IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
CLARKSBURG DIVISION

UNITED STATES OF AMERICA and THE STATE OF WEST VIRGINIA by and through the WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiffs, v. XTO ENERGY INC., Defendant.	Civil Action No. 1:14CV218

FILED
APR 24 2015
U.S. DISTRICT COURT-WVND
CLARKSBURG, WV 26301

CONSENT DECREE

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WHEREAS, Plaintiffs, the United States of America, on behalf of the United States Environmental Protection Agency ("EPA"), and the State of West Virginia ("the State"), by and through the West Virginia Department of Environmental Protection ("WVDEP"), have filed a Complaint in this action concurrently with this Consent Decree against Defendant, XTO Energy Inc. ("XTO"), alleging that Defendant violated Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), and the West Virginia Water Pollution Control Act ("WPCA"), W. Va. Code Chapter 22, Article 11, *et seq.*;

WHEREAS, the Complaint alleges that Defendant violated CWA Section 301(a) and Sections 6 and 8 of the West Virginia WPCA, §§ 22-11-6 and 22-11-8 and applicable regulations (including the State's Requirements Governing Water Quality Standards, W. Va. Code R. § 47-2-1 et seq.), by discharging pollutants, including dredged and/or fill material, and/or controlling and directing the discharge of pollutants, including dredged and/or fill material, into waters of the United States and waters of the State, without authorization, at various locations in Harrison, Marion, and Upshur Counties, West Virginia, as identified and described in the Complaint and identified in Paragraph 22 of this Consent Decree (the "Sites");

WHEREAS, Defendant promptly investigated the potential for similar violations at its other assets in West Virginia and, as a result of this investigation, certain Sites addressed in the Complaint were disclosed to Plaintiffs as locations where potential violations of CWA Section 301(a) and the West Virginia WPCA may have occurred;

WHEREAS, Defendant presented to Plaintiffs its analyses of impacts at Defendant's horizontal well pads, impoundments, compressor stations and associated access roads in West Virginia existing as of August 20, 2011, and provided Plaintiffs an opportunity to visit the locations to further assess such analyses;

WHEREAS, Defendant has worked cooperatively with EPA to comply with Administrative Orders for Sites identified in Paragraph 22;

WHEREAS, Plaintiffs, as stated in the Complaint seek: (1) to enjoin the discharge of dredged and/or fill material into any waters of the United States or waters of the State except in compliance with the CWA, Section 301(a), 33 U.S.C. § 1311(a), and Sections 6 and 8 of the West Virginia WPCA, W. Va. Code §§ 22-11-6 and 22-11-8; (2) to require Defendant, at its own expense and at the direction of the EPA, WVDEP, and/or the Corps, to effect complete restoration and/or mitigation of waters of the United States, including wetlands, at the Sites and/or to conduct off-site mitigation for areas that will not be completely restored; and (3) to require Defendant to pay civil penalties, as provided in 33 U.S.C. § 1319(d), and W. Va. Code § 22-11-22;

WHEREAS, Defendant denies any liability for the claims set forth in the Complaint.

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' civil claims under Section 301 of the CWA, 33 U.S.C. § 1311, and the State's claims under the West Virginia WPCA, W. Va. Code Chapter 22, Article 11, as alleged in the Complaint regarding the Sites;

WHEREAS, Plaintiffs and Defendant agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the claims against Defendant in this case; and

WHEREAS, the parties recognize, and the Court by entering this Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, will avoid litigation, and is a reasonable and fair settlement of Plaintiffs' claims against Defendant, and that this Consent

Decree adequately protects the public interest in accordance with the CWA and the West Virginia WPCA;

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

DEFINITIONS

"Fair Market Value" shall mean the difference between the relevant property value (a) before the restriction to be imposed pursuant to Paragraph 25 of this Consent Decree is placed and (b) as if the restriction to be imposed pursuant to Paragraph 25 of this Consent Decree is in place as of a current date. Absent an objection from EPA as set forth below, such difference in value shall be determined by an appraisal that complies with the Uniform Appraisal Standards for Federal Land Acquisition (UASFLA or Yellow Book) and is performed by an appraiser who (a) is a State Certified General Real Property Appraiser, (b) is in good standing with the licensing authority where the credential was issued, (c) has demonstrated competency in compliance with UASFLA in conducting appraisals of properties with and without the restriction of the type to be imposed pursuant to this Consent Decree, (d) can provide documentation of appraisal education courses attended including course completion for the restriction to be imposed pursuant to this Consent Decree, and (e) has been approved by EPA, in consultation with the State, in writing. If EPA, in consultation with the State, does not object to the proposed appraiser within 60 days following notification of the selection of the proposed appraiser, the proposed appraiser shall be approved for the purpose of performing the appraisal. If EPA, in consultation with the State, does not object to the appraised difference in value within 30 days of receipt of the appraisal, then that figure shall be the Fair Market Value for the purposes of this

Consent Decree. If EPA, in consultation with the State, objects to the appraised difference in value as not complying with the UASFLA standards within 30 days of receipt of the appraisal, and the parties cannot otherwise resolve EPA's objection, then the Fair Market Value shall be determined pursuant to the Dispute Resolution provisions in Section X of this Consent Decree.

"Impoundment" means a man-made excavation or diked area for the retention of fluids and excludes permitted stormwater management facilities.

"Limits of Disturbance" means the outermost boundary of the area planned to be disturbed by construction, grading, grubbing, landscaping, excavating, filling, plowing, tilling, or stockpiling of dredged or fill material as indicated by the design plan submitted to the State in an application to obtain a permit to construct. "OG Facilities" (or "OG Facility") shall mean any of Defendant's horizontal wells, horizontal well pads, and associated pipelines, access roads, surface impoundments, and compressor stations in West Virginia involved in the physical exploration, extraction, collection, processing, and/or distribution of oil and/or gas.

"Qualified Wetlands Professional" means an individual trained to identify potential aquatic resources by education and experience. A Qualified Wetlands Professional shall include one who has obtained a four-year degree in a wetland-related field and has completed at least a basic delineation training course (minimum of 24 hours of course time) in wetland science offered by professional trade associations, societies, government agencies or universities.

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, 1355 and 1367, and Section 309(b) of the CWA, 33 U.S.C. § 1319(b). For purposes of this Consent Decree, or any action to enforce or interpret this Consent Decree, Defendant consents to the Court's jurisdiction over

Defendant, this Consent Decree, and any action to enforce or interpret this Consent Decree.

2. Venue is proper in the Northern District of West Virginia pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c) and 1395(a), because the violations alleged in the Complaint occurred in this District, the Sites are located in this District, and Defendant conducts business in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, and 1344, and Sections 8 and 22 of the West Virginia WPCA, W. Va. Code §§ 22-11-8 and 22-11-22.

II. APPLICABILITY

4. The obligations arising from this Consent Decree shall apply to and be binding upon the United States, the State, and Defendant (including Defendant's officers, directors, and agents), and any successors, assigns or other entities or persons otherwise bound by law, whether or not such person or entity has notice of this Consent Decree.

5. In any action to enforce this Consent Decree against Defendant, Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, or contractors acting in concert or participation with Defendant, to take any actions necessary to comply with the provisions hereof, nor shall Defendant alter its corporate structure or enter into any agreement with third parties for the purpose of directly or indirectly circumventing the requirements of this Consent Decree. Defendant shall provide a copy of this Consent Decree to (a) all of its officers, employees, and agents whose duties might reasonably include performing work to comply with the following sections of this Decree: Sections V(Restoration, Mitigation or Preservation), VI (Compliance Requirements), VII (Reporting Requirements) and IX (Retention of Records/Inspections), (b) any contracted

entity retained to perform construction work that affects the obligations contained in this Consent Decree and (c) any environmental consultant or engineer retained to perform work that affects the obligations contained in the Consent Decree. When providing copies of the Consent Decree as required by this Paragraph, Defendant shall include a written statement advising all above-referenced officers, employees, agents, and contracted entities that they must comply with the relevant obligations contained in this Consent Decree.

6. The transfer of ownership, operation, or other interest in areas subject to restoration and/or mitigation at the Sites or, if applicable, in any additional locations used for mitigation or preservation pursuant to Section V of this Consent Decree, shall not alter or relieve Defendant of its obligation to comply with all of the terms of this Consent Decree. At least fifteen (15) business days prior to the transfer of ownership or other interest in any areas subject to restoration and/or mitigation at the Sites, or in any additional locations used for mitigation or preservation pursuant to Section V of this Consent Decree, where such transfer alters Defendant's rights or responsibilities to conduct surface activities at such Sites or additional locations, Defendant shall provide written notice and a true copy of this Consent Decree to each successor in interest to such areas or locations and shall contemporaneously notify the United States Department of Justice, EPA, the Corps, and the State at the addresses specified in Section XII, below (Notices and Submissions), that such notice has been given. As a condition to any such transfer, Defendant shall expressly reserve all rights necessary to comply with the terms of this Consent Decree. Any attempt to transfer ownership or operation of any areas subject to restoration and/or mitigation at the Sites, or any additional locations used for mitigation

or preservation pursuant to Section V of this Consent Decree, without complying with this Paragraph constitutes a violation of this Consent Decree.

III. SCOPE AND EFFECT OF CONSENT DECREE

7. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and penalties for all violations alleged in the Complaint against Defendant under Section 301 of the CWA, 33 U.S.C. § 1311, and under Sections 6 and 8 of the West Virginia WPCA, W. Va. Code §§ 22-11-6 and 22-11-8, and applicable requirements (including the State's Requirements Governing Water Quality Standards, W. Va. Code R. § 47-2-1 *et seq.*), concerning the Sites, subject to Defendant's compliance with this Consent Decree. Accordingly, Plaintiffs hereby release Defendant from, and covenant not to sue Defendant again with respect to, the civil claims for injunctive relief and civil penalties alleged in the Complaint against Defendant under CWA Section 301 and under Sections 8 and 22 of the West Virginia WPCA, W. Va. Code §§ 22-11-8 and 22-11-22.

8. It is the express purpose of the parties in entering into this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251, and Section 2 of the West Virginia WPCA, W.Va. Code§ 22-11-2. All plans, studies, construction, remedial maintenance, monitoring programs, compliance programs, and any other obligations arising under this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendant to achieve and maintain compliance with, and to further the purposes of, the CWA and the West Virginia WPCA.

9. This Consent Decree in no way affects or relieves Defendant of its responsibility to comply with any applicable federal, state, or local law, regulation or permit.

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in the Consent Decree shall limit the ability of the Corps to issue, modify, suspend, revoke, or deny any individual permit or nationwide or regional permit, nor shall this Consent Decree limit EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

11. The parties acknowledge that Nationwide Permit 32, found at 77 Fed. Reg. 10,184 (Feb. 21, 2012), authorizes any fill that was placed as of December 2, 2013, to remain in place in the areas identified in the approved restoration plans pursuant to Appendix A, subject to the conditions provided in Nationwide Permit 32, any State conditions on the use of NWP 32 (including, where applicable, West Virginia's Standard Conditions for CWA Section 401 certification of Nationwide Permit 32), and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of Nationwide Permit 32, any State conditions on the use of NWP 32, including, where applicable, West Virginia's Standard Conditions for CWA Section 401 certification of Nationwide Permit 32, and this Consent Decree.

