STATE OF CALIFORNIA Edmund G. Brown Jr., *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 13, 2012

Advice Letter 3837-E

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Subject: Amendments to Two Power Purchase and Sale Agreements Between Global Ampersand, LLC, Successor in Interest to Global Common LLC, and PG&E Company

Dear Mr. Cherry:

Advice Letter 3837-E is effective December 15, 2011 per Resolution E-4430.

Sincerely,

Edward Randolph

Edward F. Randolph, Director
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Brian K. Cherry
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May 3, 2011

Advice 3837-E
(Pacific Gas and Electric Company ID U39 E)

Public Utilities Commission of the State of California

Subject: **Amendments to Two Power Purchase and Sale Agreements Between Global Ampersand, LLC, Successor in Interest to Global Common LLC, and Pacific Gas and Electric Company**

I. INTRODUCTION

A. Purpose of the Advice Letter

Pacific Gas and Electric Company ("PG&E") seeks California Public Utilities Commission ("Commission" or "CPUC") approval to amend two power purchase and sale agreements, as previously amended, ("PPAs"), with Global Ampersand, LLC ("Global Ampersand"), the successor in interest to Global Common, LLC ("Global Common"), the counterparty for the original PPAs. Both PPAs have previously been approved by the Commission.[1] These Amendments modify the PPAs to allow for PG&E's renewed procurement of renewable energy from the 9 MW Chowchilla biomass facility located in Chowchilla, California ("Chowchilla"), and 9 MW El Nido biomass facility located in Merced, California ("El Nido").[2]

PG&E requests that the Commission issue a resolution no later than **October 20, 2011**, approving each of the PPAs, as modified respectively by the Fifth Amendment to the El Nido PPA[3] ("El Nido Amendment") and the Sixth Amendment to the Chowchilla PPA[4]

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[1] The Commission approved both PPAs, as amended by the First and Second Amendments, in Resolution E-4047 on December 14, 2006, and the Third Amendments to the PPAs in Resolution E-4110 on September 6, 2007.

[2] The El Nido facility is owned by Merced Power, LLC, and the Chowchilla facility is owned by Ampersand Chowchilla, LLC, each of which is a subsidiary of Global Ampersand.

[3] The Fourth Amendment to the El Nido PPA involved changes pursuant to the reasonable administration of the contract and thus was not submitted for CPUC approval. The Fourth Amendment was noticed in PG&E's Q1 2009 Quarterly Contract Review. To facilitate the Commission's review of the Amendment, the El Nido PPA and the First, Second, Third, and Fourth Amendments have been attached as Confidential Appendix F4.

("Chowchilla Amendment"), and containing the findings as set forth in Section VI below.

B. Subject of the Advice Letter

PG&E filed the PPAs, which resulted from bilateral negotiations, for Commission approval on September 28, 2005. The Chowchilla and El Nido Facilities (collectively the "Facilities") became commercially operable and began delivering Renewable Portfolio Standard ("RPS") eligible energy pursuant to each of the PPAs in December 2008 and February 2009, respectively. El Nido and Chowchilla ceased operations as of June 2010 as a result of operational and financial difficulties. Global Ampersand is currently preparing to restart the Facilities in anticipation of approval of these Amendments.

In response to Global Ampersand's operational and financial difficulties, PG&E entered into negotiations in 2010 to amend the PPAs. In December 2010, Akeida Environmental Funds, which is managed by Akeida Capital Management, LLC ("Akeida"), purchased the membership interests in Global Ampersand. As described in Section III.A below, Akeida has significant experience in the energy, project finance, and renewable energy sectors, providing it with the ability to operate and manage the Facilities successfully. In addition, as described in more detail in Confidential Appendix A, Akeida has demonstrated a commitment to the long-term success and viability of the Facilities. Consequently, PG&E and Global Ampersand reached agreement on the Amendments, which would allow the Facilities to recommence deliveries and be viable in the long run while still providing a competitive market value to PG&E.

The Facilities have many positive characteristics that meet PG&E's portfolio needs. The Facilities are located in-state, within PG&E's service territory, and are interconnected directly with the California Independent System Operator ("CAISO") grid. The Facilities utilize a preferred renewable generating technology (biomass), and continued operations of the Facilities should preserve over 35 local California jobs. Finally, Global Ampersand has committed to recommence delivering renewable energy under each of the PPAs within 120 days of the filing[5] of this Advice Letter in anticipation of CPUC approval of the Amendments.

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[4] The Fourth and Fifth Amendments to the Chowchilla PPA involved changes pursuant to the reasonable administration of the contract and thus were not submitted for CPUC approval. Both the Fourth and Fifth Amendments were noticed in PG&E's Q4 2008 Quarterly Contract Review. To facilitate the Commission's review of the Amendment, the Chowchilla PPA and the First, Second, Third, Fourth, and Fifth Amendments have been attached as Confidential Appendix F3.

[5] Amended PPAs require delivery within 120 days. The Facilities are currently expecting to restart by June 2011.

In contrast, without the Amendments, PG&E would no longer receive deliveries from these existing biomass Facilities. Although the amended PPA prices are above the 2009 Market Price Referent ("MPR"), the Facilities are beneficial to ratepayers because they are baseload Facilities with existing interconnections that do not require additional CAISO network upgrades, do not require PG&E or the CAISO to procure additional ancillary services normally associated with intermittent resources, and they provide additional air quality benefits, such as NOx and particulate reduction, resulting from the diversion of agricultural waste from open field burning to controlled combustion.

In addition, PG&E anticipates that with the new management team from Akeida, new investments for deferred maintenance and operating improvements made by a recapitalized Global Ampersand, and approval of the Amendments, which would provide sustainable revenues, Global Ampersand will be able to provide bundled, in-state, RPS-eligible energy to PG&E for the remainder of the twenty (20) year delivery term. Accordingly, PG&E requests that the Commission approve the Amended PPAs. The scope of and drivers for these Amendments are further described in Confidential Appendix D.

Under the terms of the Amendments, Global Ampersand is obligated to deliver RPS-eligible energy, capacity, and other attributes to PG&E as soon as the Facilities are placed in service, which will occur within 120 days of filing.

C. General Project(s) Description

Facility Names:	Global Ampersand Chowchilla and El Nido.
Technology	Biomass.
Contract Capacity (MW):	9 MW for each facility.[6]
Capacity Factor	83% based on a PPA Contract Capacity of 9 MW.
Expected Generation (GWh/Year)	65.5 GWh per Facility per Contract Quantity in each PPA.
Initial Commercial Operational Date	12/12/2008 for Chowchilla / 2/21/2009 for El Nido. Restart expected by June 2011 for both

[6] The contract capacity is 9 MW, or the minimum expected capacity net of station load and losses to the delivery point. The nameplate capacity is 12.5 MW.

	Chowchilla and El Nido Facilities based on monthly progress reports submitted by Akeida.
Date Contract Delivery Term Begins	Required deliveries are tied to the filing date of this Advice Letter. Deliveries must occur within 120 days of the filing date. Please see Section 5 (a) of the Amendments.
Delivery Term (Years)	20 years starting from 2/8/2011, (which extends the Delivery Term under each of the PPAs by about 7 years).
Vintage (New/Existing/Repower)	Existing, to be restarted.
Location (City and State)	Chowchilla, CA for Chowchilla and Merced, CA for El Nido.
Control Area (e.g., CAISO, BPA)	CAISO.
Nearest Competitive Renewable Energy Zone (CREZ) as Identified by the Renewable Energy Transmission Initiative (RETI)[7]	N/A: they are existing facilities and do not require RETI treatment.
Type of Cooling, If Applicable	Wet cooling, but fully permitted, existing facility.
Price Relative to MPR (i.e. above/below)	Above the applicable 2009 MPR for 20 year projects, coming on line in 2011. (Cost information is discussed in further detail in Confidential Appendices A and D.)

[7] Information about RETI is available at: http://www.energy.ca.gov/reti/.

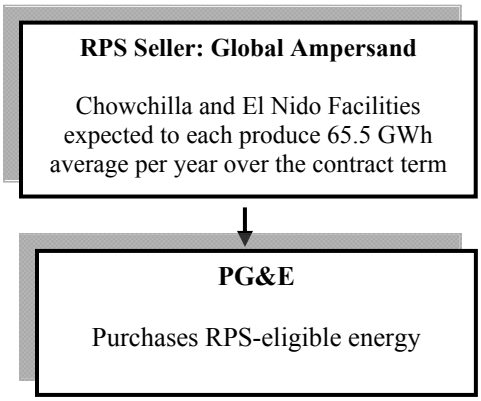
D. General Deal Structure

As described further in Confidential Appendix D, the Amendments provide for the following modifications to the PPAs:

(1) Adjustment in contract prices;
(2) Increase in Delivery Term Security;
(3) Extend delivery term;
(4) Increase in minimum required energy deliveries;
(5) Imposition of minimum project deliveries prior to Commission approval; and,
(6) Other changes are discussed in Confidential Appendix D.

Except for the modifications discussed above and discussed in Confidential Appendix D, no other major provisions of the PPAs have been modified or changed by the Amendments.

Figure 1: Delivery Structure of PPA



Further information on the deal structure is included in Confidential Appendix D.

E. RPS Statutory Goals

Senate Bill ("SB") 1078 established the California RPS Program, requiring an electrical corporation to increase its use of eligible renewable energy resources to 20 percent of total retail sales no later than December 31, 2017. The legislature subsequently accelerated the RPS goal to reach 20 percent by the end of 2010. Former Governor Schwarzenegger's Executive Order issued in November 2008 describes a new target for California of 33 percent renewable energy by 2020, and his executive order issued in

September 2009 directs the California Air Resources Board to adopt a regulation consistent with this 33 percent target by July 31, 2010. In compliance with this Executive Order, the California Air Resources Board adopted regulations in 2010 that require 33 percent of energy deliveries to be from renewable resources by 2020 with interim procurement requirements as a key measure for reducing greenhouse gas emissions and meeting California's climate change goals. In April 2011, Governor Brown signed into law Senate Bill X1 2, requiring an electrical corporation to increase its use of eligible renewable energy resources to 33 percent of total retail sales no later than December 31, 2020.

Global Ampersand is currently preparing its Facilities to restart by June 2011 (per the last Monthly Progress Report). The Amended PPAs will help to achieve PG&E's 20 percent RPS goal, and will also contribute to California's higher RPS goal of 33 percent by 2020.

