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10 UNITED STATES DISTRICT COURT  
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA, ) Case No. CV-12-2225  
13 )  
14 Plaintiff, ) **CONSENT DECREE**  
15 v. )  
16 DENNIS WENDT, individually and as Trustee )  
17 of the Dennis Wendt Trust, )  
18 WENDT CONSTRUCTION CO., INC., and )  
19 WWW.PERSSARD.INC., )  
20 Defendants. )

21  
22  
23 WHEREAS, the Plaintiff, the United States of America, on behalf of the United States  
24 Environmental Protection Agency (“EPA”), has filed a Complaint concurrently with the lodging  
25 of this Consent Decree against Defendants Dennis Wendt, both individually and as Trustee of the  
26 Dennis Wendt Trust, Wendt Construction Co., Inc., and WWW.PERSSARD.INC. (jointly,  
27 “Defendants”) for violations of Section 301, 33 U.S.C. § 1311(a), of the Clean Water Act  
28

1 (“CWA”) with respect to the discharge of pollutants into waters of the United States in Fortuna,  
2 Humboldt County, California, without permits issued pursuant to CWA Section 404, 33 U.S.C. §  
3 1344; as to Defendant Dennis Wendt, for failing to comply with EPA requests for information  
4 issued pursuant to CWA Section 308(a), 33 U.S.C. § 1318(a); and as to Defendants Dennis  
5 Wendt and Wendt Construction Co., Inc., for failing to comply with an administrative order  
6 issued pursuant to CWA Sections 308(a) and 309(a), 33 U.S.C. §§ 1318(a) and 1319(a);

7 WHEREAS, the Complaint seeks: (1) to enjoin the discharge of pollutants into waters of  
8 the United States without a permit in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2)  
9 to require the Defendants to comply with the CWA and its implementing regulations; (3) to  
10 require the Defendants, at their own expense and at the direction of EPA, to restore the affected  
11 waters of the United States and otherwise mitigate the environmental harm they have caused; and  
12 (4) to require the Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

13 WHEREAS, this Consent Decree is intended to constitute a complete and final settlement  
14 of the United States’ claims under the CWA against the Defendants as set forth in the Complaint;

15 WHEREAS, the United States and the Defendants believe that settlement of this case is  
16 in the public interest and that entry of this Consent Decree is the most appropriate means of  
17 resolving the United States’ claims under the CWA against the Defendants in this case; and

18 WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement  
19 of the United States’ claims against the Defendants in this case, and that this Consent Decree  
20 adequately protects the public interest in accordance with the CWA and all other applicable  
21 federal law.

22 THEREFORE, before the taking of any testimony upon the pleadings, without further  
23 adjudication of any issue of fact or law, and upon consent of the parties hereto by their  
24 authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

25 **I. JURISDICTION AND VENUE**

26 1. This Court has jurisdiction over the subject matter of this action pursuant to CWA  
27 Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1331, 1345, and 1355.

28 2. Venue is proper in the United States District Court for the Northern District of

1 California pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. § 1391(b) and  
2 (c), because: (1) Defendant Dennis Wendt resides in this District; (2) Defendants Wendt  
3 Construction Co., Inc. and WWW.PERSSARD.INC have their principal place of business in this  
4 District; (3) the subject properties are located in this District; and (4) the causes of action alleged  
5 in the Complaint arose in this District.

6 3. The Complaint states claims upon which relief can be granted pursuant to CWA  
7 Sections 301, 308, 309, and 404, 33 U.S.C. §§ 1311, 1318, 1319, and 1344.

## 8 **II. APPLICABILITY**

9 4. The obligations of this Consent Decree shall apply to and be binding upon the  
10 Defendants, their officers, directors, agents, employees, and servants, and their successors and  
11 assigns and any person, firm, association, or corporation who is, or will be, acting in concert or  
12 participation with the Defendants, whether or not such person has notice of this Consent Decree.  
13 In any action to enforce this Consent Decree against the Defendants, the Defendants shall not  
14 raise as a defense the failure of any of their officers, directors, agents, employees, successors, or  
15 assigns or any person, firm, or corporation acting in concert or participation with the Defendants,  
16 to take any actions necessary to comply with the provisions hereof.

