

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
EASTERN DIVISION

THE UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 6:13-cv-2031
	)	
BEEF PRODUCTS, INC.	)	
	)	
Defendant.	)	
	)	
_____	)	

**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 alleging that Defendant BPI Beef Products, Inc. (“BPI”), violated Section 112(r)(7) of the federal Clean Air Act (“CAA”), 42 U.S.C. § 7412(r)(7), at its meat processing facility in Waterloo, Iowa, and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. § 9603, (collectively the “Acts”) at its meat processing facility in South Sioux City, Nebraska.

On August 31, 2007, a release of ammonia occurred at BPI’s Waterloo Facility during the transfer of ammonia via a “pump out” line. This release resulted in the death of one BPI employee and the permanent disability of a second employee. Based on EPA’s investigation of the 2007 accident, the Complaint alleges violations of Section 112(r)(7) based on BPI’s failure to properly develop and implement the required risk management program and plan at its Waterloo Facility. The Complaint also alleges that BPI failed to properly report two releases of ammonia from its South Sioux City Facility to EPA’s National Response Center, in violation of Section 103 of CERCLA.

In December 2008, BPI paid a total penalty of \$648,000 to the Iowa Department of Occupational Safety Health Administration (“IOSHA”) in settlement of IOSHA’s alleged claims against BPI in connection with this August 31, 2007 incident.

BPI does not admit any of the violations alleged by Plaintiff in the Complaint and herein. BPI specifically denies any liability to the United States arising out of the transactions or occurrences alleged in the Complaint and herein. BPI does not admit any fact or conclusion of law alleged in the Complaint and set forth herein

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 prolonged and complicated litigation between the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, 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; Section 113(b) of the CAA, 42 U.S.C. § 7413(b); and Section 109(c) of CERCLA, 42 U.S.C. § 9609(c), and over the Parties. Venue lies in this judicial district pursuant to 28 U.S.C. §§ 1391(b) and (c) and 1395(a) and Section 113(b) of the CAA, 42 U.S.C. § 7413(b), because BPI resides and is located in this judicial district, and the violations in the Complaint are alleged to have occurred in, and BPI conducts business in, this judicial district.

2. Solely for purposes of this Decree, or any action to enforce this Decree, BPI consents to the Court's jurisdiction over this Decree and any such action and over BPI and consents to venue in this judicial district.

3. Solely for purposes of this Consent Decree, BPI agrees that the Complaint states claims upon which relief may be granted pursuant to Section 113(b) of the CAA, 42 U.S.C. § 7413(b), and Section 109(c) of CERCLA, 42 U.S.C. § 9609(c). BPI shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree

## II. APPLICABILITY

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

5. No transfer of ownership or operation of the South Sioux Facility, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve BPI of its obligation to ensure that the terms of the Decree are implemented. At least 30 Days prior to such transfer, BPI 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 Region 7, the United States Attorney for the Northern District of Iowa, and the United States Department of Justice, in accordance with Section XIII of this Decree (Notices). At least 30 days prior to any transfer of possession or control of the Holcomb Facility or Waterloo Facility under existing agreements between BPI and Tyson Foods, Inc., BPI shall provide notice to EPA Region 7, the United States Attorney for the Northern District of Iowa, and the United States Department of Justice, in accordance with Section XIII of this Decree (Notices). Any attempt to transfer ownership or operation of the South Sioux City Facility or any attempt to transfer possession or control of the Holcomb Facility or Waterloo Facility without complying with this Paragraph constitutes a violation of this Decree.

6. BPI 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. BPI

shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

7. In any action to enforce this Consent Decree, BPI 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

8. Terms used in this Consent Decree that are defined in the Acts or in regulations promulgated pursuant to the Acts shall have the meanings assigned to them in the Acts 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. "Consent Decree" or "Decree" shall mean this Decree;
- c. "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;
- d. "BPI" shall mean Beef Products, Inc., as named in the Complaint;
- e. "EPA" shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;
- f. "Effective Date" shall have the definition provided in Section XIV.

