

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
NEWARK DIVISION**

---

**UNITED STATES OF AMERICA,** )  
**STATE OF NEW JERSEY,** )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
**PSEG FOSSIL LLC,** )  
 )  
Defendant. )

---

CIVIL ACTION NO.

**CONSENT DECREE**

**TABLE OF CONTENTS**

I.	JURISDICTION AND VENUE .....	5
II	APPLICABILITY .....	6
II	DEFINITIONS .....	8
IV	EMISSION REDUCTIONS AND CONTROLS .....	13
V	ALLOWANCES, CREDITS .....	27
VI	PERMITS AND RESOLUTION OF PAST CIVIL CLAIMS .....	32
VII	RESOLUTION OF FUTURE CIVIL CLAIMS - COVENANTS NOT TO SUE .....	34
VIII	ENVIRONMENTAL MITIGATION PROJECTS .....	38
IX	REPORTING AND RECORDKEEPING .....	45
X	CIVIL PENALTY .....	46
XI	STIPULATED PENALTIES .....	47
XII	RIGHT OF ENTRY .....	51
XIII	FORCE MAJEURE .....	51
XIV	DISPUTE RESOLUTION .....	54
XV	GENERAL PROVISIONS .....	56
XVI	TERMINATION .....	61

WHEREAS, Plaintiffs, the United States of America (“the United States,”) on behalf of the United States Environmental Protection Agency (“EPA”), and the State of New Jersey (“New Jersey”) acting by and through the New Jersey Department of Environmental Protection (“NJDEP”), filed a Complaint for injunctive relief and civil penalties pursuant to Sections 113(b) and 167 of the Clean Air Act, 42 U.S.C. §§ 7413(b) and 7467, alleging that Defendant, PSEG Fossil LLC (“PSEG Fossil”) constructed major modifications at major emitting facilities in violation of the Prevention of Significant Deterioration (“PSD”) and Nonattainment New Source Review (“Nonattainment NSR”) requirements in Parts C and D of Title I the Clean Air Act (“Act”), 42 U.S.C. §§ 7470-7515, and in violation of the Federally-enforceable State Implementation Plan developed by the State of New Jersey;

WHEREAS, Defendant PSEG Fossil is the owner and operator of certain electric generating assets it acquired from Public Service Electric and Gas Company effective August 21, 2000, pursuant to the restructuring of the electric utilities in New Jersey through the New Jersey Electric Discount and Energy Competition Act, N.J.S.A. 48:3-49, et seq., and implementing restructuring orders of the New Jersey Board of Public Utilities;

WHEREAS, the Complaint alleges claims upon which relief can be granted against PSEG Fossil under Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477, and 28 U.S.C. § 1355;

WHEREAS, PSEG Fossil has not answered or otherwise responded to the Complaint in light of the settlement memorialized in this Consent Decree;

WHEREAS, PSEG Fossil has denied and continues to deny the violations alleged in the Complaint, maintains that it has been and remains in compliance with the Act and is not liable for civil penalties or injunctive relief, and states that it is agreeing to the obligations imposed by this Consent Decree solely to avoid the costs and uncertainties of litigation and to improve the environment;

WHEREAS, on or before February of 2001, EPA provided PSEG Fossil and the State of New Jersey with actual notice of the violations pertaining to PSEG Fossil's alleged violations, in accordance with Section 113(a)(1) of the Clean Air Act, 42 U.S.C. § 7413(a)(1);

WHEREAS, PSEG Fossil, consistent with its environment, health, and safety policy, approached and met with New Jersey in October of 2000, and with the United States in January of 2001, prior to PSEG Fossil receiving from EPA and NJDEP notification of the alleged violations, to reconcile the Parties' respective goals for achieving emission reductions of certain air pollutants at the electric generating stations covered under this Consent Decree;

WHEREAS, the Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated in good faith and at arm's length, that the parties have voluntarily agreed to this Consent Decree, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the parties, and that this Consent Decree is fair, reasonable, consistent with the goals of the Act, and in the public interest;

WHEREAS, the Parties anticipate that the installation and operation of pollution control equipment pursuant to this Consent Decree will achieve significant reductions in SO<sub>2</sub>, NO<sub>x</sub>, and PM emissions, and thereby improve air quality, and that certain actions that PSEG Fossil has

agreed to undertake are expected to advance technologies and methodologies for reducing certain air pollutants, including greenhouse gases;

WHEREAS, nothing in this Consent Decree is intended to preclude PSEG Fossil from selling or transferring ownership or operation of any Unit covered by this Consent Decree, or from allocating between PSEG Fossil and any prospective transferee the obligations set forth in this Consent Decree;

WHEREAS, the United States, New Jersey, and PSEG Fossil have consented to entry of this Consent Decree without trial of any issue;

NOW, THEREFORE, without any admission of fact or law, and without any admission of the violations alleged in the Complaint, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

#### **I. JURISDICTION AND VENUE**

1. This Court has jurisdiction over the subject matter herein and over this action pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and 1367, and pursuant to Sections 113 and 167 of the Act, 42 U.S.C. §§ 7413 and 7477. This Court also has personal jurisdiction over the Defendant.
2. Venue is proper under Section 113(b) of the Act, 42 U.S.C. § 7413(b), and under 28 U.S.C. § 1391(b) and (c). Solely for the purposes of this Consent Decree and the underlying Complaint, PSEG Fossil waives all objections and defenses that it may have to the claims set forth in the Complaint, the jurisdiction of the Court, or to venue in this District. PSEG Fossil shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree. For purposes of the Complaint filed

by the Plaintiffs in this matter and resolved by the Consent Decree, and for purposes of entry and enforcement of this Decree, PSEG Fossil waives any defense or objection based on standing. Except as expressly provided for herein, this Consent Decree shall not create any rights in any Party other than the United States, New Jersey and PSEG Fossil. PSEG Fossil consents to entry of this Consent Decree without further notice.

## **II. APPLICABILITY**

3. The provisions of this Consent Decree shall apply to and be binding upon the United States, New Jersey, and upon PSEG Fossil, its successors and assigns, and PSEG Fossil's officers, employees, and agents solely in their capacities as such. If PSEG Fossil proposes to sell or transfer any of its assets or operations subject to the requirements of this Consent Decree prior to the fulfillment of PSEG Fossil's obligations under this Consent Decree, it shall advise the purchaser or transferee in writing of the existence of this Consent Decree, and shall send a copy of such written notification by certified mail, return receipt requested, to Plaintiffs sixty (60) days before such sale or transfer.
4. Upon any partial or complete sale or transfer of PSEG Fossil's interest in Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2, including any interest in the ownership or operation in any of these Units (but exclusive of any non-controlling non-operational shareholder interest in such Unit), the Parties shall agree to a modification to this Consent Decree that:
  - (a) makes the purchaser or transferee jointly and severally liable as a party defendant to this civil action and Consent Decree for all requirements under this Consent Decree that may be applicable to the purchased or transferred Unit; or
  - (b) makes the purchaser or transferee solely liable as a party defendant to this Consent Decree for all requirements

under this Consent Decree that are applicable to the purchased or transferred Unit, in accordance with Paragraph 5, herein.

5. If the Plaintiffs agree that: (a) the purchaser or transferee has the financial capability, technical capability, and recent history of compliance to justify a transfer of liability from PSEG Fossil to the purchaser or transferee; (b) the purchaser or transferee has appropriately contracted with PSEG Fossil to assume the obligations and liabilities applicable to the Unit; and (c) PSEG Fossil and the purchaser or transferee have properly allocated any emission allowance or credit requirements under this Consent Decree that may be associated with the Unit, then the Plaintiffs shall agree to such a modification of this Consent Decree. These modifications shall make the purchaser or transferee solely liable as a party defendant to this civil action and Consent Decree for all requirements under this Consent Decree that are applicable to the purchased or transferred Unit.
6. In the case of a transfer of responsibility for operating Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2, the Plaintiffs may also agree to a modification of this Consent Decree to exclude the operational entity from liability for the nonoperational obligations under this Consent Decree, as long as PSEG Fossil remains liable for all requirements under this Consent Decree.
7. Notwithstanding the foregoing, PSEG Fossil may not assign, and may not be released from any obligation under this Consent Decree that is not specific to the Unit that is the subject of the sale or transfer, including the obligations set forth in Sections VIII (Environmental Mitigation Projects) and X (Civil Penalty).

8. PSEG Fossil shall provide a copy of this Consent Decree to all vendors, suppliers, consultants, contractors, agents, and any other company or other organization performing any of the work described in Sections IV (Emissions Reductions and Controls) or VIII (Environmental Mitigation Projects) of this Consent Decree. Notwithstanding any retention of contractors, subcontractors, or agents to perform any work required under this Consent Decree, PSEG Fossil shall be responsible for ensuring that all work is performed in accordance with the requirements of this Consent Decree. In any action to enforce this Consent Decree, PSEG Fossil shall not assert as a defense the failure of its officers, directors, employees, servants, agents, or contractors to take actions necessary to comply with this Consent Decree, unless PSEG Fossil establishes that such failure resulted from a Force Majeure event as defined in this Consent Decree.

### **III. DEFINITIONS**

9. A “30-Day Rolling Average Emission Rate” shall be determined by calculating the Emission Rate for an Operating Day, and then arithmetically averaging that Emission Rate with the Emission Rates for the previous twenty-nine (29) Operating Days. A new 30-Day Rolling Average shall be calculated for each new Operating Day.
10. A “24-Hour Emission Rate” shall be determined by dividing the total pounds of pollutant by the total million BTU of heat input (“lb/mmBTU”) for a 24-hour Operating Day. A new 24-Hour Emission Rate shall be calculated for each new Operating Day.
11. “Act” or the “Clean Air Act” shall mean the Federal Clean Air Act, 42 U.S.C. §§ 7401 through 7671q, and its implementing regulations.



12. “Air Pollution Control Act “ shall mean the New Jersey Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., and its implementing regulations.
13. “Bergen” shall mean the electric generating plant, owned and operated by PSEG Fossil and located in Bergen County, New Jersey, which includes one 620 MW combined-cycle Unit (“Bergen Unit 1”) and a second 545 MW combined-cycle Unit that is currently under construction (“Bergen Unit 2”), together with associated ancillary equipment and systems.
14. “CEMS” or “Continuous Emission Monitoring System,” for obligations involving NO<sub>x</sub> and SO<sub>2</sub> under this Decree, shall mean “CEMS” as defined in 40 C.F.R. Section 72.2 and installed and maintained as required by 40 C.F.R. Part 75; and for mercury, the devices described in Section VIII of this Consent Decree (Environmental Mitigation Projects).
15. “Consent Decree” shall mean this Consent Decree.
16. “Emission Rate” shall mean the number of pounds of pollutant emitted per million BTU of heat input (“lb/mmBTU”), measured as required by this Consent Decree.
17. “EPA” shall mean the United States Environmental Protection Agency.
18. “Flue gas desulfurization system,” or “FGD,” means an add-on emission control device used to remove sulfur dioxide from flue gas.
19. “Fossil fuel” shall mean any hydrocarbon fuel, including coal, petroleum oil, or natural gas.
20. “Hudson Unit 2” shall mean the coal-fired steam electric generating Unit, and associated ancillary systems and equipment, owned and operated by PSEG Fossil and located in Hudson County, New Jersey.
21. “lb/mmBTU” shall mean pounds per million British Thermal Units of heat input, based upon higher heating value (“hhv”).

