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Unified Air Pollution Control District

17 UNITED STATES DISTRICT COURT FOR THE
18 EASTERN DISTRICT OF CALIFORNIA

19
20 UNITED STATES OF AMERICA and)
SAN JOAQUIN VALLEY UNIFIED)
21 AIR POLLUTION CONTROL DISTRICT)

22 Plaintiffs,)

23 v.)

24 MERCED POWER, LLC,)

25 Defendant.)
26 _____)

Case No. 1:11-cv-00241-LJO-SMS

CONSENT DECREE

27
28

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1 WHEREAS, Plaintiff UNITED STATES OF AMERICA, on behalf of the United States
2 Environmental Protection Agency (“EPA”), and the SAN JOAQUIN VALLEY UNIFIED AIR
3 POLLUTION CONTROL DISTRICT (“District”), have filed a Complaint concurrently with this
4 Consent Decree, alleging that defendant MERCED POWER, LLC (“Defendant”) violated and/or
5 continues to violate the Clean Air Act (CAA or Act), 42 U.S.C. § 7401 *et seq.*, including the
6 California State Implementation Plan authorized by Section 110(a) of the Act, 42 U.S.C. § 7410
7 *et seq.*, through violations of authority to construct (“ATC”) permits, and conditions therein,
8 issued by the District related to its ownership and operation of a biomass fueled electric
9 generating facility in Merced (the “Facility”);

10 WHEREAS, the Complaint seeks injunctive relief and the assessment of civil penalties
11 for alleged violations of: federally enforceable permits, permit conditions, rules promulgated
12 under the California State Implementation Plan, and the California Health and Safety Code,
13 related to its ownership and operation of the Facility;

14 WHEREAS, EPA issued notices of violations (“NOVs”) to Defendant with respect to
15 such allegations on July 23, 2009 and on October 26, 2010;

16 WHEREAS, the District issued NOVs to Defendant for violations of District rules and
17 permit conditions at the Facility from October 20, 2008 to August 12, 2010;

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

21 **I. JURISDICTION AND VENUE**

22 1. This Court has jurisdiction over the subject matter of this action under Section
23 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. §§ 1331, 1345, 1355 and 1367(a),
24 and over the parties. This Court has supplemental jurisdiction over the State law claims asserted
25 by the District pursuant to 28 U.S.C. § 1367. Venue is proper in this district under Section
26 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. §§ 1391 and 1395, because it is the
27 judicial district in which the violations alleged in this Complaint have occurred and are
28 occurring.

1 2. For purposes of this Consent Decree, Defendant agrees that the Complaint states
2 claims upon which relief may be granted pursuant to Section(s) 113(a)(1)(C) and 113(b)(1) of
3 the Clean Air Act (“Clean Air Act” or the “Act”), 42 U.S.C. §§ 7413(a)(1)(C) and 7413(b)(1).
4

5 **II. APPLICABILITY**

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

9 4. No transfer of ownership of the Facility, whether in compliance with the
10 procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that
11 the terms of the Decree are implemented. Defendant shall provide a copy of this Consent Decree
12 to any proposed transferee. At least 30 Days prior to a transfer of ownership, Defendant shall
13 provide a copy of this Consent Decree to the proposed transferee and shall simultaneously
14 provide written notice of the prospective transfer, together with a copy of the proposed written
15 agreement, to the United States, in accordance with Section XIII of this Decree (Notices). Any
16 attempt to transfer ownership of the Facility without complying with this Paragraph constitutes a
17 violation of this Decree.

18 5. Defendant shall provide a copy of this Consent Decree to all officers, employees,
19 and agents whose duties might reasonably include compliance with any provision of this Decree,
20 as well as to Defendant’s contractor at the Facility, NAES Corporation, and any of its employees,
21 and to any other contractor retained to perform work required under this Consent Decree or to
22 operate the Facility. Defendant shall condition any such contract upon performance of the work
23 in conformity with the terms of this Consent Decree.

24 6. In any action to enforce this Consent Decree, Defendant shall not raise as a
25 defense the failure by any of their officers, directors, employees, agents, or contractors to take
26 any actions necessary to comply with the provisions of this Consent Decree.

27 **III. DEFINITIONS**

28 7. 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 such

1 regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are
2 used in this Consent Decree, the following definitions shall apply:

3 a. "Breakdown Incident," shall have the same meaning as provided in
4 Section 3 of District Rule 1100 – *Equipment Breakdown*;

5 b. "CEMS" shall mean a continuous emissions monitoring system, consisting
6 of the total equipment required for the determination of a gas concentration or emission rate;

7 c. "CEMS Downtime" shall mean any time when the Facility is Operating
8 and the CEMS system is not functioning due to malfunctions, breakdowns, repairs, calibration
9 checks, zero and span adjustments, out-of-control periods, or any other time the system is
10 otherwise not producing quality assured data;

11 d. "Complaint" shall mean the complaint filed by the United States and the
12 District in this action;

13 e. "Consent Decree" or "Decree" shall mean this consent decree;

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

18 g. "Defendant" shall mean Merced Power, LLC;

19 h. "District" shall mean the San Joaquin Valley Unified Air Pollution
20 Control District;

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

23 j. "Effective Date" shall have the definition provided in Section XIV;

24 k. "Facility" shall mean the biomass fueled electric generating facility owned
25 by Defendant and located at 30 West Sandy Mush Road, Merced, California;

26 l. "Full Calendar Quarter" means the three month periods commencing on
27 January 1, April 1, July 1 and October 1, and shall include the first partial calendar quarter
28

1 following Restart of the Facility, if Restart occurs less than twenty-one (21) days following
2 commencement of that calendar quarter;

3 m. "Operating" shall mean those times during which the Facility's biomass
4 fuel-fired boiler is combusting any fuel;

5 n. "Paragraph" shall mean a portion of this Decree identified by an arabic
6 numeral;

7 o. "Parties" shall mean the United States, the District, and Defendant;

8 p. "Pollutant" shall mean nitrogen oxides ("NOx"), sulfur oxides ("SOx"),
9 carbon monoxide ("CO"), ammonia ("NH3"), particulates of less than 10 microns in diameter
10 ("PM10"), and Volatile Organic Compounds ("VOCs");

11 q. "Restart" shall mean the first date on which any fuel is combusted in the
12 Facility's biomass fuel-fired boiler following the lodging of the Decree, but if this event pre-
13 dates lodging of the Decree the date of Restart shall be deemed to be the date of Lodging;

14 r. "Section" shall mean a portion of this Decree identified by a roman
15 numeral;

16 s. "State" shall mean the State of California;

17 t. "United States" shall mean the United States of America, acting on behalf
18 of EPA.