- g. “Facilities” shall mean BPI’s Holcomb Facility, South Sioux City Facility, and Waterloo Facility, as defined herein.
- h. “Holcomb Facility” shall mean BPI’s meat processing plant located at 3105 N. Ibp Rd, Holcomb, Kansas.
- i. “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral;
- j. “Parties” shall mean the United States and BPI;
- k. “Return to Production” shall mean when the amount of regulated substances (ammonia) exceeds the applicable threshold quantity at the Holcomb or Waterloo Facilities, respectively.
- l. “Section” shall mean a portion of this Decree identified by a roman numeral;
- m. “South Sioux City Facility” shall mean BPI’s meat processing plant located at 360 164th Street in South Sioux City, Nebraska.
- n. “United States” shall mean the United States of America, acting on behalf of EPA; and
- o. “Waterloo Facility” shall mean BPI’s meat processing plant located at 501 N. Elk Run Rd., Waterloo, Iowa.

#### IV. CIVIL PENALTY

9. Within 30 Days after the Effective Date of this Consent Decree, BPI shall pay the sum of \$450,000.00 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.

10. BPI 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 BPI, following entry of the Consent Decree, by the Financial Litigation Unit of the U.S. Attorney’s Office for the Northern District of Iowa, 111 7<sup>th</sup> Avenue SE, Box 1, Cedar Rapids, Iowa 52401, phone number: 319-363-6333. At the time of payment, BPI 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 the United States v. Beef Products, Inc., and shall reference the civil action number and DOJ case number *90-5-2-1-10504*, to the United States in accordance with Section XIII of this Decree (Notices); by email to [acctsreceivable.CINWD@epa.gov](mailto:acctsreceivable.CINWD@epa.gov); and by mail to:

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

11. BPI 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

12. BPI shall comply with Section 112(r) of the CAA and Section 103 of CERCLA and all applicable regulations with respect to the Facilities.

13. BPI shall complete a third-party audit of its compliance with CAA Section 112(r), the CAA Chemical Accident Prevention Program 3 requirements, and the General Duty Clause Requirements with regard to the ammonia refrigeration system at its South Sioux City

Facility, in accordance with the requirements and deadlines set forth in Paragraphs 13-16 herein.

Within 30 days of the Effective Date, BPI shall propose to EPA for its approval the name of a third party auditor and its qualifications to perform the audit that meets the requirements of Paragraph 14, below (Audit). The proposed auditor shall be a knowledgeable and experienced person or firm with expertise in risk management program requirements (and compliance with them) as well as expertise in the risk management requirements of ammonia refrigeration systems. The proposed auditor may not be a person or firm that previously performed audits for BPI.

14. Within 90 days of EPA's approval of the auditor, BPI shall perform the audit at the South Sioux Facility and complete the Audit Report as specified in Paragraphs 14 and 15, herein. The Audit shall evaluate and make recommendations regarding the facility's compliance with the 112(r) program; and shall meet, at a minimum, the following requirements:

a. The Audit shall include a review of the prior 5 years of documentation pertaining to the Section 112(r) regulated processes at the South Sioux City Facility, interviews with BPI personnel and contractors, and shall evaluate whether the risk management program adequately incorporates applicable standards for the facility's regulated processes, including but not limited to current generally accepted good engineering practices/codes/guidelines, compliance with Federal and state regulations that incorporate industry-specific design codes and practices and applicable manufacturers' recommendations. The Audit shall also evaluate whether current practices are consistent with applicable manufacturers' recommendations and instructions, and compliance with Federal and state regulations that incorporate industry-specific design codes and practices.

b. The Audit shall evaluate compliance with all elements of the risk management program required under 40 CFR Part 68 and shall not be limited to the prevention program section audited as part of a routine (and required) regulatory compliance audit required by 40 C.F.R. § 68.79. The Audit shall address, but shall not be limited to, the following items:

i. Management of Change (MOC): The Audit shall evaluate whether MOC documentation complies with the requirements of 40 C.F.R. 68.75 and includes all required elements; whether a MOC was performed prior to the regulated process changes (not after the fact); whether changes to Process Safety Information (PSI), Process Hazard Analysis (PHAs), operating procedures, mechanical integrity, training, and other program were properly completed and documented; and whether facility personnel involved with or affected by the changes were made aware of any required changes, and any resulting change to standard procedure(s).

ii. Pre-Startup Safety Review (PSSR): The Audit shall evaluate whether PSSRs required by 40 C.F.R. 68.77 were completed prior to bringing subject equipment online; whether findings and recommendations were appropriate; whether recommendations and action items were resolved or implemented; and whether facility personnel involved with or affected by the changes were made aware of any required changes, and any resulting change to standard procedure(s).

