

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 XTO Energy Inc., )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

Civil Action No. [\_\_\_\_\_]

CONSENT DECREE

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 XTO Energy Inc. violated Section 301 of the Clean Water Act (“Act”), 33 U.S.C. § 1311.

The Complaint against Defendant alleges that it caused a discharge of pollutants, including but not limited to total dissolved solids, strontium, barium, bromides, and chloride to an unnamed tributary of Sugar Run and then to Sugar Run, both waters of the United States, from a well pad located at 301 Marquardt Road, in Hughesville, Lycoming County, Pennsylvania.

Defendant does not admit any liability to the United States arising out of the facts alleged in the Complaint. Nothing in this Consent Decree shall constitute or be construed as an admission of liability or wrongdoing or as an admission of fact or law by XTO Energy Inc., except as set forth in Section I (Jurisdiction and Venue) and in Paragraphs 3 and 4 in Section II (Applicability) of this Consent Decree.

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 Section 309(a) of the Act, 33 U.S.C. § 1319(a), and over

the Parties. Venue lies in the U.S. District Court for the Middle District of Pennsylvania pursuant to Section 309(b) of the Clean Water Act, 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the violation alleged in the Complaint is alleged to have occurred in, and Defendant conducts business in, this judicial district. For purposes of this Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

2. For purposes of this Consent Decree only, Defendant agrees that the Complaint states a claim upon which relief may be granted pursuant to Section 309(a) of the CWA, 33 U.S.C. § 1319(a), which authorizes the United States to commence a civil action for any violation of Section 301 of the CWA, 33 U.S.C. § 1311.

## 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 any of the Region III Facilities, whether in compliance with the procedures of this Paragraph or otherwise, or transfer of ownership of XTO Energy Inc., in whole or in part, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to such transfer, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement describing the proposed transfer, to EPA Region III, the United States Attorney for the Middle District of Pennsylvania,

and the United States Department of Justice, in accordance with Section XIV of this Decree (Notices). Any attempt to transfer ownership or operation of any of the Region III Facilities without complying with this Paragraph constitutes a violation of this Decree.

5. Defendant shall provide a copy of this Consent Decree to all of its 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 which affects the obligations contained in this Consent Decree. When providing copies of the Consent Decree as required by this Paragraph, Defendant shall include a written statement advising all officers, employees, agents, and contractors that they must comply with the relevant obligations contained in 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 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. “Complaint” shall mean the complaint filed by the United States in this action;
  - b. “Completion” shall mean the processes and equipment necessary to conduct hydraulic fracturing on a well after drilling, including initial well stimulation and subsequent well restimulation.
  - c. “Consent Decree” or “Decree” shall mean this Decree;

- d. “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;
- e. “Defendant” shall mean XTO Energy Inc.;
- f. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;
- g. “Effective Date” shall have the definition provided in Section XV.
- h. “Flowback Fluid” shall mean any fluid, including brine and condensate, that flows from a well after well development and before gas or liquid hydrocarbon production.
- i. “Fresh Water” means water taken from a municipal water supply, natural intake such as a river or stream, or alternatively from a water source containing not more than 500 parts per million of total dissolved solids.
- j. “Net Water User Area” means the county where the continual completion operations associated with Region III Facilities are occurring and any adjacent counties within which the amount of water needed by the company for such completion operations exceeds the total amount of produced and flowback water available from Region III Facilities within that same area at that time.
- k. “Region III Facility” or “Region III Facilities” shall mean any and all well pads and their Flowback and Produced Fluid storage facilities owned or operated by Defendant that are utilized to produce hydrocarbons from the Marcellus or Utica formation in the Commonwealths of Pennsylvania and Virginia and the States of

West Virginia, Delaware, and Maryland.

