

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS**

UNITED STATES OF AMERICA,

Plaintiff,

v.

NAVISTAR, INC.

Defendant.

Civil No. 1: 15-cv-6143

Judge: Hon. Mary M. Rowland

CONSENT DECREE

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I. INTRODUCTION

WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), filed an Amended Complaint in this action on July 16, 2015, alleging that Navistar International Corporation and Navistar, Inc., violated Section 203(a)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7522(a)(1).

WHEREAS, the Amended Complaint alleged that during the calendar year 2010, Navistar International Corporation and Navistar, Inc. sold, offered for sale, introduced or delivered for introduction into commerce 7,749 on-highway heavy-duty diesel engines (“HDDEs,” collectively “Subject Engines”) without certificates of conformity as required under Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1).

WHEREAS, EPA sought relief in this case based on the contention that the Subject Engines, and also engines sold utilizing averaging, banking & trading (“AB&T”) credits generated by the Subject Engines, resulted in excess emissions of oxides of nitrogen (“NOx”).

WHEREAS, Navistar International Corporation and Navistar, Inc., denied the violations in the Amended Complaint and have not admitted any liability arising out of the transactions or occurrences alleged in the Amended Complaint.

WHEREAS, on March 1, 2017, the Court issued an order granting the United States summary judgment on the issue of liability as to Navistar, Inc. (“Defendant”), but denied summary judgment as to Navistar International Corporation. On April 3, 2018, the parties stipulated to the dismissal with prejudice of Navistar International Corporation from the above-captioned case.

WHEREAS, between April 2018 and continuing through May 20, 2021, the litigation between the United States and Navistar, Inc. (the “Parties”) over remedy-related issues

continued. The Parties exchanged documentary and written discovery, including numerous expert reports, completed fact and expert depositions, and attended a mediation.

WHEREAS, the Parties dispute the appropriate relief, including the existence and/or amount of excess emissions of NOx resulting from the alleged violations. The Parties have agreed, however, to resolve their dispute through payment of a civil penalty and the use of mitigation to offset past and future excess emissions. Consequently, the Parties have agreed that Navistar will complete mitigation projects over the next four years to reduce 10,000 tons of NOx from future emissions as mitigation.

WHEREAS, an objective of this Consent Decree is to mitigate the impact of past and future excess emissions resulting from the violations while taking into consideration Environmental Justice concerns through the selection of mitigation projects completed under the Consent Decree and also distributing mitigation in proportions that reflect the geographic distribution of vehicles powered by the Subject Engines.

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

NOW, THEREFORE, with the consent of the Parties, IT IS HEREBY ADJUDGED, ORDERED, AND DECREED as follows:

II. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action, pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 204 and 205 of the CAA, 42 U.S.C. §§ 7523 and 7524, and over the Parties. Venue lies in this District pursuant to Section 205 of the CAA, 42 U.S.C. § 7524, and 28 U.S.C. §§ 1391 and 1395, because the violations alleged in the Amended

Complaint are alleged to have occurred in, and Defendant conducts business in, this judicial district. For purposes of this Consent Decree, or any action to enforce this Decree, Defendant consents to the Court's jurisdiction over this Decree and any such action and over Defendant and consents to venue in this judicial district.

III. APPLICABILITY

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

3. No transfer of ownership of Defendant or its operations shall relieve Defendant of its obligation to ensure that the terms of the Consent Decree are implemented. In the event of a transfer of ownership after the Effective Date, Defendant shall provide, at least 30 Days prior to such transfer, a copy of this Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer in accordance with Section XVI (Notices). Within 10 Days of receipt of a written request by the United States, Defendant shall provide a copy of the final written agreement in accordance with Section XVI (Notices). Any transfer of ownership of Defendant or its operations without complying with this Paragraph constitutes a violation of this Decree.

4. Defendant shall provide a copy of this Consent Decree to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Decree.

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

actions necessary to comply with the provisions of this Decree, except to the extent provided in Section XI (Force Majeure) below.

