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18 IN THE UNITED STATES DISTRICT COURT
19 FOR THE EASTERN DISTRICT OF CALIFORNIA

19 ARC ECOLOGY, et al.,
20 Plaintiffs,
21 and
22 CALIFORNIA REGIONAL WATER
23 QUALITY CONTROL BOARD, SAN
24 FRANCISCO BAY REGION,
25 Plaintiff-Intervenor
v.
UNITED STATES MARITIME
ADMINISTRATION, et al.,
Defendants.

2:07-CV-2320 GEB KJN

CONSENT DECREE

Judge: Hon. Garland E. Burrell, Jr.

1 **I. BACKGROUND AND INTRODUCTION**

2 WHEREAS, on December 6, 2007, Plaintiffs Arc Ecology, San Francisco BayKeeper
3 and Natural Resources Defense Council (collectively, the "Environmental Plaintiffs") filed a first
4 amended complaint for declaratory and injunctive relief in this Court, alleging that Defendants
5 U.S. Maritime Administration ("MARAD"), the Maritime Administrator, United States
6 Department of Transportation, and the Secretary of Transportation (hereafter collectively
7 referred to as "Defendants"), are in violation of the Clean Water Act ("CWA"), the Resource
8 Conservation and Recovery Act ("RCRA"), California's Hazardous Waste Control Law
9 ("HWCL"), the National Environmental Policy Act ("NEPA") and the Administrative Procedure
10 Act ("APA") with respect to the operation and management of non-retention vessels at the
11 National Defense Reserve Fleet at Suisun Bay (hereafter "Suisun Bay Reserve Fleet" or
12 "SBRF"), located in the City of Benicia in Solano County, California. Environmental Plaintiffs'
13 complaint seeks declaratory and injunctive relief under the CWA, RCRA, NEPA, and the APA,
14 civil penalties under RCRA, and attorneys' fees and costs;

15
16 WHEREAS, on November 14, 2008, Plaintiff-Intervenor California Regional Water
17 Quality Control Board, San Francisco Bay Region (hereafter "Plaintiff-Intervenor" or "Regional
18 Board") filed a complaint in intervention, also alleging that Defendants are in violation of the
19 CWA in operating and managing non-retention vessels at the SBRF. Plaintiff-Intervenor seeks
20 declaratory and injunctive relief under the CWA, civil penalties to the extent authorized under
21 the CWA, and attorneys' fees and costs. Environmental Plaintiffs and Plaintiff-Intervenor are
22 hereafter collectively referred to as "Plaintiffs." Plaintiffs and Defendants are hereafter
23 collectively referred to as the "Parties;"
24
25

1 WHEREAS, Plaintiffs allege that, during the six years preceding the filing of the
2 complaints and on a continuing basis, Defendants have discharged, and are continuing to
3 discharge, pollutants from point source non-retention SBRF vessels into waters of the United
4 States without first obtaining a valid National Pollutant Discharge Elimination System
5 ("NPDES") permit from the Regional Board, in violation of section 301(a) of the CWA (33
6 U.S.C. § 1311(a)). Plaintiff-Intervenor further alleges that, for the same reasons, Defendants
7 have violated, and are continuing to violate, section 402(a) of the CWA (33 U.S.C. § 1342(a)).
8 Environmental Plaintiffs further allege that Defendants have violated, and are continuing to
9 violate, section 3006(b) of RCRA (42 U.S.C. § 6961(b)) and California's Hazardous Waste
10 Control Law (Cal. Health & Safety Code § 25100 et seq.) by accepting, storing and/or disposing
11 of hazardous waste without a hazardous waste facilities permit, and have violated, and are
12 continuing to violate, section 4005(a) of RCRA (42 U.S.C. § 6945(a)) by engaging in open
13 dumping of solid and hazardous waste;
14

15 WHEREAS, Claims 1-4 of Environmental Plaintiffs' First Amended Complaint (Dkt. No.
16 14) raised claims under NEPA and the APA. On March 28, 2008, the parties filed a stipulation
17 (Dkt. No. 26) to, inter alia, stay litigation of Claims 1-4 while Defendants prepared either a final
18 environmental assessment ("EA") and finding of no significant impact ("FONSI") or a record of
19 decision and a final environmental impact statement. The Court approved and entered the
20 parties' stipulation regarding Plaintiffs' NEPA claims (Dkt. No. 27). Defendants provided notice
21 of its final EA and FONSI on September 8, 2009. Pursuant to paragraph 5 of the Joint
22 Stipulation and Order Regarding Plaintiffs' NEPA Claims (Dkt. No. 27), and Fed. R. Civ. P.
23 15(a)(2), Plaintiffs amended their First Amended Complaint to withdraw Claims 1-4 (Dkt. No.
24
25

1 103). The Court approved Environmental Plaintiffs' amendment on October 19, 2009 (Dkt. No.
2 104);

3 WHEREAS, on January 21, 2010, the Court issued an order that held that: Defendants
4 have, since at least October 5, 2007, discharged pollutants from each SBRF non-retention vessel
5 without a valid NPDES permit in continuous violation of the CWA, 33 U.S.C. § 1311(a);
6 Defendants have, since at least October 29, 2002, continuously stored exfoliated paint that is
7 hazardous waste on SBRF non-retention vessels without a permit, in violation of California's
8 Hazardous Waste Control Law, Cal. Health & Safety Code §§ 25201(a), 25189.5, 25189.2, and
9 Section 6001(a) of RCRA, 42 U.S.C. § 6961(a); and the Court lacked jurisdiction over the
10 Environmental Plaintiffs' claim under RCRA § 4005(a), 42 U.S.C. § 6945(a);
11

