

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 MTU AMERICA INC., )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil Action No. 1:15-cv-429

CONSENT DECREE

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Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a complaint in this action concurrently with this Consent Decree, alleging that Defendant MTU America Inc. (formerly Tognum America, Inc. and prior to that MTU Detroit-Diesel, Inc.) violated Sections 203(a) and 213(d) of the Clean Air Act (“Act”), 42 U.S.C. §§ 7522(a) and 7547(d).

In November 2008, Defendant disclosed to EPA certain irregularities that occurred during durability testing on Series 4000 engines, which testing formed part of the basis for Defendant’s applications for certificates of conformity, required under Title II of the Act, 42 U.S.C. §§ 7521-7590, covering Model Year 2008 and 2009 engine families that Defendant manufactured and sold in the United States. Defendant has represented that, prior to entry of this Consent Decree, Defendant took several actions to prevent additional irregularities including conducting an audit and establishing a regular internal and external auditing program, emissions testing of its engines in the field, training its employees, establishing a whistleblower hotline, and restructuring the responsibilities for compliance testing.

On February 23, 2015, in accordance with the Sections 206(b) and 213(d) of the Act, 42 U.S.C. §§ 7525(b) & 7547(d) and 40 C.F.R. §§ 89.511 and 94.512, EPA’s Office of Transportation and Air Quality (“OTAQ”) voided *ab initio* the certificates of conformity for Defendant’s Model Year 2008 and 2009 engine families designated 8MDDL95.4XTR, 8MDDM65.0MTR, 9MDDL95.4XTR, 9MDDN65.0MTR, and 9MDDN86.2MTR. Notwithstanding EPA’s voiding *ab initio*, EPA has not determined that Defendant’s Model Year 2008 and 2009 engine families 8MDDL95.4XTR, 8MDDM65.0MTR, 9MDDL95.4XTR,

9MDDN65.0MTR, and 9MDDN86.2MTR exceed the emissions limitations in 40 C.F.R. Parts 89 and 94.

The Complaint alleges that Defendant sold or otherwise introduced into commerce engines that were not covered by a valid certificate of conformity in violation of Sections 203 and 213 of the Act, 42 U.S.C. §§ 7522 and 7547, and the regulations promulgated at 40 C.F.R. Parts 89 and 94.

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

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

**I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 203 and 213 of the Act, 42 U.S.C. §§ 7522 and 7547, and over the Parties. Venue lies in this District pursuant to Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, 40 C.F.R. §§ 89.1006(b)(1) and 94.1106(b)(1), because, pursuant to Section 205(b), 42 U.S.C. § 7542(b), this District is the location of the “Administrator’s principal place of business.”

2. For purposes of this Consent Decree, Defendant agrees that the Complaint states claims upon which relief may be granted pursuant to Sections 203, 204, 205, and 213 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, and 7547, and the regulations promulgated thereunder.

## **II. APPLICABILITY**

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

4. No transfer of ownership or operation of Defendant's Business, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. At least thirty (30) Days prior to such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement, to EPA and the United States Department of Justice, in accordance with Section XIII of this Decree (Notices). Any transfer of ownership or operation of the Business without providing the copy of the Decree and providing notice as specified in 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 any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

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

### **III. DEFINITIONS**

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. “Affiliate” means any entity that, directly or indirectly or through one or more intermediaries, owns or controls, is owned or controlled by, or is under common ownership or control with Defendant.

b. “Applicable Title II Requirements” means the requirements of Title II of the Clean Air Act, 42 U.S.C. § 7521 *et seq.*, and the implementing regulations that are applicable to Defendant’s Business and/or operations;

c. “Business” shall mean Defendant’s engine manufacturing business subject to Applicable Title II Requirements including, without limitation, any manufacturing facility, testing facility, laboratory, warehouse, distribution center, or other inventory storage location that is owned, leased or operated by Defendant, its Affiliates, or any other third-party in so far as it relates to Defendant’s compliance with Applicable Title II requirements;

d. “Certificate of Conformity” means a certificate issued by EPA pursuant to Section 206 of the Act, 42 U.S.C. § 7525, and to 40 C.F.R. §§ 89.105 and 94.208;

e. “Complaint” shall mean the complaint filed by the United States in this action;

f. “Consent Decree” or “Decree” shall mean this Decree;

g. “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;

h. “Defendant” shall mean MTU America Inc., formerly known as Tognum America, Inc., and prior to that known as MTU Detroit Diesel, Inc.;

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. “Model Year” shall mean model year as defined in 40 C.F.R. §§ 89.2 and 94.2, as appropriate;

l. “OTAQ” shall mean EPA’s Office of Transportation and Air Quality and any of its successor departments or agencies;

m. “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral;

n. “Parties” shall mean the United States and Defendant;

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

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

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

8. Defendant shall pay a civil penalty of one million two hundred thousand dollars (\$1,200,000) to the United States within thirty (30) Days after the Effective Date of this Consent Decree, plus thirty-three dollars (\$33) per day interest from the day the Decree is lodged until the date of payment.