IV. DEFINITIONS

6. Terms used in this Consent Decree that are defined in the CAA or in regulations promulgated pursuant to Title II of the CAA have the meanings assigned to them in the CAA or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Decree, the following definitions apply:

a. “Affiliate” shall mean any entity that as of the Effective Date, directly or indirectly or through one or more intermediaries, owns or controls, is owned or controlled by, or is under common ownership or control with Defendant;

b. “Amended Complaint” shall mean the Amended Complaint filed by the United States in this action, Dkt. No. 6;

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

d. “Date of Lodging” shall mean the day that this Consent Decree is lodged with the Court for public comment as provided in Section XXI (Public Participation);

e. “Day” means a calendar day unless expressly stated to be a business day; In computing any period of time for a deadline under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period runs until the close of business of the next business day;

f. “Defendant” shall mean Navistar, Inc.;

g. “DOJ” shall mean the United States Department of Justice and any of its successor departments or agencies;

h. “EPA” shall mean the United States Environmental Protection Agency and any of its successor departments or agencies;

- i. “Effective Date” shall mean the definition provided in Section XVII (Effective Date);
- j. “Interest” shall mean interest calculated at a rate of 3.25%, compounded annually;
- k. “Mitigation Program” and “Additional Mitigation Program” shall refer to those programs described in Section VII (Mitigation).
- l. “Mitigation Project” and “Project” shall mean a mitigation project as provided in Section VII (Mitigation).
- m. “NOx” shall mean the sum of nitric oxide, nitrogen dioxide, and other oxides of nitrogen originating from combustion-related emissions;
- n. “Paragraph” shall mean a portion of this Decree identified by an Arabic numeral;
- o. “Parties” shall mean the United States and Defendant;
- p. “Permanently Destroy” (or “Permanent Destruction”) means to destroy an engine’s crankshaft, cylinder head and liner, and engine block using one of the following methods. Nothing herein prohibits Defendant from recycling or reusing engine parts and components that are not the crankshaft, cylinder head and liner, and engine block, and/or from recycling or reusing the non-engine portion of the vehicle and its parts and components.
 - i. (a) Remove (and dispose of appropriately) the engine oil from the crankcase, replace the oil with a 40 percent solution of sodium silicate (SiO₂/Na₂O with a weight ratio of 3.0 or greater); (b) Run the engine at a low speed (approximately 2,000 rpm) until the engine stops; (c)

After allowing the engine to cool for an hour, try to start the engine; if the vehicle or engine contains a battery and that battery is charged and the engine will not operate at idle, the procedure is complete; (d) If the engine starts, run the engine at a low speed (approximately 2,000 rpm) until the engine stops and then try to start the engine again after allowing the engine to cool for an hour. Repeat step (d) in this process until the engine will not operate; (e) Remove and dispose of any remaining fuel in accordance with applicable law.

ii. Remove (and dispose of appropriately) all oil and fuel from the device.

Using a drill bit of no less than 3/8 inch or a cutting torch: (a) drill or cut a hole through the lower crankcase of the engine so that it no longer retains oil; (b) drill or cut a hole through each cylinder head into the combustion chamber; and (c) drill or cut a hole through the cylinder or cylinder block through the cylinder liner.

iii. Compact or crush the crankshaft, cylinder head and liner, and engine block to render them useless.

q. “Qualifying Engine” shall be given the meaning set forth in Paragraph 4 of Appendix A, including the definition of “commercially viable” set forth in Paragraph 5 of Appendix A.

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

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

V. CIVIL PENALTY

7. Within 30 Days after the Effective Date, Defendant shall pay the sum of \$52,000,000 as a civil penalty, together with Interest accruing from the date on which the Consent Decree is lodged with the Court.

8. Defendant shall pay the civil penalty due by FedWire Electronic Funds Transfer (“EFT”) to the DOJ account, in accordance with instructions provided to Defendant by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the Northern District of Illinois after the Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Petrina Collins
2701 Navistar Dr.
Lisle, IL 60532
331-332-4458
Petrina.Collins@Navistar.com

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to DOJ and EPA in accordance with Section XVI (Notices).

