

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

ASBESTOS DISEASE AWARENESS
ORGANIZATION, et. al,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and MICHAEL
REGAN¹, Administrator, U.S.
Environmental Protection Agency,

Respondents.

No. 21-70160

JOINT MOTION FOR ABEYANCE

Petitioners, 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, Philip Landrigan, MD, MSc, Richard Lemen, PhD, MSPH, and Celeste Monforton, DrPH, MPH, and Respondents, U.S.

¹ Pursuant to Fed. R. App. P. 43(c)(2), Michael S. Regan is substituted for Andrew Wheeler. Michael Regan assumed the position of Administrator of the U.S. Environmental Protection Agency on March 11, 2021.

Environmental Protection Agency and Michael Regan, Administrator, U.S.

Environmental Protection Agency (collectively “EPA”) ask the Court to hold this matter in abeyance pursuant to an agreement between the parties that sets forth EPA’s approach for conducting Part 2 of its risk evaluation of asbestos (Legacy Uses and Associated Disposals of Asbestos).

In further support of this motion, the parties state as follows:

1. This petition for review was filed on January 26, 2021. Petitioners seek review of EPA’s “Risk Evaluation for Asbestos Part 1: Chrysotile Asbestos” determining the risks of certain conditions of use of chrysotile asbestos fibers under section 6(b)(4) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2605(b)(4). EPA published a notice of availability of the risk evaluation of chrysotile asbestos and the associated information required to be provided publicly with each risk evaluation on January 4, 2021. 86 Fed. Reg. 89 (Jan. 4, 2021).

2. At the same time, the Agency announced that it would conduct a Part 2 risk evaluation addressing legacy uses and associated disposal of asbestos and indicated that, together, the two Parts would comprise the full risk evaluation for asbestos under TSCA.

3. On June 22, 2021, the Court granted the parties’ joint motion for a 90-day extension of time to file the opening brief to afford the parties additional time to negotiate potential resolution of this matter without protracted litigation. *See*

Docket Entry Nos. 12151349, 12151273. Under this extension, petitioners' opening brief is due on October 27, 2021.

4. The parties have reached an agreement for the purpose of resolving this petition for review, which would hold the case in abeyance under certain conditions while EPA develops Part 2 of the risk evaluation for asbestos. Under the agreement, EPA agrees to address in Part 2 of the risk evaluation legacy uses and associated disposals of the six fiber types included in the TSCA Title II, Section 202, 15 U.S.C. § 2642, definition for asbestos—the asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite and actinolite—plus richterite-asbestos and winchite-asbestos fiber types.

5. Under the agreement, EPA also agrees to issue a draft scoping document for the Part 2 risk evaluation in accordance with 15 U.S.C. § 26056(b)(4)(D) and 40 C.F.R. § 702.41(c), which provides that, based on reasonably available information as that term is defined at 40 C.F.R. § 702.33, the risk evaluation will include consideration of the following elements: the human health hazard endpoints and exposures associated with all six asbestos fiber types; any evidence of associations between exposure to asbestos and cancer; any evidence of non-cancer human health hazard endpoints; risks of human health hazard endpoints resulting from all environmental pathways of exposure and

inhalation, dermal, and ingestion routes of exposure to asbestos; the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints; risks of human health hazard endpoints for potentially exposed or susceptible subpopulations; and any circumstances of known, intended, or reasonably foreseen manufacture, processing, distribution in commerce, use, or disposal not evaluated in Part 1.

6. The agreement provides that if the draft risk evaluation includes all of elements described above, the parties will file a joint motion to dismiss the petition for review with prejudice. It further provides that if either the final scope document or the draft risk evaluation does not include all of these elements, allowing for consideration of public comments and the requirements of, TSCA sections 6(b), 15 U.S.C. § 2605, and sections 26(h), (i), and (k), 15 U.S.C. § 2625, Petitioners' sole remedy is to terminate the agreement and move to lift the abeyance, following an informal dispute resolution process. If, for any reason, the court should decline to grant an abeyance, the agreement is void.