F. Confidentiality

In support of this Advice Letter, PG&E has provided the confidential information listed under Section V.C, "Request for Confidential Treatment," below. This information includes the Amendments and other information that more specifically describes the rights and obligations of the parties. This information is being submitted in the manner directed by Decision ("D.") 08-04-023 and the August 22, 2006, Administrative Law Judge's Ruling Clarifying Interim Procedures for Complying with D.06-06-066 to demonstrate the confidentiality of the material and to invoke the protection of confidential utility information provided under either the terms of the IOU Matrix, Appendix 1 of D.06-06-066 and Appendix C of D.08-04-023, or General Order 66-C. A separate Declaration Seeking Confidential Treatment is being filed concurrently with this Advice Letter.

Confidential Attachments:

Appendix A – Consistency with Commission Decisions and Rules and Project Development Status

Appendix B – 2009 Solicitation Overview

Appendix C – Independent Evaluator Report (Confidential)

Appendix D – Contract Amendment Summary

Appendix E1 – Non-Modifiable and Modifiable Terms in Sixth Amendment to Chowchilla Power Purchase Agreement

Appendix E2 – Non-Modifiable and Modifiable Terms in Fifth Amendment to El Nido Power Purchase Agreement

Appendix F1 – Sixth Amendment to Chowchilla Power Purchase Agreement

Appendix F2 – Fifth Amendment to El Nido Power Purchase Agreement

Appendix F3 – Original PPA and First, Second, Third, Fourth, and Fifth Amendments to Chowchilla Power Purchase Agreement

Appendix F4 – Original PPA and First, Second, Third, and Fourth Amendments to El Nido Power Purchase Agreement

Appendix G – Projects' Contribution Toward RPS Goals

Public Attachments:

Appendix H – Independent Evaluator Report (Public)

Appendix I – Global Ampersand Consent Decrees

II. CONSISTENCY WITH COMMISSION DECISIONS

A. Compliance with Resolution E-4199

In Resolution E-4199, the Commission set forth its standards for reviewing amendments to PPAs that had previously been approved by the Commission. PG&E prepared this advice letter following the guidelines set forth in Resolution E-4199. Specifically, the Resolution E-4199 requirements are addressed to the extent possible in the public portion of this Advice Letter, and are further addressed in the Confidential Appendices as detailed in the table below:

Requirement	Refer To
The IOU should:	
• Compare the amended contracts against the most recently approved set of MPRs and the time of delivery ("TOD") factors associated with that solicitation year	Appendix B Appendix D
• Re-evaluate the competitiveness of the Amended PPAs as compared to the PPAs that the IOU is currently negotiating and to the IOU's most recent shortlist, and provide a sufficient showing in the advice letter that the Amended PPAs are competitive based on current market data	Appendix A Appendix B Appendix D
• Explain why the contract change is needed • Provide all relevant data to justify the change	Appendix D
The Counterparty must:	
• Provide the Commission and the IE with the original cash flow model, reflecting the price in the original contracts • Provide the Commission and the IE with the latest cash flow model, reflecting the price in the amended contracts	Appendix C Appendix D
The confidential IE report must, at a minimum, include its:	
• Evaluation of the new prices based on each PPA's market valuation as compared to the bids in the IOU's most recent solicitation • Review of the cash flow model • Evaluation of the change in model inputs	Appendix C

1. The Adjustment in the Contract Price is Justified

PG&E performed due diligence regarding the requested PPA price adjustment when PG&E and Global Ampersand negotiated the Amendments. Even though the PPAs do not qualify for Above Market Funds ("AMFs"), PG&E used the guidance provided in Resolution E-4199 and obtained cost information and the Facilities' cash flow models from Global Ampersand. PG&E evaluated the cost information and performed a market value assessment to determine whether the contract price adjustment was justified. Confidential Appendix A contains a thorough description of PG&E's analysis and evaluation and Confidential Appendix D contains a thorough explanation of the changes in assumptions and resulting price implications.

Based on the review of the cash flow models and supporting information provided by Global Ampersand, cost assumptions, and evaluation of the market value, PG&E concluded that the PPA price adjustments are justified. Confidential Appendix D

contains a detailed explanation of the price adjustments and how they affect payments under the Amended PPAs.

The Independent Evaluator ("IE") reviewed the Amendments and financial pro formas provided by Global Ampersand. The IE considered how Resolution E-4199 should be applied to an existing Project and whether Global Ampersand's cash flow models justified the contract price adjustment. The IE's assessment is that the price adjustment is justified from a cost perspective. Confidential Appendix C contains the IE's assessment and conclusions.

2. The Amended PPAs Are Competitive as Compared to Current Market Data

The Amended PPAs are competitive with projects that were shortlisted in the 2009 RPS Solicitation. Additional information on the comparison of the Amended PPAs against current market data is provided in the Confidential Appendices to this Advice Letter.

B. Consistency With PG&E's Adopted RPS Procurement Plan

The original PPAs resulted from PG&E's 2004 Solicitation Protocol. PG&E's 2004 renewable procurement plan ("2004 Plan") was conditionally approved in D.04-12-048 on December 20, 2004. As required by statute, the 2004 Plan included an assessment of supply and demand to determine the optimal mix of renewable generation resources, consideration of compliance flexibility mechanisms established by the Commission, and a bid solicitation setting forth the need for renewable generation of various operational characteristics.[8]

The goal of PG&E's 2004 Plan was to procure approximately one percent of its retail sales volume, or between 700 GWh and 800 GWh per year. With expected RPS-eligible energy deliveries, on average, of approximately 131 GWh per year for both facilities for a modified term of 20 years from February 8, 2011, and with expected deliveries commencing within 120 days of filing**,** the Amended PPAs meet the criteria for the renewables procurement contained in the 2004 Plan and also meet the criteria for the renewables procurement contained in PG&E's 2009 renewable procurement plan. Additionally, the Amended PPAs will continue to contribute to PG&E's longer-term RPS goals.

[8] Pub. Util. Code § 399.14(a)(3)

The Amended PPAs are also consistent with PG&E's approved 2009 Plan because they were evaluated consistent with the review protocol in the 2009 RPS Solicitation, including portfolio fit, viability and market valuation.

C. Consistency With Commission Guidelines for Bilateral Contracting

The Amendments resulted from bilateral negotiations between PG&E and Global Ampersand. PG&E proceeded with bilateral negotiations for the Facilities because of the potential for reasonable, market-competitive prices, and the fact that the Facilities are existing (though not currently operating) resources which can provide deliveries of RPS-eligible energy starting within 120 days of the filing of this Advice Letter.

To address the issue of bilateral contracting, the Commission developed guidelines pursuant to which utilities may enter into bilateral RPS contracts. In D.03-06-071, the Commission authorized entry into bilateral RPS contracts, provided that such contracts did not require Public Goods Charge funds and were "prudent."[9] Later, in D.06-10-019, the Commission again held that bilateral contracts were permissible provided that they were at least one month in duration, and also found that such contracts must be reasonable and submitted for Commission approval by advice letter.[10] Also in that decision, the Commission stated that bilateral contracts were not eligible for supplemental energy payments.[11]

Based on D.03-06-071 and D.06-10-019, the Commission set forth the following four requirements for approval of bilateral contracts in a Resolution approving a bilateral RPS contract executed by PG&E: (1) the contract is submitted for approval by advice letter; (2) the contract is longer than one month in duration; (3) the contract does not receive AMFs; and (4) the contract is deemed reasonable by the Commission.[12] The Commission noted that it would be developing evaluation criteria for bilateral contracts, but that the above four requirements would apply in the interim.[13]

On June 19, 2009, the Commission issued D.09-06-050 establishing price benchmarks and contract review processes for short-term and bilateral RPS contracts. D.09-06-050

[9] D.03-06-071 at 57-58.

[10] D.06-10-019 at 29.

[11] *Id.* at 31.

[12] Resolution E-4216 at 5.

[13] *Id.*

provides that bilateral contracts should be reviewed using the same standards as contracts resulting from RPS solicitations.

The Amended PPAs satisfy the four requirements listed above and the requirements of D.09-06-050. The Amended PPAs being submitted for approval via this Advice Letter are not eligible for AMFs because they resulted from bilateral negotiations. The Amendments' term is longer than one month in duration; both Amendments have a term of 20 years. Finally, the Amended PPAs are reasonable when considered against standards used for evaluating contracts resulting from PG&E's 2009 RPS Solicitation, including price, as PG&E explains in this Advice Letter and in the attached Confidential Appendices. The Commission should therefore approve the Amendments.

D. Consistency of Bid Evaluation Process With Least-Cost Best-Fit Decision

The RPS statute requires PG&E to procure the "least-cost best-fit" ("LCBF") eligible renewable resources.[14] The LCBF decision directs the utilities to use certain criteria in their bid ranking[15] and offers guidance regarding the process by which the utility ranks bids in order to select or "shortlist" the bids with which it will commence negotiations. PG&E's approved process for identifying the LCBF renewable resources focuses on four primary areas:

1) Determination of market value of bid;
2) Calculation of transmission adders and integration costs;
3) Evaluation of portfolio fit; and
4) Consideration of non-price factors.

PG&E examined the reasonableness of the Amended PPAs using the same comparison tools used with other RPS transactions received in the 2009 RPS Solicitation and with bilaterals currently being offered to PG&E. The general finding is that the price adjustment is reasonable and cost market competitive. A more detailed discussion of PG&E's evaluation of the Amended PPAs is provided in Confidential Appendices A and D.

1. Market Valuation

In a "mark-to-market analysis," the present value of the bidder's payment stream is compared with the present value of the product's market value to determine the benefit

[14] Pub. Util. Code § 399.14(a)(2)(B).

[15] D.04-07-029.

(positive or negative) from the procurement of the resource, irrespective of PG&E's portfolio. This analysis is based on an evaluation of the contract price in the Amended PPAs. PG&E's analysis of the market value is confidential and addressed in Confidential Appendix A.

