

1 XAVIER BECERRA  
 Attorney General of California  
 2 SUSAN S. FIERING, State Bar No. 121621  
 Supervising Deputy Attorney General  
 3 ROSE B. FUA, State Bar No. 119757  
 HEATHER C. LESLIE, State Bar No. 305095  
 4 Deputy Attorneys General  
 1515 Clay Street, 20<sup>th</sup> Floor  
 5 P.O. Box 70550  
 Oakland, CA 94612-0550  
 6 Telephone: (510) 879-0190  
 Fax: (510) 622-2270  
 7 E-mail: Rose.Fua@doj.ca.gov  
*Attorneys for California Department of Toxic  
 8 Substances Control*

9  
 10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE EASTERN DISTRICT OF CALIFORNIA

12  
 13  
 14 **CALIFORNIA DEPARTMENT OF TOXIC  
 SUBSTANCES CONTROL,**

15 Plaintiff,

16 v.

17 **THE UNITED STATES OF AMERICA,**

18 Defendant.  
 19

2:16-cv-02897-JAM-AC

**CONSENT DECREE**

Judge: John A. Mendez  
 Action Filed: December 9, 2016

20  
 21 **INTRODUCTION**

22 Plaintiff, the Department of Toxic Substances Control (“DTSC”), filed its Complaint for  
 23 Recovery of Response Costs and Declaratory Relief (“Complaint”) on December 9, 2016, in the  
 24 United States District Court for the Eastern District of California (the “Court”), pursuant to  
 25 sections 107(a) and 113(g) of the Comprehensive Environmental Response, Compensation, and  
 26 Liability Act (“CERCLA”), 42 U.S.C. §§ 9607(a) and 9613(g). This Consent Decree embodies  
 27 the settlement reached between DTSC and the Defendant, the United States of America (the  
 28

1 “United States,” on behalf of “Settling Federal Agencies”).

2 The Court, after review of the proposed settlement and consent decree and with the  
3 consent of DTSC and the United States, hereby ORDERS, ADJUDGES, and DECREES as  
4 follows:

5 1. **DEFINITIONS**

6 1.1 All terms used in this Consent Decree that are defined in section 101 of CERCLA, 42  
7 U.S.C. § 9601, shall have the same meaning as set forth in that section.

8 1.2 “DTSC” shall mean DTSC, its predecessors including, but not limited to the Toxic  
9 Substances Control Program of the State of California Department of Health Services, and its  
10 successors.

11 1.3 “Effective Date” is the day on which this Consent Decree is entered as an order of the  
12 Court.

13 1.4 “Matters Addressed” by this Consent Decree are defined as any and all civil liability  
14 of the Settling Federal Agencies, pursuant to CERCLA, or any other statute, regulation, or  
15 common law theory for reimbursement of all or any portion of response costs, past or future,  
16 incurred or to be incurred by DTSC, or by any other entity that is not a party to this Consent  
17 Decree, in response to releases or threatened releases of hazardous substances occurring at, in, or  
18 from the Site prior to the signature of this Consent Decree by the United States. Matters  
19 Addressed does not include any matters identified in Section 7, Reservation of Rights, of this  
20 Consent Decree.

21 1.5 “Response Costs” shall include all costs of “removal,” “remedial action,” or  
22 “response”, incurred or to be incurred by DTSC, or by any third person or entity not a party to  
23 this Consent Decree that incurred costs pursuant to state administrative orders related to this Site,  
24 in response to the release or threatened release of hazardous substances at, in, or from the Site.  
25 Said term shall include, but not be limited to, direct labor costs; contractor, consultant and expert  
26 costs; travel and any other out-of-pocket expenses; the costs of identifying, developing evidence  
27 against, and pursuing claims against persons or entities, alleged to be liable for the release or  
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1 threatened release of hazardous substances at, in, or from the Site; indirect costs; and oversight  
2 costs.

3 1.6. “Settling Federal Agencies” means the Department of Defense, the Department of the  
4 Army, the United States Army Corps of Engineers (“USACE”), and the General Services  
5 Administration.

