

**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 led 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 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**

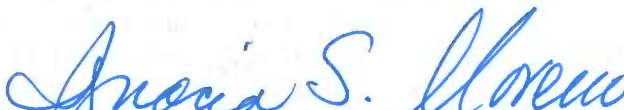
101. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Consent Decree or entering orders modifying this Consent Decree, pursuant to Sections XV (Dispute Resolution) and XXIII (Modification), or effectuating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

PATRICIA L. HURST  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
601 D Street NW, Suite 2121  
Washington, DC 20004  
(202) 307-1242

OF COUNSEL:

Sheila O'Brien, Esq.  
Natural Resources Attorney  
Office of General Counsel for Natural Resources  
National Oceanic and Atmospheric Administration  
Southeast Regional Office  
263 13th Avenue South  
Saint Petersburg, Florida 33701

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  
Environmental Protection Commission of  
Hillsborough County  
3629 Queen Palm 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  
2600 Commonwealth Blvd. MS-35  
Tallahassee FL 32301  
(850) 245-2202

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3629 Queen Palm Drive  
Tampa FL 33619  
813-627-2600 Ext. 1056



FOR DEFENDANT, MOSAIC FERTILIZER, LLC

By: \_\_\_\_\_



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