

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA)
)
 And)
)
 COMMONWEALTH OF VIRGINIA)
)
 Plaintiffs,)
)
 v.)
)
 DEGS OF NARROWS, LLC)
)
 Defendant.)
 _____)

Civil Action No. 7:10CV00085

CONSENT DECREE

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Plaintiffs, United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and the Commonwealth of Virginia (“Commonwealth”), on behalf of the Virginia Department of Environmental Quality (“VADEQ”), have filed a complaint in this action concurrently with this Consent Decree, alleging that Defendant, DEGS of Narrows, LLC (“DEGS” or “Defendant”) violated the Clean Air Act (“Act”), 42 U.S.C. §§ 7401-7671q, including the requirements established in the Commonwealth's State Implementation Plan (“SIP”) developed pursuant to Section 110(a) of the Act, 42 U.S.C. § 7410(a), requirements established in the operating permit issued to DEGS pursuant to Title V of the Act, 42 U.S.C. §§ 7661-7661f, and requirements in the National Emission Standards for Hazardous Air Pollutants: Organic Liquids Distribution (Non-Gasoline) at 40 C.F.R. Part 63, Subpart EEEE (the “OLD MACT”) pursuant to Section 112 of the Act, 42 U.S.C. § 7412.

DEGS is the owner and operator of the boilers and ancillary equipment and activities for producing steam and electricity located at and supporting the Celanese Acetate LLC plant. The boilers and ancillary equipment owned and operated by DEGS (the “Facility”) are located at 3520 Virginia Avenue, Giles County, Narrows, Virginia 24124. The violations alleged in the Complaint occurred at the Facility. On December 7, 2007, EPA issued a Notice of Violation and Finding of Violation (the “NOV/FOV”) to DEGS related to alleged violations of federal and state requirements for the DEGS Facility.

Defendant does not admit any facts or liability to the United States or the Commonwealth arising out of the transactions or occurrences alleged in the Complaint.

The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between

the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, before the taking of any testimony, without the adjudication or admission of any issue of fact or law except as provided in Section I, and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 113(b) of the Act, 42 U.S.C. § 7413(b), and over the Parties.
2. Venue lies in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the violations alleged in the Complaint are alleged to have occurred in and the Defendant conducts business in this judicial district.
3. Solely for the purposes of this Consent Decree and the underlying Complaint, the Defendant waives all objections and defenses that it may have to the Court's jurisdiction over this action, to the Court's jurisdiction over the Defendant, and to venue in this District. The Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. For purposes of the Complaint filed by the United States and the Commonwealth in this matter and resolved by the Consent Decree, and for purposes of entry and enforcement of this Consent Decree, the Defendant waives any defense or objection based on standing.
4. For purposes of this Consent Decree, the Defendant agrees that the Complaint

states claims upon which relief may be granted pursuant to Sections 110, 112, 113 and 502 of the Act, 42 U.S.C. §§ 7410, 7411, 7413 and 7661a.

II. APPLICABILITY

5. The obligations of this Consent Decree apply to and are binding upon the United States, the Commonwealth, and the Defendant and any successors, assigns, or other entities or persons otherwise bound by law.

6. No transfer of ownership or operation of the Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. At least thirty (30) Days prior to such transfer, the Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA Region III, the United States Department of Justice, and the Commonwealth in accordance with Section XII of this Consent Decree (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Consent Decree.

7. Defendant shall provide a copy of this Consent Decree to each officer, employee, and agent whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree

8. In any action to enforce this Consent Decree, Defendant shall not raise as a

defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

III. DEFINITIONS

9. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or in such regulations, unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. "Complaint" shall mean the complaint filed by the United States and the Commonwealth in this action;

b. "Consent Decree" or "Decree" shall mean this Consent Decree;

c. "Day" shall mean a calendar day unless expressly stated to be a business day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next business day;

d. "Defendant" shall mean DEGS of Narrows, LLC ("DEGS");

e. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

f. "Effective Date" shall have the definition provided in Section XIII;

g. "Facility" shall mean the boilers and ancillary equipment owned and operated by Defendant at the Celanese Acetate LLC facility located at 3520 Virginia Avenue, Giles County, Narrows, Virginia 24124;

- h. "Paragraph" shall mean a portion of this Decree identified by an arabic numeral;
- i. "Parties" shall mean the United States, the Commonwealth and Defendant;
- j. "Plaintiffs" shall mean the United States and the Commonwealth;
- k. "Section" shall mean a portion of this Decree identified by a roman numeral;
- l. "United States" shall mean the United States of America, acting on behalf of EPA.

