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**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION**

ASBESTOS DISEASE AWARENESS  
ORGANIZATION, *et al.*,  
Plaintiffs,

v.

MICHAEL REGAN, in his official capacity  
as the Administrator of the United States  
Environmental Protection Agency, *et al.*,

Defendant.

Case No. 4:21-cv-03716-PJH

**JOINT MOTION TO ENTER  
CONSENT DECREE**

Plaintiffs, Asbestos Disease Awareness Organization, American Public Health Association, Center for Environmental Health, Environmental Information Association, Safer Chemicals Healthy Families - A Program of Toxic-Free Future, Vermont Public Interest Research Group, Barry Castleman, ScD, Raja Flores, MD, Arthur Frank, MD, PhD, Phillip Landrigan, MD, MSc, Richard Lemen, PhD, MSPH, and Celeste Monforton,

JOINT MOTION TO ENTER CONSENT DECREE  
CASE NO. 4:21-cv-03716-PJH

1 DrPH, MPH, and Defendants Michael Regan in his official capacity as the Administrator  
2 of the United States Environmental Protection Agency and the United States  
3 Environmental Protection Agency (collectively “EPA”) hereby jointly move the Court to  
4 enter the attached Consent Decree (attached as Exhibit A). In support of this stipulation,  
5 the parties state the following:

6 1. Plaintiffs’ Complaint (ECF No. 1) alleges that EPA has failed to undertake  
7 a non-discretionary duty under section 6(b) of the Toxic Substances Control Act (TSCA),  
8 15 U.S.C. § 2605(b)(4)(G), and that such alleged failure is actionable under TSCA  
9 section 20(a)(2), 15 U.S.C. § 2619(a)(2).

10 2. Plaintiffs allege that EPA has not completed the risk evaluation of  
11 asbestos by June 19, 2020, as required by TSCA, because it did not evaluate the risks of  
12 legacy uses and associated disposals of asbestos.

13 3. The Parties reached agreement on a proposed Consent Decree that requires  
14 EPA to complete Part 2 of its risk evaluation of asbestos by December 1, 2024.

15 4. The proposed Decree requires EPA to submit reports every six months on  
16 its progress toward in completing the Part 2 risk evaluation.

17 5. The Parties jointly request that the Court enter the proposed Consent  
18 Decree.

19 6. The Parties agree that the Consent Decree is fair, reasonable, and in the  
20 public interest. The Court should therefore enter the attached Consent Decree.

21 WHEREFORE, the Parties respectfully move the Court to enter the attached  
22 Consent Decree.

23  
24 Respectfully submitted,

25 Date: October 13, 2021

26 Todd Kim  
27 Assistant Attorney General

28 /s/ Debra J. Carfora

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Senior Trial Counsel

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7 Date: October 13, 2021

9 /s/ Robert M. Sussman

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing JOINT MOTION TO ENTER CONSENT DECREE was served by Notice of Electronic Filing this 13th day of October 2021, upon all ECF registered counsel of record in each of the above-captioned cases using the Court's CM/ECF system.

*/s/ Debra J. Carfora*

Debra J. Carfora

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

ASBESTOS DISEASE AWARENESS  
ORGANIZATION et al.,

*Plaintiffs,*

v.

MICHAEL S. REGAN, et al.,

*Defendants.*

Case No. 4:21-CV-03716-SBA

**CONSENT DECREE**

1 WHEREAS, in 2016, Congress amended the Toxic Substances Control Act (TSCA) to  
2 create a new integrated process for prioritizing chemical substances, conducting risk evaluations  
3 to determine whether these chemical substances present an unreasonable risk to health and the  
4 environment, and promulgating rules that restrict these substances to the extent necessary so that  
5 they no longer present such unreasonable risks;

6 WHEREAS, in December 2016, as required by section 6(b)(2)(A) of TSCA, the  
7 Environmental Protection Agency (EPA) designated asbestos as one of the first ten chemical  
8 substances for risk evaluation and, by that designation, initiated the TSCA risk-evaluation  
9 process, 81 Fed. Reg. 91,927 (Dec. 19, 2016). Under section 6(b)(4) of TSCA, the purpose of  
10 EPA's risk evaluation was to determine whether asbestos presents an unreasonable risk of injury  
11 to health or the environment, without consideration of costs or other nonrisk factors, including an  
12 unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant to  
13 the risk evaluation by EPA, under the conditions of use, 15 U.S.C. § 2605(b)(4)(A);