- l. “Paragraph” shall mean a portion of this Decree identified by an arabic numeral;
- m. “Post September 2011 Permanent Production Tanks” are all Permanent Production Tanks that are installed at a Region III Facility after September 23, 2011.
- n. “Parties” shall mean the United States and the Defendant;
- o. “Permanent Production Tanks” are those Tanks which are in a fixed state and are utilized after Completion, and during the producing life of a well, for the collection of Produced Fluid.
- p. “Mobile Tanks” are those Tanks used for the collection and storage of flowback fluid, produced fluid, brine, or other liquids generated during Defendant’s natural gas extraction activities, which are designed by the manufacturer to be mobile and are not in a fixed state when used by the Defendant for the collection and storage of flowback fluid, produced fluid, brine, or other liquids.
- q. “Fixed State” as that term is used herein to describe a Tank shall mean that a Tank that remains or is intended at the time of installation to remain in the same location for more than four (4) months after the completion date of any well or that is utilized during production in place of and having the same function as Permanent Production Tanks.
- r. “Produced Fluid” shall mean any fluid, including brine and condensate, that flows from a well after the well is producing gas or liquid hydrocarbons.
- s. “Section” shall mean a portion of this Decree identified by a roman numeral;
- t. “Commonwealth” shall mean the Commonwealth of Pennsylvania.

- u. “United States” shall mean the United States of America, acting on behalf of EPA;
- v. “Tank” shall mean a device designed to contain an accumulation of liquids which is constructed primarily of non-earthen materials. As used herein, “Tanks” shall mean each and every mobile and permanent tank utilized by Defendant for the storage of Produced Fluid, Flowback Fluid at any Region III Facility for the purpose of recycling and/or disposal of those fluids. As used herein, “Tank” shall not include those tanks holding/storing fresh water.
- w. “Surface Impoundment” shall mean a natural topographic depression, manmade excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials), which is designed to hold an accumulation of liquids, including Flowback Fluid and Produced Fluid.

#### IV. CIVIL PENALTY

- 8. Within 30 Days after the Effective Date of this Consent Decree, Defendant shall pay the sum of \$100,000 as a civil penalty, together with interest accruing from the date on which the Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date of lodging.
- 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 Middle District of Pennsylvania, Ronald Reagan Federal Building, 228 Walnut Street, Suite 220, Harrisburg, Pennsylvania 17108-1754,

(570) 348-2800. 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 US v. XTO Energy Inc., and shall reference the civil action number and DOJ case number 90-5-1-1-10439, to the United States in accordance with Section XIV of this Decree (Notices); by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov); and mail to:

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

#### V. COMPLIANCE REQUIREMENTS

10. Defendant shall use best efforts to recycle Flowback Fluid and Produced Fluid associated with the operations at Region III Facilities to the maximum extent practicable and may not dispose of such Flowback Fluid and Produced Fluid at any waste treatment facility in the Commonwealth or any other state that does not have a Federally-enforceable National Pollutant Discharge Elimination System (“NPDES”) permit allowing it to accept such Flowback Fluid and Produced Fluid. If Defendant disposes of Flowback Fluid or Produced Fluid from Region III Facilities at a waste treatment facility, Defendant shall dispose of such fluids at a wastewater treatment facility with an NPDES permit with an effluent limit restricting total dissolved solids (“TDS”) to an average of 500 milligrams per liter per month or less. Defendant's Appalachian Division Environmental Health and Safety Department shall review and approve the disposal of such Flowback Fluid and Produced Fluid in order to ensure compliance with this Paragraph. In Pennsylvania, XTO shall recycle to the maximum extent practicable, but no less than 50 percent of its

total Flowback and Produced Fluid from applicable Region III Facilities as a three-year average in Net Water User Areas. Defendant shall report the volume and percent recycled with its bi-annual reports submitted under Paragraph 16. If Defendant does not meet 50 percent recycled over the 3-year average, Defendant must demonstrate meeting 50 percent was not practicable. Defendant shall report the circumstances of failing to meet 50 percent recycled as a three-year average in its fifth bi-annual report submitted under Paragraph 16, and shall include a discussion of factors including, limitations in recycling capacity, operational safety considerations (e.g., potential exceedances of maximum safety pressure ratings of piping), transportation safety concerns (e.g., truck travel in inclement weather conditions), and potential increased risk of spills due to excessive high volume storage.

