

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI**

UNITED STATES OF AMERICA and	)	
STATE OF MISSOURI	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	Civil No. 16-206
	)	
LONE STAR INDUSTRIES, INC.	)	
	)	
Defendant.	)	
	)	

**CONSENT DECREE**

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WHEREAS Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (EPA), and the State of Missouri, on behalf of the Missouri Department of Natural Resources, have, simultaneously with the lodging of this Consent Decree, filed a Complaint against Defendant Lone Star Industries, Inc. (Lone Star or Defendant), pursuant to Sections 113(b) of the Clean Air Act (Clean Air Act or CAA), 42 U.S.C. §§ 7413(b), for violations of one or more of the following statutory and regulatory requirements of the CAA at Defendant's Portland cement kiln in Cape Girardeau, Missouri (Cape Girardeau Kiln): the Prevention of Significant Deterioration (PSD) provisions of the CAA, 42 U.S.C. §§ 7470-7492; the nonattainment New Source Review (nonattainment NSR) provisions of the CAA, 42 U.S.C. §§ 7501-7515; the federally-approved and enforceable state implementation plans (SIPs), which incorporate and/or implement the above-listed federal PSD and/or nonattainment NSR requirements; Title V of the CAA, 42 U.S.C. §§ 7661-7661f; and Title V's implementing federal and state regulations;

WHEREAS, this Consent Decree sets forth injunctive relief in which Defendant has agreed to substantially reduce its emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) from the Cape Girardeau Kiln in such a manner that would resolve Defendant's alleged violations of the PSD and Title V requirements of the CAA;

WHEREAS, the United States has provided notice of the violations alleged herein to the Defendant and to the State of Missouri, pursuant to Sections 113(a) and (b) of the CAA, 42 U.S.C. § 7413(a) and (b), and Defendant stipulates that it has received actual notice of the violations alleged in the Complaint and that it does not contest the adequacy of the notice provided;

WHEREAS, Defendant does not admit that it has any liability to the United States or the State of Missouri arising out of the transactions and occurrences alleged in the Complaint;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

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

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction of the subject matter herein and over the Parties consenting hereto pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and 1367(a).

2. Venue is proper under Sections 113(b) of the CAA, 42 U.S.C. § 7413(b), and under 28 U.S.C. §§ 1391(b) and (c) and 1395(a).

3. For purposes of this Consent Decree, Defendant waives all objections and defenses it may have to the Court's jurisdiction over this action and over the Defendant, and to venue in this District.

4. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief may be granted.

**II. APPLICABILITY**

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

6. At least thirty (30) Days prior to any transfer of ownership or operation of the Cape Girardeau Kiln, 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 (with confidential provisions marked as “Confidential Business Information” (“CBI”) pursuant to 40 C.F.R. Part 2), to the Plaintiffs in accordance with Section XVII (Notices and Submissions). Defendant may, at its sole discretion, request a CBI determination by the United States at the time of or any time after submitting the proposed written agreement. Nothing in this Consent Decree shall limit Defendant’s rights to challenge and/or appeal the United States’ CBI determination.

7. No transfer of ownership or operation of the Cape Girardeau Kiln, 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, unless:

a. the transferee agrees, in writing, to undertake the obligations required by Sections V (Compliance Requirements), Section VI (Environmental Mitigation Project), Section VII (Prohibition on Netting Credits or Offsets from Required Controls), Section VIII (Permits and Survival of Consent Decree Requirements), Section IX (Review and Approval of Deliverables), Section X (Reporting Requirements), Section XI (Stipulated Penalties), Section XII (Force Majeure), Section XIII (Dispute Resolution), Section XIV (Information Collection and Retention), and further agrees in writing to be substituted for the Defendant as a Party under this Consent Decree and thereby become bound by the terms thereof;

b. the United States determines, after consultation with the State of Missouri, that the transferee has the financial and technical ability to assume the Consent Decree’s obligations applicable to the Cape Girardeau Kiln;

c. the United States consents, in writing, after consultation with the State of Missouri, to relieve Defendant of its Consent Decree obligations applicable to the Cape Girardeau Kiln; and

d. pursuant to Section XX (Modification), the Court modifies this Consent Decree to relieve Defendant of its responsibilities under this Consent Decree and make the transferee a party to this Consent Decree and responsible for all of Defendant's obligations thereunder.

8. Any transfer of ownership or operation of the Cape Girardeau Kiln or any portion thereof without complying with Paragraphs 6-7 above constitutes a violation of this Consent Decree.

9. Defendant shall provide a copy of this Consent Decree, or relevant parts thereof, to those officers, managers, contractors, and employees of Defendant who are responsible for compliance with any provision of this Decree or direct the work of others that is required under this Consent Decree. Defendant shall condition any such contracts for work required to be performed under this Consent Decree upon performance of the work in a manner which enables Defendant to comply with applicable provisions of this Consent Decree.

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

### **III. DEFINITIONS**

11. Terms used in this Consent Decree that are defined in the CAA or in regulations promulgated thereunder, shall have the meanings assigned to them in the CAA or such regulations, unless otherwise provided in this Decree. Definitions stated in this Consent Decree are exclusively for the purpose of interpreting and applying the Consent Decree terms and are

not intended to establish any type of determination under circumstances not covered by the Consent Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

a. “30-Day Rolling Average Emission Limit” shall mean, with respect to the Cape Girardeau Kiln, the maximum allowable rate of emission of a specified air pollutant from the Cape Girardeau Kiln and shall be expressed as pounds of such air pollutant emitted per Ton of clinker produced. Compliance with the 30-Day Rolling Average Emission Limit shall be demonstrated in accordance with the definition of 30-day Rolling Average Emission Rate. In calculating each compliance determination of the 30-Day Rolling Average Emission Limit for NO<sub>x</sub> or SO<sub>2</sub> at the Cape Girardeau Kiln, the total pounds of such air pollutant emitted from the Cape Girardeau Kiln during a specified period (Operating Day or 30-Day Period) shall include all emissions of that pollutant from the Cape Girardeau Kiln that occur during the specified period, including emissions during each Startup, Shutdown, or Malfunction.