9. At the time of payment, Defendant shall send notice that payment has been made: (i) to EPA via email at cinwd_acctsreceivable@epa.gov or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; (ii) to DOJ via email or regular mail in accordance with Section XVI (Notices); and (iii) to EPA in accordance with Section XVI. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. Navistar, Inc.* and shall reference the civil action number, CDCS Number and DOJ case number 90-5-2-1-10922.

10. Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section X (Stipulated Penalties) in calculating its federal income tax.

VI. RETIREMENT OF NO_x EMISSION CREDITS

11. Defendant shall permanently retire and forfeit all NO_x AB&T emission credits as referenced in Defendant's AB&T Year-End Credit Report, dated September 22, 2020.

Specifically, within 30 Days of the Effective Date, Defendant shall adjust its internal NO_x emission credit records to reflect that Defendant has retired and forfeited the above-described NO_x AB&T emission credits for the Heavy-Heavy, Medium-Heavy, and Light-Heavy Engine Service Classes. Nothing in Section VI prohibits Defendant from acquiring or generating NO_x emission credits after May 20, 2021.

12. Within 60 Days of the Effective Date, Defendant shall submit a certified Revised Heavy-Duty Diesel Emission Credit Report reflecting its compliance with the preceding Paragraph to EPA in accordance with Section XVI (Notices) and to the California Air Resources Board.

VII. MITIGATION

13. Mitigation Program. As set forth in this Section, Defendant shall mitigate a total of not less than 10,000 tons of NO_x emissions by implementing a program (the "Mitigation Program") to mitigate NO_x emissions by completing one or more projects (the "Mitigation Projects" or "Project"). Within 120 Days of the Date of Lodging, Defendant shall submit, for EPA review and approval pursuant to Section VIII (Deliverables), a plan for implementation of the Mitigation Program ("Mitigation Program Plan"). Defendant may, but is not required to, begin implementation of the Mitigation Program prior to the Effective Date but not earlier than the Date of Lodging. Defendant bears all risks that, should it implement the Mitigation Program prior to receiving EPA approval of the Mitigation Program Plan, Defendant may not receive

credit for the Permanent Destruction of otherwise Qualifying Engines acquired prior to the date of Mitigation Program Plan approval.

- a. Mitigation Program Plan. The Mitigation Program Plan shall include the following information for each Project:
 - i. A plan for implementing the Project described in Paragraph 13(d) and (e), below;
 - ii. A summary-level budget for the Project;
 - iii. A description of the anticipated NOx emission reduction estimates for the Project;
 - iv. A description of how the Mitigation Program will satisfy the requirements of this Section; and
 - v. A description of the methodology for identifying disproportionately burdened areas as described in Paragraph 13(d)(i), below, in which the Mitigation Project(s) are to be implemented.
- b. Due Date. By no later than 48 months from the Effective Date, Defendant shall complete in whole, Mitigation Projects to offset not less than 10,000 tons of NOx emissions subject to the requirements outlined in subparagraphs (c) through (e), below.
- c. Progress and Completion Reports. Defendant shall provide progress and completion reports for the Mitigation Projects and other information as set forth in Section IX and Appendix A.
- d. Selection and Implementation Criteria. Defendant shall comply with the following criteria when selecting and implementing the Mitigation Program.
 - i. Environmental Justice. Defendant shall use reasonable efforts to select

and implement the Mitigation Projects in a manner that takes into consideration areas burdened by adverse human health and environmental impacts that are identified based on a combination of demographic considerations and environmental conditions, including those relating to air quality and including (but not limited to) areas identified through EPA's Environmental Justice Screening and Mapping Tool ("EJ SCREEN").