14 WHEREAS, under section 6(b)(4)(G) of TSCA, EPA must complete a risk evaluation no  
15 later than 3 years from the date of initiation and may extend this deadline for not more than 6  
16 months;

17 WHEREAS, in June 2017, EPA published the scope of the risk evaluation for asbestos  
18 ("Scope Document"), as required by 15 U.S.C. § 2605(b)(4)(D). The Scope Document includes  
19 the hazards, exposures, conditions of use, and potentially exposed or susceptible subpopulations  
20 that EPA expects to consider in the risk evaluation, *id.*;

21 WHEREAS, in July 2018, EPA published and took public comment on a problem  
22 formulation document to refine the conditions of use, exposures and hazards presented in the  
23 scope of the risk evaluation for asbestos;

24 WHEREAS, consistent with statements in the preamble to the *Procedures for Chemical*  
25 *Risk Evaluation Under the Amended Toxic Substances Control Act*, 82 Fed. Reg. 33,726 (July  
26 20, 2017) (Risk Evaluation Rule), the scope document and problem formulation for asbestos  
27 excluded legacy uses, associated disposals, and legacy disposals from inclusion in the risk  
28 evaluation because EPA did not consider "legacy activities" to be conditions of use;

WHEREAS, in November 2019, the United States Court of Appeals for the Ninth Circuit  
held that "TSCA's definition of 'conditions of use' clearly includes uses and future disposals of

1 chemicals even if those chemicals were only historically manufactured for those uses. EPA's  
2 exclusion of legacy uses and associated disposals from the definition of 'conditions of use' is  
3 therefore unlawful." The Court also held that "TSCA unambiguously does not require past  
4 disposals to be considered conditions of use." *Safer Chemicals, Healthy Fams. v. EPA*, 943 F.3d  
5 397, 425 (9th Cir. 2019);

6 WHEREAS, on March 30, 2020, EPA made the draft risk evaluation (DRE) of asbestos  
7 available for public and scientific peer review;

8 WHEREAS, the DRE did not address the risks of legacy asbestos use and associated  
9 disposal;

10 WHEREAS, EPA issued a final risk evaluation for Asbestos Part 1 (Chrysotile Asbestos)  
11 on January 4, 2021 (86 Fed. Reg. 89) that was limited to ongoing conditions of use of chrysotile  
12 asbestos, the only asbestos fiber type that EPA identified as currently being imported, processed,  
13 or distributed in the United States;

14 WHEREAS, at the same time, the Agency announced that, in response to the 2019 Ninth  
15 Circuit decision, it would conduct a Part 2 evaluation addressing legacy uses and associated  
16 disposal of asbestos and indicated that, together, the two Parts would comprise the full risk  
17 evaluation for asbestos required under TSCA;

18 WHEREAS, EPA has initiated the scoping process for Part 2 of the asbestos risk  
19 evaluation to identify the conditions of use, exposures, hazards, and the potentially exposed or  
20 susceptible subpopulations EPA expects to consider in Part 2. The draft scope document is  
21 currently under development. After review and consideration of public comments, EPA will  
22 revise, where appropriate, and publish a final scope document clarifying the conditions of use  
23 that EPA expects to evaluate and describing how EPA expects to conduct Part 2 of the risk  
24 evaluation;

25 WHEREAS, EPA currently anticipates that it will publish a draft scope document for  
26 Part 2: Legacy Uses and Associated Disposals for Asbestos by December 31, 2021;

27 WHEREAS, EPA currently anticipates that it will publish a final scope document for Part  
28 2: Legacy Uses and Associated Disposals for Asbestos by June 30, 2022;

WHEREAS, subsequent to finalizing the scope, EPA will complete Part 2 of the risk  
evaluation for asbestos.