6 1.7 “Site” means the properties known as 711 and 750 Jackson Street, Benicia, Solano  
7 County, California (identified by Assessor’s Parcel number 0080-14-0440) and 938, 940, 942,  
8 945, 946, 952, and 954 Tyler Street; 963, 965, 967, 969, 971, 973, 977, 979, 981, 983, 985, 989,  
9 and 991 Lincoln Street; and 900 and 954 Jackson Street, Benicia, Solano County, California  
10 (identified by Assessor’s Parcel numbers 0080-28-0010, 0080-28-0030, 0080-28-0040, 0080-28-  
11 0050) and all locations where hazardous substances released at, in, or from those addresses may  
12 come to be located in the future.

13 2. **RECITALS**

14 2.1 DTSC is the California state agency with primary jurisdiction over the response to the  
15 release and threatened release of hazardous substances at, in, or from the Site.

16 2.2 By and through its Complaint, DTSC seeks to recover jointly and severally from the  
17 United States all costs it has incurred in response to releases and/or threatened releases of  
18 hazardous substances at, in, or from the Site, pursuant to section 107(a) of CERCLA, 42 U.S.C. §  
19 9607(a). DTSC also seeks a declaratory judgment that the United States is jointly and severally  
20 liable for all additional costs incurred by DTSC in response to the releases and/or threatened  
21 releases of hazardous substances at, in, or from the Site pursuant to section 113(g)(2) of  
22 CERCLA, 42 U.S.C. § 9613(g)(2).

23 2.3 In its Complaint, DTSC alleges, *inter alia*, that: the United States owned and  
24 operated the Site as part of the larger former Benicia Arsenal (“Arsenal”) from 1849 until 1965  
25 and conducted a variety of operations that released hazardous substances, including, but not  
26 limited to, lead and trichloroethylene and its breakdown products, including cis-1,2-  
27 dichloroethene and vinyl chloride, into the environment.  
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1           2.4 The Arsenal, located in Solano County, California, consisted of approximately  
2 2,728.4 acres that was acquired by the United States between 1849 and 1958 for the purpose of  
3 maintaining a military installation. The Arsenal served as the principal depot for ordnance,  
4 issuance (supplies, ammunition, small arms parts, and accessories), the testing of small arms,  
5 mobile and seacoast artillery targets, and vehicle maintenance for the Division of the Pacific.

6           2.5 The United States represents the following: the Arsenal was continuously occupied  
7 by the military from its establishment in 1849 to its closure in 1964. The United States'  
8 deactivation and closure of the Arsenal was completed in 1964. The former Arsenal, with the  
9 exception of 1.33 acres of cemetery retained by the United States, was conveyed by Quit Claim  
10 deeds to the City of Benicia, which subsequently conveyed most of the former Arsenal to Benicia  
11 Industries to develop an industrial business park. Areas within the former Arsenal have been  
12 developed with residences, industry and commercial business operations, and a portion is  
13 operated as a deep water port.

14           2.6 The United States represents the following: beginning in the 1990s, the USACE,  
15 Sacramento District, conducted research and investigations under the Defense Environmental  
16 Restoration Program for Formerly Used Defense Sites, ("DERP-FUDS") to identify chemicals  
17 used in historic military operations of the Arsenal and produced a Records Research Report and  
18 Preliminary Assessment that distinguished locations within the former Arsenal requiring no  
19 further action ("NDAI") from those requiring more investigation. The USACE shared the results  
20 of the investigations with DTSC.

21           2.7 The United States represents the following: USACE subsurface investigations  
22 determined that trichloroethene (TCE) and its degradation products (cis-1,2-dichloroethene, trans-  
23 1,2-dichloroethene and vinyl chloride), polyaromatic hydrocarbons (PAHs), petroleum  
24 hydrocarbons, and lead were contaminants of interest in soil and groundwater in portions of an  
25 area that had been historically and is currently used as an industrial area, designated Area I. As  
26 part of its DERP-FUDS investigation, the USACE determined that post-Army beneficial uses,  
27 including aluminum wheel manufacturing, ironworks and welding activities, and transmission  
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1 repair facilities, among other uses, on the property potentially contributed to the TCE, petroleum  
2 hydrocarbon (including MTBE<sup>1</sup>), lead and other known contamination at the Site.

3 2.8 The Site that is the subject of this litigation consists of several building complexes  
4 and land located in the designated Area I (industrial) portion of the former Arsenal.

5 2.9 In 2014, DTSC issued Imminent and Substantial Endangerment Orders (“ISE  
6 Orders”), as amended, to current and former owners and operators at the Site.