12 WHEREAS, the Parties have engaged in settlement negotiations in an attempt to resolve
13 the Plaintiffs' claims;

14
15 WHEREAS, the Parties desire to completely and finally resolve all the claims alleged in
16 the Plaintiffs' complaints without further litigation;

17 WHEREAS, this Consent Decree is entered into between the Parties for the purposes of
18 settlement and does not constitute an admission by Defendants of any fact or legal theory or of
19 any violation of federal law or regulation;

20
21 WHEREAS, the Parties agree, and this Court by entering this Consent Decree finds, that
22 this Consent Decree has been negotiated by the Parties in good faith, that settlement of this
23 matter will avoid prolonged and complicated litigation between the Parties, and that this Consent
24 Decree is fair, reasonable, and in the public interest;

1 THEREFORE, with the consent of the Parties to this Decree, it is ORDERED,
2 ADJUDGED, AND DECREED:

3 **II. JURISDICTION AND VENUE**

4
5 1. This Court has jurisdiction to enter this Consent Decree pursuant to 33 U.S.C. § 1365(a),
6 42 U.S.C. § 6972(a), and 28 U.S.C. § 1331.

7
8 2. Pursuant to 33 U.S.C. § 1365(c)(1), 42 U.S.C. § 6972(a) and 28 U.S.C. § 1391(e)(2),
9 venue lies in this judicial district because the SBRF is located in, and the actions alleged in the
10 complaints occurred in, this judicial district.

11 3. Solely for purposes of this Consent Decree and any action to enforce this Consent
12 Decree, Defendants consent to this Court's jurisdiction and to venue in this judicial district.

13 **III. APPLICABILITY**

14
15 4. The provisions of this Consent Decree shall apply to, inure to the benefit of, and be
16 binding upon the Environmental Plaintiffs, the Regional Board, and the Defendants, and the
17 Parties' officers, directors, employees, and agents, and any successors in interest and assigns, as
18 to matters that might reasonably include compliance with any provisions of this Decree.

19
20 **IV. DEFINITIONS**

21 5. Except as otherwise provided herein, the terms used in this Consent Decree shall have the
22 meaning given those terms in the CWA, 33 U.S.C. § 1362, RCRA, 42 U.S.C. § 6903, and those
23 statutes' implementing regulations. The following terms, as used in this Consent Decree and for
24 purposes of this Decree only, are defined as follows:
25

1 (a) "Consent Decree" shall mean this Consent Decree and all attachments hereto and
2 all modifications to this Consent Decree.

3 (b) "Day" shall mean a calendar day. In computing any period of time under this
4 Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the
5 period shall run until the close of business of the next working day.
6

7 (c) "Effective Date" shall mean the date on which this Consent Decree is entered by
8 the Court.

9 (d) "Exfoliated Paint" shall mean paint and associated dust and debris that have
10 entirely separated from a Vessel surface.
11

12 (e) "Exfoliating Paint" shall mean paint that is not yet entirely separated from a
13 Vessel surface but that can be removed from the surface with a hand scraper forced into and
14 under cracks in the painted surface.
15

16 (f) "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic
17 numeral or an uppercase or lowercase letter.

18 (g) "Remove for Disposal" or "Removed for Disposal" shall mean the permanent
19 removal of a Vessel from the Suisun Bay Reserve Fleet: pursuant to a contract or agreement for
20 subsequent disposal pursuant to 16 U.S.C. § 5405, 46 U.S.C. § 57102, 46 U.S.C. § 57103 or
21 16 U.S.C. § 1220(a); or as lawfully authorized pursuant to the U.S. Navy's SINKEX program;
22 or for disposal as otherwise provided by law.
23

24 (h) "Section" shall mean a portion of this Consent Decree identified by a capitalized
25 roman numeral.

1 (i) "Vessel" or "Vessels" shall mean the non-retention vessels that are anchored at
2 the SBRF as of November 1, 2009 as described in Exhibit A, which is attached to the Proposed
3 Consent Decree filed in this case on April 9, 2010 and located on the docket at entry 124.

4 **V. INJUNCTIVE RELIEF**

5
6 6. Defendants shall undertake the following activities on or before the dates or within the
7 time periods specified below:

8
9 (a) **NPDES Permit for Discharges from SBRF Non-Retention Vessels**

10 (1) Notice of Intent to Comply

11 (i) Within 14 days of the Effective Date, Defendants will submit to
12 the Regional Board a Notice of Intent to Comply ("NOIC") and acknowledge that they are
13 obligated by law to comply with the terms of State Water Resources Control Board, Water
14 Quality Order No. 97-03-DWQ, National Pollutant Discharge Elimination System (NPDES)
15 General Permit No. CAS000001, Waste Discharge Requirements for Discharges of Storm Water
16 Associated with Industrial Activities Excluding Construction Activities (hereafter "General
17 Permit").

