

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA**

UNITED STATES OF AMERICA)	
)	
and)	
)	
STATE OF WEST VIRGINIA, by and through)	
the WEST VIRGINIA DEPARTMENT OF)	
ENVIRONMENTAL PROTECTION)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	
)	
MESSER LLC)	
)	
<i>Defendant.</i>)	
)	
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Civil Action No. 5:23-CV-233

CONSENT DECREE

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I. INTRODUCTION

A. Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), and the State of West Virginia (“State”), by and through the West Virginia Department of Environmental Protection (“WVDEP”), have filed a complaint in this action concurrently with this Consent Decree, alleging that Defendant Messer LLC (“Defendant”) violated the conditions and limitations of a National Pollutant Discharge Elimination System (“NPDES”) permit issued to Defendant pursuant to Section 402(b) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1342(b), as well as W. Va. Code §§ 22-11-6 and 22-11-8, at its industrial gas manufacturing facility located at 616 Dry Run Road, New Cumberland, West Virginia 26047.

B. The Complaint alleges that Defendant has violated effluent limitations in its NPDES permit on 186 occasions since February 2016.

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

D. 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 among 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 II (Jurisdiction and Venue), and with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

II. 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 309(b) of the CWA, 33 U.S.C. § 1319(b), and over the Parties.

2. Venue lies in this District pursuant to Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391 and 1395(a), because it is the judicial district in which Defendant is doing business and in which the claims alleged in the Complaint occurred. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

3. This Court has supplemental jurisdiction over the WVDEP claims alleged in the Complaint pursuant to 28 U.S.C. § 1367(a) because the WVDEP claims are so related to the federal claims as to form part of the same case or controversy.

4. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to Sections 309(b) and (d) of the CWA, 33 U.S.C. §§ 1319(b) and (d), and W. Va. Code §§ 22-11-22.

III. APPLICABILITY

5. The obligations of this Consent Decree apply to and are binding upon the United States and the State, and upon 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 30 Days prior to such transfer, 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, the United States Department of Justice (“DOJ”), and the State in accordance with Section XIV (Notices). Any attempt to transfer ownership or operation of the Facility without complying with this Paragraph constitutes a violation of this Decree.

7. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents 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.

IV. DEFINITIONS

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

- a. “Complaint” means the complaint filed by the United States and the State in this action.
- b. “Consent Decree” or “Decree” means this Decree and all appendices attached hereto (listed in Section XXV).
- c. “Copper Treatment System” means the treatment system for the Facility described in Appendix B.

- d. “Day” means a calendar day unless expressly stated to be a business day. In computing any period of time for a deadline under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period runs until the close of business of the next business day.
- e. “Daily Violation” means any exceedance of a maximum daily discharge limitation, as identified by a DMR Sample, for any parameters (except copper) set forth in the NPDES permit applicable to the Facility.
- f. “Daily Copper Violation” means any exceedance of a maximum daily discharge limitation for copper, as identified by a DMR Sample set forth in the NPDES permit applicable to the Facility.
- g. “Defendant” means Messer LLC.
- h. “Diagnostic Sampling” means sampling conducted by the Defendant to determine necessary treatment measures and/or to evaluate the effectiveness of response actions taken. Such sampling of discharges need not occur at Outfall 001, which is the location designated for required sampling pursuant to the Facility’s NPDES permit.
- i. “Discharge Monitoring Report Sample” or “DMR Sample” means a sample required to be taken under the Facility’s NPDES permit but does not include samples collected during Diagnostic Sampling.
- j. “DOJ” means the United States Department of Justice and any of its successor departments or agencies.
- k. “EPA” means the United States Environmental Protection Agency and any of its successor departments or agencies.

- l. “Effective Date” means the definition provided in Section XV.
- m. “Effluent Limit Violation” means a Daily Violation or a Monthly Violation.
- n. “Facility” means Defendant’s industrial gas manufacturing facility located at 616 Dry Run Road, New Cumberland, West Virginia.
- o. “IEIP” means the inspection process for stormwater compliance at the Facility discussed in Paragraphs 28–32.
- p. “IE Inspection” means the monthly inspections for stormwater compliance at the Facility discussed in Paragraphs 28–32.
- q. “IE Inspection Checklists” mean the checklists for monthly inspections for stormwater compliance at the Facility discussed in Paragraphs 28–32.
- r. “Monthly Violation” means any exceedance, as determined by a DMR Sample, of an average monthly discharge limitation for any parameters (except copper) set forth in an NPDES permit applicable to the Facility calculated as the sum of all daily DMR samples collected during a calendar month divided by the number of daily DMR samples collected during the month.
- s. “Monthly Copper Violation” means any exceedance, as determined by a DMR Sample, of an average monthly discharge limitation for the copper parameter set forth in an NPDES permit applicable to the Facility calculated as the sum of all daily DMR samples collected during a calendar month divided by the number of daily DMR samples collected during the month.

- t. “NPDES” means the National Pollutant Discharge Elimination System defined in 40 C.F.R. § 122.2, applicable state regulations and any State-issued NPDES permit.
- u. “Paragraph” means a portion of this Decree identified by an Arabic numeral.
- v. “Parties” means the United States, the State, and Defendant.
- w. “Section” means a portion of this Decree identified by a Roman numeral.
- x. “State” means the State of West Virginia, by and through the West Virginia Department of Environmental Protection.
- y. “TCTS” means the Temporary Copper Treatment System for the Facility described in Appendix C.
- z. “United States” means the United States of America, acting on behalf of EPA.
- aa. “WVDEP” means the West Virginia Department of Environmental Protection.