2. Portfolio Fit

Portfolio fit considers how well an offer's features match PG&E's portfolio needs. As part of the portfolio fit assessment, PG&E differentiates offers by the firmness of their energy delivery and by their energy delivery patterns. A higher portfolio fit measure is assigned to the energy that PG&E is sure to receive and fits the needs of the existing portfolio. The Facilities are expected to begin initial deliveries within 120 days of the filing of this Advice Letter, and these deliveries will continue for 20 years, which will contribute toward PG&E's near- and long-term RPS goals and would provide additional RPS-eligible energy generation to PG&E's portfolio.

3. Consistency With the Transmission Ranking Cost Decision

The Amendments do not introduce any additional transmission costs. The Chowchilla and El Nido Facilities have pre-existing interconnections.

4. Consistent Application of TODs

For purposes of analysis, the specific Time of Delivery ("TOD") factors in the PPAs were applied to the Amended PPAs to reflect the value of Project power delivered during different time periods. The TOD factors applied are described in Confidential Appendix A, and the effect of TOD factors is explained in Confidential Appendix D.

5. Qualitative Factors

The Amended PPAs have reasonable prices and competitive market value. In addition, the Projects are highly viable. They are existing Facilities that can be restarted in a short period of time. As discussed previously, continued operations of the Facilities should preserve over 35 local California jobs. PG&E further addresses these qualitative factors in Confidential Appendix A.

E. Compliance With Standard Terms and Conditions

The Commission set forth standard terms and conditions to be incorporated into contracts for the purchase of electricity from eligible renewable energy resources in

D.04-06-014 and D.07-02-011, as modified by D.07-05-057 and D.07-11-025. These terms and conditions were compiled and published in D.08-04-009. Additionally, the non-modifiable term related to Green Attributes was finalized in D.08-08-028 and the non-modifiable terms related to Tradable Renewable Energy Credits ("TRECs") were finalized in D.10-03-021, as modified by D.11-01-025.

In addition to the changes described in Section I.D above, the Amendments update the PPAs to include the most current standard terms and conditions.

Each provision in the Amendments is essential to the negotiated agreement between the parties, and therefore, the Commission should not modify any of the provisions. The Commission should consider the Amendments as a whole, in terms of their ultimate effect on utility customers.

With the Amendments, each of the PPAs contains provisions that conform exactly to the "non-modifiable" terms set forth in the Decision and in previous decisions, including D.07-11-025, D.08-04-009, and D.08-08-028. Highlighting of the modifiable and non-modifiable terms in the Amended PPAs is provided in Confidential Appendix E1 and Appendix E2. The following table sets forth the specific page and section number where the Commission's non-modifiable terms are located in the Amended PPAs:

Location of CPUC Non-Modifiable Standard Terms and Conditions
Global Ampersand LLC Amendments

These terms are highlighted in blue in the Amendments attached as Confidential Appendix E1 and Appendix E2 (except for the Green Attributes sections, which are in earlier amendments).

Fifth Amendment to Master Power Purchase and Sale Agreement Between GLOBAL AMPERSAND LLC, Successor in Interest to GLOBAL COMMON LLC, and Pacific Gas and Electric Company for El Nido Facility		
Non-Modifiable Term	**Amendment Section No.**	**Amendment Page No.**
STC 1: CPUC Approval	Amendment Section 2(d)	8
STC 2: RECs and Green Attributes		
• Definition of Green Attributes	Fourth Amendment Section 1(h)	Pg 3 of Fourth Amendment

Fifth Amendment to Master Power Purchase and Sale Agreement Between GLOBAL AMPERSAND LLC, Successor in Interest to GLOBAL COMMON LLC, and Pacific Gas and Electric Company for El Nido Facility		
Non-Modifiable Term	**Amendment Section No.**	**Amendment Page No.**
• Conveyance of Green Attributes	Fourth Amendment Section 1(k) for 3.2	Pg 4 of Fourth Amendment
STC 6: Eligibility	Amendment Section 2(i) for 10.15(b)	10 - 11
STC 17: Applicable Law	Amendment Section 2(i) for Master Agreement Section 10.6	10
STC REC-1 Transfer of Renewable Energy Credits	Amendment Section 2(i) for 10.15(b)	10 - 11
STC REC-2 Tracking of RECs in WREGIS	Amendment Section 2(j) for 10.16(h)	12

Sixth Amendment to Master Power Purchase and Sale Agreement Between GLOBAL AMPERSAND LLC, Successor in Interest to GLOBAL COMMON LLC, and Pacific Gas and Electric Company for Chowchilla Facility		
Non-Modifiable Term	**Amendment Section No.**	**Amendment Page No.**
STC 1: CPUC Approval	Amendment Section 2(d)(ii)	9
STC 2: RECs and Green Attributes		
• Definition of Green Attributes	Fourth Amendment Section 1(h)	Pg 3 of Fourth Amendment
• Conveyance of Green Attributes	Fourth Amendment Section 1(k) for 3.2	Pg 4 of Fourth Amendment
STC 6: Eligibility	Amendment Section 2(i) for Master	11 - 12

Sixth Amendment to Master Power Purchase and Sale Agreement Between GLOBAL AMPERSAND LLC, Successor in Interest to GLOBAL COMMON LLC, and Pacific Gas and Electric Company for Chowchilla Facility		
Non-Modifiable Term	**Amendment Section No.**	**Amendment Page No.**
	Agreement 10.15(b)	
STC 17: Applicable Law	Amendment Section 2(i) for Master Agreement 10.6	11
STC REC-1 Transfer of Renewable Energy Credits	Amendment Section 2(i) for Master Agreement 10.15(b)	11 - 12
STC REC-2 Tracking of RECs in WREGIS	Amendment Section 2(j) for Master Agreement 10.16(h)	13

F. Consistency With Unbundled Renewable Energy Credit Transactions

The Amended PPAs are for the purchase of bundled RPS-eligible energy and therefore do not include the purchase of unbundled renewable energy credits.

G. Consistency With Minimum Quantity Decision

In D.07-05-028, the Commission determined that in order to count energy deliveries from short-term contracts with existing facilities toward RPS goals, RPS-obligated load-serving entities must contract for deliveries equal to at least 0.25 percent of their prior year's retail sales through long-term contracts or through short-term contracts with new facilities.

The Amended PPAs are long-term contracts. The original PPAs were executed in 2005 with 15-year terms. The Amendments were executed on February 8, 2011 with delivery terms starting immediately upon restart of the Facilities (within 120 days of filing) and lasting for 20 years from February 8, 2011. PG&E was in compliance with the minimum quantity set forth in D.07-05-028 for 2008, 2009, and 2010, and expects to be in compliance for 2011 as well.

H. Tier 2 Short-Term Contract "Fast Track" Process

PG&E is not submitting this contract under the "Fast Track" Process.

I. Market-Price Referent

The actual prices under the Amended PPAs are confidential, market-sensitive information. As the Amendments provide for a price adjustment, it is appropriate to compare the amended prices with the most recently approved MPR and the TOD factors associated with that solicitation year,[16] which are the 2009 MPR established in Resolution E-4298 on December 17, 2009 and PG&E's 2009 TOD factors. The prices under the Amendments are above the applicable 2009 MPR. Total cost information is discussed in Confidential Appendices A and D.

J. Above-Market Funds

The Amended PPAs are not eligible for AMFs because they resulted from bilateral negotiations.

Had the Amended PPAs been eligible for AMFs, they would be considered "voluntary" procurement because PG&E was notified by the CPUC on May 28, 2009, that PG&E had exhausted its portion of the AMFs available for above-MPR contract payments. Since exhausting its AMFs, PG&E has continued to voluntarily procure renewables that are priced above the MPR, subject to Commission approval and a finding that the procurement is just and reasonable and fully recoverable in rates.

Notwithstanding the fact that the Amended PPAs are not AMFs-eligible, an AMF analysis of the Amended PPAs is included in Confidential Appendix D, in accordance with CPUC requirements.

K. Compliance With Interim Emissions Performance Standard

A greenhouse gas emissions performance standard was established by SB 1368, which requires that the Commission consider emissions costs associated with new long-term (five years or greater) power contracts procured on behalf of California ratepayers. To implement SB 1368, in D.07-01-039, the Commission adopted an Emissions Performance Standard ("EPS") that applies to contracts for a term of five or more years for baseload generation with an annualized plant capacity factor of at least 60 percent.

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[16] *See* Resolution E-4199 at 36 ("Contracts re-filed for approval of a price amendment should be compared against the most recently approved set of MPRs and the TODs associated with that solicitation year.")

The Facilities are expected to have plant capacity factors greater than 80% with 20-year terms, and the Amendments are therefore covered procurement subject to the EPS. D.07-01-039 determined that certain renewable resources and technologies are pre-approved as EPS-compliant:

> Based on the record in this proceeding, it is reasonable to make an upfront determination that the following renewable resources and technologies are EPS-compliant:
>
> (a) Solar Thermal Electric (with up to 25% gas heat input)
> (b) Wind
> (c) Geothermal, with or without re-injection
> (d) Generating facilities (e.g., agricultural and wood waste, landfill gas) using biomass that would otherwise be disposed of utilizing open burning, forest accumulation, landfill (uncontrolled, gas collection with flare, gas collection with engine), spreading or composting.[17]

Because the Amended PPAs are for RPS-eligible energy from a generating facility using biomass that would otherwise be disposed of using conventional methods[18], they are in compliance with the EPS pursuant to D.07-01-039. PG&E has provided notice of the Amended PPAs' compliance with the interim EPS requirements by serving this Advice Letter on the service list in the RPS rulemaking, R.08-08-009.

L. Procurement Review Group Participation

The Procurement Review Group ("PRG") for PG&E includes the Commission's Energy Division and Division of Ratepayer Advocates, Department of Water Resources ("DWR"), and the California Utility Employees ("CUE"). The Amendments were discussed at a meeting on April 12, 2011. Additional information is provided in Confidential Appendix A.

[17] D.07-01-039, Conclusion of Law 35.

[18] *See* Confidential Appendix A at Section II.B.2.

M. Independent Evaluator

The IE, Merrimack Energy Group, Inc.,[19] evaluated the Amendments. The findings of the IE regarding the Amendments are contained in Confidential Appendix C and Public Appendix H.

III. Project Development Status

A. Company/Development Team

In December 2010, Global Ampersand became a wholly-owned portfolio company of the Akeida Environmental Funds, which is managed by Akeida. Akeida is a private investment firm dedicated to the energy and environmental sector. Founded in 2007, Akeida provides capital solutions and management support to late stage renewable energy infrastructure projects. In the United States, Akeida currently has four power generating assets in its portfolio with a combined installed capacity of 95 MW. Akeida also owns and manages 11 carbon reduction projects in Eastern Europe that reduce methane leakage from natural gas pipelines.