17 5. The project area to which this Consent Decree applies is located in the southwest  
18 portion of the City of Fortuna, Humboldt County, California, and includes the properties  
19 designated as Humboldt County Assessor's Parcel Numbers (APNs) 202-121-006-000, 202-121-  
20 078-000, and 202-121-083-000, as depicted on the Vicinity Map attached hereto as Appendix A  
21 and incorporated herein by reference (hereinafter, the "Mitigation Site"). Any transfer of  
22 ownership or other interest in the Mitigation Site shall not alter or relieve the Defendants, their  
23 officers, directors, agents, employees, and servants, and their successors and assigns and any  
24 person, firm, association, or corporation who is, or will be acting in concert or participation with  
25 the Defendants, of their obligation to comply with all of the terms of this Consent Decree. At  
26 least fifteen (15) days prior to any transfer of full or partial ownership or any other interest in the  
27 Mitigation Site by the Defendants, the Defendants shall provide written notice and a true copy of  
28 this Consent Decree to each of their successors in interest and shall simultaneously notify EPA

1 and the United States Department of Justice at the addresses specified in Section X below that  
2 such notice has been given. As a condition to any such transfer, the Defendants shall reserve all  
3 rights necessary to comply with the terms of this Consent Decree.

4 **III. SCOPE OF CONSENT DECREE**

5 6. This Consent Decree shall constitute a complete and final settlement of the civil  
6 claims for injunctive relief and civil penalties alleged in the Complaint against the Defendants  
7 under CWA Section 301 (as to all the Defendants), CWA Section 308(a) (as to Defendant  
8 Dennis Wendt only), and CWA Sections 308(a) and 309(a) (as to Defendants Dennis Wendt and  
9 Wendt Construction Co., Inc. only) concerning the properties described in the Complaint and all  
10 claims arising out of and involving the discharges of fill material at the locations described in the  
11 Complaint.

12 7. It is the express purpose of the United States in entering this Consent Decree to  
13 further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251. All plans, reports,  
14 construction, maintenance, and monitoring, and other obligations in this Consent Decree or  
15 resulting from the activities required by this Consent Decree, shall have the objective of causing  
16 the Defendants to achieve and maintain full compliance with, and to further the purposes of, the  
17 CWA.

18 8. The Defendants' obligations under this Consent Decree are joint and several.

19 9. Except as in accordance with this Consent Decree, the Defendants and the  
20 Defendants' agents, successors, and assigns are enjoined from discharging any dredged or fill  
21 material into waters of the United States located within the watershed encompassing the  
22 properties involved in this matter, unless such discharge complies with the provisions of the  
23 CWA and its implementing regulations.

24 10. The parties acknowledge that Nationwide Permit 32, found at 72 Fed. Reg.  
25 11,092, 11,187 (Mar. 12, 2007), authorizes a portion of the fill that was placed in the Mitigation  
26 Site to remain in place as described in Sections 4.2.1 and 4.2.2 of the MMP, subject to the  
27 conditions provided in the Nationwide Permit and this Consent Decree. The parties further  
28 acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material

1 insofar as such discharge is necessary to complete the work required to be performed pursuant to  
2 this Consent Decree. Any such discharge of dredged or fill material necessary for work required  
3 by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this  
4 Consent Decree.

5 11. This Consent Decree is not and shall not be interpreted to be a permit or  
6 modification of any existing permit issued pursuant to CWA Sections 402 or 404, 33 U.S.C. §§  
7 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the  
8 United States Army Corps of Engineers to issue, modify, suspend, revoke, or deny any  
9 individual permit or any nationwide or regional general permit, nor shall this Consent Decree  
10 limit EPA's ability to exercise its authority under CWA Section 404(c), 33 U.S.C. § 1344(c).

11 12. This Consent Decree in no way affects or relieves the Defendants of their  
12 responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

13 13. This Consent Decree in no way affects the rights of the United States as against  
14 any person not a party to this Consent Decree.

15 14. The United States reserves any and all legal and equitable remedies available to  
16 enforce the provisions of this Consent Decree and applicable law.

17 15. Nothing in this Consent Decree shall constitute an admission of fact or law by any  
18 party or be construed as an admission of liability by the Defendants.