22. “MEG Alert,” or “Maximum Electricity Generation Alert” shall mean a period in which one or more electric generating units are operated at emergency capacity, at the direction of the load dispatcher, in order to prevent or mitigate voltage reductions or interruptions in electricity service, or both. A MEG Alert begins when one or more electric generating units are operated at emergency capacity, after receiving notice from the load dispatcher directing the electric generating unit to do so, and ends when the electric generating unit ceases operating at emergency capacity.
23. “Mercer” shall mean the two coal-fired, steam electric generating Units and associated and ancillary systems and equipment, known as Mercer Unit 1 and Mercer Unit 2, owned and operated by PSEG Fossil and located in Mercer County, New Jersey.
24. “Mercury CEMS” or “mercury continuous emission monitoring system” shall mean equipment that samples, analyzes, measures, and provides, by readings taken at frequent intervals, a permanent record of mercury emissions.
25. “MW” means a megawatt, or one million Watts.
26. “NJDEP” shall mean the New Jersey Department of Environmental Protection.
27. “NO<sub>x</sub>” shall mean oxides of nitrogen, as measured in accordance with the provisions of this Consent Decree.
28. “NO<sub>x</sub> Allowances” shall be defined as that term is defined in New Jersey’s NO<sub>x</sub> Budget Program in N.J.A.C. 7:27-31 et seq.
29. “NSR” shall mean the nonattainment area new source review program within the meaning of Part D of Subchapter I of the Act, 42 U.S.C. §§ 7510-7515, 40 C.F.R. Part 51, and N.J.A.C. 7:27-18.1 et seq.

30. “Operating Day” for a Unit shall mean any calendar day on which the Unit fires fossil fuel.
31. “Ozone Control Period” shall mean the five-month period from May 1 through September 30 of any calendar year.
32. “Parties” shall mean the United States, the State of New Jersey, and PSEG Fossil.
33. “PM” shall mean total particulate matter, as measured in accordance with the provisions of this Consent Decree.
34. “PM CEMS” or “PM continuous emission monitoring system” shall mean equipment that samples, analyzes, measures, and provides, by readings taken at frequent intervals, a permanent record of PM emissions.
35. “PM Emission Rate” shall mean the average number of pounds of PM emitted per million BTU of heat input (“lb/mmBTU”), as measured in annual stack tests, in accordance with the reference methods set forth in 40 C.F.R. Part 60, Appendix A, Method 5.
36. “PM-10 emissions” shall mean finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air, as defined in 40 C.F.R. §51.100(rr), and as measured in accordance with the terms of this Consent Decree.
37. “Project Dollars” shall mean PSEG Fossil’s expenditures and payments incurred or made in carrying out the projects identified in Section VIII of this Consent Decree (Environmental Mitigation Projects) to the extent that such expenditures or payments both: (a) comply with the Project Dollar and other requirements set by Section VIII of this Consent Decree (Environmental Mitigation Projects) for such expenditures and payments; and (b) constitute PSEG Fossil’s documented external costs for contractors, vendors, as

well as equipment, and its internal costs consisting of employee time, travel, and other out-of-pocket expenses specifically attributable to these particular projects.

38. "PSD" shall mean Prevention of Significant Deterioration within the meaning of Subchapter I of the Clean Air Act, 42 U.S.C. §§ 7470-7492 and 40 C.F.R. Part 52.
39. "Removal Efficiency" shall mean the percent reduction in the emitted mass of a pollutant achieved by a Unit's pollution control device that PSEG Fossil operates at a Unit. This percentage shall be calculated by subtracting the outlet Emission Rate from the inlet Emission Rate, dividing the difference by the inlet Emission Rate, and then multiplying the result by 100.
40. "Repower" shall mean the modification of a Unit, or removal and replacement of Unit components, such that the modified or replaced Unit generates electricity through the use of new Combined Cycle Combustion Turbine technology fueled either by natural gas, by other gaseous fuels with a sulfur content no greater than that found in natural gas, or by distillate oil that is burned in accordance with the sulfur and use restrictions contained in the permit issued by NJDEP to PSEG Fossil for that Unit.
41. "SCR" shall mean Selective Catalytic Reduction technology.
42. "SO<sub>2</sub>" shall mean sulfur dioxide, as measured in accordance with this Consent Decree.
43. "SO<sub>2</sub> Allowance" shall mean "allowance," as defined at 42 U.S.C. § 7651a(3): an authorization, allocated to an affected Unit, by the Administrator of EPA under Subchapter IV-A of the Act, to emit, during or after a specified calendar year, one ton of sulfur dioxide.

44. “Title V Permit” shall mean the permit required of PSEG Fossil’s major sources under Subchapter V of the Clean Air Act, 42 U.S.C. §§7661-7661e and N.J.A.C. 7:27-22.
45. “Unit” shall mean, collectively, the coal pulverizer, the stationary equipment that feeds coal to the boiler, the boiler that produces steam for the steam turbine, the steam turbine, the generator, the equipment necessary to operate the generator, steam turbine and boiler, and all ancillary equipment, including pollution control equipment, or systems necessary for the production of electricity. An electric generating station may be comprised of one or more Units.
46. “Watt” shall mean a unit of power equal to one ampere per volt.

#### **IV. EMISSIONS REDUCTIONS AND CONTROLS**

##### SO<sub>2</sub> Emission Controls and Practices

47. PSEG Fossil shall install and commence operation of three dry flue gas desulfurization (“FGD”) systems, one each on Hudson Unit 2, Mercer Unit 1 and Mercer Unit 2, by the dates set forth in Paragraphs 53, 55, and 57, below. Each FGD shall be operated at all times that the Unit it serves operates, except that PSEG Fossil need not operate an FGD when the Unit that it is servicing is not fired with coal.
48. In determining SO<sub>2</sub> Emission Rates, PSEG Fossil shall use the methods specified in 40 C.F.R. Part 75, Appendix F and 40 C.F.R. Part 60, Appendix A.
49. In calculating the 30-Day Rolling Average SO<sub>2</sub> Emission Rate at a Unit that has ceased firing fossil fuel, PSEG Fossil may exclude the period, not to exceed two hours, from the restart of that Unit to the time that the Unit is fired with any coal.

50. In calculating the 24-Hour SO<sub>2</sub> Emission Rate at a Unit, PSEG Fossil shall exclude the pounds of pollutant emissions and million BTU of heat input (“lb/mmBTU”) pertaining to the period of time in which the Unit is not fired with coal.
51. At least 9 months prior to the commencement of operation of any FGD required by this Consent Decree, and in accordance with N.J.A.C. 7:27-22.18, PSEG Fossil shall submit to EPA and NJDEP for review and approval a proposed protocol for determining the SO<sub>2</sub> Emission Rate. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil’s proposal in accordance with Paragraphs 94 through 98 of this Consent Decree. The proposed protocol shall set forth the methods by which PSEG Fossil proposes to convert data from its CEMS to a 30-Day Emission Rate and a 24-Hour Emission Rate after the installation of the FGDs. PSEG Fossil shall also submit a revised protocol proposal to EPA and NJDEP for review and approval prior to any change, concurrent with or subsequent to the installation of the control technology required pursuant to this Consent Decree, in the location, type, or operation of a CEMS employed by PSEG Fossil for measuring SO<sub>2</sub> emissions at Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2.

#### SO<sub>2</sub> Controls at Hudson Unit 2

52. By December 31, 2004, PSEG Fossil shall submit to EPA and NJDEP for review and approval the proposed design parameters for an FGD at Hudson Unit 2 to achieve a 30-Day Rolling Average Emission Rate for SO<sub>2</sub> of no greater than 0.150 lbs/mmBTU. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil’s initial design proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.

53. By no later than December 31, 2006, PSEG Fossil shall install and commence operation of an FGD at Hudson Unit 2 in accordance with the design parameters approved by EPA and NJDEP. Beginning on this same date, PSEG Fossil shall operate the FGD at Hudson Unit 2 to achieve and maintain SO<sub>2</sub> Emission Rates of no greater than 0.150 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.250 lb/mmBTU, based on a 24-Hour Emission Rate.

SO<sub>2</sub> Controls at Mercer Unit 1

54. By December 31, 2008, PSEG Fossil shall submit to EPA and NJDEP for approval the proposed design parameters for an FGD at Mercer Unit 1 to achieve a 30-Day Rolling Average Emission rate for SO<sub>2</sub> of no greater than 0.150 lbs/mmBTU. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's initial design proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.

55. By no later than December 31, 2010, PSEG Fossil shall install and commence operation of an FGD at Mercer Unit 1 in accordance with the design parameters approved by EPA and NJDEP. Beginning on this same date, PSEG Fossil shall operate the FGD at Mercer Unit 1 to achieve and maintain SO<sub>2</sub> Emission Rates of no greater than 0.150 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.250 lb/mmBTU, based on a 24-Hour Emission Rate.

### SO<sub>2</sub> Controls at Mercer Unit 2

56. By December 31, 2010, PSEG Fossil shall submit to EPA and NJDEP for approval proposed design parameters for an FGD at Mercer Unit 2 to achieve a 30-Day Rolling Average Emission Rate for SO<sub>2</sub> of no greater than 0.150 lbs/mmBTU. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's initial design proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.
57. By no later than December 31, 2012, PSEG Fossil shall install and commence operation of an FGD at Mercer Unit 2 in accordance with the design parameters approved by EPA and NJDEP. Beginning on this same date, PSEG Fossil shall operate the FGD at Mercer Unit 2 to achieve and maintain SO<sub>2</sub> Emission Rates of no greater than 0.150 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.250 lb/mmBTU, based on a 24-Hour Emission Rate.

### Alternative SO<sub>2</sub> Control Technologies

58. PSEG Fossil may install technology other than the FGD systems described above in satisfaction of the obligations of this Consent Decree if the alternative technology achieves the same or better SO<sub>2</sub> Emission Rates as required of the FGD systems and is approved in writing by EPA and NJDEP in advance of the installation of the alternative technology.

### Fuel Limitations

59. Prior to the installation of an FGD at any Unit pursuant to this Consent Decree, PSEG Fossil shall continue to burn coal at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 in compliance with the respective NJDEP permit requirements for those Units, including sulfur content limitations, in effect as of the date of lodging of this Consent Decree. Upon



the commencement of operation of an FGD at any Unit pursuant to this Consent Decree, PSEG Fossil shall burn only coal that has a monthly average sulfur content of no greater than 2.00 % at that Unit. The monthly average sulfur content shall be determined in accordance with the New Jersey permits for these particular Units.

60. PSEG Fossil shall not burn fuel oil having a sulfur content greater than any amount authorized by regulation and permit at any Unit covered by this Consent Decree.
61. PSEG Fossil shall not burn fuel or fuel mixes not authorized by NJDEP at any Unit covered by this Consent Decree.

NO<sub>x</sub> Emission Controls and Practices

62. PSEG Fossil shall install and commence operation of three selective catalytic reduction (“SCR”) systems--one each on Hudson Unit 2, Mercer Unit 1 and Mercer Unit 2--by the dates set forth in Paragraphs 68, 71, and 72, below.
63. PSEG Fossil shall operate each SCR (or approved alternative technology approved pursuant to Paragraph 73, below) at all times that the Unit it serves operates, except that PSEG Fossil need not operate an SCR: (a) for a Unit that has ceased firing fossil fuel, during the period of time, not to exceed eight hours, from the restart of that Unit to the time that the Unit is fired with coal; and (b) for a Unit that is to be shut down, during the period of time that the Unit is no longer synchronized with any utility electric distribution system and is no longer fired with coal.
64. In determining NO<sub>x</sub> Emission Rates, PSEG Fossil shall use the methods specified in 40 C.F.R. Part 75, Appendix F and 40 C.F.R. Part 60, Appendix A.