7. EPA's commitments described above and as set forth in the agreement reflect statements of EPA's intent. The parties agree that the agreement is fair, reasonable, in the public interest, and consistent with TSCA, 15 U.S.C. §§ 2601-2697.

8. EPA currently anticipates that it will publish a draft scope document for Part 2 of the risk evaluation for asbestos by December 31, 2021; and the final scope document by June 30, 2022. Subsequent to finalizing the scope document, EPA will develop Part 2 of the risk evaluation for asbestos.

9. The parties have also reached agreement on a proposed consent decree to resolve parallel litigation in the matter captioned *Asbestos Disease Awareness Organization et al v. Regan et al*, 4:21-cv-03716-PJH (N.D. Cal.). If approved by the court, the proposed consent decree would resolve the district court litigation by setting a deadline for EPA to complete Part 2 of its risk evaluation of asbestos by December 1, 2024.

10. An abeyance is warranted here because it would preserve resources both for the parties and the Court. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”). It is possible that EPA could take action that may obviate the need for judicial resolution of some or all of the disputed issues. Further, holding this matter in abeyance will aid this Court’s consideration of the instant petition for review and contribute to the efficient administration of this Court’s docket.

11. Counsel for EPA contacted counsel for intervenor The Chlorine Institute, who indicated that intervenor does not oppose this motion.

For the foregoing reasons, the parties respectfully request that the Court issue an order (1) holding the instant matter in abeyance while EPA conducts Part 2 of its risk evaluation of asbestos; and (2) directing EPA to file status reports every 180 days.

Dated: October 13, 2021

Respectfully submitted,

/s/ Debra J. Carfora

Debra Carfora

Environmental Defense Section

Environment & Natural Resources Division

United States Department of Justice

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Motion for Abeyance was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of said filing to the attorneys of record for Petitioners and all other parties, who have registered with the Court's CM/ECF system.

So certified this 13th day of October, 2021 by

/s/ Debra J. Carfora
Debra J. Carfora
Counsel for Respondents

SETTLEMENT AGREEMENT

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

WHEREAS, on January 26, 2021, pursuant to section 19 of TSCA, 15 U.S.C. § 2618, and section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, 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, Philip Landrigan, MD, MSc, Richard Lemen, PhD, MSPH, and Celeste Monforton, DrPH, MPH (petitioners) filed a petition seeking judicial review of the Risk Evaluation for Asbestos Part 1: Chrysotile Asbestos, 86 Federal Register 89 (January 4, 2021) (Part 1” or “Part 1 of the risk evaluation”), in the matter captioned *Asbestos Disease Awareness Org, et al v. USEPA, et al*, No. 21-70160 (9th Cir.)(the Case);

WHEREAS, this Settlement Agreement is for the purpose of resolving petitioners’ Ninth Circuit petition for review of the Part I asbestos risk evaluation;

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

WHEREAS TSCA section 26(k), 15 U.S.C. § 2625(k), requires EPA, when conducting a risk evaluation, to take into consideration information relating to a chemical substance, including hazard and exposure information, under the substance’s conditions of use, that is “reasonably available to the Administrator.” While the statute does not provide a definition of “reasonably

available information,” EPA defines this term to mean “information that EPA possesses or can reasonably generate, obtain, and synthesize for use in risk evaluations, considering the deadlines specified in 15 U.S.C. § 26056(b)(4)(G) for completing such evaluation,” 40 C.F.R. § 702.33;

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

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

WHEREAS, consistent with statements in the preamble to the *Procedures for Chemical Risk Evaluation Under the Amended Toxic Substances Control Act*, 82 FR 33726 (July 20, 2017) (Risk Evaluation Rule), the scope document and problem formulation for asbestos excluded legacy uses, associated disposals, and legacy disposals from inclusion in the risk 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 chemicals even if those chemicals were only historically manufactured for those uses. EPA’s exclusion of legacy uses and associated disposals from the definition of ‘conditions of use’ is therefore unlawful.” The Court also held that “TSCA unambiguously does not require past disposals to be considered conditions of use.” *Safer Chemicals, Healthy Fams. v. EPA*, 943 F.3d 397, 425 (9th Cir. 2019);