b. “30-Day Rolling Average Emission Rate” shall mean, with respect to the Cape Girardeau Kiln, the rate of emission of a specified air pollutant from the Cape Girardeau Kiln, expressed as pounds of NO<sub>x</sub> or SO<sub>2</sub> emitted per Ton of clinker produced, and calculated following this procedure:

i. first, sum the total pounds of the air pollutant in question emitted from the Cape Girardeau Kiln during that Kiln Operating Day and the previous twenty-nine (29) Kiln Operating Days as measured pursuant to Paragraphs 19-23 (NO<sub>x</sub> CEMS) or Paragraphs 26-29 (SO<sub>2</sub> CEMS) as applicable;

ii. second, sum the total Tons of clinker produced by the Cape Girardeau Kiln during the same Kiln Operating Day and previous 29 Kiln Operating Days; and

iii. third, divide the total number of pounds of the air pollutant emitted from the Cape Girardeau Kiln during the thirty (30) Kiln Operating Days by the total Tons of clinker produced by such Cape Girardeau Kiln during the same 30 Kiln Operating Days. A new compliance determination of the 30-Day Rolling Average Emission Rate shall be calculated for each new Kiln Operating Day in accordance with the provisions of this Consent Decree.

c. “Business Day” means any Day, except Saturday, Sunday, and federal holidays. In computing any period of time used in a deadline for submission of any report, notice or deliverable under this Consent Decree, where the last Day would fall on a Saturday, Sunday or federal holiday, the period shall run until the close of the business of the next Business Day.

d. “Cape Girardeau Kiln” shall mean the Portland cement kiln located at Defendant’s Portland cement manufacturing facility located at 2524 S. Sprigg St, in Cape Girardeau, MO, about 118 miles from St. Louis, MO. The Cape Girardeau Kiln includes any associated preheater or precalciner devices, inline raw mills, inline coal mills or alkali bypasses that produces clinker by heating limestone and other materials for subsequent production of Portland cement.

e. “CEMS” or “Continuous Emission Monitoring System” shall mean, for obligations involving NO<sub>x</sub> and SO<sub>2</sub> emissions under this Consent Decree, the total equipment required for the determination of a gas concentration or emission rate. The sample interface, pollutant analyzer, and data recorder are the major subsystems of the CEMS.

f. “Commence” or “Commencement” of operation of a Control Technology shall mean to begin the introduction of the reagent employed by the Control Technology, as applicable to that technology, or where the technology is otherwise activated.

g. “Complaint” shall mean the Complaint filed by the United States and the State of Missouri in this action.

h. “Consent Decree” or “Decree” shall mean this Consent Decree.

i. “Continuously Operate” or “Continuous Operation” shall mean that when a Control Technology is used at the Cape Girardeau Kiln, it shall be operated at all times of Kiln Operation, excluding Malfunction of the Control Technology, consistent with the technological limitations, manufacturers' specifications, and good engineering and maintenance practices for such Control Technology and the Cape Girardeau Kiln. For example, the requirement to continuously operate SNCR does not require that the SNCR be operated under conditions where the Cape Girardeau Kiln has not reached or is no longer maintaining the minimum temperature for reagent injection.

j. “Control Technology” shall mean Selective Non-Catalytic Reduction with respect to control of NO<sub>x</sub> emissions and Lime Injection System with respect to control of SO<sub>2</sub> emissions.

k. “Day” shall mean a calendar day.

l. “Date of Lodging of the Consent Decree” or “Date of Lodging” shall mean the date the Consent Decree is filed for lodging with the Clerk of the Court for the United States District Court for the Eastern District of Missouri.

m. “Defendant” shall mean Lone Star Industries, Inc.

n. “Effective Date” shall have the meaning given in Paragraph 104.

o. “Emission Limit” shall mean the maximum allowable Emission Rate of a specified air pollutant from the Cape Girardeau Kiln under this Consent Decree and shall be expressed as pounds of such air pollutant emitted per Ton of clinker produced.

p. “Emission Rate” for a specified air pollutant from the Cape Girardeau Kiln shall mean the number of pounds of such air pollutant emitted per Ton of clinker measured in accordance with this Consent Decree.

q. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies.

r. “Interest” shall mean the rate specified at 28 U.S.C. § 1961.

s. “Kiln Operation” shall mean any period when any raw materials are fed into the Cape Girardeau Kiln or any combustion is occurring in the Cape Girardeau Kiln.

t. “Kiln Operating Day” shall mean any Day on which Kiln Operation has occurred.

u. “Lime Injection System” shall mean a pollution control system that injects lime or another reagent that has been demonstrated as effective in reducing SO<sub>2</sub> emissions, into the gas stream for the purpose of reducing SO<sub>2</sub> emissions.

v. “Malfunction” as used in this Consent Decree shall have the same meaning as defined at 40 C.F.R. § 60.2.

w. “NO<sub>x</sub>” shall mean oxides of nitrogen, measured in accordance with the provisions of this Consent Decree.

x. “Non-attainment NSR” shall mean the non-attainment area New Source Review (NSR) program within the meaning of Part D of Subchapter I of the CAA, 42 U.S.C. §§ 7501-7515, 40 C.F.R. Part 51, and any applicable State Implementation Plan.

y. “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral and includes subparagraphs thereof.

z. “Parties” shall mean the United States, the State of Missouri and Lone Star Industries, Inc.

aa. “Plaintiffs” shall mean the United States and the State of Missouri.

bb. “PSD” shall mean the Prevention of Significant Deterioration program within the meaning of Part C of Subchapter I of the CAA, 42 U.S.C. §§ 7470-7492, 40 C.F.R. Part 52, and any applicable State Implementation Plan.

cc. “Section” shall mean a portion of this Decree identified by a Roman numeral.

dd. “Selective Non-Catalytic Reduction” or “SNCR” shall mean a pollution control system that injects an ammonia-based reagent into the gas stream without the use of a catalyst for the purpose of reducing NO<sub>x</sub> emissions.

ee. “SO<sub>2</sub>” shall mean the pollutant sulfur dioxide, measured in accordance with the provisions of this Consent Decree.

ff. “State of Missouri” and “State” shall mean the State of Missouri, acting on behalf of the Missouri Department of Natural Resources.

gg. “Subject Kiln Modifications” shall mean the following two projects consisting of physical and operational changes performed at the Cape Girardeau Kiln: (a) the 100,000 ton clinker expansion project commencing in November 1997 and concluding in March of 1998; and (b) the Vortex Finder Project commencing in July of 2002, and concluding in February of 2003.

hh. “Title V permit” shall mean a permit required by and issued in accordance with the requirements of 42 U.S.C. §§ 7661-7661f.

ii. “Ton” or “Tons” shall mean short ton or short tons.

jj. “United States” shall mean the United States of America, acting on behalf of EPA.

kk. “Waste On Day” shall mean a Kiln Operating Day when liquid waste fuel is being fired in the main kiln burner of the Cape Girardeau Kiln at 66 lb/min or more when averaged across the entire Day.

ll. “Waste Off Day” shall mean a Kiln Operating Day when liquid waste fuel is being fired in the main kiln burner of the Cape Girardeau Kiln at less than 66 lb/min when averaged across the entire Day.