12. This Consent Decree in no way affects the rights of the United States or the State as against any person not a party to this Consent Decree. This Consent Decree shall not be construed to create rights in, or to grant any cause of action to, any party that is not a party to this Consent Decree.

13. The United States and the State reserve any and all legal and equitable remedies available to them to enforce the provisions of this Consent Decree and applicable law. This Consent Decree shall not be construed to limit the rights of the United States or the State to obtain penalties or injunctive relief under the CWA or implementing regulations, or under other federal or state laws, regulations, or permit conditions, except as expressly specified in Paragraph 7. The United States and the State further reserve all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising at, or posed by, any of Defendant's operations, whether related to the violations addressed in this Consent Decree or otherwise.

14. Nothing in this Consent Decree shall constitute an admission of fact or law by any party.

15. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, civil penalties, or other appropriate relief relating to Defendant, 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 or the State in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved as specified in Paragraph 7 of this Consent Decree.

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

IV. CIVIL PENALTY

17. Defendant shall pay the sum of $2,300,000, 50 percent to the United States and 50

percent to the State, within 30 days of the entry of this Consent Decree.

18. Defendant shall make payment to the United States, as required by Paragraph 17 above, by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice in accordance with EFT instructions provided to Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of West Virginia. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day by the National Central Intake Facility. Advance notice is required to be given to the U.S. Attorney's Office within one (1) to five (5) working days in advance of the actual FedWire EFT. Such notice shall reference the USAO File Number, Civil Action Number, and DOJ File Number, and shall be sent to: U.S. Attorney's Office, Northern District of West Virginia, c/o Financial Litigation Unit by facsimile transmission to (304) 636-1739. All subsequent payments under the Consent Decree shall be paid by EFT, or by check made payable to the U. S. Department of Justice and mailed to the Nationwide Central Intake Facility, P. O. Box 790363, St. Louis, MO 63179-0363, referencing the CDCS Number contained in Block 12 of the initial EFT Payment Instructions.

19. At the time of payment of the civil penalty required by Paragraph 17, Defendant shall send by mail a copy of the EFT authorization form and the EFT transaction record, together with a transmittal letter, which shall state the payment is for the civil penalty owed pursuant to the Consent Decree in *U.S., et al. v. XTO Energy, Inc.*, and shall reference DOJ case number 90-5-1-1-19518, to the Department of Justice and EPA at the addresses set forth in Section XII of this Consent Decree (Notices and Submissions). Defendant shall also send a copy of the EFT form, transaction record, and transmittal

letter by email to acctsreceivable.CINWD@epa.gov, and by mail to:

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

20. Defendant shall make payment to the State, as required by Paragraph 17, above, by certified or cashier's check to WVDEP to be equally deposited in the WVDEP's Water Quality Management Fund and the Oil and Gas Operating Account. The payment shall be mailed to:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th Street, SE
Charleston, WV 25304

21. Defendant shall not deduct any penalties paid under this Consent Decree pursuant to this Section or Section VIII ("Stipulated Penalties") in calculating its federal, state or local income tax.

V. RESTORATION, MITIGATION AND PRESERVATION

22. "The Sites" for the purposes of this Consent Decree are:

a. Coastal Site

b. Fancher Site

c. Boggess Site

d. Windoes Site

e. Fenn Site

f. Crim Site

g. Gould Site

h. McIntire Site

23. Defendant shall perform restoration and mitigation projects under the terms and conditions stated in Appendix A, "Work Plans and Specifications for Restoration and Mitigation Projects," appended hereto and incorporated herein by reference.

24. Upon completion of the restoration and mitigation projects required by an approved Restoration Plan, Defendant shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain, or otherwise disturb in any manner whatsoever any area of restoration/mitigation as identified in the approved Restoration Plan except as identified in the approved Restoration Plan or approved by EPA (in consultation with the Corps) and the State in writing.

25. To ensure that Defendant takes all reasonable steps to prevent disturbance at all Sites:

a. For all Sites that Defendant holds in fee simple, Defendant shall, within sixty (60) days of approval or adoption of a Restoration Plan (or a Mitigation Plan, where applicable) pursuant to Appendix A or within one-hundred eighty (180) days after entry of this Consent Decree (whichever is later), record (or deliver to the grantee for recording) a conservation easement ("Conservation Easement(s)") for the areas of the Sites that will be restored and/or used for mitigation pursuant to Appendix A with the Recorder of Deeds Office for the County in which the Conservation Easement is located. Each Conservation Easement shall comply with West Virginia's Conservation Easement Act, W. Va. Code Chapter 20, Article 12, identify EPA, the Corps, and WVDEP as third-party beneficiaries, and be substantially similar to the sample attached in Appendix B. The Conservation Easements must be granted to WVDEP, the West Virginia Department of Natural Resources, or a "holder" satisfying the definition set forth at W. Va. Code Section 20-12-3(b) selected by XTO and approved by EPA (in consultation with the

Corps) and by WVDEP (in consultation with the West Virginia Department of Natural Resources). Such approval shall not be unreasonably withheld. The timeframes in this Subparagraph may be extended by agreement of the Parties in writing. Upon recording of each Conservation Easement (or upon delivery to the grantee for recording), Defendant shall give notice to the United States, EPA and the State of such recording at the addresses in Section XII ("Notices and Submissions"); or

b. For each Site that Defendant does not hold in fee simple, Defendant shall, within sixty (60) days of approval or adoption of a Restoration Plan (or a Mitigation Plan, where applicable) pursuant to Appendix A or within one-hundred eighty (180) days after entry of this Consent Decree (whichever is later), make a good faith attempt to secure a conservation easement for the areas of such Site that will be restored and/or used for mitigation pursuant to Appendix A in the same form and manner as required by Paragraph 25(a) of this Consent Decree. In the event that a Conservation Easement is not secured for any such area after Defendant has made and documented a good faith attempt to secure one, Defendant shall make a good faith attempt to secure deed restrictions ("Deed Restrictions") for such area. The Deed Restrictions for each such area shall be recorded with the Recorder of Deeds Office in the County in which the Site is located. The Deed Restrictions shall be substantially similar to the sample attached as Appendix C, and shall provide that each deed, title or other instrument conveying an interest in the subject area shall contain a notice stating that the property is subject to this Consent Decree and shall reference the recorded location of the Consent Decree and any restrictions applicable to the property under this Consent Decree. The timeframes in this Subparagraph may be extended by agreement of the Parties in writing. Upon recording

the Deed Restrictions for each such area, Defendant shall give notice to the United States, EPA and the State at the addresses in Section XII ("Notices and Submissions").

c. For the purposes of this Paragraph 25, Defendant makes and documents a good faith attempt to secure a Conservation Easement or Deed Restrictions by presenting the owner of the fee simple with a certified letter setting forth an offer to purchase or otherwise obtain the Conservation Easement or Deed Restrictions for a price reflecting at least the Fair Market Value for the Conservation Easement or Deed Restrictions. Nothing in this Paragraph shall foreclose Defendant from negotiating with the property owner or offering a price that is less than the Fair Market Value, provided that Defendant ultimately offers a price that reflects Fair Market Value. In the event that Defendant is unable to secure a Conservation Easement or Deed Restrictions, Defendant shall provide copies of this correspondence to EPA, the Department of Justice, the Corps, and the State at the addresses set forth in Section XII below.

In the event that Defendant is unable to secure a Conservation Easement or Deed Restrictions after making a good faith attempt to do so as required by Paragraph 25(b), then Defendant shall provide additional compensatory mitigation (as calculated by the then-applicable West Virginia Stream and Wetland Valuation Metric ("WVSWVM")) to off-set the loss of permanent protection for the subject parcel or parcels. Such compensatory mitigation shall be consistent with applicable EPA and Corps regulations and guidance.

26. If, during the duration of the Consent Decree, the Conservation Easement or Deed Restriction described in Paragraph 25 is found to be defective or unlawful, the United States and/or the State may: (1) enforce this provision of the Consent Decree against

Defendant, or its successors or assigns, to obtain the granting of a Conservation Easement or Deed Restriction for the subject parcel that complies with applicable law; and/or (2) require additional compensatory mitigation to off-set the loss of permanent protection of the specific site for which the Conservation Easement or Deed Restriction was found to be defective or unlawful. Such compensatory mitigation shall be consistent with applicable EPA and Corps regulations and guidance.

VI. COMPLIANCE ASSURANCE PROGRAM

27. Compliance. As required by existing law, Defendant shall comply with Section 404 of the CWA and all applicable CWA regulations, shall not violate the prohibition in Section 301(a) of the CWA by discharging dredged or fill material into waters of the United States without a permit, shall comply with the West Virginia WPCA as applicable, and shall obtain all necessary permits prior to undertaking any action that may constitute the discharge of dredged or fill material to waters of the United States or waters of the State.

28. Training and Oversight. Within twenty-one (21) days after entry of this Consent Decree, Defendant shall develop a training program to ensure compliance with the CWA and the WPCA with respect to the discharge of dredged and/or fill material and to ensure implementation of the Compliance Protocol in Paragraph 31. The training program shall be provided to employees of Defendant whose responsibilities include the design or construction of Defendant's OG Facilities for a period of five years after the entry of this Consent Decree. Where contractors are engaged in land disturbing activities at any of Defendant's OG Facilities, Defendant shall: (a) ensure that the Limits of Disturbance are clearly marked in accordance with accepted industry practices; (b) identify a construction supervisor who is an employee of Defendant, has received the training described in this

Paragraph 28, and will be responsible for oversight of the contractor's land disturbing activities at the OG Facility; (c) advise the contractor(s) that no land disturbance may occur outside of the Limits of Disturbance without the prior approval of Defendant; and (d) advise the contractor(s) that any land disturbance outside of the Limits of Disturbance must be reported immediately to Defendant. In addition, for a period of five years after entry of this Consent Decree, Defendant shall require contracting entities retained to perform construction work at any OG Facility, and any environmental consultant or engineer retained to perform work that affects the obligations contained in the Consent Decree, to be trained to ensure that they are aware of the measures necessary to ensure their activities at the OG Facilities comply with Section 301 and 404 of the CWA and the West Virginia WPCA and to ensure implementation of the Compliance Protocol set forth in Paragraph 31 below.