11. For operations in West Virginia, XTO shall recycle to the maximum extent practicable, and shall report volumes recycled in accordance with Section VI.
12. Within 60 days of the Effective Date, Settling Defendant shall submit to EPA for EPA review and approval according to Section VII (Review and Approval) a work plan to implement spill prevention measures for Tanks including the requirements set forth in Paragraph 13 at its Region III Facilities (“Work Plan”). The Work Plan shall include a schedule, no longer than 180 days from the date of EPA approval of the Work Plan, to complete implementation of the measures in Paragraph 13 of this Consent Decree. Upon EPA approval, Defendant shall implement the Work Plan and shall maintain the measures required by the Work Plan beginning on the implementation date until Termination of the Consent Decree.
13. The Work Plan shall set forth measures to ensure that:

- a. Adequate secondary containment is provided for all Tanks during Completion and for all Post-September 2011 Permanent Production Tanks. Adequate secondary containment shall be at least the size necessary to contain a spill of the full capacity of the largest tank plus sufficient room for freeboard of at least ten percent of the capacity of that tank and shall be no less than 110% capacity of the largest Tank located within the containment area.
- b. For any interconnected mobile Tanks utilized for the storage of Flowback or Produced Fluid (but not Fresh Water), Defendant shall implement one or more of the following measures to protect against spills:
  - i. Adequate secondary containment as defined in Paragraph 13(a);
  - ii. High-level shutdown, remote monitoring or alarm notification;
  - iii. The configuration of multiple interconnected mobile Tanks in a manner that provides adequate unfilled tank capacity for the purposes of containing spilled fluid within those Tanks;
  - iv. The implementation of operating procedures in place to manage interconnections between interconnected mobile Tanks in order to prevent spills from those tanks; and/or
  - v. The implementation of any other protective measures as proposed by the Defendant and approved by EPA in advance.
- c. All Tanks in secondary containment areas are located on an impermeable layer and will be installed/located in a manner so as to minimize external corrosion and leaks;
- d. Each open-ended valve or line associated with any Tank is equipped with a cap, blind

- flange, plug, or a second closed valve;
- e. Each Permanent Production Tank is equipped with a means of high-level shutdown and Defendant shall conduct remote monitoring or alarm notification;
  - f. Flowback Fluid and Produced Fluid are not stored in tanks with an open top design;
  - g. Flowback Fluid and Produced Fluid are not stored in open pits, lagoons or other Surface Impoundments;
  - h. All Permanent Production Tank valves are secured with locks and standard operating procedures are developed and implemented so that all such valves will be locked except when active loading or unloading is occurring at any tanks;
  - i. For each Permanent Production Tank and each set of interconnected Mobile Tanks, safety information is posted in a clear and conspicuous manner at each Region III Facility, including the contact information for the Defendant's 24-hour monitored phone number, in close proximity to each Permanent Production Tank;
14. Defendant shall develop and implement a standard operating procedure ("Tank SOP") for employees, contractors, agents, or other persons loading or unloading from the Tanks. The Tank SOP shall require that, prior to loading or unloading into any Tank, the perimeter of the Tank and all valves on the Tank be inspected in order to ensure those valves not being used for loading/unloading are in a closed position and are blind flanged, bull plugged or locked, and the area within secondary containment is inspected for evidence of any spills from the tanks (e.g., staining). Such system shall provide for prompt reporting and written recordkeeping of any security breaches, spills, or other irregularities detected as a result of these procedures, including adequate and timely notice to XTO's on-call Appalachian Division Environmental Health and Safety

Department staff member. Within 60 days of the Effective Date, Defendant shall submit the Tank SOP to EPA for review and approval subject to Section VII (Review and Approval).