7 2.10 On or about December 9, 2016, DTSC initiated the above-captioned case, seeking  
8 cost recovery and declaratory relief under CERCLA sections 107(a) and 113(g), 42 U.S.C. §§  
9 9607 and 9613.

10 2.11 Unless expressly stated otherwise, DTSC and the United States represent and  
11 acknowledge that, in deciding whether to enter this Consent Decree, they have not relied on any  
12 statement of fact, statement of opinion, or representation, express or implied, made by any other  
13 party to this Consent Decree other than the investigatory reports known to DTSC and the Settling  
14 Federal Agencies and DTSC’s estimate of past and future costs for this Site. DTSC and the  
15 United States have investigated the subject matter of this Consent Decree to the extent necessary  
16 to make a rational and informed decision to execute it and each has had the opportunity to consult  
17 with independent counsel.

18 2.12 DTSC and the United States agree that settlement without further litigation and  
19 without the admission or adjudication of any issue of fact or law is the most appropriate means of  
20 resolving this action. This Consent Decree was negotiated and executed by DTSC and the United  
21 States in good faith to avoid prolonged litigation. DTSC and the United States, moreover, have  
22 negotiated this Consent Decree to further the public interest and to protect human health and the  
23 environment.

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27 <sup>1</sup> MTBE, methyl tert-butyl ether, is a gasoline additive that was first used in the United  
28 States in 1979 as an octane enhancer. *See, e.g.*, <https://www.cancer.org/cancer/cancer-causes/mtbe.html>. Thus, the United States contends that MTBE contamination could not have occurred during the Army’s occupation of the Benicia Arsenal, which ended in 1964.

1           3.     **JURISDICTION**

2           This Court has jurisdiction over this action and over the United States pursuant to 28  
3 U.S.C. § 1331 and 42 U.S.C. § 9613(b). Venue is proper in the Eastern District of California  
4 pursuant to 28 U.S.C. § 1331 and 42 U.S.C § 9613(b). Further, this Court has the authority to  
5 enter this Consent Decree as a decree of the Court.

6           4.     **SETTLEMENT OF DISPUTED CLAIMS**

7           4.1    This Consent Decree represents a fair, reasonable, and equitable settlement of the  
8 matters addressed herein.

9           4.2    For the purposes of this Consent Decree, the United States admits none of the  
10 allegations of the Complaint. Nothing in this Consent Decree shall be construed as an admission  
11 of any issue of law or fact or of any violation of law. Notwithstanding the foregoing, the United  
12 States acknowledges its responsibility pursuant to Paragraphs 5, 8, 10.2, and 18 of this Consent  
13 Decree and shall not deny such responsibility in any proceeding brought by DTSC to enforce this  
14 Consent Decree.

15          4.3    Except as set forth in Section 8 of this Consent Decree, nothing in this Consent  
16 Decree shall prejudice, waive, or impair any right, remedy, or defense that the United States may  
17 have in any other or further legal proceeding.

18          4.4    In an effort to resolve past and future costs, DTSC provided to the United States a  
19 summary of past costs. DTSC and the United States negotiated about the amount of the past costs  
20 and agreed to a total of \$595,100.54 through April 2017. For future costs, DTSC used the  
21 Remedial Action Cost Engineering and Requirements (“RACER”) software, which was  
22 developed by the United States Environmental Protection Agency (“USEPA”) for estimating  
23 future response costs, and made a bona fide estimate that the potential future costs associated with  
24 the response actions needed to adequately address the known hazardous substances released at the  
25 Site would total \$5,951,477.00. The total of DTSC’s agreed to past costs and estimated future  
26 costs for the Site are \$6,546,577.54.

27          4.5    In order to avoid protracted litigation, including third-party claims identified by the  
28 United States, and to allow response actions to commence without any further delay, DTSC and

1 the United States agreed, pursuant to the terms contained herein, the United States will pay, on  
2 behalf of the Settling Federal Agencies, eighty-four percent (84%) of the agreed upon past and  
3 estimated future costs as a one-time payment. That settlement amount is \$5,499,125.13. In  
4 addition, in order to ensure that the funding can adequately address the potential for future cost  
5 overruns and to obtain full contribution protection, the United States has agreed to pay a fifteen  
6 percent (15%) premium on the estimated future costs resulting in an additional premium payment  
7 of \$892,721.55. Under this Consent Decree, the total settlement amount to be paid by the United  
8 States, on behalf of the Settling Federal Agencies associated with the former Arsenal, to DTSC is  
9 \$6,391,846.68.

