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23 **UNITED STATES DISTRICT COURT**
24 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
25 **OAKLAND DIVISION**

26 _____)
27 BREAST CANCER PREVENTION)
28 PARTNERS, *et al.*,)
29)
30 Plaintiffs,) Case No. 4:21-cv-07360-HSG
31)
32 v.) CONSENT DECREE
33)
34 UNITED STATES ENVIRONMENTAL)
35 PROTECTION AGENCY, *et al.*,)
36)
37 Defendants.)
38 _____)

1 WHEREAS, on September 22, 2021, Plaintiffs Breast Cancer Prevention Partners, Sierra
 2 Club, Defend our Health, and Texas Environmental Justice Advocacy Services (collectively, the
 3 “Plaintiffs”) filed this lawsuit, Case No. 4:21-cv-07360-HSG, against the United States
 4 Environmental Protection Agency (“EPA”) and Michael S. Regan, in his official capacity as
 5 Administrator of the EPA (collectively, the “Defendants”), pursuant to the Administrative
 6 Procedure Act (“APA”), 5 U.S.C. §§ 555(b), 706(1), and 28 U.S.C. §§ 2201–02;

7 WHEREAS, Plaintiffs allege that EPA has unreasonably delayed taking final action on
 8 its proposed rule to list diisononyl phthalate (“DINP”) on the Toxics Release Inventory (“TRI”)
 9 pursuant to the Emergency Planning and Community Right-to-Know Act (“EPCRA”), 42 U.S.C.
 10 § 11023(e)(1);

11 WHEREAS, EPA initiated this rulemaking process in response to a petition submitted on
 12 February 24, 2000, *see* Letter from Kelly Lester and Katherine O’Brien, Earthjustice, to Michael
 13 S. Regan, EPA Adm’r (Apr. 9, 2021) (Compl., Ex. 6), which EPA received on February 29,
 14 2000;

15 WHEREAS, pursuant to EPCRA, 42 U.S.C. § 11023(e)(1)(A)–(B), “[w]ithin 180 days
 16 after receipt of a petition, the Administrator shall take one of the following actions: (A) [i]nitiate
 17 a rulemaking to add or delete the chemical to the [TRI] . . . [or] (B) [p]ublish an explanation of
 18 why the petition is denied”;

19 WHEREAS, pursuant to the Administrative Procedure Act, each federal agency has a
 20 duty “to conclude a matter presented to it” “within a reasonable time,” 5 U.S.C. § 555(b), and a
 21 “reviewing court shall . . . compel agency action” that has been “unreasonably delayed,” *id.* §
 22 706(1);

23 WHEREAS, EPA published a Proposed Rule to list DINP on the TRI on September 5,
 24 2000. Addition of Diisononyl Phthalate Category; Community Right-to-Know Toxic Chemical
 25 Release Reporting, 65 Fed. Reg. 53,681 (Sept. 5, 2000) (the “Proposed Rule”);

26 WHEREAS, EPA published a revised hazard assessment for DINP in the *Federal*
 27 *Register* on June 14, 2005 and invited further public comment on the Proposed Rule. Addition
 28 of Diisononyl Phthalate Category; Community Right-to-Know Toxic Chemical Release

1 Reporting; Notice of Data Availability, 70 Fed. Reg. 34,437 (June 14, 2005);

2 WHEREAS, EPA has yet to take final action on the Proposed Rule;

3 WHEREAS, Plaintiffs seek, *inter alia*, an order from this Court to establish a date certain
4 by which EPA will take final action on the Proposed Rule;

5 WHEREAS, Plaintiffs sent EPA a Notice of Intent to Sue to on April 9, 2021 to compel
6 EPA to take final action on the Proposed Rule. Letter from Kelly Lester and Katherine O'Brien,
7 Earthjustice, to Michael S. Regan, EPA Adm'r (Apr. 9, 2021) (Compl., Ex. 6);

8 WHEREAS, EPA, prior to issuing a final listing decision, intends to issue a supplemental
9 proposed rule that assesses listing DINP on the TRI in light of new science and the passage of
10 time;