65. In calculating the 24-Hour NO<sub>x</sub> Emission Rate at a Unit, PSEG Fossil shall exclude: (i) for a Unit that has ceased firing fossil fuel, the period of time, not to exceed eight hours, from the restart of that Unit to the time that the Unit is either fired with coal or synchronized with a utility electric distribution system; and (ii) for a Unit that is to be shut down, the period of time in which the Unit is no longer synchronized with any utility electric distribution system, and is no longer fired with coal.
66. At least 9 months prior to the commencement of operation of any SCR required by this Consent Decree, and in accordance with N.J.A.C. 7:27-22.18, PSEG Fossil shall submit to EPA and NJDEP for review and approval a proposed protocol for determining NO<sub>x</sub> Emission Rates. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's initial proposal in accordance with Paragraphs 94 through 98 of this Consent Decree. The proposed protocol shall set forth the methods by which PSEG Fossil proposes to convert data from its CEMS to a 30-Day Emission Rate and a 24-Hour Emission Rate after the installation of the SCRs. PSEG Fossil shall also submit a revised protocol to EPA and NJDEP for review and approval prior to any change, concurrent with or subsequent to the installation of the control technology required pursuant to this Consent Decree, in the location, type, or operation of a CEMS employed by PSEG Fossil for measuring NO<sub>x</sub> emissions.

#### NO<sub>x</sub> Controls at Hudson Unit 2

67. By May 1, 2005, PSEG Fossil shall submit to EPA and NJDEP for approval proposed design parameters for an SCR at Hudson Unit 2 to achieve a 30-Day Rolling Average Emission Rate for NO<sub>x</sub> of no greater than 0.100 lbs/mmBTU. NJDEP and EPA shall

approve, disapprove, or modify PSEG Fossil's initial design proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.

68. By May 1, 2007, PSEG Fossil shall commence year-round operation of an SCR at Hudson Unit 2 to achieve and maintain NO<sub>x</sub> Emission Rates of no greater than 0.100 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.150 lb/mmBTU, based on a 24-Hour Emission Rate.

NO<sub>x</sub> Controls at Mercer Units 1 and 2

69. By no later than May 1, 2002, PSEG Fossil shall submit to EPA and NJDEP for approval proposed design parameters for SCRs at Mercer Units 1 and 2:
- a. that achieve and maintain a NO<sub>x</sub> Removal Efficiency of no less than 90% of each Unit's peak hourly firing rate;
  - b. that utilize supplemental duct burners and a gas reheat system to maintain (at all times that an SCR is required under this Consent Decree to be operated) the catalyst within the optimum temperature range to remove NO<sub>x</sub>;
  - c. that are controlled by a process control system which maximizes NO<sub>x</sub> Removal Efficiency; and
  - d. that utilize an ammonia injection system and air flow in a manner which minimizes NO<sub>x</sub> emissions at all electrical loads.

By no later than 90 days prior to the commencement of operation of an SCR at Mercer Units 1 or 2, PSEG Fossil shall also submit to NJDEP and EPA, for review and approval, control room operating instructions for the SCRs at Mercer Unit 1 and Mercer Unit 2 that provide for manual operation of the SCRs to maximize

NO<sub>x</sub> Removal Efficiency and to minimize ammonia emissions (“ammonia slip”) from the SCRs.

70. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil’s initial design and operating proposals in accordance with Paragraphs 94 through 98 of this Consent Decree.
71. By no later than May 1, 2004, PSEG Fossil shall install and commence operation of an SCR at Mercer Unit 2 in accordance with the design parameters approved by EPA and NJDEP. PSEG Fossil shall operate the Mercer Unit 2 SCR during the Ozone Control Period in 2004 and 2005, and shall commence year-round operation of the SCR beginning on May 1, 2006. During all required periods of operation for the Mercer Unit 2 SCR, PSEG Fossil shall achieve and maintain NO<sub>x</sub> Emission Rates of no greater than 0.130 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.150 lb/mmBTU, based on a 24-Hour Emission Rate.
72. By no later than May 1, 2005, PSEG Fossil shall install and commence operation of an SCR at Mercer Unit 1 in accordance with the design parameters approved by EPA and NJDEP. PSEG Fossil shall operate the Mercer Unit 1 SCR during the Ozone Control Period in 2005, and shall commence year-round operation of the SCR beginning on May 1, 2006. During all required periods of operation for the Mercer Unit 1 SCR, PSEG Fossil shall achieve and maintain NO<sub>x</sub> Emission Rates of no greater than 0.130 lb/mmBTU, based on a 30-Day Rolling Average Emission Rate, and 0.150 lb/mmBTU, based on a 24-Hour Emission Rate.

### Alternative NO<sub>x</sub> Control Technologies

73. PSEG Fossil may install technology other than SCRs in satisfaction of the NO<sub>x</sub> control obligations of this Section if the alternative technology is designed to achieve the same or better Removal Efficiency and achieves the same or better NO<sub>x</sub> Emission Rates as required of the SCR systems, and is approved in writing by EPA and NJDEP prior to the installation of the alternative NO<sub>x</sub> control technology.

### Particulate Emissions (“PM”) Controls and Practices

74. The reference methods for determining PM Emission Rates shall be those specified in 40 C.F.R. Part 60, Appendix A, Method 5, using annual stack tests. The reference methods for determining PM-10 Emission Rates shall be those specified in 40 C.F.R. Part 51, Appendix M, Method 202 and either Method 201 or 201A, or other appropriate method approved by EPA and NJDEP.
75. Within three months of the date of entry of this Consent Decree, PSEG Fossil shall submit to EPA and NJDEP for review and approval a protocol for measuring PM and PM-10 emissions, in accordance with the reference methods set forth in Paragraph 74, above. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil’s initial proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.
76. PSEG Fossil shall calculate the PM and PM-10 Emission Rates from the annual stack tests in accordance with 40 C.F.R. § 60.8(f) and the emission test protocol approved by NJDEP and EPA.
77. By July 31, 2002, and every calendar year thereafter in accordance with the requirements set forth in PSEG Fossil’s permits issued by the State of New Jersey and in New Jersey’s

regulations, PSEG Fossil shall conduct stack testing for PM and PM-10 emissions at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 in accordance with the protocol approved by EPA and NJDEP. PSEG Fossil shall report to EPA and NJDEP the results of its stack tests within 60 days of conducting such tests, unless NJDEP provides PSEG Fossil with additional time in which to submit such test results. PSEG Fossil's stack tests conducted as required by its permits from the State of New Jersey may be used to satisfy the annual stack test requirement imposed by this Paragraph.

#### PM Controls at Hudson Unit 2

78. Within six months from the entry of this Consent Decree, PSEG Fossil shall submit to EPA and NJDEP for review and approval the results of an optimization study that recommends the best operational practices to minimize PM emissions from the ESP at Hudson Unit 2, and to achieve a PM Emission Rate of no greater than 0.100 lbs/mmBTU. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's study and recommendations in accordance with Paragraphs 94 through 98 of this Consent Decree. PSEG Fossil shall implement the recommendations ultimately approved by EPA and NJDEP within three months of receiving such approval, and shall thereafter operate the ESP to achieve an emission rate of no greater than 0.100 lbs/mmBTU.
79. By December 31, 2004, PSEG Fossil shall submit to EPA and NJDEP for approval proposed design parameters for a polishing baghouse at Hudson Unit 2 to achieve a PM Emission Rate of at least 0.0150 lbs/mmBTU. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's initial design proposal in accordance with Paragraphs 94 through 98 of this Consent Decree.

80. By no later than December 31, 2006, PSEG Fossil shall install and commence operation of a polishing baghouse at Hudson Unit 2 in accordance with the design parameters approved by EPA and NJDEP. Beginning on this same date, PSEG Fossil shall install and commence operation of a polishing baghouse at Hudson Unit 2 to achieve and maintain a PM Emission Rate of no more than 0.0150 lb/mmBTU. PSEG Fossil shall operate the Hudson Unit 2 polishing baghouse at all times that the Unit it serves is combusting coal. PSEG Fossil shall also operate the Hudson Unit 2 ESP at all times that the Unit it serves is burning coal or oil.
81. PSEG Fossil may install an alternative technology to the polishing baghouse described above in satisfaction of the obligations of this Paragraph if the technology achieves the same or better Emission Rate as the polishing baghouse and is approved in writing by EPA and NJDEP in advance of the installation of the alternative technology.

#### PM Controls at Mercer Units 1 and 2

82. Within six months from the entry of this Consent Decree, PSEG Fossil shall submit to EPA and NJDEP for review and approval the results of an optimization study that recommends the best operational practices to minimize PM emissions from the ESPs at Mercer Units 1 and 2. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's study and recommendations in accordance with Paragraphs 94 through 98 of this Consent Decree.
83. Within three months of its receipt of approval from NJDEP and EPA of PSEG Fossil's recommended operational practices for reducing PM emissions from Mercer Units 1 and 2 pursuant to Paragraph 82, above, PSEG Fossil shall submit to EPA and NJDEP for review

and approval an operation and maintenance plan for the ESPs at these Units that incorporates the approved operational practices. NJDEP and EPA shall approve, disapprove, or modify PSEG Fossil's operation and maintenance plan in accordance with Paragraphs 94 through 98 of this Consent Decree.

84. Beginning three months from PSEG Fossil's receipt of approval by EPA and NJDEP of the proposed operation and maintenance plan for the ESPs at Mercer Units 1 and 2, PSEG Fossil shall operate the ESPs in conformance with the practices and procedures set forth in the approved operation and maintenance plan.
85. Beginning three months from PSEG Fossil's implementation of the practices and procedures set forth in the EPA- and NJDEP-approved operation and maintenance plan for the ESPs at Mercer Units 1 and 2, PSEG Fossil shall operate these ESPs to achieve and maintain a PM Emission Rate of 0.030 lb/mmBTU.
86. PSEG Fossil shall include in its Title V Permit application and all other relevant permit applications for operation or construction, the operational practices approved by EPA and NJDEP in the optimization study.
87. PSEG Fossil shall operate the Mercer Unit 1 and Mercer Unit 2 ESPs at all times that the Unit each one serves is in operation.

#### Repowering of Bergen Unit 2

88. By no later than December 31, 2002, PSEG Fossil shall complete the Repowering of Bergen Unit 2 utilizing combined cycle combustion turbine technology to generate electricity, firing either natural gas, other gaseous fuels with a sulfur content no greater than that found in natural gas, or distillate oil that is burned in accordance with the sulfur



and use restrictions contained in the permit issued by NJDEP to PSEG Fossil for that Unit.

89. By no later than December 31, 2002, PSEG Fossil shall install and commence operation of an SCR at the Repowered Bergen Unit 2 to achieve and maintain compliance with the NO<sub>x</sub> Emission Rates in the permit issued by NJDEP to PSEG Fossil for that Unit.
90. Bergen Unit 2 may be fired with distillate fuel oil only if: (a) PSEG Fossil complies with the sulfur and time limitations contained in the permit issued by NJDEP to PSEG Fossil for that Unit; and (b) PSEG Fossil uses all NO<sub>x</sub> emission control equipment for that Unit when it is fired with such oil, consistent with Paragraph 89 of this Consent Decree.
91. PSEG Fossil shall obtain all necessary state and/or local permits for the Bergen Repowering; a PSD permit and a major NSR permit pursuant to N.J.A.C. 7:27-18 shall not be required for the Bergen Repowering project, however, as long as the project is completed in accordance with the permit issued by NJDEP to PSEG Fossil and the requirements of N.J.A.C. 7:27-8.
92. PSEG Fossil shall not operate the Repowered Bergen Unit 2 until NJDEP issues a permit for this Unit. In the event that the project is not constructed or operated in accordance with the permit issued by NJDEP to PSEG Fossil, PSEG Fossil must obtain prior approval from both EPA and NJDEP.