- ii. Geographic Distribution. Defendant shall use reasonable efforts to select and implement the Mitigation Projects within each EPA Region in proportion to the number of trucks powered by Subject Engines located in the states within those regions based on the most recent available warranty data maintained by Defendant; and
- iii. No Business Advantage. Mitigation Projects shall be structured consistent with Paragraph 13(e)(i) so as to limit Defendant's ability to (a) achieve conquest sales of new engines or new trucks, (b) engage in self-dealing, and (c) target any class of sellers that could reasonably be anticipated to increase (or avoid losses of) Defendant's new engine and/or new truck market share (e.g., whether or not they are individual or corporate owners, and whether or not they are owners of International-branded trucks, etc.) over any other class or classes of sellers.

e. Mitigation Projects. Defendant has selected and EPA has found satisfactory, subject to EPA's review and approval of the Mitigation Program Plan, the

following Mitigation Projects, of which one or more shall be completed by Defendant to satisfy the requirements of Paragraph 13. If Defendant selects the Mitigation Project identified in Paragraph 13(e)(i), below, the obligations of Paragraphs 13(a)(v) and 13(d)(i) are hereby deemed satisfied with respect to Qualifying Engines from Long-Haul Heavy Heavy Duty Diesel vehicles and Intercity and Transit Buses. Defendant may submit a Mitigation Program Plan that covers one or both Projects. If Defendant submits a Plan covering only one Project, Defendant will follow the procedures in Paragraph 14 should it choose to add the second Project:

i. On-Highway Heavy-Duty Diesel Engine Retirement Project(s):

Defendant may Permanently Destroy any combination of on-highway heavy-duty diesel engines used to power Class 4-8 heavy-duty diesel trucks, transit, intercity, or school buses, or any other on-highway heavy duty diesel vehicles, including, but not limited to, (a) Defendant may retire through Permanent Destruction any Qualifying Engine that Defendant owned on or before the date of Lodging, (b) Defendant may retire through Permanent Destruction any Qualifying Engines acquired through trade for a new engine or new vehicle sale provided that the trade-in has a Navistar engine or is an International-branded vehicle, and (c) Defendant may retire through Permanent Destruction any otherwise Qualifying Engines acquired through auction or other means of acquiring otherwise Qualifying Engines, and further provided that such Project(s) satisfy the criteria described in Paragraph 13 and Appendix A, and/or

- ii. Nonroad Heavy-Duty Diesel Engine Retirement Project(s): Defendant may Permanently Destroy any combination of the following nonroad diesel engines subject to standards promulgated under 42 U.S.C. § 7547, including but not limited to those used in agricultural tractors, inboard/sterndrives, rubber tire loaders, combines, crawler tractor/dozers, other oil field equipment, off-highway trucks, commercial chippers/stump grinders, excavators, scrapers, generator sets, and cranes, provided that such Project(s) satisfy the criteria described in Paragraph 13 and Appendix A.

14. Additional Mitigation Projects. In the event that Defendant wishes to undertake Mitigation Projects other than those described in Paragraph 13(e), Defendant shall notify the United States of its Proposed Mitigation Project(s) in accordance with Section XVI (Notices). If the United States fails to make a determination about Defendant's Proposed Mitigation Project(s) within 30 Days of receipt, Defendant may, at its discretion, consider Defendant's Proposed Mitigation Project(s) to be denied for the purpose of invoking Dispute Resolution pursuant to Section XII (Dispute Resolution) of this Consent Decree.

15. If the United States agrees with Defendant's Proposed Mitigation Project(s), Defendant shall submit to the United States an additional mitigation plan that meets the requirements of Paragraph 13 ("Additional Mitigation Program") for review and approval within 90 Days.

16. Upon approval, conditional approval, or partial approval by the United States, Defendant shall implement the Additional Mitigation Program according to the schedule for implementation contained therein. Such a schedule for implementation shall supersede the

schedule for implementation contained in Paragraphs 13 and shall become enforceable under this Decree.

17. Defendant shall continue to implement the Mitigation Program and submit semi-annual reports under Paragraph 26(a) until evidence is provided that mitigation of not less than 10,000 tons of NO_x has been achieved consistent with the criteria described in Paragraph 13(d).