1 WHEREAS, completion of the full risk evaluation for asbestos will exceed the time  
2 prescribed in section 6(b)(4)(G) of TSCA;

3 WHEREAS, section 20(a)(2) of TSCA, 15 U.S.C. § 2619(a)(2), provides that any  
4 person may commence a civil action against the Administrator “to compel [him] to perform any  
5 act or duty under this Act which is not discretionary”;

6 WHEREAS, suits under section 20(a)(2) may be brought in the district court where the  
7 plaintiff is domiciled and may be filed 60 days after the plaintiff has “given notice to the  
8 Administrator of the alleged failure of [his] alleged failure to perform an act or duty which is the  
9 basis for such action”;

10 WHEREAS, after providing notice to the Administrator on January 26, 2021, Plaintiffs  
11 Asbestos Disease Awareness Organization, American Public Health Association, Center for  
12 Environmental Health, Environmental Information Association, Safer Chemicals Healthy  
13 Families - A Program of Toxic-Free Future, Vermont Public Interest Research Group, Barry  
14 Castleman, ScD, Raja Flores, MD, Arthur Frank, MD, PhD, Phillip Landrigan, MD, MSc,  
15 Richard Lemen, PhD, MSPH, and Celeste Monforton, DrPH, MPH (collectively, “Plaintiffs”) filed this action pursuant to section 20(a)(2) of TSCA on, May 18, 2021;

16 WHEREAS, Plaintiffs’ complaint alleges that Defendants, the United States  
17 Environmental Protection Agency and Michael S. Regan, in his official capacity as  
18 Administrator (collectively, “EPA”), failed to perform a non-discretionary duty under TSCA §  
19 6(b)(4)(G), 15 U.S.C. § 2605(b)(4)(G), to complete the risk evaluation of asbestos by June 19,  
20 2020, by failing to evaluate the risks of use and disposal of legacy asbestos;

21 WHEREAS, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 15 U.S.C.  
22 § 2619(a)(2);

23 WHEREAS, Plaintiffs and EPA (collectively, “the Parties”) wish to effect a settlement  
24 of the above-captioned matter by establishing enforceable deadlines for the Part 2 evaluation;

25 WHEREAS, the Parties agree that it is in their interests to effect a settlement of this  
26 matter without expensive and protracted litigation and without admission of any issue of fact or  
27 law, except as expressly provided herein;

28 WHEREAS, the Parties consider this Consent Decree to be an adequate and equitable  
resolution of the claims in the above-captioned matter;



1 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent Decree  
2 is fair, reasonable, in the public interest, and consistent with TSCA, 15 U.S.C. §§ 2601-2697;

3 NOW THEREFORE, before the taking of testimony, without trial or determination of  
4 any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED,  
5 ADJUDGED, and DECREED that:

6 1. On or before December 1, 2024, EPA shall complete Part 2 of its risk evaluation of  
7 asbestos (Legacy Uses and Associated Disposals of Asbestos), pursuant to 15 U.S.C. §  
8 2605(b)(4)(G).

9 2. Except as provided in Paragraph 13, extension of a deadline set forth herein may be  
10 effectuated only by (a) written stipulation of the Parties with notice to the Court, or (b) by the  
11 Court following motion of any party to this Consent Decree, pursuant to the Federal Rules of  
12 Civil Procedure, and upon consideration of any response by the non-moving party.

13 3. EPA shall file status reports with the Court at six-month intervals from the entry of  
14 decree detailing its progress in completing the Part 2 risk evaluation.

15 4. If EPA anticipates failing to meet any deadline set forth herein, it shall contact  
16 plaintiffs as soon as reasonably practicable and the parties shall confer about the reason for the  
17 delay and the terms of a stipulation extending the deadline.

18 5. If the parties are unable to reach agreement on such a stipulation and EPA files a  
19 motion to extend a deadline set forth herein, it shall file that motion at least 60 days before the  
20 applicable deadline occurs and, if that is not reasonably practicable, as soon as possible after  
21 concluding that a deadline extension is necessary.

22 6. Plaintiffs and EPA shall not challenge the terms of this Consent Decree or this  
23 Court's jurisdiction to enter and enforce this Consent Decree.

24 7. The deadline for filing a motion for costs of litigation, including attorneys' fees,  
25 incurred prior to entry of this Consent Decree is hereby extended until sixty (60) days after the  
26 entry of this Consent Decree by this Court. During this time, the Parties shall seek to resolve  
27 informally any claim for costs of litigation, including attorneys' fees, and if they cannot, will  
28 submit that issue to this Court for resolution. The United States does not waive or limit any  
defenses it may have to such claim. This Court shall retain jurisdiction to resolve any requests  
for costs of litigation, including attorneys' fees.