Akeida's principals have over 50 years of combined experience in the energy, project finance, and renewable energy sectors. The principals of Akeida have advised and invested in several billion dollars worth of power, infrastructure, gas and carbon investments around the world.

Prior to founding Akeida, the principals were founding members of an environmental asset management firm that managed and invested over $900 million, financing over 20 large scale carbon reduction and renewable energy projects. The partners managed these projects through technical and regulatory approval processes, certifying over 85 million tons of U.N. based carbon credits and bringing these compliance instruments to market.

Akeida has offices in New York and Houston, and utilizes administrative, legal, environmental, construction and accounting support from globally recognized firms such as Concept Capital, Rothstein Katz, Shaw Consultants, Yorke Engineering, and Paul Hastings.

[19] New Energy Opportunities, Inc., Merrimack Energy Group's subcontractor, served as project lead on this assignment.

B. Technology

Chowchilla and El Nido are existing biomass Facilities with gross nameplate capacities of 12.5 MW each.[20] Chowchilla and El Nido delivered energy to PG&E from December 2008 and February 2009, respectively, through June 2010 under the existing PPAs. Both Facilities are currently preparing to restart by June 2011. The Amendments do not involve any changes to the generating technology.

1. Technology Type and Level of Technology Maturity

The Facilities use fluidized bed boilers, which are a mature combustion technology. Advantages of fluidized bed boilers include the ability to handle a large variety of fuels as well as lower NOx emissions from lower operating temperatures.

2. Quality of Renewable Resource

The Facilities are based on well established and proven biomass technology, and there is sufficient available fuel to serve the PPAs. Additional information is provided in Confidential Appendices C and D.

3. Other Resources Required

No other resources required.

C. Development Milestones

Per the Global Ampersand's March 2010 Monthly Progress Report, the Facilities are scheduled to restart by June 2011. Milestone activities include re-staffing, start-up fuel procurement, boiler maintenance, and purchase of new fuel handling equipment. Additional information is provided in Confidential Appendices C and D.

1. Site Control

The Facilities are existing facilities with site control.

[20] The contract capacity is 9 MW for each facility, or the minimum expected capacity net of station load and losses to the delivery point.

2. Equipment Procurement

The capital equipment necessary for operations is already in place, and Global Ampersand has initiated the purchase of minor replacement equipment to improve operational reliability and performance.

3. Permitting/Certification Status

Global Ampersand has all necessary permits necessary for a restart of the Facilities. In addition, for both the Chowchilla and El Nido Facilities, Global Ampersand has entered into Consent Decrees (the "Consent Decrees") with the Environmental Protection Agency ("EPA") and the San Joaquin Valley Unified Air Pollution Control District ("District") to resolve alleged violations of the Clean Air Act. These Consent Decrees require Global Ampersand to pay specified fines, take certain measures in operating the Facilities, and incorporate those requirements into its permits. Global Ampersand has assured PG&E that it will fulfill these requirements. These Consent Decrees are attached as Public Appendix I.

4. Production Tax Credit/Investment Tax Credit

a. Treasury Grant in Lieu of Production Tax Credit/Investment Tax Credit

Global Ampersand qualifies for a CEC subsidy under the Existing Renewable Facility Program ("ERFP"), and has received a $15 per MWh credit to date. This program will end at the end of 2011, but the long term viability of the Facilities does not depend on this subsidy.

Global Ampersand also qualifies for the federal production tax credit, which Global Ampersand explains will continue to benefit its members once the Facilities re-commence deliveries through 2017.

5. Transmission

The existing Facilities do not require any transmission-related activities.

D. Financing Plan

Global Ampersand is a privately held company. Further details on the financing plan are included in Confidential Appendix A.

IV. CONTINGENCIES AND/OR PROJECT MILESTONES

The Amended PPAs include a requirement for Global Ampersand to provide monthly progress updates until the Facilities begin delivering RPS-eligible energy again.

V. REGULATORY PROCESS

A. Requested Effective Date

PG&E requests that the Commission issue a resolution approving this advice filing by **October 20, 2011**. Justification for this date is provided in Confidential Appendix D.

B. Earmarking

PG&E reserves the right to earmark deliveries from the PPAs as amended by the Amendments.

VI. REQUEST FOR COMMISSION APPROVAL

PG&E requests that the Commission issue a resolution no later than **October 20, 2011**, that:

1. Approves the Amended PPAs in their entirety, including payments to be made by PG&E pursuant to the Amendments, subject to the Commission's review of PG&E's administration of the Amended PPAs.

2. Finds that any procurement pursuant to the Amended PPAs is procurement from eligible renewable energy resources for purposes of determining PG&E's compliance with any obligation that it may have to procure eligible renewable energy resources pursuant to the California Renewables Portfolio Standard (Public Utilities Code Section 399.11 et seq.) ("RPS"), Decision ("D.") 03-06-071 and D.06-10-050, or other applicable law.

3. Finds that all procurement and administrative costs, as provided by Public Utilities Code section 399.14(g), associated with the PPAs as amended by the Amendments shall be recovered in rates.

4. Adopts the following finding of fact and conclusion of law in support of CPUC Approval:

a. The PPAs, as amended by the Amendments, are consistent with PG&E's 2009 RPS procurement plan.

b. The terms of the PPAs, as amended by the Amendments, including the price of delivered energy, are reasonable.

5. Adopts the following finding of fact and conclusion of law in support of cost recovery for the PPAs as amended by the Amendments:

a. The utility's costs under the PPAs as amended by the Amendments shall be recovered through PG&E's Energy Resource Recovery Account.

b. Any stranded costs that may arise from the PPAs as amended by the Amendments are subject to the provisions of D.04-12-048 that authorize recovery of stranded renewables procurement costs over the life of the contract. The implementation of the D.04-12-048 stranded cost recovery mechanism is addressed in D.08-09-012.

6. Adopts the following findings with respect to resource compliance with the Emissions Performance Standard ("EPS") adopted in R.06-04-009:

a. The Amended PPAs are in compliance with the EPS adopted in D.07-01-039 because the Facilities are generating facilities using biomass that would otherwise be disposed of utilizing open burning, forest accumulation, landfill, spreading or composting, which is pre-approved as compliant with the EPS.

Protests:

Anyone wishing to protest this filing may do so by sending a letter by **May 23, 2011**, which is **20** days from the date of this filing. The protest must state the grounds upon which it is based, including such items as financial and service impact, and should be submitted expeditiously. Protests should be mailed to:

CPUC Energy Division
Attention: Tariff Unit, 4th Floor
505 Van Ness Avenue
San Francisco, California 94102

Facsimile: (415) 703-2200
E-mail: mas@cpuc.ca.gov and jnj@cpuc.ca.gov

Copies should also be mailed to the attention of the Director, Energy Division, Room 4004, and Honesto Gatchalian, Energy Division, at the address shown above.

The protest also should be sent via U.S. mail (and by facsimile and electronically, if possible) to PG&E at the address shown below on the same date it is mailed or delivered to the Commission:

Pacific Gas and Electric Company
Attention: Brian K. Cherry
Vice President, Regulation and Rates
77 Beale Street, Mail Code B10C
P.O. Box 770000
San Francisco, California 94177

Facsimile: (415) 973-6520
E-Mail: PGETariffs@pge.com

Effective Date:

PG&E requests that the Commission issue a resolution approving this advice filing on **October 20, 2011**.

Notice:

In accordance with General Order 96-B, Section IV, a copy of this Advice Letter excluding the confidential appendices is being sent electronically and via U.S. mail to parties shown on the attached list and the service lists for R.08-08-009, R.06-02-012 and R.08-02-007. Non-market participants who are members of PG&E's Procurement Review Group and have signed appropriate Non-Disclosure Certificates will also receive the Advice Letter and accompanying confidential attachments by overnight mail. Address changes to the General Order 96-B service list should be directed to PGETariffs@pge.com. For changes to any other service list, please contact the

Commission's Process Office at (415) 703-2021 or at Process_Office@cpuc.ca.gov. Advice letter filings can also be accessed electronically at http://www.pge.com/tariffs.

Brian Cherry/ent

Vice President – Regulation and Rates

cc: Service List for R.08-08-009
Service List for R.06-02-012
Service List for R.08-02-007
Paul Douglas – Energy Division
Sean Simon – Energy Division

Attachments

Limited Access to Confidential Material:

The portions of this Advice Letter marked Confidential Protected Material are submitted under the confidentiality protection of Section 583 and 454.5(g) of the Public Utilities Code and General Order 66-C. This material is protected from public disclosure because it consists of, among other items, the contract itself, price information, and analysis of the proposed RPS contract, which are protected pursuant to D.06-06-066 and D.08-04-023. A separate Declaration Seeking Confidential Treatment regarding the confidential information is filed concurrently herewith.