19 **IV. SPECIFIC PROVISIONS**

20 **A. CIVIL PENALTIES**

21 16. The Defendants shall pay a civil penalty to the United States in the amount of  
22 one- hundred seventy thousand dollars (\$170,000).

23 17. Payment to the United States shall be made within thirty (30) days of entry of this  
24 Consent Decree, in accordance with the written instructions to be provided to the Defendants by  
25 the United States Department of Justice.

26 18. Upon payment of the civil penalty required by this Consent Decree, the  
27 Defendants shall provide written notice, at the addresses specified in Section X of this Consent  
28 Decree, that such payment was made in accordance with Paragraph 17.

1           19.     Civil penalty payments pursuant to this Consent Decree (including stipulated  
2 penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the  
3 Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21, and are not tax  
4 deductible expenditures for purposes of federal law.

5           B.     MITIGATION AND PRESERVATION

6           20.     The Defendants shall perform mitigation and monitoring under the terms and  
7 conditions stated in the “Mitigation and Monitoring Plan for the East Littlefield and Strongs  
8 Creek Plaza Properties, Fortuna, California, APNs 202-121-006-000, 202-121-078-000, 202-  
9 121-083-000,” attached hereto as Appendix B and incorporated herein by reference (hereinafter,  
10 the “MMP”).

11           21.     The Defendants shall complete all tasks required under the MMP pursuant to the  
12 schedules set forth in Table 20 and Table 24 of the MMP. The specific dates and deadlines set  
13 forth in Table 20 and Table 24 of the MMP shall constitute enforceable deadlines that are subject  
14 to stipulated penalties under Section IX of this Consent Decree.

15           22.     The Defendants shall comply with the terms and conditions applicable to the  
16 Preserve Area set forth in Section 7 of the MMP, including the terms and conditions of the  
17 Declaration of Restrictions for East Littlefield Preserve Area referenced therein and attached as  
18 Appendix I to the MMP.

19           23.     The Defendants shall comply with the terms and conditions stated in the Adaptive  
20 Management Plan, attached as Appendix G to the MMP and incorporated herein by reference  
21 (hereinafter, the “AMP”).

22           24.     The Defendants shall complete all tasks required under the AMP pursuant to the  
23 schedule set forth in Table 3 of the AMP. The specific dates and deadlines set forth in Table 3 of  
24 the AMP shall constitute enforceable deadlines that are subject to stipulated penalties under  
25 Section IX of this Consent Decree.

26           25.     At least fourteen (14) days prior to commencing any site preparation work,  
27 Defendants shall notify EPA in writing of the start and anticipated end dates of the site  
28

1 preparation work. Defendants shall notify EPA in writing of any change to any of the dates as  
2 soon as they become aware of the change.

3           26. Winzler & Kelly currently serves as the Project Manager and is part of the  
4 Monitoring Team, as defined in the MMP at page 3. If a replacement Project Manager is needed  
5 for any reason, Defendants shall submit to EPA for approval the name and relevant qualifications  
6 and experiences of the person proposed to serve as a replacement Project Manager. If EPA  
7 disapproves Defendants' proposed replacement Project Manager, Defendants shall submit an  
8 alternate name within fourteen (14) days of EPA' disapproval. The replacement Project Manager  
9 may not commence work until approval by EPA.  
10

11  
12           27.       Within fifteen (15) days of entry of this Consent Decree, the Defendants shall  
13 cause to be recorded in the Humboldt County Recorder's Office the Strongs Creek Plaza, LLC  
14 Easement, attached as Appendix H to the MMP and incorporated herein by reference, in a  
15 manner and form acceptable for such recording.

16           28.       Within fifteen (15) days of entry of this Consent Decree, the Defendants shall  
17 cause to be recorded in the Humboldt County Recorder's Office the Declaration of Restrictions  
18 for East Littlefield Preserve Area, attached as Appendix I to the MMP and incorporated herein  
19 by reference, in a manner and form acceptable for such recording.

20           29.       Except as approved by EPA, upon completion of the terms and conditions of the  
21 MMP, the Defendants shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater,  
22 drain or otherwise disturb in any manner whatsoever any portion of the Enhancement Only  
23 Areas, Removal and Enhancement Areas, and the Preserve Area, areas which are identified and  
24 described in Sections 4 and 7 of the MMP and shown on Figures 6, 7, 8, and 9 of the MMP  
25 (hereinafter, the "Mitigation Areas"). The obligations of this paragraph survive termination of  
26 this Consent Decree under Section XV.