9. Defendant shall pay the civil penalty due at <https://www.pay.gov> 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 (“FLU”) of the U.S. Attorney’s Office for the District of District of Columbia. The payment instructions provided by the FLU shall include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Thomas Koenig  
Chief Financial Officer, MTU America, Inc.  
39525 MacKenzie Drive  
Novi, MI 48377  
[Thomas.Koenig@mtu-online.com](mailto:Thomas.Koenig@mtu-online.com)

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XIII (Notices). At the time of payment, Defendant shall send notice that payment has been made: (i) to EPA via email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov) or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati,



Ohio 45268; and (ii) to the United States and EPA in accordance with Section XIII. Such notice shall reference the CDCS Number and DOJ case number 90-5-2-1-10493. Defendant shall not deduct any penalties paid under this Decree pursuant to this Section or Section VII (Stipulated Penalties) in calculating its federal income tax.

#### **V. COMPLIANCE REQUIREMENTS**

10. EPA has already approved a compliance auditor who shall be responsible for conducting the external audit of Defendant's compliance with the Applicable Title II Requirements ("External Audit"). If, at any time, Defendant wishes to replace the compliance auditor as a successor for conducting the external audit of Defendant's compliance with Applicable Tier II Requirements, Defendant shall submit to the United States the proposed successor compliance auditor. The proposed successor compliance auditor may not be affiliated with Defendant, a present employee or contractor of Defendant, or present employee of any present contractor of Defendant.

11. Defendant shall submit to the United States a written statement of qualifications for the proposed successor compliance auditor that must include:

- a. the name, affiliation, and address of the proposed auditor;
- b. information demonstrating how the proposed successor compliance auditor has the experience necessary to develop and implement the External Audit;
- c. information regarding the proposed successor compliance auditor's employees' experience and training demonstrating that the auditing team proposed to conduct the External Audit has a working knowledge of Applicable Title II Requirements; and

d. descriptions of any previous work contracts or financial relationships of the proposed successor compliance auditor with Defendant.

12. EPA may approve or disapprove of the proposed successor compliance auditor. If EPA disapproves the proposed successor compliance auditor, then Defendant shall submit a list of at least two (2) alternative proposed successor compliance auditors to EPA within twenty (20) Days of receipt of EPA's notice. Unless EPA disapproves the auditor within sixty (60) Days, Defendant may proceed with the proposed successor compliance auditor. If, after Defendant has submitted a list of alternative proposed successor compliance auditors, EPA disapproves all of Defendant's alternative proposed successor compliance auditors, then Defendant and the United States agree to resolve the selection of the successor compliance auditor through the Dispute Resolution Process specified in Section IX of this Consent Decree. Any further successor to the approved compliance auditor must also be selected in accordance with the procedure set forth in this Paragraph and Paragraph 11.

13. Within thirty (30) Days of the Effective Date of this Consent Decree, Defendant shall submit a proposed scope of work for the External Audit, which shall include:

a. an evaluation of Defendant's compliance with Applicable Title II Requirements, particularly 40 C.F.R. Part 1065, for the preceding twelve-month period;

b. a physical inspection of any facility where Defendant, its Affiliate, contractor, or other third party conducts certification or compliance testing of Defendant's engines for compliance with the Applicable Title II Requirements;

c. a review and description of Defendant's training programs regarding compliance with the Applicable Title II Requirements; and

d. a review and description of Defendant's whistleblower procedures for employees to report concerns regarding Defendant's compliance with Applicable Title II Requirements.

14. EPA may approve or disapprove (with comments) the proposed scope of work for the External Audit for determining compliance with Applicable Title II Requirements. Unless EPA disapproves the proposed scope of work within ninety (90) Days, Defendant shall proceed with the proposed scope of work. Within twenty (20) Days after receiving any notification of disapproval from EPA, Defendant shall submit to EPA a revised scope of work that responds to all comments. EPA may approve or disapprove the revised scope of work. Unless EPA disapproves the revised scope of work within ninety (90) Days, Defendant shall proceed with the revised scope of work. If Defendant chooses to dispute EPA's disapproval of the revised scope of work, within twenty (20) Days after receiving a notification of disapproval of the revised scope of work from EPA, Defendant shall send the United States a written Notice of Dispute in accordance with Paragraph 43. After resolution of the issues through Dispute Resolution, Defendant shall proceed with the resulting scope of work.