Confidential Attachments:

Appendix A – Consistency with Commission Decisions and Rules and Project Development Status

Appendix B – 2009 Solicitation Overview

Appendix C – Independent Evaluator Report (Confidential)

Appendix D – Contract Amendment Summary

Appendix E1 – Non-Modifiable and Modifiable Terms in Sixth Amendment to Chowchilla Power Purchase Agreement

Appendix E2 – Non-Modifiable and Modifiable Terms in Fifth Amendment to El Nido Power Purchase Agreement

Appendix F1 – Sixth Amendment to Chowchilla Power Purchase Agreement

Appendix F2 – Fifth Amendment to El Nido Power Purchase Agreement

Appendix F3 – Original PPA and First, Second, Third, Fourth, and Fifth Amendments to Chowchilla Power Purchase Agreement

Appendix F4 – Original PPA and First, Second, Third, and Fourth Amendments to El Nido Power Purchase Agreement

Appendix G – Projects' Contribution Toward RPS Goals

Public Attachments:

Appendix H – Independent Evaluator Report (Public)

Appendix I – Global Ampersand Consent Decrees

CALIFORNIA PUBLIC UTILITIES COMMISSION

ADVICE LETTER FILING SUMMARY

ENERGY UTILITY

MUST BE COMPLETED BY UTILITY (Attach additional pages as needed)

Company name/CPUC Utility No. **Pacific Gas and Electric Company (ID U39 M)**

Utility type:

☑ ELC ☑ GAS

☐ PLC ☐ HEAT ☐ WATER

Contact Person: David Poster and Linda Tom-Martinez

Phone #: (415) 973-1082 and (415) 973-4612

E-mail: dxpu@pge.com and lmt1@pge.com

EXPLANATION OF UTILITY TYPE

ELC = Electric GAS = Gas

PLC = Pipeline HEAT = Heat WATER = Water

(Date Filed/ Received Stamp by CPUC)

Advice Letter (AL) #: **3837-E** **Tier: 3**

Subject of AL: Amendments to Two Power Purchase and Sale Agreements Between Global Ampersand, LLC, Successor in Interest to Global Common LLC, and Pacific Gas and Electric Company

Keywords (choose from CPUC listing): Contracts, Portfolio

AL filing type: ☐ Monthly ☐ Quarterly ☐ Annual ☑ One-Time ☐ Other _____

If AL filed in compliance with a Commission order, indicate relevant Decision/Resolution #:

Does AL replace a withdrawn or rejected AL? If so, identify the prior AL: No

Summarize differences between the AL and the prior withdrawn or rejected AL: _____

Is AL requesting confidential treatment? If so, what information is the utility seeking confidential treatment for: Yes. See the attached matrix that identifies all of the confidential information.

Confidential information will be made available to those who have executed a nondisclosure agreement: ☐ Yes ☐ No All members of PG&E's Procurement Review Group who have signed nondisclosure agreements will receive the confidential information.

Name(s) and contact information of the person(s) who will provide the nondisclosure agreement and access to the confidential information: Kelvin Yip (415) 973-4354

Resolution Required? ☑Yes ☐ No

Requested effective date: **October 20, 2011**

No. of tariff sheets: N/A

Estimated system annual revenue effect (%): N/A

Estimated system average rate effect (%): N/A

When rates are affected by AL, include attachment in AL showing average rate effects on customer classes (residential, small commercial, large C/I, agricultural, lighting).

Tariff schedules affected: N/A

Service affected and changes proposed[1]: N/A

Pending advice letters that revise the same tariff sheets: N/A

Protests, dispositions, and all other correspondence regarding this AL are due no later than 20 days after the date of this filing, unless otherwise authorized by the Commission, and shall be sent to:

CPUC, Energy Division
Tariff Files, Room 4005
DMS Branch
505 Van Ness Ave.,
San Francisco, CA 94102
jnj@cpuc.ca.gov and mas@cpuc.ca.gov

Pacific Gas and Electric Company
Attn: Brian Cherry
Vice President, Regulation and Rates
77 Beale Street, Mail Code B10C
P.O. Box 770000
San Francisco, CA 94177
E-mail: PGETariffs@pge.com

DECLARATION OF KELVIN YIP
SEEKING CONFIDENTIAL TREATMENT
FOR CERTAIN DATA AND INFORMATION CONTAINED IN
ADVICE LETTER 3837-E
(PACIFIC GAS AND ELECTRIC COMPANY - U 39 E)

I, Kelvin Yip, declare:

1. I am presently employed by Pacific Gas and Electric Company ("PG&E"), and have been an employee at PG&E since 2002. My current title is Senior Analyst within PG&E's Energy Procurement organization. In this position, my responsibilities include negotiating PG&E's Renewables Portfolio Standard Program ("RPS") Power Purchase Agreements and supporting PG&E's solicitation programs. In carrying out these responsibilities, I have acquired confidential information related to PG&E's contracts and negotiations with various counterparties. Through this experience, I have become familiar with the type of information that would affect the negotiating positions of electricity sellers with respect to price and other terms, as well as with the type of information that such sellers consider confidential and proprietary.

2. Based on my knowledge and experience, and in accordance with Decision ("D") 08-04-023 and the August 22, 2006 "Administrative Law Judge's Ruling Clarifying Interim Procedures for Complying with Decision 06-06-066," I make this declaration seeking confidential treatment of Appendix A - G to PG&E's Advice Letter 3837-E, submitted on May 3, 2011.

3. Attached to this declaration is a matrix identifying the data and information for which PG&E is seeking confidential treatment. The matrix specifies that the material PG&E is seeking to protect constitutes the particular type of data and information listed in Appendix 1 of D.06-06-066 and Appendix C of D.08-04-023 (the "IOU Matrix"), or constitutes information

that should be protected under General Order 66-C. The matrix also specifies the category or categories in the IOU Matrix to which the data and information corresponds, if applicable, and why confidential protection is justified. Finally, the matrix specifies that: (1) PG&E is complying with the limitations specified in the IOU Matrix for that type of data or information, if applicable; (2) the information is not already public; and (3) the data cannot be aggregated, redacted, summarized or otherwise protected in a way that allows partial disclosure. By this reference, I am incorporating into this declaration all of the explanatory text in the attached matrix.

I declare under penalty of perjury, under the laws of the State of California, that to the best of my knowledge, the foregoing is true and correct. Executed on May 3, 2011, at San Francisco, California.

KELVIN YIP

PACIFIC GAS AND ELECTRIC COMPANY
Advice Letter 3837-E
May 3, 2011

IDENTIFICATION OF CONFIDENTIAL INFORMATION PER DECISION 06-06-066 AND DECISION 08-04-023

	Redaction Reference	1) The material submitted constitutes a particular type of data listed in the Matrix, appended as Appendix 1 to D.06-06-066 and Appendix C to D.08-04-023 (Y/N)	2) Which category or categories in the Matrix the data correspond to:	3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data (Y/N)	4) That the information is not already public (Y/N)	5) The data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure (Y/N)	PG&E's Justification for Confidential Treatment	Length of Time
1	Document: Advice Letter 3837-E							
2	Appendix A	Y	Item VII G) Renewable Resource Contracts under RPS program - Contracts without SEPs. Item VII (un-numbered category following VII G) Score sheets, analyses, evaluations of proposed RPS projects. Item VIII A) Bid information and B) Specific quantitative analysis involved in scoring and evaluation of participating bids. General Order 66-C.	Y	Y	Y	This Appendix contains bid information and evaluations from the 2009 Solicitation; discusses, analyzes and evaluates the Project and the terms of the PPA; contains information concerning and analyses and evaluations of project viability; and contains confidential information of the counterparties. Disclosure of this information would provide valuable market sensitive information to competitors. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential. Release of this information would be damaging to negotiations. In addition, if information about and evaluations of project viability is made public, it could harm the counterparties and adversely affect project viability. Finally, this information has been obtained in confidence from the counterparty under an expectation of confidentiality. It is in the public interest to treat such information as confidential because if such information were made public, it would put the counterparty at a business disadvantage, could create a disincentive to do business with PG&E and other regulated utilities, and could have a damaging effect on current and future negotiations with other counterparties.	For information covered under Item VII G) remain confidential for three years after the commercial operation date, or one year after expiration (whichever is sooner). For information covered under Item VII (un-numbered category following VII G), remain confidential for three years. For information covered under Item VIII A), remain confidential until after final contracts submitted to CPUC for approval. For information covered under Item VIII B), remain confidential for three years after winning bidders selected.
3	Appendix B	Y	Item VIII A) Bid information and B) Specific quantitative analysis involved in scoring and evaluation of participating bids.	Y	Y	Y	This Appendix contains bid information and bid evaluations from the 2009 Solicitation. This information would provide market sensitive information to competitors and is therefore considered confidential. Furthermore, offers from the 2005, 2006, 2007, 2008, and 2009 solicitations and offers received outside of those solicitations are still under negotiation, further substantiating why releasing this information would be damaging to the negotiation process.	For information covered under Item VIII A), remain confidential until after final contracts submitted to CPUC for approval For information covered under Item VIII B), remain confidential for three years after winning bidders selected.

PACIFIC GAS AND ELECTRIC COMPANY
Advice Letter 3837-E
May 3, 2011

IDENTIFICATION OF CONFIDENTIAL INFORMATION PER DECISION 06-06-066 AND DECISION 08-04-023

	Redaction Reference	1) The material submitted constitutes a particular type of data listed in the Matrix, appended as Appendix 1 to D.06-06-066 and Appendix C to D.08-04-023 (Y/N)	2) Which category or categories in the Matrix the data correspond to:	3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data (Y/N)	4) That the information is not already public (Y/N)	5) The data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure (Y/N)	PG&E's Justification for Confidential Treatment	Length of Time
4	Appendix C	Y	Item VII G) Renewable Resource Contracts under RPS program - Contracts without SEPs. Item VII (un-numbered category following VII G) Score sheets, analyses, evaluations of proposed RPS projects. Item VIII A) Bid information and B) Specific quantitative analysis involved in scoring and evaluation of participating bids. General Order 66-C.	Y	Y	Y	This Appendix contains bid information and evaluation from the 2009 Solicitation; discusses, analyzes and evaluates the Project and the terms of the PPA; contains information concerning and analyses and evaluations of project viability; and contains confidential information of the counterparties. Disclosure of this information would provice valuable market sensitive information to competitors. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential. Release of this information would be damaging to negotiations. In addition, if information about and evaluations of project viability is made public, it could harm the counterparties and adversely affect project viability. Finally, this information has been obtained in confidence from the counterparty under an expectation of confidentiality. It is in the public interest to treat such information as confidential because if such information were made public, it would put the counterparty at a business disadvantage, could create a disincentive to do business with PG&E and other regulated utilities, and could have a damaging effect on current and future negotiations with other counterparty.	For information covered under Item VII G) remain confidential for three years after the commercial operation date, or one year after expiration (whichever is sooner). For information covered under Item VII (un-numbered category following VII G), remain confidential for three years. For information covered under Item VIII A), remain confidential until after final contracts submitted to CPUC for approval. For information covered under Item VIII B), remain confidential for three years after winning bidders selected. For information covered