18
19 (ii) Should the State Water Resources Control Board ("State Water
20 Board") issue a new or revised NPDES Permit for Discharges of Storm Water Associated with
21 Industrial Activities, Defendants shall submit another NOIC with respect to such new or revised
22 general permit as required by paragraph E.8 of the General Permit and shall submit a new or
23 revised storm water pollution prevention plan ("SWPPP") if required by the general permit then
24 in effect.
25

1 (iii) If Defendants ever vacate the property on which the SBRF is
2 located, Defendants shall file a Notice of Termination to the Regional Board. Upon receipt of
3 such notice, the Regional Board shall terminate the Defendants' requirement to comply with the
4 General Permit with respect to the SBRF facility.

5
6 (2) Storm Water Pollution Prevention Plan. Concurrently with submittal of
7 the NOIC, Defendants shall submit a SWPPP in compliance with the requirements of the
8 General Permit. The SWPPP shall be in the same form and content as that attached as Exhibit B
9 to the Proposed Consent Decree filed in this case on April 9, 2010 and located on the docket at
10 entry 124. The Regional Board, by and through its staff, will accept and approve the SWPPP if
11 it is submitted in the same form and content as that attached as Exhibit B.

12 (b) **Removal of Exfoliating and Exfoliated Paint**

13
14 (1) Except as otherwise provided in Paragraph 6(b)(5) below, Defendants will
15 remove or encapsulate exfoliating and exfoliated paint above the waterline from the exterior
16 Vessel surfaces (including hulls and topsides) in dry-dock of 25 Vessels, including all Vessels
17 with Condition Coating #1 or #2, listed in Exhibit A by September 30, 2011.

18
19 (2) Except as otherwise provided in Paragraph 6(b)(5) below, Defendants will
20 remove or encapsulate exfoliating and exfoliated paint above the waterline from the exterior
21 Vessel surfaces (including hulls and topsides) in dry-dock or at the SBRF fleet site from all
22 Vessels in Exhibit A, other than those described in Paragraph 6(b)(1), within two years of the
23 Regional Board's approval of the SWPPP or by March 31, 2012, whichever is later. If paint
24 removal from exterior vessel surfaces above the waterline is conducted at the SBRF fleet site,
25

1 Defendants agree to conduct such paint removal activities pursuant to a SWPPP reviewed and
2 approved by the Regional Board and required by the General Permit.

3 (3) Except as provided in Paragraph 6(b)(1), the order of cleaning the Vessels
4 listed in Exhibit A shall be determined solely by MARAD.

5
6 (4) Before Defendants may encapsulate (rather than remove) exfoliating and
7 exfoliated paint pursuant to Paragraph 6(b)(1), Defendants shall first provide Plaintiffs with a
8 written description of the paint encapsulation methods and materials and their effectiveness in
9 preventing or eliminating discharges of exfoliating and exfoliated paint, and said methods and
10 materials must be approved by the Regional Board. If Defendants determine that encapsulation
11 of exfoliating and exfoliated paint pursuant to Paragraph 6(b)(2) is required or preferred,
12 Defendants agree to revise the SWPPP to specifically describe paint encapsulation methods and
13 materials and their effectiveness in preventing or eliminating discharges of exfoliating and
14 exfoliated paint, and to submit such SWPPP to the Regional Board for review and approval,
15 prior to performing any encapsulation.
16

17 (5) Exceptions to requirements to remove exfoliating and exfoliated paint
18 above the waterline on exterior vessel surfaces:

19
20 (i) Any of the 25 Vessels otherwise subject to Paragraph 6(b)(1) that are
21 Removed for Disposal prior to September 30, 2011 for use in the United States Navy's SINKEX
22 program shall not be subject to Paragraph 6(b)(1).

23 (ii) Any of the remaining Vessels otherwise subject to Paragraph 6(b)(2)
24 that are Removed for Disposal prior to the deadline specified in Paragraph 6(b)(2) for use in the
25 Navy's SINKEX program shall not be subject to Paragraph 6(b)(2).

1 (iii) Any other Vessel otherwise subject to Paragraph 6(b)(1) or 6(b)(2)
2 that is designated to be Removed for Disposal by the deadlines specified in those Paragraphs for
3 donation to an organization specified in 46 U.S.C. § 57103, sale for reuse, artificial reefing, or
4 other removal as provided by law (including but not limited to special legislation directing the
5 disposition of a particular Vessel) shall be excepted from the requirements of Paragraphs 6(b)(1)
6 or 6(b)(2) if approved by the Regional Board.

7
8 (iv) Any Vessel that is Removed for Disposal to a ship-recycling facility
9 in the San Francisco Bay Area within one year of the Effective Date shall not be subject to
10 Paragraph 6(b)(1) or 6(b)(2).

11 (6) Any Vessel that is Removed for Disposal before the Effective Date shall
12 be counted toward completion of removal or encapsulation of exfoliating or exfoliated paint by
13 September 30, 2011 as provided for in Paragraph 6(b)(1).

14
15 (7) Removal of Exfoliated Paint From Exterior Horizontal Surfaces.

16 Defendants will:

17 (i) within 120 days of the Effective Date, remove exfoliated paint from the
18 exterior horizontal surfaces of each Vessel that is still moored at the SBRF; and

19 (ii) following either the initial removal of exfoliated paint from a Vessel as
20 described in the preceding subparagraph or the return of a Vessel to the SBRF after removal of
21 exfoliating or exfoliated paint in dry-dock as described in Paragraphs 6(b)(1) and 6(b)(2),
22 remove exfoliated paint on the exterior horizontal surfaces of each Vessel that is still moored at
23 the SBRF at least once every 90 days;

24

25

1 (iii) conduct all such work by shoveling, HEPA vacuuming, and/or
2 sweeping or other method that will not result in a discharge of any pollutant to the surrounding
3 waters.

