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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN JOSE DIVISION

17  
 18 UNITED STATES OF AMERICA and the  
 STATE OF CALIFORNIA, by and through the  
 19 CALIFORNIA DEPARTMENT OF FISH AND  
 GAME and CALIFORNIA STATE LANDS  
 20 COMMISSION,

21 Plaintiffs,

22 v.

23 County of Santa Clara, Santa Clara Valley Water  
 District, City of San Jose, Midpeninsula Regional  
 24 Open Space District, Myers Industries, Inc.,  
 Buckhorn, Inc., Guadalupe Rubbish Disposal  
 25 Company, Inc., and Sunoco, Inc.,

26 Defendants.

27 AND RELATED COUNTER, CROSS, AND  
 28 THIRD PARTY ACTIONS.

United States et al. v.  
 County of Santa Clara, et al., No. CV

No. CV  
 CONSENT DECREE

Consent Decree

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 NOV 16 2005  
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 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE

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 NORTHERN DISTRICT OF CALIFORNIA

**PVT**

NOV 17 2005

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1 This Consent Decree ("Decree") is made and entered into by and among the United States  
2 of America ("the United States"), on behalf of itself and the Department of the Interior ("DOI"),  
3 and the State of California ("State"), by and through the California Department of Fish and Game  
4 ("CDFG") and the California State Lands Commission ("SLC"), as trustees for State Natural  
5 Resources (collectively, the "Plaintiffs"), and certain of the defendants in this action (collectively,  
6 the "Settling Defendants").

7 **I. INTRODUCTION**

8 **A.** The United States, on behalf of DOI in its capacity as natural resource trustee, and  
9 the CDFG and SLC in their capacities as natural resource trustees for Natural Resources of the  
10 State of California (collectively, the "Trustees"), concurrently with the filing of this Consent  
11 Decree, have filed Complaints ("Complaints") in this action under Section 107 of the  
12 Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended  
13 ("CERCLA"), 42 U.S.C. § 9607, and various State laws, seeking, *inter alia*, recovery of damages,  
14 including damage assessment costs, for injury to, destruction of, and loss of natural resources  
15 resulting from releases into the environment of inorganic and organic mercury and hazardous  
16 substances contained in mining waste (hereafter, collectively, "Hazardous Substances").

17 **B.** The Complaints allege that the Defendants (i) are or were owners or operators of  
18 facilities in the Guadalupe River Watershed, as defined herein, or (ii) are or were persons who  
19 arranged for the disposal of Hazardous Substances at or from facilities in the Guadalupe River  
20 Watershed, or (iii) are persons who are successors to or otherwise legally responsible for the acts  
21 and omissions of persons who were owners or operators of facilities in the Guadalupe River  
22 Watershed or who arranged for disposal of Hazardous Substances at facilities in the Guadalupe  
23 River Watershed, from which Plaintiffs allege there have been releases of Hazardous Substances  
24 into the environment.

25 **C.** In February 2000, DOI issued a Preassessment Screen Determination ("PSD")  
26 regarding injuries to natural resources arising from historical and continuing releases of mercury,  
27 and of other metals resulting from or associated with historic mining within the Guadalupe River  
28 Watershed. In that PSD, DOI determined that sufficient information existed for it to pursue a

1 claim for Natural Resource Damages for such releases, including damages for injury to soil,  
2 surface water, and sediment in the Guadalupe River Watershed, as well as for injuries to  
3 biological resources using those resources, including vegetation, invertebrates, amphibians, fish  
4 species, and piscivorous birds. DOI alleges that it took these actions pursuant to CERCLA,  
5 DOI's Natural Resource Damages regulations, 43 C.F.R. Part 11 (1998), and Executive  
6 Order 12580, as amended by Executive Order 13016.

7       D. The Trustees (other than the SLC) and some of the Settling Defendants entered  
8 into a Cooperative Agreement, dated September 21, 2001, pursuant to which they reviewed  
9 available data and cooperatively assessed the nature and extent of injuries, if any, to natural  
10 resources arising from the alleged releases (the "Cooperative Process"). To expedite, and to  
11 otherwise reduce the cost of, performing the assessment, the parties to the Cooperative Process  
12 agreed to use the Resource and/or Habitat Equivalency (REA/HEA) methodology. The Regional  
13 Water Quality Control Board for the San Francisco Bay Region ("Regional Board") participated  
14 in early meetings of the Trustees and PRPs, but it did not sign the Cooperative Agreement and is  
15 not asserting any rights as a trustee in connection with this action. The Regional Board staff are  
16 familiar with the conditions addressed by this Consent Decree, have reviewed the terms of this  
17 Consent Decree, and have notified the Office of the State Attorney General that the Regional  
18 Board will not file an action for natural resource damages with respect to the contamination  
19 alleged in this action. The letter of the Regional Board is attached hereto as Exhibit A.

20       E. Much of the data upon which the PSD was based was collected prior to 1997. In  
21 entering this Decree, Plaintiffs recognize that Santa Clara County has since conducted, with  
22 financial contribution from Myers Industries, Inc. and Buckhorn, Inc., substantial remediation  
23 (the "Remediation") of the mercury mining contamination at the New Almaden mining district,  
24 under the oversight of the State of California Department of Toxic Substances Control ("DTSC")  
25 and with input from the Regional Board, as well as federal agencies including the U.S. Fish and  
26 Wildlife Service. The Remediation addressed mining wastes containing mercury located within  
27 and around the original mining area. In the first phase of the Remediation, such mining wastes  
28 from several areas within the Hacienda Furnace Yard were excavated, consolidated, and capped

1 in the Hacienda Furnace Yard area. In the second phase, such mining wastes were excavated,  
2 consolidated, and capped in the Mine Hill Area. Similarly, the Santa Clara Valley Water District  
3 has carried out recent capital projects and maintenance activities in and along the Guadalupe  
4 River and its tributaries that have included the removal of substantial quantities of sediment and  
5 soil contaminated by mining wastes containing mercury and other Hazardous Substances.

6 **F.** The Plaintiffs also recognize that there are multiple sources of Hazardous  
7 Substances in the Guadalupe River Watershed, including multiple sources for which the Settling  
8 Defendants allege they have no legal responsibility. In the Cooperative Process, certain  
9 participating Parties in a position to do so have sought to coordinate their assessment with other  
10 activities and processes addressing other sources of mercury in the Guadalupe River Watershed,  
11 including the development of Total Maximum Daily Loads ("TMDLs") under the Clean Water  
12 Act (see 33 USC § 1313(d)) through, inter alia, the San Francisco Bay and Guadalupe River  
13 Watershed Mercury Total Maximum Daily Load efforts and the Mercury Load Reduction Project  
14 ("Guadalupe Mercury TMDL"). Issues relating to the control and reduction of releases of  
15 Hazardous Substances and/or the enhancement of natural resources within the Guadalupe River  
16 Watershed are also being addressed through the Santa Clara Valley Urban Runoff Pollution  
17 Prevention Program and in other cooperative processes, including the Regional Board's  
18 Watershed Management Initiative for the Santa Clara Basin, the Fisheries and Aquatic Habitat  
19 Collaborative Effort, and the Guadalupe River Flood Control Project Collaborative (collectively,  
20 "Other Processes").

21 **G.** The projects described in Paragraph 7, below, will address all known significant  
22 mining waste deposits remaining within and about the Almaden Quicksilver County Park and are  
23 actions principally to be undertaken to restore or rehabilitate the injured resources that are the  
24 subject of the Complaints. The balance of the Work that will be undertaken by the Settling  
25 Defendants constitutes the replacement or acquisition of equivalent resources providing the same  
26 or substantially equivalent services as those that had been provided by the injured natural  
27 resources (consistent with 43 C.F.R. § 11.82).

28 **H.** CERCLA and its implementing regulations require that the Trustees seek input

1 from the public before implementing a restoration plan to address injured natural resources.  
2 Consequently, the Parties acknowledge that entry of the Decree after lodging will be deferred to  
3 allow the time necessary for the Trustees to obtain public comment on this Decree and on a draft  
4 restoration plan that proposes the Work described in Section VI of this Decree, as further  
5 provided in Section XIX of this Consent Decree. A copy of the draft restoration plan is attached  
6 as Exhibit B to this Consent Decree.

7 **I.** The Trustees have undertaken a restoration planning process to determine the  
8 restoration projects that will most effectively restore or compensate for the lost use of the injured  
9 resources. The details for specific projects are contained in the draft restoration plan at Sections  
10 4.3.1.1 through 4.3.2.3 and are summarized in Section VI of this Consent Decree. A final  
11 restoration plan will be adopted by the Trustees after final approval of this Consent Decree by the  
12 Court, after provision of notice, opportunity for public input, and consideration of public  
13 comments on the Decree and attached draft restoration plan.