11 WHEREAS, Plaintiffs and Defendants have agreed to a settlement of this action without
12 admission of any issue of fact or law, except as expressly provided herein;

13 WHEREAS, Plaintiffs and Defendants, by entering into this Consent Decree, do not
14 waive or limit any claim, remedy, or defense, on any grounds, related to any final EPA action;

15 WHEREAS, Plaintiffs and Defendants consider this Consent Decree to be an adequate
16 and equitable resolution of the claims in this case;

17 WHEREAS, Plaintiffs and Defendants agree that resolution of this lawsuit without
18 further litigation is in the best interests of the parties, the public, and judicial economy;

19 WHEREAS, Plaintiffs and Defendants agree that this Court has subject matter
20 jurisdiction over the matters resolved in this Consent Decree pursuant to 28 U.S.C. § 1331 and 5
21 U.S.C. § 702, sufficient for the Court to enter this Consent Decree;

22 WHEREAS, Plaintiffs and Defendants agree that venue is proper in the Northern District
23 of California pursuant to 28 U.S.C. § 1391(e) and Civil L.R. 3-2(c); and

24 WHEREAS, the Court, by entering this Consent Decree, finds that the Consent Decree is
25 fair, reasonable, in the public interest, and consistent with the APA and EPCRA;

26 NOW THEREFORE, before the taking of testimony, without trial or determination of
27 any issues of fact or law, and upon the consent of Plaintiffs and Defendants, it is hereby
28 ORDERED, ADJUDGED, and DECREED as follows:

1 1. No later than January 31, 2023, the appropriate EPA official shall either sign a
2 final rule that lists DINP on the TRI pursuant to EPCRA, 42 U.S.C. §§ 11023(d)(1)-(2),
3 11023(e)(1), or withdraw the proposed rule to list DINP on the TRI by signing a Notice of such
4 withdrawal for publication in the *Federal Register*.

5 2. If the Office of Management and Budget (“OMB”) determines that the rule
6 referenced in Paragraph 1 warrants review under Executive Order 12866, 58 Fed. Reg. 51,735
7 (Oct. 4, 1993), at the supplemental proposal and/or final rule stage, then the deadline in
8 Paragraph 1 shall be extended 90 days for each stage of review that OMB initiates, for a total
9 extension of 180 days if review is initiated at both the supplemental proposal and final rule
10 stages.

11 3. No later than 14 days after signature of any final rule issued pursuant to
12 Paragraphs 1-2 of this Consent Decree, EPA shall send the rulemaking package to the Office of
13 the Federal Register for review and publication in the *Federal Register*.

14 4. After EPA has completed all actions set forth in Paragraphs 1-2 of this Consent
15 Decree, after notice of the final action required by Paragraph 3 has been published in the
16 *Federal Register*, and the parties have resolved the issue of costs of litigation (including
17 reasonable attorneys’ fees), Defendants may move to have this Consent Decree terminated.
18 Plaintiffs shall have 14 days to respond to such motion, unless the parties stipulate to a longer
19 time. The basis of Plaintiffs’ opposition to such motion shall be limited to whether EPA has
20 failed to perform or failed to completely perform the actions required by this Consent Decree.

21 5. Any provision of this Consent Decree—including any deadline in the Consent
22 Decree—may be modified by (a) written stipulation of Plaintiffs and Defendants filed with the
23 Court, or (b) by the Court upon motion by any party for good cause shown pursuant to the
24 Federal Rules of Civil Procedure and upon consideration of any response by the non-moving
25 party and any reply. If one of the parties files a motion to modify the Consent Decree pursuant
26 to subsection (b) of this paragraph, the non-moving party may file a response or opposition
27 within (14) days. Before filing any motion under subsection (b) of this paragraph, the moving
28 party shall follow the dispute resolution process set forth in paragraph 8 below.