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

WHEREAS, several of the petitioners and other commenters raised concerns about the completeness and sufficiency of the DRE;

WHEREAS, EPA issued a final risk evaluation for Asbestos Part 1 (Chrysotile Asbestos) on January 4, 2021 (86 Federal Register 89) that was limited to ongoing conditions of use of chrysotile asbestos, the only asbestos fiber type that EPA identified as currently being imported, processed, or distributed in the United States except as components of wastes distributed for purposes of disposal;

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

WHEREAS, in Part 1, EPA determined that asbestos presents unreasonable risk of injury to workers, occupational non-users, consumers, and/or bystanders within each of the six chrysotile asbestos use categories. EPA determined that certain chrysotile asbestos conditions of use do not present unreasonable risk or injury to human health. EPA also determined that chrysotile asbestos does not present unreasonable risk of injury to the environment from any conditions of use evaluated under Part 1;

WHEREAS, under 15 U.S.C. § 2605(c)(1), if EPA determines that a substance presents an unreasonable risk of injury, it must propose and finalize a risk management rule under section 6(a) restricting the substance to the extent necessary to assure that it no longer presents such risk;

WHEREAS, under 15 U.S.C. § 2605(i)(1), a determination that a chemical substance does not present an unreasonable risk of injury to health or the environment shall be issued by order and considered to be a final agency action that is judicially reviewable under 15 U.S.C. § 2618(a)(1)(A);

WHEREAS, under 15 U.S.C. § 2605(i)(2), a determination that a chemical substance does present an unreasonable risk of injury to health or the environment is not immediately reviewable. Rather, the unreasonable risk determination is reviewable at the same time as a risk management rule that EPA must issue under § 2605(a) to eliminate the unreasonable risk identified, 15 U.S.C. § 2618(a)(1)(A);

WHEREAS, EPA has initiated the scoping process for Part 2 of the asbestos risk evaluation to identify the conditions of use, exposures, hazards, and the potentially exposed or susceptible subpopulations EPA expects to consider in Part 2, as required by 15 U.S.C. § 2605(b)(4)(D). The draft scope document is currently under development. After review and consideration of public comments, EPA will revise, where appropriate, and publish a final scope document clarifying the conditions of use that EPA expects to evaluate and describing how EPA expects to conduct the risk evaluation;

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

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

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

WHEREAS, the parties agree that it is in their best interests to enter into this Settlement Agreement (“Agreement”) to resolve the issues raised by the petition and without admission of any issue of fact or law, except as expressly provided herein;

WHEREAS, the parties consider this Agreement to be in the interest of the public and consistent with TSCA;

NOW, THEREFORE, it is agreed:

1. EPA will address in Part 2 of the risk evaluation asbestos legacy uses and associated disposals of the six fiber types included in the TSCA Title II, Section 202, 15 U.S.C. § 2642, definition for asbestos—the asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite and actinolite -- plus richterite-asbestos and winchite-asbestos fiber types.

2. EPA will issue a draft scoping document for the Part 2 risk evaluation in accordance with 15 U.S.C. § 26056(b)(4)(D) and 40 C.F.R. § 702.41(c), which provides that, based on reasonably available information as that term is defined at 40 C.F.R. § 702.33, the evaluation will include consideration of the following:

a. The human health hazard endpoints and exposures associated with the six fiber types included in the TSCA Title II, Section 202, 15 U.S.C. § 2642, definition for asbestos—the asbestiform varieties of chrysotile (serpentine), crocidolite (riebeckite), amosite (cummingtonite-grunerite), anthophyllite, tremolite and actinolite -- plus richterite-asbestos and winchite-asbestos fiber types.

b. Any evidence of associations between exposure to asbestos and cancer, including cancers of the larynx and ovaries in addition to lung cancer and mesothelioma.

c. Any evidence of non-cancer human health hazard endpoints related to exposure to asbestos.