#### Use of Data

93. Nothing in this Consent Decree, including Paragraphs 48 (measuring SO<sub>2</sub> emissions), 64 (NO<sub>x</sub> emissions), and 76 (PM and PM-10 emissions), is intended to, or shall, alter applicable law (including the Credible Evidence Rule (62 Fed. Reg. 8,314 (1997)))

concerning the use of data, for any purpose under the Clean Air Act or the Air Pollution Control Act, generated by the reference methods specified herein or otherwise.

EPA and NJDEP Review and Approval of PSEG Fossil Submittals

94. Within sixty days from the date that EPA and NJDEP receive from PSEG Fossil any submittal required under this Consent Decree, including initial design proposals for emission control equipment, proposed protocols for calculating emission rates, and optimization studies and proposed recommendations, NJDEP or EPA shall approve, disapprove, or modify PSEG Fossil's proposal.
95. If EPA or NJDEP either disapprove or modify PSEG Fossil's initial proposal, then PSEG Fossil shall, within sixty days from such determination, respond to EPA's or NJDEP's determination to disapprove or modify PSEG Fossil's initial proposal.
96. Within sixty days of receiving PSEG Fossil's response to EPA's or NJDEP's disapproval or request for modification, NJDEP or EPA shall issue a final determination as to the parameters to be used by PSEG Fossil.
97. Within sixty days of receiving EPA's or NJDEP's final determination, PSEG Fossil shall, if required by EPA or NJDEP in its final determination, modify and resubmit its initial proposal to NJDEP and EPA.
98. If EPA or NJDEP fail to provide a response within sixty days to any of PSEG Fossil's proposals for the design and installation of emission control equipment, as required by Paragraphs 94 and 96, above, then the installation date for that piece of control equipment, as well as the effective date of any associated Emission Rate, shall be extended by the period of time beyond sixty days that EPA and NJDEP delay their responses, or any

additional amount of time as EPA and NJDEP may agree to, in consideration of PSEG Fossil's outage schedule. Any such failure by EPA and NJDEP, however, shall not alter or extend any other obligation imposed on PSEG Fossil under this Consent Decree.

Moreover, any failure by EPA or NJDEP to respond within sixty days to any PSEG Fossil submittal other than the design of emission control equipment to be installed pursuant to this Consent Decree shall not alter or extend any obligation under this Consent Decree.

## **V. ALLOWANCES, CREDITS**

### Use of SO<sub>2</sub> and NO<sub>x</sub> Allowances

99. Upon the dates specified in Paragraphs 53, 55, and 57, above, for the commencement of operation of each SO<sub>2</sub> emission control device required by this Consent Decree, PSEG Fossil may use any SO<sub>2</sub> Allowances allocated by EPA to Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 only to satisfy the operational needs of these Units, and shall neither:
- (a) use such Allowances at any other Unit, including any other PSEG Fossil Unit not covered by this Decree; nor
  - (b) sell or transfer any SO<sub>2</sub> Allowances allocated to these Units to a third party, other than for purposes of retiring such SO<sub>2</sub> Allowances in accordance with Paragraphs 100 and 109, below.
100. Within one year from the date of commencement of operation of each SO<sub>2</sub> emission control device required by Paragraphs 53, 55, and 57, PSEG Fossil shall retire to EPA, or transfer to a non-profit third party selected by PSEG Fossil for retirement, any SO<sub>2</sub> Allowances that exceed the operational SO<sub>2</sub> Allowance needs of Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, collectively. PSEG Fossil shall retire SO<sub>2</sub> Allowances by the

use of the applicable United States Environmental Protection Agency Acid Rain Program Allowance Transfer Form.

101. Upon the dates specified in Paragraphs 68, 71, and 72, above, for the commencement of operation of each NO<sub>x</sub> emission control device required by this Consent Decree, PSEG Fossil may use any NO<sub>x</sub> allowances allocated by EPA to Hudson Unit 2, Mercer Unit 1 and Mercer Unit 2 only to satisfy the operational needs of these Units, and shall neither:  
(a) use such NO<sub>x</sub> allowances at any other Unit, including any other PSEG Fossil Unit not covered by this Decree; nor (b) sell or transfer any NO<sub>x</sub> allowance allocated to these Units to a third party, other than for purposes of retiring such NO<sub>x</sub> allowances in accordance with Paragraphs 102 and 109, below.
102. Within one year from the date of commencement of operation of each NO<sub>x</sub> emission control device required by Paragraphs 68, 71, and 72, PSEG Fossil shall retire to EPA, or transfer to a non-profit third party selected by PSEG Fossil for retirement, any NO<sub>x</sub> allowances that exceed the operational NO<sub>x</sub> allowance needs of Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, collectively.

Use and Retirement of NO<sub>x</sub> Credits under the New Jersey OMET Program

103. Within sixty days of entry of this Consent Decree, PSEG Fossil shall retire 372,380 discrete emission reduction credits (“DER Credits”) of the DER Credits that PSEG Fossil has accumulated under New Jersey’s Open Market Emissions Trading program (“OMET Program”).
104. PSEG Fossil shall retain in New Jersey’s OMET Program 20,240 DER Credits for Maximum Electricity Generation (“MEG”) Alerts and 55,200 DER Credits for high emitting units that have to be unexpectedly dispatched on a higher capacity utilization schedule than PSEG Fossil’s daily dispatch plan in order to meet system demand

(“Unexpected Dispatch RACT Compliance”). PSEG Fossil shall not sell or transfer any of the DER Credits retained for MEG Alerts and Unexpected Dispatch RACT Compliance, and shall use these retained DER Credits only for MEG Alerts and Unexpected Dispatch RACT Compliance.

105. PSEG Fossil may not generate or claim DER Credits under New Jersey’s OMET program at Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2 between January 1, 2001, and the dates for the installation and operation of the SCRs at these Units set forth in this Consent Decree.
106. Upon installation of the SCRs required by this Consent Decree, PSEG Fossil may generate or claim 50% of the DER Credits which result from PSEG Fossil achieving NO<sub>x</sub> Emission Rates below those required by this Consent Decree. PSEG Fossil may also generate and claim 100% of the of the DER Credits which result from PSEG Fossil commencing operation of the SCRs earlier than the dates required by this Consent Decree.
107. By January 15, 2006, PSEG Fossil shall retire to New Jersey any remaining DER Credits from the 20,240 DER Credits previously retained for MEG Alerts. By December 31, 2015, PSEG Fossil shall retire to New Jersey any remaining DER Credits from the 55,200 DER Credits previously retained for Unexpected Dispatch RACT Compliance.

#### Retirement of Allowances

108. For purposes of this Section, “retirement of allowances” means permanently surrendering allowances from the boiler Unit accounts administered by EPA so that such allowances can never be used to meet any compliance requirement under the Clean Air Act, the New Jersey State Implementation Plan, or this Consent Decree.

109. If any allowances are transferred directly to a non-profit third party, PSEG Fossil shall submit a report of such transfer to Plaintiffs within seven (7) business days of such transfer, in accordance with Paragraph 197 of this Consent Decree. Such report shall: (i) provide the identity of the non-profit third-party recipient(s) of the allowances and a listing of the serial numbers of the transferred allowances; (ii) demonstrate that the third-party recipient(s) will not sell, trade, or otherwise exchange any of the allowances; (iii) demonstrate that the third party recipient(s) will not use any of the allowances to meet any obligation imposed by any environmental law; and (iv) demonstrate that the third-party recipient(s) will surrender the allowances for permanent retirement to EPA or NJDEP within one year after PSEG Fossil transfers the allowances to the third-party recipient(s). PSEG Fossil shall not have complied with the allowance surrender requirements of Paragraphs 100 and 102 until all third-party recipient(s) shall have actually surrendered the transferred allowances to EPA or NJDEP for retirement.
110. For all SO<sub>2</sub> Allowances surrendered to EPA, PSEG Fossil shall first submit the applicable United States Environmental Protection Agency Acid Rain Program Allowance Transfer Form to EPA's Office of Air and Radiation's Clean Air Markets Division directing the transfer of the Allowances held or controlled by PSEG Fossil to the EPA Enforcement Surrender Account or to any other EPA account that the Agency may direct. As part of submitting these transfer requests, PSEG Fossil shall irrevocably authorize the transfer of these SO<sub>2</sub> Allowances and identify, by name of account and any applicable serial or other identification numbers or station names, the source and location of the SO<sub>2</sub> Allowances being retired.

111. For all NO<sub>x</sub> allowances surrendered to NJDEP, PSEG Fossil shall submit a retirement request pursuant to the procedures set forth at N.J.A.C. 7:27-31.10(l). As part of submitting these transfer requests, PSEG Fossil shall irrevocably authorize the transfer of these allowances and identify, by name of account and any applicable serial or other identification numbers or station names, the source and location of the allowances being retired.

#### Exclusion of Certain Emission Allowances

112. For any and all actions taken by PSEG Fossil pursuant to the terms of this Consent Decree, PSEG Fossil shall not use or sell any resulting NO<sub>x</sub> or SO<sub>2</sub> emission allowances in any emission trading or marketing program of any kind.
113. Except as provided for in Paragraphs 100 and 102, nothing in this Consent Decree shall preclude PSEG Fossil from using, selling, or transferring emission allowances allocated to Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 arising from either: (a) PSEG Fossil's activities at these Units that occur prior to the date of entry of this Consent Decree; or (b) PSEG Fossil's activities at these Units that are not required under this Consent Decree and that occur after the date of entry of this Consent Decree.
114. Notwithstanding the preceding Paragraph, PSEG Fossil shall not use, sell, or transfer under New Jersey law more than 50% of the NO<sub>x</sub> and SO<sub>2</sub> allowances that result from PSEG Fossil achieving Emission Rates below those required by this Consent Decree. PSEG Fossil may, however, use, sell, or transfer, in accordance with New Jersey law, 100% of the of the NO<sub>x</sub> and SO<sub>2</sub> allowances that result from PSEG Fossil commencing operation of emission controls earlier than the dates required by this Consent Decree.

115. Nothing in this Consent Decree shall preclude PSEG Fossil from purchasing emission allowances to satisfy operational requirements that may exist outside of this Consent Decree.

## **VI. PERMITS AND RESOLUTION OF PAST CIVIL CLAIMS**

### **Timely Application for Permits**

116. Except as otherwise stated in this Consent Decree, in any instance where otherwise applicable law or this Consent Decree requires PSEG Fossil to secure a permit to authorize the construction, modification, or operation of any Unit or Unit component under this Consent Decree, PSEG Fossil shall make such application in a timely and complete manner. Such applications shall be completed and submitted to the appropriate authorities to allow sufficient time for all legally required processing and review of the permit request. Any failure by PSEG Fossil to submit a timely permit application for Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2 shall bar any use by PSEG Fossil of the Force Majeure provisions of this Consent Decree to allege that it failed to install or operate a Unit as required by this Consent Decree because a permitting authority failed to issue a necessary permit in a timely manner. Nothing in this Decree shall be construed to relieve PSEG Fossil of any obligation to comply with New Jersey's permitting requirements pursuant to Subchapters 8 and 22 of the New Jersey Code, N.J.A.C. 7:27-8 and 7:27-22; provided, however, that no such permit issued by New Jersey under Subchapters 8 or 22 may impose conditions on NO<sub>x</sub>, SO<sub>2</sub> and PM emissions that are more stringent than those imposed under Paragraphs 53, 55, 57, 59 through 61, 68, 71, 72, 80, and 85, absent either a final agency order or a change in the regulations promulgated under the Air Pollution Control Act that allows for a more stringent condition.