#### **IV. CIVIL PENALTY**

12. Within thirty (30) Days after the Effective Date, Defendant shall pay the sum of Sixty Thousand Dollars (\$60,000.00) as a civil penalty, together with Interest accruing from May 31, 2016. Of this amount, Defendant shall pay \$30,000 plus Interest accruing from May 31, 2016, to the United States and shall pay \$30,000 plus Interest accruing from May 31, 2016 to the State of Missouri as follows.

13. Payment of Civil Penalty to the United States.

a. Defendant shall pay \$30,000 of the civil penalty plus Interest as set forth in Paragraph 12 above at <https://www.pay.gov> or by FedWire Electronic Funds Transfer (EFT) to the U.S. Department of Justice account, in accordance with instructions provided to Defendant by the Financial Litigation Unit (FLU) of the United States Attorney’s Office for the Eastern District of Missouri 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:

Daniel B. Nugent  
Sr. Vice President, Environmental Affairs & Technical Services  
Buzzi Unicem USA, Inc.  
100 Brodhead Road  
Bethlehem PA 18017  
daniel.nugent@buzziunicemusa.com  
610-882-5032

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

b. At the time of payment, Defendant shall send notice that payment has been made: (a) to EPA via email at [acctsreceivable.cinwd@epa.gov](mailto:acctsreceivable.cinwd@epa.gov) or via regular mail at EPA Cincinnati Finance Office, 26 Martin Luther King Drive, Cincinnati, Ohio 45268; and (b) to the United States via email or regular mail in accordance with Section XVII (Notices and Submissions). Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States et al. v. Lone Star Industries, Inc.* and shall reference the civil action number and DOJ case number 90-5-2-1-09889.

14. Payment of Civil Penalty to State of Missouri. Defendant shall pay \$30,000 of the civil penalty plus Interest as set forth in Paragraph 12 above to the State of Missouri by sending a check to the “State of Missouri (Cape Girardeau County)” to Collections Specialist, Missouri Attorney General’s Office, P.O. Box 899, Jefferson City, MO 65102-0899 accompanied by a notice that states that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States et al. v. Lone Star Industries, Inc.* and shall reference the civil action number.

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

**V. COMPLIANCE REQUIREMENTS**

**A. Control and Monitoring of NO<sub>x</sub> Emissions from the Cape Girardeau Kiln**

16. Beginning no later than February 28, 2017, Defendant shall install and Commence Continuous Operation of SNCR technology at the Cape Girardeau Kiln.

17. Beginning no later than February 28, 2017, Defendant shall Continuously Operate SNCR technology at the Cape Girardeau Kiln.

18. Beginning on the Kiln Operating Day which is the 120<sup>th</sup> Kiln Operating Day after February 28, 2017, Defendant shall demonstrate compliance and thereafter maintain compliance with the following 30-Day Rolling Average Emission Limits for NO<sub>x</sub>:

a. For all Waste On Days: 1.5 lb/ton of clinker

b. For all Waste Off Days: 2.9 lb/ton of clinker

In each instance, the demonstration of compliance shall be subject to the calculation of the 30-Day Rolling Average Emission Rate as defined in Paragraph 11 above based upon 30 Kiln Operating Days for the respective condition (i.e., Waste On Days and Waste Off Days).

19. Beginning no later than 180 Days after the Effective Date, Defendant shall install and make operational a NO<sub>x</sub> CEMS at each stack which collects emissions from the Cape Girardeau Kiln.

20. Beginning on or before the date that a NO<sub>x</sub> CEMS is required pursuant to Paragraph 19 above, Defendant shall determine and record the daily clinker production rates for the Cape Girardeau Kiln in accordance with 40 C.F.R. § 60.63(b).

21. Except during CEMS breakdowns, repairs, calibration checks, zero span adjustments, and maintenance that requires CEMS shutdown, the CEMS required pursuant to Paragraph 19 above shall be operated at all times during Kiln Operation. Each such CEMS shall

be used at the Cape Girardeau Kiln to demonstrate compliance with the NO<sub>x</sub> Emission Limits established in Paragraph 18 above.

22. Each NO<sub>x</sub> CEMS required shall monitor and record the applicable NO<sub>x</sub> emission rate from the Cape Girardeau Kiln stack in units of lbs. of NO<sub>x</sub> per Ton of clinker produced at the Cape Girardeau Kiln and shall be installed, certified, calibrated, maintained, and operated in accordance with the requirements of 40 C.F.R. Part 60.

23. For purposes of this Consent Decree, all emissions of NO<sub>x</sub> from the Cape Girardeau Kiln shall be measured by CEMS. During any time when CEMS are inoperable and otherwise not measuring emissions of NO<sub>x</sub> from the Cape Girardeau Kiln, Defendant shall apply the missing data substitution procedures used by the State of Missouri or the missing data substitution procedures in 40 C.F.R. Part 75, Subpart C.

**B. Control and Monitoring of SO<sub>2</sub> Emissions from the Cape Girardeau Kiln**

24. Beginning no later than February 28, 2017, Defendant shall Continuously Operate a Lime Injection System at the Cape Girardeau Kiln. For purposes of SO<sub>2</sub> compliance, Continuous Operation of the Lime Injection System shall not be required during periods in which Defendant is preparing for and conducting an HCl compliance demonstration pursuant to the HWC MACT Rule, provided, however, that the limits set forth in Paragraph 25 below shall continue to apply during such time periods.

25. Beginning on the Kiln Operating Day which is the 120<sup>th</sup> Kiln Operating Day after February 28, 2017, Defendant shall demonstrate compliance and thereafter maintain compliance with the 30-Day Rolling Average Emission Limit for SO<sub>2</sub>.

- a. For all Waste On Days: 1.95 lb/ton of clinker
- b. For all Waste Off Days: 3.75 lb/ton of clinker

In each instance, the demonstration of compliance shall be subject to the calculation of the 30-Day Rolling Average Emission Rate as defined in Paragraph 11 above based upon 30 Kiln Operating Days for the respective condition (i.e., Waste On Days and Waste Off Days).