15. 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 IX 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

16. Defendant shall submit reports to EPA on the status of all actions required by Section V (Compliance Requirements) of this Consent Decree which shall include a description of: the measures taken pursuant to the Work Plan schedule, including but not limited to the location of all Permanent Production Tanks and all interconnected Mobile Tanks, the secondary containment installed (including a description of the type of containment and the capacity of the containment) for all Tanks or any secondary containment or alternative measures taken pursuant to Paragraph 13(b) with respect to interconnected Mobile Tanks, the measures taken to provide for locks and inspections at each Region III Facility, and the percentage of Flowback Fluid and Produced Fluid that is disposed of and recycled. The first such report shall also include any actions taken in order to comply with this Consent Decree prior to its entry. The first report shall be

provided to EPA within six months of the Effective Date of this Consent Decree and shall be updated with a subsequent report every six months until all actions of Section V (Compliance Requirements) are completed upon approval by EPA under Section VII (Review and Approval).

- a. All reports required by this Paragraph shall also include a description of any non-compliance with the requirements of the approved Work Plan and an explanation of the likely cause of the non-compliance and of the remedial steps taken, or to be taken, to prevent or minimize such non-compliance. Non-compliance with the requirements of the approved Work Plan means any non-compliance that occurs in connection with the storage of Flowback Fluid, Produced Fluid, brine or other liquids (other than Fresh Water) in Tanks, or the loading or unloading of such fluids to or from Tanks. If Defendant is not in compliance, or has reason to believe that it may not be in compliance, with any requirement of this Consent Decree and such non-compliance causes a release of any Flowback Fluid, Produced Fluid, brine or other liquids (other than Fresh Water) from a Tank or any other equipment, Defendant shall notify the United States of such non-compliance and its likely duration, in writing, within ten working Days of the Day Defendant first becomes aware of the release caused by non-compliance, with an explanation of the non-compliance's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such non-compliance. If the cause of the non-compliance cannot be fully explained at the time the report is due, Defendant shall so state in the report. Defendant shall investigate the cause of the non-compliance and shall then submit an amendment to the report, including a full

explanation of the cause of the non-compliance, within 30 Days of the Day Defendant becomes aware of the cause of the non-compliance. Nothing in this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the notice required by Section IX of this Consent Decree (Force Majeure).

- b. Whenever any non-compliance of this Consent Decree or any other event affecting Defendant's performance under this Decree or the performance of its Region III Facility, may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after Defendant first knew of the non-compliance or event. This procedure is in addition to the requirements set forth in the preceding subsection.
- c. All reports shall be submitted to the persons designated in Section XIV of this Consent Decree (Notices).
- d. Each report submitted by Defendant under this Consent Decree shall be signed by an official of XTO Energy Inc. 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.

17. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.
18. 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.
19. In addition, every six months until this Consent Decree is terminated, Defendant shall report to EPA semi-annually, on June 1 and December 1, a description of any spill of Flowback Fluid, Produced Fluid, brine or other liquid (other than Fresh Water) at or from Defendant's Region III Facilities. The first such report shall be made on the first occurrence of either June 1 or December 1; whichever falls six months or more after the Effective Date. This semi-annual report may be submitted in a spreadsheet format or in an alternative form agreed to by the Parties and shall list:
  - a. Spill date;
  - b. National Response Center identification number (if applicable);
  - c. Narrative description of the spill location or latitude/longitude coordinates of the spill;
  - d. From what piece of equipment the spill occurred;
  - e. Spill material and quantity spilled;

- f. Quantity recovered;
- g. Name of water body that the spill entered or potentially impacted (if applicable);  
and
- h. Description of any environmental impact from the spill.