Title V Permits.

117. Within sixty (60) days of entry of this Decree, PSEG Fossil shall amend its existing Title V Permit application(s) or apply for an amendment of its Title V Permit(s), to include a schedule for all performance, operational, maintenance, and control technology requirements established by this Consent Decree, including but not limited to Emission Rates, limits on fuel use, and operation and maintenance optimization requirements. Within one year after commencement of operation of each pollution control device in Section IV (Emission Reductions and Controls) of this Decree, PSEG Fossil shall submit a proposed modification to its Title V permit(s) and applications to reflect the new Emission Rates pursuant to Section IV (Emission Reduction and Controls) and, to the extent applicable, the surrender of allowances under Section V (Allowances, Credits) of this Decree.
118. Except as this Consent Decree expressly requires otherwise, this Consent Decree shall not be construed to require PSEG Fossil to apply for or obtain a permit pursuant to Parts C and D in Title I of the Clean Air Act for any work performed by PSEG Fossil within the scope of the Resolution of Claims provisions of Paragraphs 121 and 122, below, or within the scope of Section IV (Emission Reductions and Controls) of this Consent Decree. Nothing in this Decree shall be construed to relieve PSEG Fossil of any obligation to comply with Title V of the Clean Air Act and NJDEP's implementing regulations.
119. Resolution of Past Federal Civil Claims - This Consent Decree resolves PSEG Fossil's civil liability for violations at Hudson Unit 2, Mercer Unit 1, Mercer Unit 2, and Bergen Unit 2 that have arisen from PSEG Fossil's actions at these Units prior to the date on which this Consent Decree is lodged with the Court of: (a) the Prevention of Significant

Deterioration (“PSD”) or Non-Attainment New Source Review (“NSR”) provisions of Parts C and D in Title I of the Clean Air Act; (b) the Federally-enforceable NSR provisions incorporated into N.J.A.C. 7:27-18; and (c) the Federally-enforceable New Jersey permitting requirements set forth in N.J.A.C. 7:27-8.3(a), (b), and (c). This Consent Decree further resolves PSEG Fossil’s civil liability for violations of the Federally-enforceable provisions of N.J.A.C. 7:27-19.6 and 7:27-19.24 at the designated set of electricity generating units identified in New Jersey Title V permit no. 05-95-0009.

120. Resolution of Past State Civil Claims -This Consent Decree resolves PSEG Fossil’s civil liability for violations at Hudson Unit 2, Mercer Unit 1, Mercer Unit 2, and Bergen Unit 2 that have arisen from PSEG Fossil’s actions at these Units prior to the date on which this Consent Decree is lodged with the Court of: (a) the Prevention of Significant Deterioration (“PSD”) or Nonattainment New Source Review (“Nonattainment NSR”) provisions of Parts C and D in Title I of the Clean Air Act; (b) the NSR provisions incorporated into N.J.A.C. 7:27-18; and (c) the New Jersey permitting requirements set forth in N.J.A.C. 7:27-8.3(a), (b), and (c). This Consent Decree further resolves PSEG Fossil’s civil liability for: (a) the OMET provisions incorporated into N.J.A.C. 7:27-30; and (b) compliance with N.J.A.C. 7:27-19.6 and 7:27-19.24 with respect to the use of DER Credits.

## **VII. RESOLUTION OF FUTURE CIVIL CLAIMS - COVENANTS NOT TO SUE**

121. Resolution of Future Federal Claims – Subject to the limitations specified in Paragraphs 123 and 124, the United States covenants not to sue PSEG Fossil and its successors and assigns for civil claims arising from the PSD or Nonattainment NSR provisions of Parts C and D in Title I of the Clean Air Act, 42 U.S.C. § 7401 et seq., at Hudson Unit 2, Mercer

Unit 1, and Mercer Unit 2 based on failure to obtain PSD or Nonattainment NSR permits for:

- a. physical changes or changes in the method of operation at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, after the date of lodging of this Consent Decree, that this Consent Decree expressly directs PSEG Fossil to undertake; or
- b. physical changes or changes in the method of operation at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, after the date of lodging of this Consent Decree, that are not required by this Consent Decree, if and only if PSEG Fossil is otherwise in compliance with: Section IV (Emissions Reductions and Controls), other than the 30-Day, 24-Hour, and PM Emission Rates contained in Paragraphs 53, 55, 57, 68, 71, 72, 80, and 85; Section V (Allowances, Credits); and Paragraph 117 of this Consent Decree.

122. Resolution of Future State Claims – Subject to the limitations specified in Paragraphs 123 and 124, below, New Jersey covenants not to sue PSEG Fossil and its successors and assigns for civil claims arising from the PSD or Nonattainment NSR provisions of Parts C and D in Title I of the Clean Air Act, 42 U.S.C. § 7401 et seq., and N.J.A.C. 7:27-18.1 et seq. at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 based on failure to obtain PSD or Nonattainment NSR permits for:

- a. physical changes or changes in the method of operation at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, after the date of lodging of this Consent Decree, that this Consent Decree expressly directs PSEG Fossil to undertake; or
- b. physical changes or changes in the method of operation at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, after the date of lodging of this Consent Decree, that

are not required by this Consent Decree, if and only if PSEG Fossil is otherwise in compliance with: Sections IV (Emissions Reduction and Controls), other than the 30-Day, 24-Hour, and PM Emission Rates contained in Paragraphs 53, 55, 57, 68, 71, 72, 80, and 85; Section V (Allowances, Credits); and Paragraph 117 of this Consent Decree.

General Limitations on the Future Covenants Not To Sue

123. If emissions from Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, collectively exceed more than 16,444 tons of NO<sub>x</sub> in any calendar year after December 31, 2005, or more than 29,948 tons of SO<sub>2</sub> in any calendar year after December 31, 2006, then the covenants not to sue in Paragraphs 121 and 122 shall not apply to any physical change or change in the method of operation at these Units within the five-year period preceding the exceedance.
124. The Covenants Not to Sue in Paragraphs 121 and 122 do not apply to physical changes or changes in the method of operation, either individually or collectively for a Unit, at Hudson Unit 2, Mercer Unit 1 or Mercer Unit 2 that would increase the maximum hourly emission rates, as determined by 40 C.F.R. § 60.14, for NO<sub>x</sub>, SO<sub>2</sub>, or any other pollutant regulated under the applicable New Source Performance Standard by more than 10 percent. To determine the allowable maximum hourly emission rate increase, PSEG shall use the following formulae:

$$\text{PostCI} = (\text{ER}_{\text{current}} \times (1 - \text{CE})) \times 0.10$$

$$\text{PreCI} = \text{ER}_{\text{current}} \times 0.10$$

where

$$\text{PostCI} = \text{Allowable post control maximum hourly emission rate increase (lbs/hr)}$$

$ER_{\text{current}}$	=	Maximum hourly emission rate, as determined by 40 C.F.R. § 60.14 at the time of lodging consent decree (lbs/hr)
CE	=	Control efficiency, expressed as a decimal fraction, expected from a given control as determined by comparing the average 30-Day Rolling Average Emission Rate achieved at the Unit during the year prior to entry of the Consent Decree to the 30-Day Rolling Average Emission Rate Required by the Consent Decree
PreCI	=	Allowable pre-control maximum hourly emission rate increase (lbs/hr).

125. Any claim not resolved through this Section of the Consent Decree is reserved, as is any affirmative defense or claim of exemption to any such claim. As to any claim resolved but later re-opened under this Section of the Decree, no such Party shall assert issue preclusion, claim preclusion, or any claim splitting theory to defeat such a claim or defense.
126. The State of New Jersey specifically reserves all rights under the Air Pollution Control Act, N.J.S.A. 26:2C-1 et seq., and common law, to require PSEG Fossil to take additional actions that NJDEP determines are necessary to protect public health, safety, welfare, and the environment. Moreover, nothing in this Consent Decree shall constitute a waiver of any statutory or common law right of NJDEP to require such additional actions should NJDEP determine that such actions are necessary.
127. Notwithstanding any other provisions of this Decree, the provisions of Paragraphs 121 and 122 (Resolution of Future Federal and State Civil Claims) shall terminate on December 31, 2015, and are without any force or effect as to any physical change or change in the method of operation of a Unit commenced or completed after that date.

Effect of this Section on PSEG Fossil.

128. This Section of the Decree does not: (a) impose any affirmative obligation on PSEG Fossil; (b) preclude PSEG Fossil from obtaining a PSD or Nonattainment NSR permit for a modification of a Unit that would be subject to the limitations and reopeners contained in Paragraphs 123 and 124; or (c) relieve PSEG Fossil of any obligation imposed on it by other Sections of this Decree.

**VIII. ENVIRONMENTAL MITIGATION PROJECTS**

129. PSEG Fossil shall submit for review and approval, pursuant to Paragraphs 94 through 98 of this Consent Decree, plans for the Mitigation Projects described in this Section (Environmental Mitigation Projects), and shall implement those projects in compliance with the schedules and terms of this Consent Decree and the plans for such projects approved under this Decree. In performing these Projects, PSEG Fossil shall spend no less than \$6.0 million (present value in 2001 dollars) in Project Dollars. PSEG Fossil shall maintain all documents required by Generally Accepted Accounting Principles to substantiate the Project Dollars spent by PSEG Fossil, and shall provide these documents to EPA and NJDEP within 30 days of a request by either EPA or NJDEP for the documents.
130. All plans and reports submitted by PSEG Fossil pursuant to the requirements of this Section of the Consent Decree shall be publicly available from PSEG Fossil, without charge by PSEG Fossil.
131. PSEG Fossil shall certify, as part of each plan submitted to the Plaintiffs for any Mitigation Project, that as of the date of entry of this Consent Decree it was unaware of any person

required by law, other than this Consent Decree, to perform the Project described in the plan.

132. PSEG Fossil shall use good faith efforts to secure as much benefit as possible for the Project Dollars expended, consistent with the applicable requirements and limits of this Consent Decree.
133. If PSEG Fossil elects to undertake a Project by contributing funds to another person or instrumentality that will carry out the Project, that person or instrumentality must, in writing: (a) identify its legal authority for accepting such funding; and (b) identify its legal authority to conduct the Project for which PSEG Fossil contributes the funds. Regardless of whether PSEG Fossil elects to undertake a Project by itself or to do so by contributing funds to another person or instrumentality that will carry out the Project, PSEG Fossil acknowledges that it will receive credit for the expenditure of such funds as Project Dollars only if PSEG Fossil demonstrates that the funds have been actually spent either by PSEG Fossil or by the person or instrumentality receiving them, and that such expenditures met all requirements of this Consent Decree.
134. Within sixty (60) days following the completion of each approved Mitigation Project to be undertaken by PSEG Fossil, PSEG Fossil shall submit to EPA and NJDEP a report that documents the date that the Mitigation Projects were completed, the results of implementing the project, including the emission reductions or other environmental benefits achieved, and the Project Dollars expended by PSEG Fossil in implementing the project. PSEG Fossil shall include in its reports pursuant to Section IX (Reporting and Recordkeeping) of this Consent Decree all recorded mercury and PM CEMS data, in electronic format.