14 **J.** This settlement is made in good faith after arm's-length negotiations. The Parties  
15 agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been  
16 negotiated by the Parties in good faith, that settlement of this matter and entry of this Decree will  
17 avoid complicated and potentially costly litigation between the Parties, is the most appropriate  
18 means to resolve the matters covered herein, and is fair, reasonable, consistent with the purposes  
19 of CERCLA, and in the public interest.

20 NOW, THEREFORE, with the consent of the Parties to this Decree, it is hereby  
21 ORDERED, ADJUDGED AND DECREED:

## 22 **II. JURISDICTION AND VENUE**

23 1. The Plaintiffs have alleged that this Court has jurisdiction over the subject matter  
24 of this action pursuant to 28 U.S.C. §§ 1331, 1345, and 1367; Sections 107 and 113(b) of  
25 CERCLA, 42 U.S.C. §§ 9607, 9613(b); California Fish and Game Code sections 2104, 5650, and  
26 5650.1; and the common law of nuisance; that the Court has personal jurisdiction over the  
27 Settling Defendants; and that venue lies in this District pursuant to 28 U.S.C. § 1391(b), (c) and  
28 1395(a) and Section 113(b) of CERCLA. For purposes of this Consent Decree, only, the Settling

1 Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to  
2 venue in this District.

3 **III. APPLICABILITY OF DECREE**

4 2. The obligations of this Consent Decree apply to and are binding upon the Plaintiffs  
5 and their departments, agencies and instrumentalities, and upon the Settling Defendants and their  
6 respective successors and assigns.

7 **IV. DEFINITIONS**

8 3. This Decree incorporates the definitions set forth in Section 101 of CERCLA, 42  
9 U.S.C. § 9601, and in Section 11.14 of the Natural Resource Damages (“NRD”) regulations, 43  
10 CFR § 11.14. In addition, whenever the following terms are used in this Decree, they shall have  
11 the following meanings:

12 A. “Damage Assessment Costs” shall mean all costs associated with the planning,  
13 design, implementation, and oversight of the Trustees’ damage assessment process, which  
14 addresses the extent and quantification of the injury to, destruction of, or loss of Natural  
15 Resources and the services provided by these resources resulting from the alleged releases of  
16 Hazardous Substances, and with the planning of restoration or replacement of such Natural  
17 Resources and the services provided by those resources, or the planning of the acquisition of  
18 equivalent resources or services, and any other costs necessary to carry out the Trustees’  
19 responsibilities with respect to those Natural Resources injuries resulting directly or indirectly  
20 from the alleged releases of Hazardous Substances, including all related enforcement costs.

21 B. “Date of Entry of this Decree” shall mean the date on which the District Court has  
22 approved and entered this Decree as a judgment.

23 C. “Date of Final Approval of this Decree” shall mean (1) the Date of Entry of this  
24 Decree, or (2) if an appeal is taken after entry, the date on which the District Court’s judgment is  
25 affirmed and there is no further right to appellate review.

26 D. “Date of Lodging of this Decree” shall mean the date that this Decree is lodged  
27 with the Court, subject to the public comment period referred to in Section XIX of this Decree.

28 E. “Natural Resource Damages” shall mean all damages, including loss of use,

1 restoration costs, resource replacement costs, or equivalent resource values, Damage Assessment  
2 Costs, and any other costs or losses that have been incurred in the past or will be incurred in the  
3 future by the United States, the State of California, or any other person pursuant to Trustee  
4 approval, authorization, or direction, with respect to injury to, destruction of, or loss of any and  
5 all natural resources resulting either directly or indirectly from the releases of Hazardous  
6 Substances in the Guadalupe River Watershed, including any continuing releases.

7 F. "Natural Resources" shall have that meaning set forth in Section 101(16) of  
8 CERCLA, 42 U.S.C. § 9601(16).

9 G. "Guadalupe River Watershed" for purposes of this Decree shall mean (i) the  
10 Guadalupe River and all its tributary streams, including without limitation Alamitos Creek,  
11 Guadalupe Creek, and Arroyo Calero, and the associated tributaries, reservoirs, impoundments,  
12 banks and sediments of each of the foregoing; (ii) all areas that drain water or sediment into the  
13 waters described in (i); and (iii) that area of San Francisco Bay south of the Dumbarton Bridge.

14 H. "Interest" shall mean interest at the rate specified for interest on investments of the  
15 EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on  
16 October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest  
17 shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change  
18 on October 1 of each year.

19 I. "Parties" shall mean the United States; the State of California, by and through the  
20 CDFG and SLC; and the Settling Defendants.

21 J. "Settling Defendants" shall mean the Defendants who have signed this Consent  
22 Decree as described below:

- 23 (1) The County of Santa Clara ("County") shall mean the County  
24 of Santa Clara, located in the State of California, and its  
25 departments, agencies and instrumentalities;
- 26 (2) Santa Clara Valley Water District ("SCVWD") shall mean the  
27 Santa Clara Valley Water District, located in the State of  
28 California, and its departments, agencies and instrumentalities;

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- (3) Midpeninsula Regional Open Space District ("MROSD") shall mean the Midpeninsula Regional Open Space District, located in the State of California, and its departments, agencies and instrumentalities;
- (4) The City of San Jose shall mean the City of San Jose, located in the State of California, and its departments, agencies and instrumentalities;
- (5) Guadalupe Rubbish Disposal Company, Inc., shall include its parent corporations, consisting of USA Waste of California, Inc., Waste Management Holdings, Inc., and Waste Management, Inc.; and incorporators and former officers, directors and/or shareholders of Guadalupe Rubbish Disposal Company, Inc., consisting of James L. Zanardi, Joseph A. Zanardi, Dennis C. Varni, David K. Cecich, James L. Zanardi and Randi J. Zanardi, individually and as Co-Trustees of the Zanardi Living Trust dated March 29, 1990; Joseph A. Zanardi and Elizabeth E. Zanardi, individually and as Co-Trustees of the Zanardi Living Trust dated September 18, 1989; Dennis C. Varni and Kathleen D. Varni, individually and as Co-Trustees of the Varni Living Trust dated November 13, 1988; and Lori R. Cecich and David K. Cecich, individually and as Co-Trustees of The Cecich Family 1986 Trust dated November 18, 1986;
- (6) Myers Industries, Inc. ("Myers") (an Ohio corporation) and its officers, directors, and employees acting in their capacities as such;
- (7) Buckhorn, Inc. ("Buckhorn") (an Ohio Corporation) and its officers, directors and employees acting in their capacities as

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such; and

(8) Sunoco, Inc. ("Sunoco").

K. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

L. "State of California" shall mean the CDFG and SLC.

M. "Work" shall mean implementation by the Settling Defendants of (i) those activities that are generally described in Section VI, Paragraphs 6–11, of this Consent Decree and more particularly described in Exhibit B to this Consent Decree, at Sections 4.3.1.1. through 4.3.2.3, which Sections are hereby incorporated as a part of this Decree, or (ii) any project or in lieu payment authorized by Paragraph 7.e of this Decree.

**V. PAYMENTS**

4. Sunoco shall pay Plaintiffs \$85,000 within ten (10) business days of the Date of Entry of this Consent Decree, such payment to be made to DOI pursuant to the provisions of Paragraph 5 of this Decree.

5. Sunoco shall make payment to DOI by electronic fund transfer ("EFT") to the U.S. Department of Justice in accordance with instructions to be provided to Sunoco following lodging of the Decree by the Financial Litigation Unit of the U.S. Attorney's Office for the Northern District of California. At the time of payment, Sunoco shall send written notice of payment and a copy of any transmittal documentation (which should reference DOJ case number 90-11-2-07048) to the Parties in accordance with Section XXI of this Decree and to:

Charles McKinley, Esq.  
Office of the Solicitor  
U.S. Department of the Interior  
1111 Jackson Street, Suite 735  
Oakland, California 94607

and

Bruce Nesslage  
DOI Restoration Fund Manager  
1849 "C" Street, N.W.  
Mail Stop 4449  
Washington, D.C. 20240

1 The EFT and transmittal letters shall reflect that the payment is being made to the "Natural  
2 Resources Damage Assessment and Restoration Fund, Account No. 14X5198." DOI will assign  
3 those funds a special project number to allow the funds to be maintained as a segregated account  
4 (the "Guadalupe River Watershed NRD Account") within the DOI Natural Resource Damage  
5 Assessment and Restoration Fund.

