proceedings.

74. The United States and the State of Florida retain all authority and reserve all rights to take any and all action authorized by law, to the extent not in conflict with the terms of this Consent Decree.



## **XIX. COVENANT OF MOSAIC**

75. Mosaic covenants not to sue and agrees not to assert any claims or causes of action against the Trustees, their employees agents, experts, or contractors, with respect to the Spill, including but not limited to:

A. Any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. §9507) 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 State or Federal law;

B. Any claim against the Trustees, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, relating to Natural Resource Damages resulting from the Spill;

C. Any claims arising out of activities related to the Restoration Projects, including, without limitation, claims based on the Trustees' selection of the Restoration Projects, oversight of the Restoration Projects, and/or the approval of plans for such activities;

D. Any claims under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law relating to Natural Resource Damages resulting from the Spill.

76. 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).

77. Mosaic reserves its right to contest any claim allowed by Sections XVII (Covenant Not to Sue by the United States and the State) and/or XVIII (Reservation of Rights by the United States and the State) of this Consent Decree, and Mosaic does not by entering into to this Consent Decree waive or release any defenses whatsoever to any such claims, except that Mosaic covenants not to assert, and may not maintain, any defense based upon the principles of waiver, res judicata, collateral estoppels, issue preclusion, claim splitting, or any other defense based upon the contention that the claims were or should have been brought in the instant case.

78. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of Mosaic with respect to all matters other than those expressly specified in the covenants set forth in Paragraphs 76.

## **XX. CERTIFICATION**

79. Mosaic hereby certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Trustees all information requested by the Trustees regarding alleged Natural Resource Damages associated with the Spill, which are currently in the possession of its officers, employees, contractors, and agents that relate in any way to the alleged release of hazardous substances at or from the Facility associated with the Spill.

## XXI. ACCESS

80. Upon reasonable notice, Mosaic shall provide to the Trustees and EPC, and their designated representatives, access at reasonable times to all locations used in implementing the Restoration Projects, including to all areas of the Restoration Projects as well as to all vessels used by Mosaic, or their contractors, for any purpose relating to the implementation and oversight of the Restoration Projects, to future monitoring activity at Restoration Project Sites, or to corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree, including but not limited to:

A. Interviewing Mosaic's personnel involved in field work conducted pursuant to the Statement of Work provided, however, that Mosaic and its personnel shall have the right to have legal counsel present;

B. Inspecting records, and/or operating logs related to implementation of the Restoration Projects;

C. Reviewing the progress of Mosaic in implementing the Restoration Projects;

D. Conducting such sampling, tests or other actions as the Trustees and/or their representatives deem appropriate for implementation and oversight of the Restoration Projects, for future monitoring, for corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree;

E. Using a camera, sound recording, or other documentary equipment to make or preserve observations or measurements; and

F. Verifying any reports or data that the Mosaic submits to the Trustees.

G. During any site visits to or inspections of the Restoration Projects, the Trustees and EPC, their representatives, and contractors must comply with reasonable health and safety instructions given by Mosaic at the time of the site visit or inspection, including applicable OSHA requirements.

81. Pursuant to the above requirements, Mosaic acknowledges the right of the Trustees and EPC, and their designated representatives, to be present at all times that Mosaic, including its contractor(s) or subcontractor(s), are performing any work or activity involved in implementing the Restoration Projects. The Trustees and EPC may designate other representatives, including, but not limited to, federal and state employees, contractors, and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Restoration Projects. All Parties recognize that employees and contractors of FDEP are subject to Florida Statutes pertaining to confidential business information.

82. Mosaic representatives may accompany the Trustees, EPC and/or their representatives whenever and wherever they are present at the Restoration Projects sites, but may not delay or impede any access or activities of the Trustees and EPC authorized under this Section. Further, with respect to any samples taken by Mosaic from the Restoration Projects

sites, copies of the results of any analyses or tests on such samples shall be provided to the Trustees and EPC, or their designated representatives, upon request.

83. When requested and upon reasonable advance notice by the Trustees, Mosaic shall make available to the Trustees, at an appropriate location, any of its employees, agents, or representatives with knowledge of material facts concerning the implementation of the Restoration Projects for purposes of investigations, information gathering, or interviews by the Trustees provided, however, that a Mosaic representative and Mosaic's or its employees', agents' or representatives' legal counsel are present at any such meeting(s).

## **XXII. RETENTION OF RECORDS AND ACCESS TO INFORMATION**

84. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), Mosaic shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the Spill and/or the materials related to alleged Natural Resource Damages, which may have been associated with the alleged release of hazardous materials during the Spill.

85. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), and excepting records, documents, and other information prepared in anticipation of litigation, protected by the attorney-client privilege or any other privilege recognized by federal law, Mosaic shall make available to the Trustees and EPC, or their representatives, within 30 Days of a written request, copies of any records, documents, data, or information not covered in paragraph 86, whether in written or electronic form, maintained by or in the possession of Mosaic, their contractors, agents or representatives, which relate to any work or activity involved with alleged Natural Resource Damages associated with the Spill and/or any such records associated with implementing any portion of the Restoration Projects that is reasonably requested by the Trustees, EPC, or their representatives under this Decree.

86. Any record, document, data, and other information that Mosaic is required by this Consent Decree to provide directly to the Trustees, EPC, or their representatives, shall be considered a public record and shall not be withheld or protected from release. No claim of privilege or confidentiality shall be made with respect to any sampling, analytical, monitoring, hydrologic, hydrogeologic, scientific, chemical, or engineering data generated through any work or activity undertaken in implementing any portion of the Restoration Projects pursuant to this Consent Decree. Such non-privileged records, documents, data and other information include those used in surveying, design, construction, analysis of data, chain of custody records, receipts, final reports, correspondence, or other records or materials related to the Restoration Projects. Notwithstanding any other provision of this Consent Decree, however, no record, document, data or other information of Mosaic's, its counsel, or its experts which is entitled to privilege or work product protection relative to the putative class action litigation styled *Curd, et al. v. Mosaic Fertilizer, LLC*, Thirteenth Judicial Circuit Court, Hillsborough County, Florida (Case No. 04-8653) shall lose such protections or otherwise be subject to discovery or production to the plaintiffs in that action, the United States, the State of Florida, EPC, or any other person as a result of any term or condition of this Consent Decree or any related document, except that

Mosaic recognizes that the State of Florida is subject to the requirements of Florida Law in regards to public records.

87. Mosaic may assert that certain records, documents or other information provided to the Trustees include or constitute confidential business information that is subject to legal protection under federal or state law ("CBI"). Whenever Mosaic submits a record, document or other information to the Trustees or EPC which Mosaic asserts includes or constitutes CBI, Mosaic shall identify the record, document, or information, or portion thereof, which is asserted to be CBI with particularity and demonstrate a proper basis in fact and law why the information is considered to be CBI. Records, documents or information, or portions thereof, that the Trustees determine to be CBI under applicable federal or state laws or regulations will be protected from further release to the extent and in the manner afforded by such laws. If CBI is not identified by Mosaic at the time a record, document, or information is submitted to the Trustees or EPC, or if the Trustees notify Mosaic that the record, document or information is not determined to be CBI under applicable federal or state laws or regulations, the public may be given access to such documents or information without further notice to Mosaic.

88. In the event that Mosaic believes that the records, documents, data, or information requested by the Trustees, EPC, and/or their representatives under paragraph 85 of this Consent Decree is privileged or subject to work product protection, Mosaic may assert that claim by providing to the Trustees and EPC within 60 Days after the request the following information for each item as to which a privilege is claimed:

A. A description of the information, data, or other material which contains sufficient information to allow the District Court to determine whether the claimed privilege or work product protection applies. If the material at issue is a document, Mosaic shall, at a minimum, provide the following information in as much detail as possible without revealing any information claimed privileged or protected: (i) the title of the document; (ii) the date of the document; (iii) the name and title of the author of the document; (iv) the name and title of each addressee and recipient; and (v) a description of the contents of the document; and

B. A statement of the specific privilege(s) or protection(s) claimed and the basis for the claim. If Mosaic fails without good cause to timely provide the information required by this Subparagraph, the Trustees shall interpret such failure as a waiver of any claim of privilege with respect to the specific information, data, or other material for which it failed to timely provide the information. If the Trustees or EPC object to Mosaic's claim that the information, data, or other material is privileged or protected, Trustees or EPC may file a motion with the Court to compel access to the material.

C. Notwithstanding the provisions of this Paragraph and its Subparagraphs, Mosaic must meet all statutory requirements to sustain a claim of privilege under Florida Law.

89. At the conclusion of the required information-retention period, Mosaic shall notify the Trustees and EPC at least 60 Days prior to the destruction of any documents, records, or other information subject to the requirements of this Consent Decree.

90. This Consent Decree in no way limits or affects any right to obtain information held by the United States, the State of Florida, or EPC pursuant to applicable state or federal laws, rules, regulations, or permits, nor does it limit or affect any duty or obligation of Mosaic to maintain documents, records, or other information imposed by applicable federal or state laws, regulations or permits.

91. The Parties recognize that documents submitted to the State Trustees and EPC are subject to provisions of Chapter 119, Florida Statutes, unless otherwise exempt from disclosure per Florida Statutes.

### **XXIII. MODIFICATION**

92. The terms of this Consent Decree, including the work or deadlines in the Statement of Work, may be modified only by a subsequent written agreement signed by the Parties, or as ordered by the Court upon the noticed motion of any Party. Where any modification constitutes a material change to any terms of this Consent Decree, it shall be effective only upon approval by the Court. Changes to the Appendices to this Consent Decree, agreed to by the Parties in writing, shall be deemed not to be material.

93. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon entry of the Consent Decree in its entirety, without modification, addition, or deletion except as agreed to in writing by the Parties.

94. Economic hardship or changed financial circumstances of Mosaic shall not serve as a basis for modification of this Consent Decree.

### **XXIV. COMPLIANCE WITH OTHER LAWS**

95. This Consent Decree shall not be construed in any way to relieve Mosaic or any other person or entity from the obligation to comply with any Federal, State, or local law, except that, as previously provided in Paragraph 26 of this Consent Decree, permits from FDEP and EPC will not be required for the Work.

### **XXV. TERMINATION**

96. This Consent Decree shall terminate upon granting of a motion duly filed by Mosaic, demonstrating that Mosaic has received a Project Final Completion Certificate for each of the Restoration Projects from the Trustees, paid the amounts required by Section VIII (Reimbursement of Past Costs) and Section IX (Reimbursement of Future Costs), and any outstanding stipulated penalties or interest under Sections XVI (Stipulated Penalties). Before Mosaic files any such motion, it shall meet and confer with the Plaintiffs and EPC, to ensure that all Parties agree that Mosaic has satisfied its obligations under the Consent Decree.

### **XXVI. LODGING AND PUBLIC NOTICE**

97. The Parties agree and acknowledge that final approval by the United States and the State of Florida and entry of this Consent Decree is subject to a 30 Day period for public notice and comment in accordance with Section 122 of CERCLA, 42 U.S.C. § 9622(d)(2)(B),



and U.S. Department of Justice policy. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment. The United States and the State of Florida each reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Mosaic and EPC consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States or the State of Florida have notified them in writing that there is no longer unanimous support for the entry of the Consent Decree. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, 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.

## **XXVII. SIGNATORIES AND SERVICE**

98. Each undersigned representative of Mosaic, the State of Florida, EPC and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

99. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. With regard to matters relating to this Consent Decree and its enforcement and the filing of the Complaint, Mosaic shall identify on the attached signature page the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that entity with respect to all matters arising under or relating to this Consent Decree and the filing of the Complaint. Mosaic agrees to accept service of process by mail with respect to all matters arising 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.

## **XXVIII. INTEGRATION**

100. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent 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 Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

## **XXIX. RETENTION OF JURISDICTION**

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

**XXVIII. FINAL JUDGMENT**

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

FOR THE PLAINTIFF UNITED STATES:

DATED: 2/8/13




IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

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FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By:   
LARRY MORGAN  
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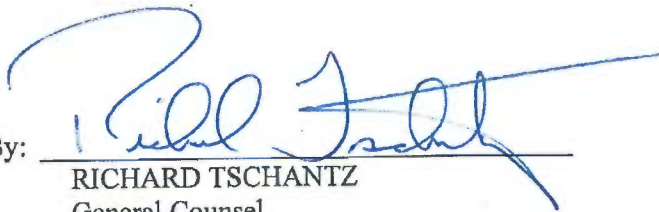
FOR RULE 19 PARTY ENVIRONMENTAL  
PROTECTION COMMISSION OF HILLSBOROUGH  
COUNTY

By: \_\_\_\_\_  
RICHARD TSCHANTZ  
General Counsel  
Environmental Protection Commission of  
Hillsborough County  
3629 Queen Palma Drive  
Tampa FL 33619  
813-627-2600 Ext. 1056

FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By: \_\_\_\_\_  
LARRY MORGAN  
Florida Department of Environmental Protection  
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FOR RULE 19 PARTY ENVIRONMENTAL  
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RICHARD TSCHANTZ  
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3629 Queen Palm Drive  
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FOR DEFENDANT, MOSAIC FERTILIZER, LLC

By: 

RICHARD L. MACK  
Executive Vice President  
Mosaic Fertilizer, LLC  
3033 Campus Drive  
Plymouth, MN 55441  
(763) 577-2851



**UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION**

UNITED STATES OF AMERICA;  
STATE OF FLORIDA DEPARTMENT  
OF ENVIRONMENTAL PROTECTION;  
and HERSCHEL T. VINYARD, JR., as  
Natural Resources Trustees for the State  
of Florida,

Plaintiffs,

v.

MOSAIC FERTILIZER, LLC,

Defendant,

v.

ENVIRONMENTAL PROTECTION  
COMMISSION OF HILLSBOROUGH  
COUNTY,

Rule 19 Party

Civil Action No.

**CONSENT DECREE ADDRESSING NATURAL RESOURCE DAMAGES**

This Consent Decree is made and entered into by and between the United States of America ("United States"), on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service ("DOI"), and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP and designated Natural Resources Trustee for the State of Florida ("State" or "State of Florida"), the Environmental Protection Commission of Hillsborough County ("EPC"), and Mosaic Fertilizer, LLC ("Mosaic"). NOAA, DOI, FDEP, and Herschel T. Vinyard, Jr., are collectively referred to as the "Trustees;" and the United States, the State, EPC and Mosaic are collectively referred to as the "Parties."

## **BACKGROUND**

1. Contemporaneously with the lodging of this Consent Decree, the United States, on behalf of DOI and NOAA, and FDEP and Herschel T. Vinyard, Jr., filed a Complaint in this matter against Mosaic pursuant to 28 U.S.C. §§ 1331, 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9613(b). FDEP also made a claim in the Complaint pursuant to §403.727, Florida Statutes. The Complaint seeks Natural Resource Damages arising from an alleged release of hazardous substances and other pollutants into South Archie Creek Canal, Hillsborough Bay, and Tampa Bay, in the State of Florida, through a spill of approximately 65 million gallons of acidic process water from a phosphoric acid/fertilizer production facility located in Riverview, Florida (the "Facility"), which occurred on or about September 5 and 6, 2004 (the "Spill"). At the time of the Spill, which coincided with severe weather conditions associated with Hurricane Frances, the Facility was owned by Cargill Fertilizer, Inc. Mosaic succeeded to the liabilities of Cargill Fertilizer, Inc. associated with the claims for Natural Resource Damages as a result of an October, 2004 merger of IMC Global Inc. and Cargill, Incorporated's Crop Nutrition Division. EPC is named in the Complaint as an indispensable party pursuant to Federal Rule of Civil Procedure 19.

2. DOI and NOAA have been designated Federal Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. *See* Executive Order 12,580 and the National Contingency Plan, 40 C.F.R. § 300.600(1) and (2). FDEP and Herschel T. Vinyard, Jr. have been designated State Trustees for natural resources impacted by unlawful discharges of hazardous substances and other pollutants under CERCLA. The Trustees share trusteeship for natural resources affected by the Spill and have worked together to assess the natural resource injuries and losses caused by the Spill and to plan restoration to compensate for those losses.

3. The Trustees and Mosaic agreed to perform a cooperative, restoration-based assessment to address potential natural resource injuries caused by the Spill. After completing the cooperative assessment, the Trustees concluded that hazardous substances released at or from the Facility injured or potentially injured benthic sediment habitat and organisms, aquatic habitats and organisms, terrestrial wildlife habitat, and other natural resources.

4. The Trustees' assessment of these injuries to natural resources, including their estimates of interim losses and the Restoration Projects (as defined herein) proposed to compensate for those losses, are identified in the Final Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA") for the Facility, dated August 17, 2012, attached hereto as Appendix A, and incorporated herein by reference.

5. The DARP/EA specifies the Restoration Projects to be implemented by Mosaic to restore natural resources allegedly injured by the Spill. These Restoration Projects are as follows: 1) a previously completed Project to remove exotic and invasive species from approximately 26.46 acres of mangrove and salt marsh allegedly damaged by the Spill; 2) the Giant's Fish Camp Restoration Project, which includes reconnection of historic tidal flows and

creation of oyster habitat; 3) the Borrow Pit Restoration Project, which enhances a wetland presently covered with invasive plants; and 4) the preservation of approximately 103.76 acres of mangrove and marsh habitat adjacent to Hillsborough Bay and the Alafia River in Hillsborough County, Florida through the execution of two Conservation Easements, attached hereto as Appendix B, and incorporated herein by reference, that protect the conservation values of the properties in perpetuity. These Projects are more fully described in Section VI of this Consent Decree and in the Statement of Work, attached hereto as Appendix C, and incorporated herein by reference. When timely and successfully completed, these Projects will compensate for the loss of natural resources or natural resource services, allegedly injured, destroyed, or lost as a result of the Spill.

6. During development of the DARP/EA, the Trustees provided opportunities for public participation, including a formal public review and comment period on the proposed DARP/EA, in accordance with 43 C.F.R. §§ 11.32 and 11.81, 42 U.S.C. §§ 9607(f) and 9611(1), and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*

7. This Consent Decree is a settlement of a contested matter, and, consequently, no action or lack of action by any Party, including, without limitation, participating in the cooperative assessment, developing and performing Restoration Projects, the payment or the acceptance of any consideration, represents any admission of any nature, including fact, law, liability, or responsibility by any Party. Mosaic agrees to the Court's jurisdiction to enter and enforce this Consent Decree and agrees in any such enforcement proceeding not to challenge the terms of this Consent Decree.

8. The Parties have consented to the entry of this Consent Decree without trial of any issues, and the Parties hereby stipulate that in order to resolve the issues stated in the Complaint, this Consent Decree should be entered. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith, and implementation of this Consent Decree will expedite the restoration of natural resources, and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED as follows:

## **I. JURISDICTION AND VENUE**

9. This Court has personal jurisdiction over the Parties and has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, the Clean Water Act ("CWA"), 33 U.S.C. § 1321(n), and Sections 107 and 113(b) of CERCLA, 42 U.S.C. § 9613(b). Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and Section 113(b) of CERCLA, 42 U.S.C. § 9613(b). Solely for the purposes of this Consent Decree, the Parties waive all objections and defenses that they may have to the personal jurisdiction of the Court, to venue in this District, to enforcement of this Consent Decree by this Court, and to service of process.

## **II. PARTIES BOUND**

10. This Consent Decree applies to and is binding upon the United States, the State, EPC, Mosaic, and its successors and assigns. Any change in ownership or corporate status of

Mosaic shall in no way alter its responsibilities under this Consent Decree. Each signatory to this Consent Decree certifies that she or he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind her or his Party to it.

### **III. OBJECTIVES**

11. The Parties to this Consent Decree agree that settlement of this action without further litigation is in the public interest and that entry of the Consent Decree is the most appropriate means of resolving this action.

12. Mosaic does not admit any of the facts or allegations contained in the Complaint, and neither Mosaic's participation in the cooperative assessment, its development and performance of Restoration Projects, its entry into this Consent Decree, nor any provision herein shall be construed as an admission of any kind for any purpose.

13. This Consent Decree provides the terms upon which the Parties agree to settle the claims of the United States and the State of Florida pursuant to CERCLA, the CWA, and the claims of the State of Florida under § 403.727, Florida Statutes, concerning Natural Resource Damages that allegedly resulted from the Spill.

14. The Objectives of the Parties in entering into this Consent Decree are to compensate the Trustees, on behalf of the public, for alleged Natural Resource Damages by restoring, replacing, or acquiring resources that are the equivalent of the allegedly injured, destroyed, or lost natural resources, and to compensate the Plaintiffs and EPC for Past and Future Costs.

### **IV. DEFINITIONS**

15. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in the CWA, 33 U.S.C. § 1321(a), shall have the meaning assigned to them in the CWA, and terms that are defined in CERCLA, 42 U.S.C. § 9601 *et seq.*, and in regulations promulgated under CERCLA, 43 C.F.R. Part 11 and 40 C.F.R. Part 300, shall have the meaning assigned to them in CERCLA, or in such regulations. Whenever terms listed below are used in this Consent Decree or in the attachments hereto and incorporated hereunder the following definitions shall apply:

A. "Consent Decree" means this document entitled "Consent Decree Addressing Natural Resource Damages," including all Appendices.

B. "Conservation Easements" means the documents attached as Appendix B.

C. "DARP/EA" means the plan entitled "Final Natural Resources Damage Assessment and Restoration Plan/Environmental Assessment (DARP/EA) for the Riverview, Florida Phosphogypsum Stack Release, September 5-6, 2004," dated August 17, 2012, and attached as Appendix A to this Consent Decree.

D. "Day" means a calendar day unless expressly stated to be a business day. "Business Day" shall mean a Day other than a Saturday, Sunday, or State or Federal holiday. In

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

E. “Effective Date” means the date on which either this Consent Decree or an order entering this Consent Decree is filed with the Clerk of the Court after the United States and the State of Florida have moved for entry and the District Judge has signed the Consent Decree or an order entering this Consent Decree.

F. “Federal Trustees” means NOAA and DOI.

G. “Future Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the Trustees and EPC incur in connection with the implementation of the Restoration Projects and this Consent Decree, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree, implementing, monitoring, correcting or otherwise overseeing the Restoration Projects, or otherwise enforcing this Consent Decree commencing June 2, 2012 for the Federal Trustees and EPC, and July 3, 2012 for State Trustees. Indirect costs shall be calculated pursuant to NOAA’s established indirect cost rates for the Damage Assessment, Remediation, and Restoration Program for the fiscal year(s) in which the indirect costs were incurred.

H. “Holder” means a person or entity qualified under Florida Law that is approved by the Trustees to hold the Conservation Easement. EPC is the initial Holder.

I. “Interest” means interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a).

J. “Natural Resource Damages” means damages recoverable pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and Section 311(f) of the CWA, 33 U.S.C. § 1321(f).

K. “Paragraph” means a portion of this Consent Decree identified by an Arabic numeral.

L. “Past Costs” shall mean all costs, including, but not limited to, direct and indirect costs, incurred by the Federal Trustees between May 11, 2008 and June 1, 2012, by the State Trustees between May 1, 2010 and July 2, 2012, and by EPC between July 2, 2005 and June 1, 2012, in connection with the assessment of and response to Natural Resource Damages arising out of or resulting from the Spill, including but not limited to costs involved in reviewing or developing plans, reports and other items pursuant to this Consent Decree. All Past Costs are itemized in the invoices attached to this Consent Decree as Appendix D.

M. “Plaintiff(s)” mean the Plaintiffs in this litigation, the United States of America, the State of Florida Department of Environmental Protection, and Herschel T. Vinyard, Jr., as Natural Resource Trustees for the State of Florida.



N. “Restoration Projects” or “Projects” means the restoration actions briefly described in Section VI of this Consent Decree, and more fully described in the DARP/EA and Statement of Work. The Restoration Projects include the recorded Conservation Easements.

O. “Section” means a portion of the Consent Decree identified by an uppercase Roman numeral.

P. “State Trustees” means FDEP and Herschel T. Vinyard, Jr.

Q. “Statement of Work” means the document attached as Appendix C.

R. “Trustees” means the Federal Trustees and the State Trustees.

S. “Work” shall mean implementation by Mosaic of those activities that are described in Section VI (Natural Resource Restoration Requirements) and Appendix C of this Consent Decree (Statement of Work).

## **V. EFFECT OF THE CONSENT DECREE**

16. Copies of the Consent Decree. Mosaic shall provide a copy of this Consent Decree to each entity representing it with respect to the Restoration Projects, and to the Supervising Contractor (per Paragraph 22(A)) hired to oversee construction of the Restoration Projects who will be responsible for distributing the Consent Decree to all subcontractors. Mosaic shall nonetheless remain responsible for ensuring that its contractors and subcontractors perform the Restoration Projects in accordance with this Consent Decree.

17. Consent Decree Not a Permit. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any Federal, State, or local law, regulation, rule, or ordinance. The United States and the State of Florida do not, by signing this Consent Decree, warrant or aver in any manner that Mosaic’s compliance with the Consent Decree will constitute or result in compliance with the requirements of any Federal, State, and local laws, regulations, or rules that may apply to the implementation of the Restoration Projects or other activities required by the terms of this Consent Decree. Notwithstanding this provision, implementation of the Statement of Work does not require a separate permit from FDEP, or EPC.

18. Responsibility for Compliance. Notwithstanding any action by the United States and the State, including, without limitation, their issuance of the DARP/EA or the review and approval of any design, plan, report, or other information or action formulated by Mosaic under this Consent Decree, Mosaic is and shall remain solely responsible for compliance with all terms and requirements of this Consent Decree, including those related to success criteria.

19. The United States and/or the State may take any and all legal or administrative actions necessary to enforce the terms of this Consent Decree. In the event that the United States and/or the State take legal or administrative actions to enforce this Consent Decree, and such action is successful, Mosaic shall pay all reasonable costs incurred by the United States and/or the State related to this action including, but not limited to, enforcement costs, attorney’s fees and interest accruing on any balance.

20. Nothing in this Consent Decree shall be construed to create any right in, or grant any cause of action to, any person not a Party to this Consent Decree. Each of the Parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each Party may have with respect to the Spill against any person not a Party hereto.

## VI. NATURAL RESOURCE DAMAGE RESTORATION REQUIREMENTS

21. Mosaic shall fund, perform, and complete all work and other activities required to implement the Restoration Projects in accordance with (a) the DARP/EA; (b) the Statement of Work; (c) any other plans intended to accomplish the Restoration Projects and Statement of Work approved by the Trustees; (d) the procedures, schedules and terms set forth in this Consent Decree; and (e) all applicable laws and permits. The Projects are briefly described below. Thorough descriptions of the Projects and deadlines associated with their construction and completion are in the Statement of Work.

A. Removal of Exotic Invasive Vegetation (Emergency Primary Restoration). This Project involved the removal of exotic invasive plants from and adjacent to approximately 26 acres of mangrove and tidal marsh that allegedly were damaged by the Spill and were surrounded by exotic invasive vegetation. The exotic invasive vegetation was primarily composed of Brazilian pepper, but included other species such as chinaberry (*Melia azedarach*), lead tree (*Leucaena leucocephala*), and air potato (*Dioscorea bulbifera*). Due to their tolerance of freezing events, rapid re-growth following injury, and lack of native insect predators, these species are aggressive invaders of disturbed habitats and have a competitive advantage over many native tidal marsh, mangrove forest, and transitional zone plants. The Trustees determined that invasion by the exotic invasive vegetation into the approximately 26-acre tract of injured wetland was likely to occur without emergency action that would have resulted in an extended period of recovery for the wetland and could have lead to the complete loss of the wetland habitat and resource services. This Project has been completed in accordance with applicable requirements of this Consent Decree.

B. Giant's Fish Camp Hydrology Restoration with Oyster Reef and Tidal Creek Creation and Enhancement. This Project is located at the southwest corner of the Highway 41 Bridge at the former site of the Giant's Fish Camp. The goals of this Project are to restore and enhance mangrove habitat and associated natural resource services by improving the hydrology in the general area, and to create an oyster reef habitat to provide additional ecosystem enhancement. This Project includes (1) connecting the Giant's Camp marina basin to an existing tidal creek via creation of a new, approximately 1,003 linear feet, waterway; (2) reopening approximately 2,094 linear feet of additional remnant tidal creeks through mangrove habitat largely closed to tidal flows; (3) widening existing waterways and removing approximately 17,000 cubic yards of spoil to eliminate blockages to sheet flow; (4) improving the hydroperiod in an impounded tidal pond of approximately 0.53 acres by enhancing tidal creek connection; (5) enhancing 3,652 square feet of oyster reef habitat by placing substrate suitable for oyster larvae settlement ("cultch") along the seawall of the marina boat basin; (6) creating 2,000 square feet of oyster reef habitat within Channel B; and (7) creating 0.25 acres of wetland habitat (0.08 acres apply directly to this project as mitigation for wetland impacts and the remaining 0.17 acres will be "banked" for potential future mitigation needs, including but not limited to unanticipated wetland impacts which may occur during construction or to bolster meeting success criteria).

C. Borrow Pit Hydrological Restoration and Wetland Enhancement Project.

The Borrow Pit Hydrological Restoration and Wetland Enhancement Project is located between Old Highway 41 and Highway 41 North within a Mosaic-owned parcel. The objective of this Project is to improve habitat functionality through creation of a tidal creek (approximately 900 linear feet) and pond (approximately one acre) that will be connected to the Delaney Creek Pop-Off Canal. The mouth of the ditch that currently connects the Borrow Pit Project site to the Delaney Creek Pop-Off Canal will be widened and extended into the new tidal creek. The creek will flow into a tidal pond that will remain partially wet during all but the lowest tides of the year. Removal of invasive vegetation will allow for colonization by native wetland vegetation at low and high marsh elevations. A saltern will also be created adjacent to the wetland to provide additional habitat diversity. Wetland enhancement will comprise approximately four acres.

D. Conservation Easements over the Giant's Camp and Borrow Pit Restorations. Conservation easements totaling approximately 103.76 acres will secure the approximately 82.48 acres of mangrove forest with restored and newly created tidal creeks in the Giant's Fish Camp Restoration Project and approximately 21.28 acres of newly created tidal creek, pond and saltern in the Borrow Pit Project.

22. All Work undertaken as part of the Statement of Work shall comply with the requirements in Subparagraphs 22(A) through (D) below. The Parties recognize that the Restoration Projects will be constructed as set forth in the Statement of Work and that the times for completion of construction and compliance monitoring for each Project will be different. Mosaic shall submit a Completion of Project Construction Report and Final Report for each Project as it is completed. However, Mosaic will not receive a Certificate of Project Success for a Project until it has demonstrated that the Project meets applicable success criteria, or has performed supplemental compensatory restoration, if applicable.

A. Supervising Contractor. All aspects of the Work shall be taken under the direction and supervision of a qualified contractor, approved by the Trustees ("Supervising Contractor"). Mosaic has proposed, and the Trustees have approved John C. Landon, P.E., of Landon, Moree & Assoc., Inc., as Supervising Contractor. A replacement Supervising Contractor is subject to approval by the Trustees, which approval shall not be unreasonably withheld. If at any time Mosaic proposes to use a different Supervising Contractor for the Work, Mosaic shall notify the Trustees in writing and shall obtain from them written authorization to proceed before a new Supervising Contractor performs any Work. Any change in the Supervising Contractor shall not excuse any Work deadlines or schedules. If the Trustees do object, the work deadlines and schedules shall be extended by a time period equal to that between Mosaic's initial request for approval of a replacement Supervising Contractor and receipt of the Trustees' approval.

B. Semi-Annual Reports. Mosaic shall submit written Semi-Annual Progress Reports to the Trustees with respect to actions and activities taken pursuant to this Section. The Semi-Annual Progress Reports shall be submitted by October 15, and April 15 following the Effective Date of this Consent Decree. Mosaic's obligation to submit Semi-Annual Progress Reports for any particular Restoration Project continues until the Trustees' approval of the Project Final Report for that Project pursuant to Paragraph 25. In addition, the Trustees may request periodic briefings by Mosaic to discuss the progress of the Work.

C. Semi-Annual Report Contents. At a minimum, the Semi-Annual Progress Reports shall: (1) describe the actions that have been taken to comply with this Consent Decree during the prior six-month period; (2) include all results of construction sampling and tests and all other data received by Mosaic and not previously submitted to the Trustees; (3) include all descriptions of plans, reports, deliverables, permits and authorizations, and procedures completed under the Statement of Work during the previous six months; (4) describe the activities planned for the next six-month period; and (5) describe all significant problems encountered during the previous six months and any anticipated significant problems in future six-month periods, any actual or anticipated significant delays, and solutions developed and implemented to mitigate or address any actual or anticipated significant problems or delays. The Semi-Annual Reports shall include the information required in this Paragraph for each Restoration Project, and shall be organized in separate sections devoted to each Restoration Project.

D. Completion of Project Construction Reports. Within 60 Days after Mosaic concludes that construction of the Work on a Restoration Project is complete, Mosaic will submit a Completion of Project Construction Report for that Project to the Trustees. At a minimum, this Report shall include as-built plans and a certification from the Supervising Contractor that all of the Work has been completed for a particular Restoration Project in compliance with the requirements of the Statement of Work. Following submission of the Completion of Project Construction Report, the Trustees shall have the right to conduct an inspection of the Project to determine compliance with the Statement of Work, and to identify any additional impacts to wetlands or other natural resources resulting from construction. If, after the Trustees' receipt and review of the Completion of Project Construction Report, the Trustees determine that the Work or any portion thereof has not been completed in accordance with the Statement of Work, the Trustees shall notify Mosaic in writing of the activities that must be undertaken to complete construction of the Restoration Project, and shall include in the notice a schedule for performance of such activities. If the Trustees identify natural resource injuries resulting from construction that were not previously mitigated, the Trustees shall notify Mosaic in writing of their conclusions, and thereafter Mosaic shall perform additional projects to mitigate the injuries, on a scope and schedule proposed by Mosaic, subject to the Trustees' approval. Mosaic may contest either notice in accordance with the Dispute Resolution procedures under Section XV. Mosaic shall perform all activities described in the notice (as amended in through Dispute Resolution, if applicable) in accordance with the specifications and schedules established therein. Mosaic shall submit for approval a revised Completion of Project Construction Report with a certification from the Supervising Contractor once the additional activities have been completed. If upon review of the revised Completion of Project Construction Report, the Trustees determine that the Work has been completed in accordance with the Statement of Work, and any other subsequent construction identified pursuant to this paragraph, they shall notify Mosaic in writing that the Work has been completed in accordance with the Statement of Work. If the Trustees determine, under either of the provisions of this Paragraph, that construction of the Work has not been completed in accordance with the Statement of Work, this determination may be disputed by Mosaic in accordance with the dispute resolution procedures set forth in Section XV of this Consent Decree. If the Trustees determine that construction of the Work has not been completed, it shall again follow the procedures specified in this Paragraph until (a) construction of the Work is complete; or (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved.



23. Certification of Semi-Annual Progress Reports and Final Report. In addition to any other certifications required by this Consent Decree, the Semi-Annual Reports and the Completion of Project Construction Reports submitted by Mosaic shall be certified by a responsible corporate official of Mosaic and accompanied by the following certification:

“I certify under penalty of law that, based upon the procedures described below, the information contained in or accompanying this submission is true, accurate and complete. This certification is based on my review or analysis of the submission, and/or supervision of persons who, acting on my instructions, made the verification that the submitted information is this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

24. Restoration Project Performance Monitoring. Following the Trustees' acceptance of the Completion of Project Construction Report for a particular Restoration Project submitted pursuant to Paragraph 22(D), Mosaic shall initiate performance monitoring for that Project, as required in the Statement of Work, and submit Performance Monitoring Reports to the Trustees as required therein. As an alternative to the submission of separate Performance Monitoring Reports, Mosaic may include results of performance monitoring in the Semi-Annual Reports.

25. Demonstration of Restoration Project Success. Once Mosaic believes that it has met all of the requirements set forth in this Consent Decree, including the success criteria contained in the Statement of Work, for a particular Project, it shall submit a Final Report to the Trustees for that Restoration Project. The Trustees shall review the Final Report and determine whether the success criteria for that particular Restoration Project have been met. If the Trustees find that the success criteria have been met, then they shall issue and provide to Mosaic a dated “Project Success Certificate,” certifying that the particular Restoration Project is successful. If the Trustees find that any of the success criteria have not been met, the Trustees shall identify and notify Mosaic of those further actions that are needed for the Restoration Project to meet the success criteria. The procedures specified in Paragraph 22(D) for resubmitting the Completion of Project Construction Report shall be followed for the Final Report until (a) the success criteria have been met; (b) if dispute resolution is invoked under Section XV (Dispute Resolution), until compliance with a final determination issued pursuant to Section XV has been achieved; or (c) the Trustees determine that the success criteria for that Project cannot be met within a reasonable time period.