19 **IV. CIVIL PENALTY**

20 8. Defendant shall pay the sum of \$246,000 as a civil penalty to the United States,
21 together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961
22 as of the Effective Date. If a sale of the stock of Defendant is pending after the Effective Date,
23 Defendants shall make such payment as soon after the close of the transaction as practicable,
24 provided that full payment of the civil penalty shall in no event be made later than 90 Days after
25 the Effective Date of this Consent Decree.

26 9. Defendant shall pay the civil penalty due by FedWire Electronic Funds Transfer
27 ("EFT") to the U.S. Department of Justice in accordance with written instructions to be provided
28 to Defendant, following entry of the Consent Decree, by the Financial Litigation Unit of the U.S.

1 Attorney's Office for the Eastern District of California, 501 I Street, Suite 10-100, Sacramento,
2 California 95814-2322, telephone number (916) 554-2700. At the time of payment, Defendant
3 shall send a copy of the EFT authorization form and the EFT transaction record, together with a
4 transmittal letter, which shall state that the payment is for the civil penalty owed pursuant to the
5 Consent Decree in *United States v. Merced Power, LLC*, and shall reference the civil action
6 number and DOJ case number 90-5-2-1-09903, to the United States in accordance with Section
7 XIII of this Decree (Notices); by email to cinwd_acctsreceivable@epa.gov; or by mail to:

8 EPA Cincinnati Finance Office
9 26 Martin Luther King Drive
10 Cincinnati, Ohio 45268.

11 10. Defendant shall not deduct any penalties paid under this Decree pursuant to this
12 Section or Section VII (Stipulated Penalties) in calculating its federal, state and local income tax.

13 11. Defendant shall pay the sum of \$246,000 as a civil penalty to the District, together
14 with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the
15 Effective Date. If a sale of the stock of Defendant is pending after the Effective Date,
16 Defendants shall make such payment as soon after the close of escrow as practicable, provided
17 that full payment of the civil penalty shall in no event be made later than 90 Days after the
18 Effective Date of this Consent Decree. Payment shall be made by delivery of a check made
19 payable to the San Joaquin Valley Unified Air Pollution Control District and delivered by
20 certified U.S. Mail to:

21 San Joaquin Valley Unified Air Pollution Control District
22 Attn: District Counsel's Office
23 1990 E. Gettysburg Avenue
24 Fresno, CA 93726.

25 **V. COMPLIANCE REQUIREMENTS**

26 12. Defendant shall comply with all conditions contained in the authority to construct
27 permits issued for the Facility or contained in any permits to operate issued for the Facility, as
28 well as all applicable District rules and regulations, and all other legal requirements alleged to
have been violated in the Complaint.

1 13. Defendant shall:

2 a. No later than 90 days following Restart of the Facility, monitor emissions
3 rates from the Facility through use of a flow monitor in addition to any other equipment
4 presently utilized, or required by permit or law, such as a CEMS. A permit application shall be
5 submitted to modify any applicable permit to operate the Facility to require use of the flow
6 monitor. All equipment for such monitoring, including the CEMS, shall be installed and
7 certified by Defendant as operational to EPA and the District, no later than 90 days following
8 Restart of the Facility.

9 b. No later than 30 days following Restart of the Facility, submit an
10 application to modify the applicable permit conditions to specify that the required ammonia
11 injection system used in the Facility's selective non-catalytic reduction system for the control of
12 NO_x emissions must be an automated system. Defendant shall certify to EPA and the District
13 that the automated system is operational no later than 30 days following Restart of the Facility.

14 c. Immediately following Restart of the Facility, limit total CEMS Downtime
15 for the Facility to no more than 5.0% of operating hours for each of the first eight consecutive
16 Full Calendar Quarters following Restart of the Facility and, if applicable, any partial calendar
17 quarter that immediately follows Restart. Within 90 days following Restart of the Facility,
18 Defendant shall submit for approval, to EPA and the District, an operations and maintenance
19 procedures manual for maintenance of CEMS. A permit application shall be submitted to
20 modify any applicable permit to operate to require use of the operations and maintenance
21 procedures manual.

22 d. No later than 60 days following Restart of the Facility, conduct source
23 testing to measure the NO_x, SO_x, PM₁₀, CO, VOC and NH₃ emission rates and at least once
24 every twelve months thereafter and, no later than 90 days following Restart of the Facility,
25 conduct a Relative Accuracy Test Audit of the Facility's CEMS in accordance with EPA
26 guidelines and a seven day Drift Test pursuant to the requirements of 40 C.F.R. Part 60,
27 Appendix B.

1 e. Revise reporting of emissions exceedences in a manner that is consistent
2 with, and that allows for ready evaluation of compliance with emissions limitations contained in
3 any permits issued for the Facilities, including each stipulated penalty triggered by a violation of
4 this Consent Decree during the reporting period, and a summary thereof. Within 30 days
5 following Restart of the Facility, Defendant shall submit for approval, to EPA and the District, a
6 proposed revised reporting format. The first quarterly emissions exceedence report following
7 approval by EPA and the District, and each such report thereafter, shall use the revised format.
8 Use of such revised reporting format shall be a requirement of this Decree for the first eight
9 consecutive Full Calendar Quarters following Restart of the Facility and, if applicable, any
10 partial calendar quarter that immediately follows Restart.

11 f. Submit to EPA and the District for review and approval a Preventative
12 Maintenance and Operations Plan (“PMO Plan”) within 90 days following Restart of the Facility.