6 **VI. PERFORMANCE OF THE WORK**

7 6. The Settling Defendants having responsibilities relating to each project in the  
8 Work described below (Responsible Settling Defendants) shall finance and, as specified in more  
9 detail below, commence and complete performance of the Work in accordance with the terms and  
10 schedules contained in Sections 4.3.1.1 through 4.3.2.3 of Exhibit B, and any design and work  
11 plans approved by the Trustees, which terms, schedules, and design and work plans are  
12 incorporated in and shall be enforceable under this Decree.

13 7. Hacienda Furnace Yard and Jacques Gulch Projects

14 a. To restore or rehabilitate allegedly injured natural resources, the  
15 Responsible Settling Defendants, as identified more specifically in Subparagraph c, below, shall  
16 properly consolidate and cap onsite those calcine tailings piles identified at or near the Hacienda  
17 Furnace Yard along Alamitos Creek, as more specifically described in Section 4.3.1.1 of Exhibit  
18 B, and further shall remove non-native plants, revegetate with native plants, and otherwise  
19 enhance the riparian habitat in the areas described in that Section ("Hacienda Project").

20 b. To restore or rehabilitate the allegedly injured natural resources, the  
21 Responsible Settling Defendant(s), as identified more specifically in Subparagraph d, below, shall  
22 properly consolidate and cap onsite those calcine tailings piles identified in the area below Mine  
23 Hill known as Jacques Gulch, as more specifically described in Section 4.3.1.2 of Exhibit B, and  
24 further shall remove non-native plants, revegetate with native plants, and otherwise enhance the  
25 riparian habitat in the areas as described in that Section ("Jacques Gulch Project").

26 c. The County shall implement the Hacienda Project. The obligations of  
27 Myers and Buckhorn under Section VI of this Decree shall consist of making financial  
28 contributions to the County's implementation of the Hacienda Project as has been agreed to in a

1 separate agreement between the County and Myers and Buckhorn. The implementation of the  
2 Hacienda Project is contingent on the issuance of permits and approvals for both the Hacienda  
3 and Jacques Gulch Projects as provided in Par. 7.e below. The County, at its option, may  
4 schedule its work on the Hacienda Project to begin only after SCVWD's commencement of on-  
5 site work on the Jacques Gulch Project.

6 d. SCVWD shall implement the Jacques Gulch Project. The obligations of  
7 the County for the Jacques Gulch Project under this Decree shall be to permit the SCVWD access  
8 to those project areas on County property, to permit the consolidation of the subject materials  
9 within the Almaden Quicksilver Park, to maintain and monitor the area of consolidation, without  
10 charge, and as otherwise agreed to between the SCVWD and the County in a separate agreement.  
11 The obligations of Guadalupe Rubbish for the Jacques Gulch Project under this Decree shall  
12 consist of making financial or in-kind contributions to the SCVWD's implementation of the  
13 Jacques Gulch Project, pursuant to a separate agreement between the SCVWD and Guadalupe  
14 Rubbish.

15 e. All Work required under this Paragraph 7 is contingent on approval by the  
16 appropriate State of California and federal agencies of the consolidation and capping of any  
17 excavated material at an appropriate location within the Almaden Quicksilver County Park, and  
18 the issuance of any permits, certifications, and approvals necessary to perform the Work  
19 (including, without limitation, approval of work within the streambed of Alamos Creek,  
20 including temporary diversion of that stream) without mitigation obligations ("Approvals"). If  
21 such Approvals are not obtained for both the Hacienda and Jacques Gulch Projects, the  
22 Responsible Settling Defendants will meet and confer with Plaintiffs to consider (1) alternate  
23 means of implementing the Projects subject to the additional Approval requirements, (2)  
24 alternative projects of comparable cost to the Responsible Settling Defendants and comparable  
25 benefit to the resources in question, or (3) payment of monetary Natural Resource Damages in  
26 lieu of project performance. If the Parties agree that there are comparable alternatives, the  
27 Responsible Settling Defendants shall have the right to select the alternative to be implemented  
28 from among those alternatives. The Responsible Settling Defendants will be entitled to relief

1 under Section XII of this Consent Decree (Force Majeure) for any delay in performance resulting  
2 from a failure to obtain, or a delay in obtaining, any Approval required for the Hacienda or  
3 Jacques Gulch Projects, provided that they have timely submitted applications and other materials  
4 needed to obtain such Approvals as provided in Paragraph 11, below, and provided that the other  
5 requirements of Section XII of this Consent Decree are met.

6 8. Hillsdale Bridge Project. To replace, in part, those lost services resulting from the  
7 alleged injuries to Natural Resources, the City of San Jose ("City") has implemented this project,  
8 as more fully described in Section 4.3.2 of Exhibit B, by removing or having caused to be  
9 removed the concrete barrier to fish passage located at the Hillsdale bridge on the Guadalupe  
10 River and planting the adjacent areas with appropriate native plants.

11 9. Coyote Creek Project

12 a. To further replace, in part, those lost services resulting from the alleged  
13 injuries to Natural Resources, the Responsible Settling Defendant(s), as identified more  
14 specifically in Subparagraph b, below, shall undertake a project to enhance the riparian habitat  
15 along Coyote Creek downstream of Anderson Reservoir, by removing Arundo along a portion of  
16 that stream and re-planting appropriate native plants, as more specifically described in  
17 Section 4.3.2.1 of Exhibit B.

18 b. The SCVWD shall implement the Coyote Creek Project. The obligation of  
19 the County for the Coyote Creek Project under this Decree shall be to permit the SCVWD to  
20 access the project area, without charge, and as may otherwise be agreed to pursuant to a separate  
21 agreement between the SCVWD and the County. The obligation of Guadalupe Rubbish and the  
22 City for the Coyote Creek Project under this Decree shall be as otherwise agreed to in separate  
23 agreements between those Parties and the SCVWD.

24 10. Ravenswood Marsh Project. To further replace, in part, those lost services  
25 resulting from the alleged injuries to natural resources, the MROSD shall, for five (5) years, pay  
26 for a predator control program at the Ravenswood Marsh, as more fully described in Section  
27 4.3.2.3 of Exhibit B, for the benefit of the Clapper Rail, a species listed as threatened under  
28 Section 4(c) of the Endangered Species Act, 16 U.S.C. § 1533(c). In addition, the MROSD shall

1 maintain the Ravenswood Marsh, in perpetuity, as open space and habitat for the Clapper Rail.  
2 Within thirty (30) days of the Date of Final Approval of this Decree, the MROSD shall record a  
3 memorandum of this Decree in the appropriate land title records for San Mateo County and shall  
4 provide the Trustees with a conformed copy of the recorded memorandum. The memorandum  
5 shall contain a statement that “the referenced Decree requires that Ravenswood Marsh shall be  
6 maintained, in perpetuity, as open space and habitat for the Clapper Rail.”

7 11. All Work undertaken by the Settling Defendants pursuant to this Decree shall be  
8 performed in accordance with the requirements of all applicable federal and State of California  
9 laws and regulations. Where any portion of the Work requires a federal, State, or local permit,  
10 certification, or approval, the responsible Settling Defendants shall submit timely and complete  
11 applications and take all other actions necessary to obtain all such permits, certifications, or  
12 approvals, where required. The Trustees will cooperate with the Settling Defendants, as  
13 necessary and to the extent permitted by law, in undertaking actions to obtain and/or process such  
14 permits, certifications, and approvals in a timely manner. This Decree is not, and shall not be  
15 construed to be, a permit issued pursuant to any federal or State of California statute or  
16 regulation, nor shall it be construed in any way to affect any past, current, or future obligation of  
17 the Settling Defendants or any other person or entity to comply with any federal, State of  
18 California, or local law.

19 **VII. COVENANT NOT TO SUE BY PLAINTIFFS**

20 12. Except as specifically provided in Paragraph 15 of this Decree, the United States  
21 and the State of California, by and through the CDFG and SLC as trustees for the State of  
22 California’s Natural Resources, covenant not to sue or to take administrative action against the  
23 Settling Defendants for Natural Resource Damages under CERCLA, 42 U.S.C. § 9607, the  
24 Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C. § 1321(f), or other federal,  
25 State or common law, for injuries to soil, surface water, or sediment, as well as for injuries to  
26 biological resources using those resources, including vegetation, invertebrates, amphibians, fish  
27 species, and piscivorous birds, resulting from releases of Hazardous Substances into the  
28 environment in the Guadalupe River Watershed, including any continuing releases. These

1 covenants take effect upon the Entry of this Decree and are contingent upon satisfactory  
2 completion of the Work and the payment of the amount required in Section V; should any portion  
3 of the Work not be completed satisfactorily, or any amount required by Section V not be paid, the  
4 Plaintiffs shall be excused from this covenant only with respect to Settling Defendants having  
5 responsibilities relating to that portion of the Work or any amount unpaid. Nothing in this  
6 Paragraph is intended to preclude or limit the United States or the State of California, through the  
7 Regional Board, from exercising authorities that may be available to them under the Clean Water  
8 Act or the Porter Cologne Water Quality Control Act, as applicable, including but not limited to  
9 permitting and enforcement under the National Pollutant Discharge Elimination System program,  
10 adoption and implementation of TMDLs, including but not limited to TMDLs for mercury in the  
11 Guadalupe Watershed and the San Francisco Bay, and issuance of cleanup orders, waste  
12 discharge requirements, and water quality certifications. Nor is anything in this Paragraph  
13 intended to preclude or limit the United States or DTSC, or any other State agency, as  
14 appropriate, from taking any response actions pursuant to their authority under CERCLA or other  
15 applicable law.