15. Defendant shall ensure that the compliance auditor conducts the External Audit in accordance with the approved scope of work. Defendant shall make available to the compliance auditor all of Defendant's records regarding Defendant's compliance with Applicable Title II Requirements for the prior calendar year, except for privileged documents pursuant to Paragraph 54, and all records regarding Defendant's compliance with Applicable Title II Requirements of any Affiliate, contractor, or other third party utilized by Defendant to assist in complying with Applicable Title II Requirements. Defendant shall provide the

approved compliance auditor with access to any facility where certification or compliance testing of Defendant's engines subject to Applicable Title II Requirements occurs. This requirement applies to any facility owned or operated by Defendant or any Affiliate, or any facility operated by any contractor or third party used for any activity of or on behalf of Defendant that is subject to the Applicable Title II Requirements. Defendant shall provide all reasonable assistance to allow the compliance auditor to monitor compliance for Defendant's engines with Applicable Title II Requirements, including making employees, Affiliates, or contractors available to answer questions or provide information.

16. Defendant's contract with the compliance auditor must require the compliance auditor to conduct three annual External Audits of the prior twelve months ("External Audit period"). The first External Audit period begins with the second full month following approval, the expiration of the 90-day period for EPA's disapproval, or resolution through Dispute Resolution as specified in Section IX of this Decree, of the scope of work in accordance with Paragraph 14 of this Consent Decree. The second and third External Audit periods shall cover, respectively, the second and third twelve-month period following the first External Audit period.

17. Defendant shall submit to the United States the External Audit Report within ninety (90) Days after the end of each of the three twelve-month periods subject to the compliance auditing. The External Audit Report must contain a detailed summary of the audit process, including any obstacles encountered, a description of any facility or subject matter where a full audit did not occur and reasons therefore, address the status of Defendant's compliance with all Applicable Title II Requirements during the preceding twelve-month period,

and contain sufficient information to allow the United States to evaluate Defendant's compliance with Applicable Title II Requirements. In coordination with the compliance auditor, Defendant may identify in the External Audit Report information that Defendant asserts 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, in coordination with the compliance auditor, shall follow the procedures set forth in 40 C.F.R. Part 2.

18. At a minimum, the External Report shall also:

a. provide detailed findings for all items in the approved auditor's scope of work;

b. identify areas of noncompliance related to Defendant's engines with Applicable Title II Requirements with specificity, including any deficiencies in best management practices associated with any identified areas of noncompliance, and including at any facility or other location that is owned, leased or operated by any Affiliate, contractor, or any other third party in so far as it relates to Defendant's compliance with Applicable Title II Requirements;

c. estimate the amount of emissions of excess pollutants, as applicable, associated with each area of any noncompliance, specifying the pollutants and the estimated amounts;

d. recommend actions, as applicable, for Defendant to take to achieve compliance with any Applicable Title II Requirements as quickly as possible, including as necessary, at any facility or other location that is owned, leased or operated by any Affiliate,

contractor, or any other third party in so far as it relates to Defendant's compliance with Applicable Title II Requirements; and

e. recommend actions, as applicable, for Defendant to take to mitigate any excess emissions associated with noncompliance.

19. Within sixty (60) Days after submission of the External Audit Report to EPA, Defendant shall submit to EPA a written response to the External Audit Report findings and provide an Action Plan for expeditiously addressing each item warranting a response in the External Audit Report, and specifically for addressing any identified areas of noncompliance by achieving full compliance with Applicable Title II Requirements. The Action Plan shall include a schedule that is as expeditious as practicable of the steps that will be taken for Defendant to achieve full compliance with the Applicable Title II Requirements.

20. EPA may approve or disapprove (with comments) the Action Plan. Unless EPA disapproves the Action Plan within 60 Days, Defendant shall implement the Action Plan. Within thirty (30) Days after receiving any notification of disapproval from EPA, Defendant shall submit to EPA a revised Action Plan that responds to all comments. EPA may approve or disapprove the revised Action Plan. Unless EPA disapproves the revised Action Plan within thirty (30) Days, Defendant shall implement the revised Action Plan. If Defendant chooses to dispute the revised Action Plan, within twenty (20) Days of its receipt of EPA's disapproval of the revised Action Plan, Defendant shall send the United States a written Notice of Dispute in accordance with Paragraph 43 (Informal Dispute Resolution). After resolution of the issues through Dispute Resolution, Defendant shall implement the resulting Action Plan.