10 **5. PAYMENTS BY THE UNITED STATES**

11 5.1 As soon as reasonably possible after the Effective Date, the United States, on behalf  
12 of the Settling Federal Agencies, shall pay to DTSC the sum of \$6,391,846.68. The payment to  
13 DTSC shall be made on or within sixty (60) days from the Effective Date of this Agreement. If  
14 the United States on behalf of the Settling Federal Agencies does not pay this amount in full on or  
15 within sixty (60) days from the Effective Date, then interest shall begin to accrue on the unpaid  
16 balance. Interest shall accrue at the rate specified for interest on investments of the Hazardous  
17 Substance Superfund established under subchapter A of chapter 98 of Title 26 of the United  
18 States Code, commencing on the 61<sup>st</sup> day after the Effective Date and accruing through the date  
19 of the payment.

20 5.2 The payments described in Section 5.1 will be made by electronic fund transfer.

21 Copies of all payments or notices of electronic payments shall be sent to:

22 Charlie Ridenour  
23 Branch Chief, Cleanup Program – Sacramento Office  
24 Department of Toxic Substances Control  
25 8800 Cal Center Drive  
26 Sacramento, CA 95826  
27 Charlie.Ridenour@dtsc.ca.gov

28 Rose B. Fua  
Deputy Attorney General  
California Department of Justice  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612-0550

1 Rose.Fua@doj.ca.gov

2 5.3 DTSC and the United States recognize and acknowledge that the payment obligations  
3 of the United States on behalf of the Settling Federal Agencies under this Consent Decree can  
4 only be paid from appropriated funds legally available for such purpose. Nothing in this Consent  
5 Decree shall be interpreted or construed as a commitment or requirement that the United States  
6 obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other  
7 applicable provision of law.

8 6. **COVENANT NOT TO SUE BY DTSC**

9 Except as specifically provided for in Section 7 below, and except as may be  
10 necessary to enforce the terms of this Consent Decree, as of the Effective Date, DTSC covenants  
11 not to sue the Settling Federal Agencies for the Matters Addressed by this Consent Decree.

12 7. **RESERVATION OF RIGHTS**

13 7.1 The Covenant Not to Sue set forth in Section 6 above does not pertain to any matters  
14 other than those expressly specified therein. DTSC reserves, and this Consent Decree is without  
15 prejudice to all rights and claims of DTSC against the Settling Federal Agencies and any other  
16 person with respect to all other matters, including, but not limited to, the following:

- 17 (a) Failure of the United States to meet its obligations under Paragraphs 5, 8, 10.2,  
18 and 18 of this Consent Decree;
- 19 (b) Damage to natural resources, as defined in section 101(6) of CERCLA, 42  
20 U.S.C. § 9601(6), including all costs incurred by any natural resources trustees;
- 21 (c) Liability resulting from the United States' introduction of any hazardous  
22 substance, pollutant, or contaminant to the Site after the signature of this Consent  
23 Decree by the United States;
- 24 (d) Liability resulting from acts by the United States after the signature of this  
25 Consent Decree by the United States that cause the exacerbation of the hazardous  
26 substance conditions existing at or from the Site;
- 27 (e) Liability based on the ownership or operation of the Site by the United States
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1 when such ownership or operation commences after the signature of this Consent  
2 Decree by the United States;

3 (f) Liability arising from the past, present, or future disposal of hazardous  
4 substances at sites or locations other than the Site; and

5 (g) Criminal liability.

6 7.2. Except as expressly provided in this Consent Decree, nothing in this Consent Decree  
7 is intended to nor shall it be construed to preclude DTSC from exercising its existing authority  
8 under any law, statute, or regulation, and nothing in this Consent Decree is intended, nor shall it  
9 be construed, to preclude any other state agency, department, board, or entity or any federal  
10 entity, including the United States Environmental Protection Agency or a federal natural resource  
11 trustee, from exercising its authority under any law, statute, or regulation.