V. CIVIL PENALTY

10. Within 30 Days after the Effective Date, Defendant shall pay the sum of \$1,900,000 as a civil penalty (the “Civil Penalty”), together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging. The Civil Penalty will be divided between the United States and the State as specified below.

11. Defendant shall pay half of the Civil Penalty (\$950,000), together with interest, to the United States by FedWire Electronic Funds Transfer (“EFT”) to the DOJ account, in accordance with instructions provided to Defendant by the Financial Litigation Unit (“FLU”) of

the United States Attorney's Office for the Northern District of West Virginia after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System ("CDCS") number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Gabriela Redondo
Treasurer, Americas Financial Services
Gabriela.Redondo@messer-us.com
Messer Americas
200 Somerset Corporate Blvd., Suite 7000
Bridgewater, NJ 08807, USA
Office Work Number: +1-908-771-1433
Cellular: +1-908-656-4800

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to DOJ and EPA in accordance with Section XIV (Notices).

12. At the time of payment to the United States, Defendant shall send notice that payment has been made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov, to the Regional Hearing Clerk at R3_Hearing_Clerk@epa.gov, and in accordance with Section XIV; and (ii) to DOJ via email in accordance with Section XIV. Such notice shall state that the payment is for the Civil Penalty owed pursuant to the Consent Decree in *United States and State of West Virginia, by and through the West Virginia Department of Environmental Protection, v. Messer LLC*, and shall reference the civil action number, CDCS Number, and DOJ case number 90-5-1-1-12590.

13. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VIII (Stipulated Penalties) in calculating its federal or State or local income tax.

14. Defendant shall pay the other half of the Civil Penalty (\$950,000), together with interest, to WVDEP by Wire transfer in accordance with instructions provided by the WVDEP Accounts Receivable unit.

15. At the time of payment to the WVDEP, Defendant shall send notice that payment has been made to gregory.l.null@wv.gov and kimberly.a.scott@wv.gov. Such notice shall state that the payment is for the Civil Penalty owed pursuant to the Consent Decree in *United States and State of West Virginia, by and through the West Virginia Department of Environmental Protection, v. Messer LLC*, and shall reference the civil action number, CDCS Number, and DOJ case number 90-5-1-1-12590.

VI. COMPLIANCE REQUIREMENTS

A. General Compliance Requirements

16. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Consent Decree, EPA, after consultation with the State, will in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

17. If the submission is approved pursuant to Paragraph 16(a), Defendant shall take all actions required by the plan, report, or other document, in accordance with the schedules and requirements of the plan, report, or other document, as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 16(b) or (c), Defendant shall, upon written direction from EPA, after consultation with the State, take all actions required by the approved plan, report, or other item that EPA, after consultation with the State, determines are technically severable from any disapproved portions.

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

19. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA, after consultation with the State, may again require Defendant to correct any deficiencies, in accordance with the preceding Paragraphs.

20. If Defendant elects to invoke Dispute Resolution as set forth in Section X (Dispute Resolution) concerning a decision by EPA to disapprove, approve upon specified conditions, or modify a deliverable, Defendant shall do so by sending a Notice of Dispute in accordance with Paragraph 60 within 30 Days (or such other time as the Parties agree to in writing) after receipt of the applicable decision.

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

22. No later than 30 Days from the Effective Date, Defendant shall submit to EPA and the State for review a list of deadlines included in this Consent Decree. For any deliverable required by the Consent Decree, the list shall indicate whether EPA and State approval is

required. The list shall be in substantially the same form as Appendix A and shall be submitted in an electronic format (e.g., unlocked spreadsheet or similar format agreed to by the Parties).

Within 10 Days of modification of any deadline under this Consent Decree, Defendant shall provide an updated list reflecting changes to the future schedule. In the event of conflict between the list generated pursuant to this Paragraph and the Consent Decree, the Consent Decree shall control.

23. Permits. Where any compliance obligation under Section VI requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

Defendant may seek relief under the provisions of Section IX (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

B. Effluent Limitation Violation Response

24. Upon the Effective Date, Defendant shall implement a response plan for Effluent Limit Violations, which shall provide for investigation of Effluent Limit Violations and implementation of actions necessary to achieve compliance with the applicable NPDES permit limits. This response plan shall include, at a minimum, the following for Outfall 001:

a. Daily Violation Response

- (1) Upon notification of a Daily Violation or a Daily Copper Violation at the Facility, Defendant shall immediately investigate and correct the cause of the violation using such tools as Diagnostic Sampling and supplemental treatment of wastewater as needed.

- (2) Upon notification of a second Daily Violation and any subsequent Daily Violation(s) of any non-copper parameters at Outfall 001 within three months of a previous Daily Violation, Defendant shall continue its investigative and corrective actions until one compliant DMR Sample result for that parameter is achieved at Outfall 001.
- (3) Upon notification of a second Daily Copper Violation and any subsequent Daily Copper Violation at Outfall 001 within three months of a previous Daily Copper Violation, Defendant shall consult with a third-party consultant with substantial expertise in CWA compliance and in treatment systems for and control of copper and implement measures recommended by that individual. In addition, Defendant shall continue Diagnostic Sampling until two consecutive daily compliant DMR Sample results for that parameter are achieved at Outfall 001.

b. Monthly Violation Response

- (1) Upon notification of a Monthly Violation or a Monthly Copper Violation, Defendant shall immediately investigate and correct the cause of the violation using such tools as Diagnostic Sampling and supplemental treatment of wastewater as needed.
- (2) Upon notification of the second consecutive Monthly Violation and any subsequent consecutive Monthly Violation of any non-copper parameters at Outfall 001, Defendant shall continue its

investigative and corrective actions until Outfall 001 meets the average monthly discharge limit.