PACIFIC GAS AND ELECTRIC COMPANY
Advice Letter 3837-E
May 3, 2011

IDENTIFICATION OF CONFIDENTIAL INFORMATION PER DECISION 06-06-066 AND DECISION 08-04-023

	Redaction Reference	1) The material submitted constitutes a particular type of data listed in the Matrix, appended as Appendix 1 to D.06-06-066 and Appendix C to D.08-04-023 (Y/N)	2) Which category or categories in the Matrix the data correspond to:	3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data (Y/N)	4) That the information is not already public (Y/N)	5) The data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure (Y/N)	PG&E's Justification for Confidential Treatment	Length of Time
5	Appendix D	Y	Item VII G) Renewable Resource Contracts under RPS program - Contracts without SEPs. Item VII (un-numbered category following VII G) Score sheets, analyses, evaluations of proposed RPS projects. Item VIII A) Bid information and B) Specific quantitative analysis involved in scoring and evaluation of participating bids. General Order 66-C.	Y	Y	Y	This Appendix contains bid information and evaluations from the 2009 Solicitation; discusses, analyzes and evaluates the Project and the terms of the PPA; and contains confidential information of the counterparties. Disclosure of this information would provide valuable market sensitive information to competitors. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential. Release of this information would be damaging to negotiations. Furthermore, the counterparties to the PPA have an expectation that the terms of the PPA will remain confidential pursuant to confidentiality provisions in the PPA. It is in the public interest to treat such information as confidential because if such information were made public, it would put the counterparty at a business disadvantage, could create a disincentive to do business with PG&E and other regulated utilities, and could have a damaging effect on current and future negotiations with other counterparty.	For information covered under Item VII G) remain confidential for three years after the commercial operation date, or one year after expiration (whichever is sooner). For information covered under Item VII (un-numbered category following VII G), remain confidential for three years. For information covered under Item VIII A), remain confidential until after final contracts submitted to CPUC for approval. For information covered under Item VIII B), remain confidential for three years after winning bidders selected.
6	Appendix E1 and E2	Y	Item VII G) Renewable Resource Contracts under RPS program - Contracts without SEPs.	Y	Y	Y	This Appendix contains the Amendments to the PPAs for which PG&E seeks approval in the Advice Letter filing. Disclosure of certain terms of the Amendments would provide valuable market sensitive information to competitors. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential. Release of this information would be damaging to negotiations. Furthermore, the counterparty to the Amended PPAs has an expectation that the terms of the Amended PPAs will remain confidential pursuant to confidentiality provisions in the PPA.	For information covered under Item VII G), remain confidential for three years after the commercial operation date, or one year after expiration (whichever is sooner).
7	Appendices F1, F2, F3, F4	Y	Item VII G) Renewable Resource Contracts under RPS program - Contracts without SEPs.	Y	Y	Y	These Appendices contains the PPAs and amendments. Disclosure of the PPAs and amendments would provide valuable market sensitive information to competitors. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential. Release of this information would be damaging to negotiations. Furthermore, the counterparty to the PPA has an expectation that the terms of the PPA will remain confidential pursuant to confidentiality provisions in the PPA.	For information covered under Item VII G), remain confidential for three years after the commercial operation date, or one year after expiration (whichever is sooner).
8	Appendix G	Y	Item VII (un-numbered category following VII G) Score sheets, analyses, evaluations of proposed RPS projects. Item VI B) Utility Bundled Net Open Position for Energy (MWh).	Y	Y	Y	This Appendix contains information that, if disclosed, would provide valuable market sensitive information to competitors and allow them to see PG&E's remaining RPS net open energy position. Since negotiations are still in progress with bidders from the 2005, 2006, 2007, 2008, and 2009 solicitations and with other counterparties, this information should remain confidential for three years.	Remain confidential for three years.

Public Appendix H

Independent Evaluator Report

Report of the Independent Evaluator

Amendments to

Two Power Purchase and Sale Agreements

Between

Pacific Gas and Electric Company

and

Global Ampersand LLC

April 2011

Merrimack Energy Group, Inc.

and

New Energy Opportunities, Inc.

Report of the Independent Evaluator
Amendments to Two Power Purchase and Sale Agreements between
Pacific Gas and Electric Company and Global Ampersand LLC

On February 8, 2011 Pacific Gas & Electric Company ("PG&E") executed amendments to two power purchase and sale agreements ("PPAs") with Global Ampersand LLC ("Global Ampersand") regarding the purchase of energy, capacity and renewable energy attributes from two existing wood-fired power plants. These plants are the El Nido Biomass Facility located in Merced, California ("El Nido Facility") and the Chowchilla Biomass Facility located in Chowchilla, California ("Chowchilla Facility"). Each facility has a nameplate capacity of 12.5 MW.

The El Nido and Chowchilla facilities first went into commercial operation in the 1988-90 timeframe, but were shut down in 1995 after the PPAs with PG&E were bought out. In September 2005, PG&E entered into two long-term PPAs with Global Common LLC (the predecessor in interest to Global Ampersand) for the purchase of energy and related products from the two biomass facilities, which Global Common LLC had acquired and planned to refurbish and restart. The PPAs have been amended several times since. Late in 2008, the Chowchilla Facility achieved commercial operation, and the El Nido Facility followed in early 2009.

Late in 2009, Global Ampersand sought an increase in the PPA price and modifications to other PPA terms and conditions, claiming that the two projects were not economically viable under the existing PPA rates. While the initial PPAs with Global Ampersand were not entered into by PG&E as the result of a solicitation pursuant to the California Renewable Portfolio Standards, PG&E treated the proposed contract amendments as coming within the scope of the California Public Utility Commission's Resolution E-4199 (issued on March 12, 2009). PG&E selected Merrimack Energy Group, Inc. ("Merrimack Energy") to serve as Independent Evaluator ("IE").[1]

Resolution E-4199 requires that if a developer requests an amendment to an approved contract that affects the contract price, the investor-owned utility ("IOU") should evaluate the competitiveness of the amended project as compared to the projects that the IOU is considering from its most recent solicitation and other sources. The IOU must provide a sufficient showing in the advice letter that the amended contract is competitive based on current market data. Additionally, advice letter filings for approval of an amendment that affect an approved contract's price have to explain why the contract modification is needed, and provide all relevant data to justify the change.

The Resolution also requires the developer to provide the Commission and IE with cash flow models, both the original reflecting the price in the original contract and the latest version, for projects that are re-filed with the Commission for approval of a price amendment if the new contract price is above the market price referent. The confidential

[1] New Energy Opportunities, Inc. served as a subcontractor to Merrimack Energy in this assignment.

project-specific IE report must, at a minimum, include its evaluation of the new price based on the project's market valuation as compared to the bids in the IOU's most recent solicitation, a review of the cash flow model and an evaluation of the change in model inputs. An IE's conclusions must not be based on whether the developer's rate of return is reasonable, but rather whether the changes in model inputs are reasonable and justify the price change.[2]

Merrimack Energy monitored the contract negotiations and has reviewed the PPA amendments and detailed financial pro formas provided by Global Ampersand, the project owner. The pro formas included those prepared both before the two plants were refurbished as well as current cash flow statements. Merrimack Energy's report addresses the following matters:

1. A history and description of the original PPAs and amendments prior to the commencement of contract negotiations for an increase in prices.

2. A description of the contract amendments and the negotiation process associated with the amendments.

3. The IE's role in the process.

4. How the assessment required under Resolution E-4199 should or might be applied in the context of operating power plants, in contrast to power plants that are still in the development stage.

5. Whether the changes in the model inputs presented by the plants' owner are reasonable and justify the change in price reflected in the PPA amendments.

6. Whether the prices in the PPA amendments are competitive with proposals under consideration by PG&E from the most recent RPS solicitation and other sources.

7. The extent to which the two biomass plants with amended PPAs are viable projects.

Most of the information relevant to the IE's assessment is confidential. Hence, the bulk of this report is contained in the Confidential Appendix.

As set forth in detail in the Confidential Appendix, it is Merrimack Energy's assessment that the changes in the model inputs from the pre-refurbishment project pro formas are reasonable and support the proposed increases in contract prices. Absent the PPA amendments, it is highly unlikely that the plants could continue operations on an ongoing basis. Hence, there is a need for amending the existing PPAs. Further, the amended PPA prices are, based on the proposals under consideration by PG&E from the last RPS solicitation (2009) as well as other proposals, reasonably, but not highly, competitive.

[2] Resolution E-4199, March 12, 2009 (pages 26-28).

However, since the Global projects are existing plants, they do not have the development risks associated with most new RPS projects, and with approval of the PPA amendments, the prospects for viable, ongoing baseload operation of the plants appear to be good. For these reasons, it is Merrimack Energy's opinion that the amended PPAs have ample justification to warrant Commission approval.

Public Appendix I

Global Ampersand Consent Decrees

ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice

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UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT Plaintiffs, v. AMPERSAND CHOWCHILLA BIOMASS, LLC, Defendant.	Case No. 1:11-cv-00242-LJO-DLB **CONSENT DECREE**

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

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

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

WHEREAS, the District has issued NOVs to Defendant for violations of District rules and permit conditions at the Facility from October 20, 2008 to October 15, 2010;

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

I. JURISDICTION AND VENUE

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

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

II. APPLICABILITY

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

4. No transfer of ownership 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. Defendant shall provide a copy of this Consent Decree to any proposed transferee. At least 30 Days prior to a transfer of ownership, 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 the United States, in accordance with Section XIII of this Decree (Notices). Any attempt to transfer ownership of the Facility without complying with this Paragraph constitutes a violation of this Decree.

5. 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 Defendant's contractor at the Facility, NAES Corporation, and any of its employees, and to any other contractor retained to perform work required under this Consent Decree or to operate the Facility. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

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

III. DEFINITIONS

7. Terms used in this Consent decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such

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

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

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

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

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

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

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

g. "Defendant" shall mean Ampersand Chowchilla Biomass, LLC;

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

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

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

k. "Facility" shall mean the biomass fueled electric generating facility owned by Defendant and located at 16457 Avenue 24-1/2, Chowchilla, California;

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

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

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

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

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

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

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

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

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

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

IV. CIVIL PENALTY

8. Defendant shall pay the sum of $164,000 as a civil penalty to the United States, together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the Effective Date. If a sale of the stock of Defendant is pending after the Effective Date, Defendants shall make such payment as soon after the close of the transaction as practicable, provided that full payment of the civil penalty shall in no event be made later than 90 Days after the Effective Date of this Consent Decree.