1           8. Plaintiffs and EPA agree that this Consent Decree shall constitute a complete and  
2 final settlement of all claims that Plaintiffs have asserted against the United States, including  
3 EPA, under any provision of law in connection with *Asbestos Disease Awareness Organization*  
4 *et al. v. Regan et al.*, Civil Case No. 4:21-CV-03716-SBA (N.D. Cal.), except as provided in  
5 Paragraph 7 of this Consent Decree. Plaintiffs therefore discharge and covenant not to sue the  
6 United States, including EPA, for any such claims.

7           9. Nothing in this Consent Decree shall be construed to limit or modify any discretion  
8 accorded EPA by TSCA or by general principles of administrative law in taking the actions that  
9 are the subject of this Consent Decree, including discretion to alter, amend, or revise any  
10 responses or final action contemplated by this Consent Decree. EPA's obligation to perform the  
11 action specified in Paragraph 1 of this Consent Decree by the time specified therein does not  
12 constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

13           10. Nothing in this Consent Decree shall be construed as an admission of any issue of  
14 fact or law nor as a waiver or limitation regarding any claim or defense, on any grounds, related  
15 to any final action EPA may take with respect to the risk evaluation of asbestos.

16           11. Nothing in this Consent Decree shall be construed to confer upon the District Court  
17 jurisdiction to review any final decision made by EPA pursuant to this Consent Decree. Nothing  
18 in this Consent Decree shall be construed to confer upon the District Court jurisdiction to review  
19 any issues that are within the exclusive jurisdiction of the United States Court of Appeals  
20 pursuant to TSCA section 19, 15 U.S.C. § 2618. Nothing in the terms of this Consent Decree  
21 shall be construed to waive any remedies or defenses the Parties may have under TSCA section  
22 19, 15 U.S.C. § 2618.

23           12. The obligations imposed upon EPA under this Consent Decree can only be  
24 undertaken using appropriated funds. No provision of this Consent Decree shall be interpreted  
25 as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of  
26 the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

27           13. If a lapse in EPA appropriations occurs within one hundred twenty (120) days prior  
28 to the deadline in Paragraph 1 in this Decree, that deadline shall be extended automatically one  
day for each day of the lapse in appropriations. Nothing in this Paragraph shall preclude EPA

from seeking an additional extension of time through modification of this Consent Decree pursuant to Paragraph 2.

14. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution within twenty (20) business days after receipt of the notice, any party may move the Court to resolve the dispute.

15. No motion or other proceeding seeking to enforce this Consent Decree or for contempt of Court shall be filed unless Plaintiffs have followed the procedure set forth in Paragraph 14.

16. Any notices required or provided for by this Consent Decree shall be in writing, via electronic mail or other means, and sent to the following (or to any new address of counsel as filed and listed in the docket of the above-captioned matter, at a future date):

For Plaintiffs:

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1           17. The Court shall retain jurisdiction to determine and effect compliance with this  
2 Consent Decree. When EPA's obligations under Paragraph 1 of this Consent Decree is  
3 complete, and Plaintiffs' claim for costs of litigation has been resolved pursuant to Paragraph 7,  
4 the above-captioned matter shall be dismissed with prejudice. The Parties may either jointly  
5 notify the Court that the Consent Decree should be terminated and the case dismissed, or EPA  
6 may so notify the Court by motion. If EPA notifies the Court by motion, then Plaintiffs shall  
7 have twenty (20) days in which to respond.

8           18. It is hereby expressly understood and agreed that this Consent Decree was jointly  
9 drafted by Plaintiffs and EPA and that any and all rules of construction to the effect that  
10 ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning  
11 the terms, meaning, or interpretation of this Consent Decree.

12           19. If for any reason the Court should decline to approve this Consent Decree in the form  
13 presented, this agreement is voidable at the sole discretion of either party, and the terms of this  
14 Consent Decree may not be used as evidence in any litigation between the parties.

15           20. The undersigned representative of each Party certifies that he or she is fully  
16 authorized to bind that Party to the terms of this Consent Decree.


17  
18           SO ORDERED on this \_\_\_\_ day of \_\_\_\_\_, 2021.

19  
20 DATED:

\_\_\_\_\_  
Phyllis J. Hamilton  
United States District Judge

1 SO AGREED:

2  
3  
4 FOR PLAINTIFF

  
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10 DATED:

OCTOBER 12, 2021

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12 FOR DEFENDANT

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19 DATED:

OCTOBER 12, 2021