21. Any stipulated penalties applicable to the original submission of the Action Plan or Statement of Work, as provided in Section VII of this Decree, shall accrue from the date the original submission was due, but shall not be payable unless the resubmission is untimely or is disapproved; provided that, if the original submission was so deficient as to constitute a material breach of Defendant's obligations under this Decree (as determined by EPA but subject to Dispute Resolution in accordance with Section IX of this Decree), the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

22. By no later than thirty (30) Days after completion of the implementation of all actions, if any, required by an Action Plan, Defendant shall submit, pursuant to Section VI (Reporting Requirements), its certification and a report to EPA certifying that Defendant has implemented the requirements of the Action Plan and that Defendant is in compliance with the Applicable Title II Requirements.

#### **VI. REPORTING REQUIREMENTS**

23. Whenever any violation of this Consent Decree or of any applicable Title II Requirement or any other event affecting Defendant's performance under this Decree, or the performance of its Business, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by email as soon as possible, but no later than twenty-four (24) hours after Defendant first knew of the violation or event.

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

25. Each report required to be submitted by Defendant under this Section shall be signed by an authorized representative 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 and does not apply to reports required to be submitted by the external auditor.

26. 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.

27. 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**

28. Defendant shall be liable for stipulated penalties to the United States 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.

29. Late Payment of Civil Penalty

If Defendant fails to pay the civil penalty required to be paid under Section IV of this Decree (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$10,000 per Day for each Day that the payment is late.

30. a. Deliverables and Reporting Requirements. The following

stipulated penalties shall accrue per violation per Day for each violation of the requirement to submit deliverables required by Sections V and VI of this Consent Decree, including the submission of a scope of work for the compliance auditor, the External Audit, an Action Plan, the certification of completion of the Action Plan, and any revisions to the deliverables required herein:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th Day
\$2,000	15th through 30th Day
\$3,000	31st Day and beyond

b. Action Plans. The following stipulated penalties shall

accrue per violation per Day for Defendant’s failure to comply with any Action Plan prepared pursuant to Paragraphs 19 and 20:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,500	1st through 14th Day
\$3,000	15th through 30th Day
\$5,000	31st Day and beyond

31. Defendant shall pay any stipulated penalty within thirty (30) Days of receiving the United States' written demand.

32. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

33. Stipulated penalties shall continue to accrue as provided in Paragraphs 29-30, during any Dispute Resolution, but need not be paid until the following:

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

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

c. If the United States or Defendant appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) Days of receiving the final appellate court decision.

34. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices 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) of this Consent Decree that the penalties are being paid.

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

36. 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 Applicable Title II Requirements, Defendant shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

#### **VIII. FORCE MAJEURE**

37. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any 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.

38. 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 email to the United States, 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 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.

39. If EPA 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 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 shall notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

40. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant in writing of its decision.

41. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than fifteen (15) Days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be or was 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 37 and 38, 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**

42. 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.

43. 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 a written Notice of

Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed twenty (20) Days from the date the dispute arises, unless that period is modified by written agreement. If the Defendant and the United States cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within fourteen (14) Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

44. 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 a single 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.

45. The United States shall serve its Statement of Position within sixty (60) Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

46. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIII of this Consent Decree (Notices) and applicable rules of civil procedure, a motion requesting judicial resolution of the dispute. The motion must be filed within fourteen (14) Days of receipt of the United States'

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.

47. The United States shall respond to Defendant's motion within the time period and in the manner allowed by the applicable rules of civil procedure. Defendant may file a reply memorandum, in the manner and to the extent permitted by the applicable rules of civil procedure.

48. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 44 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 44, questions of the meaning of the Consent Decree, interpretation of the Clean Air Act and applicable regulations, the existence of violations of Applicable Title II Requirement identified in the External Audit Report, and all other questions shall be reviewed in accordance with applicable principles of law.

49. 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 33. 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**

50. The United States and its 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 in accordance with the terms of this Consent Decree;
- c. obtain samples and, upon request, splits of any samples taken by Defendant or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess Defendant's compliance with this Consent Decree.



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

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

53. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least ninety (90) Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to EPA.

54. Defendant may assert that certain documents, records, or other information required to be provided by this Section or Paragraph 15 is privileged under the attorney-client privilege or any other privilege recognized by federal law, and withhold such privileged documents, records or other information. 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.

55. 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.

56. 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 pursuant to applicable federal 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**

57. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint through the date of lodging, regarding engine families 8MDDL95.4XTR, 8MDDM65.0MTR, 9MDDL95.4XTR, 9MDDN65.0MTR, and 9MDDN86.2MTR for Model Years 2008 and 2009 against the Defendant.

