

IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA

**SCOTT G. MANDIROLA, DIRECTOR,
DIVISION OF WATER AND WASTE
MANAGEMENT, WEST VIRGINIA
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,**

Plaintiff,

v.

Civil Action No. 16-C-84

**SWANSON INDUSTRIES, INC. and
SWANSON PLATING CORPORATION, INC.,**

Defendants.

CONSENT DECREE

WHEREAS, Plaintiff, Scott G. Mandirola, Director, Division of Water and Waste Management, West Virginia Department of Environmental Protection (“WVDEP”) filed the Complaint herein alleging that the Defendants are in violation of the West Virginia Water Pollution Control Act (“Act”), West Virginia Code §§ 22-11-1 through -28, and West Virginia/National Pollutant Discharge Elimination System Permit No. WV0070076 (“Permit”), issued for a waste water treatment facility in Monongalia County, West Virginia; and

WHEREAS, Plaintiff WVDEP and Defendant Swanson Industries, Inc. (“Swanson Industries”) agree that Swanson Industries is not subject to the Permit and therefore should not be subject to the provisions of this Consent Decree; and

WHEREAS, Defendant Swanson Plating Corporation, Inc. (“Swanson Plating”) owns, operates, and holds the Permit for the waste water treatment facility that discharges into Toms Run, a tributary of the Monongahela River, and which facility the WVDEP alleges is in violation of the Act and the Permit; and

WHEREAS, the parties having agreed that settlement of this matter is in the public interest and that entry of this Consent Decree without further litigation is the most appropriate means of resolving this matter;

NOW, THEREFORE, It is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

This Court has jurisdiction over the subject matter and the parties hereto pursuant to W. Va. Code § 22-11-22. Venue is proper in this Circuit Court pursuant to W. Va. Code § 22-11-22, because Defendant Swanson Plating is located and doing business in this judicial circuit, and because the violations that are the subject of this action occurred in this judicial circuit.

II. APPLICATION OF CONSENT DECREE

This Consent Decree applies to, and is binding upon, Defendant Swanson Plating, its officers, directors, agents, servants, employees, contractors, subcontractors, successors, assigns, and all persons, firms, and corporations in active concert or participation with them. This Consent Decree does not apply to Swanson Industries, its officers, directors, agents, servants, employees, contractors, subcontractors, successors, assigns, and all persons, firms, and corporations in active concert or participation with them.

III. INJUNCTIVE RELIEF

The Court enjoins Defendant Swanson Plating from operating or maintaining its waste water treatment facility in a manner that will result in further violations of the Act and its Permit, and orders Defendant Swanson Plating to comply with all terms and conditions in its Permit.

The Court further orders Defendant Swanson Plating to expend the funds necessary to operate and maintain its treatment facility in compliance with the Act and its Permit. In this regard, Defendant Swanson Plating shall undertake a program to attain and thereafter maintain

compliance with the Act and its Permit. This program shall include undertaking and completing the following tasks on or before the deadlines specified in the following compliance schedule:

<u>TASK</u>	<u>DEADLINE DATE</u>
Develop operation & maintenance plan to correct deficiencies that caused effluent violations alleged in complaint and submit to agency	8/15/2016
File a permit modification to remove cooling tower discharge from storm water spout leading to outlet 005	9/15/2016
File a permit modification to include a reverse osmosis system waste stream as a component of sanitary sewage influent or create another outlet with an appropriate treatment system	9/15/2016

IV. CIVIL PENALTY

In settlement of Plaintiff's claims in the Complaint relating to reported violations of the Act and the Permit, Defendant Swanson Plating shall pay a civil penalty of \$267,000, in six installments of \$44,500 each, with the first payment due and payable within thirty days after entry of this Consent Decree, and monthly thereafter from the date of the first payment until paid in full. Each payment shall be submitted to the Chief Inspector, Environmental Enforcement, West Virginia Department of Environmental Protection, 601 57th Street SE, Charleston, West Virginia 25304, by check payable to the "West Virginia Department of Environmental Protection" for deposit in the Water Quality Management Fund.

V. STIPULATED PENALTIES

Defendant Swanson Plating shall be liable for stipulated penalties to the WVDEP for a period of one year after entry of this Consent Decree as follows:

- \$1,000 for any Maximum Daily effluent limitation violation;
- \$1,000 for any Average Monthly effluent limitation violation that does not exceed 300% of the applicable limitation; and
- \$2,000 for any Average Monthly effluent limitation violation that exceeds 300% of the applicable limitation.

For any other violation of this Consent Decree, Defendant Swanson Plating shall pay a stipulated penalty of \$1,000 per day.

Payment of stipulated penalties shall be made within seven days of receipt of written demand by Plaintiff, unless the Defendant moves the Court within the seven-day period for a hearing thereon and thereafter demonstrates to the satisfaction of the Court that the failure to meet any deadline or requirement in this Consent Decree was due to circumstances entirely beyond the control of the Defendant.

The stipulated penalties provided herein pertain only to the requirements of this Consent Decree and are in addition to other remedies and sanctions available to the WVDEP by reason of the Defendant's failure to comply with the requirements of the Consent Decree, the Act, or its Permit. All payments to the WVDEP under this Section shall be paid by certified or cashier's check payable to the "West Virginia Department of Environmental Protection" for deposit in the Water Quality Management Fund and shall be sent to the Chief Inspector, Environmental Enforcement, to the address specified in Section IV above.