29. List of Facilities. For a period of five (5) years after entry of this Consent Decree, Defendant shall establish and provide to EPA, the Corps, and the State, upon their written request as specified below, at the addresses set forth in Section XII, a list of its OG Facilities, but shall not include pipelines. The list of OG Facilities required by this Paragraph shall identify the location (latitude/longitude, nearest town, county, state) of each OG Facility and the type of operation (well pad, access road, compressor station). Within thirty (30) days of a written request by EPA, the Corps, or the State, a current list shall be provided to authorized representatives of EPA, the State, and the Corps and shall include any such OG facilities existing or under construction as of the date of the request. If Defendant asserts that all or portions of such list include Confidential Business Information ("CBI"), EPA, the Corps, and the State will follow their existing procedures

for handling CBI. *See, e.g.*, 40 C.F.R. §§ 2.201-2.215 & 2.302; 32 C.F.R. §§ 286.12(d), 518.13(d); W. Va. Code § 29B-1-4, and WVDEP Communication Policy #10 (Information Requests).

30. Designation of Compliance Coordinators.

a. Within 21 days after entry of this Consent Decree, Defendant shall designate one Primary Compliance Coordinator ("PCC") and one Secondary Compliance Coordinator ("SCC") with responsibility for addressing concerns and questions raised by Plaintiffs with respect to matters involving Defendant's compliance with this Consent Decree and activities that involve discharges of dredged and/or fill material into waters of the United States for each of Defendant's OG Facilities for the duration of the Consent Decree. The Regulatory Manager shall be the PCC and the Drilling Manager shall be the SCC.

b. Plaintiffs shall direct concerns and/or questions with respect to Defendant's compliance with this Consent Decree to the PCC/SCC.

c. The PCC/SCC shall be responsible for acknowledging in writing the receipt of any concerns and/or questions received by Defendant from the Plaintiffs in writing within 72 hours of receipt. Additional time may be required to address a concern or question. In all instances, the PCC/SCC will make a good faith effort to resolve the concern or question as quickly as possible and will timely report to Plaintiffs the ultimate resolution of the concern or question. In addition, the PCC/SCC shall provide status reports, orally or in writing, to Plaintiffs regarding such a concern or question promptly after such status reports are reasonably requested by Plaintiffs in writing. For the purposes of this Paragraph 30(c), "in writing" shall include electronic mail. The

communications required by this Paragraph 30(c) shall be exempt from the requirements of Section XII of this Consent Decree.

d. Defendant shall notify EPA, the Corps and the State within 30 days after entry of this Consent Decree of its choice(s) for PCC and SCC. For a period of five years after the entry date of this Consent Decree, Defendant shall notify EPA, the Corps, and the State within thirty (30) days after Defendant designates a new PCC or SCC.

31. Compliance Protocol. Within sixty (60) days of the entry of this Consent Decree, and for a period of five years after the entry date of this Consent Decree, Defendant shall implement the Compliance Protocol set forth in this Paragraph ("Compliance Protocol") at all OG Facilities to ensure compliance with Section 404 of the CWA and, as applicable, the West Virginia WPCA, Chapter 22, Article 11, Section 1 *et seq*.

a. The Compliance Protocol shall include the following elements:

(i) Prior to the submission to WVDEP of any application for a permit to drill for a well pad that would require new land disturbing activities or additional land disturbing activities outside any existing Limits of Disturbance at an OG facility, or the submission of any application to WVDEP for a permit to construct any Impoundment (including any pond) or to conduct any other construction activity, or any other application to the West Virginia Division of Highways to construct or enhance an access road associated with a well pad, Defendant shall use a Qualified Wetlands Professional, trained in the implementation of the 1987 Corps Wetlands Manual and Regional Supplements, as may be amended, to visit such OG Facility and provide an assessment regarding the potential presence of all aquatic resources (including but not limited

to streams and wetlands), both within the Limits of Disturbance and within (1) 100 horizontal feet of the Limits of Disturbance of a pipeline, access road or other linear project or (2) 300 horizontal feet of the Limits of Disturbance of a well pad, impoundment, compressor station, or any other non-linear OG Facility project ("Pre-Disturbance Assessment"). In the event that Defendant, after making a reasonable effort, cannot obtain access to property that is beyond the Limits of Disturbance, the Qualified Wetlands Professional may rely upon remote sensing data to identify aquatic resources on such property for the purpose of the Pre-Disturbance Assessment. The remote sensing data must include review of the NRCS Soil Survey Geographic Database for the presence of mapped hydric soils and the 1:4,800 Scale WV SAMB Stream Layer available at http://wvgis.wvu.edu/data/dataset.php?ID=265. In addition, the Pre-Disturbance Assessment based on such remote sensing data must include an analysis of reasonably available aerial photographs and topographic features, such as contours, to identify small streams not identified in the WV SAMB Stream Layer or the USGS National Hydrography Dataset; and

(ii) To the extent that a Pre-Disturbance Assessment identifies aquatic resources (including but not limited to streams and wetlands) and Defendant does not elect to pursue an alternative for the construction activity that would involve no impacts to aquatic resources identified during the Pre-Disturbance Assessment, Defendant shall:

(a) Prepare documentation of the consideration of alternative locations for the existing or proposed OG Facility that would avoid or minimize

impacts to aquatic resources as compared to the proposed land disturbing activity at the existing or proposed OG Facility, and documentation of why such alternative locations were not selected, including, as applicable, why such alternatives were not deemed practicable as that term is defined at 40 C.F.R. § 230.3(q);

(b) Design the existing or proposed OG Facility to avoid and minimize to the maximum extent practicable impacts to aquatic resources;

(c) Implement construction techniques that are certified by a registered professional engineer as consistent with sound engineering practices; and ensure stabilization of disturbed earth as soon as practicable, unless more rapid stabilization is required by state law, including but not limited to:

1. ensuring construction of earthen fill slopes no greater than 2:1, except where engineered methods can accommodate steeper slopes and such methods are approved by the WVDEP;

2. providing for temporary and permanent seed planting (including the use of native, non-invasive species); and

3. applying erosion and sediment controls consistent with the State or local Erosion & Sediment Handbook applicable to the proposed physical operation location, which in West Virginia is the State of West Virginia's Erosion & Sediment Control Best Management Practice Manual;

(d) Submit prior to land disturbing activities an individual CWA Section 404 permit application for any OG Facility where Defendant's

proposed impacts to aquatic resources would require an individual CWA Section 404 permit;

(e) Prior to construction at an OG Facility, ensure that all of Defendant's employees supervising or responsible for the construction of the OG Facility, and the general contractor responsible for the design and construction of the OG Facility, are aware of the existence of any aquatic resources identified in the Pre-Disturbance Assessment for such OG Facility and any permits and/or permit authorizations that may be required for such OG Facility;

(f) Comply with the pre-construction notification requirements of this Consent Decree, set forth in Paragraph 32 below;

(g) Stabilize disturbed areas, and restore any affected aquatic resources, as soon as practicable at such OG Facility insofar as such stabilization and restoration is consistent with the terms of any West Virginia WPCA permit or CWA Section 404 permit authorizing the discharge of dredged and/or fill material at the OG Facility; and

(h) Maintain all records relating to this Compliance Protocol consistent with the record retention requirements set forth in Section IX of this Consent Decree, and provide a copy of the Pre-Disturbance Assessment to the next owner or leaseholder in the event that Defendant transfers its interest in any OG Facility.

b. Defendant shall incorporate the Compliance Protocol into Defendant's standard operating procedures for West Virginia, including any applicable manuals or other documentation setting forth such procedures, ensure that the Compliance Protocol

is provided to each PCC/SCC, and ensure that Defendant's general contractor and any environmental consultant or engineer identified in Paragraph 5(c) comply with the Compliance Protocol.

c. Nothing in this Paragraph 31 shall be interpreted to relieve Defendant of the requirements of the CWA or the West Virginia WPCA, including the requirement to obtain authorization under Section 404 of the CWA for the discharge of dredged and/or fill material into waters of the United States. Moreover, except for the claims resolved under Paragraph 7 of this Consent Decree, Plaintiffs reserve in full their authority to institute a civil, criminal, or administrative action pursuant to the CWA and/or the West Virginia WPCA for any unauthorized discharge of dredged and/or fill material.

32. Pre-Construction Notification. For a period of twelve months after entry of this Consent Decree, Defendant shall, prior to undertaking construction that will involve discharges of dredged and/or fill material into waters of the United States at an OG Facility that Defendant believes would qualify for a Nationwide Permit under the CWA (except for activities undertaken pursuant to this Consent Decree to which NWP 32 applies), submit a preconstruction notification ("PCN") to the Corps even if one is not otherwise required by law, and request that the Corps verify in writing that any proposed discharge of dredged and/or fill material conforms with the terms and conditions of the Nationwide Permit. The Corps will review the PCN and process Defendant's submission in accordance with the process and timelines established by the Nationwide Permit program.

VII. REPORTING REQUIREMENTS

33. For the first two years following entry of this Consent Decree, Defendant shall provide the United States and the State with a quarterly written status report detailing Defendant's

progress toward completing all tasks required by this Consent Decree. The status report shall be sent to the addresses specified in Section XII of this Consent Decree by March 30, June 30, September 30, and December 30 of each year. If the required task has been completed, the notice shall specify the date when it was completed. If the required task has not been completed, or was completed after the deadline, then the notice shall explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree. From the third year after entry of this Consent Decree until the Consent Decree is terminated, Defendant shall provide a status report that meets the requirements of this Paragraph to the United States and the State by June 30 and December 30 of each year.

34. For each of the documents listed in Paragraph 35, Defendant shall, by signature of a senior management official designated to act on behalf of Defendant or of a duly authorized representative, certify as follows:

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

35. Defendant shall certify the following documents as set forth in Paragraph 34:

a. Delineation reports

b. Restoration plans

c. Status reports submitted pursuant to Paragraph 33

d. Pre-Construction notifications

e. Completion reports, following restoration of Sites

f. Request for termination

g. Force majeure submissions to Plaintiffs

h. Notice of recording of Conservation Easement(s)

i. Notice of recording of Deed Restrictions

Plaintiffs reserve the right to require the certification set forth in Paragraph 34 for any document not listed that is required to be submitted to Plaintiffs pursuant to this Consent Decree.

36. Compliance with the reporting requirements of this Consent Decree does not relieve Defendant of any reporting obligations required by the CWA or its implementing regulations, or by any other federal, state or local law, regulation, permit or other requirement.

VIII. STIPULATED PENALTIES

37. Defendant shall be liable for stipulated penalties to the United States and the State 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 Consent Decree according to all applicable requirements of this Consent Decree and within the specified time schedules established by or approved under this Consent Decree, or otherwise agreed to by the parties pursuant to this Consent Decree.

38. Late Payment of Civil Penalty: If Defendant fails to pay the civil penalty required to be paid under Section IV of this Decree ("Civil Penalty") when due, Defendant shall pay a stipulated penalty of $5,000 per day for each day that the payment is late.