135. PSEG Fossil shall submit the required plans and certifications for, and complete, the following Projects:

PSEG Fossil - New Jersey Carbon Dioxide Reduction Program

136. By December 31, 2005, PSEG Fossil shall undertake measures to reduce its calendar year average carbon dioxide (“CO<sub>2</sub>”) emission rate, expressed in pounds per Megawatt-hour (“lbs/MWhr”), from fossil fuel-fired electric generating units in New Jersey (“NJEGUs”) owned or operated by PSEG Fossil, a wholly-owned subsidiary of PSEG Fossil or a wholly-owned affiliate of PSEG Fossil, to a goal of 1,450 lbs/MWhr, which is 15% below PSEG Fossil’s 1990 CO<sub>2</sub> emission rate of 1,706 lbs/MWhr.
137. PSEG Fossil shall receive a \$0.10 credit in Project Dollars for each \$1.00 expended by PSEG Fossil up until December 31, 2005, for what EPA and NJDEP deem to be reasonable and prudent capital expenditures made to reach this 15% CO<sub>2</sub> reduction goal, up to a maximum of \$3.5 million in Project Dollars (for up to \$35 million in reasonable and prudent capital expenditures). PSEG Fossil’s costs associated with its repowering of Bergen Unit 2 are not eligible for credit as Project Dollars.
138. Notwithstanding any other provision of this Consent Decree, if PSEG Fossil does not for any reason attain the goal of a 15% reduction from the 1990 CO<sub>2</sub> emission rate at these plants by December 31, 2005, then by April 30, 2006, PSEG Fossil shall pay to NJDEP \$1.00 per ton of CO<sub>2</sub> emissions for the shortfall. The shortfall, if any, shall be determined by calculating the difference between the 2005 Overall Calendar Year CO<sub>2</sub> Emission Rate from PSEG Fossil’s NJEGUs and PSEG Fossil’s 15% CO<sub>2</sub> emission rate reduction goal of 1,450 lb/MWh. The difference in emission rates shall be multiplied by the total megawatt hours generated in 2005 by PSEG Fossil’s NJEGUs resulting in pounds of CO<sub>2</sub>. The



pounds of CO<sub>2</sub> is then divided by 2,000 lbs/ton to calculate the tons of CO<sub>2</sub>. The tons of CO<sub>2</sub> shall be multiplied by the CO<sub>2</sub> fund rate of \$1.00 per ton. The shortfall payment, if any, shall not exceed \$1.5 million. Each such dollar paid by PSEG Fossil to NJDEP shall be counted as a Project Dollar, for purposes of this Consent Decree.

#### Methane Gas Recovery

139. By December 31, 2002, PSEG Fossil shall pay not less than \$1.5 million to NJDEP, which shall utilize the money for the recovery and beneficial reuse of methane gas from landfills in New Jersey. Each dollar paid by PSEG Fossil shall be counted as a Project Dollar, for purposes of this Consent Decree.
140. PSEG Fossil may not recover the cost of the methane gas recovery Project Dollar expenditures.

#### Mercury Reduction and Monitoring

141. Through the installation and optimization of the FGD systems to be installed pursuant to Paragraphs 53, 55, and 57 of this Consent Decree, or through the installation and operation of any alternate SO<sub>2</sub> emissions reduction system approved by EPA and NJDEP under Paragraph 58, PSEG Fossil shall use best efforts to achieve a 90% reduction of PSEG Fossil's mercury emissions from year 2000 levels at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, within one year after the installation of each FGD system at these Units.
142. By December 31, 2008, PSEG Fossil shall also expend not less than \$1.0 million in the development of technology for monitoring mercury emissions from coal-fired Units. Each dollar spent by PSEG Fossil pursuant to Paragraphs 143 through 147 shall be counted as a Project Dollar, for purposes of this Consent Decree.

143. By December 31, 2002, PSEG Fossil, in consultation with EPA and NJDEP, shall evaluate technologies for continuous mercury emissions monitoring (“Mercury CEMS”) at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2, and shall provide a report to EPA and NJDEP proposing Mercury CEMS technology at these Units.
144. By December 31, 2003, EPA and NJDEP, in consultation with PSEG Fossil, shall select and approve a Mercury CEMS demonstration technology for Hudson Unit 2, Mercer Unit 1, or Mercer Unit 2.
145. By December 31, 2004, PSEG Fossil shall install and commence operation of a Mercury CEMS demonstration technology selected by EPA and NJDEP, in consultation with PSEG Fossil. For purposes of this Paragraph, it shall be presumed that PSEG Fossil will install the Mercury CEMS demonstration technology at Hudson Unit 2, unless PSEG Fossil demonstrates to the satisfaction of EPA and NJDEP that installation at an alternative Unit is more appropriate.
146. Beginning on December 31, 2004, PSEG Fossil shall consult with EPA, NJDEP, and the Mercury CEMS supplier(s) to optimize and evaluate the performance of the Mercury CEMS demonstration technology. On or before December 31st of 2005, 2006, and 2007, PSEG Fossil shall submit to EPA and NJDEP a report summarizing the performance and accuracy of the Mercury CEMS demonstration technology.
147. By December 31, 2008, PSEG Fossil shall also install and commence operation of Mercury CEMS at the two remaining Units at which the Mercury CEMS demonstration technology was not installed, unless by March 31, 2008, EPA and NJDEP determine, based on the results of the Mercury CEMS demonstration technology and the results from any other available Mercury CEMS, that it is infeasible to operate Mercury CEMS at these

two remaining Units. If by March 31, 2008, EPA and NJDEP determine that it is infeasible to operate Mercury CEMS at these two remaining Units, PSEG Fossil shall be entitled to discontinue operation of and remove the Mercury CEMS demonstration technology.

148. For purposes of Paragraph 147, above, “infeasible” shall mean: (a) that the CEMS cannot be kept in proper condition for sufficient periods of time without chronic and serious interference with the operation of the Unit; (b) the CEMS demonstrate persistent and unusual equipment adjustment and servicing needs that cannot be resolved without an unreasonable expenditure of resources; or (c) the data generated cannot be used to assess mercury emissions from the Unit and the Unit’s pollution control devices.
149. Any determination by EPA and NJDEP as to the feasibility of operating Mercury or PM CEMS shall be subject to the dispute resolution provisions of this Consent Decree, but shall be upheld upon judicial review unless the Court concludes that the Agencies’ determination was arbitrary and capricious.
150. If on or before March 31, 2008, EPA and NJDEP determine that it is infeasible to operate Mercury CEMS at the two remaining Units, using either the Mercury CEMS demonstration technology or any other Mercury CEMS technology, and if PM CEMS are commercially-available in the United States, then within two years from the date of such determination of infeasibility, PSEG Fossil shall install and commence continuous operation of PM CEMS on Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 in accordance with 40 C.F.R. Part 60, Appendix B and Appendix F, unless the available technical literature indicates that PM CEMS are technically infeasible given the flue gas stack conditions of these Units.

151. Until the Mercury CEMS referenced above is installed on Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2 and EPA and NJDEP determine that such technology produces reliable results, PSEG Fossil shall conduct stack tests in accordance with NJDEP regulations and permits as well as 40 C.F.R. Part 60, Appendix A, EPA Method 29 or Method 101A. By July 1st of each year following the entry of this Consent Decree, and annually thereafter, PSEG Fossil shall conduct these stack tests to determine emissions and concentrations of mercury. PSEG Fossil shall report to EPA and NJDEP the results of its stack tests within 60 days of conducting such tests, unless NJDEP provides PSEG Fossil with additional time in which to submit such test results.
152. By April 30, 2002, and by the end of each calendar month thereafter until EPA and NJDEP conclude that the installed continuous emission monitoring technology has produced reliable results, PSEG Fossil shall conduct a monthly analysis of the mercury in the coal used as fuel at Hudson Unit 2, Mercer Unit 1, and Mercer Unit 2. If after 24 months of monthly mercury coal analysis, EPA and NJDEP may approve quarterly testing if EPA and NJDEP determine that the annual average does not change significantly from twelve samples per year to four samples per year. PSEG Fossil shall revert to monthly sampling and analysis, however, if EPA and NJDEP determine that monthly sampling is warranted by the quarterly results.
153. PSEG Fossil shall also determine the mercury content of representative samples of the coal being burned during mercury stack testing each year, and shall correlate the amount of mercury in the coal to the amount being emitted to the air for that year. The coal sampling and analysis conducted during these annual stack tests may also serve as the

monthly (or quarterly) mercury sampling and analysis for that month in which the annual test was conducted.

154. PSEG Fossil shall report the results of its mercury coal analyses to EPA and NJDEP, in the periodic reports to be submitted in accordance with Section IX (Reporting and Recordkeeping) of this Consent Decree.

#### **IX. REPORTING AND RECORDKEEPING**

155. Within 180 days after completing construction on each control technology specified in Paragraphs 53, 55, 57, 68, 71, 72, 80, and 85, PSEG Fossil must conduct performance tests and submit performance test reports that demonstrate compliance with all the Emission Rates in this Consent Decree. Performance test reports shall be submitted to both EPA and NJDEP at the addresses specified in Paragraph 197.
156. Beginning at the end of the first calendar quarter following entry of this Decree and continuing until December 31, 2003, and annually on January 31, 2004, and every year thereafter for the duration of this Decree, and in addition to any other express reporting requirement in this Consent Decree, PSEG Fossil shall submit to EPA and NJDEP a progress report.
157. Such progress report shall provide: (a) all information necessary to determine compliance with this Consent Decree, including compliance with Paragraphs 47, 53, 55, 57, 59-61, 63, 68, 71-72, 78, 80, 85, 87-90, 100, 102-104, 107, 109, 129, 136-139, 141-142, 145, 147, 150, and 160; (b) all information necessary to determine whether PSEG Fossil has complied with the restrictions in Paragraphs 123 and 124 on the future federal and state covenants; (c) information relating to emission allowances and credits that PSEG Fossil claims to have generated in accordance with Paragraphs 106 and 113 by compliance

beyond the requirements of this Consent Decree; and (d) information indicating that the installation and commencement of operation date for a pollution control device may be delayed, including the nature and cause of the potential delay, and any steps taken by PSEG Fossil to mitigate such delay.

158. Each PSEG Fossil progress report shall be signed by PSEG Fossil's Vice President, Fossil Operations, or, in his or her absence, another company Vice President, or higher ranking official, and contain the following certification:

“ I certify under penalty of law that I believe the information provided in this document is true, accurate and complete. I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attached documents and, based on my inquiry of those individuals immediately responsible for obtaining the information, I believe that the submitted information is true, accurate and complete. I am aware that there are significant civil and criminal penalties, including the possibility of fine or imprisonment or both, for submitting false, inaccurate or incomplete information.”

159. PSEG Fossil shall report to EPA and NJDEP any violation of the requirements of this Consent Decree, including Emission Rate exceedances, within 10 days of any such violation. PSEG Fossil shall also summarize any such violations, and any other anticipated violations, in the periodic progress reports submitted pursuant to this Section.

#### **X. CIVIL PENALTY**

160. Within thirty (30) calendar days of entry of this Consent Decree, PSEG Fossil shall pay to the United States a civil penalty in the amount of \$1,400,000. The civil penalty shall be paid by Electronic Funds Transfer (“EFT”) to the United States Department of Justice, in accordance with current EFT procedures, referencing the USAO File Number and DOJ Case Number 90-5-2-1-1866/1 and the civil action case name and case number of this

action. The costs of EFT shall be PSEG Fossil's responsibility. Payment shall be made in accordance with instructions provided by the Financial Litigation Unit of the U.S. Attorney's Office for the District of New Jersey. Any funds received after 4:00 p.m. (EST) shall be credited on the next business day. PSEG Fossil shall provide notice of payment, referencing the USAO File Number, DOJ Case Number 90-5-2-1-1866/1, and the civil action case name and case number, to the Department of Justice and to EPA, as provided in Paragraph 197. Failure to timely pay the civil penalty shall subject PSEG Fossil to interest accruing from the date payment is due until the date payment is made at the rate prescribed by 28 U.S.C. § 1961, and shall render PSEG Fossil liable for all charges, costs, fees, and penalties established by law for the benefit of a creditor or of the United States in securing payment.