16 13. The United States covenants not to sue or to take administrative action against  
17 CDFG, SLC, or the California Department of Transportation ("CalTrans") for Natural Resource  
18 Damages under CERCLA, 42 U.S.C. § 9607, the Clean Water Act, 33 U.S.C. § 1321(f), or other  
19 federal law, for injuries to soil, surface water, or sediment, as well as for injuries to biological  
20 resources using those resources, including vegetation, invertebrates, amphibians, fish species, and  
21 piscivorous birds, resulting from releases of Hazardous Substances into the environment in the  
22 Guadalupe River Watershed, including any continuing releases. These covenants take effect  
23 upon the Entry of this Decree.

24 14. The State of California, by and through the CDFG and SLC as trustees for the  
25 State of California's Natural Resources, and CalTrans covenant not to sue or to take  
26 administrative action against the United States for Natural Resource Damages under CERCLA,  
27 42 U.S.C. § 9607, the Clean Water Act, 33 U.S.C. § 1321(f), or other federal, State or common  
28 law, for injuries to soil, surface water, or sediment, as well as for injuries to biological resources

1 using those resources, including vegetation, invertebrates, amphibians, fish species, and  
2 piscivorous birds, resulting from releases of Hazardous Substances into the environment in the  
3 Guadalupe River Watershed, including any continuing releases. These covenants take effect  
4 upon the Entry of this Decree.

5 **VIII. RESERVATION OF RIGHTS**  
6 **FOR NATURAL RESOURCE DAMAGES**

7 15. Notwithstanding any other provision of this Decree, the United States and the State  
8 of California reserve the right to institute proceedings against the Settling Defendants in this  
9 action or in a new action seeking recovery of Natural Resource Damages (1) based on injury to,  
10 destruction of, or loss of Natural Resources resulting from conditions that were unknown to the  
11 Trustees as of the Date of Lodging of this Decree ("Unknown Conditions"), or (2) based on  
12 information received by the Trustees after the Date of Lodging of this Decree that indicates that  
13 there is injury to, destruction of, or loss of Natural Resources of a type unknown to the Trustees  
14 as of the Date of Lodging of this Decree ("New Information").

15 16. Notwithstanding any other provision of this Decree, the covenants not to sue in  
16 Paragraph 12 shall apply only to matters addressed in that Paragraph and specifically shall not  
17 apply to the following claims:

- 18 a. claims based on a failure by a Settling Defendant to satisfy any  
19 requirement imposed upon it by this Decree;
- 20 b. claims for criminal liability; and
- 21 c. claims arising from the past, present or future disposal, release, or threat of  
22 release of hazardous substances not addressed in this Decree. Releases of hazardous  
23 substances or Natural Resource Damages resulting from activities undertaken by or at the  
24 direction of Plaintiffs, including pursuant to the terms of this Decree, shall be deemed not  
25 to be included in this Subparagraph c.

26 Further, the Parties understand that agreement to this Decree does not, by its terms, relieve any  
27 Party of obligations that may be imposed pursuant to the implementation of TMDLs, although it  
28 is recognized that the Settling Defendants' implementation of the projects identified in

1 Paragraph 7 will directly address the objective of the Guadalupe Mercury TMDL and the TMDL  
2 for mercury in the San Francisco Bay, and the Settling Defendants shall not be precluded from  
3 claiming credit for their activities pursuant to this Decree with respect to the establishment of  
4 requirements pursuant to the TMDLs, Other Processes, or other legal proceedings by application  
5 of the pre-existing duty rule with respect to the obligations made pursuant to this Decree or  
6 otherwise.

7 17. For purposes of Paragraph 15, "Unknown Conditions" or "New Information" shall  
8 not include or pertain to (i) a change only in Plaintiffs' quantification of Natural Resource  
9 Damages arising out of the past and/or continuing releases of Hazardous Substances alleged by  
10 Plaintiffs in this action; and/or (ii) damages based on releases of hazardous substances other than  
11 Hazardous Substances as defined herein, unless Plaintiffs can demonstrate that such releases  
12 resulted in an injury different in type than those alleged in this action.

13 18. No information shall be deemed "new," and no condition shall be deemed  
14 "unknown," if the information or condition is contained or identified in, or could be reasonably  
15 determined from, documents and data in the possession of CDFG, DTSC, the Regional Board,  
16 DOI, or Region IX of the U.S. EPA, on or before the Date of Entry of this Decree.

17 **IX. COVENANTS BY SETTLING DEFENDANTS**

18 19. Subject to Paragraph 20, the Settling Defendants hereby covenant not to sue or to  
19 assert any administrative claims or causes of action against the United States or against the State  
20 of California with respect to the Work set forth in, or payments required by, this Decree or in  
21 connection with the Cooperative Process ("Settling Defendant Claims"), including, but not  
22 limited to:

23 a. any direct or indirect Settling Defendant Claim for reimbursement from the  
24 Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. §  
25 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

26 b. any Settling Defendant Claims against the United States or the State of  
27 California, including any department, agency or instrumentality of the United States or the State  
28 of California, under CERCLA Sections 107 or 113;

1 c. any Settling Defendant Claims against the Guadalupe River Watershed  
2 NRD Account; or

3 d. any Settling Defendant Claims under the United States Constitution, the  
4 California Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28  
5 U.S.C. § 2412, as amended, or at common law.

6 20. The Settling Defendants reserve their right to contest any claims alleged to be  
7 reserved by Section VIII of this Decree, and the Settling Defendants do not by consenting to this  
8 Decree waive any defenses to such claims, except that the Settling Defendants covenant not to  
9 assert, and may not maintain, any defense based upon principles of waiver, res judicata, collateral  
10 estoppel, issue preclusion, claim-splitting, or other defense based upon the contention that the  
11 claims that are allowed by Section VIII of this Decree were or should have been brought in the  
12 instant case. In the event that either the United States or the State of California brings any claim  
13 not settled by this Decree, or pursuant to Section VIII of this Decree, the Settling Defendants  
14 reserve the right to assert all potential counterclaims, cross-claims, or third-party claims against  
15 the United States or the State of California arising from such claim. Nothing in this Decree shall  
16 be deemed to constitute preauthorization of a claim within the meaning of Section 111 of  
17 CERCLA, 42 U.S.C. § 9611.

18 **X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

19 21. The Settling Defendants do not admit any of Plaintiffs' allegations or claims set  
20 forth herein and deny any liability for Plaintiffs' claims against the Defendants set forth in the  
21 Complaint.

22 22. Nothing in this Consent Decree shall be construed to create any rights in, or grant  
23 any cause of action to, any person not a Party to this Consent Decree. The preceding sentence  
24 shall not be construed to waive or nullify any rights that any person not a signatory to this Decree  
25 may have under applicable law. Each of the Parties expressly reserves any and all rights  
26 (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of  
27 action that each Party may have against any person not a Party hereto.

28 23. The Parties agree, and the Court hereby finds, adjudges and decrees, that (1) the

1 Parties have fully negotiated the terms of this Consent Decree at arms length with the assistance  
2 and advice of competent, independent counsel; (2) the consideration exchanged and commitments  
3 made herein are reasonable in the context of the rights and responsibilities of the Parties and their  
4 potential liabilities; (3) public notice (including a properly noticed public comment period) of the  
5 opportunity for submitting comments on the terms and conditions of this settlement has been  
6 provided; and (4) the settlement reflected herein is made in good faith and is neither fraudulent  
7 nor collusive, nor affected by any fraud or collusion. Accordingly, the Parties agree, and the  
8 Court hereby finds, orders, adjudges, and decrees, that this Consent Decree represents a fair,  
9 adequate, reasonable, equitable, and good-faith settlement, and that therefore the Settling  
10 Defendants are entitled to contribution protection provided by CERCLA Section 113(f)(2), 42  
11 U.S.C. § 9613(f)(2), or otherwise provided by State or common law, for matters addressed by this  
12 Consent Decree. "Matters addressed" in this Consent Decree include all Natural Resource  
13 Damages with respect to releases of Hazardous Substances within the Guadalupe River  
14 Watershed, as defined herein, including continuing releases. The "Matters Addressed" in this  
15 Consent Decree do not include those claims as to which any Party has reserved its rights under  
16 this Consent Decree (except for claims for failure to comply with this Decree), in the event that  
17 any Party asserts rights against another coming within the scope of such reservations.