13 i. The PMO Plan shall be a compilation of Defendant’s approaches for
14 exercising good air pollution control practices and for minimizing
15 NO_x, CO, NH₃, SO₂ and particulate emissions from the Facilities.

16 The PMO Plan shall have as its goal the elimination of excess
17 emissions events.

18 ii. The PMO Plan shall address at a minimum, boiler operations, air
19 pollution control equipment operations, CEMS operations, startup and
20 shutdown procedures, and emergency procedures.

21 iii. The PMO Plan shall include, but need not be limited to, the following
22 procedures: 1) identification/function of responsible facility personnel;
23 2) chain-of-command procedures including procedures between owner
24 and operator personnel; 3) equipment inspections/inspection
25 frequency; 4) audits and quality assurance; 5) operation and
26 maintenance procedures; 6) identification of critical components; 7)
27 spare parts lists/inventory; 8) housekeeping; and 9) recordkeeping/
28 reporting procedures.

1 iv. The PMO Plan shall apply at all times, including periods of startup,
2 shutdown, and malfunction.

3 v. EPA and the District do not, by their review and approval of the PMO
4 Plan, warrant or aver in any manner that any of the actions that
5 Defendant may take pursuant to such PMO Plan will result in
6 compliance with the provisions of the Clean Air Act or any other
7 applicable federal, state, or local law or regulation. Notwithstanding
8 the review and approval by EPA or the District of the PMO Plan,
9 Defendant shall remain solely responsible for compliance with the
10 Clean Air Act and such other laws and regulations.

11 g. Amend any existing operation and maintenance agreement related to the
12 Facility, within 60 days of the Restart of the Facility, to incorporate, by reference, the applicable
13 requirements of this Consent Decree and to require any agent, contractor, partner, or other person
14 or entity bound by said operation and maintenance agreement, to comply with those specified
15 requirements. Until termination of this Decree pursuant to Section XVII, any new operation and
16 maintenance agreement related to the Facility shall also incorporate, by reference, the applicable
17 requirements of this Consent Decree and require any contractor, partner, or other entity bound by
18 said operation and maintenance agreement, to comply with those specified requirements.
19 Compliance by a third party with any operation and maintenance agreement shall not be
20 construed to limit the rights of the United States or the District to obtain penalties or injunctive
21 relief against such third parties, under the Act or implementing regulations, or under other
22 federal or state laws, regulations, or permit conditions. Within 30 days of the execution of any
23 modified operation and maintenance agreement, Defendant shall provide evidence satisfactory to
24 the EPA and the District that any such modified operation and maintenance agreement
25 incorporates by reference, the applicable requirements of the Consent Decree.

26 14. Approval of Deliverables. After review of any plan, report, or other item that is
27 required to be submitted pursuant to this Consent Decree, EPA, shall review such document and
28 after consultation with the District, shall in writing: a) approve the submission; b) approve the

1 submission upon specified conditions; c) approve part of the submission and disapprove the
2 remainder; or d) disapprove the submission.

3 15. If the submission is approved pursuant to Paragraph 14.a, Defendant shall take all
4 actions required by the plan, report, or other document, in accordance with the schedules and
5 requirements of the plan, report, or other document, as approved. If the submission is
6 conditionally approved or approved only in part, pursuant to Paragraph 14.b or .c, Defendant
7 shall, upon written direction from EPA, after consultation with the District, take all actions
8 required by the approved plan, report, or other item that EPA, after consultation with the District,
9 determines are technically severable from any disapproved portions, subject to Defendant's right
10 to dispute only the specified conditions or the disapproved portions, under Section IX of this
11 Decree (Dispute Resolution).

12 16. If the submission is disapproved in whole or in part pursuant to Paragraph 14.c
13 or 14.d, Defendant shall, within 45 Days or such other time as the Parties agree to in writing,
14 address all deficiencies and resubmit the plan, report, or other item, or disapproved portion
15 thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is
16 approved in whole or in part, Defendant shall proceed in accordance with the preceding
17 Paragraph.

18 17. Any stipulated penalties applicable to the original submission, as provided in
19 Section VII of this Decree, shall accrue during the 45-Day period or other specified period, but
20 shall not be payable unless the resubmission is untimely or is disapproved in whole or in part;
21 provided that, if the original submission was so deficient as to constitute a material breach of
22 Defendant's obligations under this Decree, the stipulated penalties applicable to the original
23 submission shall be due and payable notwithstanding any subsequent resubmission.

24 18. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in
25 whole or in part, EPA, after consultation with the District, may again require Defendant to
26 address any deficiencies, in accordance with the preceding Paragraphs, or may themselves
27 correct any deficiencies, subject to Defendant's right to invoke Dispute Resolution and the right
28 of EPA and the District to seek stipulated penalties as provided in the preceding Paragraphs.

1 19. Permits. Where any compliance obligation under this Section requires Defendant
2 to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete
3 applications and take all other actions necessary to obtain all such permits or approvals.
4 Defendant may seek relief under the provisions of Section VIII of this Consent Decree (Force
5 Majeure) for any delay in the performance of any such obligation resulting from a failure to
6 obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if
7 Defendant has submitted timely and complete applications and has taken all other actions
8 necessary to obtain all such permits or approvals.

9 **VI. REPORTING REQUIREMENTS**

10 20. Defendant shall submit the following reports, in addition to those reports already
11 required by permits issued to the Facility or this Consent Decree:

12 a. Within 30 Days after the end of each calendar year quarter (i.e., by
13 April 30, July 30, October 30, and January 30) following Restart of the Facility, until termination
14 of this Decree pursuant to Section XVII, Defendant shall submit, a quarterly report for the
15 preceding quarter that shall include a report on progress of installation, certification and
16 operation of a stack flow rate monitor, on certification and operation of an automated NH₃
17 injection system at the Facility, revisions made to excess emissions reports to comport with this
18 Consent Decree, implementation of operations and maintenance procedures for maintenance of
19 CEMS at the Facility, preparation and completion of a PMO Plan for the Facility, revisions to
20 any Operations and Maintenance agreement related to operation of the Facility, and submission
21 of permit amendment applications to fulfill the requirements of this Consent Decree.