4 (8) Disposition of Exfoliated and Removed Paint. Defendants shall ensure
5 that all paint and debris collected or removed from any Vessel is properly characterized, stored,
6 removed, transported, and disposed of in accordance with the requirements of applicable federal,
7 state and local laws and regulations. Defendants shall manage any exfoliated paint from Vessels
8 (including without limitation paint removed and/or collected pursuant to this Consent Decree),
9 and all mixtures of such paint and other materials, as hazardous waste and subject to the
10 requirements of RCRA Subtitle C, California's HWCL, and implementing regulations, unless
11 and until Defendants properly characterize such material and determine that it does not exhibit a
12 characteristic of hazardous waste and is not hazardous waste.
13

14 (9) If, for any reason, including any force majeure event as defined in
15 Paragraph 12, any Vessel from which exfoliating paint was previously removed pursuant to
16 Paragraph 6(b)(1) or 6(b)(2) remains in the SBRF for a period of 5 years following the initial
17 removal of exfoliating paint, Defendants shall once again remove any exfoliating paint from said
18 Vessel within 6 months after expiration of the 5-year period, unless otherwise authorized by the
19 Regional Board.

20 (c) **Removal for Disposal.**

21
22 (1) Defendants shall Remove for Disposal Vessels listed in Exhibit A
23 according to the schedule below. The order of removal of the Vessels listed in Exhibit A shall be
24 determined solely by MARAD, except that Defendants shall insure that the 25 Vessels, including
25 all Vessels with Condition Coating #1 or #2, referenced in Paragraph 6(b)(1), will all be

1 Removed for Disposal on or before September 30, 2013, unless the parties otherwise agree in
 2 writing.

Completed By:	Cumulative Number of Vessels Removed for Disposal:
September 30, 2010	10
September 30, 2011	20
September 30, 2012	28
September 30, 2013	32
September 30, 2014	38
September 30, 2015	44
September 30, 2016	50
September 30, 2017	57

11
 12 (2) The parties shall meet and confer on or before September 30, 2012 to
 13 determine if a more aggressive Vessel removal schedule is feasible. If the parties agree that a
 14 more aggressive Vessel removal schedule is feasible, the Parties will submit to the Court for
 15 approval a proposed revision to the removal schedule set forth in this Paragraph 6(c).

16
 17 **VI. INSPECTIONS, REPORTING, AND RECORD RETENTION**

18 7. **Reporting.** Defendants shall provide reports related to exfoliating and exfoliated paint
 19 removal and Vessels Removed for Disposal as follows:

20
 21 (a) Defendants shall prepare and provide to Plaintiffs and to the Court quarterly status
 22 reports on Defendants' implementation of this Consent Decree.

23 (1) Each such status report shall indicate the number of Vessels to be
 24 Removed for Disposal in the following quarter, and if practicable, a description of the Vessels to
 25 be Removed for Disposal. Each status report shall also describe each Vessel Removed for

1 Disposal in the preceding quarter and the disposition of such Vessel. In addition, such report
2 shall describe exfoliating and exfoliated paint removal for each Vessel that has been remediated
3 in the preceding quarter and for each Vessel undergoing remediation at the time of the report, as
4 follows: the status of removal of exfoliating and exfoliated paint and the characterization,
5 removal, storage, transportation and disposal of any hazardous waste associated with removal of
6 such paint and debris. The report shall include copies of the Vessel Condition Summary Report
7 for the preceding quarter and copies of all hazardous waste manifests for any material disposed
8 of by Defendants from the SBRF.

9
10 (2) Defendants shall post the quarterly status reports on MARAD's web site.

11 (3) In providing the quarterly status reports, Defendants are not required to
12 disclose procurement, business-sensitive or proprietary information that is subject to a
13 confidentiality agreement with a third party and/or applicable privilege or exemption from
14 disclosure.

15
16 (b) Consistent with the requirements of Federal Acquisition Regulations and other
17 applicable laws and regulations, Defendants shall post copies of ship-specific removal project
18 schedules on MARAD's website.

19
20 (c) Defendants shall also provide Plaintiffs with copies of all storm water monitoring
21 results and reports within 21 days after such results and reports are received or produced by
22 Defendants.

23 (d) Defendants shall provide Plaintiffs with 48 hours advance notice (or if 48 hours
24 notice is not practicable, as much advance notice as is practicable) before moving any Vessel to
25 conduct paint removal pursuant to Paragraphs 6(b)(1) or 6(b)(2) and before removing any Vessel

1 for disposal pursuant to Paragraph 6(c). The notice required by this paragraph may be provided
2 by electronic mail.

3
4 8. **Record Retention.** Defendants shall retain and maintain copies of all reports,
5 certifications and other submissions required under this Consent Decree for the duration of this
6 Decree.