18         24. The Settling Defendants agree that, with respect to any suit or claim for  
19 contribution brought by them for matters related to this Consent Decree, they will notify the  
20 United States and the State of California in writing no later than sixty (60) days prior to the  
21 initiation of such suit or claim, unless the giving of such advance notice would subject such suit  
22 or claim to a defense that it is barred by the statute or limitations or other time-related defense.

23         25. The Settling Defendants also agree that, with respect to any suit or claim for  
24 contribution brought against them for matters related to this Consent Decree, they will notify in  
25 writing the United States and the State of California within ten (10) days of service of the  
26 complaint on them. In addition, Settling Defendants shall notify the United States and the State  
27 of California within ten (10) days of service or receipt of any Motion for Summary Judgment  
28 with respect to such a claim, and within ten (10) days of receipt of any order from a court setting

1 such a case for trial.

2 **XI. PENALTIES FOR LATE AND/OR INADEQUATE PERFORMANCE**  
 3 **(INCLUDING PAYMENTS)**

4 26. If the payment required of Sunoco by Paragraph 4 is not made by the date  
 5 specified in that Paragraph, or the Work required of the Settling Defendants responsible for  
 6 implementation of the Work described in Section VI of this Decree is not performed in  
 7 accordance with this Decree, Sections 4.3.1.1 through 4.3.2.3 of Exhibit B hereto, or any  
 8 approved work plans, unless excused by a Force Majeure in accordance with Section XII of this  
 9 Decree, those Settling Defendants responsible for implementing the particular Work obligation,  
 10 making the payment, or submitting the report in question shall be jointly and severally liable for  
 11 the following amounts for, respectively, each day of delay in performance, payment, or  
 12 late/deficient report:

<u>Days of Delay</u>	<u>Payment Per Day of Delay:</u>	<u>Late Payment</u>	<u>Late/Deficient Report</u>
1-14	\$ 500/day	\$ 2000/day	\$ 500/day
15-60	\$ 1000/day	\$ 3000/day	\$ 750/day
Beyond 60 Days	\$ 2500/day	\$ 4000/day	\$ 1000/day

13  
 14  
 15  
 16  
 17  
 18 27. Payments due under the preceding Paragraph shall be paid by certified check and  
 19 disbursed 50 percent to the United States and 50 percent to CDFG. Subject to Paragraph 29,  
 20 below, stipulated penalties are due within thirty (30) days following receipt by a Settling  
 21 Defendant of a written demand by Plaintiffs for payment of such stipulated penalties. Stipulated  
 22 penalties owing to the United States shall, as directed by the United States, be paid by certified or  
 23 cashier's check in the amount due payable to the "U.S. Department of Justice," referencing DOJ  
 24 No. 90-11-2-07048, and shall be delivered to the office of the United States Attorney, Northern  
 25 District of California, Financial Litigation Unit, 450 Golden Gate Avenue, Box 36055, San  
 26 Francisco, California 94102. Notice of such payment shall be sent to the Plaintiffs as provided in  
 27 Section XXI of this Decree.

28

1           28.     Stipulated penalties owing to the State of California shall be payable to the  
2 Department of Fish and Game and delivered to

3                             John A. Holland  
4                             Office of Spill Prevention and Response  
5                             Department of Fish and Game  
6                             P.O. Box 160362  
7                             Sacramento, California 95816-0362

8                             Or, if by courier or overnight mail, to

9                             John A. Holland  
10                            Office of Spill Prevention and Response  
11                            Department of Fish and Game  
12                            1700 K Street, Suite 250  
13                            Sacramento, California 95814

14           29.     Except as provided in Paragraph 34 below, stipulated penalties shall begin to  
15 accrue on the day after the performance or payment is due and shall continue to accrue until  
16 performance is satisfactorily completed or payment is made. Except as provided in Paragraph 34  
17 below, penalties shall continue to accrue during any dispute resolution under Section XIII of this  
18 Decree, with interest on accrued penalties payable and calculated at the rate established by the  
19 Secretary of the Treasury, pursuant to 28 U.S.C. § 1961, but need not be paid until fifteen (15)  
20 days after final resolution of the dispute, in the amount determined by such resolution.

21           30.     Nothing herein shall prevent the simultaneous accrual of separate penalties for  
22 separate violations of this Consent Decree. The payment of stipulated penalties shall not alter in  
23 any way a Settling Defendant's obligation to complete the performance of the Work required of it  
24 under this Consent Decree. In addition to the remedy provided for in Paragraph 26, if the  
25 payment required of Sunoco by Paragraph 4 of this Decree is not made by the date specified in  
26 that Paragraph, Sunoco shall be liable for, in addition to the payment specified in that Paragraph,  
27 Interest on the amount due.

28           31.     In addition to the remedies provided for in Paragraphs 26 and 30, if the payment  
required of Sunoco by Paragraph 4 of this Decree or the stipulated penalties provided for by this  
Section are not made, the defaulting Settling Defendant(s) in question shall be liable for any costs  
and attorneys fees incurred by Plaintiffs in enforcing the terms of this Decree.

32.     Payments due under this Section shall be in addition to any other remedies or

1 sanctions that may be available to the Plaintiffs on account of a Settling Defendant's failure to  
2 comply with the terms of this Decree.

3 **XII. FORCE MAJEURE**

4 33. "Force Majeure," for purposes of this Consent Decree, is defined as any event  
5 arising from causes beyond the control of the responsible Settling Defendants, their contractors,  
6 or any entity controlled by Settling Defendants that delays the performance of any Work  
7 obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the  
8 obligation. "Best efforts" include using best efforts to anticipate any potential force majeure  
9 event and to address the effects of any such event (a) as it is occurring and (b) after it has  
10 occurred, such that the delay is minimized to the extent reasonably possible. "Force Majeure"  
11 does not include the Settling Defendants' financial inability to perform any obligation under this  
12 Consent Decree. "Force Majeure" shall otherwise be deemed to include a delay in performance  
13 of the Work required pursuant to Section VI provided that the requirements of Paragraph 34 are  
14 addressed.

15 34. If any event occurs or has occurred that may delay the performance of any Work  
16 obligation under this Decree, as to which a Settling Defendant intends to assert a claim of Force  
17 Majeure, the Settling Defendant shall provide notice in writing, as provided in Section XXI of  
18 this Decree (Notice), within fourteen (14) days from the time a responsible representative of the  
19 Settling Defendant first knew of, or by the exercise of due diligence should have known of, the  
20 event. Such notification shall include an explanation and description of the reasons for the delay;  
21 the anticipated duration of the delay; a description of all actions taken or to be taken to prevent or  
22 minimize the delay; a schedule for implementation of any measures to be taken to prevent or  
23 mitigate the delay or the effect of the delay; and the Settling Defendant's rationale as to why the  
24 implementation plan is adequate. Unless otherwise agreed to by the Plaintiffs, failure to comply  
25 with the above requirements shall preclude a Settling Defendant from asserting any claim of  
26 Force Majeure.

27 35. A Settling Defendant shall have the burden of proving, by a preponderance of the  
28 evidence that the Settling Defendant gave timely Notice as required by the preceding Paragraph;

1 that the Settling Defendant used best efforts to prevent or minimize any delay attributable to the  
2 event; and that any period of delay was attributable to that event. Delays “attributable” to a Force  
3 Majeure include further delays resulting from the passing of construction seasons that may  
4 interfere with the implementation of any requirement following the initial Force Majeure event.

5 36. If the Trustees agree that any delay or anticipated delay has been justified under  
6 the provisions of this Section, the Trustees shall stipulate to an extension of time for a Settling  
7 Defendant’s performance of the affected requirement pursuant to the implementation plan  
8 presented with the Notice or as otherwise agreed upon. In such circumstances, the appropriate  
9 modification shall be deemed to have been made pursuant to Section XVII of this Consent Decree  
10 (Modification) and shall be deemed to have been incorporated into Sections 4.3.1.1 through  
11 4.3.2.3 of Exhibit B. In the event the affected Parties cannot agree, the matter shall be resolved in  
12 accordance with Section XIII of this Consent Decree (Dispute Resolution). The penalties  
13 provided for by Section XI shall not accrue during the period between provision of Notice  
14 pursuant to Paragraph 34 and the resolution of any dispute under Section XIII of this Decree,  
15 provided that the Notice is substantially justified. An extension of time for performance of the  
16 obligations affected by a Force Majeure event shall not, of itself, extend the time for performance  
17 of any other obligation.