iii. Management System: The Audit shall evaluate whether the management system, as written, meets the requirements of 40 C.F.R. 68.15; and whether the management system is properly implemented at the facility, with clearly delineated lines of authority and decision making for implementation of the risk management program.

iv. Process Hazard Analysis (PHA): The Audit shall evaluate whether PHAs required by 40 C.F.R. 68.67 have been properly performed; whether previously performed PHAs have fully identified issues and root causes of incidents; and whether deficiencies set forth within the PHAs have been resolved properly and in a timely manner.

v. Operating Procedures: The Audit shall evaluate whether documented operating procedures meet the requirements of 40 C.F.R. 68.69; are prepared consistent with recognized and accepted good engineering practices; whether the procedures have been updated in a timely manner, written, and whether the operating procedures have been fully implemented and annually certified.

vi. Lockout/Tag out (LOTO) Procedures: The Audit shall evaluate whether documented lockout/tag out procedures meet the requirements of 40 C.F.R. 68.69(d); whether they have been prepared consistent with recognized and accepted good engineering practices; whether the procedures have been updated in a timely manner; and whether the lock out/tag out procedures have been fully implemented.

vii. Compliance Audit: The Audit shall evaluate whether the compliance audit(s) at the South Sioux Facility performed pursuant to 40 C.F.R. 68.79, within the five year period preceding the date of lodging of this Consent Decree, properly evaluated risk management implementation activities; whether the Compliance Audits properly identified deficiencies in program elements, whether action items were properly identified by the Compliance Audits; and whether identified deficiencies/action items were resolved in a timely manner.

viii. Incident Investigation: The Audit shall review the prior 5 years of incidents at the facility (from the date of lodging of the Consent Decree) to determine whether incidents should have resulted in an Incident Investigation required by 40 C.F.R. 68.81 (regardless of whether such investigation occurred.) For incidents where an investigation was performed, the Audit shall evaluate whether the incident investigation was conducted properly, in accordance with BPI's written incident investigation policy and 40 C.F.R. 68.81; whether findings were appropriate, and whether appropriate action items from each investigation were developed and implemented. For other identified incidents (that were not investigated), the auditor shall recommend whether an incident investigation remains appropriate in order to identify contributing factors or a systemic issue or set of issues that should be investigated further.

ix. Contractor practices: The Audit shall evaluate whether BPI's contractor procedures meet the requirements of 40 C.F.R. 68.87; whether the contractor practices are being properly implemented; and whether BPI is properly ensuring performance by contractors(s) of the facility's risk management program elements.

x. Emergency Response: The Audit shall evaluate whether the facility's emergency response program meets the requirements of 40 C.F.R. 68, Subpart E; whether the program has been fully coordinated with local emergency responders and whether mechanisms for timely notification of first responders and the public are adequate and being implemented. The Audit shall evaluate the facility's mechanisms for providing notice to the State Emergency Response Commission (SERC) and National Reporting Center (NRC). The

Audit shall also evaluate the facility's implementation of the emergency response program (or of an emergency action program, for a non-responding facility), as applicable.

xi. Risk Management Plan (RMP): The Audit shall evaluate whether the facility's RMP meets the requirements of 40 C.F.R. 68, Subpart G, and whether the RMP has been updated in a timely manner following accidents.

15. Audit Action Plan: Within 60 days after completion of the Audit, the auditor shall provide an Audit Report directly to EPA and BPI. The Audit Report shall provide a detailed summary of the auditor's evaluations and shall present recommendations for action regarding the facility's compliance with Section 112(r) of the CAA, and shall identify all documentation and personnel evaluated during the Audit. Within 90 days of submittal of the Audit Report, BPI shall submit to EPA for approval an Audit Action Plan that shall propose a schedule to complete all actions necessary to address the Audit's findings and recommendations. The actions shall be completed as expeditiously as possible, but no later than 1 year from the date of BPI's receipt of the Audit Report. BPI shall provide EPA reports on BPI's implementation of the approved Audit Action Plan pursuant to the reporting requirements of Section VI (Reporting Requirements).