22 b. The report shall also include a description of any non-compliance with the
23 requirements of this Consent Decree and an explanation of the violation's likely cause and of the
24 remedial steps taken, or to be taken, to prevent or minimize such violation.

25 c. If Defendant violates, or is on notice that it may materially violate, any
26 requirement of this Consent Decree, Defendant shall notify the United States and the District of
27 such violation and its likely duration, in writing, within ten business Days of the Day Defendant
28 first becomes aware of the violation or prospective violation, with an explanation of the

1 violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize
2 such violation. If the cause of a violation cannot be fully explained at the time the notification is
3 due, Defendant shall so state in the notification. Defendant shall investigate the cause of the
4 violation and shall then provide a full explanation of the cause of the violation in the next report
5 due pursuant to Paragraph 20.a. Nothing in this Paragraph or the following Paragraph relieves
6 Defendant of its obligation to provide the notice required by Section VIII of this Consent Decree
7 (Force Majeure).

8 21. Whenever any violation of this Consent Decree or of any applicable permits or
9 any other event affecting Defendant's performance under this Decree, or the performance of the
10 Facility may pose an immediate threat to the public health or welfare or the environment,
11 Defendant shall notify EPA and the District orally or by electronic or facsimile transmission as
12 soon as possible, but no later than 24 hours after Defendant first knew of the violation or event.
13 This procedure is in addition to the requirements set forth in the preceding Paragraph.

14 22. All reports shall be submitted to the persons designated in Section XIII of this
15 Consent Decree (Notices).

16 23. Each report submitted by Defendant under this Section shall be signed by an
17 official of Defendant and include the following certification:

18 I certify under penalty of law that this document and all attachments were
19 prepared under my direction or supervision in accordance with a system designed
20 to assure that qualified personnel properly gather and evaluate the information
21 submitted. Based on my inquiry of the person or persons who manage the system,
22 or those persons directly responsible for gathering the information, the
23 information submitted is, to the best of my knowledge and belief, true, accurate,
24 and complete. I am aware that there are significant penalties for submitting false
25 information, including the possibility of fine and imprisonment for knowing
26 violations.

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

29 24. The reporting requirements of this Consent Decree do not relieve Defendant of
30 any reporting obligations required by the Clean Air Act or implementing regulations, or by any
31 other federal, state, or local law, regulation, permit, or other requirement.

1 25. Any information provided pursuant to this Consent Decree may be used by the
2 United States in any proceeding to enforce the provisions of this Consent Decree and as
3 otherwise permitted by law.

4 **VII. STIPULATED PENALTIES**

5 26. Defendant shall be liable for stipulated penalties to the United States and the
6 District for violations of this Consent Decree as specified below, unless excused under Section
7 VIII (Force Majeure). A violation includes failing to perform any obligation required by the
8 terms of this Decree, including any work plan or schedule approved under this Decree, according
9 to all applicable requirements of this Decree and within the specified time schedules established
10 by or approved under this Decree.

11 27. Late Payment of Civil Penalty. If Defendant fails to pay the entirety of the civil
12 penalty required to be paid under Section IV of this Decree (Civil Penalty) to both Plaintiffs
13 when due, Defendant shall pay a stipulated penalty of \$5,000 per Day for each Day that the
14 payment, to either or both Plaintiffs, is late.

15 28. Violation of Permit Conditions.

16 a. The following stipulated penalties shall accrue per Pollutant, for each day
17 on which one or more violations of the Pollutant’s applicable emissions limit occurs at a level of
18 between one to ten percent higher than the Pollutant’s applicable emission limits, for each of the
19 first eight consecutive Full Calendar Quarters following Restart of the Facility and, if applicable,
20 any partial calendar quarter that immediately follows Restart:

21	<u>\$500</u>	1 st to 10 th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
22		
23		
24	<u>\$1,000</u>	11 th to 30 th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
25		
26		
27		
28		

1 \$1,500

31st day, and each day beyond, with any violation at
2 the Facility sufficient to trigger stipulated penalties
3 under this subparagraph.

4 For exceedences of more than one emission limit associated with a single Breakdown Incident,
5 the penalty shall be capped at two violations. In determining whether a Breakdown Incident has
6 occurred, all provisions of District Rule 1100 shall apply.

7 b. The following stipulated penalties shall accrue per Pollutant, for each day
8 on which one or more violations of the Pollutant's applicable emissions limit occurs at a level of
9 more than ten percent higher than the Pollutant's applicable emission limits, for each of the first
10 eight consecutive Full Calendar Quarters following Restart of the Facility and, if applicable, any
11 partial calendar quarter that immediately follows Restart:

12 \$2,000

1st to 10th days with any violation at the Facility
13 sufficient to trigger stipulated penalties under this
14 subparagraph

15 \$3,000

11th to 30th days with any violation at the Facility
16 sufficient to trigger stipulated penalties under this
17 subparagraph

18 \$4,000

31st day, and each day beyond, with any violation at
19 the Facility sufficient to trigger stipulated penalties
20 under this subparagraph.

21 For exceedences of more than one emission limit associated with a single Breakdown
22 Incident, the penalty shall be capped at two violations. In determining whether a Breakdown
23 Incident has occurred, all provisions of District Rule 1100 shall apply. For each day on which
24 multiple violations of the emission limit for any individual Pollutant trigger stipulated penalties
25 under both subparagraphs 28.a and 28.b, the penalty shall be capped at the penalty
26 applicable under subparagraph 28.b, but for purposes of determining any subsequent penalty
27 under each subparagraph, a daily violation shall be attributed to each subparagraph.

1 c. The following stipulated penalties shall accrue per day for each separate,
 2 non-emissions based violation of any permit issued for the Facility, for each of the first eight
 3 consecutive Full Calendar Quarters following Restart of the Facility and, if applicable, any
 4 partial calendar quarter that immediately follows Restart:

5 Penalties per Separate Non-Emissions Based Permit Violation, Per Day, for Each
 6 Quarterly Reporting Period

7	<u>\$250</u>	1 st to 10 th days with any non-emissions
8		based permit violation at the Facility
9	<u>\$500</u>	11 th to 30 th days with any non-emissions
10		based permit violation at the Facility
11	<u>\$1,000</u>	31 st day, and each day beyond, with any
12		non-emissions based permit violation at the
13		Facility.