- (3) Upon notification of the second consecutive Monthly Copper Violation and any subsequent consecutive Monthly Copper Violation at Outfall 001, Defendant shall consult with an individual with substantial expertise in CWA compliance and in treatment systems for and control of copper and implement measures recommended by that individual, including potential reevaluation of the Copper Treatment System and/or need for revised treatment approach. In addition, Defendant shall continue Diagnostic Sampling until Outfall 001 meets the average monthly discharge limit for two consecutive months.

C. Copper Treatment System Requirements

25. Defendant shall undertake a commissioning and calibration period for the permanent treatment system and thereafter operate the new permanent treatment system as described in Appendix B (collectively referred to as the “Copper Treatment System”) to treat cooling water blowdown that is currently discharged via Outfall 001 at the Facility.

26. Until the Copper Treatment System is in full operation after the commissioning and calibration period, Defendant shall continue to operate the Temporary Copper Treatment System (“TCTS”) described in Appendix C to this Consent Decree.

27. Copper Treatment System Compliance Milestones. Defendant will complete the commissioning and calibration period for the Copper Treatment System consistent with the schedule included in Appendix A.

D. Stormwater Compliance Requirements

28. SWPPP Internal Environmental Inspections. Within 90 Days of the Effective Date, Defendant shall submit for EPA and WVDEP review and approval an updated Stormwater Pollution Prevention Plan (“SWPPP”) with a description of all best management practices (“BMPs”) for NPDES permit stormwater compliance. The SWPPP shall include (1) written internal environmental inspection processes and (2) checklists, for the implementation of a monthly Internal Environmental Inspection Process (“IEIP”) at the Facility for stormwater compliance.

29. Beginning with the first full calendar month after EPA and WVDEP approval of the SWPPP, Defendant shall initiate monthly inspections for stormwater compliance that will include, at a minimum, an evaluation of each item provided in Paragraph 30, below (“IE Inspections”). IE Inspections required by this Section may be conducted by the Defendant or by a contractor hired by Defendant.

30. IE Inspection Checklists shall include entries for whether:
- a. Collection, storage and treatment system are in good repair;
 - b. Collection, storage and treatment systems are being properly maintained;
 - c. Paperwork and reports are being maintained;
 - d. Required monitoring under the Facility’s NPDES permit and this Consent Decree has been conducted;
 - e. Required notification have been made as a required under the Facility’s NPDES permit;
 - f. Any limitation under any applicable NPDES permit, the CWA, or West Virginia Water Pollution Control Act has been exceeded during the prior month;

- g. All BMPs are being followed; and
- h. All BMPs are properly maintained and functioning.

The IE Inspection Checklist shall be completed at time of each inspection and signed by the individual(s) completing the inspection.

31. Defendant shall submit the IE Inspection Checklist with the quarterly reports required under Section VII (Reporting Requirements). Each IEIP report shall:

- a. Summarize the results of the IE Inspections for the previous reporting period, including any noncompliance with any environmental law or other areas of concern identified;
- b. Summarize actions taken in response to any noncompliance or areas of concern identified by the IE Inspections, including dates completed or deadlines for completion of any ongoing actions; and
- c. Include copies of all completed IE Inspection Checklists for the previous reporting period.

32. The inspections required by this Consent Decree shall not obviate any other inspection requirements at the Facility.

VII. REPORTING REQUIREMENTS

33. By July 31st, October 31st, and January 31st, and April 30th of each year after the lodging of this Consent Decree, until termination of this Decree pursuant to Section XVIII (Termination), Defendant shall submit to EPA, DOJ, and the State by email a quarterly report for the preceding three (3) months.

- a. The report shall include:
 - (1) the status of any construction or compliance measures;
 - (2) completion of milestones;

- (3) a description of Effluent Limitation Violation Response actions taken pursuant to Paragraph 24;
 - (4) IE Inspection Checklist for the previous reporting period as set forth in Paragraphs 28–31;
 - (5) problems encountered or anticipated, together with implemented or proposed solutions;
 - (6) status of permit applications; and
 - (7) operation and maintenance.
- b. The report shall also include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the violation’s likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall so state in the report. Defendant shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 45 Days of the Day Defendant becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section IX (Force Majeure).

34. Whenever any violation of this Consent Decree or of any applicable permits 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, Defendant shall notify EPA at the email address provided in Section XIV (Notices), and the State by contacting Jeremy Bandy, Chief

Inspector via telephone at 304-926-0488 ext. 43894 and by email at jeremy.w.bandy@wv.gov as soon as possible, but no later than 24 hours after Defendant first knew of the violation or event.

This procedure is in addition to the requirements set forth in Paragraph 33.b.

35. Each report submitted by Defendant under this Section shall be signed by an official of the submitting party (which shall include a plant manager or his designee) and include the following certification:

I certify under penalty of perjury 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 have no personal knowledge that the information submitted is other than 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.

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

37. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the CWA or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

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

VIII. STIPULATED PENALTIES

39. Defendant shall be liable for stipulated penalties to the United States and the State for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all

applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

40. Late Payment of Civil Penalty. If Defendant fails to pay the civil penalty required to be paid under Section V (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$1,000 per Day for each Day that the payment is late.