16. The Waterloo Facility and the Holcomb Facility: BPI shall properly maintain and implement the risk management program in full compliance with the Clean Air Act Section 112(r) and its implementing regulations at the Waterloo Facility and Holcomb Facility. Within 30 days of the quantity of ammonia at either of these facilities being reduced below the threshold amount specified at 40 C.F.R. § 68.130, BPI will deregister the applicable facility in accordance with 40 CFR 68.190(c), and provide written confirmation of the deregistration of the

facility to EPA Region 7. No later than 30 days prior to the quantity of ammonia at either the Waterloo Facility or the Holcomb Facility again exceeding the threshold amount, BPI shall resubmit an Risk Management Plan (RMP) in accordance with 40 CFR 68.150. No later than 30 days prior the Return to Production at either the Waterloo Facility or Holcomb Facility, BPI shall provide written notice of the Return to Production at the applicable facility to EPA Region 7. If either the Waterloo Facility or Holcomb Facility Returns to Production, BPI shall comply with the requirements of Paragraphs 13-15 for performance of an Audit for the facility, with the compliance deadlines (for selection of an Auditor, performance of an Audit, submission of an Audit Report and submission of Audit Action Plan for EPA approval) timed from the date of the facility's Return to Production. For purposes of the requirements of Paragraph 14, the review of the prior 5 years of documentation shall extend from the date of the facility's Return to Production.

17. Approval of Deliverables. After review of any plan, report, or other item that is required to be submitted pursuant to this Consent Decree, EPA shall 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.

18. If the submission is approved pursuant to Paragraph 17.a, BPI 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 17.b or .c, BPI 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

BPI's right to dispute only the specified conditions or the disapproved portions, under Section IX of this Decree (Dispute Resolution).

19. If the submission is disapproved in whole or in part pursuant to Paragraph 17.c or .d, BPI shall, within 30 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, BPI shall proceed in accordance with the preceding Paragraph.

20. Any stipulated penalties applicable to the original submission, as provided in Section VII of this Decree, shall accrue during the 30 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 BPI's obligations under this Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission.

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

22. Permits. Where any compliance obligation under this Section requires BPI to obtain a federal, state, or local permit or approval, BPI shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals. BPI may seek relief under the provisions of Section VIII of this Consent Decree (Force Majeure) for



any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if BPI has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

## VI. REPORTING REQUIREMENTS

23. BPI shall submit the following reports:

a. **Annual Reports:** Within 30 Days after the end of each calendar year after lodging of this Consent Decree, until termination of this Decree pursuant to Section XVII, BPI shall submit an Annual Report for the preceding year that shall include the status of BPI's implementation of the Compliance Requirements of this Consent Decree (Section V) as well as copies of all updates to documentation required under the CAA Section 112(r) risk management program for BPI's Facilities, including, without limitation, updates to the programmatic documentation described in Paragraph 14, above.

b. **Non-Compliance Reports:** If BPI violates, or has reason to believe that it may violate, any requirement of this Consent Decree, BPI shall notify the United States of such violation and its likely duration, in writing, within ten working Days of the Day BPI first becomes aware of the violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, BPI shall so state in the report. BPI shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 Days of the Day BPI becomes aware of the cause of the violation. Nothing in this Paragraph or the following

Paragraph relieves BPI of its obligation to provide the notice required by Section VIII of this Consent Decree (Force Majeure).

24. Whenever any violation of this Consent Decree or any other event affecting BPI's performance under this Decree, or the performance of each of its Facilities, may pose an immediate threat to the public health or welfare or the environment, BPI shall notify EPA orally or by electronic or facsimile transmission as soon as possible, but no later than 24 hours after BPI first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

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

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

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

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

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

28. 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

29. BPI 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 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.

30. Late Payment of Civil Penalty

If BPI fails to pay the civil penalty required to be paid under Section IV of this Decree (Civil Penalty) when due, BPI shall pay a stipulated penalty of \$2,000 per Day for each Day that the payment is late.

31. Compliance Milestones

a. The following stipulated penalties shall accrue per violation per Day for each violation of the requirements identified in subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,000	1st through 14th Day

\$2,000	15th through 30th Day
\$4,000	31st Day and beyond

b. Selection and Notice of Proposed Auditor (Paragraph 13), Performance of Required Audit(s) (Paragraph 14, 16), Submission of Audit Report (Paragraph 15), and the Submission and Implementation of Audit Action Plan (Paragraph 15).

32. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of Section VI of this Consent Decree:

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

33. 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.

34. BPI shall pay any stipulated penalty within 30 Days of receiving the United States' written demand.

35. Stipulated penalties shall continue to accrue as provided in Paragraph 33, 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, BPI 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, BPI 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, BPI shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of receiving the final appellate court decision.

36. BPI shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraph 10, 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.