18. Permits. Where any compliance obligation under this Section requires Defendant to obtain a federal, state, or local permit or approval, Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

Defendant may seek relief under the provisions of Section XI (Force Majeure) for any delay in the performance of any such obligation resulting from a failure to obtain, or a delay in obtaining, any permit or approval required to fulfill such obligation, if Defendant has submitted timely and complete applications and has taken all other actions necessary to obtain all such permits or approvals.

19. Mitigation Project Certifications. With regard to the Mitigation Project(s), Defendant certifies the truth and accuracy of each of the following:

a. That, as of the date of executing this Consent Decree, Defendant is not required to perform or develop any Mitigation Project(s) by any federal, state, or local law or regulation and is not required to perform or develop any Mitigation Project(s) by agreement, grant, or as injunctive relief awarded in any other action in any forum;

b. That the Mitigation Project(s) is or are not Mitigation Project(s) that Defendant was planning or intending to construct, perform, or implement other than in settlement of the claims resolved in this Consent Decree;

c. That Defendant has not received and will not receive credit for the

Mitigation Project(s) in any other enforcement action; and

d. That Defendant shall neither generate nor use any pollutant reductions from the Mitigation Project(s) as netting reductions, pollutant offsets, or to apply for, obtain, trade, or sell any pollutant reduction credits.

VIII. DELIVERABLES

20. After review of the Mitigation Program Plan or Additional Mitigation Program Plan (hereinafter the “Plan”), EPA will in writing: (a) approve the submission; (b) approve the submission upon specified conditions; (c) approve part of the submission and disapprove the remainder; or (d) disapprove the submission.

21. If the submission is approved pursuant to Paragraph 20(a), Defendant shall take all actions required by the Plan in accordance with its schedules and requirements as approved. If the submission is conditionally approved or approved only in part pursuant to Paragraph 20(b) or (c), Defendant shall, upon written direction from EPA, take all actions required by the approved Plan that EPA determines are technically severable from any disapproved portions, subject to Defendant’s right to dispute only the specified conditions or the disapproved portions, under Section XII (Dispute Resolution).

22. If the submission described in the preceding paragraph is disapproved in whole or in part pursuant to Paragraph 20(c) or (d), Defendant shall, within 45 Days or such other time as the Parties agree to in writing, correct all deficiencies and resubmit the Plan, or disapproved portion thereof, for approval, in accordance with the preceding Paragraphs. If the resubmission is approved in whole or in part, Defendant shall proceed in accordance with the preceding Paragraph.

23. If a resubmitted Plan is disapproved in whole or in part, EPA may again require Defendant to correct any deficiencies, in accordance with the preceding Paragraphs, or may

correct any deficiencies subject to Defendant's right to invoke Dispute Resolution and the right of EPA to seek stipulated penalties as provided in Section X.

24. If Defendant elects to invoke Dispute Resolution as set forth in Paragraphs 21 or 23, Defendant shall do so by sending a Notice of Dispute in accordance with Paragraph 52 within 30 Days (or such other time as the Parties agree to in writing) after receipt of the applicable decision.

25. Any stipulated penalties applicable to the original submission of the Mitigation Program Plan, as provided in Paragraph 36(a), continue to accrue during the 45 Day period or other specified period after any disapproval in whole or in part, but shall not be payable unless the resubmission is untimely or is disapproved in whole or in part; provided that, if the original submission was so deficient as to constitute a material breach of Defendant's obligations under this Consent Decree, the stipulated penalties applicable to the original submission shall be due and payable notwithstanding any subsequent resubmission. Any disputes relating to this provision are subject to the requirements of Section XII.