41. Effluent Limit Violations, NPDES Permit No. WV0049361 Outfall 001. The following stipulated penalties shall accrue against Defendant per violation for each violation of any effluent limit contained in NPDES Permit No. WV0049361 Outfall 001, that occurs after the date of lodging:

<u>Penalty Per Violation</u>	<u>Period of Noncompliance</u>
\$2,250	Daily Violation
\$4,500	Monthly Violation
\$3,750	Daily Copper Violation
\$6,500	Monthly Copper Violation

42. Compliance Milestones. The following stipulated penalties shall accrue per violation per Day for each violation of any requirement identified in Paragraph 27:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,500	1st through 14th Day
\$1,875	15th through 30th Day
\$2,750	31st Day and beyond

43. Other Compliance Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of Section VI (Compliance Requirements) of this Consent Decree not subject to a stipulated penalty pursuant to Paragraph 42:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$750	1st through 14th Day
\$1,125	15th through 30th Day
\$2,250	31st Day and beyond

44. Non-Compliance with Reporting and Information Collection and Retention Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of Section VII (Reporting Requirements) and Section XI (Information Collection and Retention) of this Consent Decree:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	Per Day of Violation

45. 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.

46. Defendant shall pay any stipulated penalty within 30 Days of receiving a written demand by either Plaintiff. Defendant shall pay 50 percent of the total stipulated penalty amount due to the United States and 50 percent to the State. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

47. Either Plaintiff may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

48. Stipulated penalties shall continue to accrue as provided in Paragraph 45, during any Dispute Resolution, but need not be paid until the following:

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

prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 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, together with interest, within 15 Days of receiving the final appellate court decision.

49. Defendant shall pay stipulated penalties owing to the United States in the manner set forth in Paragraph 11 and with the confirmation notices required by Paragraph 12, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

50. Defendant shall pay stipulated penalties owing to the State in the manner set forth in Paragraph 14 and with the notices requested in Paragraph 15, except that the transmittal email shall state that the payment is for stipulated penalties and shall state for which violations(s) the penalties are being paid.

51. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant 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 State from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

52. The payment of penalties and interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

53. Non-Exclusivity of Remedy. Stipulated penalties are not the Plaintiffs' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XII (Effect of Settlement/Reservation of Rights), each Plaintiff expressly reserves the right to seek any other relief it deems appropriate for Defendant's violation of this Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

IX. FORCE MAJEURE

54. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

55. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice EPA at the email address provided in Section XIV (Notices) and the State by contacting Jeremy Bandy, Chief Inspector via telephone at 304-926-0488 ext. 43894 and by email at jeremy.w.bandy@wv.gov, within 72 hours of when Defendant first knew that the event might cause a delay. Within seven Days thereafter, Defendant shall provide in writing to EPA

and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

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

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

58. If Defendant elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 Days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 54 and 55. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

X. DISPUTE RESOLUTION

59. 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 to enforce any obligation of Defendant arising under this Decree.

60. 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 DOJ, EPA, and the State a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 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, after consultation with the State, shall be considered binding unless, within ten Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

61. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by sending DOJ, EPA, and the State 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.

62. The United States, after consultation with the State, will send Defendant its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' 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. The United States' Statement of Position is binding on Defendant unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

63. Judicial Dispute Resolution. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States and the State a motion requesting judicial resolution of the dispute. The motion (a) must be filed within ten Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph; (b) may not raise any issue not raised in informal dispute resolution pursuant to Paragraph 60, unless the Plaintiffs raise a new issue of law or fact in the Statement of Position; (c) shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation; and, (d) shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

64. The United States, after consultation with the State, 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.

65. Standard of Review

- a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 61 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.
- b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 61, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

66. 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 48. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VIII (Stipulated Penalties).

XI. INFORMATION COLLECTION AND RETENTION

67. The United States, the State, 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 or the State 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;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant's compliance with this Consent Decree.

68. Upon request, Defendant shall provide EPA and the State or their authorized representatives splits of any samples taken by Defendant. Upon request, EPA and the State shall provide Defendant splits of any samples taken by EPA or the State.

69. 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 come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under 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 State, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

70. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States and the State 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 or the State, Defendant shall deliver any such documents, records, or other information to EPA or the State. Defendant may assert that certain documents, records, or other information is 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: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) 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.

71. 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.

72. 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 State 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.

XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

73. This Consent Decree resolves the civil claims of the United States and the State for the violations alleged in the Complaint filed in this action through the date of lodging.

74. The United States and the State 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 State 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 Paragraph 73. The United States and the State further reserve all legal and equitable remedies to address any conditions if there is or may be an imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, Defendant's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

75. In any subsequent administrative or judicial proceeding initiated by the United States or the State 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 State 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 73.

76. 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 State do not, by their 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 Clean Water Act, or with any other provisions of federal, State, or local laws, regulations, or permits.

77. This Consent Decree does not limit or affect the rights of Defendant or of the United States or the State 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.

78. 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.

XIII. COSTS

79. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the State shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the Civil Penalty or any stipulated penalties due but not paid by Defendant.

XIV. NOTICES

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

As to DOJ: eescdcopy.enrd@usdoj.gov
Re: DJ # 90-5-1-1-12590

As to EPA: R3_ORC_Mailbox@epa.gov
Re: 3RC40, United States, et al., v. Messer, LLC
Shane McAleer
mcaleer.shane@epa.gov

As to the State: Jeremy Bandy
jeremy.w.bandy@wv.gov
Brooke Hirst
brooke.hirst@wv.gov

As to Defendant: Philipp Sieber
phillip.sieber@messer-us.com
Richard Lingg
richard.lingg@messer-us.com
John Cermak
jcermak@cermaklegal.com
arroyo.environmental@messer-us.com

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

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

XV. EFFECTIVE DATE

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

XVI. RETENTION OF JURISDICTION

84. 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 X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

XVII. MODIFICATION

85. The terms of this Consent Decree, including any attached appendices, 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.

86. Any disputes concerning modification of this Decree shall be resolved pursuant to Section X (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 65, 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).