37. If BPI fails to pay stipulated penalties according to the terms of this Consent Decree, BPI 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 BPI's failure to pay any stipulated penalties.

38. 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 BPI's violation of this Consent Decree or applicable law. Where a violation of this Consent

Decree is also a violation of Section 112(r) of the CAA and/or Section 103 of CERCLA, BPI shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation.

#### VIII. FORCE MAJEURE

39. “Force majeure,” for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of BPI, of any entity controlled by BPI, or of BPI's contractors, that delays or prevents the performance of any obligation under this Consent Decree despite BPI's best efforts to fulfill the obligation. The requirement that BPI exercises “best efforts to fulfill the obligation” includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any such event (a) as it is occurring and (b) after it has occurred to prevent or minimize any resulting delay to the greatest extent possible. “Force Majeure” does not include BPI's financial inability to perform any obligation under this Consent Decree.

40. 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, BPI shall provide notice orally or by electronic or facsimile transmission to EPA within 72 hours of when BPI first knew that the event might cause a delay. Within 7 days thereafter, BPI 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; BPI'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 BPI, such event may

cause or contribute to an endangerment to public health, welfare or the environment. BPI 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 BPI 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. BPI shall be deemed to know of any circumstance of which BPI, any entity controlled by BPI, or BPI's contractors knew or should have known.

41. 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 BPI in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

42. 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 BPI in writing of its decision.

43. If BPI elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, BPI 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 BPI complied with the requirements of Paragraphs 39 and 40, above. If BPI carries this burden, the delay at issue shall be deemed not to be a violation by BPI of the affected obligation of this Consent Decree identified to EPA and the Court.

#### IX. DISPUTE RESOLUTION

44. 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. BPI's failure to seek resolution of a dispute under this Section shall preclude BPI from raising any such issue as a defense to an action by the United States to enforce any obligation of BPI arising under this Decree.

45. 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 BPI 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 20 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 7 Days after the conclusion of the informal negotiation period, BPI invokes formal dispute resolution procedures as set forth below.

46. Formal Dispute Resolution. BPI 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 BPI's position and any supporting documentation relied upon by BPI.

47. The United States shall serve its Statement of Position within 45 Days of receipt of BPI'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 BPI, unless BPI files a motion for judicial review of the dispute in accordance with the following Paragraph.

48. BPI 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), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 Days of receipt of the United States' Statement of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of BPI'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.

49. The United States shall respond to BPI's motion within the time period allowed by the Local Rules of this Court. BPI may file a reply memorandum, to the extent permitted by the Local Rules.

50. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 46 pertaining

to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree; the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, BPI 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 46, BPI shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

51. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of BPI 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 35. If BPI 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

52. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any Facilities 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 BPI or its representatives, contractors, or consultants;
- d. obtain documentary evidence, including photographs and similar data; and
- e. assess BPI's compliance with this Consent Decree.

53. Until five years after the termination of this Consent Decree, BPI 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 BPI'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, BPI shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

54. At the conclusion of the information-retention period provided in the preceding Paragraph, BPI 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, BPI shall deliver any such documents, records, or other information to EPA. BPI 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 BPI 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 BPI. 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. BPI 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 BPI seeks to protect as CBI, BPI 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 BPI 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 filed in this action through the date of lodging.

58. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree, except as expressly stated in Paragraph 57. 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 57. 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, BPI's Facilities, whether related to the violations addressed in this Consent Decree or otherwise.

59. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to the Facilities, or BPI's violations, BPI shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 57 of this Section.

60. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. BPI is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and BPI'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 BPI's compliance with any aspect of this Consent Decree will result in compliance with Section 112(r) of the CAA or Section 103 of CERCLA, or with any other provisions of federal, state, or local laws, regulations, or permits.

61. This Consent Decree does not limit or affect the rights of BPI 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 BPI, except as otherwise provided by law.

62. 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.

## XII. COSTS

63. 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 BPI.