7 9. **Document Disclosure.** At any time during the effective period of the Consent Decree,
8 Plaintiffs may request and (to the extent not covered by an applicable privilege or exemption
9 from disclosure recognized under federal law) Defendants shall provide copies of any
10 documents, records or other information required to be maintained under this Consent Decree.
11 Any such request by Plaintiffs shall be in writing. If Defendants withhold requested information
12 on the grounds of privilege or exemption from disclosure, Defendants shall concurrently provide
13 a detailed privilege log identifying: (i) the title, date and name of the document, record or
14 information; (ii) the title of the author of the document, record or information; (iii) the name and
15 title of each recipient of the document, record or information; (iv) the general subject matter of
16 the document, record or information (without revealing any privileged material); and (v) the
17 privilege or exemption from disclosure asserted with respect to the document, record or
18 information. Defendants shall not withhold on grounds of privilege or exemption from
19 disclosure any document, record or other information that has been created or generated
20 specifically to satisfy the requirements of this Consent Decree. Any dispute regarding the
21 disclosure of any document, record or other information shall be subject to Section IX (Dispute
22 Resolution).
23
24
25

1 10. **Requirements of Consent Decree in Addition to Other Laws.** The monitoring,
2 reporting, certification, record retention and other requirements of this Consent Decree are in
3 addition to, and do not supersede or otherwise relieve Defendants of, any other monitoring,
4 reporting, record retention and information disclosure as required by applicable federal, state or
5 local laws or regulations.

6
7 11. **Inspections.** This Consent Decree shall be in addition to, and does not supersede or
8 otherwise modify, the Regional Board's statutory and regulatory authority to conduct inspections.
9 In addition to the Regional Board's statutory and regulatory authority to conduct inspections, the
10 Environmental Plaintiffs shall be entitled to conduct one joint inspection of the SBRF per year.
11 Environmental Plaintiffs shall request such inspection by notice as specified in Paragraph 24 at
12 least 2 days in advance of the proposed joint inspection date. Approval by the Defendants of the
13 request shall not be unreasonably withheld. Any dispute regarding the annual joint inspection by
14 the Environmental Plaintiffs shall be subject to Section IX (Dispute Resolution).

15
16 **VII. FORCE MAJEURE**

17 12. For purposes of this Consent Decree, "force majeure" is defined as any event arising from
18 one or more causes beyond Defendants' control, including the control of Defendants' employees,
19 agents, contractors, consultants, and any other person acting on Defendants' behalf or pursuant to
20 Defendants' authorization, which delays or prevents Defendants' performance of or compliance
21 with any obligation or requirement of this Consent Decree, despite Defendants' best efforts
22 otherwise to fulfill the obligation or meet the requirement in question. "Best efforts" includes
23 anticipating and/or addressing the effects of any force majeure event to prevent or minimize any
24 resulting delay, non-performance or non-compliance. "Lack of availability," when used in this
25

1 Section, means that Defendants are unable to perform the obligations in and/or meet the
2 requirements of, this Consent Decree while complying with all applicable statutes and
3 regulations, including but not limited to the Federal Acquisition Regulations (FAR). The events
4 listed below are "force majeure" events if they meet the criteria above. Other events also may be
5 force majeure events if they meet the criteria above.

6
7 (a) acts of God, fire, war, insurrection, or civil disturbance;

8 (b) bid protest or any litigation regarding MARAD's award of a contract related to
9 ship maintenance, disposal, dry-docking, or towing;

10
11 (c) restraint by court order;

12 (d) lack of availability of commercial towing assets;

13 (e) lack of availability of commercial dry-dock facilities;

14 (f) lack of availability of commercial ship recycling services;

15 (g) any strike or similar work stoppage resulting from labor dispute;

16 (h) government shut-down or a government- or agency-wide prohibition of work by
17 essential or non-essential personnel;

18 (i) lack of responsive bids, as set forth in Federal Acquisition Regulation Parts 14
19 and 15, from qualified contractors in response to solicitations for maintenance, towing, dry-
20 docking, removal, disposal, or other services related to the Vessels;

21 (j) inability lawfully to obtain after exercise of reasonable diligence, any necessary
22 authorizations, approvals, permits, or licenses due to action or inaction of any governmental
23
24
25

1 agency or authority other than the Department of Transportation or MARAD or its authorized
2 contractors. Defendants shall not be deemed to have acted with reasonable diligence within the
3 meaning of this Paragraph 12(j) unless the action for which an authorization, approval, permit or
4 license is sought would comply with all applicable federal, state and local laws and regulations,
5 including but not limited to, applicable federal and state water quality standards;

6
7 (k) lack of appropriated funds;

8 (l) weather events that individually or cumulatively impact the maintenance, towing,
9 dry-docking, removal, disposal, or other services related to the Vessels;

10
11 (m) change in applicable requirements of international, Federal or State laws,
12 regulations, or authorities which delays or prevents Defendants' performance of or compliance
13 with any obligation or requirement of this Consent Decree; and

14 (n) requirement to dry-dock any Vessel more than once, which prevents Defendants
15 from being able to meet the schedule pursuant to Paragraph 6(c)(1), provided that any
16 requirement to dry-dock any Vessel more than once shall not be used as force majeure with
17 respect to any requirement in this Consent Decree other than the schedule in Paragraph 6(c)(1).
18

19 13. If any event occurs that Defendants reasonably believe qualifies as a force majeure event,
20 Defendants shall notify Plaintiffs in writing, at the addresses specified in Section X (Notices), no
21 later than 21 days after the date on which Defendants first knew, or in the exercise of due
22 diligence reasonably should have known, of such event. Such notice shall include a discussion
23 of: (i) each obligation or requirement of the Consent Decree that has been affected; (ii) how and
24 why such obligation or requirement has been affected, including the reasons for and estimated
25 length of the delay, non-performance or non-compliance; (iii) any measures Defendants have

1 taken or intend to take to prevent or minimize the delay, non-performance or non-compliance;
2 and (iv) a schedule for implementation of such measures. Defendants shall include with such
3 notice all available documentation supporting Defendants' claim that the delay, non-performance
4 or non-compliance is or was attributable to a force majeure event(s).