XVIII. TERMINATION

87. After Defendant has completed the requirements of Section VI (Compliance Requirements), has thereafter maintained satisfactory compliance with this Consent Decree and Defendant's NPDES permit for a period of 3 years, has complied with all other requirements of this Consent Decree, and has paid the Civil Penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States and the State a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

88. Following receipt by the United States and the State 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 after consultation with the State agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

89. If the United States after consultation with the State does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section X. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 60 Days after service of its Request for Termination.

XIX. PUBLIC PARTICIPATION

90. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States and the State each reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. 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 State has notified Defendant in writing that it no longer supports entry of the Decree.

XX. SIGNATORIES/SERVICE

91. Each undersigned representative of Defendant, of the State, and of the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice identified on the DOJ signature page below, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

92. 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. Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XXI. INTEGRATION

93. This Consent Decree, including deliverables that are subsequently approved pursuant to this Decree, constitutes the entire agreement among the Parties regarding the subject matter of the Decree and supersedes all prior representations, agreements and understandings, whether oral or written, concerning the subject matter of the subject matter of the Decree herein.

XXII. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

94. For purposes of the identification requirement in Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of Section III (Applicability), Paragraph 7; Section VI.A (General Compliance Requirements) Paragraphs 16–17 and 23; Section VI.B (Effluent Limitation Violation Response) Paragraph 24; Section VI.C (Copper Treatment System Requirements) Paragraphs 25–27 and related Appendices B–C; Section VI.D (Stormwater Compliance Requirements) Paragraphs 28–33; Section VII (Reporting Requirements) Paragraphs 34–36; Section XI (Information Collection and Retention) Paragraphs 67–70, is restitution, remediation, or required to come into compliance with law.

XXIII. HEADINGS

95. Headings to the Sections and Subsections of this Consent Decree are provided for convenience and do not affect the meaning or interpretation of the provisions of this Consent Decree.

XXIV. FINAL JUDGMENT

96. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States, the State, and Defendant.

XXV. APPENDICES

97. The following Appendices are attached to and part of this Consent Decree:
“Appendix A” is a spreadsheet with deadlines set forth in this Consent Decree;
“Appendix B” is a description of the Copper Treatment System;
and
“Appendix C” is a description of the TCTS.

Dated and entered this __ day of _____, 20__

UNITED STATES DISTRICT JUDGE

Signature Page to Consent Decree in *United States and West Virginia Department of Environmental Protection v. Messer LLC*, N.D. WV

FOR THE UNITED STATES OF AMERICA:

TODD KIM
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

NATHANIEL DOUGLAS
Deputy Section Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice

6/12/2023

Date



SYLVIA LAM
Trial Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
Washington, DC 20044-7611
Telephone: (202) 305-4903
Email: Sylvia.Lam@usdoj.gov

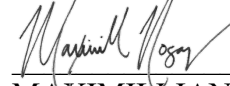
Signature Page to Consent Decree in *United States and West Virginia Department of Environmental Protection v. Messer LLC*, N.D. WV

FOR THE UNITED STATES OF AMERICA:

WILLIAM J. INHLENFELD, II
United States Attorney
Northern District of West Virginia

6/22/2023

Date



MAXIMILLIAN F. NOGAY
Assistant United States Attorney
W. Va. Bar # 13445
United States Attorney's Office
P.O. Box 591
1125 Chapline Street, Suite 3000
Wheeling, WV 26003
(304) 234-0100 office
(304) 234-0110 facsimile
Max.Nogay@usdoj.gov

Signature Page to Consent Decree in *United States and West Virginia Department of Environmental Protection v. Messer LLC*, N.D. WV

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

6/14/23

Date

ADAM ORTIZ

Digitally signed by ADAM
ORTIZ
Date: 2023.06.14 16:25:12
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ADAM ORTIZ
Regional Administrator
U.S. Environmental Protection Agency, Region III
Philadelphia, PA 19103-2029

6/12/23

Date

CECIL
RODRIGUES

Digitally signed by CECIL
RODRIGUES
Date: 2023.06.12 09:50:08
-04'00'

CECIL RODRIGUES
Regional Counsel
U.S. Environmental Protection Agency, Region III
Philadelphia, PA 19103-2029

5/1/23

Date

DOUGLAS
FRANKENTHALER

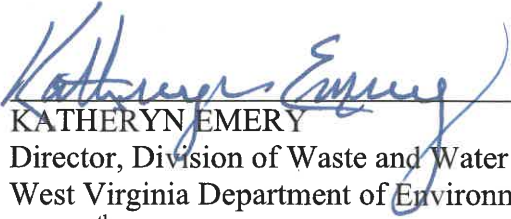
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FRANKENTHALER
Date: 2023.05.01 11:37:40
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DOUGLAS FRANKENTHALER
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region III
Philadelphia, PA 19103-2029

Signature Page to Consent Decree in *United States and West Virginia Department of Environmental Protection v. Messer LLC*, N.D. WV

FOR THE STATE OF WEST VIRGINIA:

5/4/2023
Date


KATHERYN EMERY
Director, Division of Waste and Water Management
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304


5/8/2023
Date


BROOKE HIRST
Attorney
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304
Telephone: 304-926-0499 ext. 41212
Email: brooke.hirst@wv.gov

Signature Page to Consent Decree in *United States and West Virginia Department of Environmental Protection v. Messer LLC*, N.D. WV

FOR MESSER LLC:

4/25/23
Date


BRIAN KENNEY
Executive Vice President, Operations
Messer Americas

Appendix A

U.S. and the State of West Virginia v. Messer, LLC

Appendix A

Consent Decree Implementation Schedule Messer Arroyo Facility New Cumberland, WV WV/NPDES Permit No. WV0049361		
Event	Completion in Days	Description
Effective Date of Consent Decree	0	Starting date
Update Stormwater Pollution Prevention Plan (SWPPP) (See Paragraph 28)	Within 90 days of the Effective Date	Update required to incorporate Consent Decree specific compliance requirements into the SWPPP
Quarterly Reports	January 31st April 30th July 31st October 31st	Of each year following lodging of the Consent Decree per Paragraph 33 of the CD. The first Quarterly Report will be due in the period following the CD's effective date.
Commissioning and Calibration of Copper Treatment System	Complete within 120 days of the Effective Date	Activity could commence prior to the Effective Date

Appendix B

U.S. and the State of West Virginia v. Messer, LLC

Appendix B
Copper Treatment System Description
Messer Arroyo Facility
New Cumberland, WV
WV/NPDES Permit No. WV0049361
February 2023

1.0 INTRODUCTION

This document describes the Copper Treatment System (CTS) designed to address copper impacts in the cooling tower blowdown effluent at the Messer LLC (Messer) Arroyo Facility (Facility) located at 616 Dry Run Road, New Cumberland, West Virginia (WV). The following sections describe the CTS process and process components. A process flow diagram is presented in **Figure B1**.

2.0 BACKGROUND

The Facility uses an evaporative cooling tower to discharge heat generated by the Facility's heat exchangers and compressors. Dust from the air results in the accumulation of particulates within the process water; a disinfectant (chlorine) is added to the cooling water in addition to dispersants and biocides to prevent fouling in the heat exchanger units. This process of evaporative cooling generates a concentrate (blowdown) which must be discharged to maintain system operation. In addition, the air compressors at the Facility generate condensate that is injected into the cooling water return and any contaminants are treated in the cooling tower blowdown.

The blowdown is regulated under a National Pollutant Discharge Elimination System (NPDES) permit for the facility. To meet the NPDES permit copper limitations for the Facility, a CTS was designed to remove copper from the blowdown discharge.

3.0 COPPER TREATMENT SYSTEM PROCESS SUMMARY

The CTS was designed with two primary treatment trains (Train 1 and Train 2) and consists of the following unit processes: cooling tower blowdown pre-treatment, two-stage granular activated

carbon (GAC), and one stage ion exchange. During typical system operation, a single train will operate continuously up to a peak flow of 80 gpm. During high flow system operation (when flow exceeds 80 gpm), both trains will operate in parallel and the control valves will balance the flow between trains. The cooling tower blowdown discharge flow rate will be adjusted via two control valves to maintain a specific conductivity set point in the cooling tower, an important operational parameter for cooling tower performance. Additionally, each individual treatment train is sized such that a single train can operate at a “high-high” flow rate of up to 120 gpm during short-term maintenance events (no more than a few days).

3.1 Cooling Tower Blowdown Pretreatment

To optimize the GAC media lifespan, pre-treatment of the blowdown water is required. These pre-treatment steps are described below.

3.1.1 Dechlorination

Excess chlorine can incidentally reduce the capacity of the GAC to bind organics. Therefore, when necessary, as dictated by chlorine type and dosage, a chlorine scavenger (sodium bisulfite) may be added before a static in-line mixer to transform the free chlorine into chloride, eliminating the free chlorine from the blowdown. The chlorine scavenger chemical reaction is instantaneous and renders the chlorine inert before it interacts with the GAC.

3.1.2 Bag filtration

The cooling tower blowdown contains particulate matter in the form of suspended solids. Therefore, the CTS is designed with two sets of duplex bag filters in series (four filters in total). Under nominal operating conditions, pre-filtration mitigates the need for backwashing the GAC units. Upset conditions, such as those with elevated suspended solids, or with carbon biofouling, may require proactive replacements of the filters to ensure continued operation.

3.2 GAC Treatment

The anti-corrosion agent used to prevent copper corrosion of the heat exchanger bundles also chelates or sequesters the minute amounts of free copper dissolved in the cooling water stream. This chelation creates an organometallic complex, which typically can readily adsorb on

GAC. Therefore, it is possible to remove copper from the discharge waste stream by selectively removing the organics in the waste stream. For this reason, liquid phase GAC was selected as the primary copper treatment media for the cooling tower discharge. Each train will be equipped with two 3000-pound GAC vessels plumbed in series in a lead/lag configuration. The plumbing will allow for easy backwashing and switching the vessel lead/lag configuration.