A. Establishing Alternative Compliance Criteria or Additional Compensatory Restoration. The Parties believe that the Restoration Projects will timely meet the success criteria in the Statement of Work, but they also recognize that success is not guaranteed. If a Project does not timely meet the success criteria, then the time for compliance can be extended, the Project modified, or Mosaic can undertake or pay for additional compensatory



restoration sufficient to compensate for the difference between the actual services provided by the Project and services the Parties anticipated the Project would provide. If the Trustees determine that the success criteria for a particular Project cannot be met within a reasonable time period, they shall notify Mosaic of that determination in writing. The Parties shall meet to seek resolution of the matter. If the Parties resolve the matter, Mosaic shall comply with the resolution in the time period established in the resolution. If the Parties cannot resolve the matter, the Trustees shall send Mosaic written notification of what it must do to either meet the alternative compliance criteria or the additional compensation requirements. Mosaic may contest that notice pursuant to Section XV (Dispute Resolution), subject to the rights granted thereunder. The Parties shall comply with any orders issued pursuant to the Dispute Resolution process,

B. Project Final Completion Certificate. Once Mosaic has completed all its obligations with regard to a particular Restoration Project under this Consent Decree, the Statement of Work, and any orders issued pursuant to Section XV (Dispute Resolution) with respect to that Restoration Project, the Trustees shall issue a Project Final Completion Certificate for that Project.

26. All Work undertaken by Mosaic shall be performed in compliance with the requirements of all applicable federal, state, and local laws and regulations. Where any portion of the Work requires a federal, state, or local permit, certification or approval, Mosaic shall submit timely and complete applications and take all other actions necessary to obtain all such permits, certifications, or approvals. Notwithstanding the foregoing statements, environmental resource permits from the FDEP and authorizations for construction in wetlands from the EPC are not required for any portion of the Work.

## **VII. CONSERVATION EASEMENTS**

27. The Conservation Easements will be granted with warranty covenants, free and clear of all prior liens and encumbrances, except as otherwise provided in the Conservation Easements. Within 90 Days of the Effective Date, Mosaic will submit for recording to the Clerk of the Court for Hillsborough County, Florida the Conservation Easements and provide the Trustees and EPC with a certified copy of the original recorded Conservation Easements showing the clerk's recording stamps, upon receipt of same from the Clerk of the Court of Hillsborough County, Florida.

## **VIII. REIMBURSEMENT OF PAST COSTS**

28. The United States, FDEP and EPC have expended time, funds, and resources in assessing Natural Resource Damages alleged to have resulted from the Spill. Mosaic has made payments to the Trustees and EPC in reimbursement for some of these Past Costs. Within 90 Days of the Effective Date, Mosaic shall make additional payments to the United States, FDEP and EPC in the amounts of \$122,749.78, \$9,777.20 and \$8,200.00, respectively, in reimbursement of Past Costs. Invoices for these additional Past Costs have been provided to Mosaic.

29. Payment of Past Costs to the United States shall be made by electronic funds transfer in accordance with current electronic funds transfer procedures and instructions for same

to be provided to Mosaic by the Financial Litigation Unit of the United States Attorney's Office for the Middle District of Florida following the entry of this Consent Decree. At the time of payment, Mosaic shall provide notice of payment, referencing DOJ Case Number 90-5-1-1-08961 and this civil action case name and number to the United States, NOAA and DOI at the addresses set forth in Section XI (Notices).

30. Payment of Past Costs to the State shall be made by certified check to "The Department of Environmental Protection" and shall include thereon OGC Case Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to the Department of Environmental Protection. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

31. Payment of Past Costs to EPC shall be made as follows: Mosaic shall mail a certified check made payable to "The Environmental Protection Commission" to Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

#### **IX. REIMBURSEMENT OF FUTURE COSTS**

32. The United States, FDEP and EPC have incurred and will incur Future Costs in connection with assessing the alleged damages, oversight of this Consent Decree, the implementation of the Statement of Work, and monitoring of the Conservation Easement. Mosaic shall pay all Future Costs as follows: Either separately, or together, the Trustees and EPC may submit to Mosaic, on a periodic basis, an invoice for Future Costs which will include an itemized cost summary. The itemized cost summary for Future Costs will include all direct and indirect costs, including, but not limited to, personnel billing rates, hours applied against each Project, a narrative description of work performed, time and travel costs of the personnel, and associated indirect costs, contractor costs, inspection of work activities, visits to observe the Work, discussions regarding disputes that may arise during the conduct of the Work, and review and approval or disapproval of reports. Such accounting shall specify the amount and method of payment. Within 60 Days of receipt of an accounting, Mosaic shall pay such costs in a manner to be specified by the Party or Parties submitting the accounting. Mosaic may dispute Future Costs pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

33. Notice of Payment. Upon making any payment under this Section, Mosaic shall send written notice that payment has been made to the United States, NOAA, DOI, EPC, FDEP and Herschel T. Vinyard, Jr., in accordance with Section XI (Notices).

#### **X. LATE PAYMENTS OF PAST AND FUTURE COSTS**

34. Interest. Interest shall accrue on the unpaid balance through the date of payment for any payment owed by Mosaic under Sections VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) that is not received when due. Accrued interest shall be paid

by Mosaic within 60 Days of receipt of a written request from a Party in the manner specified in the request.

35. Stipulated Penalties. In addition to the interest required to be paid under the preceding subparagraph, if any amounts to be paid under Section VIII (Reimbursement of Past Costs) or IX (Reimbursement of Future Costs) are not paid by the required date, Mosaic shall pay a stipulated penalty for every Day that such payment is late to the affected Party, as provided in Section XVI (Stipulated Penalties). Mosaic may dispute any claim for Stipulated Penalties pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.

## **XI. NOTICE**

36. Each Party hereby respectively designates the following person(s) for receipt of notices required under this Consent Decree, including, but not limited to, notices pertaining to the payment of Past or Future Costs, and notices invoking force majeure or dispute resolution. Whenever notice is required by this Consent Decree, it shall be addressed to the persons listed below.

### United States:

Section Chief  
Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, DC 20044-7611  
Re: DOJ Case No. 90-5-1-1-08961

### NOAA:

Sheila O'Brien  
NOAA, Office of the General Counsel, SE  
263 13<sup>th</sup> Ave. S. Suite 177  
Saint Petersburg, FL: 33701

NOAA Project Coordinator

DOI:

Brigette J. Beaton  
Attorney Advisor  
U.S. Department of Interior  
Office of the Regional Solicitor  
75 Spring Street, Suite 304  
Atlanta, GA 30303

FDEP and/or Vinyard:

Larry Morgan  
Chief Deputy General Counsel  
Office of General Counsel  
Department of Environmental Protection  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32399-3000

EPC:

Richard Tschantz  
General Counsel  
Environmental Protection Commission of Hillsborough County  
3629 Queen Palm Drive  
Tampa FL 33619

Mosaic:

Patrick van der Voorn  
Senior Environmental Counsel  
Mosaic Fertilizer, LLC  
3033 Campus Drive, Suite E490  
Plymouth, MN 55441

and

David B. Weinstein  
Greenberg Traurig  
625 East Twiggs Street  
Suite 100  
Tampa, FL 33602

37. Any Party may change its designated person or address as set forth in this Section by communicating such changes in writing to the other Parties. If a contact person initially designated is changed, the identity of the successor will be provided at least 10 Days before the change occurs, unless impracticable.

38. All notices shall be considered effective upon receipt, unless otherwise provided. All notices shall be sent by first class United States Mail, with the exception of notices of meetings, which may be sent by electronic mail. Submission of written notice by mail as specified in this Section shall constitute complete satisfaction of any written notice requirement of the Consent Decree.

39. Submission of technical documents, including Semi-Annual Reports, Completion of Project Construction Reports, Performance Monitoring Reports, and Final Reports, need not be sent to the notice recipients identified by the Parties pursuant to this Section. Such documents shall be transmitted electronically to the recipients designated by each Party pursuant to this Paragraph, with trailing paper copies by U.S. Mail if requested.

## **XII. PLAINTIFFS NOT LIABLE**

40. The United States and the State of Florida, including all of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments, assume no liability for any injuries or damages to persons or property resulting from acts or omissions by Mosaic, or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree. The United States, the State of Florida, or any of their officials, agents, employees, contractors, subcontractors, representatives, agencies and departments may not be deemed a party to any contract entered into by Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out any action or activity pursuant to this Consent Decree.

## **XIII. INDEMNIFICATION BY MOSAIC**

41. The United States and the State of Florida do not assume any liability by entering into this agreement. Mosaic shall indemnify, save, and hold harmless the United States and the State of Florida and their officials, agents, employees, contractors, subcontractors, representatives, agencies, and departments for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Mosaic, its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control, in carrying out activities pursuant to this Consent Decree. Further, Mosaic agrees to pay the United States and the State of Florida all costs incurred including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State Plaintiffs based on negligent or other wrongful acts or omissions of Mosaic or its officers, directors, employees, agents, representatives, successors, assigns, contractors, subcontractors, or any person acting on its behalf or under its control in carrying out activities pursuant to this Consent Decree. Neither Mosaic nor any of its contractors shall be considered agents of the United States or the State of Florida. This indemnification obligation does not include any claim, cause of action, or cost arising from, or on account of, a negligent or wrongful act or omission of the United States or the State. Mosaic may dispute any claim for indemnification pursuant to the dispute resolution procedures set forth in Section XV of this Consent Decree.



42. The United States and the State of Florida shall give Mosaic notice of any third party claim for which the United States or the State of Florida plans to seek indemnification from Mosaic pursuant to this Section and shall attempt to consult with Mosaic at least 30 Days prior to settling such claim.

43. Mosaic waives all claims against the United States and the State of Florida for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State of Florida arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects, including, but not limited to, claims on account of delays. In addition, Mosaic shall indemnify and hold harmless the United States and the State of Florida with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Mosaic and any person for performance of the Restoration Projects including, but not limited to, claims on account of delays.

#### **XIV. FORCE MAJEURE**

44. "Force majeure," for the purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Mosaic, of any entity controlled by Mosaic, or of its contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Mosaic's best efforts to fulfill the obligation, except the obligations to make payments described in Sections VIII, IX, X and XVI of this Consent Decree, for which force majeure may not be claimed. The requirement that Mosaic exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event, and best efforts to address the effects of any such event (a) as it is occurring, and (b) after it has occurred, to prevent or minimize any resulting delay to the greatest extent reasonably possible. "Force majeure" does not include Mosaic's financial inability to perform any obligation under this Consent Decree.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Mosaic shall provide notice orally or by electronic or facsimile transmission to the NOAA Project Coordinator within 5 Business Days of when Mosaic first learns that the event might cause a delay. Within 30 Days thereafter, Mosaic shall provide in writing to the persons identified in Section XI (Notice), an explanation and description of the reasons for the delay; the anticipated duration of the delay, all actions taken or to be taken to prevent or minimize the delay, a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay, Mosaic's rationale for attributing such delay to a force majeure event if it intends to assert such a claim, and a statement as to whether, in Mosaic's opinion, such circumstances may cause or contribute to an endangerment to public health and/or the environment. Mosaic shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Mosaic from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Mosaic shall be deemed to know of any circumstance of which Mosaic, any entity controlled by Mosaic, or its contractors knew or should have known.

46. If the Trustees agree that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the Trustees for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If the Trustees agree that the delay is attributable or potentially attributable to a force majeure event, the Trustees shall notify Mosaic in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

47. If the Trustees do not agree that the delay or anticipated delay has been or will be caused by a force majeure event, they will notify Mosaic in writing of their decision. Mosaic may dispute any force majeure determination by the Trustees pursuant to the dispute resolution procedures set forth in Section XV and Paragraph 48 of this Consent Decree.

48. If Mosaic elects to invoke the dispute resolution procedures set forth in Section XV ("Dispute Resolution") regarding the Trustees' notice under Paragraph 46 or 47, it shall do so no later than 15 Days after receipt of the Trustees' notice. In any such proceeding, Mosaic shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Mosaic complied with the requirements of Paragraphs 44 and 45, above. If Mosaic carries this burden, the delay at issue shall be deemed not to be a violation by Mosaic of the affected obligation(s) of this Consent Decree.

## **XV. DISPUTE RESOLUTION**

49. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, such procedures shall not apply to actions by the Trustees and EPC to enforce obligations of Mosaic under this Consent Decree that have not been disputed in accordance with this Section.

50. Informal Dispute Resolution. Mosaic may initiate dispute resolution under this Section by sending a written notice to all Parties. The notice shall identify the issue in dispute and Mosaic's position concerning the issue. The Parties shall attempt to resolve the dispute by consensus by engaging in good faith informal negotiations. Each Party agrees that it will devote reasonable time and effort to such informal negotiations. The period for informal negotiations shall not exceed 20 Days from the date the notice is sent, unless this time period is modified by written agreement of the Parties. In the event the Parties are unable to reach agreement during such informal negotiation period, the Plaintiff(s) or EPC (if the dispute involves EPC) shall provide Mosaic with a written summary of their position regarding the issues in dispute within 45 Days from the end of the informal negotiations. The Plaintiff(s) and EPC may provide a joint summary or individual summaries. In the event that a party takes more than 45 Days to provide its summary, stipulated penalties shall not accrue under this Consent Decree from the 46<sup>th</sup> Day through the date that party issues its summary. Once all parties involved in the dispute have

issued written summaries, stipulated penalties shall once again accrue, and shall continue to accrue during the remainder of the dispute resolution process.

51. Formal Dispute Resolution In the event that the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the Plaintiff(s), individually or jointly, or by EPC shall be considered binding on Mosaic unless, within 30 Days after Mosaic receives the Plaintiff(s)' or EPC's written summary, Mosaic invokes the formal dispute resolution procedures of this Section by serving the Plaintiff or EPC with a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by Mosaic.

52. Within 60 Days after receipt of Mosaic's Statement of Position, the Plaintiff(s) or EPC shall serve on Mosaic their Statement of Position, including any factual data, analysis, or opinion supporting each position and all supporting documentation relied upon by the Plaintiff(s) or EPC. Within 15 Days after receipt of the Statement of Position, Mosaic may submit a Reply.

53. A record of the dispute shall be maintained by the Plaintiff(s) or EPC and shall contain all Statements of Position, including supporting documentation, and any Reply. Where appropriate, the Plaintiff(s) or EPC may allow submission of supplemental Statements of Position by the Parties.

54. The Plaintiff(s) or EPC shall issue a final decision resolving the dispute based on the record. This decision shall be binding on Mosaic, subject only to the right to seek judicial review pursuant to Paragraph 55. Decisions for the Florida Trustees will be made by the Secretary of FDEP or his designee.

55. Any decision made by the Plaintiff(s) or EPC pursuant to this Section shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Mosaic with the Court and served on all Parties within 45 Days of receipt of the Plaintiff(s)' or EPC's final decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The Plaintiff(s) and EPC may file a joint response or individual response to Mosaic's motion. In the event that the Court takes more than 45 Days to rule on Mosaic's motion, stipulated penalties shall cease to accrue on the 46<sup>th</sup> Day.

56. Standard of Review.

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by the Trustees under this Consent Decree; the adequacy of the performance of Work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the record under applicable principles of administrative law, which the parties agree apply. Mosaic shall have the burden of demonstrating, based on the record maintained by the Trustees, that the position of the Plaintiff(s) is arbitrary and capricious or

otherwise not in accordance with law. Mosaic may move the Court to supplement the record. Plaintiffs and EPC reserve the right to take the position that the record should not be supplemented.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 55, Mosaic shall bear the burden of demonstrating that its position complies with this Consent Decree and better achieves the objectives of the Consent Decree.

57. The invocation of informal or formal dispute resolution procedures pursuant to this Section shall not extend, postpone, or affect in any way any obligation of Mosaic under this Consent Decree that is not directly in dispute, unless the Trustees or the Court agree otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first Day of noncompliance with any applicable provision of this Consent Decree. In the event that Mosaic does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVI ("Stipulated Penalties").

## **XVI. STIPULATED PENALTIES**

58. Mosaic shall be liable for stipulated penalties to the United States, the State of Florida and EPC in the amounts set forth in Paragraph 59 for failure to comply with the requirements of this Consent Decree specified below. "Compliance" by Mosaic shall include completion of the activities identified in Paragraph 59 within the schedules established by and approved in compliance with the Consent Decree, the Statement of Work and any work plans or other documents approved by the Trustees pursuant to the Statement of Work.

59. The following stipulated penalties shall accrue per violation per Day for Mosaic's failure to comply with the time schedules established for the following implementation requirements:

A. Failure to timely submit any draft or revised work plan required under the Statement of Work:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$250	1 <sup>st</sup> through 7 <sup>th</sup> day
\$500	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,000	31 <sup>st</sup> day and beyond

B. Failure to comply with schedules for Restoration Project implementation set forth in the Statement of Work, including for monitoring and for any other activities approved under the Statement of Work to complete the Restoration Project, or failure to meet the deadlines established in Section VII (Conservation Easements):

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
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\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$750	8 <sup>th</sup> through 30 <sup>th</sup> day
\$1,250	31 <sup>st</sup> day and beyond

C. Failure to make the payments required by Section VIII (Reimbursement of Past Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$500	1 <sup>st</sup> through 7 <sup>th</sup> day
\$1,000	8 <sup>th</sup> through 30 <sup>th</sup> day
\$2,500	31 <sup>st</sup> day and beyond

D. Failure to make a payment required by Section IX (Reimbursement of Future Costs) in a timely manner:

<u>Penalty per day per violation</u>	<u>Period of Noncompliance</u>
\$100	1 <sup>st</sup> through 7 <sup>th</sup> day
\$175	8 <sup>th</sup> through 30 <sup>th</sup> day
\$250	31 <sup>st</sup> day and beyond

60. All penalties shall begin to accrue on the Day after performance is due or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Separate penalties will accrue for separate violations of this Consent Decree. Notwithstanding any other provision of this Section, Plaintiffs and EPC, in their unreviewable discretion, may waive any portion of stipulated penalties owed to them that have accrued pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States, the State, or EPC to seek any other remedies or sanctions available by virtue of Mosaic's violation of this Consent Decree or of the statutes and regulations upon which it is based, provided, however, that the United States, the State and EPC shall not seek civil penalties for any violation for which a stipulated penalty is collected pursuant to this Consent Decree.

61. Following the determination by Plaintiffs and EPC, individually or jointly, that Mosaic failed to comply with one of the requirements of this Consent Decree listed above, the Party may give Mosaic written notification of the same and describe the noncompliance. The Party may send Mosaic a written demand for the payment of penalties. Penalties shall accrue and are due as provided in this Section regardless of whether Party has notified Mosaic of a violation. All stipulated penalties due under this Section shall be due and payable within 30 Days of Mosaic's receipt of a demand for payment from Party, unless Mosaic invokes dispute resolution under Section XV of this Consent Decree. If Mosaic invokes dispute resolution under



Section XV, then stipulated penalties shall be due at the time specified in Paragraph 65, unless Mosaic prevails in the dispute resolution process. Interest shall accrue on unpaid stipulated penalties beginning on the 31st Day after Mosaic's receipt of the demand for stipulated penalties. Penalties assessed by the Plaintiffs, individually or jointly, shall be paid 50 percent to the United States and 50 percent to the State, regardless of whether the demand is made individually or jointly.

62. All payments to the United States under this Section shall be paid by certified check made payable to "U.S. Department of Justice." This payment shall be mailed to the U.S. Attorney's Office, 400 N. Tampa Street, Suite 3200, Tampa, Florida 33602, referencing "United States and the State of Florida v. Mosaic, DOJ Case Number 90-5-2-1-08961" and the name and address of the Party making payment. Copies of the check and notice shall be sent to the Parties as specified in Section XI (Notice).

63. All payments made to the State of Florida under this Section shall be paid by certified check made payable to "The Department of Environmental Protection" and shall include thereon OGC Number 04-1548 and the notation "Ecosystem Management and Restoration Fund." Payment shall be sent to FDEP's contact designated in paragraph 36.

64. All payments made to EPC under this Section shall be paid by certified check made payable to "The Environmental Protection Commission." This payment shall be mailed to the Environmental Protection Commission of Hillsborough County, c/o Richard Tschantz -- General Counsel, 3629 Queen Palm Drive, Tampa FL 33619. At the time of payment, Mosaic shall provide written notice of payment, referring to this case number, to EPC in accordance with Section XI (Notices).

65. In the event Mosaic fails to pay stipulated penalties when due, the United States, the State of Florida and EPC may institute a legal proceeding to collect such penalties, as well as interest accruing on any unpaid balance, as provided by law. Stipulated penalties continue to accrue during dispute resolution, but need not be paid until the following:

A. If the dispute is resolved by agreement, accrued penalties agreed to be owed shall be paid within 30 Days of the agreement;

B. If the dispute is appealed to this Court and the Plaintiff(s) or EPC prevails in whole or in part, Mosaic shall pay all accrued penalties determined by the Court to be owed within 60 Days of receipt of the Court's decision or order, except as provided by Paragraph 65(C) below. Mosaic shall not be required to pay any stipulated penalties or court costs if it prevails on the disputed issue;

C. If the District Court's decision is appealed by any Party, Mosaic shall pay all accrued penalties determined by the District Court to be owed into an interest-bearing escrow account within 60 Days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 Days. Within 15 Days of the final appellate court decision, the escrow agent shall pay the balance of the account to the United States and the State of Florida, EPC, or to Mosaic to the extent that it prevails.

**XVII. COVENANTS NOT TO SUE  
BY THE UNITED STATES, THE STATE OF FLORIDA AND EPC**

66. Covenant by the United States. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the United States covenants not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the United States under Section XVI (Stipulated Penalties), and to pay any interest owed to the United States due to the failure to timely pay any amount owed to the United States.

67. Covenant by the State of Florida and EPC. Except as specifically provided in Section XVIII (Reservation of Rights by Plaintiffs), the State of Florida and EPC covenant not to sue Mosaic pursuant to Section 311(f) of the CWA, 33 U.S.C. § 1321(f) and Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and Chapters 376 and 403, Florida Statutes, to recover Past Costs, Future Costs and Natural Resource Damages resulting from the Spill. This covenant not to sue is conditioned upon the satisfactory performance by Mosaic of all of its obligations under this Consent Decree, including its obligations to complete all Work, to pay all Past Costs and Future Costs, to pay any amounts that may become due to the State under Section XVI (Stipulated Penalties), and to pay any interest owed to the State due to the failure to timely pay any amount owed to the State.

68. These covenants not to sue by the United States, the State of Florida and EPC extend only to Mosaic: provided, however, that these covenants not to sue (and the reservations thereto) shall also apply to: (a) the successors and assigns of Mosaic, but only to the extent that the alleged liability of the successor or assign is based on the alleged liability of Mosaic; and (b) the officers, directors, agents, and employees of Mosaic, but only to the extent that the alleged liability of the officer, director, agent, or employee is based on said person's status as an officer, director, agent, or employee of Mosaic, or as a result of conduct within the scope of such person's employment or authority.

**XVIII. RESERVATION OF RIGHTS BY THE UNITED STATES  
AND THE STATE OF FLORIDA**

69. Notwithstanding any other provision of this Consent Decree, the United States and the State of Florida reserve, and this Consent Decree is without prejudice to all rights against Mosaic with respect to all matters not expressly included within Section XVII (Covenant Not to Sue by the United States and the State of Florida). Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Mosaic with respect to:

A. claims based on a failure by Mosaic to meet a material requirement of this Consent Decree;

B. liability for any costs incurred or to be incurred by the Plaintiffs that are not within the definitions of Natural Resource Damages, Past Costs or Future Costs;

C. liability for damages for any injury to, destruction of, or loss of natural resources resulting from any event or releases or threatened releases of hazardous substances or oil, other than the hazardous substances known to have been released in the Spill;

D. any and all criminal liability; and

E. violation of any Federal or State law during the implementation of Restoration Projects or monitoring of such Project.

70. Special Reservations Regarding Natural Resource Damages. Notwithstanding any other provision of this consent Decree, the United States and the State of Florida reserve the right to institute proceedings in this action or in a new action seeking recovery of Natural Resource Damages, including costs of damage assessment: (a) based on conditions caused by the Spill, unknown to the Trustees as of the date when this Consent Decree is lodged with the Court, that result in releases of hazardous substances that contribute to injury to, destruction of, or loss of natural resources; or (b) based on information received by the Trustees after the date when this Consent Decree is lodged with this Court indicating that the Spill has resulted in injury to, destruction of, or loss of natural resources of a type or magnitude unknown to the Trustees as of the date of this Consent Decree is lodged with the Court. For purposes of this provision, the information and conditions known to the Trustees shall include only the information and the conditions set forth in the DARP/EA and the administrative record supporting the DARP/EA.

71. The covenants not to sue set forth above do not pertain to any matters other than those expressly set forth in the Consent Decree.

72. The failure of the Trustees to insist upon strict and prompt performance of any provision of this Consent Decree shall not operate as a waiver of any requirement of this Consent Decree or of the United States' and the State of Florida's right to insist on prompt compliance in the future with such provision, and shall not prevent a subsequent action by the United States and the State of Florida to enforce such a provision.

73. In any subsequent administrative or judicial proceeding initiated by the United States or the State of Florida for injunctive relief, recovery of response costs, or other appropriate relief relating to the Spill, Mosaic 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 to any claim brought pursuant to Paragraph 69, above, based upon any contention that the claim raised by the United States or the State of Florida in subsequent proceedings was or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XVII (Covenants Not to Sue by the United States and the State), nor does it preclude Mosaic from raising other available defenses in any such subsequent proceedings.

74. The United States and the State of Florida retain all authority and reserve all rights to take any and all action authorized by law, to the extent not in conflict with the terms of this Consent Decree.

## **XIX. COVENANT OF MOSAIC**

75. Mosaic covenants not to sue and agrees not to assert any claims or causes of action against the Trustees, their employees agents, experts, or contractors, with respect to the Spill, including but not limited to:

A. Any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. §9507) 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 State or Federal law;

B. Any claim against the Trustees, including any department, agency or instrumentality of the United States, under CERCLA Sections 107 or 113, 42 U.S.C. §§ 9607 and 9613, relating to Natural Resource Damages resulting from the Spill;

C. Any claims arising out of activities related to the Restoration Projects, including, without limitation, claims based on the Trustees' selection of the Restoration Projects, oversight of the Restoration Projects, and/or the approval of plans for such activities;

D. Any claims under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law relating to Natural Resource Damages resulting from the Spill.

76. 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).

77. Mosaic reserves its right to contest any claim allowed by Sections XVII (Covenant Not to Sue by the United States and the State) and/or XVIII (Reservation of Rights by the United States and the State) of this Consent Decree, and Mosaic does not by entering into to this Consent Decree waive or release any defenses whatsoever to any such claims, except that Mosaic covenants not to assert, and may not maintain, any defense based upon the principles of waiver, res judicata, collateral estoppels, issue preclusion, claim splitting, or any other defense based upon the contention that the claims were or should have been brought in the instant case.

78. Notwithstanding any other provision of this Consent Decree, this Consent Decree is without prejudice to all rights of Mosaic with respect to all matters other than those expressly specified in the covenants set forth in Paragraphs 76.

## **XX. CERTIFICATION**

79. Mosaic hereby certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Trustees all information requested by the Trustees regarding alleged Natural Resource Damages associated with the Spill, which are currently in the possession of its officers, employees, contractors, and agents that relate in any way to the alleged release of hazardous substances at or from the Facility associated with the Spill.

## XXI. ACCESS

80. Upon reasonable notice, Mosaic shall provide to the Trustees and EPC, and their designated representatives, access at reasonable times to all locations used in implementing the Restoration Projects, including to all areas of the Restoration Projects as well as to all vessels used by Mosaic, or their contractors, for any purpose relating to the implementation and oversight of the Restoration Projects, to future monitoring activity at Restoration Project Sites, or to corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree, including but not limited to:

A. Interviewing Mosaic's personnel involved in field work conducted pursuant to the Statement of Work provided, however, that Mosaic and its personnel shall have the right to have legal counsel present;

B. Inspecting records, and/or operating logs related to implementation of the Restoration Projects;

C. Reviewing the progress of Mosaic in implementing the Restoration Projects;

D. Conducting such sampling, tests or other actions as the Trustees and/or their representatives deem appropriate for implementation and oversight of the Restoration Projects, for future monitoring, for corrective action pertaining to the Restoration Projects, or for the enforcement of this Consent Decree;

E. Using a camera, sound recording, or other documentary equipment to make or preserve observations or measurements; and

F. Verifying any reports or data that the Mosaic submits to the Trustees.

G. During any site visits to or inspections of the Restoration Projects, the Trustees and EPC, their representatives, and contractors must comply with reasonable health and safety instructions given by Mosaic at the time of the site visit or inspection, including applicable OSHA requirements.

81. Pursuant to the above requirements, Mosaic acknowledges the right of the Trustees and EPC, and their designated representatives, to be present at all times that Mosaic, including its contractor(s) or subcontractor(s), are performing any work or activity involved in implementing the Restoration Projects. The Trustees and EPC may designate other representatives, including, but not limited to, federal and state employees, contractors, and consultants, to observe, monitor, assess, or assist in overseeing the progress of the Restoration Projects. All Parties recognize that employees and contractors of FDEP are subject to Florida Statutes pertaining to confidential business information.

82. Mosaic representatives may accompany the Trustees, EPC and/or their representatives whenever and wherever they are present at the Restoration Projects sites, but may not delay or impede any access or activities of the Trustees and EPC authorized under this Section. Further, with respect to any samples taken by Mosaic from the Restoration Projects



sites, copies of the results of any analyses or tests on such samples shall be provided to the Trustees and EPC, or their designated representatives, upon request.

83. When requested and upon reasonable advance notice by the Trustees, Mosaic shall make available to the Trustees, at an appropriate location, any of its employees, agents, or representatives with knowledge of material facts concerning the implementation of the Restoration Projects for purposes of investigations, information gathering, or interviews by the Trustees provided, however, that a Mosaic representative and Mosaic's or its employees', agents' or representatives' legal counsel are present at any such meeting(s).

## **XXII. RETENTION OF RECORDS AND ACCESS TO INFORMATION**

84. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), Mosaic shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, that relate in any manner to the Spill and/or the materials related to alleged Natural Resource Damages, which may have been associated with the alleged release of hazardous materials during the Spill.

85. Until three years after termination of this Consent Decree pursuant to Section XXV (Termination), and excepting records, documents, and other information prepared in anticipation of litigation, protected by the attorney-client privilege or any other privilege recognized by federal law, Mosaic shall make available to the Trustees and EPC, or their representatives, within 30 Days of a written request, copies of any records, documents, data, or information not covered in paragraph 86, whether in written or electronic form, maintained by or in the possession of Mosaic, their contractors, agents or representatives, which relate to any work or activity involved with alleged Natural Resource Damages associated with the Spill and/or any such records associated with implementing any portion of the Restoration Projects that is reasonably requested by the Trustees, EPC, or their representatives under this Decree.

86. Any record, document, data, and other information that Mosaic is required by this Consent Decree to provide directly to the Trustees, EPC, or their representatives, shall be considered a public record and shall not be withheld or protected from release. No claim of privilege or confidentiality shall be made with respect to any sampling, analytical, monitoring, hydrologic, hydrogeologic, scientific, chemical, or engineering data generated through any work or activity undertaken in implementing any portion of the Restoration Projects pursuant to this Consent Decree. Such non-privileged records, documents, data and other information include those used in surveying, design, construction, analysis of data, chain of custody records, receipts, final reports, correspondence, or other records or materials related to the Restoration Projects. Notwithstanding any other provision of this Consent Decree, however, no record, document, data or other information of Mosaic's, its counsel, or its experts which is entitled to privilege or work product protection relative to the putative class action litigation styled *Curd, et al. v. Mosaic Fertilizer, LLC*, Thirteenth Judicial Circuit Court, Hillsborough County, Florida (Case No. 04-8653) shall lose such protections or otherwise be subject to discovery or production to the plaintiffs in that action, the United States, the State of Florida, EPC, or any other person as a result of any term or condition of this Consent Decree or any related document, except that

Mosaic recognizes that the State of Florida is subject to the requirements of Florida Law in regards to public records.

87. Mosaic may assert that certain records, documents or other information provided to the Trustees include or constitute confidential business information that is subject to legal protection under federal or state law ("CBI"). Whenever Mosaic submits a record, document or other information to the Trustees or EPC which Mosaic asserts includes or constitutes CBI, Mosaic shall identify the record, document, or information, or portion thereof, which is asserted to be CBI with particularity and demonstrate a proper basis in fact and law why the information is considered to be CBI. Records, documents or information, or portions thereof, that the Trustees determine to be CBI under applicable federal or state laws or regulations will be protected from further release to the extent and in the manner afforded by such laws. If CBI is not identified by Mosaic at the time a record, document, or information is submitted to the Trustees or EPC, or if the Trustees notify Mosaic that the record, document or information is not determined to be CBI under applicable federal or state laws or regulations, the public may be given access to such documents or information without further notice to Mosaic.

88. In the event that Mosaic believes that the records, documents, data, or information requested by the Trustees, EPC, and/or their representatives under paragraph 85 of this Consent Decree is privileged or subject to work product protection, Mosaic may assert that claim by providing to the Trustees and EPC within 60 Days after the request the following information for each item as to which a privilege is claimed:

A. A description of the information, data, or other material which contains sufficient information to allow the District Court to determine whether the claimed privilege or work product protection applies. If the material at issue is a document, Mosaic shall, at a minimum, provide the following information in as much detail as possible without revealing any information claimed privileged or protected: (i) the title of the document; (ii) the date of the document; (iii) the name and title of the author of the document; (iv) the name and title of each addressee and recipient; and (v) a description of the contents of the document; and

B. A statement of the specific privilege(s) or protection(s) claimed and the basis for the claim. If Mosaic fails without good cause to timely provide the information required by this Subparagraph, the Trustees shall interpret such failure as a waiver of any claim of privilege with respect to the specific information, data, or other material for which it failed to timely provide the information. If the Trustees or EPC object to Mosaic's claim that the information, data, or other material is privileged or protected, Trustees or EPC may file a motion with the Court to compel access to the material.

C. Notwithstanding the provisions of this Paragraph and its Subparagraphs, Mosaic must meet all statutory requirements to sustain a claim of privilege under Florida Law.

89. At the conclusion of the required information-retention period, Mosaic shall notify the Trustees and EPC at least 60 Days prior to the destruction of any documents, records, or other information subject to the requirements of this Consent Decree.

90. This Consent Decree in no way limits or affects any right to obtain information held by the United States, the State of Florida, or EPC pursuant to applicable state or federal laws, rules, regulations, or permits, nor does it limit or affect any duty or obligation of Mosaic to maintain documents, records, or other information imposed by applicable federal or state laws, regulations or permits.

91. The Parties recognize that documents submitted to the State Trustees and EPC are subject to provisions of Chapter 119, Florida Statutes, unless otherwise exempt from disclosure per Florida Statutes.

### **XXIII. MODIFICATION**

92. The terms of this Consent Decree, including the work or deadlines in the Statement of Work, may be modified only by a subsequent written agreement signed by the Parties, or as ordered by the Court upon the noticed motion of any Party. Where any modification constitutes a material change to any terms of this Consent Decree, it shall be effective only upon approval by the Court. Changes to the Appendices to this Consent Decree, agreed to by the Parties in writing, shall be deemed not to be material.

93. The provisions of this Consent Decree are not severable. The Parties' consent hereto is conditioned upon entry of the Consent Decree in its entirety, without modification, addition, or deletion except as agreed to in writing by the Parties.

94. Economic hardship or changed financial circumstances of Mosaic shall not serve as a basis for modification of this Consent Decree.

### **XXIV. COMPLIANCE WITH OTHER LAWS**

95. This Consent Decree shall not be construed in any way to relieve Mosaic or any other person or entity from the obligation to comply with any Federal, State, or local law, except that, as previously provided in Paragraph 26 of this Consent Decree, permits from FDEP and EPC will not be required for the Work.

### **XXV. TERMINATION**

96. This Consent Decree shall terminate upon granting of a motion duly filed by Mosaic, demonstrating that Mosaic has received a Project Final Completion Certificate for each of the Restoration Projects from the Trustees, paid the amounts required by Section VIII (Reimbursement of Past Costs) and Section IX (Reimbursement of Future Costs), and any outstanding stipulated penalties or interest under Sections XVI (Stipulated Penalties). Before Mosaic files any such motion, it shall meet and confer with the Plaintiffs and EPC, to ensure that all Parties agree that Mosaic has satisfied its obligations under the Consent Decree.