26. Beginning no later than 180 Days after the Effective Date, Defendant shall install and make operational an SO<sub>2</sub> CEMS at each stack which collects emissions from the Cape Girardeau Kiln.

27. Except during CEMS breakdowns, repairs, calibration checks, and zero span adjustments, and maintenance requiring CEMS shutdown, the CEMS required pursuant to Paragraph 26 above shall be operated at all times during Kiln Operation. Each such CEMS shall be used at the Cape Girardeau Kiln to demonstrate compliance with the SO<sub>2</sub> Emission Limits established in Paragraph 25 above.

28. Each SO<sub>2</sub> CEMS required shall monitor and record the applicable SO<sub>2</sub> emission rate from the Cape Girardeau Kiln in units of lbs. of SO<sub>2</sub> per Ton of clinker produced at the Cape Girardeau Kiln and shall be installed, certified, calibrated, maintained, and operated in accordance with the requirements of 40 C.F.R. Part 60.

29. For purposes of this Consent Decree, all emissions of SO<sub>2</sub> from the Cape Girardeau Kiln shall be measured by CEMS. During any time when CEMs are inoperable and otherwise not measuring emissions of SO<sub>2</sub> from the Cape Girardeau Kiln, Defendant shall apply the missing data substitution procedures used by the State of Missouri or the missing data substitution procedures in 40 C.F.R. Part 75, Subpart D.

## **VI. ENVIRONMENTAL MITIGATION PROJECT**

30. Defendant shall implement an Environmental Mitigation Project (Project) as set forth in Paragraphs 31-37 below.

31. The Project to be performed by Defendant shall be for the purpose of beneficially restoring and/or mitigating the environments allegedly damaged by the operation of the Cape Girardeau Kiln in violation of the CAA.

32. By no later than sixty (60) Days after the Effective Date of this Consent Decree, Defendant shall replace one of its TIER 0 front end loaders with a current TIER 4 model (the Project) and shall ensure that the replaced engine is properly disposed of, which must include destruction of the engine block.

33. Within sixty (60) Days following the Effective Date, Defendant shall submit to Plaintiffs a report that documents the date that the Project was completed, provides the serial number of the front end loader that was replaced, Defendant's results from implementing the Project, including the estimated emission reductions or other environmental benefits achieved (including the estimated annual emission reductions achieved), and the money expended by Defendant in implementing the Project.

34. Defendant shall maintain, and, within thirty (30) Days upon either Plaintiff's request, provide to the requesting Plaintiff all documents that substantiate work completed on the Project in accordance with Section XVII (Notices and Submissions).

35. All plans and reports prepared by Defendant pursuant to this Section of this Consent Decree and required to be submitted to Plaintiffs shall be publicly available from Defendant without charge.

36. Defendant certifies that Defendant is not otherwise required by law to perform the Project, that Defendant is unaware of any other person who is required by law to perform the Project, and that Defendant will not use the Project, or portion thereof, to satisfy any obligations that it may have under other applicable requirements of law.

37. In connection with any communication to the public or to shareholders regarding Defendant's actions or expenditures relating in any way to the Project, Defendant shall include prominently in the communication the information that the actions and expenditures were required as part of a negotiated consent decree to resolve allegations that Defendant violated the CAA.

**VII. PROHIBITION ON NETTING CREDITS AND OFFSETS  
FROM REQUIRED CONTROLS**

38. Except as specifically stated to the contrary in this Consent Decree, NO<sub>x</sub> and SO<sub>2</sub> emission reductions resulting from compliance with the requirements of this Consent Decree shall not be considered as a creditable contemporaneous emission decrease for the purpose of obtaining a netting credit under the CAA's PSD and Non-attainment NSR programs.

39. The limitations on the generation and use of netting credits or offsets set forth in Paragraph 38 above, do not apply to emission reductions achieved by Defendant that are surplus to those required under this Consent Decree (surplus emission reductions). For purposes of this Paragraph, surplus emission reductions are the reductions over and above those required under this Consent Decree that result from Defendant's compliance with federally enforceable emissions limits that are more stringent than limits imposed under this Consent Decree or from Defendant's compliance with emissions limits otherwise required under applicable provisions of the CAA or with an applicable SIP that contains more stringent limits than those imposed under this Consent Decree.

40. Nothing in this Consent Decree is intended to preclude the emission reductions generated under this Consent Decree from being considered by EPA or the State of Missouri as creditable contemporaneous emission decreases for the purpose of attainment demonstrations submitted pursuant to Section 110 of the CAA, 42 U.S.C. § 7410, or in determining impacts on

National Ambient Air Quality Standards, PSD increments, or air quality-related values, including visibility in a Class I area.

41. Notwithstanding this Section VII (Prohibition on Netting Credits and Offsets from Required Controls), nothing in this Consent Decree prohibits Defendant from relying upon the emission reductions for purposes of determining whether there is a net emissions increase or significant net emissions increase of any pollutant where the construction approval relying on that netting analysis was issued prior to the Date of Lodging of this Consent Decree.

**VIII. PERMITS AND SURVIVAL OF CONSENT DECREE REQUIREMENTS**

42. Where any compliance obligation under this Consent Decree requires Defendant to obtain a federal, State, or local permit or approval, Defendant shall submit a timely and complete application for such permit or approval and take all other actions necessary to obtain all such permits or approvals, allowing for all legally required processing and review including requests for additional information by the permitting or approval authority. The inability of Defendant to obtain a permit in adequate time to allow compliance with the deadlines stated in this Consent Decree shall be considered a Force Majeure event where Defendant submitted a timely and administratively complete permit application and the failure of the permitting authority to issue the relevant permit is beyond the control of the Defendant. Subject to the requirements of this Section, nothing in this Consent Decree shall be construed to require Defendant to apply for or obtain a PSD or Non-attainment NSR permit or SIP amendment to permit any actions required under this Consent Decree, unless otherwise required by law.