39. Compliance Milestones: Except as specified in Paragraph 40, the following stipulated penalties shall accrue per violation per day for each violation of the requirements identified in Sections V ("Restoration, Mitigation and Preservation"), VI ("Compliance

Assurance Program"), and VII ("Reporting Requirements"):

Penalty Per Violation Per Day	Period of Noncompliance
$1,000	1st through 30th Day
$2,000	31st through 60th Day
$3,000	61st Day and beyond

40. Reporting Requirements: The following stipulated penalties shall accrue per violation per day for each violation of the reporting requirements identified in Paragraphs 25, 29, 30, and 33 of this Consent Decree:

Penalty Per Violation Per Day	Period of Noncompliance
$ 500	1st through 30th Day
$1,000	31st through 60th Day
$1,500	61st Day and beyond

41. 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.

42. Defendant shall pay any stipulated penalty within forty-five (45) days of receiving a written demand from either Plaintiff. The Plaintiff making the demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff by electronic or first-class mail. Defendant shall pay 50 percent of the total stipulated penalty amount to the United States and 50 percent to the State. Defendant shall pay stipulated penalties owing to the United States and the State in the manner set forth in

Section IV ("Civil Penalty"), except that the ETF forms and transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

43. Either the United States or the State may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties that would otherwise be due to it under this Consent Decree.

44. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section X and/or the Force Majeure provisions in Section XI shall be resolved upon motion to this Court as provided in Section X ("Dispute Resolution").

45. Stipulated penalties shall continue to accrue during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of the EPA, in consultation with the State, that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, 50 percent of the total amount to the United States and 50 percent to the State, within 45 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. To the extent Defendant demonstrates to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Section XI, below) or otherwise prevails on the disputed issue, the Court will excuse the stipulated penalties for that delay or non-compliance.

d. If any Party appeals the Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within fifteen (15) days of receiving the final appellate court decision.

e. Defendant shall pay stipulated penalties owing to the United States and the State in the manner set forth in Paragraph 42.

46. If Defendant fails to pay stipulated penalties according to the terms of this Consent Decree on time, Defendant shall be liable for interest on such penalties, as provided in 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall be construed to limit the United States or the State from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties.

47. Subject to the provisions of Section III of this Consent Decree ("Scope and Effect of Consent Decree"), the stipulated penalties provided for above shall be in addition to any other rights, remedies, or sanctions available to the United States and the State for Defendant's violation of this Consent Decree or applicable law.

IX. RETENTION OF RECORDS AND INSPECTIONS

48. For the durations specified in Paragraph 49, Defendant shall preserve and retain the following records, documents, and information now in its possession, custody or control or which come into its possession, custody or control, regardless of any corporate retention policy to the contrary.

a. Draft and final delineation reports submitted to EPA and supporting documentation

b. Draft and final restoration plans submitted to EPA and supporting documentation

c. Pre-Disturbance Assessments and supporting documentation

d. Status reports submitted pursuant to Paragraph 33

e. All permits, pre-construction notifications, and supporting documentation

f. Training records

g. Correspondence between or among XTO and any/all of the Plaintiffs

h. Records regarding payment of the civil penalty and stipulated penalties (if any)

i. Completion reports following restoration of Sites

j. Recorded conservation easements

k. Recorded deed restrictions

l. Final appraisal reports and supporting documentation

m. Correspondence between XTO and landowners regarding the securing of conservation easements and deed restrictions

n. Alternatives analyses and supporting documentation, as required by Paragraph 31(a)(ii)(a)

o. Documents regarding transfer of any Sites

p. Motions for dispute resolution

q. Force Majeure notifications and subsequent correspondence among XTO and the Plaintiffs

r. Restoration/mitigation monitoring records and supporting documentation

s. Request(s) for termination and subsequent filings

t. Final erosion and sediment control plans

u. As-built drawings

v. Letters of credit reservation and receipts for the purchase of credits from a mitigation bank (as applicable)

49. The documents, information, and records identified in Paragraph 48 shall be retained as follows:

a. Except for restoration/mitigation monitoring records and supporting documentation, other documents, information, and records pertaining to Site restoration shall be maintained for five years after the completion of physical on-site construction work required by the approved Restoration Plan, and other documents, information, and records pertaining to mitigation shall be maintained for five years after completion of physical on-site construction work required by the approved Mitigation Plan.

b. All other documents, information, and records set identified in Paragraph 48 shall be retained for five years after their generation, or until the date that is ten years after entry of this Consent Decree, whichever is later.

50. Defendant shall instruct its contractors, agents, successors, and assigns to preserve all non-identical copies of documents, records, and information identified in Paragraph 48 above relating to the performance of the tasks in this Consent Decree for the durations specified in Paragraph 49.

51. At the conclusion of the document retention periods specified in Paragraph 49, Defendant shall notify the United States and the State at least ninety (90) days prior to the destruction of any of the records, information, or documents identified in Paragraph 48,

and, upon request by the United States or the State, Defendant shall deliver any such non-privileged, non-identical copies of records, information, or documents within the Defendant's possession, custody or control to the requesting Plaintiff. If the United States or the State does not request delivery of such records, information, or documents within the 90-day period, then the records or documents may be destroyed. Defendant may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the United States and the State with 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 the 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.

Provided, however, that Defendant shall not withhold on privilege grounds any final report that this Consent Decree specifically requires Defendant to generate and submit.

52. During the document retention periods specified in Paragraph 49, the United States and/or the State may inspect and review any records required to be kept under the terms and conditions of this Consent Decree and the CWA, and Defendant shall produce such non-privileged records for inspection by the United States and/or the State after reasonable notice at a reasonable time and location.

53. Inspections: Until termination of this Consent Decree, the United States, WVDEP, and their authorized representatives and contractors may, upon reasonable notice and at all reasonable times, enter any of Defendant's OG Facilities in West Virginia and Pennsylvania and any locations identified in a Restoration or Mitigation Plan approved or adopted pursuant to Appendix A to:

    a. Monitor the activities required by this Consent Decree;

    b. Verify any data or information submitted to the United States or the State;

    c. Obtain samples; and

    d. Inspect and evaluate Defendant's restoration, mitigation, and/or preservation activities.

54. This Section IX of the Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States or the State to conduct inspections, to require monitoring and to obtain information from Defendant as authorized by law.

X. DISPUTE RESOLUTION

55. Unless expressly provided for in this Consent Decree, the Dispute Resolution procedures of this Section X 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 or the State to enforce any obligation of Defendant arising under this Decree.

56. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the parties to attempt to resolve such dispute. The period for informal negotiations shall not

extend beyond thirty (30) days beginning with written notice by one party to the other affected party or parties that a dispute exists, unless agreed to in writing by those parties. If a dispute between the United States and/or the State, on the one hand, and Defendant, on the other, cannot be resolved by informal negotiations, then the written position advanced by the United States following consultation with the State shall be considered binding unless, within fourteen (14) days after the end of the informal negotiations period, the Defendant files a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States, in consultation with the State, shall have thirty (30) days to respond to the motion and propose an alternate resolution.

57. If the United States or the State believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, the United States or the State may move the Court for a resolution of the dispute prior to the expiration of the thirty (30) day period for informal negotiations. Defendant shall have fourteen (14) days to respond to the motion and propose an alternate resolution.

58. Standard of Review

a. Disputes Concerning Matters Accorded Record Review. Except as otherwise provided in this Consent Decree, in any dispute brought under this Section X pertaining to the adequacy of the performance of work undertaken pursuant to this Consent Decree; and all other disputes that are accorded review on the administrative record under applicable principles of administrative law, Defendant shall have the burden of demonstrating, based on the administrative record, that the position of the United States and/or the State 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 this Section X, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree and better furthers the objectives of the Consent Decree.

59. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendant under this Consent Decree, except as provided in Section VIII, above, regarding payment of stipulated penalties.

XI. FORCE MAJEURE

60. Defendant shall perform the actions required under this Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event, or otherwise agreed to in writing by the United States, the State, and Defendant. A Force Majeure event is defined as any event or series of related events arising from causes beyond the control of Defendant, including its employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, *inter alia*, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state, or local permits or approvals unless Defendant has timely applied for such permits or approvals and has provided all information required by the permitting/approving authority for the evaluation of such

permit application.

61. If Defendant believes that a Force Majeure event has affected its ability to perform any action required under this Consent Decree, Defendant shall notify the United States and the State in writing within ten (10) calendar days after the event at the addresses listed in Section XII ("Notices and Submissions"), below. Such notice shall include a discussion of:

    a. what action has been affected;

    b. the specific cause(s) of the delay;

    c. the length or estimated duration of the delay; and

    d. any measures taken or planned by Defendant to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendant may also provide to the United States and the State any additional information it deems appropriate to support its conclusion that a Force Majeure event has affected its ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States and the State shall constitute a waiver of any claim of Force Majeure as to the event in question.

62. If the United States, after a reasonable opportunity for consultation with the State, determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event and/or any such other date as agreed upon in writing by the parties. Defendant shall coordinate with the United States and the State to determine when to begin or resume the operations affected by any Force Majeure event.

63. If the parties are unable to agree whether the conditions constitute a Force Majeure event,

or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the procedures in Section X ("Dispute Resolution") of this Consent Decree.

64. Defendant shall bear the burden of proving by a preponderance of the evidence:

a. That the noncompliance at issue was caused by circumstances entirely beyond the control of Defendant, and any entity controlled by Defendant, including its employees, agents, consultants and contractors, which could not be overcome by due diligence and which delayed or prevented the performance of the affected action;

b. That Defendant or any entity controlled by Defendant could not reasonably have foreseen and prevented such noncompliance; and

c. The number of days of noncompliance that were caused by such circumstances.

XII. NOTICES AND SUBMISSIONS

65. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

TO EPA:

Pamela J. Lazos, Mail Code 3RC20
Senior Assistant Regional Counsel
United States Environmental Protection Agency Region III
1650 Arch St.
Philadelphia, PA 19103-2029

Todd Lutte, Mail Code 3EA30
United States Environmental Protection Agency Region III
1650 Arch St.
Philadelphia, PA 19103-2029

TO THE DEPARTMENT OF JUSTICE:

Kenneth C. Amaditz

Chloe Kolman
Trial Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

TO THE CORPS:

Dana M. Adipietro
Assistant District Counsel
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

Karen Kochenbach
Chief, Southern Section, Regulatory Branch
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

TO WVDEP:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Quality
601 57th Street, SE
Charleston, WV 25304

Chief
Office of Oil and Gas
West Virginia Department of Environmental Quality
601 57th Street, SE
Charleston, WV 25304

TO DEFENDANT:

Michael Johnson, Division Vice President
XTO Energy Inc.
502 Keystone Drive
Warrendale, PA 15086

Michael Cannon, Esquire
XTO Energy Law Department

810 Houston Street
Fort Worth, Texas 76102

Notice will be given to all parties within 30 days, if either above-identified point of contact for Defendant changes. The new point of contact, including address, will be provided.

XIII. COSTS OF SUIT

66. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action, except that the United States and/or the State shall be entitled to collect the costs (including attorney's fees) incurred in any action necessary to enforce this Consent Decree or to collect any portion of the civil penalty or any stipulated penalties due, but not paid by Defendant.