### **XXVI. LODGING AND PUBLIC NOTICE**

97. The Parties agree and acknowledge that final approval by the United States and the State of Florida and entry of this Consent Decree is subject to a 30 Day period for public notice and comment in accordance with Section 122 of CERCLA, 42 U.S.C. § 9622(d)(2)(B),

and U.S. Department of Justice policy. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment. The United States and the State of Florida each reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Mosaic and EPC consent to entry of this Consent Decree without further notice and agree not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Consent Decree, unless the United States or the State of Florida have notified them in writing that there is no longer unanimous support for the entry of the Consent Decree. If for any reason the Court should decline to approve this Consent Decree in the form presented, or if approval and entry is subsequently vacated on appeal of such approval and entry, 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.

## **XXVII. SIGNATORIES AND SERVICE**

98. Each undersigned representative of Mosaic, the State of Florida, EPC and the United States certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the party he or she represents to this document.

99. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. With regard to matters relating to this Consent Decree and its enforcement and the filing of the Complaint, Mosaic shall identify on the attached signature page the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that entity with respect to all matters arising under or relating to this Consent Decree and the filing of the Complaint. Mosaic agrees to accept service of process by mail with respect to all matters arising 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.

## **XXVIII. INTEGRATION**

100. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent 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 Consent Decree or the settlement it represents, nor shall it be used in construing the terms of this Consent Decree.

## **XXIX. RETENTION OF JURISDICTION**

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

**XXVIII. FINAL JUDGMENT**

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

FOR THE PLAINTIFF UNITED STATES:

DATED: 2/8/13



IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division  
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FOR PLAINTIFFS STATE OF FLORIDA  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and HERSCHEL T. VINYARD, JR.

By:   
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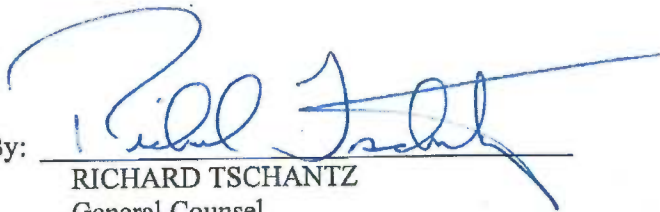
FOR RULE 19 PARTY ENVIRONMENTAL  
PROTECTION COMMISSION OF HILLSBOROUGH  
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**APPENDIX A**

**Final Damage and Restoration Plan/Environmental Assessment for the “Archie Creek”  
Site, Hillsborough County, Florida**

NATURAL RESOURCE DAMAGE ASSESSMENT AND RESTORATION  
PLAN/ ENVIRONMENTAL ASSESSMENT (DARP/EA) FOR THE  
RIVERVIEW, FLORIDA PHOSPHOGYPSUM STACK DISCHARGE,  
SEPTEMBER 5 – 6, 2004

Prepared by

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August 17<sup>th</sup>, 2012



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## 1. Introduction

This Final Damage Assessment and Restoration Plan/Environmental Assessment (Draft DARP/EA) was prepared by the natural resource trustees responsible for restoring natural resources and services impacted by the September 5 – 6, 2004, process water discharge (the “Discharge”) from a phosphogypsum stack owned and operated by Mosaic Fertilizer, LLC (formerly Cargill Crop Nutrition) in Riverview, Hillsborough County, Florida. Mosaic Fertilizer, LLC (“Mosaic”) is taking responsibility for the costs of conducting a natural resource damage assessment, as well as the costs of implementing restoration to nearby wetlands and surface waters. This Draft DARP/EA describes how the trustees and Mosaic documented and quantified injuries resulting from the Discharge and describes several restoration projects that the trustees identified as compensation for injuries to natural resources resulting from the Discharge.

The purpose of restoration, as outlined in this Draft DARP/EA, is to make the environment and the public whole for damages resulting from the Discharge by implementing restoration actions that return impacted natural resources and services to baseline conditions, and compensate for interim losses.

The natural resource trustees for this incident include two federal and one state agency: the U.S. Department of Commerce, represented by the National Oceanic and Atmospheric Administration (NOAA); the U.S. Department of the Interior (USDO), represented by the U.S. Fish and Wildlife Service (USFWS); and the Florida Department of Environmental Protection (FDEP), (collectively, the “Trustees”). These agencies share Trusteeship and responsibilities for natural resources and services and their supporting ecosystems belonging to, managed by, controlled by, or appertaining to the United States of America and the State of Florida that have been injured by the discharge of hazardous substances as defined by applicable federal statutes (described in more detail in Section 1.1 below).

The Trustees have prepared this DARP/EA to inform the public about injury assessment and restoration planning efforts related to the Discharge and to solicit comments on the preferred restoration alternatives presented. Members of the public had 30 days from the release of this Draft DARP/EA on January 29<sup>th</sup>, 2012 to provide comments to the Trustees regarding the Natural Resource Damage Assessment (“NRDA”) and preferred restoration projects. No comments were received.

### 1.1 Statutory Authorities

NOAA, USFWS, and FDEP are acting under their authority as natural resource trustees under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. § 9601 et seq., the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq. (also known as the Clean Water Act or CWA), and other federal statutes and regulations, including the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) Subpart G, 40 C.F.R. Sections 300.600 - 300.615 and 43 C.F.R. Part 11, which are applicable to natural resource damage assessments under CERCLA. In addition, FDEP is acting under Chapters 376 and 403,

Florida Statutes, and the rules promulgated thereunder. Each of the Trustees is authorized under applicable law to assess and recover natural resource damages arising from the Discharge and to base that assessment on the costs to restore, replace, or acquire the equivalent of the injured resources, and lost resource services.

## 1.2 Coordination with Responsible Party

The trustees coordinated with Mosaic and its representatives (collectively, “Mosaic” or “RP” for responsible party) throughout the NRDA process to collect and analyze data that would ultimately be used for injury assessment and restoration planning. Beginning with the initial phases of the pre-assessment, a cooperative working group was established that included representatives from NOAA, USFWS, FDEP, and Mosaic (“Working Group”). Technical support was also provided to the Working Group by the Florida Fish and Wildlife Conservation Commission (FWC) and the Environmental Protection Commission of Hillsborough County (EPCHC).

In May of 2005, the Trustees held a public meeting in conjunction with the Tampa Bay Regional Planning Council’s Agency on Bay Management. During this first public meeting, the Trustees explained the NRDA process and presented preliminary findings of the injury assessment and case updates. The public was provided the opportunity to ask questions about the injury assessment and restoration selection process.

The Trustees published a “Notice of Intent to Conduct Restoration Planning” (NOI) on February 10, 2006. In order to get the broadest distribution, the NOI was published simultaneously in two local newspapers with wide distribution and readership in the Tampa Bay area: the *St. Petersburg Times* and the *Tampa Tribune*. The NOI was intended to inform the public about the status of the case, communicate the Trustees’ authority to pursue a claim for natural resource injuries, solicit feedback on the injury assessment, and solicit restoration projects that might be implemented to offset natural resource losses that resulted from the Discharge. The NOI also made the “Preassessment Data Report” (PADR) available to the public and announced that a public meeting would be held to discuss the PADR and restoration planning.

A second public meeting, also held in conjunction with the Tampa Bay Regional Planning Council’s Agency on Bay Management, was held in March of 2006. The Trustees presented an overview of the PADR and answered questions related to the injury assessment, restoration planning and other topics. The Trustees announced that they were soliciting restoration projects that would help compensate for injuries sustained from the Discharge.

On January 29<sup>th</sup>, 2012, the Trustees published a Public Notice in the Tampa Bay Times announcing the Draft DARP/EA and to invite the public the opportunity to comment with an open 30 day public comment period. No comments were received.



A third public meeting, also held in conjunction with the Tampa Bay Regional Planning Council's Agency on Bay Management, was held in September 6th, 2012. The Trustees and Responsible party presented an overview of the Draft DARP /EA with its proposed restoration projects and answered questions related to the injury assessment, restoration planning and other topics. The Trustees announced that they were moving forward with implementing the selected restoration alternatives that would help compensate for injuries sustained from the Discharge.

Final projects have been selected and the federal trustees have completed the Damage Assessment Restoration Plan/ Environmental Assessment (DARP/EA) in conformance with National Environmental Policy Act (NEPA).

### 1.3 Administrative Record

An administrative record was created which contains the major documents that will be used to make determinations of injury and select restoration alternatives. The Administrative Record is maintained and updated by NOAA and can be accessed by requesting access to the Administrative Record (AR) by contacting Sheila O'Brien, NOAA Office of the General Counsel SE; 253 13<sup>th</sup> Ave. S Suite 177; St. Petersburg, FL 33701; telephone: (727) 824-5382.

## 2. Overview of Incident

### 2.1 Description of the Discharge

Early in the morning on September 5, 2004, during Hurricane Frances<sup>1</sup> high winds and rainfall eroded a berm at the top of a phosphogypsum stack at the Mosaic phosphoric acid/fertilizer production facility in Riverview, Florida (Figure 1). As a result, until the breach was closed on September 6, 2004, approximately 65 million gallons of acidic process water were discharged from the stack and traveled through several swales on Mosaic's property until it reached South Archie Creek Canal and eventually Hillsborough Bay. The acidic water, with a pH approaching 2 standard units\*, killed and injured vegetation and aquatic organisms in open waters and adjacent marshes and mangroves. Once it reached the bay, currents spread most of the acidity northward

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<sup>1</sup> There is some question about whether hurricane force winds were present during the breach of the berm on the phosphogypsum stack. By the time Hurricane Frances reached Tampa Bay, it had been downgraded to a tropical storm. The nearest NOAA wind gauges registered wind speeds of 47 knots max, although the wind speed on top of the stack is unknown. Regardless whether the storm met the technical definition of a hurricane, it will be referred to in this document interchangeably as Hurricane Frances, the hurricane, or the storm. The official storm report has the following data measurements for the storm – Location -Tampa (KTPA), Date and Time (UTC) - 05/2225, Pressure (mb) 980.0, Date and Time (UTC) 05/1905 Sustained Winds (knots) 39, Peak Gust (knots) - 47 Rainfall Storm total (inches) - 5.74 – Source – “Tropical Cyclone Report Hurricane Frances 25 August - 8 September 2004 John L. Beven II National Hurricane Center 17 December 2004

\* For actual measurements and data please refer to the Pre-Assessment Damage Report



along the shore, where high water levels and winds associated with the storm carried the acidic water into the adjacent marshes. The open waters of the bay were also acidified, and lower than normal pH values were recorded up to 0.75 miles offshore on September 6. The open waters of the bay tended to neutralize the acidity, and pH levels throughout the affected waters were near normal by September 15. Circulation modeling following the hurricane event shows a 42% change in flux in Tampa Bay within 48 hours of the storm. The additional input of floodwater and wind driven positive volume increases did not drain until 50 hours after the event. (Wilson M. et. al. 2006).

During the Discharge, Mosaic worked closely with the several federal, state, and local agencies to stop the discharge and mitigate the damage, but these could not prevent natural resource injuries and losses from occurring. Since acidity was a major concern, Mosaic attempted to neutralize the process water at the point of discharge and in South Archie Creek Canal from September 5-7, 2004, but the attempt was not successful.

The process water which was discharged is typically used and re-circulated throughout the phosphate processing systems at the Mosaic facility as a scrubbing medium for production equipment air pollution control devices, a heat-exchange medium, for phosphate recovery, and as a transport medium. Process water contains approximately 2% phosphoric acid and other compounds including nutrients (nitrogen and phosphorous), fluoride and heavy metals. A complete description of the chemical constituents in the process water is in Table 1a of the Pre-Assessment Data Report, which is in the administrative record of this case and available from NOAA.

During and after the Discharge, federal, state, and local agencies and Mosaic started collecting data in a joint effort to gather and preserve information concerning the size and effects of the Discharge on potentially affected natural resources. Detailed descriptions of these activities are included in the Pre-Assessment Data Report and are summarized in this DARP/EA.



Figure 1. Incident Location.

## 2.2 Affected Environment

Consistent with NEPA, this section briefly describes the physical and biological environments that were affected or potentially affected by the Discharge and that may be affected by the restoration actions. The physical environment includes the surface waters of Archie Creek and Hillsborough Bay, associated freshwater wetlands and estuarine habitats, surface waters and habitats near the mouth of the Alafia River, and the locations of the restoration projects. The biological environment includes a wide variety of fish, crustaceans, shellfish, wetland vegetation, submerged aquatic vegetation, birds, and other organisms.

### 2.2.1 Physical

Tampa Bay, located on the west central coast of peninsular Florida, is the State's largest open water estuary. This roughly Y-shaped estuary covers almost 400 square miles and is typically subdivided into five main segments (Hillsborough Bay, Old Tampa Bay, Middle Tampa Bay, Lower Bay, and Terra Ceia Bay). The Tampa Bay watershed spans 2,300 square miles in six counties. Due to the influence of rivers and tributaries that drain into Tampa Bay, activities in its watershed directly affect the health of the Bay. Hillsborough Bay and associated emergent wetlands are approximately 1/10<sup>th</sup> the size of the entire estuary. The Alafia River discharges into Hillsborough Bay, along with the Hillsborough River and Palm River. Hillsborough Bay is bordered by the City of Tampa and has a major port located in its northern reach. South Archie Creek and North Archie Creek are small tributaries that also drain into Hillsborough Bay near the Discharge site.

### 2.2.2 Biological

Biological resources exposed to the acidic water included tidal marsh (primarily smooth cordgrass, *Spartina alterniflora* and needlerush, *Juncus roemerianus*), mangrove forests (red mangrove *Rhizophora mangle*, black mangrove *Avicennia germinans*, and white mangrove, *Laguncularia racemosa*), high marsh and transitional vegetation consisting mostly of salt grass (*Distichlis spicata*), and exotic plant species primarily Brazilian pepper (*Schinus terebinthifolius*); invertebrates, (blue crab (*Callinectes sapidus*), fiddler crabs (*Uca spp.*) and various shrimp species), water column organisms, seagrasses and marine algae; fish species included small forage fish species (*Gambusia holbrooki*, *Lucania parva*, *Poecilia latipinna*, *Cyprinodon variegatus*, *Fundulus spp.*, *Adinia xenica*), marsh resident and transient species such as sand seatrout (*Cynoscion arenarius*), striped mullet (*Mugil cephalus*), spadefish (*Chaetodipterus faber*), scaled sardine (*Harengula jaguana*), mojarra (*Eucinostomus spp.*), stingray (Dasyatidae), croaker (*Micropogonias spp.*), menhaden (*Brevoortia tyrannus*), sea robin (*Prionotus spp.*), hog choaker (*Trinectes maculatus*), white grunt (*Haemulon plumieri*), spotted seatrout (*Cynoscion nebulosus*), red drum (*Sciaenops ocellatus*), and common snook (*Centropomus undecimalis*). Though a number of species occur within Hillsborough County that are designated by either state or federal laws as threatened, endangered, or species of special concern, the Trustees did not document injury to any such species.



The open waters of Hillsborough Bay provide important habitat for the estuarine dependant fish species, such as those mentioned above, as well as marine fish species, marine mammals (e.g., bottlenose dolphin, *Tursiops truncatus*, and the West Indian Manatee, *Trichechus manatus*) and seabirds. Other important habitats within Tampa and Hillsborough Bays are seagrass meadows, tidal marshes, salt barrens, oyster reefs, and mangrove forests. Among the more commonly identified functions of the affected wetlands are food web support, water quality maintenance, and wildlife habitat. Detritus produced by wetland vegetation provides food resources to microbial and protozoan communities that act as food for invertebrates, which in turn act as food for fish. Wetland vegetation enhances water quality through the removal and uptake of nitrogen and phosphorus. Wetland vegetation, whether herbaceous, shrub or canopy species, provides cover for fish and wildlife which is an important habitat characteristic

### 2.2.3 Cultural and Human Use

Water-related recreational activities common in Tampa Bay include recreational fishing, swimming, canoeing, and other boating activities. These activities are important to tourists and residents. Currently, there are more than 46,000 registered boats in Hillsborough County (2009 Alphabetical Vessel Statistics by County [FLHMSV]) and over 200 public and private marinas. This does not include vessels brought into the area by visitors. The Alafia River boat ramp is the closest recreational access to the Discharge site. Recreational activities on Hillsborough Bay also support businesses, such as bait shops and boat rental facilities, some of which are located along the Alafia River.

Agriculture, boat building, and port activities are some of the historic and current industries in the Tampa Bay region. Due in large part to the Port of Tampa and the dredging of more than eighty miles of deep-water shipping channels, seaborne commerce has historically been a large part of the Tampa Bay area's economy. The Port of Tampa is the largest port in Florida and the tenth largest in the nation. The port accommodates 50% of Florida's cargo in the form of bulk, break bulk, roll-on/roll-off, refrigerated and container cargo. The port also has a large ship repair and building industry, and recently expanded cruise ship facilities. It supports important industries, such as phosphate mining, by providing affordable bulk transportation. Tampa is one of the world's leading exporters of phosphate. Tampa Bay is also a major commercial fishing port, with fish and shellfish landings at 1,946,103 pounds during 2007 (Florida Fish and Wildlife Conservation Commission, 2008), the majority of which was shrimp caught in the Gulf of Mexico.

## 2.3 Summary of Pre-Assessment Activities

Following the Discharge, the Responsible Party and the Trustees acted quickly to identify and, to the extent practicable, coordinate activities to collect data and other information needed to document the Discharge and assess its potential to adversely affect natural resources. These efforts took into account investigations undertaken as part of the Discharge response, natural resources at risk, preexisting monitoring programs for resources of concern, and the different capabilities, human resources and expertise of the

agencies investigating the resource injuries. Relevant activities are described in the PADR and included the following:

- (1) Documentation of the Discharge and its movement through South Archie Creek Canal and Hillsborough Bay;
- (2) Tributary and open bay water column sampling to assess potential injuries and to document pathways of potential resource exposure;
- (3) Visual surveys to identify and assess resource impacts;
- (4) Benthic sampling to evaluate potential effects on benthic communities;
- (5) Ground reconnaissance, systematic field sampling and aerial photographic surveys to assess potential impacts to shoreline, wetland, and upland vegetation; and
- (6) Fish sampling activities.

#### 2.4 Natural Resources and Resource Services with Documented Injuries

As described in the PADR, the Working Group identified four types of natural resource injuries warranting further assessment in developing this DARP/EA:

##### 2.4.1 Estuarine Wetland

Approximately 78.4 acres of mangroves and 57.3 acres of tidal marsh situated along South Archie Creek Canal and the eastern edge of Hillsborough Bay experienced some degree of die-off as a result of contact with the acidic process water. The die-off of vegetation represents a loss of associated ecological services until such time as the areas recover to pre-Discharge conditions.

##### 2.4.2 Seagrass

Post-Discharge monitoring indicated approximately 21.57 acres of seagrass meadow showed some level of stress from the Discharge. In addition, an estimated 2.87 acres of seagrass meadows were presumed to exist at some point before the Discharge from historic survey data, but evidence of these meadows (*i.e.*, leaves or rhizomes) could not be identified during post-Discharge surveys. Data suggests that 24.44 acres of seagrass meadow likely existed along the shoreline before the Discharge.

##### 2.4.3 Surface Water

The Discharge injured the physical and chemical quality of the surface waters of South Archie Creek Canal and Hillsborough Bay for several days. It reduced pH in South Archie Creek Canal and nearshore Hillsborough Bay to levels below water quality criteria established under both state and federal law. The Discharge also added



nutrients, such as phosphorus and nitrogen, to South Archie Creek Canal and Hillsborough Bay.<sup>2</sup>

#### 2.4.4 Marine Organisms

Fish, crabs and shrimp were killed in South Archie Creek Canal, Hillsborough Bay, and their attendant marshes. The loss of these individuals also created the potential for a corresponding loss of future production of these species and the services they provide.

### 2.5 Natural Resources and Resource Services with Undocumented, but Likely, Injuries

The Trustees also identified the potential injury of the following natural resources or resource services due to the spill:

#### 2.5.1 Birds and terrestrial vertebrates

Although no bird or other terrestrial animal injuries were observed, losses of fish and crustaceans, the food base for some birds, were observed and documented. This loss of prey provides a basis for concern that the Discharge may have indirectly affected birds, in particular, by temporarily reducing available prey.

#### 2.5.2 Lost Use of Fish for Recreation

The fish loss caused by the Discharge could have impacted recreational fishing by decreasing the availability and abundance of fish stocks. Recreational fishing activity might have declined or the quality of the recreational fishing experience might have decreased as a result.

#### 2.5.3 Estuarine Benthic Invertebrates

The Trustees compared pre- and post-Discharge sampling data bearing on the abundance and diversity of benthic communities in estuarine portions of the Alafia River. The results were inconclusive as differences in pre- and post-Discharge data were generally consistent with “normal” seasonal variability or salinity changes following significant rainfall. Nevertheless, these resources could have been injured by the Discharge. However, the Trustees concluded further study of potential injuries to estuarine benthos was not justified, because ecological benefits to estuarine benthos would accrue from the types of restoration actions that would be considered to compensate for other injuries, such as for the fish losses.

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<sup>2</sup>The Trustees agreed to address the damages caused by the discharge of approximately 100 tons of nutrients through a consent order between Mosaic, FDEP and EPCHC. Consent Order No. 04-1548 is available by contacting either FDEP or EPCHC.

For each of the potential injuries identified in sections 2.5.1 through 2.5.3, additional investigations or studies would have been necessary to assess and quantify the losses. The Trustees elected not to proceed with additional investigations or studies for these potential injuries for several reasons. Primarily, due to data gaps, it was difficult to establish with the necessary degree of certainty that fish losses were significant on a local population level. As an alternative, the Agency/RP Working Group sought to develop a restoration plan that would compensate for the documented natural resource injuries while also maximizing benefits to birds and fish. This strategy recognized that restoration actions available to compensate for documented injuries are likely to also effectively compensate for any recreational fishing impacts or indirect injuries to birds that may have occurred, based on the circumstances of the event and the period for exposure or effects. Accordingly, these potential injuries were considered in developing this DARP/EA.

## 2.6 Resource Services with no Documented Injury

Lost Use of Surface Waters for Recreational Boating – Given the inclement weather associated with Hurricane Frances and the timing of the incident, the Trustees concluded that recreational boating losses that could be attributable to the Discharge were unlikely to have occurred. The severe weather conditions were sufficient to have eliminated boating activity during the Discharge period. The Trustees determined that further action or cost to assess such potential for loss was not warranted.

## 3. Assessment of Injury Categories

### 3.1 Estuarine Wetland

#### 3.1.1 Mangrove Forest

##### (1) Overview of Assessment Activities and Findings

Methods described in the 'Proposed Ephemeral Data Collection Protocols for Documenting and Monitoring Vegetation Impacts', NRDA Working Group, Version 2, September 20, 2004, were used to assess injury to wetland vegetation. Methods included using low altitude high-resolution true color and color infrared photographs of the assessment area and using both quadrat and transect monitoring. Aerial photography was taken on numerous dates to document initial mangrove injury and potential delayed effects. Permanent vegetation sampling locations, including quadrats and transects, were established to monitor mangrove impact and recovery.

Nine one-meter square quadrats were established in impact and reference locations; data were collected from September, 2004 through April, 2007. Each corner of the quadrat was marked with permanent PVC pipe and the quadrat was photographed. Vegetation parameters recorded within each quadrat included the following: (1) plant species by ground cover, shrub layer and canopy strata; (2) plant communities; (3) percent cover estimated visually; (4) the estimated percent of live and dead stems by species; and (5) a characterization of any stress symptoms and type of stressor visible (*i.e.*, chlorotic leaves, leaf deformities, wilting, insect damage, etc.). For mangrove trees

where only lower portions of the tree showed leaf stress and loss, percent leaf mortality was recorded. At ten points within the quadrat, the maximum height of vegetation was recorded by species.

Vegetation transects were established in visibly stressed and un-stressed plant communities based on data from the first two overflights. Transects were oriented across tidal streams or at right angles to shorelines if established at shoreline locations. In tidal stream locations, the transects were established to traverse the sampled vegetation from a "top of bank" position in the vegetation on one side of a tidal stream, across the tidal stream, and extending into the vegetation on the other side of the tidal stream. At each site, a tape measure was stretched the length of the transect and uniquely numbered stakes were installed on the centerline at approximately ten meter intervals, depending on the vegetation community. A profile of the vegetation touched by the transect line and lying 1 meter on each side was recorded in the field.

## (2) Injury Determination

Injuries to mangrove habitat from the Discharge were categorized in terms of projected recovery. Mangroves occur at various life stages and recovery is affected by both the magnitude of impact and life stage. For species that were dead, recovery was assumed based on the time for the species to grow to pre-spill dimensions from natural volunteer propagules. For plants with partial impact, recovery was assumed based on results of monitoring re-growth in subsequent years. Of the estimated impact to 78.4 acres of mangrove communities, approximately 53.59 acres of young mangroves were expected to recover in less than two years, 10.09 acres were expected to recover in two to four years, 13.70 acres were expected to recover in four to ten years, and approximately 1.02 acre of mature mangroves were anticipated to require over ten years to recover (Figure 2, Table 1).

Data collected in April, 2007, and reported in the Technical Data Report Supplement Number Two, August, 2007, show that most of the impacted mangrove areas recovered or were at a minimum of 50% recovery. Follow up investigations and photographic documentation in fall 2009 confirmed that the natural recovery of the affected mangroves did recover as expected. This included the ongoing recovery of a small island area of old black mangroves (25-30' tall) that was determined to take ten or more years to fully return to baseline condition (Table 1). During January, 2010, a freezing weather condition which persisted for several days resulted in plant stress within the impact area and throughout the region.

### 3.1.2 Tidal Marsh

#### 1) Overview of Assessment Activities and Findings

The same aerial photography and methods used for mangrove assessments were also used to determine tidal marsh injury. Data for injury and recovery of tidal marshes was

collected at the same time as mangrove data collections. Injuries to tidal marshes and recovery times were evaluated and projected.

(2) Injury Determination

A total of 57.36 acres of tidal marsh situated along South Archie Creek Canal and the eastern edge of Hillsborough Bay experienced some injury as a result of the Discharge. Injuries from the Discharge were categorized for each habitat in terms of projected recovery. For species that were dead, recovery was assumed based on the time for the species to grow to pre-spill dimensions. For plants with partial impact, recovery is assumed based on results of monitoring re-growth in subsequent years. Recovery for 57.36 acres of tidal marsh was projected to occur between one and four years. (Figure 2, Table 1).

Data collected in April, 2007 and reported in the Technical Data Report Supplement Number Two, August, 2007, show that most of the impacted tidal marsh areas recovered or were at a minimum of 50% recovery. Follow up investigations and photographic documentation in fall 2009 confirmed that the natural recovery of the affected marsh did proceed as expected and in some cases even showed the progress of natural succession from cordgrass marsh to mangroves (Figures 3 and 4).



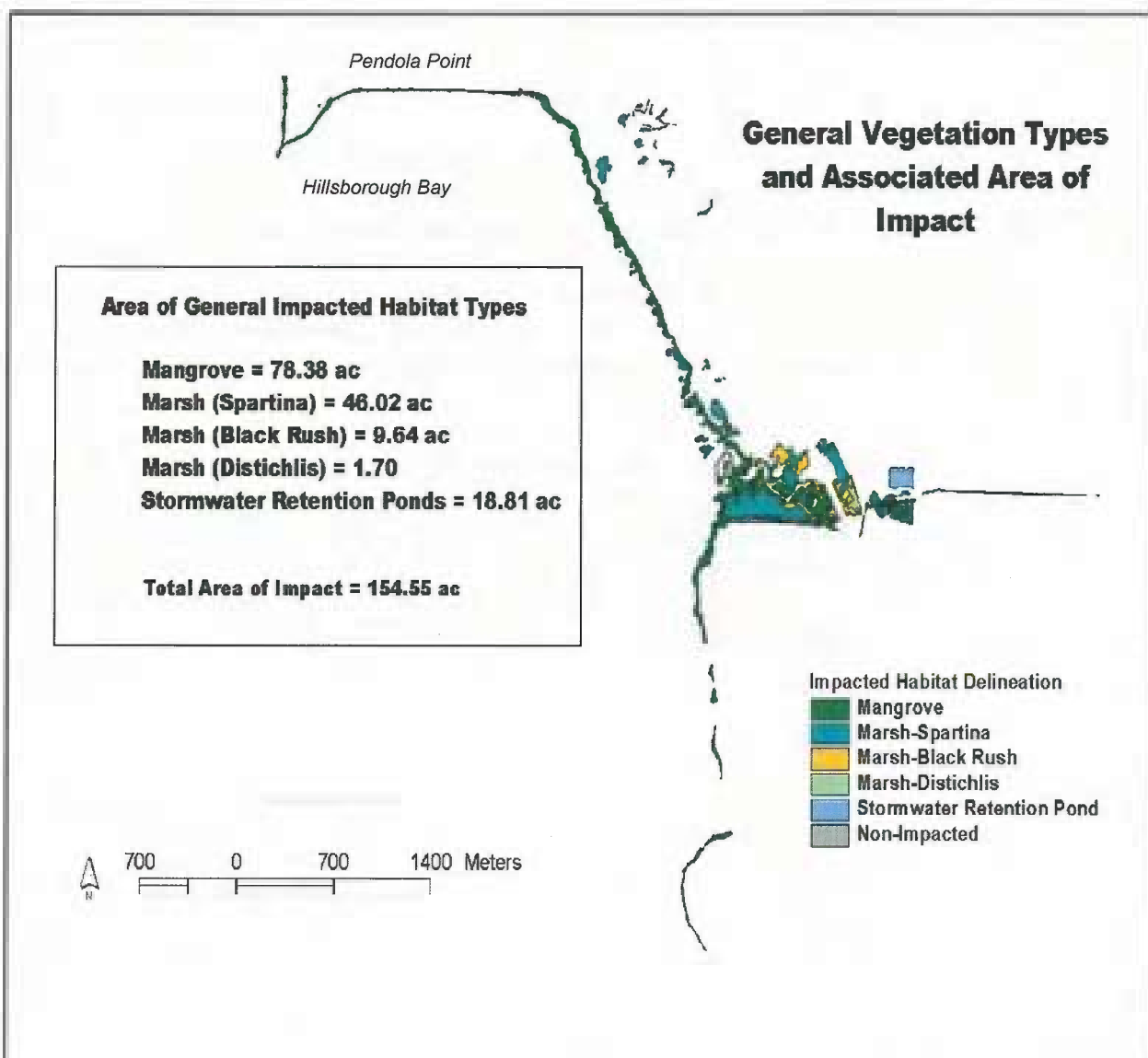


Figure 2. Impacted Vegetative Habitat Types and Distribution.



Table 1. Projected Recovery Time (years) for the 154.57 Acres of Varied Degree of Impacted Vegetative Habitats. (Data from PADR,2005)

Habitat Type	Projected Recovery Time	Affected Acres
Mangrove	<2 years	53.59
Mangrove	2-4 years	10.09
Mangrove	4-10 years	13.70
Mangrove	> 10 years	1.02
<b>Total Mangrove</b>		<b>78.40</b>
Spartina Marsh	<2 years	9.11
Spartina Marsh	2-3 years	33.18
Spartina Marsh	3-4 years	3.73
<b>Total Spartina Marsh</b>		<b>46.02</b>
Black Rush Marsh	<2 years	6.88
Black Rush Marsh	2-4 years	2.76
<b>Black Rush Marsh Sum</b>		<b>9.64</b>
Distichlis Marsh	2-3 years	1.7
<b>Total Marsh</b>		<b>57.36</b>

Total mangrove and marsh impacts equal 135.76 acres with an additional 18.81 acres of stormwater retention pond (total impacts 154.57 acres).



**Figure 3.** Damaged mangrove and tidal marsh south side of South Archie Creek Canal and east of Old Hwy 41 in “Severe Impact Area”. Photo taken September 13, 2004.



**Figure 4.** Damaged mangrove and tidal marsh north side of South Archie Creek Canal and east of US 41 in “Severe Impact Area”. Photo taken April 19, 2007.

### 3.1.3 Seagrass meadows

#### (1) Overview of Assessment Activities and Findings

Two species of seagrass are known to be present in Hillsborough Bay, shoal grass (*Halodule wrightii*), and widgeongrass (*Ruppia maritima*). Assessing the seagrass injury resulting from the Discharge required an estimate of the acreage and condition of seagrass before and after the Discharge. While local Tampa Bay groups, such as the City of Tampa Bay Studies Group (COTBSG) and Tampa Bay Interagency Seagrass Monitoring Program (TBISP), have done significant work to monitor and evaluate seagrass health and distribution, the monitoring has not been carried out with the intent of quantifying the exact acreage and density of every seagrass bed in Hillsborough Bay. Given the specific challenges of monitoring seagrass beds and their likely rapid response to low pH from the discharge, it is impossible to know precisely the pre-Discharge extent of the seagrass meadows. For this reason, the Working Group used a combination of photo-interpretation and field evaluation to estimate pre-Discharge seagrass bed extent and density.

True color and color infra-red aerial photographs were taken of South Canal and the impacted areas in Hillsborough Bay periodically from September 8, 2004 until November 11, 2004. Initial photographs were used to assist with estimates of pre-Discharge extent of seagrass meadows and as an aid in selecting appropriate sites for on-the-ground data collection (such as transects, quadrats and seagrass bed circumference measurements). Subsequent photographs were used to assess the extent and degree of seagrass meadow coverage.

Field surveys of the coastline were undertaken at low tide to identify the circumference of seagrass meadows. DGPS (Garmin GPS Map 76) was used to record points with obvious seagrass vegetation. In addition, hand trowels were used to spot-check other areas for the existence of rhizomes. If rhizomes were found without above-ground leaves the location was recorded on the DGPS and designated as part of the pre-Discharge extent of seagrass meadows. The points were overlain on Southwest Florida Water Management District 2004 rectified photography. The circumference and area of seagrass meadows were estimated by constructing polygons around individual seagrass meadows based on DGPS points, field observations and professional judgment.

The pre-Discharge density of individual seagrass meadows were also characterized in terms of “continuous and sparse” using Florida FLUCCS code definitions (Florida Department of Transportation 1999). Continuous meadows are defined as evenly distributed vegetation or rhizomes within a given area or greater than 25% cover. Sparse meadows are defined as areas with less evenly distributed vegetation or rhizomes with large patches of bare sand bottom or less than 25% cover. Thirty quadrat samples were used to assess the seagrass cover.

To evaluate post-Discharge conditions, two methods of field inspections (transect monitoring and haphazard quadrat sampling) were used to estimate the acreage and percent cover of meadows through time. The transect procedure involved setting a linear transect starting at the shoreline and extending out perpendicularly from the shore across existing seagrass meadows. A one square meter quadrat was used at either 25 m or 10 m intervals along each transect, and seagrass abundance was estimated using the Braun-Blanquet methodology. General observations were recorded, including water depth and short shoot density (short shoots per 100 cm<sup>2</sup>), and the condition of the meadow. These data were used to assist in the estimate of seagrass stress or mortality. A separate quadrat sampling protocol was used to determine the extent and degree of injured seagrass, as well as potential recovery through time. Density of above-ground seagrass was recorded from ten haphazardly placed quadrats at each sampling site. Sites were sampled through April, 2005 to provide a comparison through time.

## (2) Injury Determination

Post-Discharge monitoring and general field observations indicate that 24.44 acres of seagrass meadow likely existed along the shoreline before the Discharge. Of those, 21.57 acres were located and showed signs of stress and 2.87 acres were not visible (*i.e.*, leaves or rhizomes could not be identified during post-Discharge surveys). The results of these surveys are further documented in LES Tech report Supplement Number 1, March 2006.

### 3.1.4 Fishery Resources (Fish and Crustaceans)

#### (1) Overview of Assessment Activities and Findings

Shoreline surveys were performed to provide an estimate of the number of dead organisms in the affected area. Survey sampling locations were 100 yards long and ten feet from the shoreline and followed the American Fisheries Society Sourcebook for Investigation and Valuation of Fish Kills (AFS 1993). In addition to counts of organisms along transects, dead organisms found on the beach and in the marsh perpendicular to the transect locations were also quantified by direct counts. Fish counts by species and size class were recorded for both transect and direct counts. Surveys were conducted from Pendola Point to Archie Creek on September 8, 2004 and from Archie Creek to south of the Alafia River on September 9, 2004.