12 7.3. Notwithstanding any other provision in the Consent Decree, DTSC reserves the right  
13 to institute proceedings in this action or in a new action against the United States seeking any  
14 remedy allowed by law, if: conditions previously unknown to DTSC, for which the United States  
15 is potentially liable under any statute or law, are discovered at the Site after the Effective Date  
16 and these conditions indicate that (1) a previously unknown hazardous substance has been or is  
17 being released at the Site, there is a threat of such release into the environment, or previously  
18 unknown ordnance or radiological material are discovered at the Site and (2) the response  
19 performed at the Site is not protective of human health and the environment.

20 8. **COVENANT NOT TO SUE BY THE UNITED STATES ON BEHALF OF THE**  
21 **SETTLING FEDERAL AGENCIES**

22 The United States on behalf of the Settling Federal Agencies covenants not to sue,  
23 and agrees not to assert any claims or causes of action against, DTSC, or its contractors,  
24 employees, or attorneys for any costs or damages the Settling Federal Agencies might incur or for  
25 any injuries or losses the Settling Federal Agencies might suffer as a result of their obligations  
26 under this Consent Decree. The United States on behalf of the Settling Federal Agencies further  
27 covenants not to sue, and agrees not to assert any claims or causes of action against, DTSC, or its  
28 contractors, employees, or attorneys, for any and all civil liability for reimbursement of all or any

1 portion of the Settling Federal Agencies' response costs, past or future, declaratory relief,  
2 injunctive relief, or any other relief under CERCLA with regard to releases or threatened releases  
3 of hazardous substances at, in, or from the Site.

4 9. **EFFECT OF THE CONSENT DECREE**

5 9.1 This Consent Decree constitutes the resolution of the Settling Federal Agencies'  
6 alleged liability with respect to the Matters Addressed in a judicially approved settlement within  
7 the meaning of section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2).

8 9.2 Accordingly, upon entry of this Consent Decree as a consent decree of the Court, and  
9 provided that the United States, on behalf of the Settling Federal Agencies, performs all of its  
10 obligations under this Consent Decree, the Settling Federal Agencies shall be entitled, as of the  
11 Effective Date, to protection against all claims for contribution, pursuant to section 113(f)(2) of  
12 CERCLA, 42 U.S.C. § 9613(f)(2), for the Matters Addressed by this Consent Decree, to the  
13 fullest extent of the law.

14 9.3 Except as specifically provided in this Consent Decree, nothing in this Consent  
15 Decree is intended, nor shall be construed, to waive, release, or otherwise affect any right, claim,  
16 or cause of action held by any party to this Consent Decree against, or to provide a covenant not  
17 to sue to, any third person not a party to this Consent Decree, or to in any way limit, restrict, or  
18 impair the right of any party to this Consent Decree to assert rights, claims, causes of action, and  
19 defenses against any third person not a party to this Consent Decree, including without limitation,  
20 the right to seek payment, reimbursement, contribution, or indemnity from such persons for  
21 obligations incurred or to be incurred, or actions taken or to be taken, under this Consent Decree.  
22 Except as specifically provided in this Consent Decree, DTSC and the United States expressly  
23 reserve any rights, claims, or causes of action they might have against any third persons not a  
24 party to this Consent Decree.

25 9.4 This Consent Decree is contingent and dependent on all of its terms being approved  
26 and entered by the Court. If the Court does not approve and enter this Consent Decree, DTSC  
27 and the United States reserve all their respective rights, remedies, and defenses.  
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1           9.5 This Consent Decree is not intended, nor shall it be construed, to limit or otherwise  
2 affect DTSC's right to select a response action for the Site.

3           10. **NOTIFICATION**

4           10.1 Notification to or communication between DTSC and the United States as required or  
5 provided for in this Consent Decree shall be addressed as follows:

6           As to DTSC:

7           Charlie Ridenour  
8           Branch Chief, Cleanup Program – Sacramento Office  
9           Department of Toxic Substances Control  
            8800 Cal Center Drive  
            Sacramento, CA 95826

10          Rose B. Fua  
11          Deputy Attorney General  
12          California Department of Justice  
13          1515 Clay Street, 20th Floor  
            P.O. Box 70550  
            Oakland, CA 94612-0550

14          As to the United States:

15          Letitia J. Grishaw,  
16          Chief, Environmental Defense Section  
17          United States Department of Justice  
            P.O. Box 7611  
            Washington, D.C. 20044-7611

18          Mark A. Rigau  
19          Trial Attorney  
20          United States Department of Justice  
            301 Howard Street, Suite 1050  
            San Francisco, CA 94105

21  
22          10.2 Upon 10 days written notice to the other party, a party to this Consent Decree may  
23 substitute another person for an addressee named above to receive notifications or  
24 communications as required or provided for in this Consent Decree.

