

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department Of Justice

DAVID B. GLAZER
Natural Resources Section
Environment & 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
e-mail: david.glazer@usdoj.gov

KEVIN V. RYAN
United States Attorney
Northern District Of California
CHARLES M. O'CONNOR (SBN 56320)

Assistant United States Attorney
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone: (415) 436-7200
Facsimile: (415) 436-7234

Attorneys For Plaintiff United States Of America
(see next page for names of additional counsel.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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

Plaintiffs,

v.

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

Defendants.

AND RELATED COUNTER, CROSS, AND
THIRD PARTY ACTIONS.

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

No. CV
CONSENT DECREE

FILED

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CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE

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FILED

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RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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1 BILL LOCKYER
Attorney General of the State of California
2 MARY HACKENBRACHT
Senior Assistant Attorney General
3 GAVIN G. McCABE, State Bar No. 130864
Deputy Attorney General
4 455 Golden Gate Avenue, Suite 11000
San Francisco, California 94102-7004
5 Telephone: (415) 703-5605
Facsimile: (415) 703-5480
6 e-mail: gavin.mccabe@doj.ca.gov
7 Attorneys for State of California, by and through
the California Department of Fish and Game and
8 California State Lands Commission
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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;

- 1 (3) Midpeninsula Regional Open Space District ("MROSD") shall
2 mean the Midpeninsula Regional Open Space District, located
3 in the State of California, and its departments, agencies and
4 instrumentalities;
- 5 (4) The City of San Jose shall mean the City of San Jose, located
6 in the State of California, and its departments, agencies and
7 instrumentalities;
- 8 (5) Guadalupe Rubbish Disposal Company, Inc., shall include its
9 parent corporations, consisting of USA Waste of California,
10 Inc., Waste Management Holdings, Inc., and Waste
11 Management, Inc.; and incorporators and former officers,
12 directors and/or shareholders of Guadalupe Rubbish Disposal
13 Company, Inc., consisting of James L. Zanardi, Joseph A.
14 Zanardi, Dennis C. Varni, David K. Cecich, James L. Zanardi
15 and Randi J. Zanardi, individually and as Co-Trustees of the
16 Zanardi Living Trust dated March 29, 1990; Joseph A. Zanardi
17 and Elizabeth E. Zanardi, individually and as Co-Trustees of
18 the Zanardi Living Trust dated September 18, 1989; Dennis C.
19 Varni and Kathleen D. Varni, individually and as Co-Trustees
20 of the Varni Living Trust dated November 13, 1988; and Lori
21 R. Cecich and David K. Cecich, individually and as Co-
22 Trustees of The Cecich Family 1986 Trust dated November
23 18, 1986;
- 24 (6) Myers Industries, Inc. ("Myers") (an Ohio corporation) and its
25 officers, directors, and employees acting in their capacities as
26 such;
- 27 (7) Buckhorn, Inc. ("Buckhorn") (an Ohio Corporation) and its
28 officers, directors and employees acting in their capacities as

1 such; and

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

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

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

6 M. "Work" shall mean implementation by the Settling Defendants of (i) those
7 activities that are generally described in Section VI, Paragraphs 6-11, of this Consent Decree and
8 more particularly described in Exhibit B to this Consent Decree, at Sections 4.3.1.1. through
9 4.3.2.3, which Sections are hereby incorporated as a part of this Decree, or (ii) any project or in
10 lieu payment authorized by Paragraph 7.e of this Decree.

11 **V. PAYMENTS**

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

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

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

24 and

25 Bruce Nessler
26 DOI Restoration Fund Manager
1849 "C" Street, N.W.
27 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

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

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

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

IX. COVENANTS BY SETTLING DEFENDANTS

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

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

b. any Settling Defendant Claims against the United States or the State of California, including any department, agency or instrumentality of the United States or the State 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
United States and State of California v.
County of Santa Clara, et al., No. CV

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

such a case for trial.

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

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

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

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

32 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

1 Charles McKinley, Esq.
2 Office of the Solicitor
3 U.S. Department of the Interior
4 1111 Jackson Street, Suite 735
5 Oakland, California 94607
6 Tel: (510) 817-1461
7 Fax: (510) 419-0143

8 **As to State of California:**

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

16 Or, if by courier or overnight mail, to

17 John A. Holland
18 Office of Spill Prevention and Response
19 Department of Fish and Game
20 1700 K Street, Suite 250
21 Sacramento, California 95814

22 **As to Settling Defendants:**

23 As to the County of Santa Clara:

24 Lisa Killough
25 Director Parks and Recreation Department
26 County of Santa Clara
27 298 Garden Hill Drive
28 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

1 Fax (408) 266-0271

2 and

3 Debra Cauble
4 District Counsel
5 Santa Clara Valley Water District
6 5750 Almaden Expressway
7 San Jose, California 95118-3686
8 Fax (408) 445-1435

9 and

10 Robert Falk
11 Morrison & Foerster LLP
12 425 Market Street
13 San Francisco, California 94105
14 Fax (415) 268-7522

15 As to Guadalupe Rubbish Disposal Company,
16 Inc.:

17 General Counsel's Office - Western Group
18 Attention: Andrew M. Kenefick
19 Waste Management
20 7025 N. Scottsdale Road, Suite 200
21 Scottsdale, Arizona 85253