3.3 Ion exchange

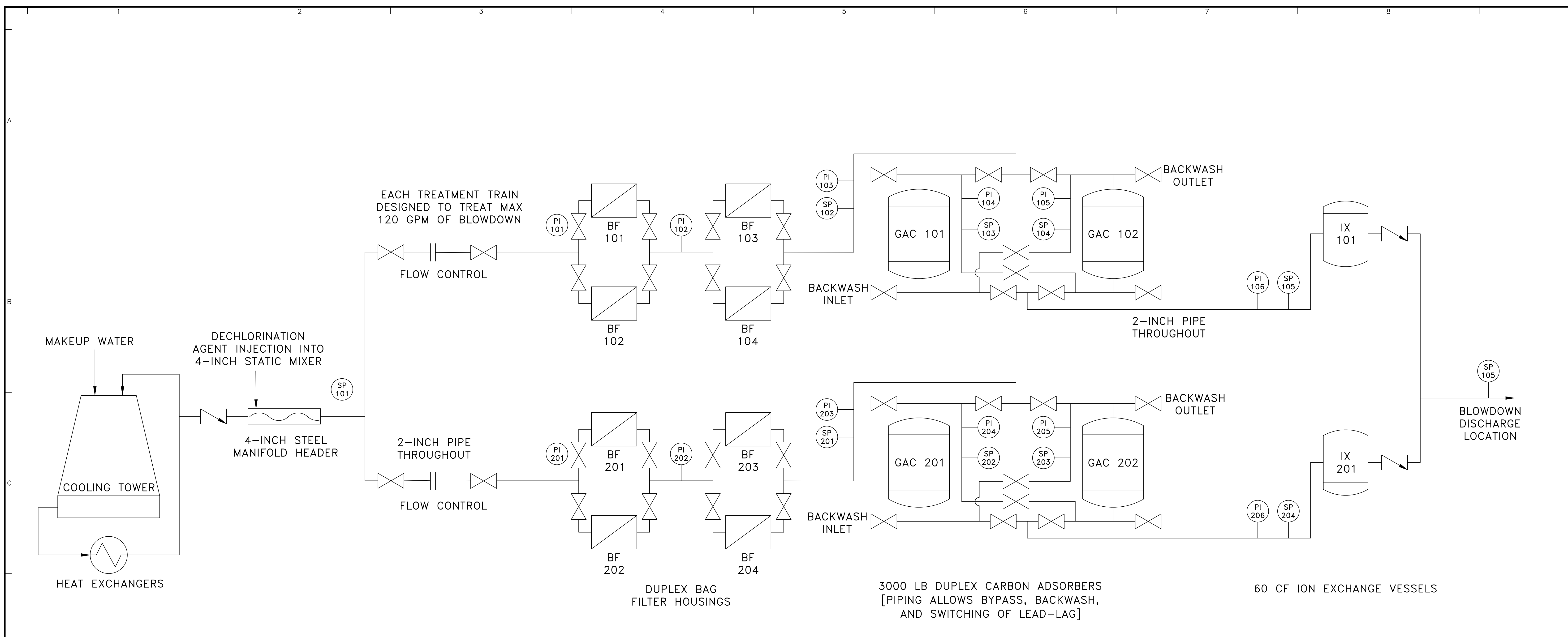
While it is expected that the anticorrosion agent will chelate nearly all the copper in the cooling tower blowdown, free copper may remain present in the water. Therefore, a single 60 cu. ft IX treatment vessel is included as a polishing step for the treatment system.

3.4 Discharge

At this time it is anticipated that treated effluent from the CTS will be discharged to the Facility's drainage swale that is located along the north and west sides of the Facility at a point above Outfall 001.

3.5 Location

The copper treatment system is located in the former boiler room of the Facility and is heated and insulated to protect the system from varying weather conditions.



EACH TREATMENT TRAIN DESIGNED TO TREAT MAX 120 GPM OF BLOWDOWN

LEGEND:
 BF BAG FILTER
 CF CUBIC FEET
 GAC GRANULAR ACTIVATED CARBON
 GPM GALLONS PER MINUTE
 IX ION EXCHANGE
 LB POUND
 PI PRESSURE INDICATOR
 SP SAMPLE PORT

NOTES:
 1. BLOWDOWN WILL BE PRE-TREATED BY A SET OF BAG FILTERS PRIOR TO TREATMENT BY THE GRANULAR ACTIVATED CARBON AND ION EXCHANGE SYSTEMS. TREATED WATER WILL BE DISCHARGED DIRECTLY TO AN EXISTING SUB-GRADE DISCHARGE PIPE.

 Langan Engineering and Environmental Services, Inc. 300 Kimball Drive Parsippany, NJ 07054 T: 973.560.4900 F: 973.560.4901 www.langan.com NJ CERTIFICATE OF AUTHORIZATION No. 24GA2786400	Project MESSER LLC ARROYO PLANT NEW CUMBERLAND HANCOCK WEST VIRGINIA	Drawing Title COPPER TREATMENT SYSTEM PROCESS FLOW DIAGRAM	Project No. 200145901	Drawing No. B1 Sheet 1 of 1
			Date 02/13/2023	
Drawn By AQ				
Checked By AQ/SA				

Appendix C

U.S. and the State of West Virginia v. Messer, LLC

**Appendix C:
Temporary Copper Treatment System Description
Messer Arroyo Facility
New Cumberland, WV
WV/NPDES Permit No. WV0049361
February 2023**

1.0 INTRODUCTION

This document describes the Temporary Copper Treatment System (TCTS) currently deployed to address copper impacts in the cooling tower blowdown effluent at the Messer LLC (Messer) - Arroyo Facility (Facility) located at 616 Dry Run Road, New Cumberland, West Virginia (WV). The following sections describe the TCTS process and provides the technical description for each selected process. A process flow diagram of the TCTS is presented in **Figure C1**.

2.0 BACKGROUND

The Facility uses an evaporative cooling tower to discharge heat generated by the Facility's heat exchangers and compressors. Dust from the air results in the accumulation of particulates within the process water; a disinfectant (chlorine) is added to the cooling water in addition to dispersants and biocides to prevent fouling in the heat exchanger units. This process of evaporative cooling generates a concentrate (blowdown) which must be discharged to maintain system operation. In addition, the air compressors at the Facility generate condensate that is injected into the cooling water return and any contaminants are treated in the cooling tower blowdown. This blowdown is regulated under a National Pollutant Discharge Elimination System (NPDES) permit for the facility.

In accordance with West Virginia Department of Environmental Protection Order 6999 Amendment No. 1, Messer was to comply with NPDES permit copper limitations by July 1, 2022. Supply chain disruptions during 2022 resulted in delays of the installation and start-up of a copper treatment system by the July 1, 2022, deadline. Therefore, Messer elected to instead install the TCTS, which is leased from contractor Clean Harbors, Inc. to address elevated copper impacts in the cooling tower blowdown until the copper treatment system is constructed.