58. Neither the United States nor EPA shall base an allegation against an entity other than Defendant or its Affiliates that engines in engine families 8MDDL95.4XTR,

8MDDM65.0MTR, 9MDDL95.4XTR, 9MDDN65.0MTR, and 9MDDN86.2MTR for Model Years 2008 and 2009 do not conform to the requirements of 40 C.F.R. § 89.130, § 89.1003(a)(3)(iii), § 1068.120 and § 94.11 (pertaining to rebuilding practices), 40 C.F.R. § 89.612(a) and (d), § 89.1003(a)(6), § 94.805(a) and (d), § 94.1103(a)(1)(ii) (pertaining to importation), 40 C.F.R. § 89.1003(b)(4) (pertaining to the use of certified nonroad engines) or the requirements of 40 C.F.R. §§ 60.4201, 60.4202, 60.4210, and 60.4211 (pertaining to the obligations of owners to purchase certified engines), solely on the basis of the voiding *ab initio* of the Certificates of Conformity.

59. Defendant agrees not to contest the voiding, *ab initio*, by OTAQ of Certificates of Conformity EPA issued for Defendant's Model Year 2008 and 2009 engine families designated 8MDDL95.4XTR, 8MDDM65.0MTR, 9MDDL95.4XTR, 9MDDN65.0MTR, and 9MDDN86.2MTR.

60. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. Except as expressly specified in Paragraphs 57 and 58, this Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations or permits, including for violations identified through the audit required by Section V.

61. 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. The United States does not, by its 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. § 4700 *et seq.*, or with any other provisions of federal, State, or local laws, regulations, or permits.

## **XII. COSTS**

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

63. 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:

EES Case Management Unit  
Environment and Natural Resources Division  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-2-1-10493  
[eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)  
and

Director, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W. (2242A)

Washington, D.C. 20460

To EPA:

Director, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
Attn: Mobile Source Enforcement Branch  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave., N.W. (2242A)  
Washington, D.C. 20460

and

Christopher Thompson  
Chief - Western Field Office  
Air Enforcement Division - 8MSU  
U.S. EPA Office of Civil Enforcement  
1595 Wynkoop Street  
Denver, Colorado 80202-1129  
Thompson.Christopher@epa.gov

To Defendant(s):

General Counsel  
MTU America, Inc.  
39525 MacKenzie Drive  
Novi, MI 48377

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

65. 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**

66. 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**

67. 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**

68. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by Defendant and the United States. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

69. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX of this Decree (Dispute Resolution), provided, however, that, notwithstanding any provision of Section IX 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**

70. After Defendant has completed the requirements of Section V (Compliance Requirements) of this Decree, completed activities required under any and all

Action Plans to address any non-compliance identified in the External Audit, and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation.

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

72. If the United States 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 Section IX, until 60 Days after service of its Request for Termination.

#### **XVIII. PUBLIC PARTICIPATION**

73. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States 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**

74. Each undersigned representative of Defendant 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.

75. 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**

76. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding between 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**

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

Dated and entered this \_\_\_ day of \_\_\_\_\_, \_\_\_\_.

---

UNITED STATES DISTRICT JUDGE  
District of Columbia

Signature Page to Consent Decree in:  
*United States v. MTU America Inc.,*

FOR THE UNITED STATES DEPARTMENT OF JUSTICE



JOHN C. CRUDEN  
Assistant Attorney General  
Environment and Natural Resources  
Division  
United States Department of Justice



KRISTIN M. FURRIE  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
P.O. Box 7611  
Washington, DC 20044-7611  
(202) 616-6515

Signature Page to Consent Decree in:  
*United States v. MTU America Inc.*,

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY



CYNTHIA GILES  
Assistant Administrator  
Office of Enforcement and  
Compliance Assurance  
United States Environmental  
Protection Agency



PHILLIP A. BROOKS  
Director, Air Enforcement Division  
United States Environmental  
Protection Agency

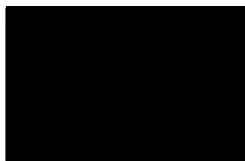


CHRISTOPHER THOMPSON  
Chief – Western Field Office  
Air Enforcement Division  
United States Environmental  
Protection Agency  
1595 Wynkoop Street  
Denver, Colorado 80202

Signature Page to Consent Decree in:  
*United States v. MTU America Inc.,*

FOR DEFENDANT MTU AMERICA INC.

FEB 23 2015



THOMAS KOENIG  
Chief Financial Officer and President  
MTU America Inc.



JAMES W. STEVENOT  
General Counsel  
MTU America Inc.