22 As to Buckhorn, Inc.:

23 Kevin C. O'Neil
24 Assistant Secretary
25 Buckhorn, Inc.
26 1293 South Main Street
27 Akron, OH 44301
28 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

1 Myers Industries, Inc.
2 1293 South Main Street
3 Akron, Ohio 44301
4 Tel: (330) 253-5592
5 Fax: (330) 761-6166

6 and

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

13 As to the Midpeninsula Regional Open Space
14 District:

15 Attention: General Counsel
16 330 Distel Circle
17 Los Altos, California 94022-1404

18 As to the City of San Jose:

19 Richard Doyle
20 City Attorney
21 City of San Jose
22 151 W. Mission Street
23 San Jose, California 95110
24 Tel: (408) 277-4450

25 and

26 Mollie Dent
27 Senior Deputy City Attorney
28 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

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 J. Turebull
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

5
6 Dated: July 25, 2005

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

7
8
9
10 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


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18 OF COUNSEL

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

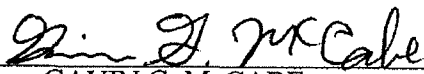
1 FOR THE CALIFORNIA DEPARTMENT OF FISH AND GAME

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:

5 Dated: June 16, 2005

6 
7 RYAN BRODDRICK
8 Director
9 California Department of Fish and Game

10
11
12 BILL LOCKYER, Attorney General
13 of the State of California
14 GAVIN G. McCABE,
15 Deputy Attorney General


16 By: 
17 GAVIN G. McCABE

18 Attorneys for Plaintiff California Department of Fish and Game
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1 FOR THE CALIFORNIA STATE LANDS COMMISSION

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:

5 Dated: 6/1, 2005


6 PAUL D. THAYER
7 Executive Officer
8 State Lands Commission
9
10
11

12 BILL LOCKYER, Attorney General
13 of the State of California
14 GAVIN G. McCABE,
15 Deputy Attorney General

16 By: 

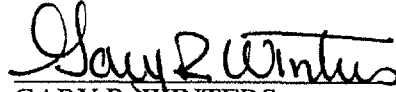
GAVIN G. McCABE

17 Attorneys for Plaintiff California State Lands Commission
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1 FOR THE CALIFORNIA DEPARTMENT OF TRANSPORTATION

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:

5 Dated: December 6,, 2004



6 GARY R. WINTERS
7 Chief
8 Division of Environmental Analysis
9 California Department of Transportation
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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: 5/11/05

5 NAME

Title: CEO

Address: 5750 Almaden Expressway

6 Stan Williams

San Jose, CA 95118-3614

7 Santa Clara Valley Water District

8
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

Title: District Counsel

13 Address: Santa Clara Valley Water District

5750 Almaden Expressway


San Jose, California 95118-3686

14 Ph. Number: (408) 265-2600

FOR SETTLING DEFENDANTS:

WE HEREBY CONSENT to the entry of the Consent Decree in United Stated, 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

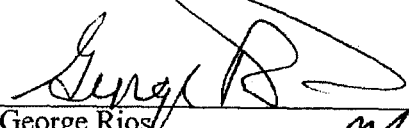
Address: 70 West Hedding St., 9th Floor
San Jose, CA 95110

Ph. Number: (408) 299-5900

1 FOR SETTLING DEFENDANTS:

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

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


George Rios
Assistant City Attorney
City of San Jose
151 W. Mission Street
San Jose, Ca. 95110
(408) 277-4454

6
7
8
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 Richard Doyle
13 City Attorney
14 City of San Jose
15 151 W. Mission Street
16 San Jose, California 95110

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Ph. Number: (408) 277-4450

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 26th, 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

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: February 2, 200⁵ Thomas J. Haines
~~NAME~~ Title: Senior Counsel
Address: Sunoco, Inc. Law Department
1801 MARKET STREET
Philadelphia, PA 19103

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

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

Name (print): SAME AS ABOVE

Title: _____

Address: _____

Ph. Number: (215) 977-6273

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: February 8, 2004

NAME

Duane C. Woods

Title:

President, Guadalupe
Address: Rubbish Disposal, Inc.

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

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

Name (print): Andrew M. Kenefick

Title: Senior Legal Counsel

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

Ph. Number: 206-264-3062

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
11
12 Name (print): Kevin C. O'Neil
13 Title: Vice President and General Counsel
14 Address: 1293 S. Main Street
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
22
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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 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
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Exhibit A

**California Regional Water Quality Control Board****San Francisco Bay Region**

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>

Arnold Schwarzenegger
Governor

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").¹

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

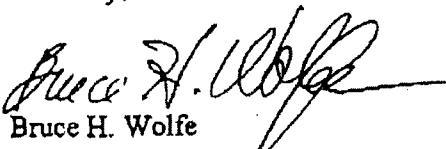
¹ Collectively these statutory authorities give rise to particular types of claims for "natural resources damages." To avoid confusion with other statutory authorities that may be used to address environmental contamination, including discharges of waste to the waters of the State, we refer to these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