Fish and macroinvertebrate sampling was performed by Mote Marine Laboratory on September 8 and 9, 2004 by using a standard 20 foot otter trawl with a 3.8 centimeter (1.5 inch) mesh net. The trawl mouth was approximately 12.5 feet across the bottom, 9.5 feet across the top and 18 inches high, resulting in a net opening area of five square meters. Trawl sites were randomly selected in areas of known exposure, areas with no known exposure, and potentially exposed areas based on preliminary data and observations regarding the extent of injury. Mote Marine Laboratory performed 20 ten-minute trawls north and south of the Alafia River. Five trawls were conducted in shallow water and five trawls in deep water both north and south of the Alafia River.



Nineteen five-minute trawls were performed north of the Alafia River and South of Pendola Point by Florida Fish and Wildlife Commission (FWC) using a standard 20 foot otter trawl. Each trawl sample consisted of the biomass collected during five minutes at 1.2 knots (0.1 nautical miles). All species of fish and select macroinvertebrates were identified for each sample. Each specimen was identified to the species or species-complex level, measured, and counted.

Surveys of actively fishing crab traps surveys near the Discharge site were conducted on September 7, 8 and 9, 2004. The trap identifier information was recorded and traps were inspected for live and dead organisms by species to provide evidence regarding the extent of acute toxicity to organisms in the traps at the time of the survey. GPS positions of over 110 crab traps in Hillsborough Bay were recorded. The precise date and time of the placement individual crab traps, relative to the Discharge, was not determined.

## (2) Injury Determination

All species captured by trawl were identified. Fish and elasmobranchs commonly captured included silverside (*Menidia menidia*), sand trout (*Cynoscion arenarius*), spadefish (*Chaetodipterus faber*), blue gill (*Lipomus spp.*), scaled sardine (*Harengula jaguana*), mojarra (*Eucinostomus spp.*), stingray (*Dasyatidae*), croaker (*Micropogonias spp.*), menhaden (*Brevoortia tyrannus*), sea robin (*Prionotus spp.*), hog choaker (*Trinectes maculatus*), and white grunt (*Haemulon plumieri*). Crustaceans and other invertebrates captured include brown shrimp (*Farfantepenaeus aztecus*), pinkspotted shrimp (*Farfantepenaeus braziliensis*), pink shrimp (*Farfantepenaeus duorarum*), white shrimp (*Litopenaeus setiferus*), roughneck shrimp (*Rimapenaeus constrictus*), blue crab (*Callinectes sapidus*), lesser blue crab (*Callinectes similis*), stone crab (*Menippe spp.*), horseshoe crab (*Limulus polyphemus*), and the cannonball jelly (*Stomolophus meleagris*).

The total species, organisms, and biomass for each trawl performed by Mote Marine Laboratory were normalized to the length of the trawl (*i.e.*, species per kilometer, *etc.*). No significant differences were found between assumed impact and non-impact (reference) areas or between impact areas and historical data. (Please refer to the PADR for actual data.)

Shoreline survey data from sampled transects were extrapolated to overall estimates of dead marine organisms using American Fisheries Guidelines (American Fisheries Society 1993). The estimated numbers of dead fish along the shoreline was 7,387 and represent a portion of the total kill. Crab trap data collected by NOAA September 7-9, 2004, found 523 blue crabs in 117 traps examined in the vicinity of the discharge. Of these, 367 (70.2%) were dead, and 156 (29.8%) were live. Seven of the traps examined were empty, ten had a mixture of live and dead crabs, 31 had only live crabs and 69 had only dead crabs. Additionally, 4 dead stone crabs, ten dead horseshoe crabs, twenty-five dead snails, and 20 additional fish were found dead in the traps.

Estimates of total biomass loss and fish and invertebrate injuries are difficult to determine for a number of reasons, including: 1) The severe weather associated with the



Discharge did not allow sampling to occur until three days following the incident. Small fish and invertebrates can rapidly decay and/or be scavenged during that time; 2) The tropical weather event resulted in a surge of tidal waters into the mangroves and marshes. Tidal flooding carried the low pH water from the Discharge into the marshes and likely resulted in the broad distribution of dead organisms throughout the marsh system, rather than accumulation along the shoreline, and therefore those animals would be largely unaccounted for with the given sampling methods; and 3) It is possible that changes in barometric pressure and a decrease in salinities associated with Hurricane Frances could trigger some fish species to seek deeper water for shelter, thereby altering the typical fish assemblages (Greenwood *et al.* 2006).

### 3.1.5 Surface Water

#### (1) Overview of Assessment Activities and Findings

Water column pH and salinity were measured at ten sites near the Discharge site from September 6 to September 27, 2004. Water column pH was measured by State agencies throughout Hillsborough Bay from September 6 to September 29, 2004. Mosaic also maintains stream flow monitoring stations, on Archie Creek North and on Archie Creek South, each near Highway 41. Each station records pH continuously. The stream flow gauge failed in South Archie Creek Canal on September 9, 2004.

#### (2) Injury Determination

Water quality was affected by acidity and other components of the Discharge. Surface water pH data from Hillsborough Bay on September 6, 2005 were interpolated to isobars of reduced pH in the Bay (Figure 5). Hillsborough Bay pH levels in the vicinity of the mouth of South Archie Creek Canal remained low for several days. FDEP observed pH values below State Water Quality Standards in South Archie Creek Canal through September 10, 2004.

Low pH in surface waters resulted in lethal and sub-lethal effects on biota. Injuries to mangroves, marshes, seagrasses, fish and macroinvertebrates were assessed. Low pH also likely resulted in a range of other water quality injuries including loss of phytoplankton and zooplankton, macro and micro algae and disruption of chemical processes. While not quantified, the Trustees considered these likely water quality injuries during restoration planning and expect that the restoration options will also address these injuries.



Figure 5. pH value interpretation presented as gradient contours.

#### 4. Types of Restoration and Restoration Plan Alternatives

##### 4.1 Types of Restoration

Federal liability frameworks for natural resource damages share a common objective – to provide for expeditious restoration, replacement, or acquisition of equivalent resources to compensate the public when injuries to natural resources result

from unlawful discharges of hazardous substances, pollutants or contaminants. Under these laws, the Trustees are responsible for determining the actions needed to meet this objective. The four alternative actions considered for the Discharge include the broad categories of *primary restoration*, *emergency restoration*, *compensatory restoration* and *no action*.

**Primary Restoration** includes those actions taken to return natural resources and services directly injured by the Discharge to the condition they would have been in if the Discharge had not occurred (sometimes referred to as the baseline conditions). Primary restoration may include natural recovery of injured resources.

**Emergency Restoration** is action considered necessary to reduce continuing natural resource injuries and to keep the injured area from further degradation. Emergency restoration is implemented as soon as possible after an injury event.

**Compensatory restoration** is action taken to compensate for the interim losses of natural resources and/or services before they recover to baseline conditions. Compensatory restoration can include restoration, rehabilitation, replacement, or acquisition of equivalent natural resources and/or services. The Trustees used a number of criteria to evaluate potential compensatory restoration projects including the following:

1. Relationship of the Restoration Action to the Type and Quality of Resources and/or Services Injured – This criterion considers the nature and extent to which a restoration action would address the natural resource injuries that occurred as a result of the event. It includes the extent to which the benefits of the action would be on-site, in-kind, or would be otherwise comparable in nature, scope, and location to injuries that occurred. Evaluation of each restoration action also considered the full range of potentially affected resource categories, even if no injury assessment was completed for that category. Specifically, projects that meet this criterion augment or create fish nursery habitat, create or enhance conditions for invertebrate growth and their availability as forage for fish and other animals, increase foraging opportunities for birds, and/or enhance water quality in the area.
2. Consistency with Community Objectives – This criterion considers the degree to which a given restoration action is consistent with current or future community objectives. Community objectives are discerned from larger ecosystem restoration plans and discussions with local resource managers. For example, the regional effort to remove exotic species is a current and future community objective.
3. Multiple Benefits – This criterion considers the extent to which a restoration action will address more than one natural resource injury or benefit other resources.

4. Technical Feasibility – This criterion considers both the likelihood that a given restoration action will succeed in a reasonable period of time and the availability of technical expertise, programs and contractors to implement the action. This criterion includes, but is not limited to, consideration of prior experience with methods or techniques proposed for use, availability of equipment and materials, site availability, and logistical difficulty.
5. Restoration Site Requirements - This criterion considers the extent to which the scientific, engineering or legal requirements of the restoration can be met by available sites.
6. Potential for Additional Natural Resource Injury – This criterion considers the risk that a action may aggravate or cause additional natural resource injuries.
7. Restoration is Self-sustaining – This criterion considers the degree to which a restoration will achieve and maintain success without human intervention.
8. Consistency with Applicable Laws and Policies – This criterion considers the extent to which a restoration is consistent with relevant State, Federal and County policies and would be implemented in accordance with State, Federal and County laws.
9. Potential Effects on Human Health and Safety – This criterion considers the potential adverse impacts a restoration may have to human health and safety.
10. Cost Effective – This criterion considers the costs of a restoration alternative to the benefits of that. Other factors being substantially equal, a less costly restoration approach is preferred.

**No Action** includes no direct restoration activities undertaken by the Trustees to restore injured resources or to compensate for lost resource services pending their ecological recovery. Only natural recovery occurs under this option. Interim losses are not compensated.

This DARP/EA identifies the restoration alternatives that address injuries to natural resources and their services as a result of the Discharge. In addition to natural recovery of the directly injured resources, three projects are proposed and/or completed to address the injuries identified above. The projects include one emergency restoration (project completed) and two compensatory restoration projects. All three projects include restoration and protection of mangrove forest, marsh enhancement and wetland creation and one of the projects incorporates oyster reef creation. In addition, conservation easements over 103.76 acres will be established for the future protection of two of the project sites



## 4.2 Restoration Plan Alternatives

### 4.2.1 Primary Restoration Alternative - Natural Recovery

The Trustees have determined that natural recovery is the most appropriate action to restore those resources and services that were directly injured by the Discharge. The Trustees did not identify any other primary restoration actions that would restore the natural resources and services in a more expeditious and robust manner than natural recovery, because the injured areas were surrounded by adequate seed sources and the Discharge did not change the elevations or substrate in ways that would prevent the injured areas from recovering naturally.

#### (1) Evaluation of Alternative

Injuries to the mangrove and marsh habitat were caused by exposure to the Discharge. The Trustees consider the mangroves and marsh vegetation recovered when they meet baseline conditions. While vegetation planting could be considered, natural recruitment was expected to re-vegetate the area, and recovery to baseline was expected to occur in 4 years or less for 121.02 acres of the 135.74 acres of injured saltwater habitat (89%). Monitoring of the habitat over the past 6 years has supported that assumption as marsh and mangrove habitat has actively recruited. The 14.72 acres of mangrove and marsh habitat with longer time periods to recovery have also recruited vegetation and will return to full function when the vegetation reaches baseline levels.

The seagrass meadow injuries were also caused by exposure to the Discharge. The Trustees consider the re-growth of seagrass meadow back to baseline levels an appropriate measure of recovery. However, establishment of a baseline for seagrass habitat is difficult given their natural temporal and spatial variability. Given the fact that 21.57 acres of the 24.44 acres (88%) injured showed signs of stress but still had intact rhizomes, the Trustees expected that natural recovery would occur for some portion of this habitat during the next growing season. For the 2.87 acres of seagrass habitat that was lost and the seagrass habitat that was stressed, the Trustees expect natural recovery to take place over several years. In this particular instance, natural recovery is preferred as a better alternative than active restoration since replanting entire seagrass meadows is inherently difficult and the restoration alternatives will account for the lost services from this impacted area.

The Trustees also propose that natural recovery is the best primary restoration alternative for fish and invertebrate injuries. Although the Discharge killed fish and invertebrates, it was difficult to establish with the necessary degree of certainty based on the numbers of fish and invertebrates collected from the impact and non impact areas or between the impact areas and historic survey data that the difference was significant. This data suggests that the fish and invertebrate populations in unimpacted waters surrounding the site of the Discharge were able to recolonize the area of the acute injury within a short time period. The Trustees were not able to establish a statistically significant difference in the composition of the fish and invertebrate communities, and no active primary restoration is warranted for this injury.



The injuries to phytoplankton, zooplankton, and micro- and macroalgae caused by low pH and compromised water quality appeared to be short-lived. The pH returned to baseline condition within several days and the affected natural resources and services likely returned to something similar to baseline with respect to pH shortly thereafter. No active primary restoration action is warranted for this injury.

#### 4.2.2 Emergency Restoration Alternative - Wetland Enhancement through Removal of Exotic Invasive Vegetation

The Trustees authorized Mosaic to implement one emergency restoration project, which was considered necessary to reduce continuing natural resource injuries and to keep the injured area from further degradation due to invasive species colonization.

Trustees approved "Draft 5 Proposed Protocol for Exotic Plant Species Control, Monitoring and Reporting at the Cargill Site, Riverview, Florida" [December 13, 2004], which set forth a plan to remove exotic plants from 26.46 acres of land comprised of wetlands injured by the Discharge and adjacent uplands. These areas include North Parcel East B-2, 16.50 acres; North Parcel East B-3, 1.61 acres; and North Parcel West-C, 8.35 acres (Figure 6, Site 3 and Figure 10).

#### (2) Evaluation of Alternative

Within 30 days of the Discharge, Mosaic presented an emergency restoration plan to the Trustees to promptly prevent additional degradation of wetlands from invasive exotic species colonization. This plan identified 26.46 acres of mangrove and tidal marsh vegetation that had been killed by the Discharge and was surrounded by invasive and exotic species. The exotic plant community was primarily composed of Brazilian pepper, but included other species such as chinaberry (*Melia azedarach*), lead tree (*Leucaena leucocephala*), and air potato (*Dioscorea bulbifera*). Due to their tolerance of freezing events, rapid re-growth following injury, and lack of native insect predators, these species are aggressive invaders of disturbed habitats and have a competitive advantage over many native tidal marsh, mangrove forest, and transitional zone plants. The Trustees determined that invasion by the exotic vegetation into the wetland was likely to occur without emergency action. Such an invasion would result in an extended period of recovery for the wetland and could lead to the complete loss of the wetland habitat and resource services.

Removal of exotic vegetation began January 31, 2005 and was completed February 22, 2005. Regular maintenance of the area has prevented exotic plant invasion in the injured wetland and allowed for natural recolonization by native wetland species. The final monitoring report shows at 5.98 acres of restored wetland habitat through the Time Zero Plus 69 Months Monitoring Report, December 13, 2010.



Figure 6. Location of Parcels included in the Emergency Primary Restoration.

## (2) Relationship to Injury

The emergency restoration likely prevented further degradation of the affected mangrove and tidal marsh and alleviated the potential for complete loss of the resource had exotic species invaded and displaced the natural vegetation. The emergency restoration likely allowed for a more rapid return to baseline for the injured wetlands.

## (3) Environmental and Socio-Economic Impact

Removing exotic vegetation and preventing their spread has environmental and socio-economic impacts. Brazilian pepper is a long-term invasive exotic species that

grows in areas between uplands and wetlands. The species spreads rapidly through dispersal of seeds by wind and fauna. Dense forests of Brazilian pepper will inhibit the growth of native plants and few native animals rely significantly on the plant for food, shelter, or nesting. Removal of Brazilian Pepper benefits the environment by allowing the re-colonization of native plant species. (Cuda, et al 2006.) Ultimately, re-establishing native habitat will support native fauna by providing shelter, nesting, and foraging habitat to which they are adapted.

Large-scale efforts are underway throughout the Tampa Bay area to control and remove many invasive plants. These activities are often undertaken with public funding in an effort to maintain public lands. Private industry also carries out exotic plant control and maintenance activities. Removal and maintenance of exotic plants is often a chronic task that requires expensive vigilance and man-power. The emergency removal not only eliminates the invasive plants but also eliminates an additional 26.46 acres of a potential seed source and lowers the amount of money needed to address the perennial problem.

#### 4.2.2 Compensatory Restoration Alternative (Project 1 of 2) – Giants Camp Hydrologic Restoration with Mangrove Tidal Creek Creation/Enhancement and Oyster Habitat Creation (Site 1).

While natural recovery is the preferred alternative to restore those resources that were directly injured as a result of the Discharge, the Trustees have considered several alternative projects to compensate for the loss of resources and associated resource services until full recovery has occurred. The objective of these compensatory restoration projects is to compensate for injuries to mangrove tidal marshes, seagrass, fish, macroinvertebrates, and surface waters.

##### Location

Two projects are the Compensatory Restoration Alternative projects. The first project (Site 1) is the Giant's Camp Hydrologic Restoration with Tidal Creek Creation/Enhancement and Oyster Reef Creation Project. The second restoration project is the Borrow Pit Wetland Creation and Enhancement (Site 2). The location of Site 1 is southwest of the Highway 41 Bridge adjacent to the Alafia River. The Borrow Pit Wetland Creation and Enhancement project (Site 2) is located east of Highway 41 North just north of the Riverview facility (Figure 7).



Figure 7. Locations of the Two Chosen Restoration Sites - Giant's Camp Hydrologic Restoration with Mangrove Tidal Creek Creation/Enhancement and Oyster Habitat Creation, and Borrow Pit Wetland Creation and Enhancement.



**A. The Giant's Camp Hydrologic Restoration with Tidal Creek Creation/Enhancement and Oyster Reef Creation Project (Site 1).**

The goal of this project is to restore and enhance mangrove habitat and associated natural resource services by improving hydrology. Pockets of the mangrove forest show signs of both stress and die-off, possibly due to a reduced tidal prism. Gradual closure of the tidal creeks can cause impounded conditions affecting mangroves. Analysis of historical photography shows that the areas of die-off have only developed since the early 1990's.

Restoration of the site will improve the hydrological regime that provides adequate tidal prism in an attempt to stop the decline of the mangrove forest and to provide additional nursery and forage habitat for local fish species. Hydrodynamic modeling indicates that creating a tidal channel between the marina basin and the mangrove forest and re-establishing the historic channels will result in an increase in flow through the system. Routine flooding of the mangrove forest should provide forage fish species greater access to habitat and ultimately should increase fish production in the area. The pond located near the eastern edge of the mangrove forest will be connected to the created/restored tidal creeks to provide habitat for both resident and transient fish species, and to provide additional nursery habitat for fish and invertebrate species of importance to local fishing interests (*e.g.*, common snook, red drum, spotted seatrout, striped mullet, blue crab, and pink shrimp).

The project includes the following actions:

1. Connecting the Giant's Camp marina basin to the tidal creek labeled as Flow Way #5 (Figure 8). This construction will span approximately 1,020 linear feet, and construction is divided into two parts as follows:
  - a. First, a portion of seawall at the southwest corner of the marina will be removed and 270' of new tidal creek will be created. The new tidal creek will extend to an existing remnant tidal creek as described in part b (below). A small bridge or large culvert will be placed over the breach in the seawall to maintain road access to the education facility located on site.
  - b. Second, 750 linear feet of existing remnant tidal creek will be widened and deepened to allow for hydrologic flow from the 270' marina tidal creek into existing Flow Way #5. The cross section of the remnant tidal creek will be modified to match the width and depth of the new 270' marina tidal creek. (Figure 8).
2. Reopening approximately 1,517 linear feet of additional remnant tidal creeks through mangrove habitat which is largely closed to tidal flows.



3. Widening and removing 1,900 cubic yards of spoil to eliminate blockages to sheet flow. The spoil removal spans 234 linear feet adjacent to tidal creeks in the mangroves (Figure 8).
4. Improving the hydroperiod in an impounded 0.56 acre tidal pond by enhancing tidal creek connection. (Figure 8).
5. Enhancing oyster habitat through the placement of rip rap along a portion of the existing boat basin seawall. Placement of rip rap will provide approximately 3,652 square feet of surface area along the shoreline of the marina basin and will be available for oyster recruitment.
6. Removal and relocation of live oyster clusters from the footprint of the rip rap placement described above in Action 5. to a 2000 square foot created oyster habitat alongside the Channel B area.
7. Cleaning approximately 500 linear feet of an existing tidal creek to remove debris and vegetation.



Figure 8. The Giant's Camp Hydrologic Restoration with Tidal Creek Creation/Enhancement and Oyster Reef Creation Project Restoration Plan.

## (1) Evaluation of Alternative

Improved hydrology will likely benefit the mangrove and tidal marsh habitat by relieving impounded conditions and allowing for more frequent and extensive flooding throughout the system. Prior to its realignment, the mouth of the Alafia River took a southern turn through this mangrove system. Currently, flow from the Alafia is restricted to the western portion of the area. Breaching the seawall in the marina will allow for river water from the northeast to continually flow through a larger portion of the mangrove habitat. In addition, the widening and deepening of tidal creeks is expected to allow for tidal waters from the southwest to flow more freely into the system. The improved hydrology should be adequate to maintain the tidal channels, allow for improved hydroperiod, and enhance mangrove and tidal marsh productivity.

Fish and macroinvertebrates will use the area more often due to the increased frequency and extent of flooding. Resident species may reproduce and feed year-round in sub-tropical mangrove ecosystems, but vary significantly in their utilization of mangrove forest microhabitats based on seasonal and daily changes in forest inundation. For example, the common mangrove and saltern species, the sheepshead minnow (*Cyprinodon variegatus*), breeds in open areas within the basin mangrove forest, feeds on cyanobacterial mats during seasonal high water periods, and retreats to mangrove fringed tidal creeks and adjacent seagrass meadows during low water periods. Transient fish species move between the Alafia River and Tampa Bay and the adjacent wetlands (Whitman and Gilmore. 1991).

Improvements to water quality are also likely to result from implementation of this project. A portion of Alafia River water will flow through the wetland system prior to entering Hillsborough and Tampa Bay. The river water will be exposed to wetland processes which can include the removal of nutrients and the settling of suspended sediments. Similar improvements to water quality are also likely to result from improvements to sheet flow as a result of spoil bank removal.

While not directly beneficial to seagrass habitat, improvements to water quality are known to have indirect benefits on seagrass. Removal of excess nutrients benefits seagrass by decreasing the proliferation of epiphytes, phytoplankton and algae that can smother seagrass habitat and block light penetration. Similarly, decreased turbidity benefits seagrass by improving light penetration which is critical to photosynthesis.

Hydrologic restoration projects are common in the Tampa Bay watershed and have been largely supported by resource managers and restoration practitioners. A similar project, which also involved deepening and widening tidal channels, was completed about 20 years ago on the same property. The enhanced tidal channels allow for tidal waters to flow through the system on a strong high tide and for river water to flow through following high rainfall in the watershed. Based upon the completion and success of the previous project, the Trustees have confidence in the technical feasibility

of the project and in the potential for the project site to become self-sustaining following implementation.

Feasibility of project implementation is also ensured since Mosaic is the sole owner of the property above mean sea-level. Property ownership reduces the need to identify and acquire a parcel of land for restoration project implementation. Given the fact that large portions of the Tampa Bay coastline are developed with low likelihood for restoration, privately owned with high purchase prices, or publicly owned with restoration already underway, identification of alternative sites for project implementation was challenging.

Oyster reef creation is an integral component of ongoing restoration efforts in Tampa Bay, providing habitat for aquatic fauna, improving water quality and enhancing recreational opportunities. Oyster reefs provide three-dimensional habitat for both shelter and foraging for crabs, shrimp and fish. Ultimately, the introduction of additional habitat will likely enhance overall fisheries production in the area.

Current conditions at Giant's Camp support only minimal oyster colonization, primarily attached to vertical concrete seawalls. This is likely due to accumulation of soft sediments and the lack of appropriate substrate for colonization in the open waters of the abandoned boat basin. The removal of accumulated sediment and creation of flow to the adjacent mangrove forest, though the hydrologic restoration, will result in improved conditions for oysters by improving water quality and the flow of food through the boat basin.

The Giant's Fish Camp Oyster Reef Creation portion of the project entails placing substrate suitable for oyster larvae settlement (cultch) along the seawalls of the marina boat basin. Live oyster clusters currently within the footprint of the creation portion of the project will be removed and transplanted within a 2000 square foot oyster reef habitat within Channel B. This area is referred to as "Structure C" in the restoration plan. This oyster platform will serve as an additional oyster creation restoration area to prevent the destruction of live oyster within the rip rap site and to allow for no net loss of oyster from construction activities.

For the portion of oyster reef creation within the Giants Camp Basin (Structures "A" and "B"), in areas where the seawall can be removed, oyster reef may be placed along the sloping shoreline. Placement of artificial oyster reef base materials, whether limestone, mined or recycled fossil shell, in appropriate locations will facilitate the colonization of sessile organisms such as American oysters (*Crassostrea virginica*) and barnacles and result in the creation of oyster reef habitat. The placement of cultch material will "soften" the vertical seawall and create a greater surface area for attachment of sessile invertebrates. The cracks and crevices created by the natural hardening on the created oyster reef attract and promote production of invertebrates such as crabs and shrimp. Placement of limestone or concrete rip rap extending 5.5 to 6 m out from the seawall, will provide approximately 3,652 square feet of surface area for oyster colonization. Sources of larvae include natural sources at Showman's Island upstream on the Alafia River, and at the Williams Park Marina, directly across the river from the

Giant's Camp boat basin. Fish species including red drum, common snook, mullet, and sheepshead will utilize the reefs for shelter during juvenile stages and return in adulthood to search for prey. Eventually some of the high edges of these reefs, at or just above the high tide mark, are expected to be naturally colonized by mangroves (Figure 9). As part of this portion of the restoration, accumulated sediments in the marina will be removed providing a more stable substrate for cultch placement.





Figure 9. Oyster Reef Creation at Giants Camp.



## (2) Relationship to Injury

The Giant's Camp Hydrologic Restoration with Tidal Creek Creation/Enhancement and Oyster Reef Creation Project will compensate for several of the injuries caused by the Discharge including injuries to the mangrove and marsh habitat, fish and invertebrates, and water quality. Seagrass habitat benefits indirectly from improved water quality. Avifauna should benefit from increased numbers of fish and macroinvertebrates.

Oyster reef creation will provide new habitat that supports the invertebrate and fish species impacted by the Discharge. The location of the oyster reef will be within the shallow estuarine environment and will provide additional habitat and diversity to the ecosystem. Species expected to use the reefs include oysters, barnacles, pink shrimp, white shrimp, blue crab, lesser blue crab, stone crab, and fish species, such as sheepshead, common snook, and juvenile goliath grouper.

The filtering capacity of oysters also provides benefits to water quality. Given the small size of these reefs, this effect is expected to be minimal; however, it should contribute to improved water quality within the boundaries of the marina basin.

Creation of oyster reef habitat is also expected to benefit avifaunal species that may have been impacted by the reduced food availability in surrounding waters as a result of the Discharge. Some shorebirds rely on oyster habitat for foraging.

## (3) Environmental and Socio-Economic Impact

Prior to removing a portion of the marina seawall to allow for river water to flow through the marina into the wetland system, accumulated sediments within the marina will likely require removal. The sediments will be analyzed to determine if contamination is present and to determine the appropriate methods for handling and disposal. Contaminated sediments will be properly removed and disposed of to ensure that no contaminated sediments are washed into the surrounding estuarine marshes once the marina is reconnected to the mangrove system.

The majority of the restoration site is dominated by wetland vegetation, including mangrove forests, needlerush and salt flats (which include cyanobacterial mats). The restoration work is expected to enhance fish use of higher elevation ephemeral ponds and salt flats, as well as to increase fish migration through tertiary and secondary channels and tributaries. However, in order to create and restore the tidal creeks necessary to allow fish access and improve impounded wetland conditions, approximately 1.94 acres of mangroves will be removed (Figure 9). The removal of these mangroves is necessary to establish adequate tidal creek widths that will remain open over a long period of time. Restoration of the smaller adjacent tidal creeks will result in approximately 0.11 acres of mangrove removal. Removal of spoil and widening the southern connection will result in approximately 0.50 acres of mangrove removal (Figure 9). The hydrologic restoration will create some negative environmental impacts when the mangroves are removed. These negative impacts will be offset by the improvements in flow that will improve the

health of the remaining mangroves and enhance the entire area and the compensatory project described herein.

The projected environmental benefits to creating and restoring the tidal creek connections include an increase of fish habitat, increase of resident fish production, and an increase of wetland biological productivity transfer to the adjacent riverine and estuarine ecosystems through flows, fish migration, and food webs. An increase in fish production may benefit local fishermen. Additional benefits include the provision of long term shoreline protection from storm events and sea level rise due to the enhanced health of the mangrove ecosystem and improvements to water quality through enhanced treatment of riverine waters as they flow through the wetland.

The mangrove restoration project and its subsequent monitoring data also provides socio-economic benefits, as well as educational opportunities for local students. The Fiddler's Cove Education Center, located on the property just west of the project site, helps to educate local elementary school students about the importance of coastal habitats. Classes are held each spring and fall at the Center. Options for integrating additional educational aspects to the program include expanding the students' knowledge of the importance of seagrass, mangrove, and tidal creek habitats, and the Tampa Bay ecosystem as a whole. This can be achieved through on-site visits and catching and tracking fish tagged in the study as well as utilizing the mangrove and oyster restorations as study tools to engage students in the value and importance of coastal marine habitats. The specific curriculum will be determined by coordination between Mosaic's educational department and local schools.

Creation of oyster reef habitat adjacent to tidal wetlands provides an important alternative nursery and foraging area for estuarine fishes. Provision of habitat has direct socio-economic benefits as it enhances fishery populations with resultant impacts on commercial and recreational fishing. Given the small size of the reefs, this effect is expected to be minimal; however, the surrounding area is heavily frequented by recreational fishermen who may realize the benefit of increased fishery habitat. Over time, colonization of bivalve species will aid in filtering water, contributing to the overall improvement to water quality.

Another important outcome of this project will be the improved habitat functionality within the Giant's Fish Camp Marina. Currently, this area does not provide habitat value nor is it aesthetically pleasing, given the sedimentation in the marina and the failing seawalls. Removal of the accumulated sediment, introduction of limestone rip rap and creation of fishery habitat will improve the habitat functionality and aesthetic qualities of this publically visible project site.



Figure 10. Areas of Mangrove Removal Necessary to Create and Restore the Tidal Creek System.

#### **B. Compensatory Restoration Alternative (Project 2 of 2) - Borrow Pit Wetland Creation and Enhancement Project (Site 2)**

The Borrow Pit Hydrological Restoration and Wetland Enhancement Project (Borrow Pit Project) is located between Old Highway 41 and Highway 41 North within a Mosaic-owned parcel (Figure 8, Site 2). Historically, a portion of the parcel was used as a source of fill material for construction of the highway and railroad. This alteration of the land resulted in a “borrow pit” feature which subsequently developed into a combination of mangrove and saltern habitats. The remaining portion of the parcel has been periodically altered by ditching, excavation, or filling, and is presently comprised of uplands and wetlands dominated by Brazilian pepper. A narrow ditch on the north end of the parcel connects the site to the Delaney Creek Pop-Off Canal which runs directly into Hillsborough Bay, over a distance of approximately 0.5 miles.

The objective of this project is to improve habitat functionality through creation of a tidal creek (approximately 900 feet) and pond (approximately one acre) that will be connected to Delaney Creek Pop-Off Canal. The mouth of the ditch that currently connects the site to Delaney Creek Pop-Off Canal will be widened and extended into a newly created tidal creek. The creek will flow into a tidal pond that will remain partially



wet during all but the lowest tides of the year (Figure 11). Removal of invasive vegetation will allow for colonization by native wetland vegetation at low and high marsh elevations. A saltern will also be created adjacent to the wetland to provide additional habitat diversity; wetland enhancement will comprise 4 acres.

#### (1) Evaluation of Alternatives

Given the restricted tidal flow, the existing condition of the site provides limited habitat value to fish and macroinvertebrate species. The exotic species present throughout the transitional wetland also provide limited habitat functionality.

Currently, the opening between the ditch and Delaney Creek Pop-Off Canal is too narrow to sustain a long term tidal connection to the site. Mangroves have grown across the opening and will likely cause a blockage in the connection over time. Widening the opening and constructing a tidal creek connecting to the wetland pond will create a sustainable tidal prism to keep the connection open. The pond is expected to provide habitat for fish and macroinvertebrates and serve as a refuge for small forage fish during low tide. Removal and control of exotic species within the wetland boundary will allow for native wetland plant colonization and provide additional foraging habitat for local wildlife. Creation of the saltern will provide additional habitat complexity. Several restoration projects of similar design have been successfully implemented in the Tampa Bay watershed.

Removal and control of invasive exotic vegetation is a priority for resource managers in the Tampa Bay area. Exotic removal will follow the procedures used for the emergency restoration. Brazilian pepper will be mechanically removed and stumps sprayed with an EPA approved wetland herbicide (Garlon 4) to terminate re-growth. Subsequent herbicide treatments and hand pulling of seedlings over time will prevent re-colonization of exotic species and will allow the natural colonization of native species to dominate (Figure 6). Exotic vegetation maintenance will be required until such time as native vegetation have completely re-colonized the site. Based upon past experience, exotic vegetation control will likely be required for five years. At that point, the site is expected to be self-sustaining.

The location of the project site on Mosaic-owned property increases the cost effectiveness and likelihood of success of project implementation. As previously described, land available for restoration in Tampa Bay is limited and when available, is typically expensive to acquire.

#### (2) Relationship to Injury

The Borrow Pit Project serves as compensatory restoration for injuries to fish, macroinvertebrates, mangroves, and tidal marsh. The improved connectivity of the wetland to the Canal will allow for improved fish access to the wetland. Creation of the tidal creek and pond will provide a refuge for fish and macroinvertebrates during low tide. Exotic vegetation removal and control will enhance the wetland area by allowing re-colonization of native wetland species such as those injured in the Discharge. The

new wetland and saltern area will also provide foraging area for avifauna species that may have experienced decreased prey availability as a result of the Discharge.

### (3) Environmental and Socio-Economic Impact

The Borrow Pit project will have positive socio-economic benefits related to the creation of estuarine wetland habitat and removal of invasive exotic vegetation. Enhancement of marsh habitat and creation of additional fisheries habitat will facilitate overall fish production for Tampa Bay. Tidal creek habitats, like those created by this project, often specifically benefit popular sport fish species such as redfish and snook, which may benefit recreational fishing activities.



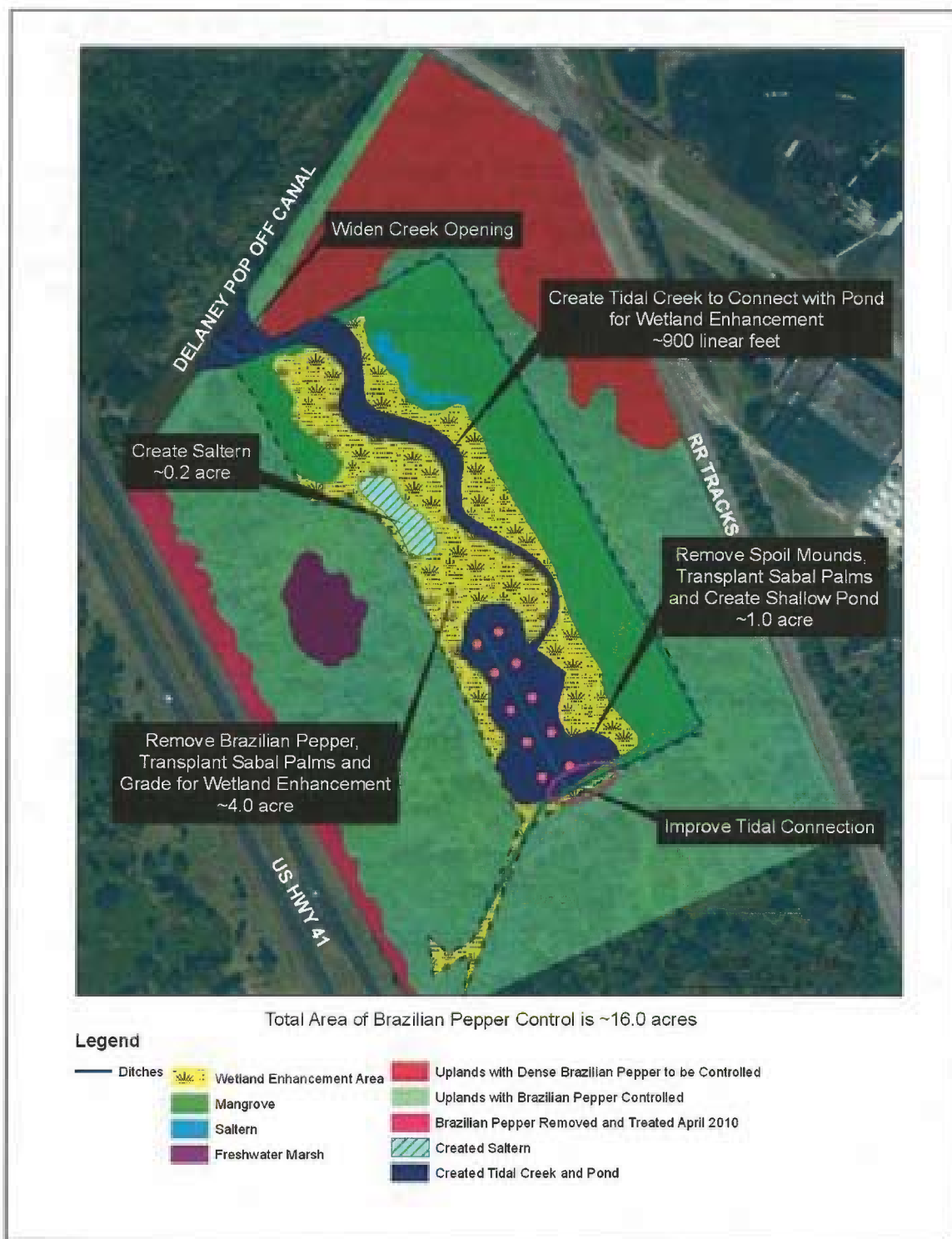


Figure 11. Borrow Pit Restoration Plan.