18 **XIII. DISPUTE RESOLUTION**

19 37. This Section provides the exclusive mechanism for resolution of disputes arising  
20 under this Consent Decree, subject to the provisions of Section XVII of this Decree  
21 (Modification). However, except as otherwise provided in Section XII, such procedures shall not  
22 apply to actions by the Plaintiffs to enforce obligations of a Settling Defendant that have not been  
23 disputed in accordance with this Section.

24 38. Any dispute shall be, in the first instance, the subject of informal negotiations  
25 between the Plaintiffs and the Settling Defendant(s) invoking Dispute Resolution. Such period of  
26 informal negotiations shall not extend beyond twenty (20) days after date that notice of a dispute  
27 is given by a Settling Defendant, unless otherwise agreed to in writing by the Plaintiffs.

28 39. If informal negotiations do not result in resolution of the dispute, then the

1 Plaintiffs' position shall prevail, unless the Settling Defendant exercises its right to petition the  
2 Court in accordance with this Section. The Settling Defendant may petition the Court within  
3 thirty (30) calendar days of the end of the informal negotiations period for resolution of the  
4 dispute. The petition shall set forth the nature of the dispute and a proposal for its resolution.  
5 Further briefing and argument on the petition will comply with the requirements of the Local  
6 Rules for the Northern District of California, subject to such modifications as may be sought from  
7 the Court.

8 40. In all disputes under this Section, the Settling Defendant(s) shall bear the burden  
9 of proof/persuasion.

10 41. Except as otherwise provided in Section XII, the invocation of dispute resolution  
11 under this Section shall not extend, postpone, or affect in any way any obligation of a Settling  
12 Defendant under this Consent Decree, not directly in dispute, unless the Plaintiffs or the Court  
13 agrees otherwise.

#### 14 **XIV. RETENTION OF RECORDS**

15 42. Until three years after completion of the Work required by this Decree, each  
16 Settling Defendant shall preserve and retain all records and documents now in its possession or  
17 control or that come into its possession or control, that relate to the identification, nature, and  
18 quantity of mercury in the Guadalupe River Watershed, the nature and extent of alleged releases  
19 of Hazardous Substances from the Guadalupe River Watershed, or the pathway of any alleged  
20 release of any mercury to or from the Guadalupe River Watershed. This obligation does not  
21 apply to records or documents previously exchanged between the Settling Defendants and the  
22 Plaintiffs prior to the Date of Lodging of this Decree. Within ninety (90) days of the conclusion  
23 of this document-retention period, upon request by either Plaintiff, the Settling Defendants shall  
24 produce or make available for inspection any non-privileged records or documents at a mutually  
25 convenient time and place, before destroying any such records or documents.

26 43. In addition to the opportunity to obtain documents at the conclusion of the  
27 document-retention period set forth in the preceding Paragraph, either Plaintiff may request, at  
28 any time during the document-retention period, that a Settling Defendant make available for

1 inspection or, at the Settling Defendant's option, produce, any non-privileged documents retained  
2 pursuant to the preceding Paragraph. The Settling Defendant receiving such request shall  
3 produce or make available for inspection non-privileged documents at a mutually convenient time  
4 and place after such request is made.

5 44. With respect to the obligation to retain, produce, or make available records as set  
6 forth in this Section, the Settling Defendants may assert that certain documents or records are  
7 privileged under the attorney/client privilege or any other privilege recognized under applicable  
8 law. If any Settling Defendant asserts any such privilege, it shall provide the Plaintiffs with the  
9 following information relating to any documents or records that are requested and withheld as  
10 privileged: (1) title of document or record; (2) date of document or record; (3) name and position  
11 of the author of the document or record; (4) description of the subject of the document or record;  
12 and (5) the specific basis for the privilege asserted. The privilege log relating to the subject  
13 documents must be produced to the Plaintiffs at a mutually convenient time and place after  
14 Plaintiffs request the documents that are withheld. Settling Defendants shall retain the documents  
15 that are withheld as privileged, until any privilege disputes relating to those documents are  
16 resolved. However, no final documents, reports created, or data generated pursuant to the  
17 requirements of this Consent Decree shall be withheld on grounds of privilege.

18 45. This Section in no way affects or limits any obligation of the Settling Defendants  
19 to retain records under any other administrative or judicial order or agreement, whether such  
20 order or agreement is currently extant or created in the future. Further, this Section in no way  
21 affects or limits any obligation of the Settling Defendants to retain records under any other  
22 judicial, statutory, or common law doctrine that would otherwise require retention of records, nor  
23 does this Paragraph limit the information-gathering authorities of the Plaintiffs under any  
24 applicable federal or state laws or regulations.

25 46. Each Settling Defendant hereby certifies individually that, to the best of its  
26 knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed,  
27 or otherwise disposed of any records, documents, or other information (other than identical  
28 copies) relating to its potential liability regarding Natural Resource Damages with respect to the

1 Guadalupe River Watershed since notification of potential liability by the Plaintiffs and that it has  
2 fully complied with any and all of Plaintiffs' prior requests for information with respect to this  
3 site, pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), or other applicable federal or  
4 state laws or regulations.

5 **XV. CERTIFICATE AND SIGNATURE**

6 47. Each Defendant certifies by affixing its signature to this Decree that the Work that  
7 it has agreed to perform under the Decree is not an activity that it is legally obligated to perform  
8 by any other permit, lawsuit, administrative proceeding, or other process. The certification  
9 provided by the preceding sentence shall not be deemed to be invalid where Work performed  
10 pursuant to this Decree complements obligations undertaken pursuant to other permits, lawsuits,  
11 administrative proceedings, the TMDL, or Other Processes, including by more precisely  
12 specifying the time, place, and/or manner of performance, or by requiring the performance of  
13 Work that is only encouraged or contemplated, but not legally guaranteed, by another agreement.

14 48. The undersigned representatives of each Settling Defendant certifies that he or she  
15 is fully authorized to enter into the terms and conditions of this Decree and to legally execute and  
16 bind that party to this Decree.

17 49. This Consent Decree may be signed in counterparts, and such counterpart  
18 signature pages shall be given full force and effect.

19 **XVI. ENTIRE AGREEMENT**

20 50. This Consent Decree and Sections 4.3.1.1. through 4.3.2.3 of Exhibit B constitute  
21 the final, complete, and exclusive agreement and understanding between the Trustees and the  
22 Settling Defendants with respect to the settlement embodied in the Decree and supersede all prior  
23 agreements and understandings, whether oral or written. Other than Exhibit B, which is attached  
24 to and incorporated in this Decree, no other document, nor any representation, inducement,  
25 agreement, understanding, or promise, constitutes any part of this Decree or the settlement it  
26 represents, nor shall it be used in construing the terms of this Decree.

27 **XVII. MODIFICATION**

28 51. The terms of this Consent Decree may be modified only by a subsequent written

1 agreement signed by all the Parties or as ordered by the Court upon the noticed motion of any  
2 Party. The terms and schedules contained in Sections 4.3.1.1 through 4.3.2.3 of Exhibit B of this  
3 Decree may be modified upon written agreement of the affected Parties without Court approval.  
4 Where any other modification constitutes a material change to any term of this Decree, it shall be  
5 effective only upon approval by the Court.

#### 6 **XVIII. TERMINATION**

7 52. This Consent Decree shall terminate as to each Settling Defendant upon granting  
8 of a motion duly filed by that Settling Defendant, demonstrating that such Settling Defendant has,  
9 as applicable, paid the amount required by Section V of this Decree, performed the Work required  
10 by Section VI of this Decree, and paid any outstanding stipulated penalties under Section XI of  
11 this Decree, except that the provisions and effect of Sections VII, VIII, IX, X, XIV; the County's  
12 obligation to monitor and maintain the consolidated and encapsulated materials, in accordance  
13 with Sections 4.3.1.1 and 4.3.1.2 of Exhibit B; and MROSD's obligation, set forth in Paragraph  
14 10, to maintain Ravenswood Marsh, in perpetuity, as open space and habitat for the Clapper Rail  
15 shall survive termination of the Decree.

#### 16 **XIX. PUBLIC COMMENT**

17 53. The Trustees have preliminarily determined that the Work to be performed and the  
18 payments to be made pursuant to this Decree constitute appropriate action to protect and restore  
19 the natural resources damaged as alleged in the Complaint and satisfy the requirements of Section  
20 122(j)(2) of CERCLA, 42 U.S.C. § 9622(j)(2), with respect to each Settling Defendant.