IX. REPORTING REQUIREMENTS

26. Defendant shall submit the following reports to EPA and DOJ at the addresses set forth in Section XVI:

a. By July 31st and January 31st of each year after the Effective Date until termination of this Consent Decree, Defendant shall submit a Mitigation Program Progress Report for the preceding period since the prior report that includes the information required by Appendix A and the following: the status of any Mitigation Projects; completion of milestones (if any); problems encountered or anticipated, together with implemented or proposed solutions; status of permit applications (if any); and a summary of costs incurred since the previous report. A Mitigation Program Completion

Report shall be due 60 Days after mitigating not less than 10,000 tons of NO_x or on the reporting date for the period in which Defendant completes the requirements of Section VI, whichever is later. The Mitigation Program Completion Report shall include information required by Appendix A and also document the following: the date the Program was completed; the results and documentation of implementation of the Program (including the estimated emission reductions achieved); the estimated costs of completing the Program; and a certification by an authorized representative in accordance with Paragraph 30 of this Consent Decree that the Program was completed in full satisfaction of the requirements of the Decree.

b. Each Mitigation Program Progress Report and the Mitigation Program Completion Report shall also include a description of any conduct that violates the requirements of this Consent Decree and an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States of such violation and its likely duration, in writing, within ten business days of the Day Defendant first becomes aware of the violation or anticipated violation, with an explanation of the violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall so state in the report. Defendant shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 Days of the Day Defendant becomes aware of the cause of the violation. Nothing in this Paragraph or the following Paragraph relieves

Defendant of its obligation to provide the notice required by Section XI.

27. Defendant shall make an electronic copy of all submissions required to be submitted by this Consent Decree, including Mitigation Program Progress Reports and the Mitigation Program Completion Report, available on a publicly accessible website, subject to Paragraph 28.

28. Notwithstanding Paragraph 63 of this Consent Decree, Defendant agrees not to assert that information in the Mitigation Program Progress Reports or Mitigation Program Completion Report is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2, except that in any Reports created in connection with this Consent Decree, Defendant shall redact any CBI or Personally Identifiable Information (“PII”) (the disclosure of which is restricted by applicable law, provided that no emissions test methods, data, or results may be claimed as CBI) before making any such Reports available through publicly accessible media.

29. Whenever any violation of this Consent Decree or any other event affecting Defendant’s performance under this Decree may pose an immediate threat to the public health or welfare or the environment, Defendant shall notify EPA by telephone at (202) 564-4133 or by email to the individuals identified in Section XVI as soon as possible, but no later than 24 hours after Defendant first knew of the violation or event. This procedure is in addition to the requirements set forth in the preceding Paragraph.

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

I certify under penalty of perjury that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that

the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

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

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

33. Any information provided pursuant to this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

X. STIPULATED PENALTIES

34. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section XI (Force Majeure). A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

35. Late Payment of Civil Penalty. If Defendant fails to pay the civil penalty required to be paid under Section V (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$15,000 per Day for each Day that the payment is late.

36. Mitigation Project Compliance.

a. If Defendant fails to submit the Mitigation Program within 120 Days of Lodging as required by Section VII, Defendant shall pay a stipulated penalty per the following schedule.

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,250.....	1st through 14th Day
\$1,750.....	15th through 30th Day
\$2,250.....	31st Day and beyond

If, pursuant to Section VIII (Deliverables), EPA disapproves of Defendant’s Mitigation Program or any Additional Mitigation Program, in whole or in part, and Defendant fails to correct the deficiencies and resubmit the disapproved portion(s) within 45 Days, or any such other time that the Parties agree to in writing, Defendant shall pay a stipulated penalty of \$5,000 per Day for each Day the submission is late.

b. If Defendant fails to timely and satisfactorily complete the Mitigation Program or Additional Mitigation Program, Defendant shall pay a stipulated penalty of \$5,000 per Day for each Day after the final deadline for the late Mitigation Program or Additional Mitigation Program.