5
6 14. If documentation or portions of documentation that is necessary to substantiate a claim
7 that the delay, non-performance or non-compliance is or was attributable to a force majeure
8 event also contains procurement, business-sensitive or proprietary information that is subject to a
9 confidentiality agreement with a third party and/or an applicable legal privilege or exemption
10 from disclosure, then Defendants shall provide such information to Plaintiffs. Such information
11 shall be subject to a Protective Order in the form attached as Exhibit C to the Proposed Consent
12 Decree filed in this case on April 9, 2010 and located on the docket at entry 124.

13
14 15. Within 21 days of receipt of the notice specified in Paragraph 13, Plaintiffs shall inform
15 Defendants in writing as to whether they concur that Defendants' delay, non-performance or
16 non-compliance is attributable to a force majeure event. If Plaintiffs agree that Defendants'
17 delay, non-performance or non-compliance is attributable to a force majeure event, the time for
18 performance of or compliance with the applicable obligation or requirement of the Consent
19 Decree shall be extended as the Parties agree is reasonably necessary to complete the obligation
20 or requirement. Subject to the Court's order as provided in Paragraph 32, the Decree will be
21 modified in accordance with the Parties' written agreement. The Parties shall provide the
22 amended Decree to the Court within 10 days of reaching agreement on such a modification.

23
24 16. If Plaintiffs do not concur that a force majeure event has occurred, or the Parties do not
25 concur on the amount of time to complete the obligation or requirement affected by the force

1 majeure event, Plaintiffs or Defendants may invoke the Dispute Resolution procedure in Section
2 IX or Plaintiffs or Defendants may petition the Court for a modification to Paragraph 6(b) or 6(c)
3 of the Decree.

4 **VIII. ANTI-DEFICIENCY ACT**

5
6 17. Notwithstanding any other provision of this Decree, the obligations of this Decree are
7 subject to the availability of appropriated funds. No provision of this Decree shall be interpreted
8 as or constitute a commitment or requirement that the United States obligate or pay funds in
9 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

10
11 **IX. DISPUTE RESOLUTION**

12 18. Except as provided for in Section VII (Force Majeure), the dispute resolution procedure
13 provided for in this Section IX shall be the exclusive mechanism to resolve disputes and
14 disagreements arising under or with respect to this Consent Decree. The Parties shall make all
15 reasonable efforts to resolve their disputes and disagreements regarding the meaning of,
16 compliance with and/or implementation of this Consent Decree informally and in good faith
17 prior to seeking any relief from the Court. However, in the event that either an activity of
18 Defendants at the SBRF in alleged violation of this Consent Decree or compliance with this
19 Consent Decree poses an imminent and substantial endangerment to the health of persons or to
20 the environment, any Party may seek immediate relief from the Court and need not first meet and
21 confer with other parties pursuant to this Section IX.

22
23 19. If any Party has a dispute concerning the meaning of, compliance with, and/or
24 implementation of this Consent Decree, that Party shall send a written notice to all other Parties
25 that specifies the nature of the dispute and requests resolution of the dispute.

1 20. Upon receipt of written notice pursuant to Paragraph 19, the Party receiving such notice
2 shall either send the other Party written notice within 21 days of receipt pursuant to Paragraph 19
3 that it intends to cure and shall cure the alleged deficiency within 60 days; or, if the Party
4 receiving the notice pursuant to Paragraph 19 is unable to cure the alleged deficiency or disputes
5 the alleged deficiency, that Party receiving such notice shall provide written notice to this effect
6 to all Parties within 21 days of receipt of the notice pursuant to Paragraph 19.

7
8 21. If the Party receiving the notice pursuant to Paragraph 19 disputes the alleged deficiency,
9 the Parties shall initiate informal negotiations to resolve the dispute. Such period of informal
10 negotiations shall not extend beyond 60 days from the date on which the Party receiving the
11 notice requests such negotiations, unless the Parties agree otherwise in writing. If Defendants
12 fail to remedy the alleged violation or reach an agreement with the Plaintiff during the 60-day
13 informal negotiation period, concerning the alleged violation, Plaintiff may file a motion seeking
14 judicial enforcement and specific performance of this Consent Decree, subject to Paragraphs 22
15 and 23 below.

16
17 22. Except as provided in Paragraph 18, Plaintiffs agree not to seek judicial enforcement of
18 this Consent Decree for alleged delays or non-performance of or non-compliance with
19 requirements of the Decree unless all reasonable efforts, as set forth in this Section, to resolve the
20 dispute informally between the Parties have failed and Defendants have unreasonably delayed
21 compliance with, or unreasonably failed to perform their obligations under or to comply with, the
22 obligations and requirements of this Consent Decree.