IV. CIVIL PENALTY

10. Within thirty (30) Days after the Effective Date of this Consent Decree, Defendant shall pay to the Plaintiffs the total sum of \$310,000.00 as a civil penalty. Of this civil penalty, Defendant shall pay \$155,000 to the United States and shall pay \$155,000 to the Commonwealth within thirty (30) Days after the Effective Date. If any portion of the civil penalty due to the United States or to the Commonwealth is not paid when due, Defendant shall pay interest on the amount past due accruing from the Effective Date of this Consent Decree through the date of payment at the rate specified in 28 U.S.C. § 1961. Interest payment under this Paragraph shall be in addition to any stipulated penalty due in accordance with this Consent Decree.

11. Payment to the United States. Payment of the civil penalty in the amount of \$155,000 shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department

of Justice in accordance with written instructions to be provided to Defendant, following lodging of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney's Office for the Western District of Virginia, *Nancy Withers*, Roanoke, VA 25301, (540) 857-2970. At the time of payment, Defendant shall send a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in United States and Commonwealth of Virginia v. DEGS of Narrows, LLC, and shall reference the civil action number and DOJ case number 90-5-2-1-09375, to the United States in accordance with Section XII of this Decree (Notices); by email to acctsreceivable.CINWD@epa.gov; and by mail to:

EPA Cincinnati Finance Office
26 Martin Luther King Drive
Cincinnati, Ohio 45268

and

Joan M. Dent
Regional Docket Clerk (3RC00)
U.S. EPA Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029.

12. Payment to the Commonwealth of Virginia. Payment of the civil penalty in the amount of \$155,000 shall be made to the Commonwealth of Virginia in the form of a certified check or cashier's check, payable to "Treasurer of Virginia" and delivered to:

Receipts Control
Department of Environmental Quality
P.O. Box 1104
Richmond, VA 23218.

13. Defendant shall not deduct any penalties paid under this Decree pursuant to this

Section or Section VII (Stipulated Penalties) in calculating its federal or state income tax.

V. COMPLIANCE REQUIREMENTS

14. By February 15, 2010, or thirty (30) days after entry of the Consent Decree, whichever is later, Defendant shall permanently surrender to EPA a total of 450 nitrogen oxide (“NOx”) Allowances of 2009 or earlier vintage.

15. For all NOx Allowances surrendered to EPA, Defendant shall first submit a NOx Allowance transfer request form electronically or in writing by first class U.S. mail or overnight mail to EPA’s Office of Air and Radiation’s Clean Air Markets Division (“OAR’s CAMD”) directing the transfer of such NOx Allowances to the EPA Enforcement Surrender Account or to any other EPA account that EPA may direct in writing. The NOx Allowance transfer request form shall be submitted to Paula Branch, U.S. Environmental Protection Agency, Office of Air and Radiation/Clean Air Markets Division, Mailcode (MC-6204J), 1200 Pennsylvania Ave., NW, Washington, DC 20460. As part of submitting this transfer request, Defendant shall irrevocably authorize the transfer of these 450 NOx Allowances and identify – by name of account and any applicable serial or other identification numbers or station names – the source and location of the NOx Allowances being surrendered. For written paper form transfers, Defendant must submit an allowance transfer form (available at <http://www.epa.gov/airmarkets/business/docs/forms/transfer%2012-30-08.pdf>) to Paula Branch at OAR’s CAMD at the address in this Paragraph with written copies sent to EPA Region III and the United States in accordance with Section XII of this Consent Decree. The transfer form must indicate the program (CAIR NOx Ozone Season Allowances or CAIR NOx Allowances,)

the transferee account number (CAIR00000306), and the transferee Authorized Account Representative (Authorized EPA Representative (999999)). Electronic transfers must also reference the program (CAIR NOx Ozone Season Allowances or CAIR NOx Allowances), the transferee account number (CAIR00000306), and the transferee Authorized Account Representative (Authorized EPA Representative (999999)). Defendant may electronically transfer the 450 NOx Allowances using OAR's CAMD's Business System; however, a written notice of the electronic transfer must be submitted to Paula Branch at the address in this Paragraph and to EPA Region III and the United States in accordance with Section XII of this Consent Decree, including the information identified in this Paragraph.