27           30.       To ensure that the Mitigation Areas referenced in Paragraph 27 remain  
28 undisturbed, the Defendants shall, within fifteen (15) days of entry of this Consent Decree,

1 record a certified copy of this Consent Decree with the recorder of deeds for Humboldt County,  
2 California. Thereafter, each deed, title, or other instrument conveying any interest the  
3 Defendants may have in the Mitigation Areas shall contain a notice stating that the property is  
4 subject to this Consent Decree and shall reference the recorded location of the Consent Decree  
5 and any restrictions applicable to the property under this Consent Decree.

6 **V. NOTICES AND OTHER SUBMISSIONS**

7 31. Within thirty (30) days after the deadline for completing any task set forth in the  
8 MMP and AMP, the Defendants shall provide the United States with written notice, at the  
9 addresses specified in Section X of this Consent Decree, of whether or not that task has been  
10 completed.

11 32. If the required task has been completed, the notice shall specify the date it was  
12 completed and explain the reasons for any delay in completion beyond the scheduled time for  
13 such completion required by the MMP and AMP.

14 33. In all notices, documents, or reports submitted to the United States pursuant to  
15 this Consent Decree, the Defendants shall, by signature of a senior management official, certify  
16 such notices, documents, and reports as follows:

17 I certify under penalty of law that this document and all attachments were  
18 prepared under my direction or supervision in accordance with a system designed to  
19 assure that qualified personnel properly gather and evaluate the information submitted.  
20 Based on my inquiry of the person or persons who manage the system, or those persons  
21 directly responsible for gathering such information, the information submitted is, to the  
22 best of my knowledge and belief, true, accurate and complete. I am aware that there are  
23 significant penalties for submitting false information, including the possibility of fine and  
24 imprisonment for knowing violations.

25 34. The reporting requirements of this Consent Decree do not relieve Defendants of  
26 any reporting obligations required by the CWA or its implementing regulations, or by any other  
27 federal, state, or local law, regulation, permit, or other requirement.

28 35. Any information provided pursuant to this Consent Decree may be used by the  
United States in any proceeding to enforce the provisions of this Consent Decree and as  
otherwise permitted by law.



1                   **VI.    RETENTION OF RECORDS AND RIGHT OF ENTRY**

2           36.    Until ten (10) years after entry of this Consent Decree, the Defendants shall  
3 preserve and retain all records and documents now in their possession or control or which come  
4 into their possession or control that relate in any manner to the performance of the tasks in the  
5 MMP and AMP, regardless of any corporate retention policy to the contrary. Until ten (10) years  
6 after entry of this Consent Decree, the Defendants shall also instruct their contractors and agents  
7 to preserve all documents, records, and information of whatever kind, nature or description  
8 relating to the performance of the tasks in the MMP and AMP.

9           37.    At the conclusion of the document retention period, the Defendants shall notify  
10 the United States at least ninety (90) days prior to the destruction of any such records or  
11 documents, and, upon request by the United States, and subject to the restrictions in this Consent  
12 Decree, the Defendants shall deliver any such records or documents to EPA. The Defendants  
13 may assert that any such documents, records, and other information are privileged under the  
14 attorney-client privilege, attorney-work product doctrine, or any other privilege recognized by  
15 federal law and may assert that any requested document, record, or other information is  
16 confidential business information pursuant to federal law. If the Defendants assert such a  
17 privilege, they shall provide the United States with the following: (1) the title of the document,  
18 record, or information; (2) the date of the document, record, or information; (3) the name and  
19 title of the author of the document, record, or information; (4) the name and title of each  
20 addressee and recipient; (5) a description of the subject of the document, record, or information;  
21 and (6) the privilege asserted by the Defendants. However, no documents, reports, or  
22 information required to be created or maintained pursuant to this Consent Decree shall be  
23 withheld based upon any claim that such document, report, or information is privileged.