43. Within 12 months after the Effective Date of this Consent Decree, Defendant shall apply to the State of Missouri to include the requirements and limitations enumerated in Paragraphs 11 a, b, d, e, i, j, k, o, p, q, s-x, bb and dd-ll, 16-29, and 38-41 of this Consent Decree in a construction permit or other permit or approval (other than a Title V permit) which is

federally enforceable, issued under the SIP of the State of Missouri, and issued under authority independent of the State of Missouri authority to issue Title V permits. The permit or approval shall require compliance with the requirements and limitations enumerated in Paragraphs 11 a, b, d, e, i, j, k, o, p, q, s-x, bb and dd-ll, 16-29, and 38-41 of this Consent Decree; any requirements to install the pollution Control Technology specified in this Consent Decree, continuously operate pollution Control Technology pursuant to this Consent Decree, meet applicable 30-Day Rolling Average Emission Limits for Waste On and Waste Off scenarios as specified in this Consent Decree, install and operate CEMS as specified in this Consent Decree; and compliance with monitoring requirements, and the prohibition on netting credits and offsets as specified in this Consent Decree. Following submission of the application for the permit or approval, Defendant shall cooperate with the appropriate permitting authority by promptly submitting all information that such permitting authority seeks following its receipt of the application for the permit. The methods specified in this Decree for demonstrating compliance with the limits in this Decree are not intended to change the means by which Defendant demonstrates compliance with standards not addressed by this Decree, if any.

44. Upon issuance of any permit or approval required under Paragraphs 42-43 above, Defendant shall file any applications necessary to incorporate the requirements of that permit into the Title V operating permit for the Cape Girardeau Kiln. Defendant shall not challenge the inclusion in any such permit of the Emission Limits expressly prescribed in this Consent Decree (including, where applicable, 30-Day Rolling Average Emission Limits determined in accordance with Section V), but nothing in this Consent Decree is intended nor shall it be construed to require the establishment of Emission Limits other than those Emission Limits expressly prescribed in this Consent Decree nor to preclude Defendant from challenging any

more stringent Emission Limits should they be proposed for reasons independent of this Consent Decree.

45. The Parties agree that the incorporation of any Emission Limits and any other requirements and limitations of this Consent Decree into the Title V permits for the Cape Girardeau Kiln shall be in accordance with the applicable federal, State or local rules or laws.

46. Defendant shall provide EPA and the State of Missouri with a copy of each application for a permit to address or comply with any provision of this Consent Decree, as well as a copy of any permit proposed as a result of such application, to allow for timely EPA or the State of Missouri participation in any public comment opportunity.

47. In lieu of incorporating the terms of the Consent Decree directly into a permit issued under a SIP pursuant to Paragraphs 42-43 above, Defendant may request the State to submit the portions of this Consent Decree to EPA for approval under the State's SIP in accordance with 42 U.S.C. § 7410(k). Upon approval by EPA, those portions of this Consent Decree will be incorporated into the State's SIP, and subsequently incorporated into Title V permits for the Cape Girardeau Kiln consistent with applicable requirements in 40 C.F.R. Part 70 or State-specific rules adopted and approved consistent with Part 70. Defendant agrees not to contest the submittal of any such proposed SIP revision that incorporates the terms of this Consent Decree to EPA, or EPA's approval of such submittal, or the incorporation of the applicable portions of this Consent Decree through these SIP requirements into the Title V permits. Nothing in this Consent Decree shall limit Defendant's right to contest portions of any such SIP revision which are more stringent than or not consistent with the terms of this Consent Decree.

48. The following emission limits, requirements and standards imposed by this Consent Decree shall survive termination of this Consent Decree:

- a. Paragraphs 16 through 23 (Control and Monitoring of NO<sub>x</sub> Emissions from the Cape Girardeau Kiln); and
- b. Paragraphs 24 through 29 (Control and Monitoring of SO<sub>2</sub> Emissions from the Cape Girardeau Kiln).

49. In the event that Defendant should ever seek to delete or modify a requirement surviving termination by virtue of Paragraph 48 above, such requirements shall not be deleted or modified unless the United States, after consultation with the State of Missouri, has first agreed in writing to the deletion or modification.

50. Notwithstanding the reference to Title V permits in this Consent Decree, the enforcement of such permits shall be in accordance with their own terms and the CAA. The Title V permits shall not be enforceable under this Consent Decree, although any term or limit established by or under this Consent Decree shall be enforceable under this Consent Decree regardless of whether such term has or will become part of a Title V permit, subject to the terms of Section XXI (Termination) of this Consent Decree

**IX. REVIEW AND APPROVAL OF DELIVERABLES**

51. After review of any plan, report, or other document that is required to be submitted pursuant to this Consent Decree, EPA, after consultation with the State, shall 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.

52. If the submission is approved pursuant to Paragraph 51 above, 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 51 above, Defendant shall, upon written direction of EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to Defendant's right to dispute only the specified conditions or the disapproved portions, under Section XIII of this Decree (Dispute Resolution).

53. If the submission is disapproved in whole or in part pursuant to Paragraph 51 above, Defendant shall, within forty-five (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.

54. Any stipulated penalties applicable to an original submission that is disapproved in whole or in part pursuant to Paragraph 51 above, as provided in Section XI (Stipulated Penalties) of this Decree, shall continue to accrue during the period specified in Paragraph 69, but any stipulated penalties that accrue following the receipt of the submission 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.

55. If a resubmitted plan, report, or other item, or portion thereof, is disapproved in whole or in part, EPA may again require Defendant to correct any deficiencies in accordance with the preceding Paragraphs, or may itself correct any deficiencies and seek stipulated

penalties, subject to Defendant's right to invoke Dispute Resolution under Section XIII of this Consent Decree.

**X. REPORTING REQUIREMENTS**

56. Within thirty (30) Days after the end of each half calendar year (i.e., June 30, December 31) after the Effective Date, until termination of this Decree pursuant to Section XXI (Termination), Defendant shall submit a semi-annual report to EPA and the State of Missouri for the immediately preceding half calendar year period addressing activity during that period that shall:

a. Identify any and all dates on which Defendant has installed, or describe the progress of installation of, each Control Technology required for the Cape Girardeau Kiln under Section V (Compliance Requirements) and describe any problems encountered or anticipated during such installation, together with implemented or proposed solutions;

b. Identify any and all dates on which Defendant has completed installation of, or describe the progress of installation of, each CEMS required under Section V (Compliance Requirements) and describe any problems encountered or anticipated during such installation, together with implemented or proposed solutions;

c. Provide, in electronic format able to be manipulated with Microsoft Excel, all CEMS data collected for the Cape Girardeau Kiln, reduced to 1 hour averages, in accordance with 40 C.F.R. § 60.13(h)(2), including an explanation of any periods of CEMS downtime together with any missing data for which Defendant applied missing data substitution procedures, under Section V (Compliance Requirements);

d. Demonstrate compliance with all applicable 30-Day Rolling Average Emission Limits of this Consent Decree, including but not limited to those in under Section V (Compliance Requirements) of this Consent Decree;

e. Describe the status of permit applications and any proposed SIP revisions made to implement the requirements of this Consent Decree, including a table that identifies each Emissions Limit applicable to the Cape Girardeau Kiln, the date the permit application was submitted to incorporate that limit, and the date a permit that included the limit was issued;

f. Describe the status of any operation and maintenance work relating to activities required under this Consent Decree;

g. Describe, if applicable, any instances where Defendant needed to prepare for any HCl compliance demonstration noted in Paragraph 24 above conducted during the reporting period and the time necessary for that demonstration; and

h. describe the progress of the Environmental Mitigation Project required by Section VI of this Consent Decree.