161. Payments made pursuant to this Section are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. §162(f), and are not tax deductible expenditures for purposes of federal law.

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

162. Within thirty days after written demand from the United States or New Jersey, and subject to the provisions of Sections XIII (Force Majeure) and XIV (Dispute Resolution), PSEG Fossil shall pay the following stipulated penalties to the Plaintiffs, in accordance with their direction on the amounts to be paid to each of the Plaintiffs, for each failure by PSEG Fossil to comply with the terms of this Consent Decree:
  - a. For failure to pay timely the civil penalty as specified in Section X (Civil Penalty) of this Consent Decree: \$10,000 per day;

- b. For all violations of a 24-Hour Emission Rate: (1) less than 5% in excess of limit--\$2,500 per day, per violation; (2) more than 5% but less than 10% in excess of limit--\$5,000 per day per violation; (3) equal to or greater than 10% in excess of limit--\$10,000 per day, per violation;
- c. For all violations of a 30-Day Rolling Average Emission Rate: (1) Less than 5% in excess of limit -- \$2,500 per day per violation; (2) more than 5% but less than 10% in excess of limit -- \$5,000 per day per violation; (3) equal to or greater than 10% in excess of limit -- \$10,000 per day per violation;
  - i. Violation of an Emission Rate that is based on a 30-Day Rolling Average Emission Rate is a violation on every day of the 30-day period on which the average is based;
  - ii. Where a violation of a 30-Day Rolling Average Emission Rate (for the same pollutant and from the same source) recurs within periods less than 30 days, PSEG Fossil shall not pay a daily stipulated penalty for any day of the recurrence for which a stipulated penalty has already been paid;
- d. For failure to operate an FGD, SCR, ESP, or polishing baghouse when the Unit associated with the FGD, SCR, ESP, or polishing baghouse is in operation, except as permitted by Paragraphs 47, 63, 80 and 87: \$10,000 per day, per violation, for the first 30 days, and \$27,500 per day, per violation, thereafter;
- e. For failure to construct and operate the Bergen Repowering project in a manner consistent with the permit issued by NJDEP to PSEG Fossil, unless prior approval is given by EPA and NJDEP: \$15,000 per day, per violation;



- f. For failure to burn coal or oil except as permitted by PSEG Fossil's permit from NJDEP and by this Consent Decree: \$10,000 per day, per violation;
- g. Failure to submit a protocol, report, study, or analysis to EPA and NJDEP or to comply with EPA and NJDEP revisions to the submitted protocol, report, study, or analysis: \$1,000 per day, per violation;
- h. For failure to apply for a permit, as required by Paragraph 116: \$1,000 per day, per violation;
- i. Violation of any Consent Decree prohibition on the use of SO<sub>2</sub> or NO<sub>x</sub> allowances as set forth in Section V (Allowances, Credits) of this Consent Decree: three times the market value of the improperly used allowance, as measured at the time of the improper use, per violation;
- j. For failure to permanently retire allowances in accordance with Paragraphs 100 and 102: \$27,500 per day, per violation, plus \$1,000 per SO<sub>2</sub> Allowance;
- k. For failure to demonstrate the third party surrender of allowances to EPA within one year after PSEG Fossil's transfer of such allowances to the third party in accordance with Paragraphs 109: \$2,500 per day, per violation;
- l. For failure to install or operate CEMS, as required by this Consent Decree: \$1,000 per day, per violation;
- m. For failure to conduct a stack test, as required by Paragraph 77: \$1,000 per day, per violation;
- n. For failure to undertake and complete an action required as Part of the Mitigation Projects described in Section VIII (Environmental Mitigation Projects): \$1,000 per

day per violation for the first 30 days, and \$5,000 per day per violation thereafter;  
and

- o. For any other violation of this Consent Decree, \$1,000 per day, per violation.
- 163. Should PSEG Fossil dispute its obligation to pay part or all of a demanded stipulated penalty, it may avoid the imposition of a separate stipulated penalty for the failure to pay the disputed penalty by depositing the disputed amount in a commercial escrow account pending resolution of the matter and by invoking the Dispute Resolution provisions of this Consent Decree within the time provided in Section XIV (Dispute Resolution) of the Consent Decree for payment of the disputed penalty. If the dispute is thereafter resolved in PSEG Fossil's favor, the escrowed amount plus accrued interest shall be returned to PSEG Fossil. If the dispute is resolved in favor of the plaintiffs, then the Plaintiffs shall be entitled to the escrowed amount determined to be due by the Court, plus accrued interest. The balance in the escrow account, if any, shall be returned to PSEG Fossil.
- 164. The Plaintiffs reserve the right to pursue any other remedies to which they are entitled, including, but not limited to, a new civil enforcement action and additional injunctive relief for PSEG Fossil's violations of this Consent Decree.
- 165. If the Plaintiffs elect to seek civil or contempt penalties after having collected stipulated penalties for the same violation, any further penalty awarded shall be reduced by the amount of the stipulated penalty timely paid or escrowed by PSEG Fossil. PSEG Fossil shall not be required to remit any stipulated penalty that is disputed in compliance with Section XIV (Dispute Resolution) of this Consent Decree until the dispute is resolved in favor of the Plaintiffs. However, nothing in this Paragraph shall be construed to cease the accrual of the stipulated penalties until the dispute is resolved.

## **XII. RIGHT OF ENTRY**

166. Any authorized representative of EPA or NJDEP, upon presentation of credentials, shall have a right of entry upon the premises of Bergen, Hudson, or Mercer at any reasonable time for the purpose of monitoring compliance with the provisions of this Consent Decree, including inspecting plant equipment and inspecting and copying any records maintained by PSEG Fossil required by this Consent Decree. PSEG Fossil shall retain such records for a period of fifteen (15) years from the date of entry of this Consent Decree. Nothing in this Consent Decree shall limit the authority of EPA to conduct tests and inspections at PSEG Fossil's facilities under Section 114 of the Act, 42 U.S.C. § 7414.

## **XIII. FORCE MAJEURE**

167. For purposes of this Consent Decree, a "Force Majeure Event" shall mean (a) an event which causes a delay in performing any requirement of this Consent Decree, or (b) a Unit malfunction which causes PSEG Fossil to exceed a 30-Day or 24-Hour Emission Rate required under this Consent Decree, which has been or will be caused by circumstances beyond the control of PSEG Fossil, including any entity controlled by PSEG Fossil, and which PSEG Fossil could not have prevented by the exercise of due diligence.
168. If a Force Majeure Event occurs, PSEG Fossil shall notify the Plaintiffs in writing as soon as practicable, but in no event later than seven (7) business days following the date PSEG Fossil first knew, or within ten (10) business days following the date PSEG Fossil should have known by the exercise of due diligence, that the Force Majeure Event caused or may cause such delay or exceedance. In this notice PSEG Fossil shall reference this Paragraph of this Consent Decree and describe the anticipated length of time that the delay or exceedance may persist, the cause or causes of the delay or exceedance, the measures taken

or to be taken by PSEG Fossil to prevent or minimize the delay or exceedance, and the schedule by which those measures will be implemented. PSEG Fossil shall adopt all reasonable measures to avoid or minimize such delays or exceedances.

169. Failure by PSEG Fossil to comply with the notice requirements of the above Paragraphs in this Section shall render this Section voidable by the Plaintiffs, as to the specific event for which PSEG Fossil has failed to comply with such notice requirement. If voided, the provisions of this Section shall have no effect as to the particular event involved.
170. The Plaintiffs shall notify PSEG Fossil in writing regarding PSEG Fossil's claim of Force Majeure within (15) fifteen business days of receipt of the Force Majeure notice provided under Paragraph 168.
171. If the Plaintiffs agree that a delay has been or will be caused by a Force Majeure Event, the parties shall stipulate to an extension of the required deadline(s) for all requirement(s) affected by the delay for a period of time equivalent to the delay actually caused by such circumstances. Such stipulation shall be filed as a modification to this Consent Decree in order to be effective.
172. PSEG Fossil shall not be liable for stipulated penalties for the period of any delay, or for any exceedance of a 30-Day or 24-Hour Emission Rate, that the Plaintiffs agree to characterize as a Force Majeure Event.
173. If the Plaintiffs do not accept PSEG Fossil's claim of a Force Majeure Event, to avoid the imposition of stipulated penalties PSEG Fossil must submit the matter to this Court for resolution by filing a petition for determination. Once PSEG Fossil has submitted the matter, the Plaintiffs shall have fifteen business days to file their response. If PSEG Fossil submits the matter to this Court for resolution, and the Court determines that the delay or

excedance has been or will be caused by a Force Majeure Event, as defined in this Consent Decree, PSEG Fossil shall be excused as to that event(s) and excedance (including stipulated penalties otherwise applicable), but only for the period of time equivalent to the delay caused by the Force Majeure Event, and only for the excedances caused by the Force Majeure Event.

174. PSEG Fossil shall bear the burden of proving that any delay in performing any requirement of this Consent Decree or any excedance of a 30-Day or 24-Hour Emission Rate was caused by or will be caused by a Force Majeure Event. PSEG Fossil shall also bear the burden of proving the duration and extent of any delay or excedance attributable to a Force Majeure Event. An extension of one compliance date based on a particular event may, but will not necessarily, result in an extension of a subsequent compliance date.
175. Unanticipated or increased costs or expenses associated with the performance of PSEG Fossil's obligations under this Consent Decree shall not constitute a Force Majeure Event. However, failure of a permitting authority to issue a necessary permit in a timely fashion may constitute a Force Majeure Event where the failure of the permitting authority to act is beyond the control of PSEG Fossil and PSEG Fossil has taken all steps available to it to obtain the necessary permit, including, but not limited to, submitting a complete permit application, responding to requests for additional information by the permitting authority in a timely fashion, accepting lawful permit terms and conditions, and prosecuting appeals of any allegedly unlawful terms and conditions imposed by the permitting authority in an expeditious fashion.
176. The Parties agree that, depending upon the circumstances related to an event and PSEG Fossil's response to such circumstances, the kinds of events listed below could also qualify

as Force Majeure Events within the meaning of this Section: construction, labor, or equipment delay or failures; natural gas and gas transportation availability delay or failures; acts of God; acts of War; acts of terrorism; and orders by governmental officials acting under and authorized by applicable law, that direct PSEG Fossil to supply electricity in response to a legally declared, system-wide (or state-wide) emergency.

177. Notwithstanding any other provision of this Consent Decree, this Court shall not draw any inferences nor establish any presumptions adverse to any Party as a result of PSEG Fossil delivering a notice pursuant to this Section or the Parties' inability to reach agreement on a dispute under this Section.
178. As part of the resolution of any matter submitted to this Court under this Section, the Parties by agreement, or this Court by order, may in appropriate circumstances extend or modify the schedule for completion of work under this Consent Decree to account for the delay in the work that occurred as a result of any delay agreed to by the Plaintiffs or approved by this Court. PSEG Fossil shall be liable for stipulated penalties for its failure thereafter to complete the work in accordance with the extended or modified schedule.