21 54. The Parties acknowledge that this Consent Decree and the draft restoration plan set  
22 forth in Exhibit B to this Decree will be subject to a public comment period of not less than thirty  
23 (30) days, as provided by 43 C.F.R. § 11.81. Consequently, entry of the Decree after lodging  
24 shall be deferred to allow the time necessary for the United States and the State to obtain and  
25 evaluate public comment on this Decree and on Exhibit B hereto. The United States and the State  
26 of California reserve the right to withdraw their consent to this Decree if comments received  
27 disclose facts or considerations that show that this Decree or the draft restoration plan is  
28 inappropriate, improper, or inadequate. The Settling Defendants consent to the entry of this

1 Decree by the Court without further notice. The Settling Defendants further agree not to oppose  
2 entry of this Consent Decree by the Court or to challenge any provision of the Decree, unless  
3 either the United States or CDFG has notified Settling Defendants in writing that it no longer  
4 supports entry of the Decree.

5 55. In the event that there is no Date of Final Approval of this Decree, this Decree and  
6 the settlement embodied herein is voidable at the discretion of any Party, and the terms hereof  
7 may not be used as evidence in any litigation or other proceeding.

8 **XX. RETENTION OF JURISDICTION**

9 56. The Court shall retain jurisdiction of this case until termination of this Consent  
10 Decree, for the purpose of enabling any of the Parties to apply to the Court for such further order,  
11 direction, or relief as may be necessary or appropriate for the construction or modification of this  
12 Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in  
13 accordance with Section XIII of this Decree (Dispute Resolution).

14 **XXI. NOTICE**

15 57. Any notice required hereunder shall be in writing and shall be delivered by hand,  
16 facsimile or overnight mail as follows:

17 **As to the United States:**

18 Chief, Environmental Enforcement Section  
19 Environment and Natural Resources Division  
20 DOI Case #90-11-2-07048  
21 U.S. Department of Justice  
22 P.O. Box 7611  
23 Washington, D.C. 20044-7611

24 and

25 David B. Glazer  
26 United States Department of Justice  
27 301 Howard Street, Suite 1050  
28 San Francisco, California 94105  
Tel.: (415) 744-6477  
Fax: (415) 744-6476

And

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Charles McKinley, Esq.  
Office of the Solicitor  
U.S. Department of the Interior  
1111 Jackson Street, Suite 735  
Oakland, California 94607  
Tel: (510) 817-1461  
Fax: (510) 419-0143

**As to State of California:**

John A. Holland  
Office of Spill Prevention and Response  
Department of Fish and Game  
P.O. Box 160362  
Sacramento, California 95816-0362  
Tel: (916) 445-3153  
Fax: (916) 324-5662

Or, if by courier or overnight mail, to

John A. Holland  
Office of Spill Prevention and Response  
Department of Fish and Game  
1700 K Street, Suite 250  
Sacramento, California 95814

**As to Settling Defendants:**

As to the County of Santa Clara:

Lisa Killough  
Director Parks and Recreation Department  
County of Santa Clara  
298 Garden Hill Drive  
Los Gatos, California 95030  
Tel: (408) 355-2200  
Fax: (408) 355-2290

and

Kathryn A. Berry  
Office of County Counsel  
County of Santa Clara  
70 W. Hedding St., 9th Floor  
San Jose, California 95110  
Tel: (408) 299-5900  
Fax: (408) 292-7240

As to the Santa Clara Valley Water District:

Stan Williams  
CEO  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, California 95118-3686

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Fax (408) 266-0271

and

Debra Cauble  
District Counsel  
Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, California 95118-3686  
Fax (408) 445-1435

and

Robert Falk  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, California 94105  
Fax (415) 268-7522

As to Guadalupe Rubbish Disposal Company, Inc.:

General Counsel's Office - Western Group  
Attention: Andrew M. Kenefick  
Waste Management  
7025 N. Scottsdale Road, Suite 200  
Scottsdale, Arizona 85253

As to Buckhorn, Inc.:

Kevin C. O'Neil  
Assistant Secretary  
Buckhorn, Inc.  
1293 South Main Street  
Akron, OH 44301  
Tel: (330) 253-5592  
Fax: (330) 761-6166

and

David D. Cooke  
Allen Matkins Leck Gamble & Mallory LLP  
Three Embarcadero Center, 12th Floor  
San Francisco, California 94111  
Tel: (415) 837-1515  
Fax: (415) 837-1516

As to Myers Industries Inc.:

Kevin C. O'Neil  
General Counsel

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Myers Industries, Inc.  
1293 South Main Street  
Akron, Ohio 44301  
Tel: (330) 253-5592  
Fax: (330) 761-6166

and

David D. Cooke  
Allen Matkins Leck Gamble & Mallory LLP  
Three Embarcadero Center, 12th Floor  
San Francisco, California 94111  
Tel: (415) 837-1515  
Fax: (415) 837-1516

As to the Midpeninsula Regional Open Space District:

Attention: General Counsel  
330 Distel Circle  
Los Altos, California 94022-1404

As to the City of San Jose:

Richard Doyle  
City Attorney  
City of San Jose  
151 W. Mission Street  
San Jose, California 95110  
Tel: (408) 277-4450

and

Mollie Dent  
Senior Deputy City Attorney  
San Jose City Attorney's Office  
151 W. Mission Street  
San Jose, California 95110  
Tel: (408) 277-2405

As to Sunoco, Inc.:

Thomas J. Haines  
Senior Counsel  
Sunoco, Inc.  
Law Department  
1801 Market Street  
Philadelphia, Pennsylvania 19103  
Tel: (215) 977-6273  
Fax: (215) 977-6878

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58. Each Party to this Decree may change the person(s) it has designated to receive notice for that Party, or the addresses for such notice, by filing a written notice of such change with the Court and serving said notice on each of the other Parties to this Decree.

59. Each Settling Defendant hereby agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons.

**XXII. JUDGMENT**

60. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between the Plaintiffs and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

IT IS SO ORDERED

DATED: 11/16/05

*Patricia V. Trumbull*  
MAGISTRATE  
UNITED STATES DISTRICT JUDGE  
NORTHERN DISTRICT OF CALIFORNIA

1 FOR THE UNITED STATES OF AMERICA:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v.  
3 County of Santa Clara, et al., subject to the public notice and comment requirements of  
4 Section XIX of this Consent Decree

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Dated: July 25, 2005

Kelly A Johnson  
KELLY A. JOHNSON  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
United States Department of Justice

Dated: July 27, 2005

David B. Glazer  
DAVID B. GLAZER  
Natural Resources Section  
Environment and Natural Resources Division  
United States Department of Justice  
301 Howard Street, Suite 1050  
San Francisco, California 94105  
Telephone: (415) 744-6491  
Facsimile: (415) 744-6476

OF COUNSEL

CHARLES C. MCKINLEY, ESQ.  
Assistant Field Solicitor  
U.S. Department of the Interior  
1111 Jackson Street  
Oakland, California 94607

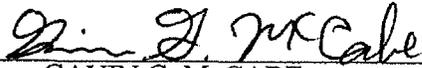
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FOR THE CALIFORNIA DEPARTMENT OF FISH AND GAME

WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v. County of Santa Clara, et al., subject to the public notice and comment requirements of Section XIX of this Consent Decree:

Dated: June 16, 2005   
JRB  
RYAN BRODDRICK  
Director  
California Department of Fish and Game

BILL LOCKYER, Attorney General  
of the State of California  
GAVIN G. McCABE,  
Deputy Attorney General

By:   
GAVIN G. McCABE  
Attorneys for Plaintiff California Department of Fish and Game

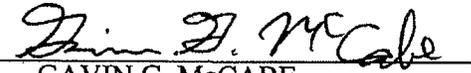
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FOR THE CALIFORNIA STATE LANDS COMMISSION

WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v. County of Santa Clara, et al., subject to the public notice and comment requirements of Section XIX of this Consent Decree:

Dated: 6/1, 2005   
PAUL D. THAYER  
Executive Officer  
State Lands Commission

BILL LOCKYER, Attorney General  
of the State of California  
GAVIN G. McCABE,  
Deputy Attorney General

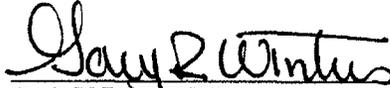
By:   
GAVIN G. McCABE  
Attorneys for Plaintiff California State Lands Commission

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FOR THE CALIFORNIA DEPARTMENT OF TRANSPORTATION

WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v. County of Santa Clara, et al., subject to the public notice and comment requirements of Section XIX of this Consent Decree:

Dated: December 6, 2004

  
GARY R. WINTERS  
Chief  
Division of Environmental Analysis  
California Department of Transportation

1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United Stated, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: 5/11/05  
5 NAME \_\_\_\_\_ Title: CEO  
6  Address: 5750 Almaden Expressway  
7 Stan Williams San Jose, CA 95118-3614  
8 Santa Clara Valley Water District