XIV. PUBLIC COMMENT

67. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States and the State is subject to the requirements of 28 C.F.R. § 50.7, and the West Virginia Code of State Rules, W. Va. Code R. § 47-10-16.2.c, which provide for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed consent judgment is inappropriate, improper, or inadequate. Defendant agrees not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree unless the United States has notified Defendant in writing that it no longer supports entry of the Consent Decree.

XV. CONTINUING JURISDICTION OF THE COURT

68. This Court shall retain jurisdiction over this action in order to enforce or modify the

Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree.

XVI. ENTRY AND MODIFICATION

69. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any material modification of this Consent Decree shall be in writing, and shall not take effect unless signed by the United States, the State, and Defendant and approved by the Court; provided, however, that schedules for the completion of tasks required by Paragraph 23 and Appendix A, revisions to plans submitted and approved pursuant to Appendix A, and the timeframes for transfer and/or recording of Conservation Easements and Deed Restrictions pursuant to Paragraph 25 may be modified by written agreement of the United States and Defendant.

XVII. EFFECTIVE DATE

70. 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. TERMINATION

71. Except for Paragraphs 24, 49(b), and 51, this Consent Decree may be terminated through either of the following procedures:

a. After Defendant has completed the requirements of Sections IV ("Civil Penalty"), V ("Restoration, Mitigation and Preservation"), VI ("Compliance Assurance Program"), and VII ("Reporting Requirements") of this Consent Decree, including any compliance periods associated with those requirements, and has paid any accrued stipulated penalties as required by Section VIII this Consent Decree, Defendant may

serve upon the United States and the State a Request for Termination, stating that Defendant has satisfied those requirements, together with all necessary supporting documentation. If the United States and the State agree that the Consent Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree. If the United States and/or the State do not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section X of this Consent Decree. However, Defendant shall not seek Dispute Resolution for any dispute regarding termination of this Consent Decree until 180 days after service of its Request for Termination; OR

b. Defendant, the United States, and the State may at any time make a joint motion to the Court for termination of this Decree or any portion of it.

XIX. SIGNATORIES/SERVICE

71. Each of the undersigned certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents to this document.

72. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

XX. APPENDICES

73. The following appendices are attached to and part of this Consent Decree:

Appendix A: Restoration and Mitigation Work Plan
Appendix B: Sample Conservation Easement
Appendix C: Sample Deed Restriction

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

IT IS SO ORDERED.

Dated and entered this 24th day of April, 2015.

Irene M. Keeley
United States District Judge

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

ON BEHALF OF DEFENDANT XTO ENERGY INC.:

Dated: 12/15/14

MICHAEL R. JOHNSON
Vice President, Appalachian Division
XTO Energy Inc.
502 Keystone Drive
Warrendale, PA 15086

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

ON BEHALF OF THE UNITED STATES:

SAM HIRSCH
Acting Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

Dated: 12/19/14

KENNETH C. AMADUZ
CHLOE H. KOLMAN
Trial Attorneys
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
(202) 514-3698 (Amaditz)
(202) 514-9277 (Kolman)

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

U.S. ENVIRONMENTAL PROTECTION AGENCY

Dated: 12/15/14

CYNTHIA GILES
Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

SUSAN SHINKMAN
Director
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

MARK POLLINS
Director
Water Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

BENJAMIN BAHK
Chief, Industrial Enforcement Branch
Water Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (MC-2243A)
Washington, D.C. 20460

J. CLARKE THURMON
Attorney-Advisor
Water Enforcement Division
Office of Civil Enforcement
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (MC-2243A)
Washington, D.C. 20460

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

SHAWN M. GARVIN
Regional Administrator
U.S. Environmental Protection Agency
Region III

Dated: 12/17/14

Marcia E. Mulkey
Regional Counsel
U.S. Environmental Protection Agency
Region III

Dated: 12/11/14

Pamela J. Lazos
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III

Dated: 11/24/14

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

ON BEHALF OF THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION:

Dated: 12-18-14

SCOTT MANDIROLA
Director
Division of Water and Waste Management
West Virginia Department of Environmental Protection
601 57th Street Southeast
Charleston WV 25304
(304) 926-0499

Dated: 12/18/14

SCOTT DRIVER
Associate Attorney
West Virginia Department of Environmental Protection
601 57th Street Southeast
Charleston WV 25304
(304) 926-0499

Appendix A: Restoration and Mitigation Work Plan

This Work Plan sets forth the procedures applicable to the restoration work to be undertaken by XTO Energy, Inc. ("Defendant") pursuant to the Consent Decree among the United States of America, the State of West Virginia (by and through the West Virginia Department of Environmental Protection) and Defendant. This Work Plan is incorporated into the Consent Decree.

The sites covered by this Work Plan (collectively, the "Appendix A Sites") are those listed in Paragraph 22 of the above-referenced Consent Decree.

I. Delineation Reports

a. For each Appendix A Site for which a delineation report has not been approved by EPA, Defendant shall submit a pre-disturbance wetland and stream delineation ("Delineation Report") to the U.S. Environmental Protection Agency ("EPA") for review and approval. Defendant shall utilize a methodology for identifying wetlands and streams in disturbed and undisturbed areas consistent with methods accepted by the EPA and the U.S. Army Corps of Engineers ("Corps").

b. Defendant shall submit Delineation Reports for all Appendix A Sites within 120 days of the entry of the Consent Decree or as otherwise agreed to by the parties. Delineation Reports submitted to and approved by EPA prior to the entry of the Consent Decree will satisfy this requirement.

c. After review of the Delineation Report, EPA will: a) approve the Report, in whole or in part; b) approve the Report upon specified conditions; c) disapprove the Report, in whole or in part; or d) any combination of the above. EPA may disapprove the Delineation Report, in whole or in part, based on EPA's determination that the Report is not in accordance with the objectives of the Consent Decree and the CWA (and the West Virginia WPCA, as applicable).

d. If EPA disapproves all or part of a Delineation Report, Defendant shall, within 60 days of receipt of EPA's disapproval, address the reasons provided for disapproval and resubmit the Delineation Report for approval. If a Delineation Report submitted pursuant to this provision is disapproved in whole or in part three times or more, EPA, in consultation with the Corps and the State, may itself correct the deficiencies in the Report, subject to Defendant's right to invoke Dispute Resolution pursuant to Section X of the Consent Decree.

II. Restoration Plans and Mitigation Plans

a. Within 120 days of EPA's approval of each Delineation Report, or as otherwise agreed to by the parties, Defendant shall submit a detailed Restoration Plan for the applicable Appendix A Site to EPA for approval. The Restoration Plan must (a) be designed to restore the Restoration Site to approximate pre-disturbance original conditions consistent with the definition of restoration found in 40 C.F.R. § 230.92; (b) include a schedule for implementation; (c) include restoration measures that adequately compensate for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric ("WVSWVM"); (d) ensure that restored areas are stabilized so as to avoid landslides or slips, (e) utilize only native West Virginia species

for planting; (f) incorporate quantitative performance measures; (g) include a post-restoration monitoring plan that provides for an initial five years of monitoring, unless otherwise requested by EPA, and provides for monitoring to be extended if performance measures are not on track to be met at maturity; and (h) address whether notification to the Corps is required under NWP General Conditions 18 and 20 (Endangered Species and Historic Properties). Where Defendant believes restoration of an Appendix A Site in full or in part would not be practicable, Defendant may so indicate in the Restoration Plan. Such a conclusion must be supported by adequate information to allow EPA to assess Defendant's reasoning and must include calculations for impacts to streams and wetlands using the West Virginia Stream and Wetland Valuation Metric ("WVSWVM") to determine the appropriate amount of mitigation needed to offset permanent and temporal losses to aquatic resources.

b. After review of the Restoration Plan, EPA will: a) approve the Plan, in whole or in part; b) approve the Plan upon specified conditions; c) disapprove the Plan, in whole or in part; or d) any combination of the above. EPA may disapprove the Restoration Plan, in whole or in part, based on EPA's determination that the Plan is not in accordance with the objectives of the Consent Decree and the CWA (and the West Virginia WPCA, as applicable).

c. If EPA disapproves all or part of a Restoration Plan, Defendant shall, within 60 days of receipt of EPA's disapproval, address the reasons for disapproval and resubmit the Restoration Plan for approval. If a Restoration Plan submitted pursuant to this provision is disapproved in whole or in part three times or more, EPA, in consultation with the Corps and the State, may itself correct the deficiencies in the Plan and require restoration in accordance with the plan developed by EPA, subject to Defendant's right to invoke Dispute Resolution pursuant to Section X of the Consent Decree.

d. In the event that the physical, chemical, and biological functions of the impacted aquatic resources cannot be fully restored at any Appendix A Site due to lack of access or for any other reason, Defendant shall notify EPA and develop and submit to EPA a Mitigation Plan. The Mitigation Plan must use WVSWVM to determine the appropriate amount of mitigation needed to compensate for all unrestored impacted resources. Defendant may satisfy any such additional mitigation obligations by (i) purchasing additional mitigation credits from mitigation banks authorized to sell offsite mitigation credits, (ii) proposing a mitigation project to be completed or funded by Defendant that includes long-term protection for mitigation areas via a conservation easement or a deed restriction, or (iii) otherwise undertaking compensatory mitigation in a manner consistent with 40 C.F.R. §§ 230.91-230.98 (2013). The Mitigation Plan must provide long-term protection for mitigation areas via a conservation easement or other appropriate instrument and must address whether notification to the Corps is required under NWP General Conditions 18 and 20 (Endangered Species and Historic Properties). A single Mitigation Plan may be used to compensate for unrestored impacts at multiple sites within an 8-digit HUC watershed. A Mitigation Plan for an individual Appendix A Site must be submitted to EPA as part of the Restoration Plan or within 60 days of Defendant determining that such Mitigation Plan must be submitted pursuant to this Paragraph, unless Defendant has notified EPA that Defendant intends to submit a comprehensive Mitigation Plan for multiple Appendix A Sites, including the individual Appendix A Site in question. If Defendant opts to submit a comprehensive Mitigation Plan for multiple Appendix A Sites, Defendant shall submit a Conceptual Plan to EPA within sixty (60) days of approval of all Restoration Plans for all Appendix A Sites subject to the comprehensive