24           38.    Until termination of this Consent Decree, the United States and its authorized  
25 representatives and contractors shall have authority at all reasonable times to enter the Mitigation  
26 Site to:

- 27                   A.    Monitor the activities required by this Consent Decree;  
28                   B.    Verify any data or information submitted to the United States;

- 1 C. Obtain samples and, upon request, splits or duplicates of any samples
- 2 taken by the Defendants, their contractors, or consultants;
- 3 D. Inspect and evaluate the Defendants' mitigation and monitoring activities;
- 4 and
- 5 E. Inspect and review any records required to be kept under the terms and
- 6 conditions of this Consent Decree and the CWA.

7 This provision of this Consent Decree is in addition to, and in no way limits or otherwise  
8 affects, the statutory authorities of the United States to conduct inspections, to require  
9 monitoring, and to obtain information from the Defendants as authorized by law.

## 10 **VII. DISPUTE RESOLUTION**

11 39. Any dispute that arises with respect to the meaning or requirements of this  
12 Consent Decree shall be, in the first instance, the subject of informal negotiations between the  
13 United States and the Defendants to attempt to resolve such dispute. The period for informal  
14 negotiations shall not extend beyond thirty (30) days beginning with written notice by one party  
15 to the other party that a dispute exists, unless a longer period is agreed to in writing by the  
16 parties. If a dispute between the United States and the Defendants cannot be resolved by  
17 informal negotiations, then the position advanced by the United States shall be considered  
18 binding unless, within fourteen (14) days after the end of the informal negotiations period, the  
19 Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set  
20 forth the nature of the dispute and a proposal for its resolution. The United States shall have  
21 thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any  
22 such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence  
23 that the United States' position is not in accordance with the objectives of this Consent Decree  
24 and that the Defendants' position will achieve compliance with the terms and conditions of this  
25 Consent Decree and the CWA.

26 40. If the United States believes that a dispute is not a good faith dispute, or that a  
27 delay would pose or increase a threat of harm to the public or the environment, it may move the  
28 Court for a resolution of the dispute prior to the expiration of the thirty-day (30-day) period for

1 informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion  
2 and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the  
3 burden of proving by a preponderance of the evidence that the United States' position is not in  
4 accordance with the objectives of this Consent Decree and that the Defendants' position will  
5 achieve compliance with the terms and conditions of this Consent Decree and the CWA.

6 41. The filing of a motion asking the Court to resolve a dispute shall not extend or  
7 postpone any obligation of the Defendants under this Consent Decree, except as provided in  
8 Paragraph 47 below regarding payment of stipulated penalties.

9 **VIII. FORCE MAJEURE**

10 42. The Defendants shall perform the actions required under this Consent Decree  
11 within the time limits set forth or approved herein, unless the performance is prevented or  
12 delayed solely by a Force Majeure event. A Force Majeure event is any event arising from  
13 causes beyond the control of the Defendants, including its employees, agents, consultants, and  
14 contractors, which could not be overcome by due diligence and which delays or prevents the  
15 performance of an action required by this Consent Decree within the specified time period. A  
16 Force Majeure event does not include, inter alia, increased costs of performance, changed  
17 economic circumstances, changed labor relations, normal precipitation or climate events,  
18 changed circumstances arising out of the sale, lease, or other transfer or conveyance of title or  
19 ownership or possession of a site, or failure to obtain federal, state, or local permits.

20 43. If the Defendants believe that a Force Majeure event has affected the Defendants'  
21 ability to perform any action required under this Consent Decree, the Defendants shall notify the  
22 United States in writing within seven (7) calendar days after the event at the addresses listed in  
23 Section X. Such notice shall include a discussion of the following:

- 24 A. What action has been affected;
- 25 B. The specific causes of the delay;
- 26 C. The length or estimated duration of the delay; and
- 27 D. Any measures taken or planned by the Defendants to prevent or minimize  
28 the delay and a schedule for the implementation of such measures.

1 The Defendants may also provide to the United States any additional information that  
2 they deem appropriate to support the conclusion that a Force Majeure event has affected their  
3 ability to perform an action required under this Consent Decree. Failure to provide timely and  
4 complete notification to the United States shall constitute a waiver of any claim of Force  
5 Majeure as to the event in question.

6 44. If the United States determines that the conditions constitute a Force Majeure  
7 event, then the deadline for the affected action shall be extended by the amount of time of the  
8 delay caused by the Force Majeure event. The Defendants shall coordinate with EPA to  
9 determine when to begin or resume the operations that had been affected by any Force Majeure  
10 event, with EPA retaining final approval regarding a beginning date.