25          11. **MODIFICATION OF THE CONSENT DECREE**

26                 The Consent Decree may only be modified upon the written agreement of DTSC and  
27 the United States and the approval of the Court or, following entry of this Consent Decree, upon  
28 order of the Court after noticed motion by a party to this Consent Decree.

1           12.    **APPLICATION OF THE CONSENT DECREE**

2                   This Consent Decree shall apply to and be binding upon DTSC, the United States and  
3   Settling Federal Agencies, and each of their respective successors and assigns. The provisions of  
4   this Consent Decree shall inure to the benefit of DTSC, the United States and Settling Federal  
5   Agencies, and each of their respective successors and assigns.

6           13.    **INTEGRATION**

7                   This Consent Decree, including any exhibits and materials incorporated herein by  
8   reference, constitutes the entire agreement between DTSC and the United States, on behalf of the  
9   Settling Federal Agencies, and may not be amended or supplemented except as provided for in  
10  this Consent Decree.

11          14.    **RETENTION OF JURISDICTION**

12                   The Court shall retain jurisdiction of this matter for the purpose of interpreting and  
13  enforcing the terms of this Consent Decree.

14          15.    **EXECUTION OF DECREE**

15                   This Consent Decree may be executed in two or more counterparts, each of which  
16  shall be deemed an original, but all of which together shall constitute one and the same  
17  instrument.

18          16.    **INTERPRETATION**

19                   This Consent Decree shall be deemed to have been drafted equally and by all parties  
20  hereto.

21          17.    **ATTORNEYS' FEES AND COSTS**

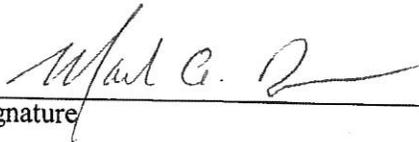
22                   Except as provided in paragraph 18, as to each other, DTSC and the United States on  
23  behalf of Settling Federal Agencies, shall bear their own costs, attorneys' fees, and all other costs  
24  of litigation. This paragraph shall have no effect on the rights of DTSC, the United States, or the  
25  Settling Federal Agencies to recover these fees or costs from any other party.



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**THE UNITED STATES OF AMERICA:**

Dated: December 15, 2017

  
Signature

MARK A. RIGAU  
Name

Trial Attorney  
Title

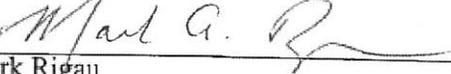
**APPROVED AS TO FORM:**

Dated: \_\_\_\_\_

Rose B. Fua  
Heather C. Leslie  
Deputy Attorneys General  
Attorneys for the California Department of  
Toxic Substance Control

Dated: December 15, 2017

JEFFERY H. WOODS  
Acting Assistant Attorney General  
Environment and Nat. Res. Division  
United States Department of Justice

  
Mark Rigau  
Trial Attorney  
Environment and Nat. Res. Division  
United States Department of Justice  
Attorney for the United States

**IT IS SO ORDERED.**

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**THE UNITED STATES OF AMERICA:**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

**APPROVED AS TO FORM:**

Dated: 12/15/17

  
\_\_\_\_\_  
Rose B. Fua  
Heather C. Leslie  
Deputy Attorneys General  
Attorneys for the California Department of  
Toxic Substance Control

Dated: \_\_\_\_\_

JEFFERY H. WOODS  
Acting Assistant Attorney General  
Environment and Nat. Res. Division  
United States Department of Justice

\_\_\_\_\_  
Mark Rigau  
Trial Attorney  
Environment and Nat. Res. Division  
United States Department of Justice  
Attorney for the United States

**IT IS SO ORDERED.**

1 Dated: \_\_\_\_\_

2 UNITED STATES DISTRICT COURT  
3 JUDGE JOHN A. MENDEZ

4 OK201595002  
5 Draft Consent Decree to US (9-8-17)

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