57. The semi-annual report shall also include a description of any non-compliance with the requirements of this Consent Decree and an explanation of the likely cause of the non-compliance and of the remedial steps taken, or to be taken, to prevent or minimize such non-compliance.

58. If Defendant fails to comply, or has reason to believe that it may fail to comply, with any requirement of this Consent Decree, Defendant shall notify the Plaintiffs of such violation and its likely duration, in writing, within ten (10) Days of the Day Defendant first becomes aware of the failure to comply, with an explanation of the likely cause of the failure and of the remedial steps taken, or to be taken, to prevent or minimize such failure and to mitigate any adverse effect of such failure. Defendant shall investigate the cause of the failure and shall then submit an amendment to the report required under this Paragraph, including a full explanation of the cause of the failure, within thirty (30) Days of the Day Defendant becomes

aware of the cause of the failure. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section XII (Force Majeure) of this Consent Decree, if Defendant contends a Force Majeure event occurred.

59. Whenever any failure to comply with the terms of this Consent Decree, or of any applicable permits required under this Consent Decree, or any other event affecting Defendant's performance under this Decree, or the performance of the Cape Girardeau Kiln under this Consent Decree, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA and the State of Missouri orally or by electronic or facsimile transmission as soon as possible, but no later than twenty-four (24) hours after Defendant first knew, or should have known, of the failure or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

60. All reports shall be submitted to the persons designated in Section XVII (Notices and Submissions) of this Consent Decree.

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

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

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

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

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

#### **XI. STIPULATED PENALTIES**

65. Defendant shall be liable for stipulated penalties to the Plaintiffs for violations of this Consent Decree as specified in Table 1 below, unless excused under Section XII (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. Violation of an Emission Limit that is based on a 30-Day Rolling Average is a violation on every Day on which the average is based. Each subsequent Day of violation after a violation of a 30-Day Rolling Average Emission Limit is subject to the corresponding penalty per Day specified in Table 1, below. Where a violation of a 30-Day Rolling Average Emission Limit (for the same pollutant and from the same source) recurs within periods of less than thirty (30) Days, Defendant shall not pay a daily stipulated penalty for any Day of recurrence for which a stipulated penalty is already payable. Stipulated penalties may only be assessed once for a given Day or month within any averaging period for violation of any particular Emission Limit. Stipulated penalties for consecutive periods of violation of an Emission Limit shall be calculated based upon the violation of the Emission Limit for the same pollutant from the Cape Girardeau Kiln.

**TABLE 1**

<b>Consent Decree Violation</b>	<b>Stipulated Penalty</b>
Failure to Pay Civil Penalty and Interest to the United States and/or State of Missouri as Required by Section V of this Consent Decree.	\$2000 for each Day penalty or portion thereof is late.
Failure to comply with a 30-Day Rolling Average Emission Limit for NO <sub>x</sub> or SO <sub>2</sub> where the emissions are less than 5% in excess of the limits set forth in this Consent Decree.	\$1,500 for each Day during any 30-Day rolling period.
Failure to comply with a 30-Day Rolling Average Emission Limit for NO <sub>x</sub> or SO <sub>2</sub> where the emissions are equal to or greater than 5% but less than 10% in excess of the limits set forth in this Consent Decree.	\$3,000 for each Day during any 30-Day rolling period.
Failure to comply with a 30-Day Rolling Average Emission Limit for NO <sub>x</sub> or SO <sub>2</sub> where the emissions are equal to or greater than 10% in excess of the limits set forth in this Consent Decree.	\$5,000 for each Day during any 30-Day rolling period.
Failure to install or Commence Continuous Operation or Continuously Operate Control Technology at the Cape Girardeau Kiln required by the deadlines established in Section V.A. and B.	\$5,000 for each Day during the first 20 Days, \$ 10,000 for each consecutive Day for the next 40 Days, and \$32,500 for each consecutive Day thereafter.
Failure to apply for any permit or permit amendment or seek a SIP approval required by Section VIII (Permits and Survival of Consent Decree Requirements).	\$1,000 for each Day for each such failure.
Failure to install or continuously operate a CEMS or other monitoring device in conformance with the requirements of Section V, Paragraphs 19-23 (NO <sub>x</sub> CEMS), and Section V, Paragraphs 26-29 (SO <sub>2</sub> CEMS).	\$1,000 for each Day for each such failure.

<b>Consent Decree Violation</b>	<b>Stipulated Penalty</b>
Failure to timely submit, modify, or implement, as approved, a report, plan, study, analysis, protocol, or other submittal required by this Consent Decree.	\$750 for each Day during the first 10 Days, \$1,000 per Day thereafter.
Any other violation of this Consent Decree.	\$1,000 for each Day for each violation.

66. Subject to the provisions of Paragraph 65 above, 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.

67. Either or both Plaintiffs may demand stipulated penalties by sending a written stipulated penalty demand to the Defendant pursuant to Section XVII (Notices and Submissions). Prior to one Plaintiff sending Defendant a stipulated penalty demand, it shall consult with the other Plaintiff and give the other Plaintiff thirty (30) Days to join in the demand before sending it to Defendant. Defendant shall pay any stipulated penalty within thirty (30) Days of receiving a written demand to the Plaintiff(s) demanding the stipulated penalties. Where both Plaintiffs demand a stipulated penalty, Defendant shall pay each Plaintiff 50% of the total stipulated penalty demanded unless both Plaintiffs instruct Defendant to pay a different amount to each Plaintiff. Defendant shall not be liable for more than the maximum stipulated penalty per violation set forth in Paragraph 66 above.