11 45. If the parties are unable to agree whether the conditions constitute a Force  
12 Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at  
13 issue should be extended, any party may seek a resolution of the dispute under the Dispute  
14 Resolution procedures set forth in Section VII of this Consent Decree.

15 46. The Defendants shall bear the burden of proving: (1) that the noncompliance at  
16 issue was caused by circumstances entirely beyond the control of the Defendants and any entity  
17 controlled by the Defendants, including their contractors and consultants; (2) that the Defendants  
18 or any entity controlled by the Defendants could not have foreseen and prevented such  
19 noncompliance; and (3) the number of days of noncompliance that were caused by such  
20 circumstances.

21 **IX. STIPULATED PENALTIES**

22 47. After entry of this Consent Decree, if the Defendants fail to timely fulfill any  
23 requirement of the Consent Decree (including the requirements of the MMP and AMP), the  
24 Defendants shall pay a stipulated penalty to the United States for each violation of each  
25 requirement of this Consent Decree as follows:

26 A. For Day 1 up to and including Day 30 of non-compliance:

27 Two hundred fifty dollars (\$250.00) per day

28 B. For Day 31 up to and including Day 60 of non-compliance:

1 Five hundred dollars (\$500.00) per day

2 C. For Day 61 and beyond of non-compliance:

3 Fifteen hundred dollars (\$1,500.00) per day

4 Such payments shall be made upon demand by the United States on or before the last day  
5 of the month following the month in which the stipulated penalty accrued.

6 48. Any disputes concerning the amount of stipulated penalties, or the underlying  
7 violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant  
8 to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in  
9 Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 37 and 38.

10 49. The filing of a motion requesting that the Court resolve a dispute shall stay the  
11 Defendants' obligation to pay any stipulated penalties with respect to the disputed matter  
12 pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties  
13 shall continue to accrue from the first day of any failure or refusal to comply with any term or  
14 condition of this Consent Decree. In the event that the Defendants do not prevail on the disputed  
15 issue, stipulated penalties shall be paid by the Defendants as provided in this Section.

16 50. The United States may, in the exercise of its unreviewable discretion, waive its  
17 right to any or all of the stipulated penalty amount otherwise due it under this Consent Decree.

18 51. To the extent the Defendants demonstrate to the Court that a delay or other  
19 noncompliance was due to a Force Majeure event (as defined in Paragraph 40 above) or  
20 otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that  
21 delay or noncompliance.

22 52. In the event that a stipulated penalty payment is applicable and not made on time,  
23 interest will be charged in accordance with the statutory judgment interest rate provided for in 28  
24 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the  
25 date the payment is made. The interest shall also be compounded annually.

26 53. The Defendants shall make any payment of a stipulated penalty in accordance  
27 with the instructions to be provided by the United States Department of Justice as set forth in  
28 Paragraph 17 of this Consent Decree. Upon payment of any stipulated penalties, the Defendants

1 shall provide written notice, at the addresses specified in Section X of this Decree.

2 **X. NOTICES AND COMMUNICATIONS**

3 54. All notices and communications required under this Consent Decree shall be  
4 made to the parties through each of the following persons and addresses:

5 A. U.S. Environmental Protection Agency:

6 Marcela von Vacano  
7 Office of Regional Counsel (ORC-2)  
8 U.S. Environmental Protection Agency  
9 Region 9  
10 75 Hawthorne Street  
11 San Francisco, CA 94105  
12 Ph: 415-972-3905  
13 Email: vonvacano.marcela@epa.gov

14 B. U.S. Department of Justice:

15 Kim N. Smaczniak  
16 U.S. Department of Justice  
17 Environment and Natural Resources Division  
18 Environmental Defense Section  
19 P.O. Box 23986  
20 Washington, DC 20026-3986  
21 Ph: 202-514-0165  
22 Email: kim.smaczniak@usdoj.gov

23 C. Defendants:

24 Richard Smith  
25 Harland Law Firm LLP  
26 622 H Street  
27 Eureka, California 95501  
28 Ph: 707-444-9281  
Email: rsmith@harlandlaw.com