## VII. REVIEW AND APPROVAL

- 20. Approval of Deliverables. For any plan, report or document required under Paragraphs 12 and 13 (the Work Plan) and 14 (the Tank SOP) to be submitted to EPA for approval in accordance with this Section, Defendant shall follow the procedures set forth in this Section. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA 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.
- 21. If the submission is approved pursuant to Paragraph 20(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 20(b) or 20(c), Defendant shall, upon written direction from EPA, take all actions required by the approved plan, report, or other item that EPA determines are technically severable from any disapproved portions, subject to Defendant's right to dispute only the specified conditions or the disapproved portions, under Section X of this Decree (Dispute Resolution).
- 22. If the submission is disapproved in whole or in part pursuant to Paragraph 20(c) or 20(d),

Defendant shall within 45 Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Defendant shall proceed in accordance with the preceding Paragraph or invoke Dispute Resolution. Any stipulated penalties applicable to the original submission, as provided in Section VIII of this Decree (Stipulated Penalties), 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. In the event that Defendant prevails in dispute resolution with respect to any disapproved submission, Defendant shall not be required to pay any stipulated penalty associated with the submission on which Defendant prevailed.

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

#### VIII. STIPULATED PENALTIES

24. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section IX (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree according to all applicable requirements of this Decree and within the specified time

schedules established by or approved under this Decree.

25. 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 \$5,000 per Day for each Day that the payment is late.

26. Compliance Milestones.

a. The following stipulated penalties shall accrue per violation per Day for each violation of each of the requirements identified in or pursuant to Paragraphs 10, 11, 12, 13 and 14:

Penalty Per Violation Per Day	Period of Noncompliance
\$1,000	1st through 14th Day
\$1,500	15th through 30th Day
\$2,000	31st Day and beyond

b. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section IV (Reporting Requirements) of this Consent Decree:

Penalty Per Violation Per Day	Period of Noncompliance
\$500	1st through 14th Day
\$750	15th through 30th Day
\$1,000	31st Day and beyond

27. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent

Decree.

28. Defendant shall pay any stipulated penalty within 30 Days of receiving the United States' written demand.
29. The United States may in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.
30. Stipulated penalties shall continue to accrue 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 that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within 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 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.
31. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices made in the manner set forth in 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.

32. 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 seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.
33. Subject to the provisions of Section XII 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 federal law, Defendant shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

#### IX. FORCE MAJEURE

34. "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. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances

arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

35. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, which Defendant believes may be a force majeure event, Defendant shall provide notice orally or by electronic or facsimile transmission to EPA Region III, 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.
36. 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 will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

37. 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.
38. If Defendant elects to invoke the dispute resolution procedures set forth in Section X (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 34 and 35, 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.

#### X. DISPUTE RESOLUTION

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

40. 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 30 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 15 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.
41. 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 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.
42. The United States shall serve its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.
43. Defendant may seek judicial review of the dispute by filing with the Court and serving on

the United States, in accordance with Section XIV 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' 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.

44. The United States 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.

45. Standard of Review

- a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 40 pertaining to the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.
- b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 41, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

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

#### XI. INFORMATION COLLECTION AND RETENTION

47. 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 information submitted to the United States in accordance with the terms of this Consent Decree;
  - c. obtain documentary evidence, including photographs and similar data;
  - d. take samples; and
  - e. assess Defendant's compliance with this Consent Decree.
48. 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 possession or control, or that come into its 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.

49. At the conclusion of the information retention period provided in the preceding Paragraph, Defendant shall notify the United States 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, Defendant shall deliver any such documents, records, or other information to EPA. 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.
50. 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.
51. 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.

## XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

52. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.
53. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as described in Paragraph 52. 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 or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 51. The United States further reserves 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, any of Defendant's Region III Facilities, whether related to the violations addressed in this Consent Decree or otherwise.
54. This Consent Decree shall not limit or in any way excuse the obligation to comply with the Spill Prevention, Control, and Countermeasure regulations set forth in 40 C.F.R. Part 112, or any other federal requirement.
55. 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 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, 33 U.S.C. § 1251 et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

56. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.
57. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.
58. This Consent Decree expressly does not resolve any enforcement action of the Commonwealth of Pennsylvania under any federal and state law and any such claims are not precluded or limited in any way by resolution of this matter.