XIII. NOTICES

64. 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 & Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DOJ No. 90-5-2-1-10504

To EPA:

Howard Bunch  
Senior Assistant Regional Counsel  
U.S. EPA, Region 7  
11201 Renner Road  
Lenexa, KS 66219

and

Jodi Harper, Compliance Officer  
U.S. EPA, Region 7  
11201 Renner Road  
Lenexa, KS 66219

To BPI:

Richard Jochum  
Corporate Administrator  
Beef Products, Inc.  
891 Two Rivers Drive  
Dakota Dunes, SD 57049

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

66. 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

67. 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

68. 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

69. The terms of this Consent Decree 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.

70. Any disputes concerning modification of this Decree shall be resolved pursuant to Section IX of this Decree (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 50, 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

71. After BPI has completed the requirements of Section V (Compliance Requirements) of this Decree, has thereafter maintained satisfactory compliance with this Consent Decree for a period of 2 years under Section VI (Reporting), and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, BPI may serve upon the United States a Request for Termination, stating that BPI has satisfied those requirements, together with all necessary supporting documentation.

72. Following receipt by the United States of BPI's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether BPI 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.

73. If the United States does not agree that the Decree may be terminated, BPI may invoke Dispute Resolution under Section IX of this Decree. However, BPI shall not seek Dispute Resolution of any dispute regarding termination, under Paragraph 46 of Section IX, until 90 Days after service of its Request for Termination.

## XVIII. PUBLIC PARTICIPATION

74. 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. BPI 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 BPI in writing that it no longer supports entry of the Decree.

#### XIX. SIGNATORIES/SERVICE

75. Each undersigned representative of BPI 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.

76. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. BPI 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

77. 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.

XXI. FINAL JUDGMENT

78. 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 BPI.

Dated and entered this \_\_ day of \_\_\_\_\_, 2013

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UNITED STATES DISTRICT JUDGE  
Northern District of Iowa

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Beef Products, Inc. (N.D. Iowa).

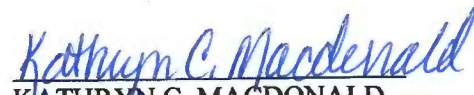
FOR PLAINTIFF UNITED STATES OF AMERICA:

IGNACIA L. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division

4/18/2013  
Date

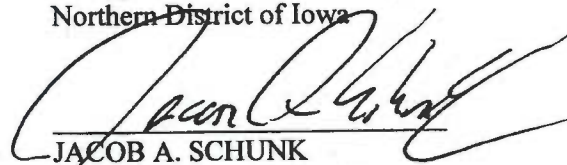
  
ELLEN M. MAHAN  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division

4/19/2013  
Date

  
KATHRYN C. MACDONALD  
Senior Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Telephone: (202) 353-7397  
Email: kathryn.macdonald@usdoj.gov

SEAN R. BERRY  
Acting United States Attorney  
Northern District of Iowa

3/29/13  
Date

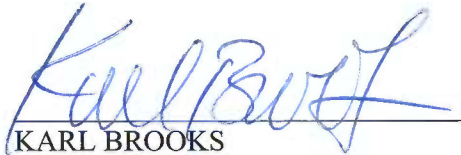
  
JACOB A. SCHUNK  
Assistant United States Attorney  
Northern District of Iowa  
111 7<sup>th</sup> Avenue SE, Box 1  
Cedar Rapids, Iowa 52401  
Telephone: (319) 731-4030  
Email: jacob.schunk@usdoj.gov

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Beef Products, Inc. (N.D. Iowa).

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

4/9/13

Date:



KARL BROOKS

Regional Administrator  
U.S. Environmental Protection Agency  
Region 7  
11201 Renner Road  
Lenexa, Kansas 66219

4/8/13

Date:



DAVID COZAD

Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
11201 Renner Road  
Lenexa, Kansas 66219

4/3/13

Date:



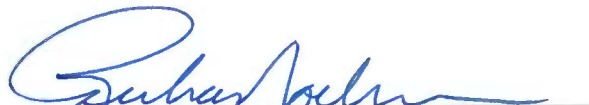
HOWARD C. BUNCH

Special Assistant United States Attorney by appointment  
Sr. Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 7  
11201 Renner Road  
Lenexa, Kansas 66219  
(913) 551-7879  
[bunch.howard@epa.gov](mailto:bunch.howard@epa.gov)  
Member of the Michigan Bar

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Beef Products, Inc. (N.D. Iowa).

FOR DEFENDANT BEEF PRODUCTS, INC.:

3/21/13  
Date



RICHARD JOCHUM  
Corporate Administrator  
Beef Products, Inc.  
891 Two Rivers Drive  
Dakota Dunes, SD 57049

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States of America v. Beef Products, Inc. (N.D. Iowa).

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

4/11/13  
Date:

  
ROSEMARIE A. KELLEY

Director  
Waste and Chemical Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460