#### 4.2.3 Conservation Easements at Giant's Camp and Borrow Pit – Alternative

##### (1) Evaluation of Alternative

Conservation easements will be secured at both of the project sites (Figure 6, Sites 1 and 2) to ensure the future protection of the restored and newly created wetlands. The Giant's Camp Conservation Easement will encompass 82.48 acres of mangrove forest with restored and newly created tidal creeks. The Borrow Pit Conservation Easement will encompass 21.28 acres of wetland restoration and creation with a newly created tidal creek, pond and saltern. Together, 103.76 acres of wetland habitat will be protected by conservation easements provided by Mosaic.

##### (2) Relationship to Injury

Conservation easements at these two restoration project sites will permanently ensure the future preservation of the ecological and socio-economic benefits of these projects. Both projects will result in benefits to fish, invertebrates and mangrove and marsh vegetation of the types that were injured by the Discharge. Protection of the project sites into the future will ensure that these benefits are maintained.

##### (3) Environmental and Socio-Economic Impact

While wetlands in the Tampa Bay area enjoy a strong degree of regulatory protection, there is no guarantee that current protection will remain unchanged. Historic development has impacted a large percentage of estuarine wetlands in the Tampa Bay watershed. Ongoing development pressures continue to pose a threat. Permanent protection of the restored wetlands through conservation easement ensures the resources and services provided will not be directly impacted by development activities. Oversight by the EPC and the Trustees will further ensure that the project locations are managed as described in the conservation easement.

#### 4.3 Non-preferred Alternative Projects

In addition to the projects identified as preferred alternatives for compensatory restoration, the Trustees also considered several other projects. The Trustees evaluation of each of these non-preferred alternatives is described below.

##### Mangrove Forest

Alternatives for mangrove restoration included a general analysis of potential areas within Hillsborough Bay. Much of the western shoreline of Hillsborough Bay has been developed, leaving only the eastern side for potential projects. Mangroves along the shoreline of Delaney Pop-Off Canal, Archie Creek North, Archie Creek, and the South Archie Creek Canal were either not in need of active restoration or were not affected by the Discharge and were monitored for natural re-establishment of vegetation. Mangroves in need of restoration near the Discharge site but not affected by the Discharge were limited to an area south of the Alafia River. This area, commonly known as the "South Parcel" is owned by Mosaic and includes the Site 1 alternative. The South Parcel was the

historic Alafia River channel before the river's mouth was straightened, deepened and widened to allow for large vessel access to the phosphate plant. Dredge material from this excavation was placed on the South Parcel with a water flow connection just west of the Highway 41 Bridge. Later, the construction of the Giant's Fish Camp Boat Basin on the southwest corner of the Highway 41 Bridge cut off direct flow from the river into the mangrove system. Over time, mangrove tidal creeks have closed, choking the system and stressing the mangroves.

In addition to the design described for the Site 1 alternative, a number of other designs were considered. The first conceptual design for the Giant's Camp project, as described in the Alafia River/Mulberry Phosphates Spill (a separate incident) Estuarine Restoration Implementation Plan, included creating wetlands in the remnant boat basin and placing a relatively small culvert through the marina seawall to connect the boat basin to the adjacent mangrove forest. During the early conceptual design phase, it was determined that this design would not provide sufficient flow of water in the system to sustain open tidal channels and restore mangroves. Therefore, the original project plan design was rejected and modified to include excavation of the marina sediments coupled with a larger culvert to provide adequate flow.

The second conceptual design for the Giant's Camp project included only minor excavation of existing tidal channels, proposed to be accomplished by hand-digging to minimize impacts to existing mangroves surrounding the tidal channels. A modeling exercise indicated that more extensive excavation would be needed to allow for the water flow needed to maintain open tidal creeks through time. The minimal excavation originally proposed would not increase water flow through the mangrove forest and the benefits of the project would be minimized and short-lived.

#### Tidal Marsh

Alternative tidal marsh restoration projects included reviewing areas that were affected by the Discharge, other potential restoration areas on Mosaic property, and consideration of wetland restoration at William's Park.

Initial considerations included re-planting salt marsh areas that were affected by the Discharge. However, due to monitoring and relatively quick re-growth of vegetation this alternative did not meet the criteria of restoration. Other salt marsh areas on Mosaic property are a part of Net Environmental Benefits (NEBs) agreed to as part of the permitting of gypsum stack expansion, and are already required to be maintained and monitored regularly.

The "Cargill Stormwater Ponds at William's Park", originally considered and described in the Alafia River/Mulberry Spill Estuarine Restoration Implementation Plan, was also considered as a site for potential wetland creation to compensate from injuries resulting from this Discharge. However, during the initial conceptual design phase it was determined that the area is a potential site of historical significance. In order to not disturb the site, the project was abandoned and replaced by tidal marsh restoration at the Borrow Pit (Site 2).



### Conservation Easements

Several options for conservation easements at Giant's Camp were considered. These included areas north of the access road to the Fiddler's Cove Educational Center and various combinations of parcels within the Giant's Camp property to create a contiguous area of protection. Due to potential maintenance needs of the Mosaic Berth, property along the Alafia Bank north of the access road was not included in the easement. Ultimately, the preferred option was to create conservation easements that would adjoin existing conservation easements to create and enhance a large contiguous area of mangrove forest protection.

### No Action Alternative

A No Action alternative would not entail direct restoration activities undertaken by the Trustees to restore injured resources nor to compensate for lost resource services pending their ecological recovery. Only natural recovery occurs under this option. Interim losses are not compensated.

As a result of the Discharge, a total of 154.55 acres of wetland and upland habitat incurred varied levels of impact. The wetland habitats affected by the Discharge are mangrove, native tidal marsh, high marsh and transitional vegetation consisting mostly of salt grass and exotic species (*e.g.*, Brazilian pepper).

The habitat vegetation types were identified from aerial photographs and verified by vegetation transect and quadrat data during the damage assessment. Degrees of effect from the Discharge were categorized for each habitat in terms of projected recovery. For species that were dead, recovery is assumed based on the time for the species to grow to pre-Discharge dimensions. For other species with partial impact, recovery is assumed based on results of monitoring re-growth (measured in years) and professional judgment. After five years of post-Discharge monitoring, almost all of the vegetation has visually recovered to conditions similar to those that existed pre-Discharge. This recovery has occurred naturally without additional planting (see examples in Figures 3&4). However, functional loss of these habitats from the Discharge and subsequent recovery cannot be accounted for by the No Action Alternative.

## 5. NEPA Compliance

5.1.1 The Trustees performed their assessment and restoration planning in accordance with the National Environmental Policy Act (NEPA), 42 USC 4321, *et seq.*, and 40 CFR Parts 1500- 1508. In considering and identifying the restoration actions described herein, the DARP/EA for Mosaic Florida Phosphogypsum acid water discharge integrates the elements of an Environmental Assessment (EA) into this document, in accordance with NEPA. The DARP/EA, identifies the restoration actions which the Agencies believe are appropriate to

return the impacted areas of the Alafia River and Archie Creek to baseline conditions and compensate the public for interim natural resource losses.

#### 5.1.2 Finding of No Significant Impact (if applicable)

In accordance with NEPA, the Federal Trustees are pursuing Findings of No Significant Impact(FONSI) in relation to these restoration implementation activities.



## 6. References

- American Fisheries Society. 1993. Sourcebook for Investigation and Valuation of Fish Kills Southwick Associates, 151 pages.
- Cuda, J, P. Ferriter, V. Manrique & J. Medal. 2006. Interagency Peppertree (*Schinus terebinthifolius*) Management Plan for Florida. Recommendations from the Brazilian Peppertree Task Force, Florida Exotic Pest Plant Council.
- Greenwood M., P. Stevens & R. Matheson. 2006. Effects of the 2004 hurricanes on the fish assemblages in two proximate southwest Florida estuaries: Change in the context of interannual variability. *Estuaries and Coasts* 29:985-996.
- Florida Department of Transportation. 1999. Florida Land Use, Cover and Forms Classification System (FLUCCS), third edition.
- Florida Department of Highway Safety and Motor Vehicles. 2009. Alphabetical Vessel Statistics by County.  
<http://www.flhsmv.gov/dmv/TaxCollDocs/vesselstats2009.pdf>.
- Florida Fish and Wildlife Conservation Commission. 2008. Marine Fisheries Information System, 2007 Annual Landings Summary.
- Lewis Environmental Services, Inc. 2004. Proposed Ephemeral Data Collection Protocols for Documenting and Monitoring Vegetation Impacts, Version 2, September 20.
- Lewis Environmental Services, Inc. 2004. Draft 5 Proposal Protocol for Exotic Plant Species Control, Monitoring and Reporting at the Cargill Site, Riverview, Florida.
- Lewis Environmental Services, Inc. 2005. Technical Data Report: Supplemental Report #1. Prepared for Mosaic Fertilizer, LLC, Riverview, FL. 31 pages.
- Lewis Environmental Services, Inc. 2007. Technical Data Report Supplemental Report #2. Prepared for Mosaic Fertilizer, LLC. Riverview, FL. 35 pages.
- Lewis Environmental Services, Inc. 2010. Time Zero Plus Sixty-nine Exotic Plant Species Control Summary of Data (Emergency Primary Restoration) at Mosaic Fertilizer, LLC, Riverview, FL. 32 pages.
- U.S. Department of Commerce, NOAA, *et al.* 2005. Preassessment Data Report *Mosaic Acidic Process Water Release Riverview, Florida*. 120 pages.
- Whitman, R.L., Jr. and R.G. Gilmore, Jr. 1991. Comparative evaluation of fisheries community structure and habitat relationships in natural and created saltmarsh ecosystems. Proctor and Redfern Inc. Final Rpt. to Southwest Florida Water Management District, Brooksville, Florida, USA.
- Wilson, M., S. Meyers & M. Luther. 2006. Changes in the circulation of Tampa Bay due to Hurricane Frances as recorded by ADCP measurements and reproduced with a numerical ocean model. *Estuaries and Coasts* 29(6A):914-918

**7. List of Preparers –**

The State of Florida's Department of Environmental Protection -  
Charles Kovach, David Thulman and Lauren Greenfield

The United States Department of Interior's United States Fish and Wildlife Service –  
Patricia Hurst (ENRD)

The Hillsborough County Environmental Protection Commission – Richard Boler and  
Tom Ash

The United States Department of Commerce's National Oceanic and Atmospheric  
Administration – Daniel Hahn, Leslie Craig, Sheila O'Brien and Sean Meehan

MOSAIC DARP/EA Amendment summaries

12/14/2012

**1) Change in location and impacts from construction of opening of tidal creek into Giant's Fish Camp Basin**

The change and language below was provided by Lewis Environmental Services, contractor for MOSAIC.

“Based on our analysis of the TECO power pole located just north of the culvert location and our discussions with TECO representatives, we have determined that it is necessary to move the culvert location 26 feet to the south. After examination, the power pole guy wire would be in the way of the original proposed culvert location. In addition, it would have been difficult to stage the crane needed for dredge placement just west of the proposed culverts without violating OSHA standards for distance from power lines. The culvert movement will not change the overall function of the proposed restoration and we expect the flow rates to remain the same. This adjustment will not change the area of oyster habitat enhancement. However, the change will result in additional permanent and temporary wetland impacts. Additional permanent wetland impacts of 1,796 sq ft are necessary to make this adjustment because a portion of the original culvert location was in uplands and with this adjustment is now within wetlands. This change of location also required a design change to the grading area resulting in additional impacts. Details are summarized below and shown on the “Proposed Wetland Impacts” attachment.

Total permanent wetland impacts

Previous: 83,187 sf, Current: 84,085 sf (increase of 898 sf)

Permanent impacts that are converted to surface water

Previous: 79,600 sf, Current: 79,819 sf (increase of 219 sf)

Permanent impacts that are permanently filled

Previous: 3,587 sf, Current: 4,266 sf (increase of 679 sf)

The increased permanent impacts to wetlands of 679 sf (square feet) for a total of 4,266 sf will be compensated by a 0.25 acre sediment drag down and exotic plant removal near the culvert mouth location. This project has been approved by both parties. Its location is marked in Figure 4 as Wetland Creation Area and is designated by the green circle. The spoil mound removal to wetland elevation will be monitored for natural colonization of native wetland plant species and must reach 50% mean cover within 3 years and 80% mean cover by the end of five years with no more than 10% exotic plant cover at any time.



This activity and resulting change in construction is accurately reflected in the Statement of Work for the Giants Camp Restoration projects, dated Dec 13<sup>th</sup>, 2012.

**2) Change in location for the reference sites for monitoring oyster restoration within the Giants Fish Camp Restoration Project.**

William's Park on the Alafia River was the original site selected to conduct reference monitoring for oyster growth and survival in the Alafia River and the Restoration Areas. However, observations on several occasions of people harvesting large oysters at Williams Park and associated biota to use as fishing bait has made this site not acceptable. LES located acceptable oyster reefs at the opening of Giants Fish Camp Basin to the Alafia River and at Showman's reef, a created oyster reef just up river from the Giant's Fish Camp location. Both of these sites are acceptable to the Trustees as reference sites and permanent transects, as per the DARP/EA and SOW methodologies have been established. Nothing more has changed from the original monitoring methodologies other than the reference site locations. Please refer to the updated graphic below for the site locations. This figure should replace Figure 9 in the Final DARP/EA. The SOW has the updated language and graphic.





## **APPENDIX B**

### **Conservation Easements**

**DEED OF CONSERVATION EASEMENT**

Prepared by: T. Andrew Zodrow, Esq.  
Return to: Environmental Protection Commission  
3629 Queen Palm Dr.  
Tampa, Florida, 33619  
Attn: Wetlands Management Division

- For recording purposes only -

THIS DEED OF CONSERVATION EASEMENT is given this \_\_\_\_ day of \_\_\_\_\_, 2012, by Mosaic Fertilizer, LLC, whose address is 13830 Circa Crossing Drive, Lithia, Florida 33547 ("Grantor") to the ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, whose address is 3629 Queen Palm Drive, Tampa, Florida 33619 ("Grantee" or "EPC"). As used herein, the term Grantor shall also include any and all, successors and assigns of the Grantor, and all subsequent owners of the Borrow Pit Conservation Property (as hereinafter defined) and the term Grantee shall include any and all successors or assignees of the Grantee.

***WITNESSETH***

WHEREAS, the Grantor is the sole owner in fee simple of certain real property (the "Borrow Pit Conservation Property") in Hillsborough County, Florida, more particularly described in Exhibit A, attached hereto and incorporated herein by reference;

WHEREAS, the United States of America, on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service, and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP (collectively, "Trustees"), and the EPC entered a Consent Decree with Grantor to settle certain claims for alleged natural resource damages against the Grantor. Under the Consent Decree, the Grantor agreed to preserve the Borrow Pit Conservation Property in perpetuity as partial compensation to the Trustees and EPC for the alleged damages as set forth in the Consent Decree;

WHEREAS, the Grantor and the Trustees agree that the granting of this Conservation Easement will fully satisfy the obligations of the Grantor to grant a conservation easement over the Borrow Pit Restoration Area pursuant to the Consent Decree;

WHEREAS, pursuant to the Consent Decree, Appendix A, the final Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA"), and Appendix C, the Statement of Work ("SOW"), Grantor has agreed to implement

certain restoration projects within the Borrow Pit Conservation Property, which restoration projects are excepted from the prohibited uses set forth in this Conservation Easement;

WHEREAS, as described further herein, Grantor retains certain rights to conduct additional wetland creation, restoration and enhancement activities within the Borrow Pit Conservation Property, as additional restoration which may be required pursuant to the Consent Decree;

WHEREAS, Grantor and Grantee desire to retain the Borrow Pit Conservation Property predominantly in its natural, vegetative, hydrologic, scenic, open or native non-nuisance wooded condition and to retain such areas as suitable habitat for fish, plants or wildlife, subject to the limited exceptions noted herein;

WHEREAS, under the jurisdiction of the EPC, pursuant to the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended, and Chapter 1-11, Rules of the EPC, the EPC may accept conservation easements over properties in Hillsborough County and is an agency authorized under the provisions of §704.06, Florida Statutes, to hold conservation easements for the preservation and protection of land predominantly in its natural, scenic, historical, agricultural, forested, or open space condition; and

WHEREAS, Grantor, pursuant to the Consent Decree and the EPC Wetland Rule Chapter 1-11, grants this Conservation Easement for purposes of preventing adverse impacts to water quality and natural resources, including fish, wildlife, and native non-nuisance wetland plants or other surface water functions.

NOW THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, together with other good and valuable consideration, the adequacy and receipt of which is hereby acknowledged, Grantor hereby voluntarily grants and conveys a perpetual conservation easement, as defined in Section 704.06, Florida Statutes, subject to the reservations provided herein, but without intending the validity of this Conservation Easement to be dependent on the continuing existence of such laws, for and in favor of the Grantee upon the Borrow Pit Conservation Property which shall run with the land and be binding upon the Grantor, and shall remain in full force and effect forever.

The scope, nature and character of this Conservation Easement shall be as follows:

1. Purpose. The purpose of this Conservation Easement is to retain land or water areas predominantly in their natural, vegetative, hydrologic, scenic, open, or native wooded condition and to retain such areas as suitable habitat for fish, plants or wildlife.
2. Rights of Grantee. To carry out this purpose, the following rights are conveyed to Grantee by this Conservation Easement, subject, however, to the reservations provided herein:



a. The right to take action to preserve and protect the environmental value of the Borrow Pit Conservation Property, as set forth in paragraph 2.c., below;

b. The right of access to and within the Borrow Pit Conservation Property, to enter upon and inspect the Borrow Pit Conservation Property in a reasonable manner and at reasonable times, including the right to use vehicles and all necessary equipment to determine if Grantor or its successors and assigns are complying with the covenants and prohibitions contained in this Conservation Easement; and

c. The right to enforce this Conservation Easement by injunction or proceed at law or in equity to enforce the provisions of this Conservation Easement and the covenants set forth herein, to prevent the occurrence of any of the prohibited activities hereinafter set forth, and the right to require Grantor to restore such areas or features of the Borrow Pit Conservation Property that may be damaged by any Prohibited Uses identified in paragraph 3 below.

3. Prohibited Uses. Except as provided in paragraph 4, any activity on or use of the Borrow Pit Conservation Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the foregoing, except as provided in paragraph 4 or otherwise authorized by EPC, the following activities and uses are expressly prohibited:

a. Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground, except for access control and property identification signage, or other signs required by the Consent Decree including the DARP/EA and SOW;

b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;

c. Removal or destruction of trees, shrubs, or other vegetation, including the removal, destruction, trimming or alteration of mangroves, except for any maintenance or removal of invasive exotic plant species;

d. Planting or seeding of plants that are outside its natural range or zone of dispersal and has or is able to form self-sustaining, expanding, and free-living populations in a natural community with which it has not previously associated;

e. Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface;

f. Surface use except for purposes that permit the land or water area to remain predominantly in its natural condition;

g. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation including, but not limited to, ditching, diking and fencing; and

h. Acts or uses detrimental to such aforementioned retention of land or

water areas.

4. Reserved Rights. Grantor reserves all rights as owner of the Borrow Pit Conservation Property, including the right to engage in uses of the Borrow Pit Conservation Property that are not prohibited herein and which are not inconsistent with any EPC rule, permit and the intent and purposes of this Conservation Easement. In addition, and notwithstanding anything herein to the contrary, Grantor retains the right to conduct the following activities within the Borrow Pit Conservation Property, subject to compliance with any and all existing rules and laws:

a. All activities associated with construction and implementation of the compensatory restoration projects as set forth in the Consent Decree, DARP/EA, and SOW including, but not limited to, post-construction sampling and monitoring activity;

b. Additional wetland creation and enhancement activities which may be required to supplement the above-noted restoration plan, so long as the additional mitigation does not adversely affect the compensatory restoration projects authorized by the Consent Decree;

c. Installation and maintenance of fences for access control, land management and habitat protection purposes;

d. Removal or extermination of nuisance or exotic species;

e. The right to relocate listed, threatened or endangered plant and wildlife species from offsite locations to appropriate areas within the Borrow Pit Conservation Property; and

f. Installation of signs for access control, property identification, public information, land management and habitat protection purposes.

5. Public Access. No right of access by the general public to any portion of the Borrow Pit Conservation Property is conveyed by this Conservation Easement.

6. Responsibilities of Parties. Grantor, its successors or assigns, shall take responsibility for any costs or liabilities related to the operation, upkeep or maintenance of the Borrow Pit Conservation Property. In addition, except as otherwise provided in paragraph 8 below, Grantee, its successors or assigns, shall have no responsibility for any costs or liabilities related to the operation, upkeep or maintenance of the Borrow Pit Conservation Property.

7. Taxes. Grantor, its successors or assigns, shall pay before delinquency any and all taxes, assessments, fees, and charges of whatever description levied on or assessed by competent authority on the Borrow Pit Conservation Property, and shall furnish Grantee with satisfactory evidence of payment upon written request.

8. Liability. Grantee assumes all liability, up to the scope and limits provided in Florida Statutes §768.28, as amended and superseded from time to time, for any injury or



damage to the person or property of third parties which may occur on the Borrow Pit Conservation Property and any damage to the Borrow Pit Conservation Property arising from the negligence or intentional act of the Grantee or any of its employees, agents, contractors and invitees. Neither Grantee nor any person or entity claiming by or through Grantee shall hold Grantor liable for any damage or injury to person or personal property which may occur on the Borrow Pit Conservation Property, unless the damage or injury arose from the negligence or intentional act of Grantor. Furthermore, Grantee shall indemnify and hold harmless Grantor up to the scope and limits provided in Florida Statutes §768.28, as amended and superseded from time to time, for all liability, any injury or damage to the person or property of third parties or to the Borrow Pit Conservation Property caused by the negligence or intentional act of Grantee or any of its employees, agents, contractors or invitees. Likewise, solely as between Grantor and Grantee, Grantor assumes all liability for any injury or damage to the person or property of third parties or to the Borrow Pit Conservation Property which may occur on the Borrow Pit Conservation Property arising from the negligence or intentional act of Grantor. Furthermore, Grantor shall indemnify and hold harmless Grantee for all liability, any injury or damage to the person or property of third parties arising out of the negligence or intentional act of Grantor.

9. Hazardous Substances. Grantor has not utilized the Borrow Pit Conservation Property to treat, deposit, store, dispose of, or place any hazardous or toxic substances, as defined under applicable law, nor has Grantor authorized any other person or entity to treat, deposit, store, dispose of, or place any such hazardous or toxic substance on the Borrow Pit Conservation Property, and, to the extent of Grantor's actual knowledge without inquiry, no other person or entity has treated, deposited, stored, disposed of or placed any such hazardous or toxic substance on the Borrow Pit Conservation Property.

10. Enforcement Discretion. Enforcement of the terms, provisions and restrictions of this Conservation Easement shall be at the reasonable discretion of Grantee, and any forbearance on behalf of Grantee to exercise its rights hereunder in the event of any breach by Grantor, shall not be deemed or construed to be a waiver of Grantee's rights.

11. Venue and Enforcement Costs. The terms and conditions of this Conservation Easement may be enforced by Grantee by injunctive relief and other appropriate available remedies, and Grantor consents that venue for such enforcement actions shall lie exclusively in the circuit court of the Thirteenth Judicial Circuit, in Hillsborough County, Florida. If the Grantee prevails in an enforcement action, it shall be entitled to recover the cost of restoring the land to the natural vegetative and hydrologic condition existing at the time of execution of the Conservation Easement or to the vegetative and hydrologic condition existing at the conclusion of the restoration work implemented per the Consent Decree, DARP/EA, and SOW. These remedies are in addition to any other remedy, fine or penalty which may be applicable under Chapter 84-446, Laws of Florida.

12. Assignment of Rights. Grantee will hold this Conservation Easement exclusively for conservation purposes. Grantee will not assign its rights and obligations under this

Conservation Easement except to another organization qualified to hold such interests under applicable state laws, and only after the consent of the Trustees and Grantor.

13. Recording in Land Records. Grantor shall record this Conservation Easement and any amendments hereto within thirty (30) days of execution of this Conservation Easement in the Official Records of Hillsborough County, Florida. Grantor shall pay all recording costs and taxes necessary to record this Conservation Easement in the public records.

14. Successors. The covenants, terms, conditions and restrictions of this Conservation Easement shall be binding upon, and inure to the benefit of the parties hereto and their respective successors and assigns and shall continue as a servitude running in perpetuity with the Borrow Pit Conservation Property. The obligations of each person or entity constituting a Grantor under this Deed of Conservation Easement are only binding on such Grantor during the term of such Grantor's ownership of any portion of the Borrow Pit Conservation Property. Upon any transfer of ownership of any portion of the Borrow Pit Conservation Property (each a "Transfer Event"), the transferor shall be automatically released from all obligations arising under this Deed of Conservation Easement from and after the Transfer Event with respect to the property transferred, but said transferor shall remain liable for all obligations with respect to such property arising prior to the Transfer Event; and (b) any person or entity that acquires a fee simple interest in any portion of the Borrow Pit Conservation Property shall become liable for all obligations under this Deed of Conservation Easement as to the property so acquired arising from and after the date of the Transfer Event by which such person or entity receives such ownership interest.

15. Notices. All notices, consents, approvals or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States certified mail, return receipt requested, addressed to the appropriate party or successor-in-interest.

16. Severability. If any provision of this Conservation Easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Conservation Easement shall not be affected thereby, as long as the purpose of the Conservation Easement is preserved.

17. Alteration or Revocation. This Conservation Easement may be amended, altered, released or revoked only by written agreement between the parties hereto or their assigns or successors-in-interest, which shall be filed in the public records in Hillsborough County, Florida.

18. Controlling Law. The interpretation and performance of this Conservation Easement shall be governed by the laws of the State of Florida.

19. Rights of Florida Department of Environmental Protection and NOAA. The Florida Department of Environmental Protection and the National Oceanic and Atmospheric Administration shall have all the rights of Grantee to enforce the terms of this Conservation Easement.



20. Acts Beyond Grantor's Control. Nothing contained in this Deed of Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Borrow Pit Conservation Property resulting from natural causes beyond Grantor's control, including, without limitation, fire, floods, storms, other weather conditions, and earth movement, or from any necessary action taken by Grantor under emergency conditions to prevent, abate or mitigate significant injury to the Borrow Pit Conservation Property or to public health, safety or welfare resulting from any such causes.

**TO HAVE AND TO HOLD** the said Conservation Easement unto Grantee forever. The covenants, terms, conditions, restrictions and purpose imposed with this Conservation Easement shall be binding upon Grantor, and shall continue as a servitude running in perpetuity with the Borrow Pit Conservation Property.

Grantor hereby covenants with said Grantee that Grantor is lawfully seized of said Borrow Pit Conservation Property in fee simple; that the Borrow Pit Conservation Property is free and clear of all encumbrances that are inconsistent with the terms of this Conservation Easement, and all mortgages have been joined or subordinated; that Grantor has good right and lawful authority to convey this Conservation Easement; and that it hereby fully warrants and defends the title to the Conservation Easement hereby conveyed against the lawful claims of all persons whomsoever.

IN WITNESS WHEREOF, the Grantor has executed this Conservation Easement on the day and year first above written.

Signed, sealed and delivered  
Delaware in our presence as witnesses:

MOSAIC FERTILIZER, LLC, a  
limited liability company

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Date: \_\_\_\_\_

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

The foregoing Deed of Conservation Easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_, as the of Mosaic Fertilizer, LLC, a Delaware limited liability company, on behalf of the said limited liability company. Said person is personally known to me or has produced as identification.

\_\_\_\_\_  
Notary Public

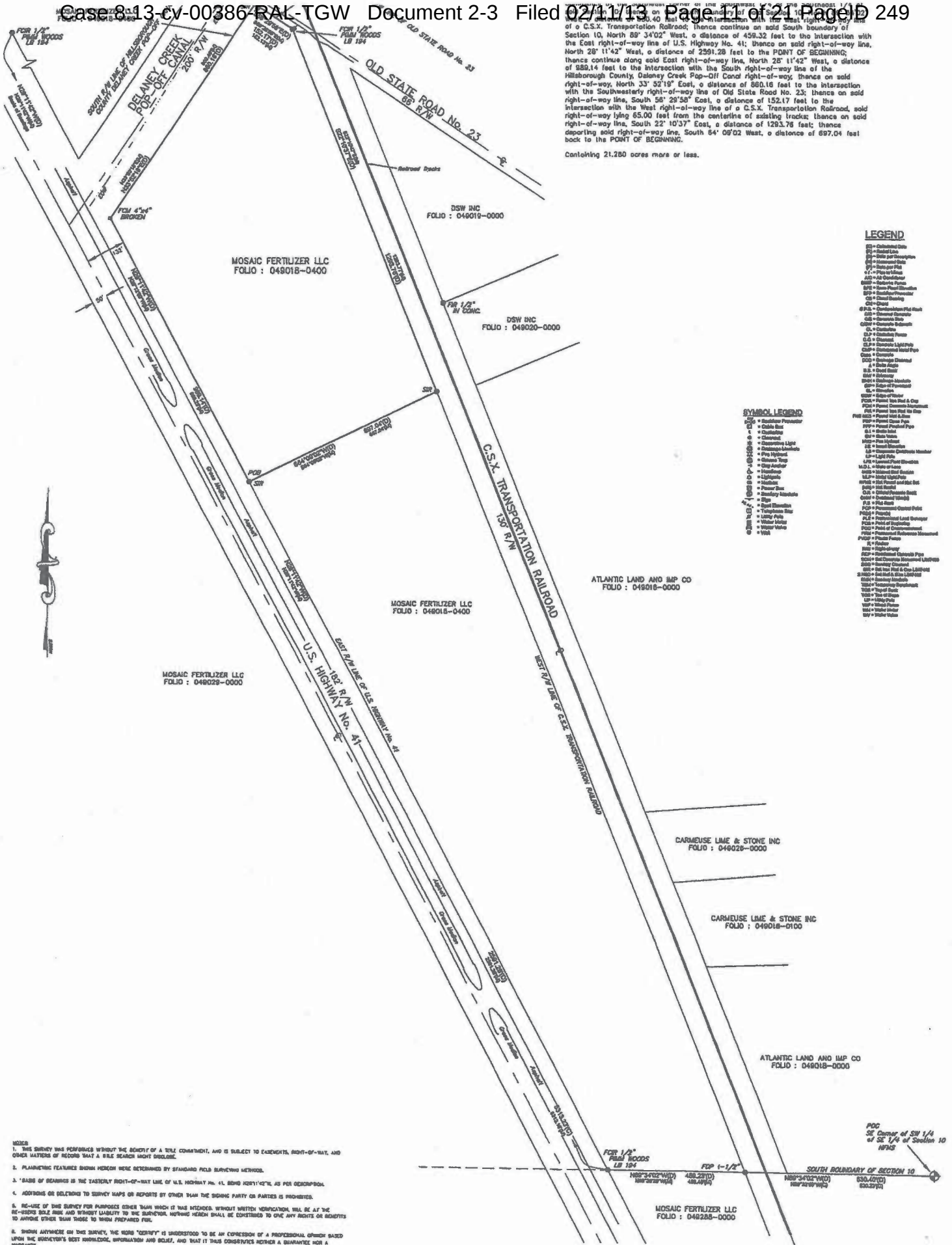
\_\_\_\_\_  
Printed/Typed Name of Notary

Commission No. \_\_\_\_\_  
Commission Expires: \_\_\_\_\_

**EXHIBIT A**

**Legal Description and Boundary Survey Sketch**





1. THIS SURVEY WAS PERFORMED WITHOUT THE BENEFIT OF A TITLE COMMITMENT, AND IS SUBJECT TO EASEMENTS, RIGHT-OF-WAY, AND OTHER MATTERS OF RECORD THAT A TITLE SEARCH MIGHT DISCLOSE.
2. PLANNING FEATURES SHOWN HEREON WERE DETERMINED BY STANDARD FIELD SURVEYING METHODS.
3. 'DATE OF BEGINNING' IS THE TACTICAL RIGHT-OF-WAY LINE OF U.S. HIGHWAY No. 41, BEING 100' WIDE, AS PER DESCRIPTION.
4. ADDITIONS OR DELETIONS TO SURVEY MAPS OR REPORTS BY OTHER THAN THE SURVEY PARTY OR PARTIES IS PROHIBITED.
5. RE-USE OF THIS SURVEY FOR PURPOSES OTHER THAN THAT FOR WHICH IT WAS INTENDED WITHOUT WRITTEN VERIFICATION WILL BE AT THE RE-USER'S SOLE RISK AND WITHOUT LIABILITY TO THE SURVEYOR. NOTHING HEREON SHALL BE CONSTRUED TO OWE ANY RIGHTS OR BENEFITS TO ANYONE OTHER THAN THOSE TO WHOM PREPARED FOR.
6. SHOULD ANYWHERE ON THIS SURVEY, THE WORD "CERTIFY" IS UNDERSTOOD TO BE AN EXPRESSION OF A PROFESSIONAL OPINION BASED UPON THE SURVEYOR'S BEST KNOWLEDGE, INFORMATION AND BELIEF, AND THAT IT DOES NOT CONSTITUTE NEITHER A GUARANTEE NOR A WARRANTY.
7. FLOOD INFORMATION SHOWN ON THE FACE OF THIS SURVEY IS FOR INFORMATIONAL PURPOSES. THE MUNICIPALITY OR GOVERNING AUTHORITY HOLDING JURISDICTION SHOULD BE CONTACTED PRIOR TO ANY JUDICIAL PROCEEDING BASED UPON THIS INFORMATION.
8. ANY TOWNSHIP INFORMATION SHOWN OR HEREON HEREON IS BASED ON INFORMATION AVAILABLE DURING THE PREPARATION OF THE SURVEY. THIS INFORMATION SHOULD BE VERIFIED WITH THE GOVERNING AUTHORITY PRIOR TO ANY DETERMINATION OF RECORD.
9. THIS SURVEY IS NOT INTENDED TO SHOW THE LOCATION OR EXISTENCE OF ANY JURISDICTIONAL HAZARDOUS OR ENVIRONMENTALLY SENSITIVE AREAS.
10. ALL DISTANCES SHOWN HEREON ARE OF THE PUBLIC RECORDS OF HILLSBOROUGH COUNTY, FLORIDA, UNLESS OTHERWISE SPECIFIED.
11. UNDERGROUND UTILITIES SHOWN HEREON ARE BASED ON SURFACE MARKERS AND/OR STRUCTURES. NO EXCAVATION WAS PERFORMED FOR THE LOCATION OF SUCH UTILITIES.

DRAWN BY:	J.S.R.
SCALE:	1" = 120'
CHECKED BY:	

## **DEED OF CONSERVATION EASEMENT**

Prepared by: T. Andrew Zodrow, Esq.  
Return to: Environmental Protection Commission  
3629 Queen Palm Dr.  
Tampa, Florida, 33619  
Attn: Wetlands Management Division

- For recording purposes only -

THIS DEED OF CONSERVATION EASEMENT is given this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by MOSAIC FERTILIZER, LLC, whose address is 13830 Circa Crossing Drive, Lithia, Florida 33547 ("Grantor") to the ENVIRONMENTAL PROTECTION COMMISSION OF HILLSBOROUGH COUNTY, whose address is 3629 Queen Palm Drive, Tampa, Florida 33619 ("Grantee" or "EPC"). As used herein, the term Grantor shall also include any and all, successors and assigns of the Grantor, and all subsequent owners of the Giant's Camp Conservation Property (as hereinafter defined) and the term Grantee shall include any and all successors or assignees of the Grantee.