14 29. Failure to Install Stack Flow Rate Monitor: Failure to install, and certify
 15 operation of, a stack flow rate monitor within 90 days of Restart of the Facility shall result in a
 16 stipulated penalty of \$250 per day for days 1 to 14, \$500 per day for days 15 to 30, and \$1,000
 17 per day beyond 30 days until such installation and certification of operation.

18 30. Failure to Certify Installed Automated Ammonia Injection System: Failure to
 19 certify as operational an automated ammonia injection system for the selective non-catalytic
 20 reduction system at the Facility within 30 days of Restart of the Facility shall result in a
 21 stipulated penalty of \$250 per day for days 1 to 14, \$500 per day for days 15 to 30, and \$1,000
 22 per day beyond 30 days until such installation and certification of operation.

23 31. Failure to Limit Quarterly CEMS Downtime: Failure to limit CEMS downtime at
 24 the Facility to no more than 5.0% of operating hours, per calendar quarter, shall result in
 25 stipulated penalties of \$2,000 for each percentage above 5.0%, where any value equal to or
 26 greater than 0.50% above an integer is rounded up to the next highest integer. For purposes of
 27 determining whether the 0.50% threshold has been met, if the first digit discarded is less than
 28 five, the last digit retained should not be changed (e.g., 5.494% becomes 5.49%), whereas if the

1 first digit discarded is five or higher the last figure retained should be increased by one unit (e.g.,
 2 5.495% becomes 5.50%). The foregoing stipulated penalties shall apply through the first eight
 3 consecutive Full Calendar Quarters following Restart of the Facility and, if applicable, any
 4 partial calendar quarter that immediately follows Restart.

5 32. Failure to Timely Conduct Source Testing: Failure to conduct source testing, to
 6 conduct a Relative Accuracy Test Audit of the Facility's CEMS and to conduct a seven day Drift
 7 Test within the time required by Paragraph 13.d, shall result in a stipulated penalty of \$250 per
 8 day for days 1 to 14, \$500 per day for days 15 to 30, and \$1,000 per day beyond 30 days until all
 9 such requirements are completed.

10 33. Reporting Requirements. The following stipulated penalties shall accrue per
 11 violation per Day for each violation of the reporting requirements of Section VI, and for each
 12 violation of the deadlines for submissions required by Paragraphs 13.b, f, .g, of this Consent
 13 Decree:

Penalty Per Violation Per Day	Period of Noncompliance
<u>\$250</u>	1st through 14th Day
<u>\$500</u>	15th through 30th Day
<u>\$1,000</u>	31st Day and beyond.

18 34. Stipulated penalties under this Section shall begin to accrue on the Day after
 19 performance is due or on the Day a violation occurs, whichever is applicable, and shall continue
 20 to accrue until performance is satisfactorily completed or until the violation ceases. Except as
 21 otherwise provided, stipulated penalties shall accrue simultaneously for separate violations of
 22 this Consent Decree.

23 35. The United States, or the District, or both, may seek stipulated penalties under this
 24 Section by sending a joint written demand to Defendant, or by either sovereign sending a written
 25 demand to the Defendant, with a copy simultaneously sent to the other Plaintiff. Either
 26 sovereign may waive stipulated penalties or reduce the amount of stipulated penalties it seeks, in
 27 the unreviewable exercise of its discretion and in accordance with this Paragraph. Where both
 28 sovereigns seek stipulated penalties for the same violation of this Consent Decree, Defendant

1 shall pay fifty percent to the United States and fifty percent to the District. Where only one
2 sovereign demands stipulated penalties for a violation, and the other sovereign does not join in
3 the demand within ten Days of receiving the demand, or timely joins in the demand but
4 subsequently elects to waive or reduce stipulated penalties for that violation, Defendant shall pay
5 the full stipulated penalties due for the violation to the sovereign making the demand less any
6 amount paid to the other sovereign.

7 36. Stipulated penalties shall continue to accrue as provided in Paragraph 52, during
8 any Dispute Resolution, but need not be paid until the following:

9 a. If the dispute is resolved by agreement or by a decision of EPA or the
10 District that is not appealed to the Court, Defendant shall pay accrued penalties determined to be
11 owing, together with interest, to the United States or the District, or to both, within 30 Days of
12 the effective date of the agreement or the receipt of EPA's or the State's decision or order.

13 b. If the dispute is appealed to the Court and the United States or the District
14 prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to
15 be owing, together with interest, within 60 Days of receiving the Court's decision or order,
16 except as provided in subparagraph c, below.

17 c. If any Party appeals the District Court's decision, Defendant shall pay all
18 accrued penalties determined to be owing, together with interest, within 15 Days of receiving the
19 final appellate court decision.

20 37. Defendant shall pay stipulated penalties owing to the United States in the manner
21 set forth and with the confirmation notice required by Paragraph 9, except that the transmittal
22 letter shall state that the payment is for stipulated penalties and shall state for which violation(s)
23 the penalties are being paid. Defendant shall pay stipulated penalties owing to the District in the
24 manner set forth and in Paragraph 11, except that the transmittal letter shall state that the
25 payment is for stipulated penalties and shall state for which violation(s) the penalties are being
26 paid.

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

1 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall
2 be construed to limit the United States or the District from seeking any remedy otherwise
3 provided by law for Defendant's failure to pay any stipulated penalties.

4 39. Subject to the provisions of Section XI of this Consent Decree (Effect of
5 Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree
6 shall be in addition to any other rights, remedies, or sanctions available to the United States for
7 Defendant's violation of this Consent Decree or applicable law. Where a violation of this
8 Consent Decree is also a violation of the Clean Air Act, the California Health and Safety Code
9 and District regulations, Defendants shall be allowed a credit, for any stipulated penalties paid,
10 against any statutory penalties imposed for such violation.