23
24 23. In addition to the foregoing pre-requisites for judicial enforcement, civil contempt
25 sanctions shall be available only with respect to an alleged violation of an Order from the Court

1 requiring specific performance or compliance with respect to, or other Court order requiring
2 action to remedy, an alleged violation of this Consent Decree. In any such proceeding for
3 sanctions, Defendants preserve all defenses.

4 **X. NOTICES**

5
6 24. All notices, submissions and communications made pursuant to this Consent Decree shall
7 reference the title, caption and case number of this action, and shall be sent via certified U.S.
8 Mail, overnight express mail, hand delivery or electronic means to the recipients and addresses
9 below. Notices shall be considered delivered upon receipt and compliance periods requiring
10 notices shall commence starting with the date of receipt.

11 **To the Environmental Plaintiffs:**

12 **For Plaintiff Natural Resources Defense Council:**

13
14 Michael E. Wall, Senior Staff Attorney
15 Natural Resources Defense Council
16 Overnight and regular mail address:
17 111 Sutter Street, 20th Floor
18 San Francisco, CA 94104
19 Email: mwall@nrdc.org

20 **For Plaintiff San Francisco Baykeeper:**

21
22 Jason Flanders, Staff Attorney
23 San Francisco Baykeeper
24 Overnight and regular mail address:
25 785 Market Street, Suite 850
San Francisco, CA 94103
Email: jason@baykeeper.org

For Plaintiff ARC Ecology:

Saul Bloom
Arc Ecology
Overnight and regular mail address:

1 4634 Third Street
2 San Francisco, CA 94124
3 Email: saulbloom@arcecolgy.org
4 //

5 **To the Regional Board:**

6 David Elias, Engineering Geologist
7 California Regional Water Quality Control Board, San Francisco Bay Region
8 Overnight and regular mail address:
9 1515 Clay Street, 14th Floor
10 Oakland, CA 94612
11 Email: delias@waterboards.ca.gov

12 Cris Carrigan, Senior Staff Counsel
13 State Water Resources Control Board, Office of Enforcement
14 Overnight mail address:
15 1001 I Street
16 Sacramento, CA 95814
17 Regular mail address:
18 P.O. Box 100
19 Sacramento, CA 95812-0100
20 Email: ccarrigan@waterboards.ca.gov

21 Tara L. Mueller, Deputy Attorney General
22 California Office of the Attorney General
23 Overnight and regular mail address:
24 1515 Clay Street, 20th Floor
25 Oakland, CA 94612
Email: tara.mueller@doj.ca.gov

To Defendants:

26 Hank Ryan, Ship Operation & Maintenance Officer
27 U.S. Department of Transportation, Maritime Administration
28 Overnight and regular mail address:
29 201 Mission Street, Suite 2200
30 San Francisco, CA 94105
31 Email: hank.ryan@dot.gov

32 Jay R. Gordon, Chief, Division of Litigation and General Law
33 U.S. Department of Transportation, Maritime Administration
34 Overnight and regular mail address:
35 1200 New Jersey Avenue SE
Mail Stop 4

1 Washington, DC 20590
2 Email: jay.gordon@dot.gov

3 //

4 Leslie M. Hill, Trial Attorney
5 U.S. Department of Justice, Environment and Natural Resources Division
6 Environmental Defense Section
7 P.O. Box 23986
8 Washington, D.C. 20026-3986
9 Email: leslie.hill@usdoj.gov

10 U.S. Department of Justice
11 Environment and Natural Resources Division
12 Chief, Environmental Defense Section
13 P.O. Box 23986
14 Washington, D.C. 20026-3986

15 25. Any Party may change its designated recipient(s) and/or address(es) by providing written
16 notice of such change to all other Parties.

17 26. Unless otherwise provided by this Consent Decree or by written agreement of the Parties,
18 any notices, submissions and communications required pursuant to this Decree shall be deemed
19 submitted upon mailing.

20 **XI. COMPLIANCE WITH APPLICABLE LAWS**

21 27. Except as provided in Section XII (Effect of Settlement and Reservation of Rights), this
22 Consent Decree does not relieve Defendants of their responsibility to comply with all applicable
23 federal, state and local laws and regulations.

24 **XII. EFFECT OF SETTLEMENT AND RESERVATION OF RIGHTS**

25 28. This Consent Decree resolves any and all claims that have been brought, or that arose
prior to the Effective Date and that reasonably could have been brought, by the Regional Board

1 or the Environmental Plaintiffs under the CWA, RCRA, NEPA, the Porter-Cologne Act, the
2 California Health and Safety Code Chapters 6.5 – 6.98, or the California Public Resources Code
3 Division 30 with respect to the Suisun Bay Reserve Fleet, as alleged in the Plaintiffs’ operative
4 complaints, and Plaintiffs release any and all such claims.

5
6 29. This Consent Decree does not limit or affect the rights of any Party against any third
7 party who is not a Party to this Decree. This Consent Decree shall not be construed to create any
8 rights in or grant any cause of action to any third party who is not a Party to this Decree.

9
10 30. Except as otherwise provided in this Consent Decree, Plaintiffs reserve all legal and
11 equitable remedies available to enforce the provisions of this Consent Decree under any federal,
12 state or local law or regulation, and Defendants reserve all legal and equitable defenses to such
13 enforcement under any federal, state or local law or regulation.