**XI. COSTS OF SUIT**

55. Each party to this Consent Decree shall bear its own costs and attorneys' fees in  
this action.

1 **XII. PUBLIC COMMENT**

2 56. The parties acknowledge that after the lodging and before the entry of this  
3 Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. §  
4 50.7, which provides for public notice and comment. The United States reserves the right to  
5 withhold or withdraw its consent to the entry of this Consent Decree if the comments received  
6 disclose facts that lead the United States to conclude that the proposed judgment is inappropriate,  
7 improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or  
8 challenge any provision of this Consent Decree, unless the United States has notified the  
9 Defendants in writing that it no longer supports entry of the Consent Decree.

10 **XIII. CONTINUING JURISDICTION OF THE COURT**

11 57. This Court shall retain jurisdiction over this action in order to enforce or modify  
12 the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as  
13 may be necessary or appropriate for construction or execution of this Consent Decree. During  
14 the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to  
15 construe and effectuate the Consent Decree.

16 **XIV. MODIFICATION**

17 58. Upon its entry by the Court, this Consent Decree shall have the force and effect of  
18 a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take  
19 effect unless signed by both the United States and the Defendants and approved by the Court.  
20 Notwithstanding the prior sentence, modifications of deadlines or other obligations contained in  
21 the MMP and AMP by a written agreement signed by both the United States and the Defendants  
22 shall not require approval of the Court.

23 **XV. TERMINATION**

24 59. Except for Paragraph 27, this Consent Decree may be terminated by either of the  
25 following:

- 26 A. The Defendants and the United States may make at any time a joint  
27 motion to the Court for termination of this Decree or any portion of it; or  
28 B. The Defendants may make a unilateral motion to the Court to terminate

1 this Decree after each of the following has occurred:

- 2 1. The Defendants have obtained and maintained compliance with all  
3 provisions of this Consent Decree and the CWA;
- 4 2. The Defendants have fully complied with and completed all tasks  
5 required under the MMP and AMP;
- 6 3. The Defendants have paid all penalties and other monetary  
7 obligations hereunder and no penalties or other monetary  
8 obligations are outstanding or owed to the United States;
- 9 4. The Defendants have certified compliance pursuant to  
10 subparagraphs 1, 2, and 3 above to the Court and EPA; and
- 11 5. Within forty-five (45) days of receiving such certification from the  
12 Defendants, EPA has not contested in writing that such compliance  
13 has been achieved. If EPA disputes the Defendants' full  
14 compliance, this Consent Decree shall remain in effect pending  
15 resolution of the dispute by the parties or the Court.

16 60. If the United States does not agree that the requirements of Paragraph 55 are  
17 satisfied, the Defendants may invoke the provisions of Section VII (Dispute Resolution) and the  
18 Consent Decree shall remain in effect pending resolution of the dispute by the parties or,  
19 ultimately, by the Court. In any dispute concerning termination of this Consent Decree, the  
20 Defendants shall bear the burden of proving that all conditions required for termination of this  
21 Consent Decree are satisfied.

## 22 **XVI. EXHIBITS**

23 61. The following Exhibits are attached to and part of this Consent Decree:

- 24 Exhibit 1: Vicinity Map
- 25 Exhibit 2: Mitigation and Monitoring Plan
- 26 Exhibit 3: Strong's Creek Plaza Easement
- 27 Exhibit 4: Declaration of Restrictions



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IT IS SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_

United States District Judge

ON BEHALF OF THE UNITED STATES:

IGNACIA S. MORENO  
Assistant Attorney General  
Environment and Natural Resources Division

\_\_\_\_\_ Dated: \_\_\_\_\_

KIM N. SMACZNIAK  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Defense Section

ON BEHALF OF EPA:

\_\_\_\_\_ Dated: \_\_\_\_\_

JARED BLUMENFELD  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 9

\_\_\_\_\_ Dated: \_\_\_\_\_

PAM MAKAZAS  
Office Director  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

\_\_\_\_\_ Dated: \_\_\_\_\_

MARK POLLINS  
Division Director  
Water Enforcement Division

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Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency

ON BEHALF OF THE DEFENDANTS:

\_\_\_\_\_ Dated: \_\_\_\_\_  
DENNIS WENDT