11 **VIII. FORCE MAJEURE**

12 40. "Force majeure," for purposes of this Consent Decree, is defined as any event
13 arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of
14 Defendant's contractors, that delays or prevents the performance of any obligation under this
15 Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that
16 Defendant exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate
17 any potential force majeure event and best efforts to address the effects of any such event (a) as it
18 is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the
19 greatest extent possible. "Force majeure" does not include Defendant's financial inability to
20 perform any obligation under this Consent Decree.

21 41. If any event occurs or has occurred that may delay the performance of any
22 obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant
23 shall provide notice orally or by electronic or facsimile transmission to Chief, Air Enforcement
24 Office (Air-5), Air Division, U.S. Environmental Protection Agency, Region IX, within 72 hours
25 of when Defendant first knew that the event might cause a delay. Within seven days thereafter,
26 Defendant shall provide in writing to EPA and the District an explanation and description of the
27 reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to
28 prevent or minimize the delay; a schedule for implementation of any measures to be taken to

1 prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such
2 delay to a force majeure event if it intends to assert such a claim; and a statement as to whether,
3 in the opinion of Defendant, such event may cause or contribute to an endangerment to public
4 health, welfare or the environment. Defendant shall include with any notice all available
5 documentation supporting the claim that the delay was attributable to a force majeure. Failure to
6 comply with the above requirements shall preclude Defendant from asserting any claim of force
7 majeure for that event for the period of time of such failure to comply, and for any additional
8 delay caused by such failure. Defendant shall be deemed to know of any circumstance of which
9 Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have
10 known.

11 42. If EPA, after a reasonable opportunity for review and comment by the District,
12 agrees that the delay or anticipated delay is attributable to a force majeure event, the time for
13 performance of the obligations under this Consent Decree that are affected by the force majeure
14 event will be extended by EPA, after a reasonable opportunity for review and comment by the
15 District, for such time as is necessary to complete those obligations. An extension of the time for
16 performance of the obligations affected by the force majeure event shall not, of itself, extend the
17 time for performance of any other obligation. EPA will notify Defendant in writing of the length
18 of the extension, if any, for performance of the obligations affected by the force majeure event.

19 43. If EPA, after a reasonable opportunity for review and comment by the District,
20 does not agree that the delay or anticipated delay has been or will be caused by a force majeure
21 event, EPA will notify Defendant in writing of its decision.

22 44. If Defendant elects to invoke the dispute resolution procedures set forth in Section
23 IX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any
24 such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the
25 evidence that the delay or anticipated delay has been or will be caused by a force majeure event,
26 that the duration of the delay or the extension sought was or will be warranted under the
27 circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and
28 that Defendant complied with the requirements of Paragraphs 40 and 41, above. If Defendant

1 carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the
2 affected obligation of this Consent Decree identified to EPA and the Court.

3 **IX. DISPUTE RESOLUTION**

4 45. Unless otherwise expressly provided for in this Consent Decree, the dispute
5 resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising
6 under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute
7 under this Section shall preclude Defendant from raising any such issue as a defense to an action
8 by the United States or the District to enforce any obligation of Defendant arising under this
9 Decree.

10 46. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under
11 this Consent Decree shall first be the subject of informal negotiations. The dispute shall be
12 considered to have arisen when Defendant sends the United States and the District a written
13 Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period
14 of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that
15 period is modified by written agreement. If the Parties cannot resolve a dispute by informal
16 negotiations, then the position advanced by the United States and the District shall be considered
17 binding unless, within 10 Days after the conclusion of the informal negotiation period,
18 Defendant invokes formal dispute resolution procedures as set forth below.

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

25 48. The United States and District shall serve their Statement of Position within 45
26 Days of receipt of Defendant's Statement of Position. The United States' and District's
27 Statement of Position shall include, but need not be limited to, any factual data, analysis, or
28 opinion supporting that position and any supporting documentation relied upon by them. The

1 United States' and District's Statement of Position shall be binding on Defendant, unless
2 Defendant files a motion for judicial review of the dispute in accordance with the following
3 Paragraph.

4 49. Defendant may seek judicial review of the dispute by filing with the Court and
5 serving on the United States and the District, in accordance with Section XIII of this Consent
6 Decree (Notices), a motion requesting judicial resolution of the dispute. The motion must be
7 filed within 10 Days of receipt of the United States' and District's Statement of Position pursuant
8 to the preceding Paragraph. The motion shall contain a written statement of Defendant's
9 position on the matter in dispute, including any supporting factual data, analysis, opinion, or
10 documentation, and shall set forth the relief requested and any schedule within which the dispute
11 must be resolved for orderly implementation of the Consent Decree.

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

15 51. Standard of Review

16 a. Disputes Concerning Matters Accorded Record Review. Except as
17 otherwise provided in this Consent Decree, in any dispute brought under Paragraph 47 pertaining
18 to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any
19 other items requiring approval by EPA and the District under this Consent Decree and all other
20 disputes that are accorded review on the administrative record under applicable principles of
21 administrative law, Defendant shall have the burden of demonstrating, based on the
22 administrative record, that the position of the United States and District is arbitrary and
23 capricious or otherwise not in accordance with law.

24 b. Other Disputes. Except as otherwise provided in this Consent Decree, in
25 any other dispute brought under Paragraph 47, Defendant shall bear the burden of demonstrating
26 that their position complies with this Consent Decree.

27 52. The invocation of dispute resolution procedures under this Section shall not, by
28 itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent

1 Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with
2 respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but
3 payment shall be stayed pending resolution of the dispute as provided in Paragraph 36. If
4 Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid
5 as provided in Section VII (Stipulated Penalties).