16. Nothing in this Consent Decree shall prevent Defendant from purchasing or otherwise obtaining NOx Allowances from another source for purposes of complying with state or federal Clean Air Act requirements to the extent otherwise allowed by law.

VI. REPORTING REQUIREMENTS

17. No later than ten (10) days after Defendant permanently surrenders to EPA the 450 NOx Allowances of 2009 or earlier vintage, Defendant shall submit a written notice to EPA and the Commonwealth stating the surrender was accomplished and shall include in the notice a copy of the NOx Allowance transfer request form sent to EPA's Office of Air and Radiation's Clean Air Markets Division.

18. Whenever any violation of this Consent Decree or any other event affecting Defendant's performance under this Decree may pose an immediate threat to the public health or welfare or the environment, Defendants shall notify EPA and the Commonwealth orally or by

electronic or facsimile transmission as soon as possible, but no later than 24 hours after Defendant first knew or should have known of the violation or event. This notification procedure is in addition to the requirements set forth in the preceding Paragraph.

19. All reports or notices required under this Consent Decree shall be submitted to the persons designated in Section XII of this Consent Decree (Notices).

20. Each report or notice submitted by Defendant under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the 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.

This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

21. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Clean Air Act, by the Commonwealth, or by any other federal, state, or local law, regulation, permit, or other requirement.

22. Any information provided pursuant to this Consent Decree may be used by the United States or the Commonwealth in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

VII. STIPULATED PENALTIES

23. Defendant shall be liable for stipulated penalties to the United States and to the Commonwealth for violations of this Consent Decree as specified below. A violation includes failing to perform any obligation required by the terms of this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by this Decree.

a. Late Payment of Civil Penalty

If Defendant fails to pay the civil penalty required to be paid under Section IV of this Consent Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$5,000 per Day for each Day that the payment is late.

b. Late Surrender of NOx Allowances

If Defendant fails to surrender the NOx Allowances required under Section V of this Decree when due, Defendant shall pay a stipulated penalty as follows:

<u>Penalty Per Day</u>	<u>Period of Noncompliance</u>
\$ 5,000	1st through 14th Day
\$10,000	15th through 30th Day
\$25,000	31st Day and beyond

c. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VI of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 250	1st through 14th Day

\$ 500	15th through 30th Day
\$1,000	31st Day and beyond

24. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

25. Defendant shall pay stipulated penalties to the United States and the Commonwealth within 30 Days of a written demand by either Plaintiff. The United States, or the Commonwealth, or both, may seek stipulated penalties under this Section by sending a written demand to Defendant with a copy simultaneously sent to the other Plaintiff. Either the United States or the Commonwealth may waive stipulated penalties or reduce the amount of stipulated penalties it seeks, in the unreviewable exercise of its discretion and in accordance with this Paragraph. Where both the United States and the Commonwealth seek stipulated penalties for the same violation of this Consent Decree, Defendant shall pay fifty (50) percent to the United States and fifty (50) percent to the Commonwealth. Where only one sovereign demands stipulated penalties for a violation, and the other sovereign does not join in the demand within twenty (20) Days of receiving the demand, or timely joins in the demand but subsequently elects to waive or reduce stipulated penalties for that violation, Defendant shall pay the full stipulated penalties due for the violation to the sovereign making the demand less any amount paid to the other sovereign, and Defendant shall not be liable for additional stipulated penalties to the other sovereign for that violation.

26. Stipulated penalties shall continue to accrue during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States and the Commonwealth within thirty (30) Days of the effective date of the agreement or the receipt of EPA's decision or order.
- b. If the dispute is appealed to the Court and the United States and the Commonwealth prevail in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within sixty (60) Days of receiving the Court's decision or order, except as provided in subparagraph c, below.
- c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing to the United States and the Commonwealth, together with interest, within fifteen (15) Days of receiving the final appellate court decision.

27. Defendant shall pay stipulated penalties owing to the United States and to the Commonwealth of Virginia in the manner set forth and with the confirmation notices required by Paragraphs 11 and 12, except that the transmittal letters shall state that the payment is for stipulated penalties and shall state for which violations the penalties are being paid.

28. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, it shall be liable for interest on such penalties, as provided for in 28 U.S.C.

§ 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States or the Commonwealth from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

29. Subject to the provisions of Section X of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States or the Commonwealth for violation of this Consent Decree or applicable law by Defendant. Where a violation of this Consent Decree is also a violation of relevant statutory or regulatory requirements, Defendant shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

VIII. DISPUTE RESOLUTION

30. 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. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States or the Commonwealth to enforce any obligation of Defendant arising under this Decree.

31. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States and the Commonwealth a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The

period of informal negotiations shall not exceed twenty (20) Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within twenty (20) Days after the conclusion of the informal negotiation period, the Defendant invokes formal dispute resolution procedures as set forth below.

32. Formal Dispute Resolution. Defendant may invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the Commonwealth a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

33. The United States and the Commonwealth shall serve their Statement of Position within forty-five (45) Days of receipt of Defendant's Statement of Position. The United States' and Commonwealth's Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States and the Commonwealth. The United States' and the Commonwealth's Statement of Position shall be binding on the disputing Defendant, unless that Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

34. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States and the Commonwealth, in accordance with Section XII of this Consent Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within ten (10) Days of receipt of the United States' and the Commonwealth's

Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of the Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

35. The United States and the Commonwealth shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

36. Standard of Review. In a formal dispute resolution proceeding under this Section, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and the Act. The Court shall decide the dispute based on applicable principles of law. The United States and the Commonwealth reserve the right to argue that their position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious or otherwise not in accordance with law.

37. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 26. If the Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid by the Defendant as provided in Section VII (Stipulated Penalties).

IX. INFORMATION COLLECTION AND RETENTION

38. The United States and the Commonwealth and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into any facility covered by this Consent Decree, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States and the Commonwealth in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendant or its representatives, contractors, or consultants to determine compliance with this Consent Decree;
- d. obtain documentary evidence, including photographs and similar data to determine compliance with this Consent Decree; and
- e. assess Defendant's compliance with this Consent Decree.

39. Upon request, Defendant shall provide EPA or its authorized representatives splits of any samples taken by Defendant. Upon request, EPA shall provide Defendant splits of any samples taken by EPA.

40. Until five years after the termination of this Consent Decree, Defendant 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 comes into their or their contractors' or agents' possession or control, and that directly relate to Defendant's performance of its obligations under Sections IV and V of this Consent Decree. This

information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States or the Commonwealth, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

41. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States and the Commonwealth at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States and the Commonwealth, Defendant shall deliver any such documents, records, or other information to EPA. Defendant may assert that certain documents, records, or other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

42. Defendant may also assert that information required to be provided under this Section is protected as Confidential Business Information ("CBI") under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

43. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States or the Commonwealth pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

X. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

44. This Consent Decree resolves the Defendant's liability for and the civil claims of the United States and the Commonwealth for the violations alleged in the Complaint filed in this action through the date of lodging of the Decree and the civil claims of the Plaintiffs for the matters alleged in the NOV/FOV through the date of lodging of the Decree.

45. The United States and the Commonwealth reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States or the Commonwealth to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in the preceding Paragraph. The United States and the Commonwealth further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the Facility, whether related to the violations addressed in this Consent Decree or otherwise.

46. In any subsequent administrative or judicial proceeding initiated by the United States or the Commonwealth for injunctive relief, civil penalties, other appropriate relief

relating to the Facility or Defendant's violations, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the Commonwealth in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 44 of this Section.

47. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States and the Commonwealth do not, by consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, or with any other provisions of federal, State, or local laws, regulations, or permits.

48. This Consent Decree does not limit or affect the rights of Defendant or of the United States or the Commonwealth against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

49. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

XI. COSTS

50. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the Commonwealth shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to enforce this Consent Decree, including an action to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XII. NOTICES

51. Unless otherwise specified herein, whenever notifications, submissions, or communications are required by this Consent Decree, they shall be made in writing and addressed as follows:

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. 90-5-2-1-09251

and

Chris Pilla, Branch Chief
Air Enforcement Branch (3AP12)
Air Protection Division,
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

and

Donna L. Mastro, Esq.

Senior Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region III (3RC10)
1650 Arch Street
Philadelphia, PA 19103-2029

To the Commonwealth of Virginia:

Director
Virginia Department of Environmental Quality
629 East Main Street
Richmond, VA 23219

Melanie D. Davenport
Director, Division of Enforcement
Virginia Department of Environmental Quality
629 East Main Street
Richmond, VA 23219

Steven A. Dietrich
Regional Director, Blue Ridge Regional Office
Virginia Department of Environmental Quality
3019 Peters Creek Road
Roanoke, VA 24019

To DEGS of Narrows, LLC:

David A. Ledonne
VP, Operations
Duke Energy Generation Services, Inc.
139 East Fourth Street
Cincinnati, OH 45202

and

Julie L. Ezell, Esq.
Associate General Counsel
Environmental, Health & Safety
Duke Energy Business Services, Inc.
1000 East Main Street
Plainfield, IN 46168

and

Kevin N. McMurray, Esq.
Frost Brown Todd LLC
2200 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

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

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

XIII. EFFECTIVE DATE

54. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court as recorded on the Court's docket.