3.0 TREATMENT PROCESS SUMMARY

The TCTS consists of the following unit processes: cooling tower blowdown pre-treatment, two stage granular activated carbon (GAC) units, and one stage ion exchange (IX). While the TCTS consists of a single treatment train, it includes two back-up GAC vessels and one back-up IX vessel. The TCTS operates using pressure from the cooling tower pumps and has a typical flow of 70 gpm. The cooling tower discharge flow rate is adjusted manually via a control valve to maintain a specific conductivity set point in the cooling tower. The TCTS is manually operated and monitored. It is regularly monitored for total flow treated, flowrate, pressure, and pressure drop across vessels.

3.1 Cooling Tower Blowdown Pretreatment

To optimize GAC media lifespan, pre-treatment of the blowdown water is required. These pre-treatment steps are described below.

3.1.1 Dechlorination

Excess chlorine can incidentally reduce the capacity of the GAC to bind organics. Therefore, a chlorine scavenger (sodium bisulfite) is added to the process flow to transform the free chlorine into chloride, eliminating the free chlorine from the discharge. The chlorine scavenger chemical reaction is instantaneous and renders the chlorine inert before it interacts with the GAC.

3.1.2 Bag filtration

The cooling tower contains particulate matter in the form of suspended solids. The TCTS operates with four stages of bag filters with progressive smaller pore sizes in series. The bag filter fouling rate appears to vary based on the local air quality conditions (dust, pollen, etc.). Elevated suspended solids or GAC clogging may require proactive replacements of the filters to ensure continued operation.

3.2 GAC Treatment

The anti-corrosion agent used to prevent copper corrosion of the heat exchanger bundles also

chelates or sequesters the minute amounts free copper dissolved in the cooling water stream. This chelation creates an organometallic complex, which typically can readily adsorb on GAC. Therefore, it is possible to remove copper from the discharge waste stream by selectively removing the organics in the waste stream. For this reason, liquid phase GAC was selected as the primary copper treatment media for the cooling tower discharge. The TCTS is equipped with two 2000-pound GAC vessels piped in series in a lead/lag configuration. Two spare standby vessels filled with GAC are maintained on-site to maximize operation TCTS operation time.

3.3 Ion exchange

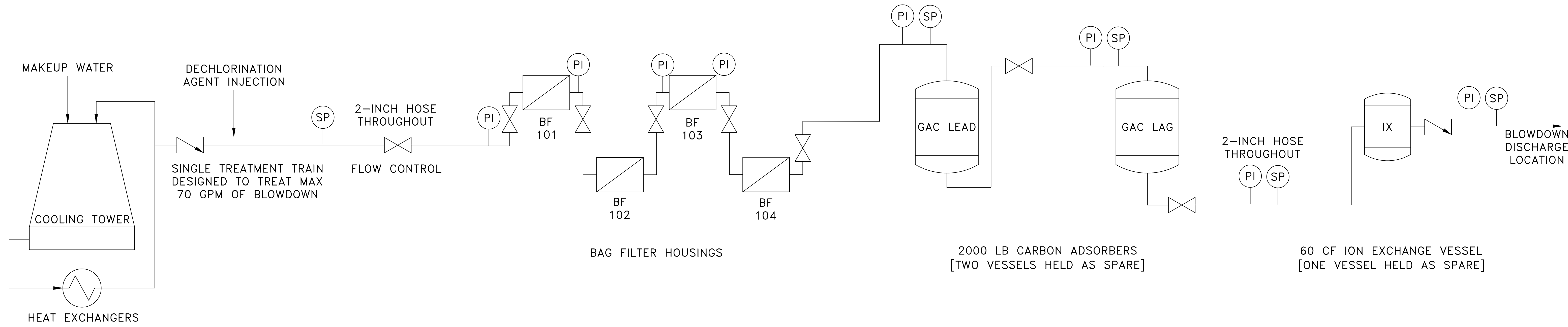
While it is expected that the anticorrosion agent will chelate nearly all the copper in the cooling tower blowdown, free copper may remain present in the water. Therefore, a single 60 cubic foot IX treatment vessel is included as a polishing step for the TCTS.

3.4 Discharge

Treated effluent from the system is discharged at the upper section of the Facility's drainage swale that is located along the north and west sides of the Facility and leads to Outfall 001.

3.5 Location

The TCTS is located outside and next to the cooling tower. The TCTS is constructed with temporary infrastructure (e.g., hoses rather than metal pipes). It is protected from weather and freezing in a temporary tent. When necessary, space heaters are used to further prevent cold temperatures and freezing.



LEGEND:

BF BAG FILTER
 CF CUBIC FEET
 GAC GRANULAR ACTIVATED CARBON
 GPM GALLONS PER MINUTE
 IX ION EXCHANGE
 LB POUND
 PI PRESSURE INDICATOR
 SP SAMPLE PORT

NOTES:

1. BLOWDOWN IS PRE-TREATED BY A DECHLORINATION AGENT AND A SERIES OF BAG FILTERS PRIOR TO TREATMENT BY THE GRANULAR ACTIVATED CARBON AND ION EXCHANGE SYSTEMS. TREATED WATER IS DISCHARGED TO THE UPPER SWALE.

 Langan Engineering and Environmental Services, Inc. 300 Kimball Drive Parsippany, NJ 07054 T: 973.560.4900 F: 973.560.4901 www.langan.com NJ CERTIFICATE OF AUTHORIZATION No. 24GA27896400	Project MESSER LLC ARROYO PLANT NEW CUMBERLAND WEST VIRGINIA HANCOCK	Drawing Title TEMPORARY TREATMENT SYSTEM PROCESS FLOW DIAGRAM	Project No. 200145901	C1 Sheet 1 of 1
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Checked By AQ/SA				