6 **X. INFORMATION COLLECTION AND RETENTION**

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

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

17 54. Until three years after the termination of this Consent Decree, Defendant, or its
18 successors or assigns, shall retain, and shall instruct their contractors and agents to preserve, all
19 non-identical copies of all documents, records, or other information (including documents,
20 records, or other information in electronic form) in their or their contractors' or agents'
21 possession or control, or that come into their or their contractors' or agents' possession or
22 control, and that relate in any manner to Defendant's performance of its obligations under this
23 Consent Decree. This information-retention requirement shall apply regardless of any contrary
24 corporate or institutional policies or procedures. At any time during this information-retention
25 period, upon request by the United States or the District, Defendant shall provide copies of any
26 documents, records, or other information required to be maintained under this Paragraph.

27 55. At the conclusion of the information-retention period provided in the preceding
28 Paragraph, Defendant shall notify the United States and the District at least 90 Days prior to the

1 destruction of any documents, records, or other information subject to the requirements of the
2 preceding Paragraph and, upon request by the United States or the District, Defendant shall
3 deliver any such documents, records, or other information to EPA or the District.

4 56. Defendant may assert that certain documents, records, or other information is
5 privileged under the attorney-client privilege or any other privilege recognized by federal law. If
6 Defendant asserts such a privilege, it shall provide the following: (1) the title of the document,
7 record, or information; (2) the date of the document, record, or information; (3) the name and
8 title of each author of the document, record, or information; (4) the name and title of each
9 addressee and recipient; (5) a description of the subject of the document, record, or information;
10 and (6) the privilege asserted by Defendant. However, no documents, records, or other
11 information created or generated pursuant to the requirements of this Consent Decree shall be
12 withheld on grounds of privilege.

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

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

22 **XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

23 59. Except as expressly provided for herein, this Consent Decree resolves the civil
24 claims of the United States and the District against the Defendant for the violations alleged in the
25 Complaint filed in this action and in the Notices of Violation identified in Paragraphs 58 and 62
26 of that Complaint, copies of which are attached hereto as Exhibit A. For purposes of this
27 Paragraph and Paragraph 61, “Defendant” shall also mean NAES Corporation, a contractor for
28 the Defendant at the Facility at the time of the violations alleged in the Complaint.

1 60. The United States and the District reserve all legal and equitable remedies
2 available to enforce the provisions of this Consent Decree, except as expressly stated in
3 Paragraph 59. This Consent Decree shall not be construed to limit the rights of the United States
4 or the District to obtain penalties or injunctive relief under the Act or implementing regulations,
5 or under other federal or state laws, regulations, or permit conditions, except as expressly
6 specified in Paragraph 59. The United States and the District further reserve all legal and
7 equitable remedies to address any imminent and substantial endangerment to the public health or
8 welfare or the environment arising at, or posed by, Defendant's Facility, whether related to the
9 violations addressed in this Consent Decree or otherwise.

10 61. In any subsequent administrative or judicial proceeding initiated by the United
11 States or the District for injunctive relief, civil penalties, or other appropriate relief relating to the
12 Facility, Defendant shall not assert, and may not maintain, any defense or claim based upon the
13 principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim preclusion, claim-
14 splitting, or other defenses based upon any contention that the claims raised by the United States
15 or the District in the subsequent proceeding were or should have been brought in the instant case,
16 except with respect to claims that have been specifically resolved pursuant to Paragraph 59 of
17 this Section.

18 62. This Consent Decree is not a permit, or a modification of any permit, under any
19 federal, State, or local laws or regulations. Defendant is responsible for achieving and
20 maintaining complete compliance with all applicable federal, State, and local laws, regulations,
21 and permits; and Defendant's compliance with this Consent Decree shall be no defense to any
22 action commenced pursuant to any such laws, regulations, or permits, except as set forth herein.
23 The United States and the District do not, by their consent to the entry of this Consent Decree,
24 warrant or aver in any manner that Defendant's compliance with any aspect of this Consent
25 Decree will result in compliance with provisions of the Act, 42 U.S.C. § 7401 *et seq.*, or with any
26 other provisions of federal, State, or local laws, regulations, or permits.

27 63. This Consent Decree does not limit or affect the rights of Defendant or of the
28 United States or the District against any third parties, not party to this Consent Decree, except as

1 to those matters addressed in Paragraph 59, nor does it limit the rights of third parties, not party
2 to this Consent Decree, against Defendant, except as otherwise provided by law.

3 64. This Consent Decree shall not be construed to create rights in, or grant any cause
4 of action to, any third party not a Party to this Consent Decree.

5 65. The resolution of civil claims for the violations alleged in the Complaint provided
6 by this Consent Decree and identified in Paragraph 59 is conditioned upon Defendant's payment
7 of the entirety of the Civil Penalty of Section IV of this Consent Decree. Failure of Defendant to
8 pay the entirety of the Civil Penalty, and any interest and stipulated penalties due thereon, within
9 120 days of the Effective Date shall nullify any effect of the Settlement contained in Paragraph
10 59, including as to NAES Corporation, and such non-payment expressly provides Plaintiffs with
11 the right to seek penalties, injunctive relief, and any other relief provided by law, for the past
12 violations alleged in the Complaint.

13 **XII. COSTS**

14 66. The Parties shall bear their own costs of this action, including attorneys' fees,
15 except that the United States and the District shall be entitled to collect the costs (including
16 attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any
17 stipulated penalties due but not paid by Defendant.

18 **XIII. NOTICES**

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

22 To the United States:

23 Chief, Environmental Enforcement Section
24 Environment and Natural Resources Division
25 Attn: Andrew Ingersoll
26 U.S. Department of Justice
27 Box 7611 Ben Franklin Station
28 Washington, D.C. 20044-7611
Re: DOJ No. [90-5-2-1-09903]

1 and

2 David Kim, ORC-3
3 U.S. Environmental Protection Agency
4 Region IX
5 75 Hawthorne Street
6 San Francisco, California 94105

7 To EPA:

8 Director, Air Division (AIR-1)
9 U.S. Environmental Protection Agency, Region IX
10 75 Hawthorne Street
11 San Francisco, CA 94105
12 Attn: Mark Sims, AIR-5

13 To the District:

14 District Counsel's Office
15 San Joaquin Valley Unified Air Pollution Control District
16 1990 E. Gettysburg Avenue
17 Fresno, CA 93726

18 To Defendant:

19 c/o Cohen Tauber Spievack & Wagner P.C.
20 420 Lexington Avenue - Suite 2400
21 New York, New York 10170
22 ATTN: Robert A. Boghosian, Esq.