### XIII. COSTS

59. 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.

#### XIV. NOTICES

60. 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  
U.S. Department of Justice  
Box 7611 Ben Franklin Station  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-1-1-10439

and

To EPA:  
Chief, NPDES Enforcement  
Region III Water Enforcement Division  
U.S. Environmental Protection Agency  
Region III  
Mailcode 3WP42  
1650 Arch Street, Philadelphia, PA 19103  
FAX: 215-814-3001

To Defendant(s):  
Michael R. Johnson  
Vice President, Production Operations - Appalachia Division  
XTO Energy Inc.  
502 Keystone Dr.  
Warrendale, PA 15086

Wil Porche  
Environmental, Health & Safety Manager  
XTO Energy Inc.  
502 Keystone Dr.  
Warrendale, PA 15086

Christopher W. Armstrong, Esq.  
Assistant General Counsel – Environmental  
XTO Energy Inc.  
810 Houston Street  
Ft. Worth, TX 76102  
FAX: 817-885-2278

61. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.
62. 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.

#### XV. EFFECTIVE DATE

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

#### XVI. RETENTION OF JURISDICTION

64. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, pursuant to Sections X and XVII, or effectuating or enforcing compliance with the terms of this Decree.

#### XVII. MODIFICATION

65. 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.
66. Any disputes concerning modification of this Decree shall be resolved pursuant to

Section X of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 45, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

#### XVIII. TERMINATION

67. After Defendant has completed the requirements of Section V of this Decree (Compliance Requirements), has thereafter maintained satisfactory compliance with this Consent Decree for a period of three (3) years 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.
68. Following receipt by the United States 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 agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.
69. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section X of this Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination, under Paragraph 41 of Section X, until fourteen days after service of its Request for Termination.

#### XIX PUBLIC PARTICIPATION

70. 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.

#### XX. SIGNATORIES/SERVICE

71. 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.
72. 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.

#### XXI. INTEGRATION

73. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree

and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## XXII. FINAL JUDGMENT

74. 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.

SO ORDERED THIS \_\_\_ DAY OF \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE  
Middle District of Pennsylvania

and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. No other document, nor any representation, inducement, agreement, understanding, or promise, constitutes any part of this Decree or the settlement it represents, nor shall it be used in construing the terms of this Decree.

## XXII. FINAL JUDGMENT

74. 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.

SO ORDERED THIS \_\_\_ DAY OF \_\_\_\_\_, 20\_\_

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE  
Middle District of Pennsylvania

FOR PLAINTIFF THE UNITED STATES OF AMERICA:

By the United States Department of Justice

Date

6/20/13

  
ROBERT G. DREHER  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Date

6-24-13

  
CARA MROCZEK  
Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611, Ben Franklin Station  
Washington, D.C. 20044-7611  
601 D Street, NW  
Washington, D.C. 20004

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Date

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PETER J. SMITH  
United States Attorney  
United States Attorney's Office  
Middle District of Pennsylvania  
228 Walnut Street, Suite 220  
Harrisburg, PA 17108

By the United States Environmental Protection Agency:

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SHAWN M. GARVIN  
Regional Administrator  
U.S. EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029

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MARCIA E. MULKEY  
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JAMES F. VAN ORDEN  
Senior Assistant Regional Counsel  
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PAMELA J. MAZAKAS  
Deputy Office Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance  
Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW  
Washington, D.C. 20460

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MARK POLLINS  
Director  
Water Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance  
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1200 Pennsylvania Ave NW  
Washington, D.C. 20460

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JOSEPH THEIS  
Branch Chief, Industrial Enforcement Branch  
Water Enforcement Division  
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Office of Enforcement and Compliance  
Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Ave NW  
Washington, D.C. 20460

For DEFENDANT, XTO Energy Inc.,

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Date

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NAME  
TITLE  
ADDRESS

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Date

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NAME  
TITLE  
ADDRESS