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

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

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

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

11. Defendant shall pay the sum of $179,000 as a civil penalty to the District, together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the Effective Date. If a sale of the stock of Defendant is pending after the Effective Date, Defendants shall make such payment as soon after the close of escrow as practicable, provided that full payment of the civil penalty shall in no event be made later than 90 Days after the Effective Date of this Consent Decree. Payment shall be made by delivery of a check made payable to the San Joaquin Valley Unified Air Pollution Control District and delivered by certified U.S. Mail to:

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

V. COMPLIANCE REQUIREMENTS

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

13. Defendant shall:

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

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

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

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

e. Revise reporting of emissions exceedences in a manner that is consistent with, and that allows for ready evaluation of compliance with emissions limitations contained in

any permits issued for the Facilities, including each stipulated penalty triggered by a violation of this Consent Decree during the reporting period, and a summary thereof. Within 30 days following Restart of the Facility, Defendant shall submit for approval, to EPA and the District, a proposed revised reporting format. The first quarterly emissions exceedence report following approval by EPA and the District, and each such report thereafter, shall use the revised format. Use of such revised reporting format shall be a requirement of this Decree for the first eight consecutive Full Calendar Quarters following Restart of the Facility and, if applicable, any partial calendar quarter that immediately follows Restart.

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

i. The PMO Plan shall be a compilation of Defendant's approaches for exercising good air pollution control practices and for minimizing NOx, CO, NH3, SO2 and particulate emissions from the Facilities. The PMO Plan shall have as its goal the elimination of excess emissions events.

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

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

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

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

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

14. Approval of Deliverables. After review of receipt of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA, shall review such document and after consultation with the District, 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.

15. If the submission is approved pursuant to Paragraph 14.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 14.b or .c, Defendant shall, upon written direction from EPA, after consultation with the District, take all actions required by the approved plan, report, or other item that EPA, after consultation with the District, 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 IX of this Decree (Dispute Resolution).

16. If the submission is disapproved in whole or in part pursuant to Paragraph 14.c or 14.d, Defendant shall, within 45 Days or such other time as the Parties agree to in writing, address 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.

17. Any stipulated penalties applicable to the original submission, as provided in Section VII of this Decree, 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.

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

19. Permits. Where any compliance obligation under this Section 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 VIII of this Consent Decree (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.

VI. REPORTING REQUIREMENTS

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

a. Within 30 Days after the end of each calendar year quarter (i.e., by April 30, July 30, October 30, and January 30) following Restart of the Facility, until termination of this Decree pursuant to Section XVII, Defendant shall submit, a quarterly report for the preceding quarter that shall include a report on progress of installation, certification and operation of a stack flow rate monitor, on certification and operation of an automated NH_3 injection system at the Facility, revisions made to excess emissions reports to comport with this Consent Decree, implementation of operations and maintenance procedures for maintenance of CEMS at the Facility, preparation and completion of a PMO Plan for the Facility, revisions to any Operations and Maintenance agreement related to operation of the Facility, and submission of permit amendment applications to fulfill the requirements of this Consent Decree.

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.

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

due, Defendant shall so state in the notification. Defendant shall investigate the cause of the violation and shall then provide a full explanation of the cause of the violation in the next report due pursuant to Paragraph 20.a. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section VIII of this Consent Decree (Force Majeure).

21. Whenever any violation of this Consent Decree or of any applicable permits or any other event affecting Defendant's performance under this Decree, or the performance of the Facility may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA and the District orally or by electronic or facsimile transmission 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 the preceding Paragraph.

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

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

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

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

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

25. 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.

VII. STIPULATED PENALTIES

26. Defendant shall be liable for stipulated penalties to the United States and the District for violations of this Consent Decree as specified below, unless excused under Section VIII (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.

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

28. Violation of Permit Conditions.

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

$500	1st to 10th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$1,000	11th to 30th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph

$1,500	31st day, and each day beyond, with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph.

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

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

$2,000	1st to 10th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$3,000	11th to 30th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$4,000	31st day, and each day beyond, with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph.

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

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

Penalties per Separate Non-Emissions Based Permit Violation, Per Day, for Each Quarterly Reporting Period	
$250	1st to 10th days with any non-emissions based permit violation at the Facility
$500	11th to 30th days with any non-emissions based permit violation at the Facility
$1,000	31st day, and each day beyond, with any non-emissions based permit violation at the Facility.

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

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

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

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

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

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

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

34. 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. Except as otherwise provided, stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

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

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

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

a. If the dispute is resolved by agreement or by a decision of EPA or the District 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 District, or to both, 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 District 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.

37. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notice required by Paragraph 9, 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. Defendant shall pay stipulated penalties owing to the District in the manner set forth and in Paragraph 11, 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.

38. 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 District from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

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

VIII. FORCE MAJEURE

40. "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 exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

41. 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 orally or by electronic or facsimile transmission to Chief, Air Enforcement Office (Air-5), Air Division, U.S. Environmental Protection Agency, Region IX, 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 District 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.

42. If EPA, after a reasonable opportunity for review and comment by the District, 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 District, 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.

43. If EPA, after a reasonable opportunity for review and comment by the District, 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.

44. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (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 40 and 41, 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.

IX. DISPUTE RESOLUTION

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

46. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States and the District 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 and the District shall be considered binding unless, within 10 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

47. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the District 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.

48. The United States and District shall serve their Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' and District'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 them. The

United States' and District'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.

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

50. The United States and District 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.

51. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 47 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA and the District under 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 and District 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 47, Defendant shall bear the burden of demonstrating that their position complies with this Consent Decree.

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

X. INFORMATION COLLECTION AND RETENTION

53. The United States, the District, 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 District in accordance with the terms of this Consent Decree;

c. obtain samples and, upon request, splits of any samples taken by Defendant or their representatives, contractors, or consultants;

d. obtain documentary evidence, including photographs and similar data; and

e. assess Defendant's compliance with this Consent Decree.

54. Until three years after the termination of this Consent Decree, Defendant, or its successors or assigns, shall retain, and shall instruct their 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 their or their contractors' or agents' possession or control, or that come into their or their 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 District, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

55. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States and the District 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 District, Defendant shall deliver any such documents, records, or other information to EPA or the District.

56. 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: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

57. 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.

58. 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 District 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.

XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

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

60. The United States and the District reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 59. This Consent Decree shall not be construed to limit the rights of the United States or the District 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 59. The United States and the District 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, Defendant's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

61. In any subsequent administrative or judicial proceeding initiated by the United States or the District for injunctive relief, civil penalties, or other appropriate relief relating to the Facility, 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 District 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 59 of this Section.

62. 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 District 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 Act, 42 U.S.C. § 7401 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

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

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

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

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

XII. COSTS

66. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the District 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.

XIII. NOTICES

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

To the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
Attn: Andrew Ingersoll
U.S. Department of Justice
Box 7611 Ben Franklin Station
Washington, D.C. 20044-7611
Re: DOJ No. [90-5-2-1-09874]

and

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

To EPA:

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

To the District:

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

To Defendant:

Ampersand Chowchilla Biomass, LLC
c/o Cohen Tauber Spievack & Wagner P.C.
420 Lexington Avenue - Suite 2400
New York, New York 10170
ATTN: Robert A. Boghosian, Esq.

and

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

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

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

XIV. EFFECTIVE DATE

70. 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.

XV. RETENTION OF JURISDICTION

71. 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 IX and XVI, or effectuating or enforcing compliance with the terms of this Decree.

XVI. MODIFICATION

72. 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.

73. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 51, 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).

XVII. TERMINATION

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

75. Following receipt by the United States and the District 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 District, agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

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

XVIII. PUBLIC PARTICIPATION

77. 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 Decree.

XIX. SIGNATORIES/SERVICE

78. Each undersigned representative of Defendant, the District and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, 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.

79. 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.

XX. INTEGRATION

80. 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. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, 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.

XXI. FINAL JUDGMENT

81. 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 District, 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.

SO ORDERED.

Dated and entered this __ day of _____, ____.

_____

[_____]

UNITED STATES DISTRICT JUDGE

Eastern District of California

FOR PLAINTIFF UNITED STATES OF AMERICA:

DATE:

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

2/14/2011
DATE:

ANDREW W. INGERSOLL
Trial Attorney
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
Telephone: (202) 305-0312
andrew.ingersoll@usdoj.gov

FOR PLAINTIFF UNITED STATES OF AMERICA (continued):

1/13/10
DATE:

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

1/13/10
DATE:

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

OF COUNSEL:

DAVID KIM
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

FOR PLAINTIFF SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT:

DATE: _____

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

DATE: _____

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

FOR DEFENDANT AMPERSAND CHOWCHILLA BIOMASS, LLC:

12/28/2010
DATE:

ERIC SHUMWAY
Chief Operating Officer
Ampersand Chowchilla Biomass, LLC

ELLEN M. MAHAN
Deputy Section Chief
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice

ANDREW W. INGERSOLL (Bar No. 221348)
Trial Attorney
Telephone: (202) 305-0312
Environmental Enforcement Section
Environment & Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044

Attorneys for Plaintiff United States of America

PHILIP M. JAY (Bar No. 086174)
District Counsel
CATHERINE T. REDMOND (Bar No. 226957)
Assistant District Counsel
Telephone: (559) 230-6033
San Joaquin Valley Unified Air Pollution Control District
1990 E. Gettysburg Avenue
Fresno, California 93726

Attorney for Plaintiff San Joaquin Valley Unified Air Pollution Control District

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT Plaintiffs, v. MERCED POWER, LLC, Defendant.	Case No. 1:11-cv-00241-LJO-SMS **CONSENT DECREE**

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

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

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

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

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

I. JURISDICTION AND VENUE

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

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

II. APPLICABILITY

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

4. No transfer of ownership 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. Defendant shall provide a copy of this Consent Decree to any proposed transferee. At least 30 Days prior to a transfer of ownership, 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 the United States, in accordance with Section XIII of this Decree (Notices). Any attempt to transfer ownership of the Facility without complying with this Paragraph constitutes a violation of this Decree.

5. 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 Defendant's contractor at the Facility, NAES Corporation, and any of its employees, and to any other contractor retained to perform work required under this Consent Decree or to operate the Facility. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

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

III. DEFINITIONS

7. Terms used in this Consent decree that are defined in the Act or in regulations promulgated pursuant to the Act shall have the meanings assigned to them in the Act or such

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CIVIL PENALTY

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

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

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

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

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

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

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

V. COMPLIANCE REQUIREMENTS

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

13. Defendant shall:

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

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

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

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

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

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

i. The PMO Plan shall be a compilation of Defendant's approaches for exercising good air pollution control practices and for minimizing NOx, CO, NH3, SO2 and particulate emissions from the Facilities. The PMO Plan shall have as its goal the elimination of excess emissions events.