68. The United States or State of Missouri may, in the unreviewable exercise of their discretion, reduce or waive stipulated penalties otherwise due the United States or State of Missouri respectively under this Consent Decree.

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

a. If the dispute is resolved by agreement between the Parties or by a decision of the United States that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with Interest accruing from the 31<sup>st</sup> Day after the written demand in Paragraph 67, within thirty (30) Days of the effective date of the agreement or the receipt of the United States' decision or order.

b. If the dispute is appealed to the Court and the United States is the prevailing party, in whole or in part, as may be determined by the Court, Defendant shall pay all accrued penalties determined by the Court to be owing, together with Interest accruing from the 31<sup>st</sup> Day after the written demand in Paragraph 67 within sixty (60) Days of receiving the Court's decision or order, except as provided in Paragraph 69.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 accruing from the 31<sup>st</sup> Day after the written demand in Paragraph 67, within fifteen (15) Days of receiving the final appellate court decision.

70. Defendant shall pay stipulated penalties owing to the United States and the State of Missouri by the methods set forth in Paragraph 13 and 14 above with confirmation notices to the persons specified in Section XVII (Notices and Submissions) stating that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

71. Defendant shall not deduct stipulated penalties paid under this Section in calculating their federal income tax.

72. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for Interest on such penalties, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the Plaintiffs from securing any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

73. Subject to the provisions of Section XV of this Consent Decree (Effect of Settlement/Reservation of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the Plaintiffs for Defendant's violation of this Consent Decree or applicable law. Where a violation of this Consent Decree is also a violation of any applicable statute or regulation, Defendant shall be allowed a credit, dollar for dollar, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

## **XII. FORCE MAJEURE**

74. "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 Defendant's contractors that causes a delay or impediment to performance in complying with any obligation under this Consent Decree despite the Defendant's best efforts to fulfill the obligation. The requirement that the 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 such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay and the effects of such event to the greatest extent possible. Force Majeure does not include the Defendant's financial inability to perform any obligation under this Consent Decree. The failure of a permitting authority to issue a necessary construction or operating permit in a timely fashion is a Force Majeure event where Defendant

submitted a timely and administratively complete permit application and the failure of the permitting authority to issue the relevant permit is beyond the control of the Defendant.

75. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree that Defendant claims was caused by a Force Majeure event, Defendant shall provide notice orally or by electronic or facsimile transmission to the representatives of EPA and the State of Missouri designated to receive notice pursuant to Section XVII (Notices and Submissions) within seven (7) Business Days of when Defendant first knew that the event might cause a delay. Within twenty-one (21) Days thereafter, Defendant shall provide in writing to EPA and the State of Missouri 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 event. 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.

76. If EPA, after consultation with the State of Missouri, 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.

77. If EPA 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.

78. If Defendant elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), it shall do so no later than fifteen (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 74 and 75 above. 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.

### **XIII. DISPUTE RESOLUTION**

79. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism for Defendant 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 Plaintiffs to enforce any obligation of Defendant arising under this Decree.

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

81. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the Plaintiffs 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.

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

83. Defendant may seek judicial review of the dispute by filing with the Court and serving on the Plaintiffs in accordance with Section XVII of this Consent Decree (Notices and Submissions), a motion requesting judicial resolution of the dispute. The motion must be filed within twenty (20) Days of receipt of the United States' Statement of Position (or in absence of a Statement of Position by the United States the State's Statement of Position) pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

84. The Plaintiff(s), 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.

85. Standard of Review. Except as otherwise provided in this Consent Decree, the Court shall decide all disputes pursuant to the applicable principles of law. The disputing parties shall state their respective positions as to the applicable standard of law for resolving the particular dispute in the Parties' initial filings with the Court under Paragraphs 83-84 of this Consent Decree. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree.

86. 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 69 above. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XI (Stipulated Penalties).

**XIV. INFORMATION COLLECTION AND RETENTION**

87. The Plaintiffs and their representatives, including attorneys, contractors, and consultants, shall have the right of entry into the Cape Girardeau Kiln 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 Plaintiffs in accordance with the terms of this Consent Decree;
- c. conduct performance testing;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant's compliance with this Consent Decree.

88. Upon request, Defendant shall provide Plaintiffs and their authorized representatives copies of analytical data from Cape Girardeau Kiln performance testing performed by Defendant. Upon request, EPA and the State of Missouri shall provide Defendant copies of analytical data from Cape Girardeau Kiln performance testing performed by EPA and/or the State of Missouri.

89. Until five (5) 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 directly relate 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 either Plaintiff, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

90. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the Plaintiffs at least ninety (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 either Plaintiff, Defendant shall deliver any such documents, records, or other information to the requesting Plaintiff. 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.

91. 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.

92. 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 State of Missouri 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.

**XV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

93. Entry of this Consent Decree resolves the civil claims of the United States and the State of Missouri for the violations alleged in the Complaint filed in this action through the Date of Lodging. In addition, with respect to the emissions of NO<sub>x</sub>, and SO<sub>2</sub>, entry of this Consent Decree shall resolve the liability of Defendant for penalties and injunctive relief for violations at the Cape Girardeau Kiln of the following requirements resulting from or arising out of the Subject Kiln Modifications:

a. The PSD and New Source Review requirements at Part C of Subchapter I of the CAA, 42 U.S.C. § 7475, and the regulations promulgated thereunder at 40 C.F.R. §§ 52.21 and 51.166;

b. “Plan Requirements for Non-attainment Areas” at Part D of Subchapter I of the CAA, 42 U.S.C. §7503 and the regulations promulgated thereunder at 40 C.F.R. §§ 51.165(a) and (b), 40 C.F.R. Part 51 (Appendix S), and 40 C.F.R. § 52.24;

c. Any applicable federally-enforceable State, regional, or local regulations that implement, adopt, or incorporate the specific federal regulatory requirements identified above; and, any applicable State, regional, or local regulations that implement, adopt, or incorporate the specific federal regulatory requirements identified above, including but not limited to the Missouri SIP, 10 C.S.R 10-6.060(6)(B) and (E)3.

d. Title V of the CAA, 42 U.S.C. §§ 7661-7661f and applicable regulations thereunder, including 40 C.F.R. §§ 70.1 and 70.5(a), (b) and (c), and any applicable federally-enforceable State, regional, or local regulations that implement, adopt, or incorporate the specific

federal regulatory requirements of Title V, including 10 C.S.R. 10-6.065; but only to the extent that such claims are based on the Defendant's failure to obtain an operating permit that reflects applicable requirements imposed under Parts C or D of Subchapter I of the CAA as a result of the Subject Kiln Projects.