23 and

24 Eric Bomgardner
25 Plant Manager
26 NAES Corporation
27 16427 Avenue 24 1/2
28 Chowchilla, CA 93610

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

69. 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.

1 **XIV. EFFECTIVE DATE**

2 70. The Effective Date of this Consent Decree shall be the date upon which this
3 Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted,
4 whichever occurs first, as recorded on the Court's docket.

5 **XV. RETENTION OF JURISDICTION**

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

10 **XVI. MODIFICATION**

11 72. The terms of this Consent Decree, including any attached appendices, may be
12 modified only by a subsequent written agreement signed by all the Parties. Where the
13 modification constitutes a material change to this Decree, it shall be effective only upon approval
14 by the Court.

15 73. Any disputes concerning modification of this Decree shall be resolved pursuant to
16 Section IX of this Decree (Dispute Resolution), provided, however, that, instead of the burden of
17 proof provided by Paragraph 51, the Party seeking the modification bears the burden of
18 demonstrating that it is entitled to the requested modification in accordance with Federal Rule of
19 Civil Procedure 60(b).

20 **XVII. TERMINATION**

21 74. After Defendant has completed the requirements of Section V (Compliance
22 Requirements) of this Decree, has thereafter maintained continuous satisfactory compliance with
23 this Consent Decree through the first eight full consecutive calendar quarters following Restart
24 of the Facility, and has paid the civil penalty and any accrued interest and stipulated penalties as
25 required by this Consent Decree, Defendant may serve upon the United States and the District a
26 Request for Termination, stating that Defendant has satisfied those requirements, together with
27 all necessary supporting documentation.
28

1 75. Following receipt by the United States and the District of Defendant's Request for
2 Termination, the Parties shall confer informally concerning the Request and any disagreement
3 that the Parties may have as to whether Defendant has satisfactorily complied with the
4 requirements for termination of this Consent Decree. If the United States, after consultation with
5 the District, agrees that the Decree may be terminated, the Parties shall submit, for the Court's
6 approval, a joint stipulation terminating the Decree.

7 76. If the United States, after consultation with the District, does not agree that the
8 Decree may be terminated, Defendant may invoke Dispute Resolution under Section IX of this
9 Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding
10 termination, under Paragraph 47 of Section IX, until 30 days after service of its Request for
11 Termination.

12 **XVIII. PUBLIC PARTICIPATION**

13 77. This Consent Decree shall be lodged with the Court for a period of not less than
14 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States
15 reserves the right to withdraw or withhold its consent if the comments regarding the Consent
16 Decree disclose facts or considerations indicating that the Consent Decree is inappropriate,
17 improper, or inadequate. Defendant consents to entry of this Consent Decree without further
18 notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to
19 challenge any provision of the Decree, unless the United States has notified Defendant in writing
20 that it no longer supports entry of the Decree.

21 **XIX. SIGNATORIES/SERVICE**

22 78. Each undersigned representative of Defendant, the District and the Assistant
23 Attorney General for the Environment and Natural Resources Division of the Department of
24 Justice, certifies that he or she is fully authorized to enter into the terms and conditions of this
25 Consent Decree and to execute and legally bind the Party he or she represents to this document.

26 79. This Consent Decree may be signed in counterparts, and its validity shall not be
27 challenged on that basis. Defendant agrees to accept service of process by mail with respect to
28 all matters arising under or relating to this Consent Decree and to waive the formal service

1 requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any
2 applicable Local Rules of this Court including, but not limited to, service of a summons.

3 **XX. INTEGRATION**

4 80. This Consent Decree constitutes the final, complete, and exclusive agreement and
5 understanding among the Parties with respect to the settlement embodied in the Decree and
6 supersedes all prior agreements and understandings, whether oral or written, concerning the
7 settlement embodied herein. Other than deliverables that are subsequently submitted and
8 approved pursuant to this Decree, no other document, nor any representation, inducement,
9 agreement, understanding, or promise, constitutes any part of this Decree or the settlement it
10 represents, nor shall it be used in construing the terms of this Decree.

11 **XXI. FINAL JUDGMENT**

12 81. Upon approval and entry of this Consent Decree by the Court, this Consent
13 Decree shall constitute a final judgment of the Court as to the United States, the District, and
14 Defendant. The Court finds that there is no just reason for delay and therefore enters this
15 judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

16 SO ORDERED.

17 Dated and entered this __ day of _____, _____.

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20 _____
21 []

22 UNITED STATES DISTRICT JUDGE
23 Eastern District of California
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28

1 FOR PLAINTIFF UNITED STATES OF AMERICA:
2

3
4 DATE: _____

ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
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7

8
9 2/14/2011
10 DATE: _____

ANDREW W. INGERSOLL
Trial Attorney
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: (202) 305-0312
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1 FOR PLAINTIFF UNITED STATES OF AMERICA (continued):

2
3 1/13/11
4 DATE: /

JARED BLUMENFELD
Regional Administrator
United States Environmental Protection Agency, Region IX

5
6
7
8 1/13/11
9 DATE: /

CYNTHIA V. GILES
Assistant Administrator for Enforcement
and Compliance Assurance
United States Environmental Protection Agency

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12
13 OF COUNSEL:
14 DAVID KIM
15 Assistant Regional Counsel
16 U.S. Environmental Protection Agency, Region IX
17 75 Hawthorne Street
18 San Francisco, California 94105
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28

1 FOR PLAINTIFF SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL
2 DISTRICT:

3
4 _____
DATE:

PHILIP M. JAY
District Counsel
San Joaquin Valley Unified Air Pollution Control District

5
6
7 _____
8 DATE:

SEYED SADREDIN
Executive Director
San Joaquin Valley Unified Air Pollution Control District

1 FOR DEFENDANT MERCED POWER, LLC:

2
3 12/28/2010
4 DATE:

ERIC SHUMWAY
Chief Operating Officer
Merced Power, LLC

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