1 6. If a lapse in EPA appropriations occurs within 120 days prior to any deadline in
2 Paragraphs 1-2 of this Consent Decree, all such deadlines shall be extended automatically by
3 one day for each day of the lapse in appropriations. Nothing in this Paragraph shall preclude
4 EPA from seeking an additional extension of time through modification of this Consent Decree
5 pursuant to Paragraph 5.

6 7. Plaintiffs and Defendants agree that this Consent Decree constitutes a complete
7 settlement of all claims in this case, Case No. 4:21-cv-07360-HSG.

8 8. In the event of a dispute between Plaintiffs and Defendants concerning the
9 interpretation or implementation of any aspect of this Consent Decree, the disputing party shall
10 provide the other party with a written notice, via electronic mail, outlining the nature of the
11 dispute and requesting informal negotiations. These parties shall meet and confer in an attempt
12 to resolve the dispute. If these parties are unable to resolve the dispute within 10 business days
13 after receipt of the notice, either party may petition the Court to resolve the dispute.

14 9. No motion or other proceeding seeking to enforce this Consent Decree or for
15 contempt of Court shall be properly filed unless the procedures set forth in Paragraph 8 have
16 been followed, and the moving party has provided the other party with written notice received
17 at least 10 business days before the filing of such motion or proceeding.

18 10. Plaintiffs reserve the right to seek, subsequent to entry of this Consent Decree,
19 the costs of litigation (including reasonable attorneys' fees) incurred in the above-captioned
20 matter. Defendants reserve the right to oppose any such request for costs of litigation
21 (including attorneys' fees).

22 11. This Court shall retain jurisdiction over this matter to enforce the terms of this
23 Consent Decree and to resolve any requests for costs of litigation (including attorneys' fees).

24 12. Nothing in this Consent Decree shall be construed to limit or modify any
25 discretion afforded to EPA by EPCRA or otherwise provided by law in taking the actions that
26 are the subject of this Consent Decree, including the discretion to alter, amend, or revise any
27 final actions promulgated pursuant to this Consent Decree consistent with governing law.
28 EPA's obligation to perform each action specified in this Consent Decree does not constitute a

1 limitation or modification of EPA's discretion within the meaning of this Paragraph.

2 13. Except as expressly provided herein, nothing in this Consent Decree shall be
 3 construed as an admission of any issue of fact or law, nor to waive or limit any claim, remedy,
 4 or defense, on any grounds, related to any final action EPA takes with respect to the actions
 5 addressed in this Consent Decree.

6 14. It is hereby expressly understood and agreed that this Consent Decree was
 7 jointly drafted by Plaintiffs and Defendants. Accordingly, the parties hereby agree that all rules
 8 of construction providing that ambiguity is construed against the drafting party shall be
 9 inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent
 10 Decree.

11 15. Any notice required or provided for by this Consent Decree shall be in writing,
 12 sent via electronic mail, and sent to the following or to any new address of counsel as filed and
 13 listed in the docket of the above-captioned matter, at a future date:

14 For Plaintiffs: Katherine O'Brien
 15 Earthjustice
 16 kobrien@earthjustice.org

17 For Defendants: Paul Caintic
 18 United States Department of Justice
 19 Environment and Natural Resources Division
 20 paul.caintic@usdoj.gov

21 16. Plaintiffs and Defendants recognize and acknowledge that the obligations
 22 imposed upon EPA under this Consent Decree can only be undertaken using appropriated funds
 23 legally available for such purpose. No provision of this Consent Decree shall be interpreted as
 24 or constitute a commitment or requirement that the United States obligate or pay funds in
 25 contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision
 26 of law.

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

1 18. The undersigned representatives of Plaintiffs and Defendants certify that they are
2 fully authorized by the party they represent to consent to the Court's entry of the terms and
3 conditions of this Consent Decree.

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5 Dated: May 25, 2022

Respectfully submitted,

6 s/ Martha Mann
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Counsel for Plaintiffs

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17 *Counsel for Defendants*

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3 **IT IS SO ORDERED** on this 16th day of June, 2022.

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6 HAYWOOD S. GILLIAM, JR.
7 United States District Judge
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