94. Notwithstanding the resolution of liability in Paragraph 93 above, nothing in this Consent Decree precludes the United States or State of Missouri from seeking from Defendant injunctive relief, penalties, or other appropriate relief for violations by Defendant of the regulatory requirements identified in Paragraph 93 above resulting from any constructions or modifications other than the Subject Kiln Projects or from the Subject Kiln Projects if the resulting violations do not relate to NO<sub>x</sub> or SO<sub>2</sub>.

95. The United States and State of Missouri 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 State of Missouri to obtain penalties or injunctive relief under the CAA or implementing regulations, or under other federal or State laws, regulations, or permit conditions, except as expressly specified in Paragraph 93 above. The United States and State of Missouri further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, the Cape Girardeau Kiln, whether related to the violations addressed in this Consent Decree or otherwise.

96. In any subsequent administrative or judicial proceeding initiated by the United States and/or State of Missouri for injunctive relief, civil penalties, other appropriate relief relating to the Facilities 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 and/or State of Missouri 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 93 of this Decree.

97. 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 the 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 Plaintiffs 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 CAA, 42 U.S.C. § 7401 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

98. This Consent Decree does not limit or affect the rights of Defendant or of the Plaintiffs 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.

99. 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.

#### **XVI. COSTS**

100. The Parties shall bear their own costs of this action, including attorneys' fees, except that the Plaintiffs 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.

**XVII. NOTICES AND SUBMISSIONS**

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

To EPA:

U.S. Environmental Protection Agency  
Director, Air Enforcement Division  
MC 2242A  
1200 Pennsylvania Ave. NW  
Washington, D.C. 20460

And

Mark Smith  
Chief, Air Permitting and Compliance Branch  
EPA Region VII  
11201 Renner Blvd  
Lenexa, KS 66219

To the United States (in addition to the EPA addresses above):

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-2-1-08221

To the State of Missouri:

Kyra Moore  
Director, Air Pollution Control Program  
Missouri Department of Natural Resources  
P.O. Box 176  
Jefferson City, MO 65102

To Defendant:

Daniel B. Nugent  
Sr. Vice President, Environmental Affairs & Technical Services  
Buzzi Unicem USA, Inc.  
100 Brodhead Road  
Bethlehem PA 18017

102. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above. In addition, any Party may submit any written notification, submission, or communication under this Decree by electronic means.

103. 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.

#### **XVIII. EFFECTIVE DATE**

104. 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 reflected on the Court's docket.

#### **XIX. RETENTION OF JURISDICTION**

105. 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 XIII (Dispute Resolution) and XX (Modification), or effectuating or enforcing compliance with the terms of this Decree.

#### **XX. MODIFICATION**

106. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by the Plaintiffs and Defendant. With the exception of submittals that are approved or conditionally approved pursuant to Section IX (Review and Approval of Deliverables), and which are incorporated by reference in this Consent Decree upon such approval or conditional approval, where the modification constitutes a material change to this Decree it shall be effective only upon approval by the Court.

107. Any disputes concerning modification of this Decree shall be resolved pursuant to Section XIII (Dispute Resolution) of this Decree, provided, however, that, instead of the standard

of review provided by Paragraph 85 above, 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).

**XXI. TERMINATION**

108. This Consent Decree shall not terminate until Defendant has:

- a. paid the Civil Penalty and Interest thereon as required by Section IV (Civil Penalty) of this Consent Decree; and
- b. satisfied the requirements of Sections V (Compliance Requirements), Section VI (Environmental Mitigation Project) and Section VIII (Permits and Survival of Consent Decree Requirements) and Section X (Reporting Requirements) of this Decree; and
- c. maintained Continuous Operation of all Control Technology as required by this Consent Decree for a period of 24 months; and
- d. has paid any accrued stipulated penalties as required by this Consent Decree and has complied with all other requirements of this Consent Decree; and
- e. the requirements of Paragraphs 16-29, and 38-41 of this Consent Decree, including the definitions contained in Paragraphs 11a, b, d, e, i, j, k, o, p, q, s-x, bb, and dd-ll, are incorporated into both non-Title V federally-enforceable permits (or SIP amendments) and Title V permits pursuant to Section XVIII (Effective Date).

109. After all of the requirements for termination set forth in Paragraph 108 a-d above have been satisfied, Defendant may serve upon the Plaintiffs a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation. If the United States, after consultation with the State of Missouri, agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

110. If the United States, after consultation with the State of Missouri, does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section XIII of this Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination under this section of this Consent Decree until sixty (60) Days after service of its Request for Termination.

**XXII. PUBLIC PARTICIPATION**

111. 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 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 has notified Defendant in writing that it no longer supports entry of the Consent Decree.

**XXIII. SIGNATORIES/SERVICE**

112. The Assistant Attorney General or Acting Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice and each undersigned representative of Defendant and the State Agency Plaintiffs 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.

113. 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 shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of Defendant with respect to all matters arising under or relating to this Consent Decree. All Parties agree that Defendant need not file an answer or otherwise respond to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

**XXIV. INTEGRATION**

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

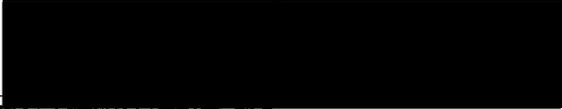
**XXV. FINAL JUDGMENT**

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

Dated and entered this \_\_\_ Day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
UNITED STATES DISTRICT COURT JUDGE  
Eastern District of Missouri

FOR THE UNITED STATES OF AMERICA:

  
\_\_\_\_\_  
JOHN C. CRUBEN  
Assistant Attorney General  
Environment & Natural Resources Division  


\_\_\_\_\_  
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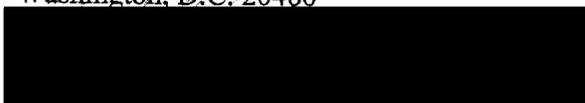
RICHARD CALLAHAN  
United States Attorney  
Eastern District of Missouri

/s/ Suzanne Moore  
\_\_\_\_\_  
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FOR THE ENVIRONMENTAL PROTECTION AGENCY OFFICE OF  
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ATTORNEY GENERAL



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Director  
Division of Environmental Quality  
Missouri Department of Natural Resources  
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FOR LONE STAR:



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