### ***WITNESSETH***

WHEREAS, the Grantor is the sole owner in fee simple of certain real property (the "Giant's Camp Conservation Property") in Hillsborough County, Florida, more particularly described in Exhibit A, attached hereto and incorporated herein by reference;

WHEREAS, the United States of America, on behalf of the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce and the Secretary of the Interior, acting through the United States Fish and Wildlife Service, and the State of Florida Department of Environmental Protection ("FDEP"), and Herschel T. Vinyard, Jr., Secretary of FDEP (collectively, "Trustees"), and the EPC entered a Consent Decree with Grantor to settle certain claims for alleged natural resource damages against the Grantor. Under the Consent Decree, the Grantor agreed to preserve the Giant's Camp Conservation Property in perpetuity as partial compensation to the Trustees for the alleged damages as set forth in the Consent Decree.

WHEREAS, the Grantor and the Trustees agree that the granting of this Conservation Easement will fully satisfy the obligations of the Grantor to grant the Conservation Easement over the Giant's Camp Restoration Project pursuant to the Consent Decree;

WHEREAS, pursuant to the Consent Decree, Appendix A, the final Damage Assessment and Restoration Plan/Environmental Assessment ("DARP/EA"), and Appendix C, the Statement of Work ("SOW"), Grantor has agreed to implement certain restoration projects within the



Giant's Camp Conservation Property, which restoration projects are excepted from the prohibited uses set forth in this Conservation Easement;

WHEREAS, as described further herein, Grantor retains certain rights to conduct additional wetland creation, restoration and enhancement activities within the Conservation Property, as additional restoration which may be required pursuant to the Consent Decree;

WHEREAS, as described further herein, Grantor retains the certain rights to maintain and install pipes across and through the Conservation Property, in a manner which would have minimal environmental impact, for transmission of material to an existing spoil disposal site adjacent to the Giant's Camp Conservation Property;

WHEREAS, Grantor and Grantee desire to retain the Giant's Camp Conservation Property predominantly in its natural, vegetative, hydrologic, scenic, open or native non-nuisance wooded condition and to retain such areas as suitable habitat for fish, plants or wildlife, subject to the limited exceptions noted herein;

WHEREAS, under the jurisdiction of the EPC, pursuant to the Hillsborough County Environmental Protection Act, Chapter 84-446, Laws of Florida, as amended, and Chapter 1-11, Rules of the EPC, the EPC may accept conservation easements over properties in Hillsborough County and is an agency authorized under the provisions of §704.06, Florida Statutes, to hold conservation easements for the preservation and protection of land predominantly in its natural, scenic, historical, agricultural, forested, or open space condition; and

WHEREAS, Grantor, pursuant to the Consent Decree and the EPC Wetland Rule Chapter 1-11, grants this Conservation Easement for purposes of preventing adverse impacts to water quality and natural resources, including fish, wildlife, and native non-nuisance wetland plants or other surface water functions.

NOW THEREFORE, in consideration of the above and the mutual covenants, terms, conditions and restrictions contained herein, together with other good and valuable consideration, the adequacy and receipt of which is hereby acknowledged, Grantor hereby voluntarily grants and conveys a perpetual conservation easement, as defined in Section 704.06, Florida Statutes, subject to the reservations provided herein, but without intending the validity of this Conservation Easement to be dependent on the continuing existence of such laws, for and in favor of the Grantee upon the Giant's Camp Conservation Property which shall run with the land and be binding upon the Grantor, and shall remain in full force and effect forever.

The scope, nature and character of this Conservation Easement shall be as follows:

1. Purpose. The purpose of this Conservation Easement is to retain land or water areas predominantly in their natural, vegetative, hydrologic, scenic, open, or native wooded condition and to retain such areas as suitable habitat for fish, plants or wildlife.
2. Rights of Grantee. To carry out this purpose, the following rights are conveyed to Grantee by this Easement, subject, however, to the reservations provided herein:

a. The right to take action to preserve and protect the environmental value of the Giant's Camp Conservation Property, as set forth in paragraph 2.c., below;

b. The right to use the existing access road and trails within the Giant's Camp Conservation Property to enter upon and inspect the Conservation Property in a reasonable manner and at reasonable times, including the right to use vehicles and all necessary equipment to determine if Grantor or its successors and assigns are complying with the covenants and prohibitions contained in this Conservation Easement; and

c. The right to enforce this Conservation Easement by injunction or proceed at law or in equity to enforce the provisions of this Conservation Easement and the covenants set forth herein, to prevent the occurrence of any of the prohibited activities hereinafter set forth, and the right to require Grantor to restore such areas or features of the Giant's Camp Conservation Property that may be damaged by any Prohibited Uses identified in paragraph 3 below.

3. Prohibited Uses. Except as provided in paragraph 4, any activity on or use of the Giant's Camp Conservation Property inconsistent with the purpose of this Conservation Easement is prohibited. Without limiting the foregoing, except as provided in paragraph 4 or otherwise authorized by EPC and the Trustees, the following activities and uses are expressly prohibited:

a. Construction or placing of buildings, roads, signs, billboards or other advertising, utilities, or other structures on or above the ground, except for access control and property identification signage or other signs required by the Consent Decree including the DARP/EA and SOW;

b. Dumping or placing of soil or other substance or material as landfill, or dumping or placing of trash, waste, or unsightly or offensive materials;

c. Removal or destruction of trees, shrubs, or other vegetation, including the removal, destruction, trimming or alteration of mangroves, except for any maintenance or removal of invasive exotic plant species;

d. Planting or seeding of plants that are outside their natural range or zone of dispersal and have or are able to form self-sustaining, expanding, and free-living populations in a natural community with which they have not been previously associated;

e. Excavation, dredging, or removal of loam, peat, gravel, soil, rock, or other material substance in such manner as to affect the surface;

f. Surface use except for purposes that permit the land or water area to remain predominantly in its natural condition;

g. Activities detrimental to drainage, flood control, water conservation, erosion control, soil conservation, or fish and wildlife habitat preservation including, but not limited to, ditching, diking and fencing; and

h. Acts or uses detrimental to such aforementioned retention of land or water areas.



4. Reserved Rights. Grantor reserves all rights as owner of the Giant's Camp Conservation Property, including the right to engage in uses of the Giant's Camp Conservation Property that are not prohibited herein and that are not inconsistent with any EPC rule, permit and the intent and purposes of this Conservation Easement. In addition, and notwithstanding anything herein to the contrary, Grantor retains the right to conduct the following activities within the Giant's Camp Conservation Property, subject to compliance with any and all existing rules and laws:

a. All activities associated with construction and implementation of the compensatory restoration projects as set forth in the Consent Decree, DARP/EA, and SOW, including, but not limited to, post-construction sampling and monitoring activity, and use of the existing road(s) and trails within the Giant's Camp Conservation Property for such purposes;

b. Additional wetland creation and enhancement activities which may be required to supplement the above-noted restoration plan, so long as the additional mitigation does not adversely affect the compensatory restoration projects authorized by the Consent Decree;

c. Construction, installation maintenance, repair, and replacement of temporary pipes, supporting structures and necessary appurtenances (the "Temporary "Pipes") across and through the Giant's Camp Conservation Property, in a manner which would have minimal additional adverse environmental impact, for the purpose of adding or extracting spoil from the existing disposal sites. In addition, the Grantor can negotiate the sale or use of the lands for the construction and operation of linear facilities as permitted by §704.06(11), Florida Statutes. The Temporary Pipes shall be placed and located within the Giant's Camp Conservation Property in consultation with EPC and the Trustees. The placement, location, and maintenance of the Temporary Pipes (including removing, disturbing, or trimming of mangroves, trees, or shrubs on the Giant's Camp Conservation Property), are subject to compliance with any and all existing rules and laws;

d. Installation and maintenance of fences for access control, land management and habitat protection purposes;

e. Removal or extermination of nuisance or exotic species;

f. The right to relocate listed, threatened or endangered plant and wildlife species from offsite locations to appropriate areas within the Giant's Camp Conservation Property; and

g. Installation of signs for access control, property identification, public information, land management and habitat protection purposes.

5. Public Access. No right of access by the general public to any portion of the Giant's Camp Conservation Property is conveyed by this Conservation Easement, however public access to Grantor's existing Coastal Education Center at Fiddler's Cove, adjacent to the Giant's Camp Conservation Property, is permitted and shall be maintained for so long as desired by Grantor.

6. Responsibilities of Parties. Grantor, its successors or assigns, shall take responsibility for any costs or liabilities related to the operation, upkeep or maintenance of the Giant's Camp Conservation Property. In addition, except as otherwise provided in paragraph 8 below, Grantee,



its successors or assigns, shall have no responsibility for any costs or liabilities related to the operation, upkeep or maintenance of the Giant's Camp Conservation Property.

7. Taxes. Grantor, its successors or assigns, shall pay before delinquency any and all taxes, assessments, fees, and charges of whatever description levied on or assessed by competent authority on the Giant's Camp Conservation Property, and shall furnish Grantee with satisfactory evidence of payment upon written request.

8. Liability. Grantee assumes all liability, up to the scope and limits provided in Florida Statutes §768.28, as amended and superseded from time to time, for any injury or damage to the person or property of third parties which may occur on the Giant's Camp Conservation Property or the access road and any damage to the Giant's Camp Conservation Property or access road arising from the negligence or intentional act of the Grantee or any of its employees, agents, or contractors. Neither Grantee nor any person or entity claiming by or through Grantee shall hold Grantor liable for any damage or injury to person or personal property which may occur on the Giant's Camp Conservation Property or the access road, unless the damage or injury arose from the negligence or intentional act of Grantor. Furthermore, Grantee shall indemnify and hold harmless Grantor up to the scope and limits provided in Florida Statutes §768.28, as amended and superseded from time to time, for all liability, any injury or damage to the person or property of third parties or to the Giant's Camp Conservation Property or the access road caused by the negligence or intentional act of Grantee or any of its employees, agents, or contractors. Likewise, solely as between Grantor and Grantee, Grantor assumes all liability for any injury or damage to the person or property of third parties or to the Giant's Camp Conservation Property which may occur on the Conservation Property arising from the negligence or intentional act of Grantor. Furthermore, Grantor or its assigns shall indemnify and hold harmless Grantee for all liability, any injury or damage to the person or property of third parties arising out of the negligence or intentional act of Grantor.

9. Hazardous Substances. Grantor has not utilized the Giant's Camp Conservation Property to treat, deposit, store, dispose of, or place any hazardous or toxic substances, as defined under applicable law, nor has Grantor authorized any other person or entity to treat, deposit, store, dispose of, or place any such hazardous or toxic substance on the Giant's Camp Conservation Property, and, to the extent of Grantor's actual knowledge without inquiry, no other person or entity has treated, deposited, stored, disposed of or placed any such hazardous or toxic substance on the Giant's Camp Conservation Property.

10. Enforcement Discretion. Enforcement of the terms, provisions and restrictions of this Conservation Easement shall be at the reasonable discretion of Grantee, and any forbearance on behalf of Grantee to exercise its rights hereunder in the event of any breach by Grantor, shall not be deemed or construed to be a waiver of Grantee's rights.

11. Venue and Enforcement Costs. The terms and conditions of this Conservation Easement may be enforced by Grantee by injunctive relief and other appropriate available remedies, and Grantor consents that venue for such enforcement actions shall lie exclusively in the circuit court of the Thirteenth Judicial Circuit, in Hillsborough County, Florida. If the Grantee prevails in an enforcement action, it shall be entitled to recover the cost of restoring the land to the natural

vegetative and hydrologic condition existing at the time of execution of the Conservation Easement or to the vegetative and hydrologic condition existing at the conclusion of the restoration work implemented per the Consent Decree, DARP/EA, and SOW. These remedies are in addition to any other remedy, fine or penalty which may be applicable under Chapter 84-446, Laws of Florida.

12. Assignment of Rights. Grantee will hold this Conservation Easement exclusively for conservation purposes. Grantee will not assign its rights and obligations under this Conservation Easement except to another organization qualified to hold such interests under applicable state laws, and only after the consent of the Trustees and Grantor.

13. Recording in Land Records. Grantor shall record this Conservation Easement and any amendments hereto within thirty (30) days of execution of this Easement in the Official Records of Hillsborough County, Florida. Grantor shall pay all recording costs and taxes necessary to record this Conservation Easement in the public records.

14. Successors. The covenants, terms, conditions and restrictions of this Conservation Easement shall be binding upon, and inure to the benefit of the parties hereto and their respective successors and assigns and shall continue as a servitude running in perpetuity with the Conservation Property. The obligations of each person or entity constituting a Grantor under this Deed of Conservation Easement are only binding on such Grantor during the term of such Grantor's ownership of any portion of the Conservation Property. Upon any transfer of ownership of any portion of the Giant's Camp Conservation Property (each a "Transfer Event"), the transferor shall be automatically released from all obligations arising under this Deed of Conservation Easement from and after the Transfer Event with respect to the property transferred, but said transferor shall remain liable for all obligations with respect to such property arising prior to the Transfer Event; and (b) any person or entity that acquires a fee simple interest in any portion of the Conservation Property shall become liable for all obligations under this Deed of Giant's Camp Conservation Easement as to the property so acquired arising from and after the date of the Transfer Event by which such person or entity receives such ownership interest.

15. Notices. All notices, consents, approvals or other communications hereunder shall be in writing and shall be deemed properly given if sent by United States certified mail, return receipt requested, addressed to the appropriate party or successor-in-interest.

16. Severability. If any provision of this Conservation Easement or the application thereof to any person or circumstances is found to be invalid, the remainder of the provisions of this Conservation Easement shall not be affected thereby, as long as the purpose of the Conservation Easement is preserved.

18. Alteration or Revocation. This Conservation Easement may be amended, altered, released or revoked only by written agreement between the parties hereto or their assigns or successors-in-interest, which shall be filed in the public records in Hillsborough County, Florida.



19. Controlling Law. The interpretation and performance of this Conservation Easement shall be governed by the laws of the State of Florida.

20. Rights of Florida Department of Environmental Protection and NOAA. The Florida Department of Environmental Protection and the National Oceanic and Atmospheric Administration shall have all the rights of Grantee to enforce the terms of this Conservation Easement.

21. Acts Beyond Grantor's Control. Nothing contained in this Deed of Conservation Easement shall be construed to entitle Grantee to bring any action against Grantor for any injury to or change in the Giant's Camp Conservation Property resulting from natural causes beyond Grantor's control, including, without limitation, fire, floods, storms, other weather conditions, and earth movement, or from any necessary action taken by Grantor under emergency conditions to prevent, abate or mitigate significant injury to the Giant's Camp Conservation Property or to public health, safety or welfare resulting from any such causes.

**TO HAVE AND TO HOLD** the said Conservation Easement unto Grantee forever. The covenants, terms, conditions, restrictions and purpose imposed with this Conservation Easement shall be binding upon Grantor, and shall continue as a servitude running in perpetuity with the Giant's Camp Conservation Property.

Grantor hereby covenants with said Grantee that Grantor is lawfully seized of said Giant's Camp Conservation Property in fee simple; that the Giant's Camp Conservation Property is free and clear of all encumbrances that are inconsistent with the terms of this Conservation Easement, and all mortgages have been joined or subordinated; that Grantor has good right and lawful authority to convey this Conservation Easement; and that it hereby fully warrants and defends the title to the Conservation Easement hereby conveyed against the lawful claims of all persons whomsoever.

IN WITNESS WHEREOF, the Grantor has executed this Conservation Easement on the day and year first above written.

Signed, sealed and delivered in our  
presence as witnesses:

MOSAIC FERTILIZER, LLC, a Delaware  
limited liability company

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Date: \_\_\_\_\_

By: \_\_\_\_\_  
Print Name: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
Print Name: \_\_\_\_\_  
Date: \_\_\_\_\_

STATE OF \_\_\_\_\_  
COUNTY OF \_\_\_\_\_

The foregoing Deed of Conservation Easement was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_, as the \_\_\_\_\_ of Mosaic Fertilizer, LLC, a Delaware limited liability company, on behalf of the said limited liability company. Said person is personally known to me or has produced \_\_\_\_\_ as identification.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Printed/Typed Name of Notary

Commission No. \_\_\_\_\_  
Commission Expires \_\_\_\_\_

**EXHIBIT A**

**Legal Description and Boundary Survey Sketch**





## **APPENDIX C**

### **STATEMENT OF WORK**

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## I. INTRODUCTION

This Statement of Work (“SOW”) describes the Work to be performed by Mosaic Fertilizer, LLC (“Mosaic”) under the Consent Decree Addressing Natural Resource Damages, (the “Consent Decree”) for the proper construction of and success criteria for the Giant’s Fish Camp Wetland Restoration and Oyster Reef Creation Project (“Giant’s Camp Project”) and The Borrow Pit Wetland Creation and Restoration Project (“Borrow Pit Project”). The Giant’s Camp Project is briefly described in Section VI, Paragraph 21(B) and the Borrow Pit Project in Section VI, Paragraph 21(C) of the Consent Decree. The Work described in this SOW and the documents referenced herein is intended to fully implement these two Projects. Unless a term is defined within this SOW, the definitions provided in Section IV of the Consent Decree shall apply herein.

This SOW does not address Mosaic’s obligation to perform other Work under the Consent Decree, including but not limited to its obligation to record Conservation Easements on parcels encompassing the Giant’s Camp and Borrow Pit Projects in Section VI, Paragraph 21(D) of the Consent Decree.

Mosaic is responsible for performing the Work to implement these Projects. From time to time, the Trustees (as identified in the Consent Decree) will oversee Mosaic’s activities throughout the performance of the Work. Mosaic shall cooperate with the Trustees in conducting oversight activities.

Review or approval of a task or report by the Trustees shall not be construed as a guarantee of the adequacy of such task or report. If the Trustees modify a report pursuant to this SOW or as provided in the Consent Decree, such report as modified shall be deemed approved by the Trustees for purposes of this SOW. A summary of the major reports that Mosaic shall submit for the Work is in Section IX(B).

## II. OVERVIEW OF THE RESTORATION PROJECTS

A. Components. The major components of the Restoration Projects are described in Section IV of the Natural Resource Damage Assessment and Restoration Plan/Environmental Assessment dated September 29, 2011 (“DARP/EA”). All plans, specifications, submittals, and other reports are subject to Trustee review and/or approval as provided in this SOW and the Consent Decree. Mosaic is responsible for fulfilling additional data and analysis needs identified by the Trustees during the Construction Phase (as defined in Section III., below) needed to support the objectives of the SOW and success monitoring, consistent with the general scope and objectives of the Consent Decree and this SOW. The Trustees will decide whether any additional



data collection and analysis are required to demonstrate that the success criteria have been achieved.

The Work to be completed under this SOW is depicted in a series of construction drawings (see Appendix, reduced size 8.5 x 11, Construction Plans and Attachment, 24 x 36 Construction Plans, signed and sealed by the Supervising Contractor identified as Sheets 1 through 13 (dated September 26, 2012), which are attached and incorporated herein. Sheet 1 depicts the general location of the Giant's Camp Project and the identification numbers of each of the affected parcels. Sheet 2 is an aerial base map showing the location of both Projects on the right and more specifically the location of the Giant's Camp Project, including the Oyster Reef Creation Project on the left. Sheet 3 depicts the work to be performed at the Giant's Camp Project area. Sheets 4-10 set forth the restoration details for the Giant's Camp Restoration Project and details for the Oyster Reef Creation Project and Wetland Restoration Area. Sheet 11 sets forth the erosion control plan for the Giant's Camp Project. Sheet 12 sets forth the restoration details for the Borrow Pit Project. Sheet 13 depicts the Borrow Pit excavation disposal area. Mosaic shall meet all the requirements of each of these construction drawings. The construction drawings may be revised from time to time and shall supersede the requirements of the SOW to the extent they conflict. Any changes to the Construction Plans shall be submitted to and approved by the Trustees.

The Construction Phase of these Projects shall commence by the deadlines established in Section VI below. "Commencement of the Project" begins within 60 days of the Effective Date of the Consent Decree or obtaining all other applicable permits and completion of allometric sampling, whichever occurs last.

The Construction Activity (defined below) for each of the Projects shall be completed as follows:

1. Giant's Camp Project: No later than 480 days after the Commencement of Project.
2. Borrow Pit Project: No later than 365 days after the Commencement of Project.

B. Success Criteria. Mosaic shall meet all Success Criteria, as defined in the Consent Decree and as specifically set forth in Section VII below. The Projects cannot be deemed complete until Mosaic has demonstrated compliance with all Success Criteria.

### III. GENERAL CONSTRUCTION CONDITIONS

A. As used in this SOW, "Construction Activity" means any activity performed during the Construction Phase (defined below) consisting of earth moving, soil disturbances or excavation, dredging, or moving construction equipment in or proximate to the Giant's Camp Project or Borrow Pit Project areas. A Construction Activity shall be deemed to extend until there is no longer a reasonable likelihood that a water quality violation may occur at the compliance points,

regardless of whether any of the activities described in the previous sentence are still ongoing, including the time needed for settling of all suspended materials and until channel sidewalls stop sloughing and are stabilized.

B. As used in this SOW, "Construction Phase" means the period between Commencement of the Project and when Construction Activities for a given Project are complete. Success criteria monitoring required pursuant to Section VIII of the SOW are not within the Construction Phase.

C. During a Construction Activity for each Project, Mosaic shall isolate areas of exposed soils from wetlands or other surface waters to prevent erosion and deposition of these soils into wetlands or other surface waters beyond the limits of Construction Activity, consistent with the erosion control plan set forth on Sheet 11.

D. Mosaic shall be responsible for inspecting and maintaining erosion control devices daily during each Construction Activity to prevent erosion, siltation, and turbid discharges.

E. If historical or archaeological artifacts are discovered at any time on the Project sites, Mosaic shall immediately notify the Trustees and the Florida Department of State, Division of Historical Resources. If a Construction Activity is suspended by the State for more than 48 hours as a result of any discovery of an archeological artifact, such event shall constitute a Force Majeure event of the Consent Decree (Section XIV).

F. Mosaic shall submit two copies to FDEP's project manager and three copies to the Federal Trustees of signed, dated and sealed as-built drawings for review and approval within 60 days of the end of the Construction Phase for each Project. The as-built drawings, which are listed below, shall be based on the construction drawings, which shall be revised to reflect changes made during Construction Activity. Both the original design and constructed elevation must be clearly shown. The plans must be clearly labeled as "as-built" or "record" drawings. Required surveyed dimensions and elevations shall be verified, signed, dated and sealed by a Florida registered surveyor or engineer. The following information shall be verified on the as-built drawings from the construction drawings dated August 1, 2012:

<u>Plan View/Cross-Section</u>	<u>Drawing Number</u>
Giant's Camp Restoration Plan – Sheet A	Sheet 4 of 13
Giant's Camp Restoration Plan – Sheet B	Sheet 5 of 13
Giant's Camp Restoration Plan – Sheet C	Sheet 6 of 13
Giant's Camp Road/Bridge Improvements	Sheet 7 of 13
Giant's Camp Upland Spoil Disposal Area	Sheet 8 of 13
Wetland Impact Areas and Brazilian	
Giant's Camp Pepper Removal Plan	Sheet 9 of 13

Giant's Camp Oyster Habitat Structures A, B, C Details	Sheet 10 of 13
Giant's Camp Erosion Control Plan	Sheet 11 of 13
Borrow Pit Restoration Site and Planting Plan	Sheet 12 of 13
Borrow Pit Excavation Disposal Area	Sheet 13 of 13

#### IV. TURBIDITY CONTROL AND MONITORING

A. Mosaic will take all actions necessary for each Project to ensure that the turbidity water quality criterion in Florida Administrative Code Rule 62-302.530(69) of 29 NTUs above background is not exceeded during Construction Activity. Mosaic will submit a Turbidity Control and Monitoring Plan for each Restoration Project, as appropriate, to the Trustees for their approval **before** commencing the Project.

B. At a minimum, each Turbidity Control Plan shall address the requirements in Paragraphs IV. D-H below:

##### Turbidity control devices

C. Mosaic shall ensure that all turbidity control devices and procedures function as intended. All devices shall be inspected before Construction Activity commences for the day and periodically during the Construction Phase. If a device or procedure is found during inspection to fail to meet the following requirements or fails to prevent a violation of the turbidity water quality criterion, then Mosaic will fix, replace, or supplement the device or procedure, as appropriate, to prevent future violations. Floating turbidity curtains shall have weighted skirts that extend to within one foot of the bottom. In addition, the turbidity control devices shall be constructed as described in Figure 1.

##### Placement and removal of turbidity control devices

D. Mosaic shall place the floating turbidity curtains in the locations shown on Figure 1.

##### *In addition:*

1. One set of floating turbidity curtains shall be placed as close to the active dredge site as practical.
2. Additional turbidity curtains shall be placed within A Creek as the dredge proceeds westward in order to create multiple settling cells.

E. Turbidity curtains surrounding the limits of construction shall remain in place during Construction Activity.

F. Mosaic shall not remove any turbidity control devices without first obtaining approval from the Trustees. Removal will be triggered by one week of no violation measurements after construction is complete and equipment removed from site.

Turbidity monitoring and testing locations and testing frequency

G. If the water is less than 5 feet deep, then single mid-depth samples are sufficient. If the water is 5 feet or deeper at the time of testing, then samples shall be collected from surface, mid-depth and 1 foot above bottom.

H. A qualified individual shall monitor turbidity during Construction Activity using the protocols in this section at the background and compliance sites depicted on Sheet 10 and Figure 1 and at the specific locations described below. Monitoring and testing frequencies for each location are listed in paragraph I (Specific Monitoring Locations) below.

I. Specific Monitoring Locations.

**Creek Dredge**

Background Site: a site that is clearly outside the influence of turbidity generated by this Project or other obvious turbidity plumes.

Compliance Site: a site that is within 15 feet outside of the turbidity curtains surrounding the dredge intake point.

**Boat Basin Dredge**

Background Site: a site that is within the Alafia River, at least 1000 feet “up current” from the dredge intake point, and clearly outside the influence of turbidity generated by this Project or other obvious turbidity plumes.

Compliance Site: a site that is within 15 feet outside of the turbidity curtains surrounding the dredge intake point.

**Return Water Discharge**

Background Site: a site that is clearly outside the influence of turbidity generated by this Project or other obvious turbidity plumes.

Compliance Site: a site that is within 15 feet outside of the turbidity curtain surrounding the discharge point.

**Borrow Pit**

No turbidity monitoring is required during excavation, exotic vegetation removal and construction if there is no off-site discharge to surface waters, e.g., Delaney Creek Pop-off Canal. If there is an off-site discharge to the Delaney Creek Pop-off Canal, turbidity will be monitored at:

Background Site: In the Delaney Creek Pop-off Canal, up current and outside the influence of turbidity generated by this project or other obvious turbidity plumes.

Compliance Site: In the Delaney Creek Pop-off Canal, within 15 feet outside of the turbidity control device(s) at the discharge point.

Off-site discharge to surface water other than the Delaney Creek Pop-off Canal requires prior written approval of the Trustees and appropriate turbidity monitoring.





Figure 1. Turbidity monitoring locations and turbidity curtain locations for the Return Water Discharge, Boat Basin Dredge, and Creek Dredge.

J. Frequency of testing.

Background Sites: Samples of background sites identified in paragraph I (Specific Monitoring Locations) shall be taken whenever a corresponding compliance site is tested.

Compliance Sites: Every two hours during normal working hours of each Construction Activity and two hours after Construction Activity has ceased for that day.

Turbidity testing protocols

K. The qualified individual shall collect background and compliance samples with a Kemmerer, Van Dorn, or a similar sampler that is designed to collect in situ water samples.

L. Samples shall be analyzed immediately after collection with a turbidimeter that produces results in Nephelometric units. The field sample results shall be accurately recorded to the precision capabilities (decimal place) of the instrument. Field turbidimeter results shall be rounded to the next whole number (ex. 15.23 NTUs shall be recorded; however the results shall be interpreted as 16.00 NTUs).

M. Mosaic shall comply with the following Quality Assurance/Quality Control (QA/QC) requirements:

1. The turbidimeter shall be calibrated each morning and each time the instrument is turned on and recalibrated every four hours thereafter.
2. Calibrations shall be performed against a blank and at least one formazin or gel-type standard. The standard value must be in the same range as the sample readings.
3. Calibration procedures shall be recorded in a permanent QA/QC logbook, and copies of the logbook entries shall be submitted with the data.

Turbidity Monitoring Reports

N. Mosaic shall submit turbidity monitoring reports to the Trustees, each week following Commencement of Construction that contain the following information:

1. Project Name,
2. Dates of sampling and analysis,
3. A statement describing the methods used in collection and analysis of the samples,
4. A map showing the sampling locations, along with the latitude and longitude of the sampling locations,
5. A statement by the Supervising Contractor or his designee certifying the authenticity, precision and accuracy of the sampling data, as follows:

*"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."*

6. For each sample taken:
  - a. Time of day sample was taken,
  - b. Depth of water body,
  - c. Depth of sample,
  - d. Tidal stage and direction of flow, and
  - e. Antecedent weather conditions, including wind direction and velocity at the time the sample was taken.

Turbidity standard violation protocols

O. Mosaic shall immediately implement the following measures when turbidity levels in surface waters surrounding the project site exceed 29 NTUs above background:

1. Immediately cease Work contributing to the water quality violation.
2. Stabilize exposed soils contributing to the violation.
3. Modify the work procedures responsible for the violation, install additional turbidity containment devices, and repair non-functioning turbidity containment devices.
4. Notify the Trustees within 24 hours of the time the violation is first detected.

P. Mosaic shall not use chemical additives such as coagulants or flocculants without prior approval from the Trustees.

Q. Watercraft associated with the Construction Activity shall operate within waters of sufficient depth to preclude bottom scouring or prop dredging. There shall be a minimum 12-inch clearance between the deepest draft of the watercraft (with the motor in the down position) and the top of submerged resources, objects, or substrate.

R. All watercraft associated with the project shall operate at "Idle Speed/No Wake" at all times while in the immediate area and while in water where the draft of the watercraft provides less than a four-foot clearance from the top of submerged resources, objects, or substrate. All watercraft will follow routes of deepest water whenever possible.

V. MANATEE PROTECTION

A. To reduce the risk of entrapment and drowning of manatees, Mosaic will install grates over the ends of submerged or partially submerged pipes or culverts with openings between eight inches and eight feet in diameter. The grates shall have bars spaced no more than eight inches apart.

B. Mosaic shall instruct all personnel associated with the Construction Activity about the presence of manatees and manatee speed zones and the need to avoid collisions with and injury to manatees. Mosaic shall advise all construction personnel that there are civil and criminal penalties for harming, harassing, or killing manatees, which are protected under the Marine Mammal Protection Act, the Endangered Species Act, and the Florida Manatee Sanctuary Act.

C. Siltation or turbidity barriers shall be made of material in which manatees cannot become entangled, shall be properly secured, and shall be regularly monitored to ensure they have not become loose or configured in a way that would entangle or entrap manatees. Barriers must not impede manatee movement.

D. All on-site project personnel are responsible for observing water-related activities for the presence of manatees. All in-water operations, including operating watercraft, must be shutdown if a manatee comes within 50 feet of the operation. In-water operations shall not resume until the manatee has moved beyond the 50-foot radius of the operation, or until 30 minutes elapses if the manatee has not reappeared within 50 feet of the operation. Personnel shall not herd or harass animals into leaving.

E. Any collision with or injury to a manatee shall be reported immediately to the Florida Fish and Wildlife Conservation Commission (FWC) Hotline at 1-888-404-FWCC. Collision and/or injury shall also be reported to the U.S. Fish and Wildlife Service in Jacksonville (1-904-731-3336).

F. Mosaic shall post temporary signs concerning manatees prior to and during all in-water operations. Mosaic shall remove all signs upon completion of the Construction Phase. Awareness signs that have already been approved for this use by the Florida Fish and Wildlife Conservation Commission (FWC) must be used (see <http://MyFWC.com>). One sign, which reads "Caution: Boaters" must be posted. A second sign measuring at least 8 1/2" by 11" explaining the requirements for "Idle Speed/No Wake" and the shut-down of in-water operations must be posted in a location prominently visible to all personnel engaged in water-related operations.



## VI. CONSTRUCTION ACTIVITY FOR GIANT'S CAMP PROJECT

This section describes the milestones for Construction Activity for the Giant's Camp Restoration Project, and provides two scenarios for the date by which Mosaic shall commence the Construction Phase for that project, which account for seasonal construction factors, the Effective Date of the Consent Decree and the dates by which Mosaic receives all other applicable permits. Mosaic shall inform the Trustees as to which scenario it will rely on.

### A. Scenario 1.

Provided that: i) Mosaic obtains coverage under the Department of the Army Corps of Engineers Nationwide Permit 27 prior to January 18, 2013; ii) the Consent Decree Effective Date is prior to April 1, 2013; iii) Mosaic is issued all other applicable permits prior to April 1, 2013; and iv) Allometric Sampling is complete prior to April 30, 2013; then Mosaic shall commence the Construction Phase for the Giant's Camp Project by May 1, 2013.

### B. Scenario 2.

In the event that any one of the conditions in Scenario 1 is unmet, Mosaic shall proceed under Scenario 2. Pursuant to Scenario 2, Mosaic shall commence the Construction Phase for the Giant's Camp Project by March 1, 2014.

### C. Under either Scenario 1 or Scenario 2, the following shall apply.

A. Within 60 days of the Effective Date of the Consent Decree or obtaining all other applicable permits and completion of allometric sampling, whichever occurs last, Mosaic shall commence the Construction Phase and notify the Trustees that the Construction Phase has commenced.

1. Within 150 days from the Commencement of the Project, Mosaic shall complete dredging of Channel A and Ditches C, D, E and remove spoil mound material to create 0.25 acre of wetland habitat.
2. Within 180 days from commencement of the Construction Phase, Mosaic shall complete dredging of Channel B Expansion.
3. Within 180 days from commencement of the Construction Phase, Mosaic shall complete Exotic Plant Removal.



4. Within 210 days of completing task VI.A.1, Mosaic shall provide approximately 2,000 square feet of surface area footprint, consisting of shell material, for oyster colonization in Channel B, identified as Oyster Habitat Structure C.
5. Within 240 days from commencement of the Construction Phase, Mosaic shall transfer oysters from boat basin to the Channel B Oyster Habitat Structure C.
6. Within 300 days from commencement of the Construction Phase, Mosaic shall complete the bridge and wing walls.
7. Within 300 days of the commencement of the Construction Phase, Mosaic shall complete dredging of the boat basin.
8. Within 330 days of completing task VI.A.1, Mosaic shall provide approximately 3,652 ft<sup>2</sup> of surface area footprint for oyster colonization by installing 6 to 8-inch limestone or if limestone is not available, concrete rubble, which will be free of foreign material (protruding metal, debris, sediment, etc.) along the western and southwestern bulkhead wall. The configuration of the placement is generally described in Sheet 4. The reef area will be totally exposed at the MLLW elevation of -0.75 ft NGVD29 and submerged at the MHW elevation of 1.61 ft NGVD29 .
9. Within 30 days of completing task VI.A.1, Mosaic shall place a sign at the entrance to the boat basin warning boaters of the presence of the oyster reef.

B. Within 480 days of commencement of the Construction Phase, Mosaic shall complete Construction Activity.

C. Within 60 days of completing Construction Activity, Mosaic shall file its Completion of Project Construction Report.

## VII. CONSTRUCTION ACTIVITY FOR BORROW PIT RESTORATION PROJECT

This section contains the milestones for Construction Activity for the Borrow Pit Restoration Project.

A. Within 180 days of the Effective Date of the Consent Decree, Mosaic shall commence the Construction Phase for the Borrow Pit Project and notify the Trustees when the Construction Phase has commenced.

1. Within 180 days of commencing the Construction Phase, Mosaic shall complete clearing of exotic plants from the restoration area.
  2. Within 270 days of commencing the Construction Phase, Mosaic shall complete excavation of pond and tidal creek.
  3. Within 330 days of commencing the Construction Phase, Mosaic shall complete planting of *Spartina alterniflora* within wetland restoration area to facilitate native plant colonization.
- B. Within 365 days of commencing the Construction Phase, Mosaic shall complete Construction Activity for the Borrow Pit Restoration Project.
- C. Within 60 days of completing Construction, Mosaic shall file its Completion of Project Construction Report.