Mitigation Plan for which Defendant has provided notice. The Conceptual Plan shall include, at a minimum: a rationale for site selection; a description of mitigation objectives that address the needs of the watershed; identification of the anticipated long-term site protection instrument(s); baseline information for the proposed site(s); a determination of credits that the proposed site(s) will provide; and a mitigation work plan. Information contained in these sections should be consistent with 33 C.F.R. § 332.4(c). After review of Defendant's Conceptual Plan, EPA will: a) approve the Plan, in whole or in part; b) approve the Plan upon specified conditions; c) disapprove the Plan, in whole or in part, or d) any combination of the above. EPA may disapprove the Conceptual Plan, in whole or in part, based on EPA's determination that the impacted aquatic resources can be fully restored. If EPA disapproves all or part of a Conceptual Plan, Defendant shall, within 60 days of receipt of EPA's disapproval, address the reasons for disapproval and resubmit the Conceptual Plan for approval. If a Conceptual Plan submitted pursuant to this provision is disapproved in whole or in part three times or more, EPA, in consultation with the Corps and the State, may require that Defendant develop and submit individual Mitigation Plans (rather than a comprehensive Mitigation Plan for multiple Appendix A Sites) subject to Defendant's right to invoke Dispute Resolution pursuant to Section X of the Consent Decree. The comprehensive Mitigation Plan must be submitted within three (3) months of EPA's approval of the Conceptual Plan or as otherwise agreed to by the parties.

e. After review of Defendant's Mitigation Plan, EPA will: a) approve the Plan, in whole or in part; b) approve Plan upon specified conditions; c) disapprove the Plan, in whole or in part, or d) any combination of the above. EPA may disapprove the Mitigation Plan, in whole or in part, based on EPA's determination that the impacted aquatic resources can be fully restored.

f. If EPA disapproves all or part of a Mitigation Plan, Defendant shall, within 60 days of receipt of EPA's disapproval, address the reasons for disapproval and resubmit the Mitigation Plan for approval. If a Mitigation Plan submitted pursuant to this provision is disapproved in whole or in part three times or more, EPA, in consultation with the Corps and the State, may itself correct the deficiencies in the Plan and require mitigation in accordance with a plan developed by EPA, subject to Defendant's right to invoke Dispute Resolution pursuant to Section X of the Consent Decree.

III. Restoration and Mitigation

Upon approval of a Restoration Plan (either with or without conditions or modifications by EPA), the Restoration Plan is incorporated into this Appendix A, and Defendant shall implement the Plan as approved or modified by EPA. Upon approval of a Mitigation Plan (either with or without conditions or modifications by EPA), the Mitigation Plan is incorporated into this Appendix A, and Defendant shall implement the Plan as approved or modified by EPA. Restoration and mitigation work at each Appendix A Site shall be executed in accordance with the approved schedule and NWP 32.

IV. Communications

All other correspondence related to this Work Plan should be submitted to the EPA representatives to whom communications are to be made pursuant to Section XII of the Consent Decree.

V. Extensions of the Timeframes Above

Defendant shall perform the actions required by this Work Plan within the time limits set forth herein. EPA recognizes that delineation and restoration activities may be delayed for a number of reasons, including, but not limited to, unanticipated seasonal and weather conditions, issues relating to landowner access, delayed Federal, state and/or local permitting and/or approvals, delays in obtaining conservation easements/deed restrictions, and leases and other transfers or conveyances of possession of Appendix A Sites. Extension requests based on these issues will not be unreasonably denied.

VI. Access to Third-Party Sites

a. If any Site or Appendix A Site is owned or controlled by persons other than Defendant, Defendant shall use best efforts to secure from such persons an agreement to provide access to the Site for Defendant, the United States, the State, and their representatives, contractors, and subcontractors, to conduct any activity pursuant to the Consent Decree including, but not limited to, the activities set forth in this Work Plan and Paragraph 53 of the Consent Decree. "Best efforts" for the purposes of this Paragraph VI includes efforts commenced no later than 30 days after EPA's approval of a Restoration Plan or development of a Restoration Plan pursuant to Section II(c) of this Work Plan, or no later than 30 days after entry of the Consent Decree for Sites with previously-approved restoration plans, and, to the extent Defendant's access rights at any Appendix A Sites are insufficient to implement the applicable Restoration Plan, includes an offer of reasonable compensation to obtain such additional rights.

b. If, within 150 days of EPA's approval of a Restoration Plan or development of a Restoration Plan pursuant to Section II(c) of this Work Plan, or within 90 days after entry of the Consent Decree for Sites with previously-approved restoration plans, Defendant has not obtained an agreement to provide access as described above, Defendant shall promptly notify Plaintiffs in writing at the addresses set forth in Section XI of the Consent Decree, and shall include in that notification a summary of the steps that Defendant has taken to attempt to comply with this Paragraph VI. The United States may, in its unreviewable discretion, assist Defendant in obtaining access. If Defendant has used best efforts and access is not obtained by Defendant or the United States for any reason, and Defendant is unable to complete its obligations under the Consent Decree, then Defendant shall, consistent with Section II of this Work Plan, provide compensatory mitigation to off-set the loss of any areas that could not be restored due to lack of access.

Appendix B: Model Conservation Easement

Prepared by: [AUTHOR]

GRANT OF CONSERVATION EASEMENT

This Grant of Conservation Easement is made this [DATE] day of [MONTH], 201[X], by [GRANTOR], whose address is [ADDRESS], located in [CITY], [COUNTY], [STATE], hereinafter referred to as "Grantor", in favor of the [GRANTEE], hereinafter referred to as "Grantee," with the United States Environmental Protection Agency ("EPA"), the West Virginia Department of Environmental Protection ("WVDEP") and the United States Army Corps of Engineers ("USACE") as Third-Party Beneficiaries with rights as provided in this Conservation Easement, pursuant to the West Virginia Code, Chapter 20, Article 12, Conservation and Preservation Easements Act, § 20-12-2 et. seq.

WITNESSETH:

WHEREAS, Grantor is the owner of certain real property located in the [PROPERTY TITLE] (hereinafter "the Property"), and the Property is also described in a deed of record in the office of the Clerk of the County Commission, [COUNTY] at Deed Book [BOOK], Page [PAGE]; and

WHEREAS, that certain portion of the surface of the Property described on Exhibit A attached hereto (the "Conserved Area") possesses open space and natural values (collectively, "Conservation Values") of great importance to Grantor, the people of [COUNTY], and the people of the State of West Virginia, and all current and future generations of mankind; and

WHEREAS, the Legislature of the State of West Virginia has recognized the importance and significant public benefit of conservation and preservation easements in its ongoing efforts to protect the natural, historic, agricultural, open-space and scenic resources of the State of West Virginia; and

WHEREAS, Grantee qualifies as a "holder" pursuant to W. Va. Code § 20-12-3; and

WHEREAS, Grantor, having the authority to do so, intends to enter into this Conservation Restriction in order to grant to Grantee a Conservation Easement on the Property to restrict subsequent disturbance and/or development of the Conserved Area in perpetuity; and

WHEREAS, Grantee affirms that this Conservation Easement represents a unique and valuable asset to the quality of life in [COUNTY] and the state of West Virginia and that by the acceptance of this Conservation Easement that it will act in good faith to uphold the conservation easement and not seek to benefit from its conversion or elimination. Grantee agrees by accepting this grant to honor the intentions of Grantor stated herein and to preserve and protect in

perpetuity the Conservation Values of the Conserved Area for the benefit of this generation and the generations to come in the future; and

WHEREAS, preservation of the Conserved Area is consistent with a central objective of a Consent Decree in the matter of [*Case name*], Civil Action No. _____ ("XTO CD"), Grantor and Grantee agree that USACE, EPA, and WVDEP, and their successor agencies (collectively "Third Parties"), are third-party beneficiaries under this conservation easement, except that nothing herein creates a property interest in the Federal Government or the State of West Virginia with regard to the Conserved Area;

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and the facts recited above and the terms, conditions and restrictions contained herein, Grantor hereby agrees that the Conserved Area shall be subject in perpetuity to the following conveyances, covenants and restrictions in favor of Grantee:

1. Grantor hereby conveys, transfers, assigns and grants to Grantee a Conservation Easement with respect to the Conserved Area.

2. This Grant of Conservation Easement shall be a burden upon and shall run with the Conserved Area, and shall bind Grantor, its successors and assigns, in perpetuity.

3. The following activities are prohibited in the Conserved Area, except as necessary for the control of alien invasive or noxious plant or animal species or as necessary to accomplish restoration and/or mitigation described in Paragraph 9:

    a. Removal, excavation, dredging, or disturbance of the surface;

    b. Dumping of, storage of, or filling with soil, rock, biological material, trash, ashes, garbage, waste, or other materials;

    c. Draining, impounding, or impairing the flow or circulation, or reducing the reach of waters, including wetlands; or any other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended;

    d. Installation of structures;

    e. Placement of pavement or other impervious materials;

    f. Alteration of the existing pattern of vegetation through removal, destruction, or planting of vegetation;

    g. Except to the extent necessary to return the Conserved Area to a use consistent with its use prior to XTO Energy, Inc.'s ("XTO") initial entry onto the Conserved Area, conversion of, or expansion into, any portion of the Conserved Area for use of agricultural, horticultural, aquacultural, silvicultural, livestock production, or

grazing activities. This prohibition also includes conversion from one type of these activities to another (e.g., from agricultural to silvicultural);

h. The use of fertilizers, herbicides or pesticides;

i. Removal, clearing, pruning, or mowing of live vegetation, including trees, unless Grantor demonstrates to Grantee that such removal will result in habitat enhancement or to prevent a safety hazard, and Grantor has received written approval of Grantee;

j. The use of the Conserved Area to provide required open space for the development or subdivision of another property or to determine any other permissible residential, commercial or agricultural uses of another property; or any legal or de facto division, subdivision or portioning of the Conserved Area;

k. Any other use of or activity in the Conserved Area that is inconsistent with the purpose of this Grant of Conservation Easement.

4. Grantor shall record this Conservation Easement in the Land Records of the county or counties where the property is located within sixty (60) days of the effective date of this Conservation Easement. Grantor shall provide Grantee, XTO and Third Parties with proof of recordation and give notice of this Grant of Conservation Easement to current record title holders of easements in the Conserved Area within thirty (30) days of recording by the County Clerk.

5. Notwithstanding any provisions to the contrary, this Grant of Conservation Easement is subject to and subordinate to any existing and duly recorded rights with respect to the Conserved Area. All structures, infrastructure, as well as all pre-existing easements or other duly recorded rights in the Conserved Area identifiable through a title search extending to documents placed of record within twenty (20) years prior to the date of this Grant of Conservation Easement, shall be indicated on Exhibit A, which is attached to this instrument and includes a copy of the most recent property deed for the Property and a legal description sufficient to identify the boundaries of the Conserved Area. Grantor certifies to Grantee and Third Parties that to Grantor's actual knowledge, there are no previously granted easements existing in the Conserved Area that interfere or conflict with the purpose of this Grant of Conservation Easement.

6. All mortgages and deeds of trust granted or entered into after the date hereof affecting the Conserved Area will be subordinate to the rights of Grantee under this Grant of Conservation Easement.

7. Grantee, XTO and Third Parties shall have the right to:

a. enter upon the Conserved Area for the purpose of inspecting the Conserved Area to determine compliance with the purposes and terms of this Grant of Conservation Easement, or for any other purpose authorized by this easement or

by the XTO CD. When practicable, such entry shall be upon prior reasonable notice to the property owner. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law;

b. take any and all action within the Conserved Area necessary to address a situation that poses an immediate risk to health, life, property or the environment; and

c. take any and all action within the Conserved Area required by Federal or State law or approved by the Third Parties.