XIV. RETENTION OF JURISDICTION

55. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections VIII, XV and XVI, or effectuating or enforcing compliance with the terms of this Decree.

XV. MODIFICATION

56. Except as provided in Paragraph 55, the terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

57. Any disputes concerning modification of this Decree shall be resolved pursuant to Section VIII of this Decree (Dispute Resolution), provided, however, that the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XVI. TERMINATION

58. After Defendant has completed the requirements of Section V (Compliance Requirements) of this Decree, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may submit to the United States and the Commonwealth a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

59. Following receipt by the United States and the Commonwealth of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States and the Commonwealth agree that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

60. If the United States and the Commonwealth do not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section VIII of this Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination, until ninety (90) Days after service of its Request for Termination.

XVII. PUBLIC PARTICIPATION

61. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States and the Commonwealth reserve the right to withdraw or withhold their consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless the United States or the Commonwealth has notified Defendant in writing that it no longer supports entry of the Decree.

XVIII. SIGNATORIES/SERVICE

62. The undersigned representatives of Defendant, the Commonwealth, and the Assistant Attorney General for the United States each certify that he or she is duly 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 the terms of the Decree.

63. This Consent Decree may be signed in counterparts, and its validity shall not be

challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XIX. INTEGRATION

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

65. Each limit and/or other requirement established by or under this Consent Decree is a separate, independent requirement.

XX. FINAL JUDGMENT

66. 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 Commonwealth and Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

Dated and entered this ____ day of _____, 20__.

UNITED STATES DISTRICT JUDGE
Western District of Virginia

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States and Commonwealth of Virginia v. DEGS of Narrows, LLC (W.D. Va.), relating to alleged violations of the Clean Air Act:

FOR PLAINTIFF UNITED STATES OF AMERICA:

W. BENJAMIN FISHEROW
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

Date 2/25/10

CARA MROCZEK
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, DC 20044
Phone: (202) 514-2757
Facsimile: (202) 616-6583

Date 2-22-10

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States and Commonwealth of Virginia v. DEGS of Narrows, LLC (W.D. VA), relating to alleged violations of the Clean Air Act:

~~TIMOTHY J. HEAPHY~~
United States Attorney
United States Department of Justice
United States Attorney's Office
Western District of Virginia

3-1-10
Date

~~JULIE DUDLEY~~
Assistant United States Attorney
Attorney for United States
Post Office Box 1709
Roanoke, Virginia 24008-1709
Telephone: (540) 857-2254
Fax: (540) 857-2283

3-1-10
Date

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States and Commonwealth of Virginia v. DEGS of Narrows, LLC (W.D. VA), relating to alleged violations of the Clean Air Act:

FOR PLAINTIFF ~~EPA REGION III:~~

SHAWN M. GARVIN
Regional Administrator
U.S. EPA Region III /
1650 Arch Street
Philadelphia, PA 19103

2/1/10
Date

MARCIA E. MULKEY
Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103

1/27/10
Date

DONNA L. MASTRO
Senior Assistant Regional Counsel
U.S. EPA Region III
1650 Arch Street
Philadelphia, PA 19103

January 26, 2010
Date

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States and Commonwealth of Virginia v. DEGS of Narrows, LLC (W.D. VA), relating to alleged violations of the Clean Air Act:

FOR PLAINTIFF COMMONWEALTH OF VIRGINIA:

DAVID K. PAYLOR ✓
Director
Virginia Department of Environmental Quality
629 East Main Street
Richmond, VA 23219

1/14/2010

Date

KERRI L. NICHOLAS
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
Environmental Section
900 East Main Street
Richmond, VA 23219

1/14/10

Date

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States and Commonwealth of Virginia v. DEGS of Narrows, LLC (W.D. VA), relating to alleged violations of the Clean Air Act:

FOR DEFENDANT DEGS of Narrows, LLC:

David A. Ledonne
Vice President, Operations
Duke Energy Generation Services, Inc.
139 East Fourth Street
Cincinnati, OH 45202

January 20, 2010
Date