9 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

10  
11 Agent Authorized to Accept Service on Behalf of Above-Signed Party:  
12 Name (print): Debra Cauble  
13 Title: District Counsel  
14 Address: Santa Clara Valley Water District  
5750 Almaden Expressway  
San Jose, California 95118-3686  
15 Ph. Number: (408) 265-2600

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FOR SETTLING DEFENDANTS:

WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v. County of Santa Clara, et al.:

Dated: MAY 24 2005

  
\_\_\_\_\_

Ann Miller Ravel  
Title: County Counsel  
Address: 70 West Hedding St., 9th Floor  
San Jose, CA 95110

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Name (print): Ann Miller Ravel  
Title: County Counsel  
Address: 70 West Hedding St., 9<sup>th</sup> Floor  
San Jose, CA 95110

Ph. Number: (408) 299-5900

1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United Stated, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: 5/13, 2005  
5 CITY OF SAN JOSE

  
6 George Rios  
7 Assistant City Attorney  
8 City of San Jose  
9 151 W. Mission Street  
10 San Jose, Ca. 95110  
11 (408) 277-4454 

12 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

13 Agent Authorized to Accept Service on Behalf of Above-Signed Party:  
14 Richard Doyle  
15 City Attorney  
16 City of San Jose  
17 151 W. Mission Street  
18 San Jose, California 95110

19 Ph. Number: (408) 277-4450

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FOR SETTling DEFENDANTS:

WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v. County of Santa Clara, et al.:

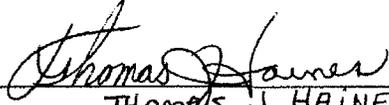
Dated: January 26<sup>th</sup>, 2005 Larry Hassett  
NAME LARRY HASSETT  
Title: President  
Address: Midpeninsula Regional Open  
Space District  
330 Distel Circle,  
Los Altos CA 94022

Agent Authorized to Accept Service on Behalf of Above-Signed Party:

Agent Authorized to Accept Service on Behalf of Above-Signed Party:  
Name (print): Sally Thiel foldt  
Title: District Clerk  
Address: 330 Distel Circle  
Los Altos CA 94022  
Ph. Number: (650) 691-1200

1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United Stated, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: February 2, 200~~4~~<sup>5</sup>   
5 ~~NAME~~ THOMAS J. HAINES  
6 Title: Senior Counsel  
7 Address: SUNOCO, INC LAW DEPARTMENT  
1801 MARKET STREET  
Philadelphia, PA 19103

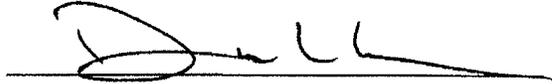
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9 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

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11 Agent Authorized to Accept Service on Behalf of Above-Signed Party:  
12 Name (print): SAME AS ABOVE  
13 Title: \_\_\_\_\_  
14 Address: \_\_\_\_\_  
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Ph. Number: (215) 977-6273

1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: February 8, 2005  
5 NAME



6 Duane C. Woods

Title: President, Guadalupe  
Address: Rubbish Disposal, Inc

9 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

11 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

12 Name (print): Andrew M. Kenefick

Title: Senior Legal Counsel

13 Address: 801 2nd Avenue, Suite 614  
Seattle, WA 98104

14 Ph. Number: 206-264-3062

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1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: June 3, 2005 MYERS INDUSTRIES, INC.

5 by: Kevin C. O'Neil  
6 Title: Vice President and General Counsel  
7 Address: 1293 South Main Street  
8 Akron, OH 44301

9 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

10 Name (print): Kevin C. O'Neil  
11 Title: Vice President and General Counsel  
12 Address: 1293 S. Main Street  
13 Akron, OH 44301  
14 Ph. Number: (330) 253-5592

15 -AND-

16 David D. Cooke  
17 Allen Matkins Leck Gamble & Mallory LLP  
18 Three Embarcadero Center, 12th Floor  
19 San Francisco, CA 94111  
20 (415) 837-1515

1 FOR SETTLING DEFENDANTS:

2 WE HEREBY CONSENT to the entry of the Consent Decree in United States, et al. v.  
3 County of Santa Clara, et al.:

4 Dated: June 3, 2005 BUCKHORN, INC.

5 by: Kevin C. O'Neil  
6 Title: Assistant Secretary  
7 Address: 1293 South Main Street  
8 Akron, OH 44301

9 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

10 Agent Authorized to Accept Service on Behalf of Above-Signed Party:

11 Name (print): Kevin C. O'Neil  
12 Title: Assistant Secretary  
13 Address: 1293 S. Main Street  
14 Akron, OH 44301  
15 Ph. Number: (330) 253-5592

16 -AND-

17 David D. Cooke  
18 Allen Matkins Leck Gamble & Mallory LLP  
19 Three Embarcadero Center, 12th Floor  
20 San Francisco, CA 94111  
21 (415) 837-1515

**Exhibit A**



# California Regional Water Quality Control Board

## San Francisco Bay Region



Arnold Schwarzenegger  
Governor

Terry Tamminen  
Secretary for  
Environmental  
Protection

1515 Clay Street, Suite 1400, Oakland, California 94612  
(510) 622-2300 • Fax (510) 622-2460  
<http://www.swrcb.ca.gov/rwqcb2>

January 9, 2004

Gavin C. McCabe  
Deputy Attorney General  
State of California  
Department of Justice  
455 Golden Gate Avenue  
Suite 1100  
San Francisco, California 94102

Dear Mr. McCabe:

As you know, the San Francisco Bay Regional Water Quality Control Board ("Water Board") is a designated Natural Resource Trustee for natural resources within its purview for purposes of Section 107(f)(2)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 ("CERCLA"), as amended, and is entitled to recover natural resource damage restoration or replacement costs under Section 311(f)(3) of the Clean Water Act ("CWA").<sup>1</sup>

We understand from the California Department of Fish and Game ("DFG") that you have inquired as to whether the Water Board will pursue a Natural Resources Damages action for Natural Resources Damages caused by discharges of mercury in the Guadalupe River watershed. We further understand that DFG and the U.S. Department of Interior are pursuing Natural Resource Damages claims for those natural resources that are within their purview against the County of Santa Clara, Myers Industries, Inc., Buckhorn, Inc. (an Ohio Corporation), the Guadalupe Rubbish Disposal Company, Inc., the City of San Jose, the Mid-Peninsula Open Space District, and the Santa Clara Valley Water District (collectively, the "Potentially Responsible Parties" or "PRPs"), and that a settlement of such action with the PRPs is imminent.

The Water Board is aware of the mercury problem in the Guadalupe watershed and its impact to waters of the State, and has made it a top priority to address this problem. The Board's current strategy is to address the mercury problem through the adoption of Total Daily Maximum Loads ("TMDLs") and implementation actions, including but not limited to requiring cleanup and removal actions and permit requirements, and through such other available remedies available to

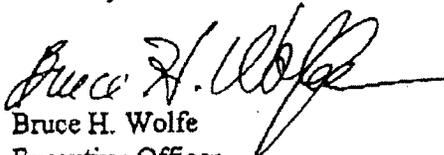
<sup>1</sup> Collectively these statutory authorities give rise to particular types of claims for "natural resources damages." To avoid confusion with other statutory authorities that may be used to address environmental contamination, including discharges of waste to the waters of the State, we refer to these as "Natural Resources Damages" herein.

Gavin McCabe  
January 9, 2004  
Page 2

it under the CWA and the Porter-Cologne Water Quality Control Act ("Porter-Cologne") (i.e., remedies other than CERCLA and CWA Natural Resources Damages claims). Given this strategy, the Water Board's current understanding of the mercury problem in the Guadalupe River watershed, and the fact that other trustee agencies are pursuing Natural Resources Damages claims against the PRPs, the Water Board will not file or ask the California Attorney General's office to file on its behalf a complaint against the PRPs for CERCLA or CWA Natural Resources Damages caused by discharges of mercury in the Guadalupe River watershed, except insofar as DFG has reserved the right to do so in the future. The preceding statement shall in no way be construed to preclude or limit in any way the Water Board from exercising its other authorities under the CWA and Porter-Cologne, including but not limited to permitting and enforcement under the National Pollutant Discharge Elimination System program, adoption and implementation of TMDLs, and issuance of cleanup and abatement orders, waste discharge requirements and water quality certifications.

If you have any questions regarding the foregoing, please contact Yuri Won or Thomas Mumley at (510) 622-2491 or (510) 622-2395, respectively.

Sincerely,

  
Bruce H. Wolfe  
Executive Officer

cc: John Holland, California Department of Fish and Game  
Charles McKinley, U.S. Department of Interior