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

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

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

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

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

14. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA, shall review such document and after consultation with the District, 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.

15. If the submission is approved pursuant to Paragraph 14.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 14.b or .c, Defendant shall, upon written direction from EPA, after consultation with the District, take all actions required by the approved plan, report, or other item that EPA, after consultation with the District, 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 IX of this Decree (Dispute Resolution).

16. If the submission is disapproved in whole or in part pursuant to Paragraph 14.c or 14.d, Defendant shall, within 45 Days or such other time as the Parties agree to in writing, address 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.

17. Any stipulated penalties applicable to the original submission, as provided in Section VII of this Decree, 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.

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

19. Permits. Where any compliance obligation under this Section 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 VIII of this Consent Decree (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.

VI. REPORTING REQUIREMENTS

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

a. Within 30 Days after the end of each calendar year quarter (i.e., by April 30, July 30, October 30, and January 30) following Restart of the Facility, until termination of this Decree pursuant to Section XVII, Defendant shall submit, a quarterly report for the preceding quarter that shall include a report on progress of installation, certification and operation of a stack flow rate monitor, on certification and operation of an automated NH_3 injection system at the Facility, revisions made to excess emissions reports to comport with this Consent Decree, implementation of operations and maintenance procedures for maintenance of CEMS at the Facility, preparation and completion of a PMO Plan for the Facility, revisions to any Operations and Maintenance agreement related to operation of the Facility, and submission of permit amendment applications to fulfill the requirements of this Consent Decree.

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.

c. If Defendant violates, or is on notice that it may materially violate, any requirement of this Consent Decree, Defendant shall notify the United States and the District of such violation and its likely duration, in writing, within ten business Days of the Day Defendant first becomes aware of the violation or prospective violation, with 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 notification is due, Defendant shall so state in the notification. Defendant shall investigate the cause of the violation and shall then provide a full explanation of the cause of the violation in the next report due pursuant to Paragraph 20.a. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section VIII of this Consent Decree (Force Majeure).

21. Whenever any violation of this Consent Decree or of any applicable permits or any other event affecting Defendant's performance under this Decree, or the performance of the Facility may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA and the District orally or by electronic or facsimile transmission 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 the preceding Paragraph.

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

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

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

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

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

25. 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.

VII. STIPULATED PENALTIES

26. Defendant shall be liable for stipulated penalties to the United States and the District for violations of this Consent Decree as specified below, unless excused under Section VIII (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.

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

28. Violation of Permit Conditions.

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

$500	1st to 10th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$1,000	11th to 30th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph

$1,500	31st day, and each day beyond, with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph.

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

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

$2,000	1st to 10th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$3,000	11th to 30th days with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph
$4,000	31st day, and each day beyond, with any violation at the Facility sufficient to trigger stipulated penalties under this subparagraph.

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

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

Penalties per Separate Non-Emissions Based Permit Violation, Per Day, for Each Quarterly Reporting Period	
$250	1st to 10th days with any non-emissions based permit violation at the Facility
$500	11th to 30th days with any non-emissions based permit violation at the Facility
$1,000	31st day, and each day beyond, with any non-emissions based permit violation at the Facility.

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

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

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

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

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

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

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

34. 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. Except as otherwise provided, stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

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

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

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

a. If the dispute is resolved by agreement or by a decision of EPA or the District 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 District, or to both, 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 District 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.

37. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notice required by Paragraph 9, 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. Defendant shall pay stipulated penalties owing to the District in the manner set forth and in Paragraph 11, 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.

38. 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 District from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

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

VIII. FORCE MAJEURE

40. "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 exercises "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. "Force majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

41. 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 orally or by electronic or facsimile transmission to Chief, Air Enforcement Office (Air-5), Air Division, U.S. Environmental Protection Agency, Region IX, 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 District 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.

42. If EPA, after a reasonable opportunity for review and comment by the District, 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 District, 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.

43. If EPA, after a reasonable opportunity for review and comment by the District, 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.

44. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (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 40 and 41, 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.

IX. DISPUTE RESOLUTION

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

46. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States and the District 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 and the District shall be considered binding unless, within 10 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

47. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States and the District 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.

48. The United States and District shall serve their Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' and District'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 them. The

United States' and District'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.

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

50. The United States and District 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.

51. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 47 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA and the District under 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 and District 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 47, Defendant shall bear the burden of demonstrating that their position complies with this Consent Decree.

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

X. INFORMATION COLLECTION AND RETENTION

53. The United States, the District, 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 District in accordance with the terms of this Consent Decree;

c. obtain samples and, upon request, splits of any samples taken by Defendant or their representatives, contractors, or consultants;

d. obtain documentary evidence, including photographs and similar data; and

e. assess Defendant's compliance with this Consent Decree.

54. Until three years after the termination of this Consent Decree, Defendant, or its successors or assigns, shall retain, and shall instruct their 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 their or their contractors' or agents' possession or control, or that come into their or their 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 District, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

55. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States and the District 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 District, Defendant shall deliver any such documents, records, or other information to EPA or the District.

56. 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: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of each author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

57. 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.

58. 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 District 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.

XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

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

60. The United States and the District reserve all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 59. This Consent Decree shall not be construed to limit the rights of the United States or the District 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 59. The United States and the District 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, Defendant's Facility, whether related to the violations addressed in this Consent Decree or otherwise.

61. In any subsequent administrative or judicial proceeding initiated by the United States or the District for injunctive relief, civil penalties, or other appropriate relief relating to the Facility, 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 District 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 59 of this Section.

62. 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 District 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 Act, 42 U.S.C. § 7401 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

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

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

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

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

XII. COSTS

66. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States and the District 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.

XIII. NOTICES

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

To the United States:

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

and

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

To EPA:

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

To the District:

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

To Defendant:

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

and

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

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

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

XIV. EFFECTIVE DATE

70. 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.

XV. RETENTION OF JURISDICTION

71. 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 IX and XVI, or effectuating or enforcing compliance with the terms of this Decree.

XVI. MODIFICATION

72. 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.

73. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 51, 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).

XVII. TERMINATION

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

75. Following receipt by the United States and the District 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 District, agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

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

XVIII. PUBLIC PARTICIPATION

77. 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 Decree.

XIX. SIGNATORIES/SERVICE

78. Each undersigned representative of Defendant, the District and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, 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.

79. 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.

XX. INTEGRATION

80. 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. Other than deliverables that are subsequently submitted and approved pursuant to this Decree, 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.

XXI. FINAL JUDGMENT

81. 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 District, 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.

SO ORDERED.

Dated and entered this __ day of _____, _____.

_____

[_____]

UNITED STATES DISTRICT JUDGE

Eastern District of California

FOR PLAINTIFF UNITED STATES OF AMERICA:

DATE:

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

2/14/2011
DATE:

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

FOR PLAINTIFF UNITED STATES OF AMERICA (continued):

1/13/11
DATE:

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

1/13/11
DATE:

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

OF COUNSEL:
DAVID KIM
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, California 94105

FOR PLAINTIFF SAN JOAQUIN VALLEY UNIFIED AIR POLLUTION CONTROL DISTRICT:

DATE: _____

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

DATE: _____

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

FOR DEFENDANT MERCED POWER, LLC:

12/28/2010
DATE:

ERIC SHUMWAY
Chief Operating Officer
Merced Power, LLC

PG&E Gas and Electric
Advice Filing List
General Order 96-B, Section IV

AT&T
Alcantar & Kahl LLP
Ameresco
Anderson & Poole
Arizona Public Service Company
BART
Barkovich & Yap, Inc.
Bartle Wells Associates
Bloomberg
Bloomberg New Energy Finance
Boston Properties
Braun Blaising McLaughlin, P.C.
Brookfield Renewable Power
CA Bldg Industry Association
CLECA Law Office
CSC Energy Services
California Cotton Ginners & Growers Assn
California Energy Commission
California League of Food Processors
California Public Utilities Commission
Calpine
Cardinal Cogen
Casner, Steve
Chris, King
City of Palo Alto
City of Palo Alto Utilities
Clean Energy Fuels
Coast Economic Consulting
Commercial Energy
Consumer Federation of California
Crossborder Energy
Davis Wright Tremaine LLP
Day Carter Murphy
Defense Energy Support Center
Department of Water Resources
Dept of General Services
Douglass & Liddell
Downey & Brand
Duke Energy
Dutcher, John
Economic Sciences Corporation
Ellison Schneider & Harris LLP
Foster Farms
G. A. Krause & Assoc.
GLJ Publications
GenOn Energy, Inc.
Goodin, MacBride, Squeri, Schlotz & Ritchie
Green Power Institute
Hanna & Morton
Hitachi
In House Energy
International Power Technology
Intestate Gas Services, Inc.
Lawrence Berkeley National Lab
Los Angeles Dept of Water & Power
Luce, Forward, Hamilton & Scripps LLP
MAC Lighting Consulting
MBMC, Inc.
MRW & Associates
Manatt Phelps Phillips
McKenzie & Associates
Merced Irrigation District
Modesto Irrigation District
Morgan Stanley
Morrison & Foerster
NLine Energy, Inc.
NRG West
Navigant Consulting
Norris & Wong Associates
North America Power Partners
North Coast SolarResources
Northern California Power Association
Occidental Energy Marketing, Inc.
OnGrid Solar
Praxair
R. W. Beck & Associates
RCS, Inc.
Recurrent Energy
SCD Energy Solutions
SCE
SMUD
SPURR
San Francisco Public Utilities Commission
Santa Fe Jets
Seattle City Light
Sempra Utilities
Sierra Pacific Power Company
Silicon Valley Power
Silo Energy LLC
Southern California Edison Company
Spark Energy, L.P.
Sun Light & Power
Sunshine Design
Sutherland, Asbill & Brennan
Tabors Caramanis & Associates
Tecogen, Inc.
Tiger Natural Gas, Inc.
TransCanada
Turlock Irrigation District
United Cogen
Utility Cost Management
Utility Specialists
Verizon
Wellhead Electric Company
Western Manufactured Housing Communities Association (WMA)
eMeter Corporation