#### **XIV. DISPUTE RESOLUTION**

179. The dispute resolution procedure provided by this Section shall be available to resolve all disputes arising under this Consent Decree, except as provided in Section VIII (Environmental Mitigation Projects) regarding Force Majeure, or in this Section, provided that the Party making such application has made a good faith attempt to resolve the matter with the other Party.
180. The dispute resolution procedure required herein shall be invoked by one Party to this Consent Decree giving written notice to the other parties to this Consent Decree advising

of a dispute pursuant to this Section. The notice shall describe the nature of the dispute and shall state the noticing Party's position with regard to such dispute. The Parties receiving such a notice shall acknowledge receipt of the notice, and the Parties shall expeditiously schedule a meeting, to occur not later than fourteen (14) business days following receipt of such notice, to discuss the dispute informally.

181. Disputes submitted to dispute resolution under this Section shall, in the first instance, be the subject of informal negotiations between the Parties to this Consent Decree. Such period of informal negotiations shall not extend beyond thirty (30) calendar days from the date of the first meeting between representatives of the Plaintiffs and PSEG Fossil unless the Parties' representatives agree to shorten or extend this period.
182. If the Parties are unable to reach agreement during the informal negotiation period, the Plaintiffs shall provide PSEG Fossil with a written summary of their position regarding the dispute. The written position provided by the Plaintiffs shall be considered binding unless, within forty-five (45) calendar days thereafter, PSEG Fossil files with this Court a petition, which describes the nature of the dispute and seeks resolution. The Plaintiffs may respond to the petition within forty-five (45) calendar days of filing.
183. Where the nature of the dispute is such that a more timely resolution of the issue is required, the time periods set out in this Section may be shortened upon motion of one of the Parties to the dispute.
184. This Court shall not draw any inferences nor establish any presumptions adverse to either Party as a result of invocation of this Section or the Parties' inability to reach agreement.
185. As part of the resolution of any dispute under this Section, in appropriate circumstances the Parties may agree, or this Court may order, an extension or modification of the

schedule for the completion of the activities required under this Consent Decree to account for the delay that occurred as a result of dispute resolution. PSEG Fossil shall be liable for stipulated penalties for its failure thereafter to complete the work in accordance with the extended or modified schedule, subject to this Section and Section XI (Stipulated Penalties).

186. The Court shall decide all disputes pursuant to applicable principles of law for resolving such disputes; provided, however, that the Parties reserve their rights to argue for what the applicable standard of law should be for resolving any particular dispute.

#### **XV. GENERAL PROVISIONS**

187. Effect of Settlement. Compliance with the terms of this Consent Decree does not guarantee compliance with all applicable Federal, State, or Local laws or regulations.
188. This Consent Decree does not apply to any claim(s) of criminal liability that could be alleged.
189. In any subsequent administrative or judicial action initiated by the Plaintiffs for injunctive relief or civil penalties relating to the matters covered by this Consent Decree at the facilities subject to this Consent Decree, PSEG Fossil shall not assert any defense or claim based upon principles of waiver, res judicata, collateral estoppel, issue preclusion, or claim splitting, or any other defense based on the contention that the claims raised by the Plaintiffs in the subsequent proceeding were brought, or should have been brought, in the instant case; provided, however, that nothing in this Paragraph is intended to affect the enforceability of the Resolution of Claims provisions of Section VII (Resolution of Future Claims -- Covenant Not to Sue) of this Consent Decree.



190. Effective Date. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.
191. Citations to Law. Except as expressly provided otherwise by this Decree, provisions of law expressly cited by this Decree shall be construed to mean the provision as it exists on the date of entry of this Consent Decree.
192. Meaning of Terms. Every term expressly defined by this Decree shall have the meaning given to that term by this Decree, and every other term used in this Decree that also is a term used under the Act or the regulations implementing the Act shall mean in this Decree what such terms mean under the Act or those regulations.
193. Other Laws. Except as specifically provided by this Consent Decree, nothing in this Consent Decree shall relieve PSEG Fossil of its obligation to comply with all applicable federal, state and local laws and regulations. Subject to Section VII (Resolution of Future Civil Claims -- Covenants Not to Sue), nothing contained in this Consent Decree shall be construed to prevent or limit the Plaintiffs' rights to obtain penalties or injunctive relief under the Clean Air Act or other federal, state or local statutes or regulations.
194. Third Parties. This Consent Decree does not limit, enlarge or affect the rights of any Party to this Consent Decree as against any third parties.
195. Costs. Each Party to this action shall bear its own costs and attorneys' fees.
196. Public Documents. All information and documents submitted by PSEG Fossil to the United States pursuant to this Consent Decree shall be subject to public inspection, unless subject to legal privileges or protection or identified and supported as business confidential by PSEG Fossil in accordance with 40 C.F.R. Part 2 and N.J.A.C. 7:27-1.6 et seq.

197. Notice. Unless otherwise provided herein, notifications to or communications with the United States or PSEG Fossil shall be deemed submitted on the date they are postmarked and sent either by overnight mail or by certified or registered mail, return receipt requested. Except as otherwise provided herein, when written notification to or communication with the United States, EPA, New Jersey, NJDEP, or PSEG Fossil is required by the terms of this Consent Decree, it shall be addressed as follows:

As to the United States of America:

For U.S. DOJ:

Chief, Environmental Enforcement Section  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
DJ # 90-5-2-1-1866/1

For U.S. EPA:

Branch Chief  
Air Compliance Branch  
DECA  
EPA Region 2  
290 Broadway  
New York, NY 10007

Branch Chief  
Air Branch  
Office of Regional Counsel  
EPA Region 2  
290 Broadway  
New York, NY 10007

As to the State of New Jersey:

Administrator  
Air and Environmental Quality Enforcement  
401 East State Street  
4<sup>th</sup> Floor, East Wing  
P.O. Box 422  
Trenton, New Jersey 08625

Deputy Attorney General  
Section Chief, Environmental Permitting and Counseling  
Division of Law - L&PS Dept.  
State of New Jersey  
R.J. Hughes Justice Complex  
P.O. Box 093  
Trenton, New Jersey 08625

As to PSEG Fossil:

Mr. Jeffrey W. Moore  
Vice President, Fossil Operations  
PSEG Fossil, LLC  
80 Park Plaza  
Newark, New Jersey 07102

With a copy to:

Christopher J. McAuliffe, Esq.  
General Environmental Counsel  
PSEG Fossil Services Corporation  
80 Park Plaza, T5C  
Newark, New Jersey 07102

Any Party may change either the notice recipient or the address for providing notices to it by serving all other Parties with a notice setting forth such new notice recipient or address.

198. Modification. Except as otherwise allowed by law or as provided in Section XIII (Force Majeure) and Section XIV (Dispute Resolution) of this Consent Decree, there shall be no modification of this Consent Decree without written approval by the United States, PSEG Fossil, and New Jersey, and approval of such modification by this Court.

199. Continuing Jurisdiction. The Court shall retain jurisdiction of this case after entry of this Consent Decree to enforce compliance with the terms and conditions of this Consent Decree and to take any action necessary or appropriate for its interpretation, construction, execution, modification, or adjudication of disputes. During the term of this Consent Decree, any Party to this Consent Decree may apply to this Court for any relief necessary to construe or effectuate this Consent Decree.
200. Complete Agreement. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties to this Consent Decree with respect to the settlement embodied in this Consent Decree. The Parties to this Consent Decree acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.
201. Signatories. This Consent Decree may be signed in counterparts, and such counterpart signature pages shall be given full force and effect. The undersigned representative of PSEG Fossil certifies he is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind PSEG Fossil.
202. Service. PSEG Fossil hereby 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 Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court, including, but not limited to, service of a summons.
203. Public Notice and Comment; Objection to Entry. The Parties to this Consent Decree agree and acknowledge that final approval by the United States and entry of this Consent Decree is subject to the procedures of 28 C.F.R. § 50.7, which provides for notice of the lodging of this Consent Decree in the Federal Register, an opportunity for public comment, and the right of the United States to withdraw or withhold consent if comments

disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. PSEG Fossil shall not oppose entry of this Consent Decree by this Court or challenge any provision of this Consent Decree unless the United States or New Jersey has notified PSEG Fossil in writing that the United States or New Jersey no longer supports entry of the Consent Decree.

204. Final Judgment. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the United States, the State of New Jersey, and PSEG Fossil.

#### **XVI. TERMINATION**

205. As soon as PSEG Fossil completes any element of construction required by this Consent Decree, or completes any requirement of this Consent Decree that is not ongoing, PSEG Fossil may seek termination of that provision of this Consent Decree containing such requirement. If PSEG Fossil believes it has complied with such requirement, then PSEG Fossil shall so certify to the Plaintiffs.
- a. If the Plaintiffs do not object in writing with specific reasons within sixty (60) days of receipt of PSEG Fossil's certification, then, upon motion by PSEG Fossil, this Court may order the termination of the provision containing the requirement.
  - b. If the Plaintiffs object to PSEG Fossil's certification, however, then the matter shall be submitted to this Court for resolution under Section XIV (Dispute Resolution) of this Consent Decree. In such case, PSEG Fossil shall bear the burden of proving that the provision of the Consent Decree should be terminated.
206. Once PSEG Fossil has completed all construction requirements of this Consent Decree, and has obtained final Title V permits that were applied for in compliance with the terms of this Consent Decree, cover all Units in this Consent Decree, include as enforceable

permit terms all of the Unit performance and other requirements required by Section IV (Emission Reductions and Controls) of this Consent Decree, then PSEG Fossil shall so certify these facts to the Plaintiffs and this Court.

- a. If the Plaintiffs do not object in writing with specific reasons within sixty (60) days of receipt of PSEG Fossil's certification, then, for any violations that occur after the filing of certification, Plaintiffs shall pursue enforcement of the requirements contained in the Title V permit through only the applicable Title V permit, and not this Consent Decree.
- b. In the event that some aspect of the Title V permit does not allow for enforcement of a requirement found in this Consent Decree, however, or if a Consent Decree requirement was intended to be part of the Title V permit and did not become or remain part of such permit, then the Plaintiffs may enforce such requirement under this Consent Decree.
- c. If the Plaintiffs do object in writing to PSEG Fossil's certification, then the matter shall be submitted to this Court for resolution under Section XIV (Dispute Resolution) of this Consent Decree. In such case, PSEG Fossil shall bear the burden of proving that it has complied with the requirements referenced in this Paragraph.

SO ORDERED, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2002.

---

UNITED STATES DISTRICT COURT JUDGE

**FOR THE UNITED STATES OF AMERICA:**

---

THOMAS J. SANSONETTI  
Assistant Attorney General  
Environmental and Natural Resources Division  
United States Department of Justice

---

MATTHEW W. MORRISON  
Trial Attorney  
Environmental Enforcement Section  
Environmental and Natural Resources Division  
United States Department of Justice

CHRISTOPHER J. CHRISTIE  
United States Attorney  
District of New Jersey

---

MICHAEL A. CHAGARES  
Chief, Civil Division  
Assistant United States Attorney  
District of New Jersey  
United States Department of Justice



---

SYLVIA K. LOWRANCE  
Acting Assistant Administrator  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

---

BRUCE C. BUCKHEIT  
Director, Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

---

RICHARD ALONSO  
Attorney Advisor  
Air Enforcement Division  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency

---

WALTER E. MUGDAN  
Regional Counsel  
Region 2  
United States Environmental Protection Agency

**FOR THE STATE OF NEW JERSEY:**

---

ROBERT C. SHINN, JR.  
Commissioner  
New Jersey Department of Environmental  
Protection

---

KEVIN P. AUERBACHER  
Deputy Attorney General  
Division of Law  
Department of Law and Public Safety

**FOR PSEG FOSSIL:**

---

THOMAS R. SMITH  
President  
PSEG Fossil LLC