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

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$750.....	1st through 14th Day
\$1,250.....	15th through 30th Day
\$1,750.....	31st Day and beyond

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

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

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

41. Stipulated penalties shall continue to accrue as provided in Paragraph 38, during any Dispute Resolution, except that stipulated penalties shall not accrue during the period, if any, when Defendant seeks judicial review pursuant to Paragraph 55, beginning on the day the Defendant files with the Court until the date that the Court issues a final decision regarding such dispute, or the day of the final appellate court decision, whichever is later. Accrued penalties need not be paid until the following:

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

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

c. If any Party appeals the District Court's decision and the United States prevails on appeal, Defendant shall pay all accrued penalties determined to be owing, together with Interest, within 15 Days of receiving the final appellate court decision.

42. Defendant shall pay stipulated penalties owing to the United States in the manner set forth in Paragraph 8 and with the confirmation notices required by Paragraph 9, except that

the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

43. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree, Defendant shall be liable for Interest on such penalties, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

44. The payment of penalties and Interest, if any, shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

45. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XIV (Effect of Settlement/Reservation of Rights), the United States expressly reserves the right to seek any other relief it deems appropriate for Defendant's violation of this Decree or applicable law, including but not limited to an action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset measures, and/or contempt. However, the amount of any statutory penalty assessed for a violation of this Consent Decree shall be reduced by an amount equal to the amount of any stipulated penalty assessed and paid pursuant to this Consent Decree.

XI. FORCE MAJEURE

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

any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. “Force Majeure” does not include Defendant’s financial inability to perform any obligation under this Consent Decree.

47. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice by telephone to EPA within 7 Days of when Defendant first knew that the event might cause a delay. Within 7 Days thereafter, Defendant shall provide in writing to the United States an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant’s rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant’s contractors knew or should have known.

48. If the United States agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by the United States for such time as is

necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. The United States will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

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

50. If Defendant elects to invoke the dispute resolution procedures set forth in Section XII, it shall do so no later than 15 Days after receipt of the United States' response. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 46 and 47. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

XII. DISPUTE RESOLUTION

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

52. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 30 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 30 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

53. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by sending DOJ and EPA a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

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

55. Judicial Dispute Resolution. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States a motion requesting judicial resolution of the dispute. The motion must be filed within 30 Days of receipt of the United States' Statement

of Position pursuant to the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

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

57. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 53 pertaining to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any other items requiring approval by EPA under this Consent Decree, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States is arbitrary and capricious or otherwise not in accordance with law.

b. Other Disputes. Except as otherwise provided in this Consent Decree, in any other dispute brought under Paragraph 53, Defendant shall bear the burden of demonstrating by a preponderance of evidence that its actions were in compliance with this Consent Decree.

58. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but

payment shall be stayed pending resolution of the dispute as provided in Paragraph 41. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section X (Stipulated Penalties).

XIII. INFORMATION COLLECTION AND RETENTION

59. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right to request information from Defendant, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. obtain documentary evidence, including photographs and similar data; and
- d. assess Defendant's compliance with this Consent Decree.

60. Upon receipt of a request for information made according to the preceding Paragraph, Defendant shall respond with the requested information within 30 Days. Failure to do so shall constitute a violation of this Consent Decree.

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

States, Defendant shall promptly provide copies of any documents, records, or other information required to be maintained under this Paragraph.

62. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to EPA. Defendant may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document, record, or information; and (f) the privilege asserted by Defendant. However, no documents, records, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on grounds of privilege.

63. Defendant may also assert that information required to be provided under this Section is protected as CBI under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

64. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

XIV. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

65. This Consent Decree resolves all civil claims of the United States for the violations alleged in the Amended Complaint and also resolves demands for injunctive relief under the Clean Air Act arising from NO_x credits claimed for the Subject Engines under EPA's AB&T regulations sought in this action through the Date of Lodging.

66. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights of the United States to obtain penalties or injunctive relief under the CAA, its implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraph 65.

67. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, other appropriate relief relating to Defendant's violations, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved pursuant to Paragraph 65.

68. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in

any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the CAA, 42 U.S.C. § 7401, et seq., or with any other provisions of federal, State, or local laws, regulations, or permits.

69. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties not party to this Consent Decree, against Defendant, except as otherwise provided by law.

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

XV. COSTS

71. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

XVI. NOTICES

72. Unless otherwise specified in this Consent Decree, whenever notifications, submissions, or communications are required by this Decree, they shall be made in writing and sent by mail or email (with a preference for email), addressed as follows:

As to DOJ by email (preferred): eescdcopy.enrd@usdoj.gov
Re: DJ # 90-5-2-1-10922

As to DOJ by mail: EES Case Management Unit
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ # 90-5-2-1-10922

As to EPA by email: belser.evan@epa.gov
kulshinsky.edward@epa.gov
cobb.christina@epa.gov

As to EPA by mail: Director, Air Enforcement Division
1200 Pennsylvania Avenue NW
William J Clinton South Building MC 2242A
Washington, D.C. 20460

As to Defendant by email (preferred): Curt.Kramer@Navistar.com
Arthur.Foerster@lw.com

As to Defendant by mail: Curt Kramer
Senior Vice President and General Counsel
Office of the General Counsel
Navistar, Inc.
2701 Navistar Dr.
Lisle, IL 60532

Arthur Foerster
Latham & Watkins LLP
330 N. Wabash
Suite 2800
Chicago, IL 60611

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

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

XVII. EFFECTIVE DATE

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

XVIII. RETENTION OF JURISDICTION

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

XIX. MODIFICATION

77. The terms of this Consent Decree may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

78. Any disputes concerning modification of this Consent Decree shall be resolved pursuant to Section XII (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 57, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

XX. TERMINATION

79. After Defendant has completed the requirements of Sections VI (Retirement of NOx Emission Credits) and Section VII (Mitigation) of this Consent Decree and has paid the civil penalty and any accrued stipulated penalties as required by this Consent Decree, Defendant may serve upon the United States a Request for Termination, together with all necessary supporting documentation, stating that Defendant has satisfied those requirements specified in Sections VI (Retirement of NOx Emission Credits) and VII (Mitigation).

80. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties

may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

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

XXI. PUBLIC PARTICIPATION

82. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Decree disclose facts or considerations indicating that the Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Decree without further notice and agrees not to withdraw from or oppose entry of this Decree by the Court or to challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

XXII. SIGNATORIES/COUNTERPARTS

83. Each undersigned representative of Defendant and the Acting Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice identified on the United States' signature page below, certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

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

XXIII. INTEGRATION

85. This Consent Decree, Appendix A, and any deliverables that are subsequently approved pursuant to this Decree, constitute the entire agreement among the Parties regarding the subject matter of the Decree and supersede all prior representations, agreements and understandings, whether oral or written, concerning the subject matter of the subject matter of the Decree herein.

XXIV. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

86. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), and 26 C.F.R. § 1.162-21(b)(2), performance of Paragraphs 4 of Section III (Applicability); Paragraphs 13, 14, 15, 17, and 18 of Section VII (Mitigation); Paragraph 21 of Section VIII (Deliverables); Paragraphs 26, 27, and 30 of Section IX (Reporting Requirements); Paragraphs 59, 60, and 61 of Section XIII (Information Collection and Retention); and Appendix A are restitution, remediation, or required to come into compliance with the law.

XXV. FINAL JUDGMENT

87. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant.

Dated and entered this __ day of _____, 20

MARY M. ROWLAND
UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

TODD KIM
Assistant Attorney General
U.S. Department of Justice
Environment and Natural Resources Division

Dated: October 25, 2021

/s/ Michael J. Zoeller
MICHAEL J. ZOELLER
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THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Navistar, Inc.*

FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: Oct. 22, 2021



LAWRENCE E. STARFIELD
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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ROSEMARIE A. KELLEY
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ED KULSCHINSKY
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FOR NAVISTAR, INC.:



Date

CURT A. KRAMER
Senior Vice President and General Counsel
Office of the General Counsel
Navistar, Inc.
2701 Navistar Dr.
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