8. In the event of a breach of this Conservation Easement by Grantor or another party, Grantee and/or Third Parties shall notify Grantor of the breach. If Grantor fails to take corrective action within 60 days of such notice, Grantee and/or Third Parties may undertake actions to effect such corrective action, including bringing a judicial action against any person(s) or entity(ies) violating or attempting to violate this Conservation Easement: provided, however, that no violation of this Conservation Easement shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing party shall be entitled to a complete restoration for any violation, as well as any other judicial remedy such as civil penalties. The costs of breach, correction and/or restoration, including Grantee's and/or Third Parties' expenses, court costs, and attorney's fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach. Enforcement shall be at the discretion of Grantee and/or Third Parties, and no omissions or delay in acting shall constitute a waiver of any enforcement right. These rights are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, under any applicable permit or certification, or under the XTO CD.

9. XTO and/or its contractors shall have the right to enter upon the Conserved Area for the purpose of performing any work required by a restoration or mitigation plan approved under the XTO CD, including construction, planting, maintenance, monitoring, long-term management, or any other restoration, enhancement, or mitigation work specified therein, provided such work is conducted in accordance with such approved plan.

10. Grantor shall provide Grantee, XTO and Third Parties written notice of any transfer or change in ownership of, or of the execution of any subsequent easement affecting, any portion of the Conserved Area, including but not limited to the name and address of the new owner at least thirty (30) days prior to the transfer or change in ownership, or execution of such easement.

11. Grantor agrees that the terms, conditions, restrictions and purposes of this Conservation Easement will be inserted in any subsequent deed, subdivision deed, lease, sub-lease or other legal instrument by which Grantor divests itself of any interest in any portion of the Conserved Area. Notwithstanding the failure of Grantor to include the terms and restrictions of this instrument, it shall run with the land and be binding on all heirs, successors and assigns.

12. Any notice, demand, request, consent, approval or communication under this Conservation Easement shall be sent by certified mail, return receipt requested or reliable overnight courier, addressed as follows:

To Grantor:

_____
_____
_____

To Grantee:

_____
_____
_____

To XTO:

_____
_____
_____

To Third Parties:
TO EPA:

Pamela J. Lazos
Senior Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency
Region III
MC 3RC20
1650 Arch St.
Philadelphia, PA 19103-2029

Associate Director, Office of Environmental Programs
Environmental Assessment and Innovation Division
United States Environmental Protection Agency
Region III
MC 3EA40
1650 Arch St.
Philadelphia, PA 19103-2029

TO THE CORPS:

Dana M. Adipietro
Assistant District Counsel

U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

Jon Coleman
Chief, Southern Section, Regulatory Branch
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

TO WVDEP:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th St.
Charleston, WV 25304

Chief
Office of Oil and Gas
West Virginia Department of Environmental Protection
601 57th St.
Charleston, WV 25304

13. A party may change the address or person to whom notices to it are required to be given by notice given in the manner above provided.

14. Grantor reserves to itself, its successors or assigns, all rights as owners of the Property, including the right to engage in all uses of the Conserved Area not inconsistent with the purpose and terms of this Conservation Easement and the right to manage the Conserved Area in accordance with the provisions of the West Virginia Conservation and Preservation Easements Act, West Virginia Code 20-12-1, *et seq*.

15. This instrument conveys no additional right of access by the general public to any portion of the Property.

16. Grantor shall be responsible for acts of its own negligence consistent with the provisions of the West Virginia Conservation and Preservation Easements Act, West Virginia Code 20-12-1, *et seq*.

17. This Conservation Easement shall survive any merger of the fee and restriction interest in the Conserved Area.

18. Upon prior written notice to Grantor, XTO and Third Parties, Grantee may assign its rights under this Grant of Conservation Easement to any qualified holder satisfying the definition set forth in West Virginia Code Chapter 20-12-3. No assignment may be made unless Grantee, as a condition of such assignment, requires the assignee to carry out the conservation purposes and terms of this Grant of Conservation Easement. If any such assignee ceases to exist, ceases to be a qualified holder under West Virginia Code Chapter 20-12-3, or abandons this easement or the rights and duties of enforcement herein set forth, or if proceedings are instituted for condemnation of this Grant of Conservation Easement, the Easement and rights of enforcement shall revert to Grantee. If Grantee shall be dissolved and if the terms of the dissolution fail to provide a successor, then the Court shall appoint a successor using the doctrine of *cy pres*.

19. Taxes, Insurance.

    a. Grantor shall keep Conserved Area free of any liens arising out of any work performed for, materials furnished to, or obligations incurred by Grantor.

    b. Grantor agrees to pay any real estate taxes or other assessments levied on the Conserved Area. If Grantor becomes delinquent in payment of said taxes or assessments, such that a lien against the land is created, Grantee, at its option, shall, after written notice to Grantor, have the right to purchase and acquire Grantor's interest in the Conserved Area or to take such other actions as may be necessary to protect Grantee's interest in the Conserved Area and to assure the continued enforceability of this Conservation Easement.

20. Eminent Domain, Proceeds.

    a. Whenever all or part of the Conserved Area is taken in the exercise of eminent domain so as to substantially abrogate the restrictions imposed by this Conservation Easement, the Grantor and Grantee shall join in appropriate actions at the time of such taking to recover the full value of the taking, and all incidental and direct damages due to the taking.

    b. In the event that all or a portion of this Conserved Area is sold, exchanged, or involuntarily converted following an extinguishment or the exercise of eminent domain, Grantee shall be entitled to the proceeds of such sale, exchange or conversion. Grantee shall use its share of the proceeds in a manner consistent with the purpose of this Grant of Conservation Easement, and in consultation with Third Parties.

21. Miscellaneous.

    a. The laws of the State of West Virginia shall govern the interpretation and performance of this Conservation Easement.

b. If any provision of this Conservation Easement or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Conservation Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

c. This Conservation Easement sets forth the entire agreement of the parties with respect to the Conservation Easement and supersedes all prior discussions, negotiations, understandings or agreements relating to the easement, all of which are merged herein. No alteration or variation of this Conservation Easement shall be valid or binding unless contained in a writing executed by the parties hereto.

d. Should there be more than one Grantor, the obligations imposed by this Conservation Easement upon each Grantor shall be joint and several.

e. The covenants, terms, conditions and restrictions of this Conservation Easement shall be binding upon, and inure to the benefit of, the parties hereto and all parties having or acquiring any right, title or interest in the Conserved Area, including holders of subdivision deeds, and shall continue as a servitude running in perpetuity with the Conserved Area.

f. The captions in this Conservation Easement have been inserted solely for convenience of reference and are not a part of this Conservation Easement and shall have no effect upon construction or interpretation.

g. Execution of this Conservation Easement does not constitute a waiver of the rights or ownership interest of the State of West Virginia in public trust property.

h. This Conservation Easement may be executed in any number of counterparts, all of which, taken together, shall constitute one and the same instrument.

22. Notwithstanding anything contained herein to the contrary, except for de minimis modifications as discussed below, any modification or termination of this Conservation Easement shall require the prior written approval of Grantee, its successors or assigns, and Third Parties. Amendments to this Conservation Easement must be in writing by all parties hereto, and must be consistent with the conservation purposes of this Grant. Grantor shall record any modification or termination of this Conservation Easement in the Land Records of the county or counties where the Conserved Area is located within sixty (60) days of executing such a modification or termination. Grantor shall provide Grantee, XTO and Third Parties with proof of recordation within thirty (30) days of recording by the County Clerk. Grantor reserves unto itself the right to undertake de minimis modifications of the Conserved Area that are approved by Grantee. A "de minimis modification" is a modification that results in an increased level of protection of or does not affect the natural resources protected by this Conservation Easement within the Conserved Area.

23. For any modification, transfer, conveyance, or assignment accomplished under paragraphs 10, 18 or 22, Grantor shall amend this instrument by preparing and submitting to Grantee for review and approval:

    a. A revised plan and metes and bounds description for the area to be preserved under the modified Conservation Easement (hereinafter the "Modification Documents"); and

    b. An Amended Conservation Easement that reflects the modifications to the original Conservation Easement, the justification for the modification, and that also includes the deed book and page of the title deed for the property or properties subject to the modified Conservation Easement set forth in the Modification Documents.

24. Grantor shall record the documents listed in paragraph 23, above, in the same manner and place as this original Conservation Easement was recorded.

25. This Grant of Conservation Easement may only be removed pursuant to West Virginia Code 20-12-4 and consistent with this Grant of Conservation Easement.

TO HAVE AND TO HOLD unto [GRANTEE], its successors and assigns forever. The covenants, terms, conditions, restrictions and purposes imposed with this Conservation Easement shall not only be binding upon Grantor but also upon its agents, personal representatives, executors, assigns and all other successors to it in interest, and shall continue as a servitude running in perpetuity with the Conserved Area.

IN WITNESS WHEREOF, Grantor has set its hand and seal on the day and year first above written, and directs that this instrument be recorded in the office of the [RELEVANT COUNTY].

[GRANTOR]

By:_____
Name:_____
Title:_____

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

STATE OF _____
COUNTY OF _____

Be it remembered that on this ____ day of _____, 20__, before me, the subscriber, a Notary Public, personally appeared: [NAME] and he thereupon acknowledged that he signed the foregoing instrument in such capacity, and that said instrument is the voluntary act of deed of said [NAME].

_____
Printed Name:_____
A Notary Public of _____

My Commission Expires: _____

EXHIBIT A

CONSERVED AREA

EXHIBIT B

CONSENT TO COMPLY WITH GRANT OF CONSERVATION EASEMENT

With respect to its rights in the "Conserved Area," as defined in the Grant of Conservation Easement made on [DATE] by [GRANTOR], whose address is [ADDRESS], located in [CITY], [COUNTY], [STATE], in favor of [GRANTEE], XTO Energy, Inc., hereby expressly consents to comply with the restriction of said Grant of Conservation Easement. This Consent is made pursuant to West Virginia Code § 20-12-4(d).