#### VIII. SUCCESS CRITERIA

In order to document the success of these Projects, Mosaic shall implement the following monitoring programs that are designed to identify an increase in ecological functions to wetlands and provide the documentation needed to demonstrate whether the projects provide adequate compensation for injuries to natural resources. True color and IR vertical aerial photographs of both project areas will be taken prior to Commencement of Construction, and subsequently on an annual basis for a total of seven project aeriels.

##### A. Types of Success Criteria

Five types of success criteria will be monitored and documented, which are briefly described here:

1. **Hydrological** – A primary criterion for success of the Giant's Camp Project is an increase in tidal prism within the North Pond. This success criterion will compare the post-construction hydrologic conditions to baseline conditions using hydrological data loggers. This success criterion is quantified in Section IX A.1 below.
2. **Vegetative** – The primary criterion for success in the Borrow Pit Project and a primary criterion for success in the Giant's Camp Project is an increase in ecological functions based upon a measured increase in the calculated above ground biomass and allometric regressions based on measured biomass of mangroves in the path of Construction Activity. A Complexity Index (CI) will be used at Giant's Camp based upon

that developed by Holdridge (1967) and used by Pool et al. (1977) and Martinez et al. (1979) to describe the structure of mangroves in Florida, Puerto Rico, Mexico and Costa Rica. This index will be calculated based upon quantitative data collection but will not be used to determine success. Increases in biomass will be the basis for measuring the success of mangrove restoration at Giant's Camp. Once the spoil mound from the Wetland Restoration Area is removed to the surrounding wetland elevation, the area will be monitored for natural colonization of native wetland plant species and must reach 50% mean cover within three years and 80% mean cover by the end of five years. If cover does not meet the 50% and 80 % criteria, mid-course correction actions will take place which will include planting of native vegetation identical to the surrounding reference areas to meet the described success metric. Success criteria at the Borrow Pit will include documenting the change in dominance and cover from the existing primarily Brazilian pepper cover to one dominated by native marine marsh and mangrove vegetation. No more than 10% exotic plant cover may be present at any time, including the spoil mound area. This success criterion is quantified in Section IX A.1 and IX A.2 below.

3. **Fisheries** – A primary criterion for success in the Giant's Camp restoration is an increase in the number of fish and a diversity of species in the constructed Channel A, the North Pond, and the connector swale between Channel A and the North Pond and differences between fish populations in the North Pond with restored hydrology and the South Pond without restored hydrology. This success criterion is quantified in Section IX A.1 below.

4. **Water Quality** – A main goal of the Giant's Fish Camp Project is an increase in the dissolved oxygen levels, as measured over four quarterly 24 hour periods annually for three to five years at four sites (north pond, south pond, Channel A and the Boat basin). Baseline data will be collected at one event prior to construction by the spring of 2013, during representative conditions for the site. Subsequent monitoring will follow quarterly after construction for three years (13 monitoring events). If at three years dissolved oxygen levels have met success criteria, sampling may be terminated. If dissolved oxygen samples have not met success criteria, sampling will continue for an additional two years for a total of 21 monitoring events.

5. **Oysters** – The primary criterion for success of the Oyster Reef Project is the establishment of an oyster reef adjacent to the western bulkhead in the Giant's Fish Camp basin that meets (no greater than 15 % below) the density and percent cover of the control oyster reef at two control sites (Alafia River Oyster Reef Reference Area A and Alafia River Oyster Reef Reference Area B, Showman's Island) and is at least 3652 ft<sup>2</sup> in aerial extent. This success criterion is quantified in Section IX A.1 below.

## B. Giant's Camp Project

1. **Hydrologic Restoration** - The existing hydrologic conditions at Giant's Fish Camp have been measured, analyzed and reported in Meyers et al. (2010). The report documented the impairment to tidal flows in the vicinity of Giant's Fish Camp due to the closure of a historical channel that connected A Creek with the North Pond and the blockage of the historical flows from the Giant's Fish Camp boat basin to the south to Hillsborough Bay. Predictive modeling in the report suggests that the tidal range in North Pond will increase by approximately 0.4 m with restoration (see before and after restoration graphs Figures 2 and 3).

The success criterion to meet this goal is the measurement of the tidal range at the same four stations sampled in the baseline report at the completion of all Construction (Time Zero), 24 months later at Time 0 + 24 months, at the end of the monitoring period at Time 0 + 60 months, and the reporting of a statistically significant (at the 0.10 probability level) increase in the tidal range within the North Pond of approximately 0.4 m.

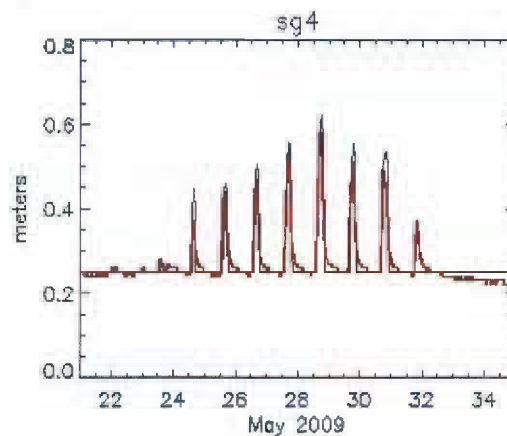


Figure 2. Baseline data for water elevation from MSL during the time period of the model baseline run. Color lines are the corresponding HOB0 data. Black lines are the model output. Elevation at SG4 (North Pond) is adjusted to 0.25 m (the dry elevation of the grid cell) when the water depth is below 0.13 m. Taken from Meyers et al (2010).



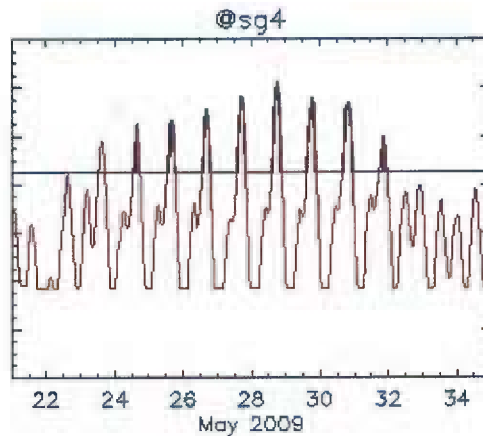


Figure 3. Model elevation Baseline (dark) vs. that for the planned restoration (color) at the model grid locations corresponding to the HOBO sites for the North Pond. Taken from Meyers et al. (2010).

2. **Vegetative Restoration** - The work of both Pool et al. (1977) and Martinez et al. (1979) has conclusively shown that the structure of a mangrove forest is closely correlated with stress to the forest and the specific structural attributes of biomass, basal area, canopy height, frequency, density, dominance, importance value and the resulting calculated Complexity Index (CI). All of these attributes will be measured in the restoration impact areas prior to construction in order to prepare an allometric set of relations between basal area, height and biomass. The details of the methodology for gathering these data are described below. Based upon previous work by Ross et al. (2001) and Smith and Whelan (2006), ten trees of each of the three mangrove species present (red mangrove, *Rhizophora mangle*; black mangrove, *Avicennia germinans*; and white mangrove, *Laguncularia racemosa*) representing the range of sizes present within the impact areas will be selected for the measurements and analysis (allometric relationships will include below-ground biomass; suggested methodologies can be found in Komiyama et al., 2005). The calculated CI values will not be used to define success, due to the fact that no published data exists to enable any rational estimate of what changes in CI might occur with hydrologic restoration; the values will be used for eventual comparison of control and treatment plots among themselves and with published data, should any become available before the project is completed.

The complexity index is determined using this formula:

$$CI = \frac{(\# \text{ of species of mangroves})(\# \text{ of stems})(\text{basal area})(\text{maximum height of mangroves})}{1000}$$



In addition, above ground biomass data will be statistically analyzed as a means of evaluating the success of the restoration. The goal of this monitoring is to evaluate whether a unit area of mangroves shows a statistically significant (at the 0.10 probability level) increase in above ground biomass when compared with the natural increase in above ground biomass as measured in the combined data from the control plots. Success for this criterion is achieved when an increase in a minimum of 10 of the plots occurs.

If more than 10 of the plots show a statistically significant increase in biomass (at the 0.10 probability level), the additional acreage will be counted towards any contingency restoration required due to the failure to meet other success criteria related to the mangrove restoration. If less than 10 plots show a statistically significant increase in biomass (at the 0.10 probability level), then additional restoration, or the provision of mangrove mitigation bank credits will be required to compensate for the shortage.

#### *Methodology and Statistical Parameters*

Due to the impossibility of random sampling given the nature of the plant community and logistics, sampling of DBH (diameter at breast height) and height (both defined by normal sampling practices) must consist of repeated measurements on the same individuals located in defined control and treatment (restoration area) plots (Figure 4). Above ground biomass and CI values will be compared to the same values for eight control sites (Figures 5, 6 and 7) located at Delaney Pop-Off Canal, near Archie Creek, and directly on the Alafia River. Treatment plots are located on the south side of the Fiddler's Cove Educational Center road and along both sides of Channel A and on the east side of Channel B. The treatment area is divided into 16 plots of approximately one acre (0.4 ha each; Figure 8).

Eight paired 25 m<sup>2</sup> quadrat stations (5 m x 5 m) will be established within the control plots and 16 paired 25 m<sup>2</sup> quadrat stations (5 m x 5 m) established within the treatment plots for a total of 48 monitoring quadrat stations. All quadrats will be measured for the parameters discussed above plus the calculation of a CI and above ground biomass. Methods of data gathering and analyses will be according to the methods of Cintron and Novelli (1984), Ross et al. (2001) and Smith and Whelan (2006).

The parameters for comparisons along a presumed gradient of health of communities include comparisons along a gradient of distance from the created and restored tidal channels and comparisons along a temporal gradient over the duration of the study. Repeated measure ANOVAs (RM-ANOVA) on each plot through time can be applied to the question of whether there has been a significant change in either DBH or height (and thus calculated biomass) for a given plot. Given the nature of the RM-

ANOVA, the data from the replicates will be pooled since the analyses track individuals (in this case, through time). If the restoration has a positive effect on the mangroves, results will show more rejections of the null hypothesis ( $H_0$ : over time, no increase between DBH or height will be observed in trees along a gradient perpendicular to restored tidal creeks' banks) as distance from the created and restored tidal creeks decreases.

Multivariate graphical analyses coupled with appropriate parametric and non-parametric statistics will be used (Bloom, 1980; Santos & Bloom, 1980; Santos & Bloom, 1983). These analyses can accommodate simultaneous consideration of DBH and height. Each tree in each sample and at each sampling time will be represented as a point on a plot of DBH versus height, thus in a 2D space. The points derived from a given plot at a point in time will be defined as a cluster (regardless of the actual distribution in the 2D space). The set of the length of each line segment from each point to every other point in a given cluster (intra-cluster) or between clusters (inter-cluster) will then be calculated. For each comparison of two clusters, there are two possible analyses and four potential outcomes. If the intra-cluster distances are statistically distinct (using a T-test or a Mann-Whitney U-test, as appropriate) from the inter-cluster distances for Cluster A to B and Cluster B to A, then the clusters occupy different volumes in the 2D universe and are distinct from one another. If one of the tests results in rejection, and the converse test results in acceptance of the  $H_0$ , then one of the clusters resides within the other. If both tests result in acceptance, then the clusters are equivalent in the 2D space. The centroid of each cluster can also be calculated and thus the effective distances between any pair of clusters can be determined. Note that this technique allows the determination of whether pooling data of replicates within a plot or data between plots is statistically valid.

If the hydrological restoration is having the desired effect, the impacted areas will show movement, i.e., increase in DBH and height and thus biomass, towards the presumed healthy end of the scale. Further, there may be differential amounts of movement as a function of distance from the created and restored tidal creeks. Success will be measured as a statistical rejection of  $H_0$  in DBH and/or height (using the appropriate ANOVA) when comparing sites that are either viewed *a priori* as highly impacted or at an extreme distance from the created and restored tidal creeks (treatment area).

Seven vegetation monitoring events beginning in the summer of 2011 will be conducted, then at Time Zero, and Time Zero + 12, 24, 36, 48 and 60 months. All plots will also be photographed from a fixed photo location with a height reference pole in place in the photograph. In addition to the mangrove plot sampling and allometric sampling, 0.25 acre of new wetland habitat will be monitored for natural colonization of

native wetland species (Figure 4). Monitoring will be completed by setting two permanent 5m x5m plots and documenting the overall mean percent cover and percent cover by species over time. Monitoring will occur at the same times as regular mangrove plot monitoring, Time Zero, Time Zero Plus 1 year and subsequent yearly monitoring for five years. Success criteria will be at least 50% cover of mangroves within 3 years and 80% cover of mangroves by 5 years. Exotic plant composition will be maintained below 10% at all times.

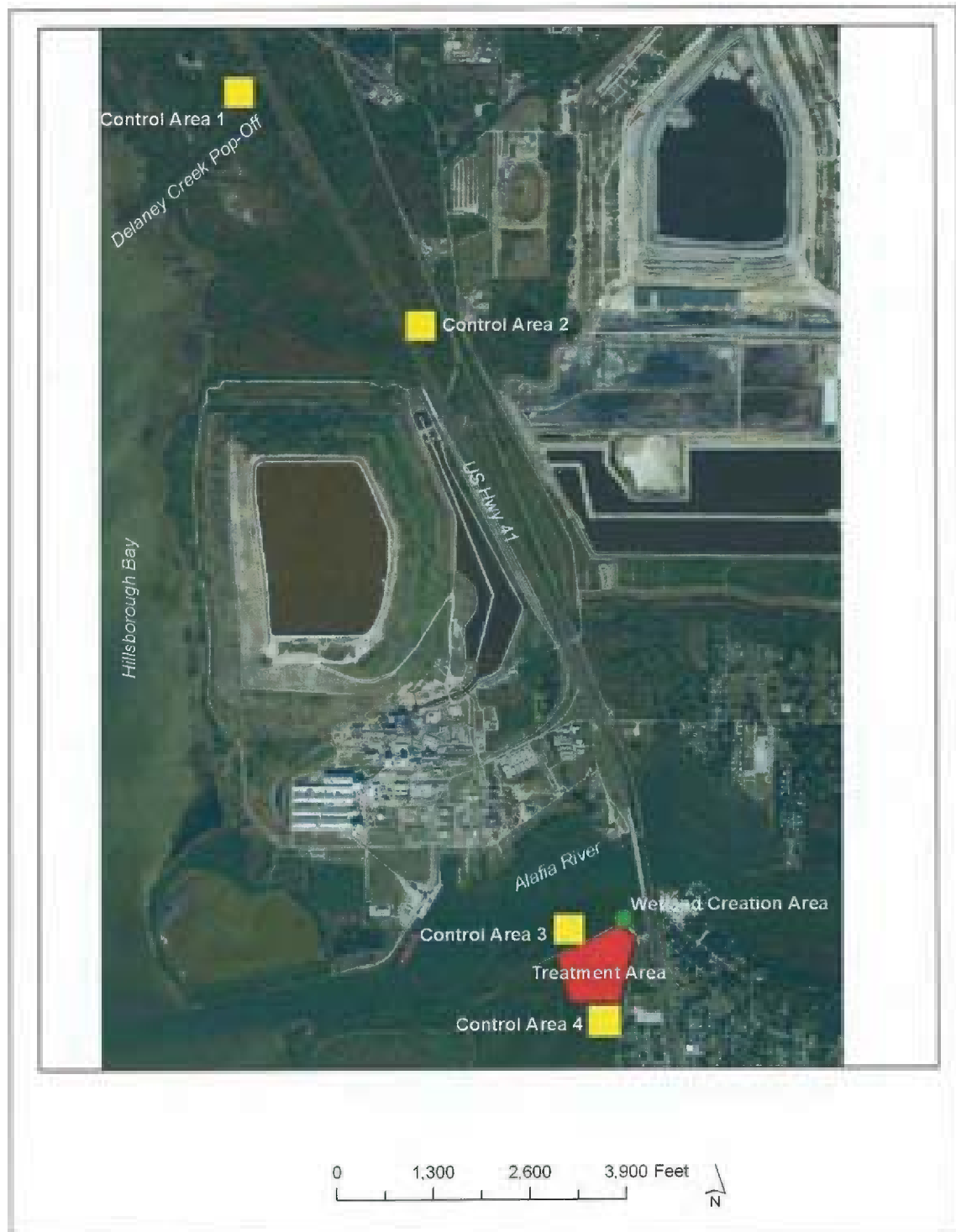


Figure 4. Location of Vegetation Monitoring Control and Treatment Areas.





Figure 5. Location of Vegetation Monitoring Control Areas C1 and C2.



Figure 6. Location of Vegetation Monitoring Control Areas C3, C4, and C5.



Figure 7. Location of Vegetation Monitoring Control Areas C6, C7 and C8.

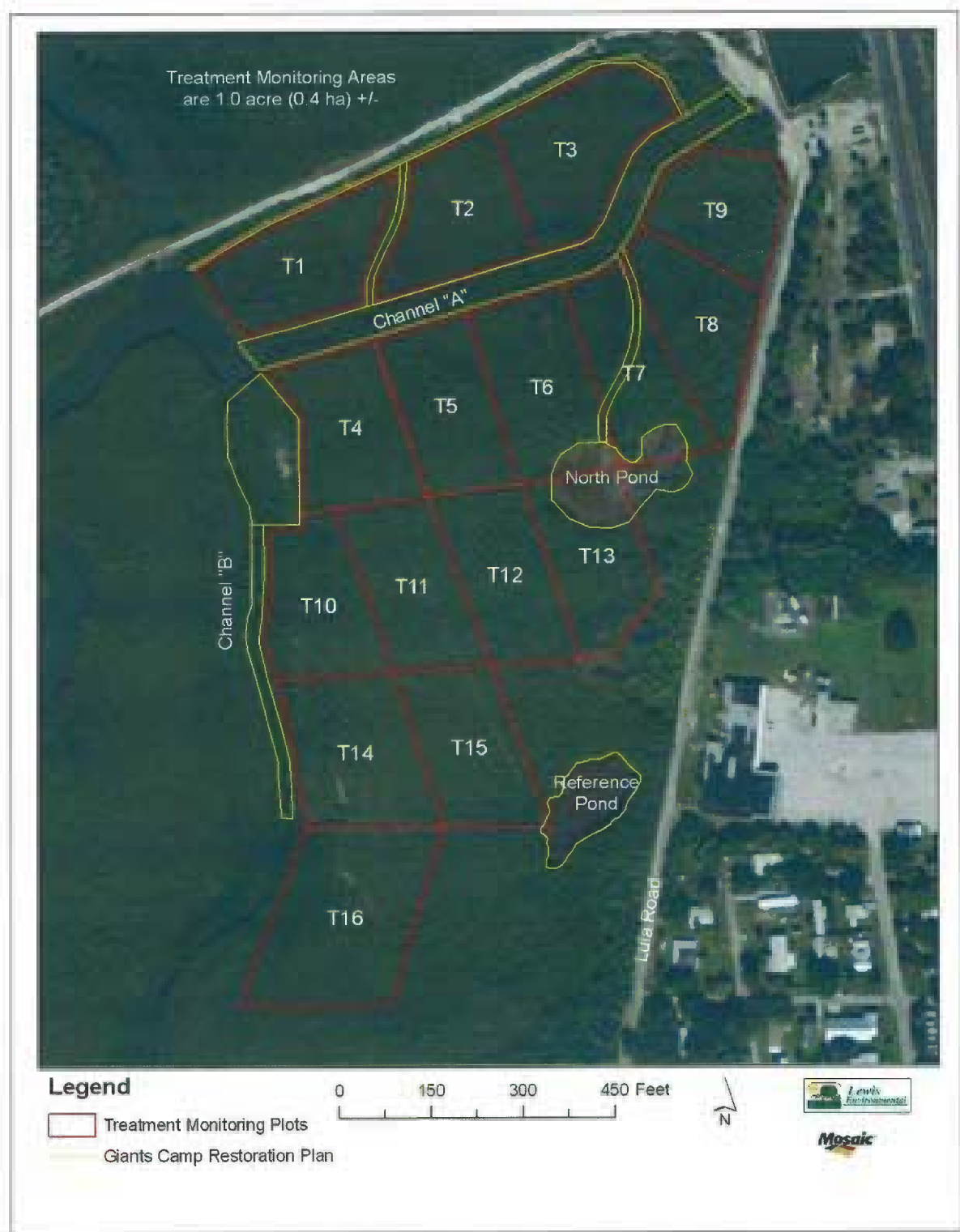


Figure 8. Location of Vegetation Monitoring Treatment Areas T1-T16.



3. **Fish Habitat Restoration** - The existing baseline conditions at Giant's Camp have been monitored and reported by Gilmore (2011 and 2012). Additional baseline monitoring using Breder traps and small seines occurred during the spring and summer of 2011 to further characterize the fish occurring in the alignment of the proposed Channel A improvements, the proposed connector swale improvements and within the North Pond, with the South Pond serving as one control site, and the Delaney Creek Pop Off Canal (DPOC) serving as the other (Figure 9).

Following completion of the Giant's Camp Project, sampling with the same gear will take place quarterly for the first year and semi-annually during years two and three within the connector swale, North Pond and South Pond. Channel A at this time will have been converted to a 50 foot wide by 5 foot deep flowing canal lined by mangroves. Use of the same sampling gear as used prior to restoration would not be appropriate due to the increased size of the channel. Therefore, a separate comparative sampling program using more appropriate larger nets will take place quarterly during the first year and semi-annually for years two and three in both the restored Channel A and in the DPOC. The DPOC would represent control conditions as a historically constructed (in 1991) more or less linear canal lined by mangroves similar to the post-construction Channel A.

Success for the connector swale and North Pond restoration is defined as a statistically significant (at the 0.10 probability level) increase in fish species composition and numbers from the data gathered as baseline information in the summer of 2011. Success for Channel A is defined as a demonstrated trend towards similarity, using the collected data, between the fish population numbers and species composition between fish populations in Channel A (treatment site) and the DPOC (control site) over the three years of sampling.



Figure 9. Location of Fish Monitoring Reference Site (DPOC) and Restoration Sampling Area (Giant's Camp).

4. **Water Quality** – Dissolved oxygen levels will be measured over four quarterly 24 hour periods annually for three to five years at four sites (north pond, south pond, Channel A and the Boat basin). Samples will be taken at a single mid channel location. Surface, mid-depth and bottom measurements will be taken in Channel A and at the boat basin, single mid-depth measurements only will be taken in the north and south ponds. Baseline data will be collected at one event prior to construction in the fall of 2012. Subsequent monitoring will follow quarterly after construction for three years (13 monitoring events). If at three years dissolved oxygen levels have met success criteria, sampling may be terminated. If dissolved oxygen samples have not met success criteria, sampling will continue for an additional two years for a total of 21 monitoring events. In addition to dissolved oxygen, temperature, conductivity, and pH will be measured at these four locations, A statistically significant (at the 0.10 probability level) increase in the average dissolved oxygen level over this period of time will be defined as success.

5. **Oyster Reef Project** - Monitoring for the Oyster Reef Project portion of the Giant's Camp Project will measure and record the three following data criteria:

- a. **Aerial Coverage** –the size or footprint in which oysters are recruiting and settling.
- b. **Density or Percent cover** – the average number of oysters per square meter.
- c. **Shell length** – the length of oysters greater than 3 cm in length from the hinge of the shell to the outer most lip margin.

The rip rap structures that will provide strength and support to the seawalls at the entrance to the bridge will also be suitable habitat substrate for oyster recruitment. There are two habitat structures: a west structure and a south structure (Figure 10). There will be a total of ten permanent transects on these structures. Each structure will be divided into ten meter segments. Within each segment, a random number generator between 0 and 9, will be used to determine the permanent transect location. Therefore the west rip rap structure, which is 53 meters long, will have a transect somewhere in meters 0-9 (section 1), a second somewhere in meters 10-19 (section 2) and so on until meters 50-53 (section 6) for a total of six. A steel rebar will be hammered in above the wall and used as the attachment points for each transect line. The south structure will have four permanent transects to cover the 37 meter length. The Channel B oyster habitat structure will have three transect marked by permanent pins for monitoring purposes and follows the same protocols as described in this section (Figure 10).

A fixed transect method will be employed to determine aerial coverage and density of oysters on the rip rap substrate. At the permanent transect locations, a meter tape will be placed from the fixed point above the water's surface to the substrate where the reef ends. Moving waterward, the first observation of oyster recruitment will be documented and a 25 cm x 25 cm quadrat will be placed there to start the first data recording of that transect. A quadrat will then be placed at the start of each meter after that first quadrat to document and record the oyster metrics and to record the data. The end of the transect will be where the last oyster is recorded as the transect approaches the edge of the substrate. This will identify the area within the substrate that oysters are recruiting and define the band of preferred oyster habitat. Averages for the data criteria will then be calculated for each transect. The average for each transect will be treated as one data point.

At the first and last transect of each structure, an additional measurement will be taken to help determine the aerial coverage of oysters. Perpendicular to the transect and in the middle of the oyster recruitment zone, a measurement of distance will be taken from the transect line to the last observed oyster moving toward the end of the structure. These numbers will record the horizontal distribution of oyster and will be used to calculate the total area on each structure. See additional information below.

At each meter interval, a 25 cm x 25 cm quadrat will be placed and live spat (< 3 cm shell) and live sub adult and adult oyster (> 3 cm ) density will be recorded as percent cover. Percent cover of other substrate competitors shall also be recorded such as algae, barnacles, etc. Then, all live adult and sub –adult (>3cm) oysters and all up to 10 spat, will be selected for measurement *in situ* to determine average shell width.

Oyster density will be determined by calculating the mean number of adult and sub-adult live oysters as well as spat per 0.0625 m<sup>2</sup> and extrapolating the results to the number of live oysters per square meter (m<sup>2</sup>). Oyster size will be determined by measuring shell height (from hinge to beak) of all, up to 10, live oysters (> 3 cm) within each quadrat and recorded in millimeters (mm). The shell growth rates will be estimated by comparing size range and mean size for each monitoring event. Surface salinity will be recorded for each monitoring event. Additionally, any observations of fish and non-sessile invertebrates will be recorded as anecdotal functional use data for the reef.

Aerial coverage (AC) will be determined by averaging the measured width of oysters present on each of the fixed transects for each structure so that the west structure will have six measurements and the south four. These averages will be multiplied by the length of the present recruited oysters obtained in the perpendicular measurement described above. This will produce an estimate of aerial extent. So that AC = [average



length of transects populated by live oysters] \* [length of substrate (perpendicular to the transects) populated by live oysters]

The same monitoring methods described above will be used to monitor two oyster reef reference areas located near the project site. The first location "Alafia River Oyster Reef Reference Area A" is located on the west side of the Boat Basin entrance and is approximately 26 m x 5m. The second location, "Alafia River Oyster Reef Reference Area B, Showman's Island" is located upstream in the Alafia River on the south side of Showman's Island (Figure 10). This site is comprised of two 5m x 5m areas that are the result of a previous oyster reef creation project. The project was a NOAA pilot project that compared settlement rates of different substrates. Four transects will be randomly selected at Alafia River Oyster Reef Reference Area A, and two (one for each 5 m x5m reef) will be randomly selected at Alafia River Oyster Reef Reference Area B.

Success criteria for oyster enhancement will be based on the comparison of the Giant's Camp oyster enhancement and the data collected from the two reference locations. Success will be determined by monitoring data being not significantly different (at the 0.10 p-level). Monitoring and reporting will include baseline monitoring of the existing oyster cover on the seawall in the Giant's Camp boat basin and the two reference locations in the winter of 2012 and then bi-annual monitoring in the spring and fall to capture oyster settlement for an additional five years.

Expected performance of the Giant's Camp oyster reef should not be significantly different than the reference area measurements for density/percent cover and depth range or distribution of oysters within 3 years. Shell size will not be used since the two reefs vary so dramatically in age. However, if a mortality event occurs at both sites, Mosaic may avail itself of the Force Majeure provisions of the Consent Decree (Section XIV). If mortality is greater at the Giants Camp site or if it fails to reach the 15% margin of the reference areas, an additional oyster reef will be constructed in an area known for oyster success to make up for the loss of function and services from the Giant's Camp reef. The size of the additional oyster reef will be determined by calculating the area not recruited:

$$[3652 \text{ ft}^2] - [\text{area containing new oyster growth}] = \text{area devoid of oyster growth} = \text{area of new reef if needed.}$$





Figure 10. Locations of Oyster Habitat Structures A, B, and C and Showman's Island and Alafia River Reference Sites.

### C. Borrow Pit Project

1. **Vegetative Restoration** - The Borrow Pit Project monitoring consists of four 5m x 5m (25m<sup>2</sup>) plots established within the proposed restoration area during the summer of 2012 as baseline data points for that project. Each of the four plots will be characterized as total percent cover by species (visual estimate). Photo stations will be established and photos taken of the plots prior to restoration. At Time Zero, the four plots will be re-established, and monitored for percent cover by species after planting with smooth cordgrass (*Spartina alterniflora*), within the marsh/mangrove restoration area) and photographed from the same photo points. Photographs and quantitative monitoring of percent cover by species and species height for the first 10 individual species encountered will occur at Time Zero, Time 0 + 3, 6, 9, 12, 18, 24, 36, 48 and 60 months. Success will be defined as the occurrence of 80% cover by native marine emergent plants after five years of monitoring and the presence of less than 10% cover of exotic non-native

invasive species within the conservation easement. This criterion will be measured using standards methodology for determining percent cover.

2. **Fish Habitat Restoration** - No quantitative fish or invertebrate sampling is proposed at the Borrow Pit site, as previous work by Whitman and Gilmore (1991) and Kurz et al. (1998) demonstrated that restoration efforts similar to that proposed at and close to the Borrow Pit have restored fish populations to species composition and numbers equivalent to control areas, again within the same Mosaic Fertilizer LLC project area, within about five years. Qualitative sampling and reporting of seine and Breder trap placements within the Borrow Pit site were done at baseline sampling in the summer of 2011 prior to restoration and will be done semi-annually for three years after restoration in order to demonstrate an increase in marine and estuarine fish and invertebrate populations within this restoration site.

#### IX. SUMMARY OF SUCCESS CRITERIA

##### A. Summary

##### 1. Giant's Camp Restoration

- a. The project is constructed as required in the Statement of Work.
- b. The tidal range in North Pond will increase by approximately 0.4 m (at the 0.10 p-level).
- c. Acreage of mangroves shows a statistically significant (at the 0.10 p-level) increase in above ground biomass when compared with the natural increase in above ground biomass as measured in the combined data from the control plots. Success for this criterion is achieved when a statistically significant increase in a minimum of 10 of the plots occurs.
- d. Success for the connector swale and North Pond restoration is defined as a statistically significant (at the 0.10 p-level) increase in fish species composition and numbers from the data gathered as baseline information in the summer of 2011.
- e. Success for 0.25 acre of wetland creation is defined as 50% mean percent cover of native wetland plant species within 3 years and 80% mean percent cover at the end of 5 years. No more than 10% exotic plant species may be present at any time.

f. Success for Channel A is defined as the collection of data demonstrating a trend towards similarity between the fish population numbers and species composition between fish populations in Channel A (treatment site) and the DPOC (control site) over the three years of sampling.

g. Success for an increase in dissolved oxygen is a statistically significant (at the 0.10 p-level) increase in the average dissolved oxygen level over five years.

h. Success criteria for oyster enhancement will be based on the comparison of the Giant's Camp oyster enhancement and the data collected from the Alafia River Reference Sites A and B. Success will be determined by monitoring data being not significantly different within five years of completion of construction for density/percent cover and range of depth and distribution. Significant difference will be not greater than <15% from Alafia River Reference Sites A and B contemporary and identical monitoring measurements. In addition, 3652 ft<sup>2</sup> of reef shall be created.

## 2. Borrow Pit Restoration

a. The project is constructed as required in the Statement of Work.

b. The occurrence of 80% cover by native marine emergent plants after five years of monitoring, and the presence of less than 10% cover of exotic non-native invasive species within the conservation easement.

## B. Summary of Major Reports

<u>Report</u>	<u>Trustee Response</u>
Supervising Contractor Selection	Review and Approve
Turbidity Control and Monitoring Plans	Review and Approve
Weekly Turbidity Monitoring Reports	Review
Semi-Annual Projects Reports	Review
As-Built Drawings	Review and Approve
Final Report	Review and Approve



## X. LITERATURE CITED

Bloom, S.A. 1980. Multivariate quantification of community recovery. In: *The Recovery Process in Damaged Ecosystems*. J.Cairns (ed.), Ann Arbor Science Publishers, Inc., Ann Arbor. Pp.141-151.

Cintron, G, and Y Schaeffer Novelli. 1984. Methods for studying mangrove structure. Pages 91-113 in SC Snedaker and JB Snedaker, *The Mangrove Ecosystem: Research Methods*. UNESCO, Paris. 251 p.

Gilmore, R.G., 2011. Baseline Fish Assessment Report for the Mosaic Fertilizer, LLC, Natural Resource Damage Assessment Compensatory Mitigation Projects, Giant's Camp, Alafia River, Hillsborough County, Florida.

Gilmore, R.G., 2012. Baseline Fish Assessment Report for the Mosaic Fertilizer, LLC, Natural Resource Damage Assessment Compensatory Mitigation Projects, Giant's Camp, Alafia River, Hillsborough County, Florida.

Holdridge, LR. 1967. Life zone ecology. Tropical Science Center, San Jose, Costa Rica. 206 pp.

Komiyama, A., S. Pongpan, and S. Kato (2005) *Journal of Tropical Ecology* 21:471-477.

Kurz, RC, RW Fenwick and KA Davis. 1998. A comparison of fish communities in restored and natural salt marshes in Tampa Bay, Florida. Technical Report to the SWFWMD. Brooksville, Florida.

Martinez, R, G Cintron and LA Encarnacion. 1979. Mangroves in Puerto Rico: a structural inventory. Government of Puerto Rico, Department of Natural Resources, San Juan, Puerto Rico. 148 p.

Meyers, SD, SA Gilbert and ME Luther. 2010. Estimates of local flow changes near the Alafia River due to hydrologic restoration. Final report to Lewis Environmental Services, Inc. 38 p.

Pool, DJ, SC Snedaker and AE Lugo. 1977. Structure of mangrove forests in Florida, Puerto Rico, Mexico and Costa Rica. *Biotropica* 9(3): 195-212.

Ross, MS, PL Ruiz, GJ Telesnicki and JF Meeder. 2001. Estimating above-ground biomass and production in mangrove communities of Biscayne National Park, Florida (U.S.A). *Wetlands Ecology and Management* 9: 27-37.



Santos, S.L. & S.A. Bloom. 1980. Stability in an annually defaunated estuarine soft-bottom community. *Oecologia* 46: 290-294.

Santos, S.L. & S.A. Bloom. 1983. Succession in an estuarine soft-bottom community. *Int.Rev.Hydrobiol.* 68: 617-632.

Smith, JT III, and KRT Whelan. 2006. Development of allometric relations for three mangrove species in South Florida for use in the Greater Everglades Ecosystem restoration. *Wetlands Ecology and Management* 14:409-419.