VI. QUARTERLY REPORTS

From the date of entry this Consent Decree, Defendant Swanson Plating shall submit quarterly compliance reports to the WVDEP until all remedial measures listed in Section III

above are completed. The compliance reports shall indicate what has been accomplished since the submittal of the last compliance report, whether Defendant is on the schedule required by this Consent Decree and, if not on schedule, an explanation of why it is behind schedule, how far it is behind schedule, and what measures are being taken to get back on schedule. Reports shall be sent to the Chief Inspector, Environmental Enforcement, to the address specified in Section IV above.

VII. FUNDING

Performance of the terms of this Consent Decree by Defendant Swanson Plating is not conditioned on the receipt of any grant or loan funds. In addition, performance is not excused by the lack of any grant or loan funds, or by the processing of any application for the same.

VIII. FORCE MAJEURE

If a force-majeure event occurs which causes or may cause a violation of any provision of this Consent Decree by Defendant Swanson Plating, it shall notify the WVDEP in writing within seven days of the date on which the Defendant has knowledge or should have had knowledge that the event may or will cause a violation. The notice shall describe the anticipated duration of the violation, the precise cause or causes of the violation, the measures taken and to be taken by the Defendant to minimize the violation, and the timetable by which those measures will be implemented. The Defendant will adopt all measures to avoid or minimize any such violation. The Defendant shall make all efforts to identify events that cause or may cause a violation of this Consent Decree.

Force Majeure is an event that is outside the control of the Defendant, such as war, labor stoppages, riot, crime, or act of God, and makes it impossible to comply with the terms of this Consent Decree.

If the WVDEP agrees that any violation of this Consent Decree is caused solely by circumstances beyond the control of the Defendant, it shall be excused as to that violation for the period of time the violation continues due to such circumstances. The Defendant's time for performance shall be extended for a period not exceeding the delay actually resulting from such circumstances. In the event the WVDEP does not agree, the Defendant may submit the matter to this Court for resolution. The burden of proving that any delay was caused solely by circumstances beyond the control of the Defendant and the length of such delay shall rest with the Defendant. Failure by the Defendant to comply with the notice requirements of this section shall render this section void and of no force and effect as to the particular incident involved, and shall constitute a waiver of the Defendant's right under this provision to obtain an extension of its obligations based on that incident.

Compliance with any requirement of this Consent Decree, by itself, shall not constitute compliance with any other requirement. The Defendant must make an individual showing or proof regarding each delayed incremental step or other requirement for which an extension is sought.

Unanticipated or increased costs, by themselves, shall not serve as a basis for relief under this section. Compliance with the provisions of this Consent Decree is not dependent on the receipt of state or federal grants or payments.

IX. RETENTION OF JURISDICTION

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

X. MODIFICATIONS

This Consent Decree contains the entire agreement between the parties. It may not be enlarged, modified, or altered, unless made in writing and approved by the parties and the Court.

XI. PERMITS AND OTHER LAWS AND REGULATIONS

This Consent Decree is not, and shall not be interpreted to be, a permit or modification of a permit under the Act, nor shall it relieve Defendant Swanson Plating of any other obligation imposed by the Act, its Permit, or any permit issued under the Act, except as expressly provided herein, nor shall it in any way relieve Defendant of its obligation to comply with any other federal or state law or any rule or regulation in any way related to the substance of this Consent Decree. Any new permit or modification must be obtained in accordance with applicable federal and state laws and rules and regulations.

XII. PUBLIC NOTICE

The parties acknowledge and agree that final approval of this Consent Decree is subject to public notice and comment as provided in 47 C.S.R. §10-16.2.c. The public shall have at least thirty days to make any comments on this Consent Decree, and the WVDEP reserves the right to withhold or withdraw its consent if the comments indicate that this Consent Decree is inappropriate, improper, or inadequate. The Defendant consents to entry of this Consent Decree without further notice. If for any reason, this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of the WVDEP and the terms of the agreement may not be used as evidence in any litigation between the parties.

XIII. EFFECTIVE DATE

The effective date of this Consent Decree shall be the date upon which it is entered by the Court.

XIV. TERMINATION

Termination of this Consent Decree shall be by order of the Court upon application by any party, provided all of the following conditions have been met: (1) The Defendant has achieved complete compliance with all requirements of this Consent Decree; (2) The Defendant has paid all civil and stipulated penalties required herein; and (3) All motions and other proceedings concerning this Consent Decree have been completed and are no longer subject to further judicial review, and all relief resulting from such motions or other proceedings have been fully satisfied.

XV. PARTIES BOUND BY CONSENT DECREE

This Consent Decree is binding on the Defendant Swanson Plating's successors and assigns, and shall remain in effect until the Defendant or its successors or assigns demonstrate, as required by Section XIV herein, they have complied with all of the terms of this Consent Decree.

XVI. SIGNATORIES AUTHORIZED

Each of the signatories to this Consent Decree certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to bind legally the party to the Consent Decree so represented by him or her.

It is so ORDERED this ____ day of _____, 2016.

JUDGE

We hereby consent to the entry of this Decree.

Scott G. Mandirola,
Director, Division of Water
and Waste Management West Virginia
Department of Environmental Protection

Date

Joseph A. Lazell (WVSB No. 2165)
Office of Legal Services/WVDEP
601 57th Street, SE
Charleston, WV 25304
304.926.0499, Ext. 1239
Counsel for Plaintiff

Date

Swanson Plating, Inc.

By _____

Date

Its _____

Kathy G. Beckett (WVSB No. 4998)
Steptoe & Johnson PLLC
Chase Tower, 8th Floor
700 Virginia Street, East
Charleston, WV 25301
304.353.8172
Counsel for Defendant

Date