By: XTO Energy, Inc. _____
Name: _____
Title: _____

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

Appendix C: Model Deed Restriction

Prepared by: [AUTHOR]

DEED RESTRICTION

THIS DECLARATION OF DEED RESTRICTIONS FOR CONSERVATION ("Declaration") made this _____ day of _____, 2013, by [*Name of Landowner*] ("Grantor"), having an address at _____;

WITNESSETH:

WHEREAS, [GRANTOR] is the owner of certain real property located in the [PROPERTY TITLE] (hereinafter "the Property"), and the Property is also described in a deed of record in the office of the Clerk of the County Commission, [COUNTY] at Deed Book [BOOK], Page [PAGE]; and

WHEREAS, Grantor, having the authority to do so, intends to record this Declaration in order to restrict subsequent disturbance and/or development of that certain portion of the surface of the Property described on Exhibit A attached hereto (the "Conserved Area") in perpetuity;

WHEREAS, the Conserved Area possesses open space and natural values (collectively, "Conservation Values") of great importance to Grantor, the people of [COUNTY], and the people of the State of West Virginia, and all current and future generations of mankind; and

WHEREAS, preservation of the Conserved Area is consistent with a central objective of a Consent Decree in the matter of [*Case name*], Civil Action No. _____ ("XTO CD"), Grantor agrees that USACE, EPA, and WVDEP, and their successor agencies (collectively "Third Parties"), are third-party beneficiaries under this Declaration, except that nothing herein creates a property interest in the Federal Government or the State of West Virginia with regard to the Conserved Area;

NOW THEREFORE, Grantor hereby agrees that the Conserved Area shall be subject in perpetuity to the following conveyances, covenants and restrictions:

1. This Declaration shall be a burden upon and shall run with the Conserved Area, and shall bind Grantor, its successors and assigns, in perpetuity.

2. Grantor shall record this Declaration in the Land Records of the county or counties where the Property is located within sixty (60) days of the effective date of this Declaration. Grantor shall provide XTO Energy, Inc. ("XTO") and Third Parties with proof of recordation and give notice of this Declaration to current record title holders of easements in the Conserved Area within thirty (30) days of recording by the County Clerk.

3. The following activities are prohibited in the Conserved Area, except as necessary for the control of alien invasive or noxious plant or animal species or as necessary to accomplish restoration and/or mitigation described in Paragraph 10:

   a. Removal, excavation, dredging, or disturbance of the surface;

   b. Dumping of, storage of, or filling with soil, rock, biological material, trash, ashes, garbage, waste, or other materials;

   c. Draining, impounding, or impairing the flow or circulation, or reducing the reach of waters, including wetlands; or any other discharge or activity requiring a permit under applicable clean water or water pollution control laws and regulations, as amended;

   d. Installation of structures;

   e. Placement of pavement or other impervious materials;

   f. Alteration of the existing pattern of vegetation through removal, destruction, or planting of vegetation;

   g. Except to the extent necessary to return the Conserved Area to a use consistent with its use prior to XTO's initial entry onto the Conserved Area, conversion of, or expansion into, any portion of the Conserved Area for use of agricultural, horticultural, aquacultural, silvicultural, livestock production, or grazing activities. This prohibition also includes conversion from one type of these activities to another (e.g., from agricultural to silvicultural);

   h. The use of fertilizers, herbicides or pesticides;

   i. Removal, clearing, pruning, or mowing of live vegetation, including trees, unless Grantor demonstrates that such removal will result in habitat enhancement or to prevent a safety hazard, and Grantor has received written approval of the West Virginia Department of Environmental Protection;

   j. The use of the Conserved Area to provide required open space for the development or subdivision of another property or to determine any other permissible residential, commercial or agricultural uses of another property; or any legal or de facto division, subdivision or portioning of the Conserved Area;

   k. Any other use of or activity in the Conserved Area that is inconsistent with the purpose of this Declaration.

4. It is the purpose of the Declaration to assure that the Conserved Area will be maintained as such and to prevent any unauthorized disturbance and/or development to the Conserved Area.

5. Notwithstanding any provisions to the contrary, this Declaration is subject to and subordinate to any existing and duly recorded rights with respect to the Conserved Area. All structures, infrastructure, as well as all pre-existing easements or other duly recorded rights in the Conserved Area identifiable through a title search extending to documents placed of record within twenty (20) years prior to the date of this Declaration, shall be indicated on Exhibit A, which is attached to this instrument and includes a copy of the most recent property deed for the Property and a legal description sufficient to identify the boundaries of the Conserved Area. Grantor certifies that to Grantor's actual knowledge, there are no previously granted easements existing in the Conserved Area that interfere or conflict with the purpose of this Declaration.

6. All mortgages and deeds of trust granted or entered into after the date hereof affecting the Conserved Area will be subordinate to this Declaration.

7. The Conserved Area is subject to the XTO CD. Each deed, title or other instrument conveying an interest in the Conserved Area shall contain a notice stating that the Property is subject to the XTO CD and shall reference the recorded location of the XTO CD and any restrictions applicable to the Property under the XTO CD.

8. XTO and Third Parties shall have the right to:

    a. enter upon the Conserved Area for the purpose of inspecting the Conserved Area to determine compliance with the purposes and terms of this Declaration, or for any other purpose authorized by this Declaration or by the XTO CD. When practicable, such entry shall be upon prior reasonable notice to the property owner. This right of entry is in addition to and does not limit any right of entry otherwise granted by Federal or State law;

    b. take any and all action within the Conserved Area necessary to address a situation that poses an immediate risk to health, life, property or the environment; and

    c. take any and all action within the Conserved Area required by Federal or State law or approved by the Third Parties.

9. Grantor grants to Third Parties a discretionary right to enforce this Declaration. In the event of a breach of this Declaration by Grantor or another party, Third Parties shall notify Grantor of the breach. If Grantor fails to take corrective action within 60 days of such notice, Third Parties may undertake actions to effect such corrective action, including bringing a judicial action against any person(s) or entity(ies) violating or attempting to violate this Declaration: provided, however, that no violation of this Declaration shall result in a forfeiture or reversion of title. In any enforcement action, an enforcing party shall be entitled to a complete restoration for any violation, as well as any other judicial remedy such as civil penalties. The costs of breach, correction and/or restoration, including Third Parties' expenses, court costs, and attorney's fees, shall be paid by Grantor, provided Grantor is determined to be responsible for the breach.

Enforcement shall be at the discretion of Third Parties, and no omissions or delay in acting shall constitute a waiver of any enforcement right. These rights are in addition to, and shall not limit, enforcement rights available under other provisions of law or equity, under any applicable permit or certification, or under the XTO CD.

10. XTO and/or its contractors shall have the right to enter upon the Conserved Area for the purpose of performing any work required by a restoration or mitigation plan approved under the XTO CD, including construction, planting, maintenance, monitoring, long-term management, or any other restoration, enhancement, or mitigation work specified therein, provided such work is conducted in accordance with such approved plan.

11. Grantor reserves to itself, its successors or assigns, all rights as owners of the Property, including the right to engage in all uses of the Conserved Area not inconsistent with the purpose and terms of this Declaration.

12. Grantor shall provide XTO and Third Parties written notice of any transfer or change in ownership of, or of the execution of any subsequent easement affecting, any portion of the Conserved Area, including but not limited to the name and address of the new owner at least thirty (30) days prior to the transfer or change in ownership, or execution of such easement.

13. Grantor agrees that the terms, conditions, restrictions and purposes of this Declaration will be inserted in any subsequent deed, subdivision deed, lease, sub-lease or other legal instrument by which Grantor divests itself of any interest in any portion of the Conserved Area. Notwithstanding the failure of Grantor to include the terms and restrictions of this instrument, it shall run with the land and be binding on all heirs, successors and assigns.

14. Notwithstanding anything contained herein to the contrary, any modification or termination of this Declaration shall require the prior written approval of Third Parties. Amendments to this Declaration must be in writing, and must be consistent with the conservation purposes of this Declaration. Grantor shall record any modification or termination of this Declaration in the Land Records of the county or counties where the Conserved Area is located within sixty (60) days of executing such a modification or termination. Grantor shall provide XTO and Third Parties with proof of recordation within thirty (30) days of recording by the County Clerk.

15. For any modification, transfer, conveyance, or assignment accomplished under Paragraph 12, Grantor shall amend this instrument by preparing and submitting:

    a. A revised plan and metes and bounds description for the area to be preserved under the Declaration (hereinafter the "Modification Documents"); and

    b. An Amended Declaration of Deed Restrictions that reflects the modifications to the original Declaration, the justification for the modification, and that also includes the deed book and page of the title deed for the property or properties subject to the modified Declaration set forth in the Modification Documents.

16. Grantor shall record the documents listed in Paragraph 15, above, in the same manner and place as this original Declaration was recorded.

17. Miscellaneous.

    a. The laws of the State of West Virginia shall govern the interpretation and performance of this Declaration.

    b. If any provision of this Declaration or the application thereof to any person or circumstance is found to be invalid, the remainder of the provisions of this Declaration, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.

    c. Should there be more than one Grantor, the obligations imposed by this Declaration upon each Grantor shall be joint and several.

    d. The covenants, terms, conditions and restrictions of this Declaration shall continue as a servitude running in perpetuity with the Conserved Area.

    e. The captions in this Declaration have been inserted solely for convenience of reference and are not a part of this Declaration and shall have no effect upon construction or interpretation.

    f. The covenants, terms, conditions, restrictions and purposes imposed with this Declaration shall not only be binding upon Grantor but also upon its agents, personal representatives, executors, assigns and all other successors to it in interest, and shall continue as a servitude running in perpetuity with the Conserved Area.

18. Any notice, demand, request, consent, approval or communication under this Declaration shall be sent by certified mail, return receipt requested or reliable overnight courier, addressed as follows:

    To Grantor:

    _____
    _____
    _____

    To XTO:

    _____
    _____
    _____

To Third Parties:
TO EPA:

Pamela J. Lazos
Senior Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency
Region III
MC 3RC20
1650 Arch St.
Philadelphia, PA 19103-2029

Associate Director, Office of Environmental Programs
Environmental Assessment and Innovation Division
United States Environmental Protection Agency
Region III
MC 3EA40
1650 Arch St.
Philadelphia, PA 19103-2029

TO THE CORPS:

Dana M. Adipietro
Assistant District Counsel
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

Jon Coleman
Chief, Southern Section, Regulatory Branch
U.S. Army Corps of Engineers
Pittsburgh District
1000 Liberty Ave., 22nd Floor
Pittsburgh, PA 15222

TO WVDEP:

Chief Inspector
Environmental Enforcement
West Virginia Department of Environmental Protection
601 57th St.
Charleston, WV 25304

Chief

Office of Oil and Gas
West Virginia Department of Environmental Protection
601 57th St.
Charleston, WV 25304

19. A party may change the address or person to whom notices to it are required to be given by notice given in the manner above provided.

IN WITNESS WHEREOF, Grantor has set its hand and seal on the day and year first above written, and directs that this instrument be recorded in the office of the [RELEVANT COUNTY].

[GRANTOR]

By:_____
Name:_____
Title:_____

United States, et al. v. XTO Energy Inc. (N.D. W. Va.)

STATE OF _____
COUNTY OF _____

Be it remembered that on this ____ day of _____, 20__, before me, the subscriber, a Notary Public, personally appeared: [NAME] and he thereupon acknowledged that he signed the foregoing instrument in such capacity, and that said instrument is the voluntary act of deed of said [NAME].

_____
Printed Name:_____
A Notary Public of _____

My Commission Expires: _____

EXHIBIT A

CONSERVED AREA