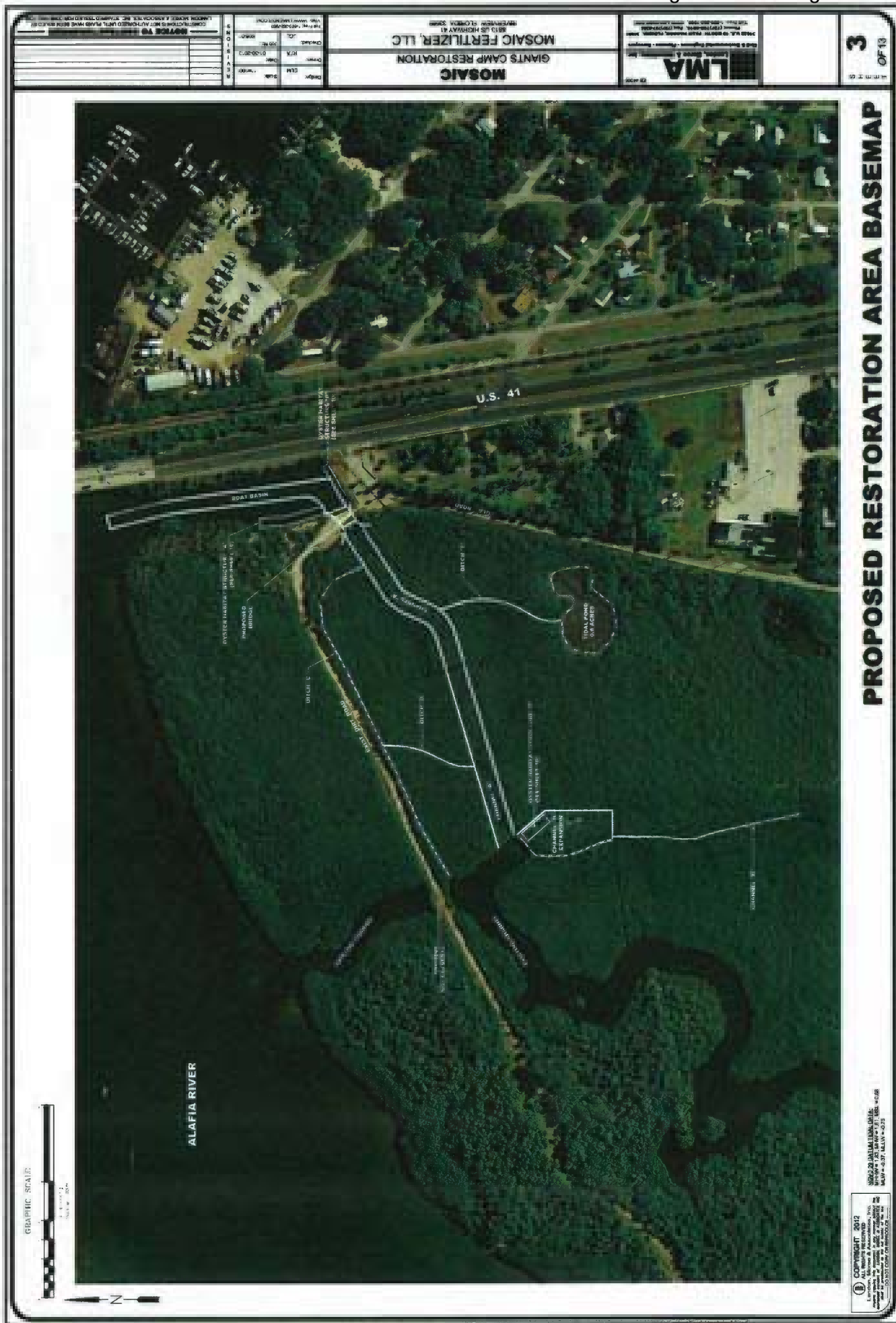
Whitman, RI, and G. Gilmore. 1991. Comparative evaluation of fisheries community structure and habitat relationships in natural and created saltmarsh ecosystems. Technical Report to the SWFWMD, Brooksville, Florida

**APPENDIX**

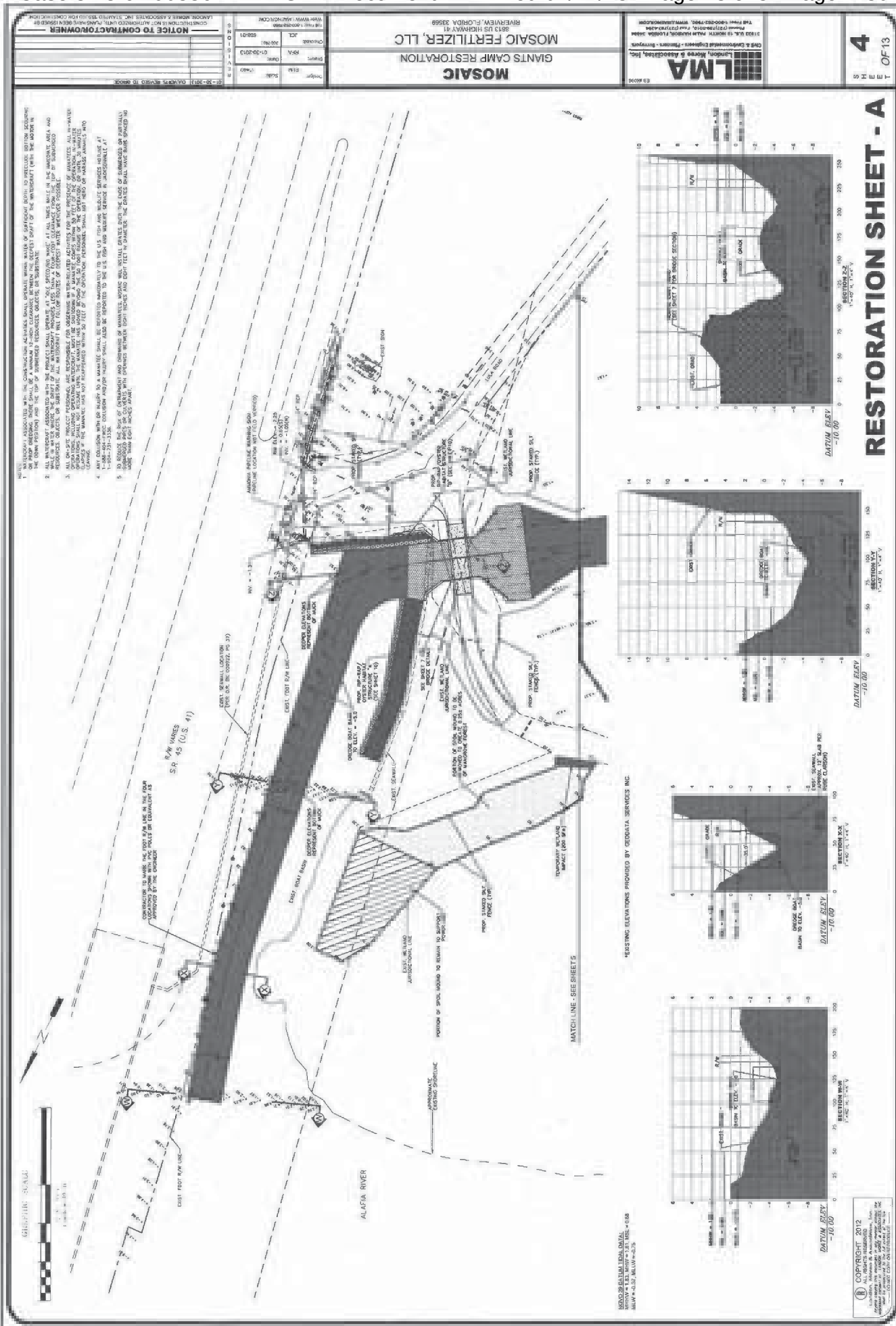
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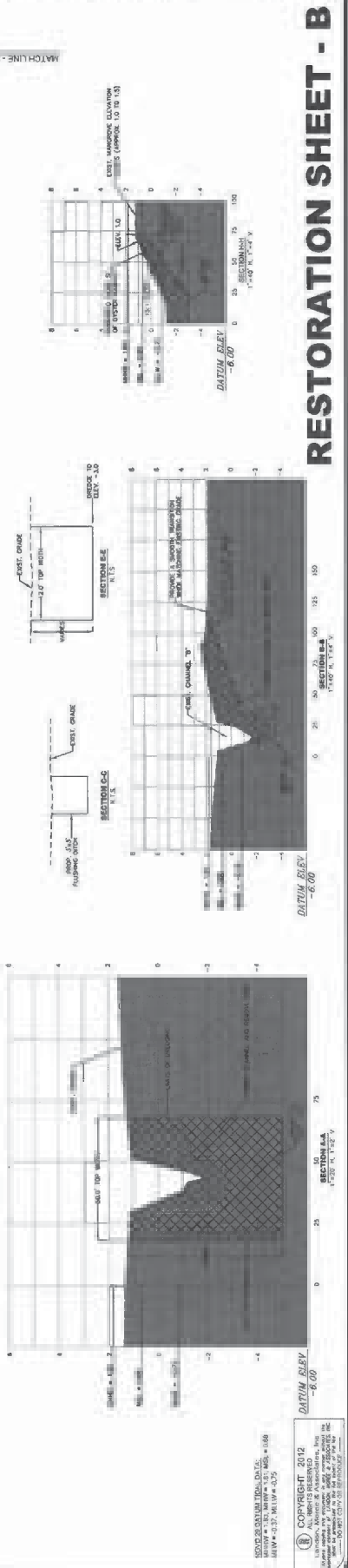
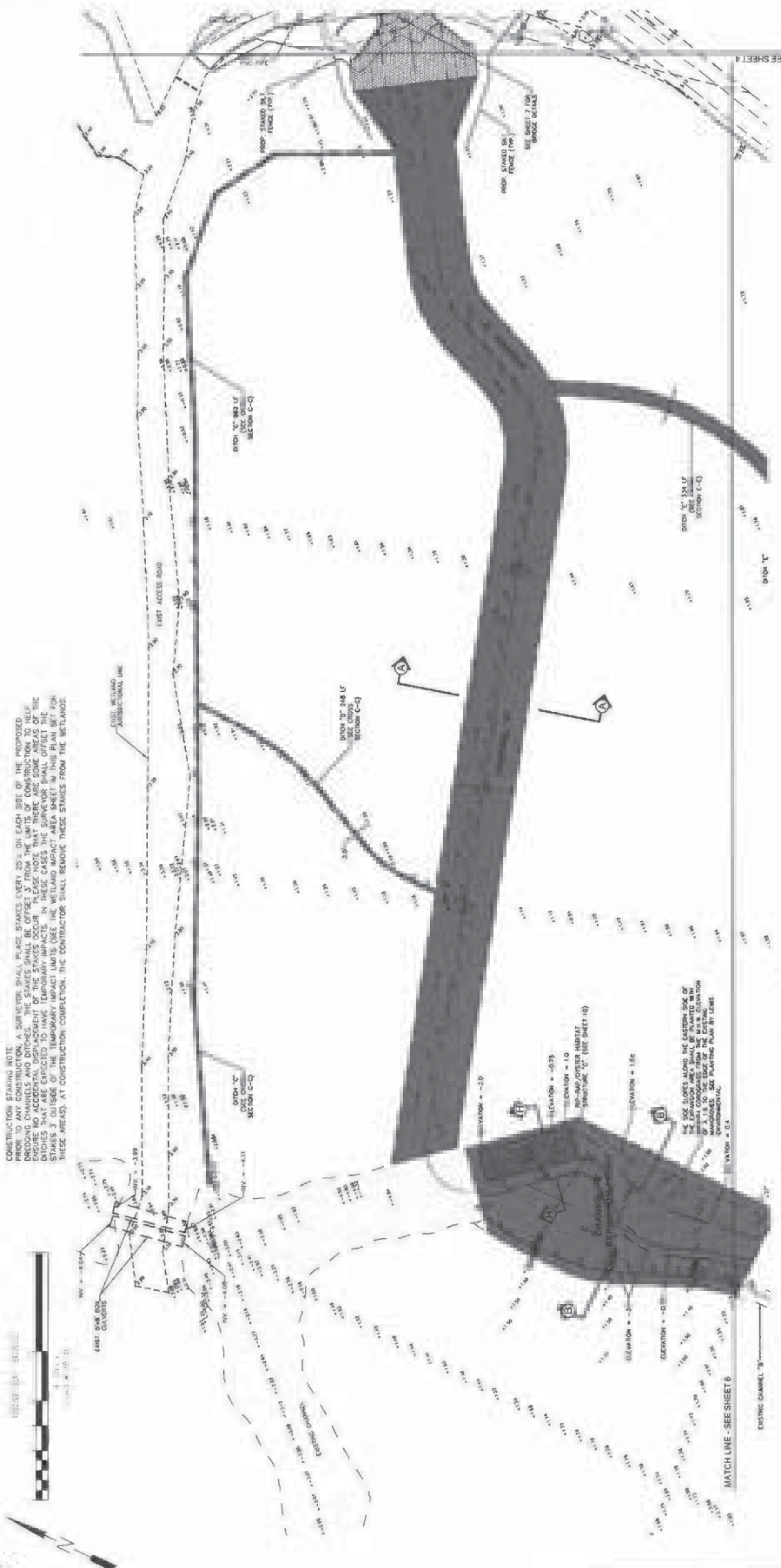
























# WETLAND IMPACT AREAS AND BRAZILIAN PEPPER REMOVAL PLAN

9 OF 13

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 MEAN = -0.37, MIN = -0.75

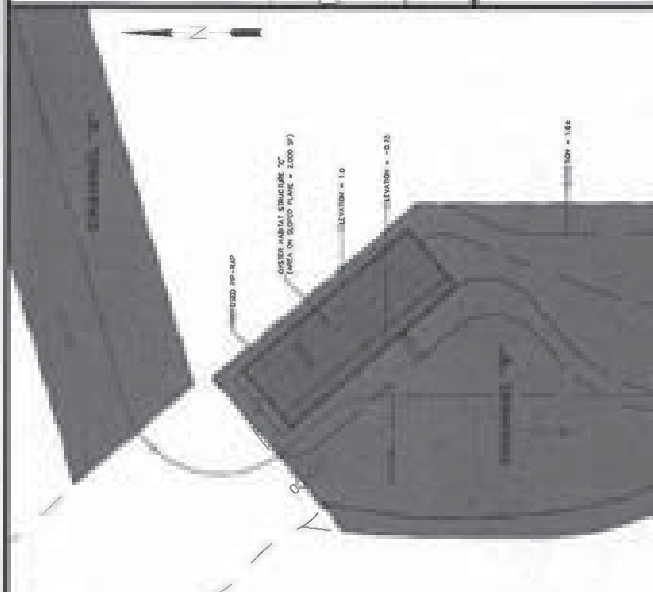
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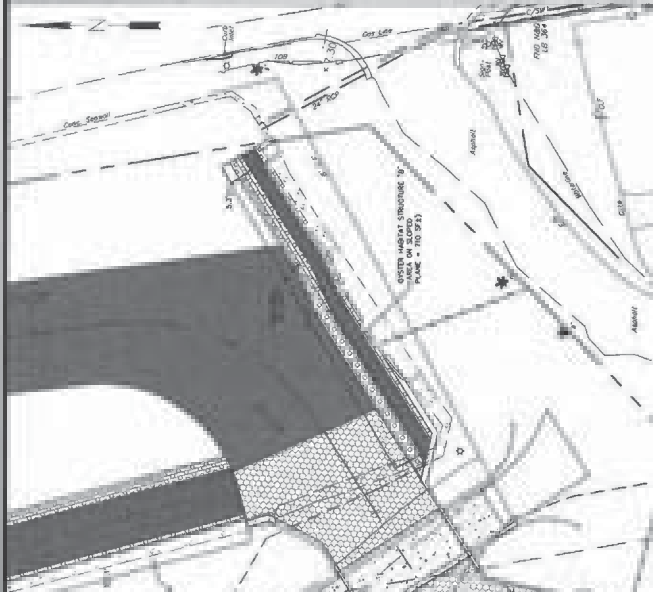
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ME & Environmental Engineers • Planners • Surveyors  
1001 U.S. 19 NORTH PALM BEACH, FLORIDA 33407  
(407) 839-0910, Fax (407) 837-4299  
Tel. Telex 4-100250-1980, WIRETELEX 00-1294

**MOSAIC**  
GIANTS CAMP RESTORATION  
MOSAIC FERTILIZER, LLC  
8813 US HIGHWAY 41  
RIVERVIEW, FLORIDA 33566

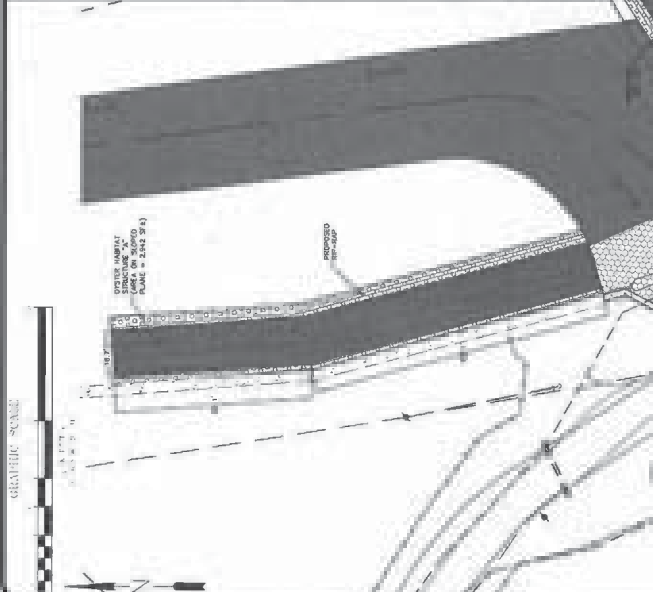
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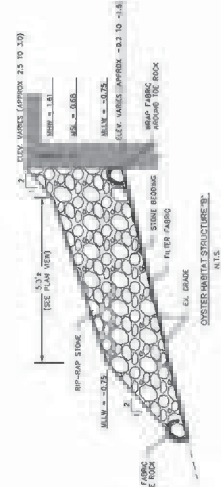
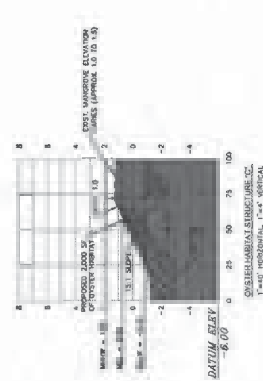
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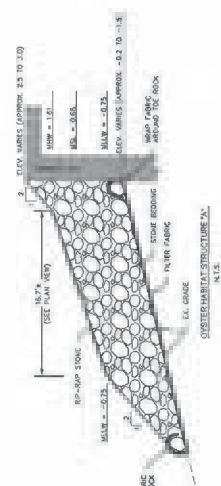
OYSTER HABITAT STRUCTURE "B"



OYSTER HABITAT STRUCTURE "A"

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OYSTER HABITAT STRUCTURE "B"

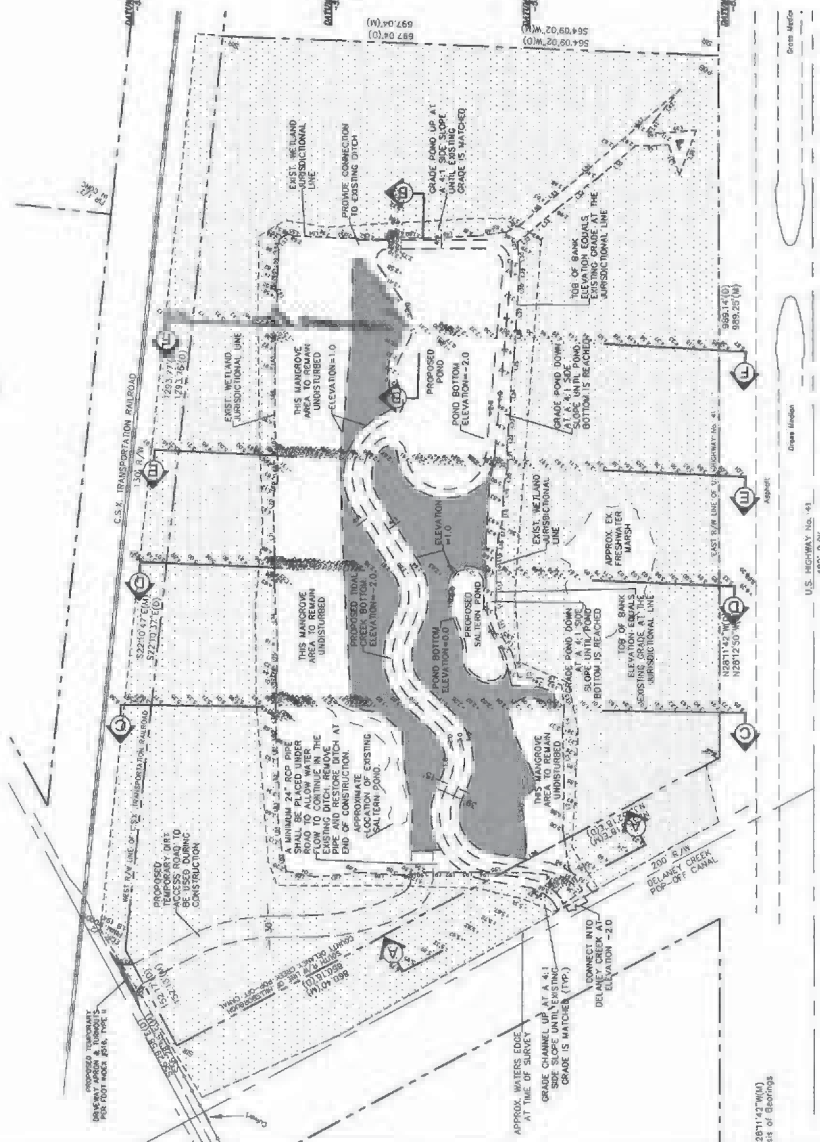
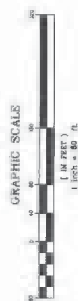
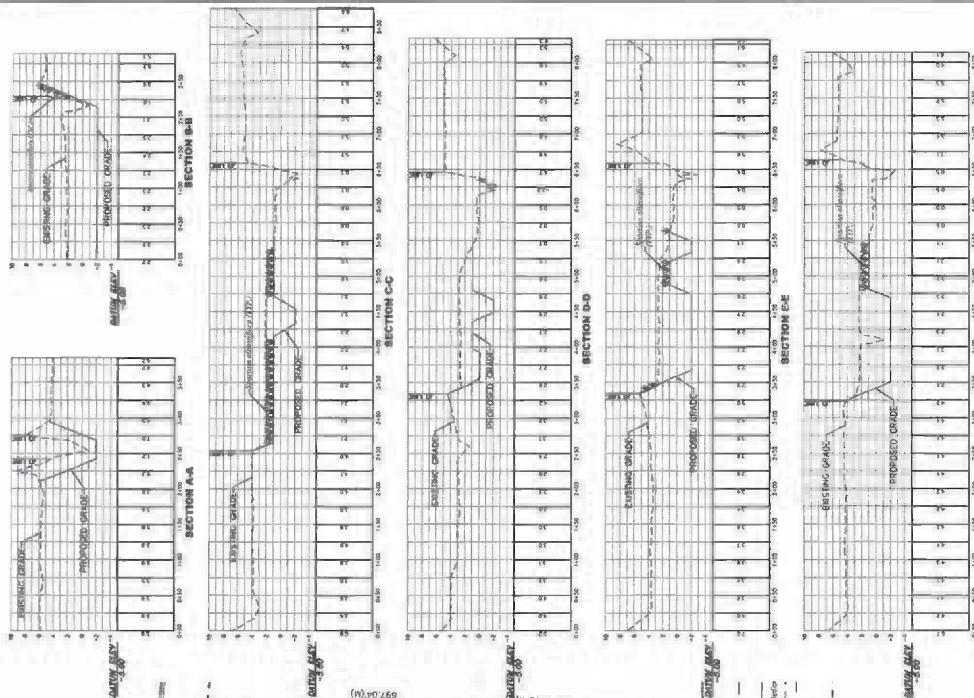


OYSTER HABITAT STRUCTURE "A"





# BORROW PIT RESTORATION SITE



1. THE FILL EXCAVATED FROM THIS SITE MAY BE PLACED WITHIN THE SPILL ISLAND SHOWING IN THIS PLAN SET OR ANY OTHER APPROVED LOCATION SUBJECT TO AGENCY APPROVAL.
2. ALL EXISTING SALT PALMS WITHIN THE PROPOSED CONSTRUCTION AREA SHALL BE TRANSPLANTED. THE CONTRACTOR SHALL COORDINATE WITH LEWIS ENVIRONMENTAL FOR DETAILS.
3. ALL PROPOSED SLOPES ARE 4:1 (HORIZONTAL:VERTICAL).
4. SINCE THE PROJECT AREA IS SURROUNDED BY THICK BRAZILIAN PAPER, NO SILT SCREEN IS NECESSARY.
5. THE CONTRACTOR SHALL BE RESPONSIBLE TO PREVENT TURBID WATER FROM BEING DISCHARGED INTO THE DELAWARE RIVER CANAL. THE CONTRACTOR SHALL MAINTAIN EROSION CONTROL MEASURES SUCH AS BERMUS, TURBIDITY CURTAINS, AND SILT FENCE. THE CONTRACTOR SHALL DISCHARGE NO WATER GREATER THAN 28 TALLS ABOVE BACKGROUND LEVELS SHALL BE CONSIDERED A VIOLATION OF STATE WATER QUALITY STANDARDS.
6. THE CONTRACTOR SHALL REFER TO THE "EROSION CONTROL PLAN" SHEET FOR ADDITIONAL NOTES ON EROSION AND TURBIDITY CONTROL.
7. REFER TO PLANS PREPARED BY LEWIS ENVIRONMENTAL FOR PROPOSED PLANTINGS.

**LEGEND**

- BRACKEN PEPER REMOVAL FROM UPLANDS - 700,000 S.F. (W. 3 ACRES)
- WETLAND EMPOWERMENT AREA TO BE CONSTRUCTED AT ELEVATION = 1.0

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13  
OF 13



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Fax: (407) 255-1101  
Email: info@lma.com  
www.lma.com

DATE	DESCRIPTION	BY	CHECKED
01/24/13	REVISED	JL	JL
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01/24/13	REVISED	JL	JL
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01/24/13	REVISED	JL	JL



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# OFF-SITE SPOIL DISPOSAL SITE



## **APPENDIX D**

### **Past Costs**



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL OCEAN SERVICE  
Silver Spring, Maryland 20910

DATE: July 25, 2012

MEMORANDUM FOR: Sheila O'Brien  
NOAA/GCNR

Sean Meehan  
NOAA/OHC

FROM: LaTonya Burgess  
Business Services Group

SUBJECT: Cost Documentation for Mosaic (Cargill Acid Spill)

Attached for your use is one certified copy of cost documents for the Mosaic (Cargill Acid Spill). In accordance with NOAA standards, the documentation includes labor reports generated by the NOAA financial systems, as well as copies of all relevant travel vouchers and contractor invoices. Representatives from the accounting firm of Cotton & Company, LLP have fully reviewed all the supporting documentation (employee timesheets, contractor invoices, etc.) to certify that all costs included in this package are correct and applicable.

Costs cover the period of May 11, 2008 through June 1, 2012. Costs are from the Assessment and Restoration Division, the Office of General Counsel for Natural Resources, and the Restoration Center. The assessment costs for this period are in the amount of \$122,749.78 and include the most current indirect rates (published November 9, 2010).

NOTE: The enclosed cost documentation may contain "Confidential Business Information or other sensitive personal or internal program/privileged information." Use or disclosure of this information beyond the Federal Government is NOT AUTHORIZED. The recipient(s) of the enclosed cost documentation are responsible for its proper safeguard and for restricting it from further distribution to unauthorized sources. It is very important that the type of information in cost documentation packages be carefully reviewed prior to releasing it to other sources. The individual to whom this information is herewith provided is responsible for safeguarding it from improper release.

If you have any questions, please call me at 301/713-4248, x211.

#### Attachments

electronic cc:  
N/ORR – R. Haddad  
N/ORR – K. Salter  
BSG – S. Beaudin  
F/H3 – L. Shaulova  
Cotton & Co., LLP – L. Wilmott  
Cotton & Co., LLP – J. Birkett  
Genwest Systems, Inc. – P. Murphy



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### Cost Documentation Package Statement

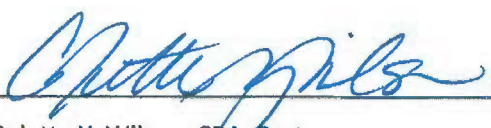
**Case Name:** Mosaic (Cargill Acid Spill)  
**Case Task Numbers:** F8K3N03PV1, G8K3N03PV1, H8K3N03PV1, H8K3RAPPV1, J8K3N03PV1, J8K3RAPPV1, K8K3N03PV1, K8K3RAPPV1, 2CK3LBYPV1, 2CK3LBZPV1  
**Time Period Covered:** May 11, 2008 through June 1, 2012  
**Costs Incurred:** \$122,749.78

In support of the Damage Assessment, Remediation and Restoration Program, and at the request of the National Oceanic & Atmospheric Administration, Assessment and Restoration Division, we have:

- Reviewed the supporting documentation provided for the above referenced case.
- Reviewed the calculations, allocations, and amounts reflected in the documentation and the summary.
- Compared the reported labor hours for this case to the information included on the time and attendance reports.
- Compared the reported labor costs for this case to information on labor cost detail reports.
- Compared the reported direct costs for this case to supporting expense reports and invoice documentation to determine that the costs were incurred for the appropriate task numbers.

The work described in the preceding paragraphs was performed in accordance with *Statements on Standards for Consulting Services* promulgated by the American Institute of Certified Public Accountants (AICPA).

Based on our analysis of information provided in this package and documentation that we have reviewed, costs presented here are accurately calculated and supported by the documentation.

Signature   
Name Colette Y. Wilson, CPA, Partner  
Firm Cotton & Company, LLP  
Date July 25, 2012

**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA)  
DAMAGE ASSESSMENT, REMEDIATION, AND RESTORATION PROGRAM (DARRP)**

**CASE SUMMARY**

<b>DARRP Component:</b>	ARD, GCNR, RC
<b>Financial Management Center (FMC):</b>	10-12, 01-02, 30-13
<b>Case Name:</b>	Mosaic (Cargill Acid Spill)
<b>Case Number:</b>	2CK3LBYPV1, 2CK3LBZPV1, F8K3N03PV1, G8K3N03PV1, H8K3N03PV1, H8K3RAPPV1, J8K3N03PV1, J8K3RAPPV1, K8K3N03PV1, K8K3RAPPV1
<b>Period Covered:</b>	May 11, 2008 through June 1, 2012
<b>Date Prepared:</b>	7/24/2012
<b>Prepared By:</b>	Julie Ditzel - Julie.Ditzel@noaa.gov - 206.526.4351 Shayna Aming - Shayna.Aming@noaa.gov - 301.713.2989 Lyuda Shaulova - Lyuda.Shaulova@noaa.gov - 301.713.0174

<b><u>COST COMPONENTS</u></b>	<b><u>ARD</u></b>	<b><u>GCNR</u></b>	<b><u>RC</u></b>	<b><u>TOTAL</u></b>
Personnel Compensation and Overhead	\$ 41,127.74	\$ 32,290.83	\$ 46,079.07	\$ 119,497.64
Travel and Transportation of Persons	\$ -	\$ -	\$ -	\$ -
Transportation of Things	\$ -	\$ -	\$ -	\$ -
Rent, Communications, Utilities	\$ -	\$ -	\$ -	\$ -
Printing and Reproduction	\$ -	\$ -	\$ -	\$ -
Contractual Labor	\$ 868.48	\$ -	\$ 483.66	\$ 1,352.14
Contractual Services	\$ -	\$ -	\$ 1,900.00	\$ 1,900.00
Supplies and Materials	\$ -	\$ -	\$ -	\$ -
Equipment	\$ -	\$ -	\$ -	\$ -
Grants, Subsidies, Contributions	\$ -	\$ -	\$ -	\$ -
Interest and Dividends	\$ -	\$ -	\$ -	\$ -
<b>Total DARRP Costs</b>	<b>\$ 41,996.22</b>	<b>\$ 32,290.83</b>	<b>\$ 48,462.73</b>	<b>\$ 122,749.78</b>

ARD - Assessment & Restoration Division  
GCNR - General Counsel for Natural Resources  
RC - Restoration Center

**State of Florida Department of Environmental Protection Expenses  
from May 1, 2010, to July 2, 2012**

Lauren Greenfield:

May 1, 2010 - November, 2011: 25 hours @ \$17.53 = \$438.25

December 2011 - July 2, 2012: 7 hours @ \$19.69 = \$137.83

Charles Kovach:

May 2010 - December 2010: 28 hours @ \$27.28 = \$763.84

January 2011 - December 2011: 102 hours @ \$27.28 = \$2782.56

January 2011 - July 2, 2012: 24 hours @ \$27.28 = \$654.72

David Thulman:

May 2010 - July 2, 2012: at least 100 hours @ \$50.00 = \$5000.00

Total: \$9777.20



**Mosaic Fertilizer, LLC acidic process water release of September 5-6, 2004  
Environmental Protection Commission of Hillsborough County  
Assessment Costs – July 2, 2005 to June 1, 2012.**

DATE	DESCRIPTION	TIME (hours)	COST (\$50.00/hr)
	<b>Richard Tschantz, General Counsel</b>		
01-18-06	Meeting (internal) at Ybor	1.0	
01-25-06	Meeting-Trustees/Mosaic Ybor	5.0	
08-11-06	Draft Tolling Agreement	1.0	
09-15-06	Meeting at NOAA	3.0	
10-05-06	Conference call re: offer	1.0	
10-11-06	Prepare and attend Trustee meeting	3.5	
10-20-06	Trustee/Mosaic meeting	6.0	
10-31-06	Conference call	2.0	
11-16-06	Conference call	1.5	
11-21-06	Call to D. Thulman	1.0	
11-22-06	Call to D. Fernandez	.5	
11-28-06	Call from D. Fernandez; e-mail to Trustees	.5	
12-01-06	Conference call – Trustees	1.5	
12-21-06	Conference call – Trustees	2.0	
02-07-07	Meeting at NOAA	2.5	
04-06-07	Call to D. Thulman re e-mails	.5	
04-11-07	Conference call	.5	
04-12-07	Meeting with Trustees	5.0	
04-13-07	Conference call with DEP	.75	
04-23-07	Call to D. Fernandez; e-mail to DEP	.5	
04-26-07	Call to D. Fernandez re nutrients	.5	
05-03-07	Meeting at Mosaic	5.0	
06-19-07	Nutrient spill conference call	1.25	
06-29-07	Conference call with Attorneys	.5	
08-17-07	Conference call with Attorneys	1.0	
09-11-07	Conference call with D. Thulman and R. Boler	.5	
11-06-07	Conference call with Trustees, D. Thulman and R. Boler	2.0	
11-15-07	Conference call with D. Thulman and R. Boler	.75	
01-23-08	Conference call with D. Thulman	1.0	
01-29-08	Conference call with Trustees	1.0	
01-30-08	Conference call with D. Thulman	.75	
04-04-08	Conference call with Attorneys	1.0	
09-04-08	Conference call with D. Thulman and C. Kovach	1.0	
09-22-08	Call to Thulman re: statute of limitation/settlement	.25	
02-26-09	Call to Thulman re: C.O.	.5	
02-12-10	Conference call	2.0	
08-09-11	Consent Decree meeting with all parties	2.0	

09-28-11	Call to P. Hurst re: Consent Decree	.5	
10-12-11	Call to A. Malefatto	.5	
11-04-11	Call to P. Hurst re: review of Consent Decree	1.5	
03-28-12	Conference Call with Trustees	.5	
05-30-12	Call to A. Malefatto	.25	
06-05-12	Conference call with Mosaic and Trustees	.5	
	<b>Total hours assessed for R. Tschantz</b>	<b>70.00</b>	<b>\$ 3,500.00</b>
	<b>Richard Boler and/or Tom Ash, General Manager</b>		
01-18-06	Meeting (internal) at Ybor	1.0	
01-25-06	Meeting-Trustees/Mosaic Ybor	5.0	
03-06-06	Conference call	1.5	
09-15-06	Meeting at NOAA	3.0	
10-20-06	Trustee/Mosaic meeting	6.0	
10-31-06	Conference call	2.0	
11-16-06	Conference call	1.5	
12-01-06	Conference call – Trustees	1.5	
12-21-06	Conference call – Trustees	2.0	
02-07-07	Meeting at NOAA	2.5	
04-11-07	Conference call	.5	
04-12-07	Meeting with Trustees	5.0	
05-03-07	Meeting at Mosaic	5.0	
06-19-07	Nutrient spill conference call	1.25	
06-25-07	Field Visit South Parcel	4.0	
09-11-07	Conference call with D. Thulman and R. Boler	.5	
11-06-07	Conference call with Trustees, D. Thulman and R. Boler	2.0	
11-15-07	Conference call with D. Thulman and R. Boler	.75	
01-29-08	Conference call with Trustees	1.0	
09-04-08	Conference call with D. Thulman and C. Kovach	1.0	
02-12-10	Conference call	2.0	
12-09-10	Meeting at EPC	2.0	
02-11-11	Conference Call with Trustees	2.0	
02-18-11	Meeting at NOAA	5.0	
05-06-11	Meeting at NOAA	5.0	
06-09-11	Meeting at NOAA	5.0	
06-21-11	Meeting at NOAA	5.0	
08-02-11	Conference Call with Trustees	2.0	
08-09-11	Consent Decree meeting with all parties	2.0	
10-26-11	Meeting at NOAA	5.0	
11-10-11	Public Meeting at Agency on Bay Management	4.0	
12-07-11	Conference Call with Trustees	.5	
12-12-11	Conference call with Mosaic and Trustees	2	
03-28-12	Conference Call with Trustees	.5	
04-06-12	Conference Call with Trustees	1.0	
04-24-12	Conference call with Mosaic and Trustees	2.0	

[illegible]