14 **XIII. COSTS OF LITIGATION**

15
16 31. Defendants stipulate that Plaintiffs are “prevailing parties” within the meaning of
17 33 U.S.C. § 1365(d), and in the case of Environmental Plaintiffs, 42 U.S.C. § 6972(e). After
18 entry of the Decree by the Court, the Parties will attempt to resolve the amount of any claims for
19 costs of litigation (including reasonable attorney and expert witness fees) under
20 33 U.S.C. § 1365(d) or 42 U.S.C. § 6972(e). In the event the Parties are unable to reach
21 agreement, Plaintiffs reserve the right to file applications with the Court for such costs.

22 **XIV. MODIFICATION**

23
24 32. The Parties may modify the requirements of Paragraphs 6(b) or 6(c) by written
25 agreement. The Parties shall file a joint stipulation and notice to the Court for any such

1 modification. Except as otherwise provided above, no material modification of this Consent
2 Decree may be made absent a joint stipulation of all the parties and Court order.

3
4 33. Any disputes concerning modification of this Consent Decree shall be resolved pursuant
5 to Section IX (Dispute Resolution) except that the Party seeking the modification bears the
6 burden of establishing that it is entitled to the requested modification.

7 **XV. RETENTION OF JURISDICTION**

8
9 34. The Court shall retain jurisdiction of this matter for all purposes, including jurisdiction to
10 resolve any disputes arising under this Consent Decree and to enforce or modify this Decree,
11 until termination of the Decree pursuant to Section XVII (Termination).

12 **XVI. FINAL JUDGMENT AND WAIVER OF APPEAL**

13
14 35. Upon entry by the Court, this Consent Decree shall constitute a final judgment, from
15 which no appeal shall be taken except with respect to subsequent orders of the Court.

16 **XVII. TERMINATION**

17
18 36. This Consent Decree shall be terminated when there has been complete compliance with
19 the terms of Section V (Injunctive Relief).

20 **XVIII. SIGNATORIES AND COUNTERPARTS**

21
22 37. Each signatory to this Consent Decree certifies that he or she is fully authorized to enter
23 into this Decree, to agree to its terms and conditions, and to execute and legally bind the Party he
24 or she represents.

25 38. This Consent Decree may be executed in counterparts.

1 **XIX. INTEGRATION CLAUSE**

2 39. This Consent Decree constitutes the final, complete and exclusive agreement and
3 understanding between the Parties, and supersedes all prior agreements and understandings,
4 whether oral or written, with respect to the claims in this case. No other document, nor any
5 representation, agreement, understanding or promise is part of this Consent Decree, nor may
6 such be used in construing the terms of this Decree.
7

8 Respectfully submitted,

9 *For Defendants:*

10 Dated: March ____, 2010

11 BENJAMIN B. WAGNER
12 United States Attorney for the
13 Eastern District of California
14 TODD A. PICKLES
15 Assistant United States Attorney
16 501 I Street, Suite 10-100
17 Sacramento, CA 95814
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21 IGNACIA S. MORENO
22 Assistant Attorney General
23 Environment & Natural Resources Division

24 LESLIE M. HILL
25 MICHELLE LAMBERT
26 Trial Attorneys
27 Environmental Defense Section
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32 E-Mail: leslie.hill@usdoj.gov

33 //

1 *For Plaintiffs:*

2 Dated: March ____, 2010

3 MICHAEL E. WALL (CBN 170238)
4 NATURAL RESOURCES DEFENSE COUNCIL
5 111 Sutter Street, 20th Floor
6 San Francisco, CA 94104
7 Telephone: (415) 875-6100
8 Facsimile : (415) 875-6161
9 E-Mail: mwall@nrdc.org

7 THOMAS CMAR (*pro hac vice*)
8 NATURAL RESOURCES DEFENSE COUNCIL
9 12 North Riverside Plaza, Suite 2250
10 Chicago, IL 60606-9997
11 Telephone: (312) 651-7906
12 Facsimile: (312) 651-7919
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16 E-Mail: sallen@lgpatlaw.com

15 DAVID A. NICHOLAS (*pro hac vice*)
16 20 Whitney Road
17 Newton, MA 02460
18 Telephone: (617) 964-1548
19 Facsimile: (617) 663-6233
20 E-Mail: dnicholas@verizon.net

19 Attorneys for Plaintiffs Arc Ecology, San Francisco
20 Baykeeper, and Natural Resources Defense Council

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21 //

22 //

23 //

24 //

25

1 *For Plaintiff-Intervenor:*

2 Dated: March ____, 2010

EDMUND G. BROWN JR.
Attorney General of the State of California

3

4

5

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Supervising Deputy Attorney General

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11

Attorneys for Plaintiff-Intervenor California

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Regional Water Quality Control Board, San

Francisco Bay Region

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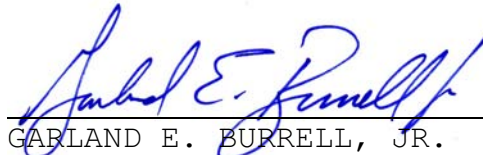
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[PROPOSED] ORDER

The Consent Decree is fair, reasonable, and equitable; does not violate the law or public policy; comes within the general scope of the pleadings; and furthers the objectives of the statutes on which Plaintiffs' and Plaintiff-Intervenor's operative complaints are based. For these reasons, the Consent Decree is approved and entered by this Court. *See Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990).

SO ORDERED.

Date: April 13, 2010



GARLAND E. BURRELL, JR.
United States District Judge

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