d. Risks of human health hazard endpoints resulting from all environmental pathways of exposure to asbestos for the conditions of use EPA will address in Part 2.

e. Risks of human health hazard endpoints for inhalation, dermal, and ingestion routes of exposure to asbestos for the conditions of use EPA will address in Part 2.

f. Any reasonably available information concerning the association between exposure to asbestos in talc and talc-containing products and human health hazard endpoints, including information obtained through forthcoming reporting requirements under TSCA section 8(a), 15 U.S.C. § 2607, pursuant to the settlement agreement in *Asbestos Disease Awareness Organization v. EPA* (ND Cal. No. 19-CV-00871).

g. For the conditions of use addressed in Part 2, risks of human health hazard endpoints for potentially exposed or susceptible subpopulations (PESSs) as defined at 15 U.S.C. § 2602(12), including individuals who may be more susceptible to the hazards of asbestos.

h. Any circumstances of known, intended, or reasonably foreseen manufacture, processing, distribution in commerce, use, or disposal not evaluated in Part 1, if any such conditions of use are identified through forthcoming reporting requirements under TSCA section 8(a) pursuant to the settlement agreement in *Asbestos Disease Awareness Organization v. EPA* (ND Cal. No. 19-CV-00871) or other reasonably available information.

3. Following receipt of public comments on the draft-scoping document, EPA will issue a final scoping document for the Part 2 evaluation, which, allowing for consideration of public comments and the requirements of, TSCA sections 6(b), 15 U.S.C. § 2605, and sections 26(h), (i), and (k), 15 U.S.C. § 2625, includes the elements described in paragraph 2 that EPA expects to consider.

4. Subsequent to finalizing the Scope, EPA will develop Part 2 of the risk evaluation for asbestos and complete a draft risk evaluation, which will be published in the Federal Register to facilitate public comment.

5. No later than seven days after this Settlement Agreement is executed, the Parties shall file a joint motion notifying the Court of this Settlement Agreement, requesting that the litigation be held in abeyance pending completion of the process described in Paragraphs 1-4 of this Settlement Agreement, and proposing that EPA file status reports every 180 days. If for any reason the Court should decline to grant an abeyance, this agreement is void, and the terms of this Agreement may not be used as evidence in any litigation between the parties.

6. If the final scoping document does not include the elements described in paragraph 2, allowing for consideration of public comments and the requirements of TSCA

sections 6(b), 15 U.S.C. § 2605, and sections 26(h), (i), and (k), 15 U.S.C. § 2625, petitioners' sole remedy is to terminate this agreement and move to lift the abeyance consistent with paragraph 9. No motion or other proceeding seeking to enforce this Agreement or for contempt of Court shall be filed.

7. If the draft risk evaluation includes all the elements described in paragraph 2, then Petitioners and EPA agree to file within 14 days of publication of the draft risk evaluation a joint motion to dismiss the petition for review with prejudice. Such motion shall be filed pursuant to Rule 42 of the Federal Rules of Appellate Procedure.

8. If the draft risk evaluation does not include all the elements included in paragraph 2, allowing for consideration of public comments and the requirements of TSCA sections 6(b), 15 U.S.C. § 2605(b), and sections 26(h), (i), and (k), 15 U.S.C. § 2625, petitioners' sole remedy is to terminate this agreement and move to lift the abeyance consistent with paragraph 9. Petitioners agree not to file a motion or other proceeding seeking to enforce this Agreement or for contempt of Court.

9. Any Party seeking to lift the abeyance will provide written notice of the reason(s) it seeks to lift the abeyance to all other Parties ("Notice") and request informal negotiations. The Parties shall meet and confer within fourteen (14) days of receipt of the Notice to discuss the concerns identified therein. If at the meet and confer, the Parties are unable to resolve the reasons for seeking to lift the abeyance or fail to develop a plan acceptable to all Parties for resolving the concerns giving rise to the desire to lift the abeyance, the notifying Party may move to lift the abeyance for the reason(s) provided in the Notice.

10. Any judicial challenge to EPA's Final Part 2 risk evaluation must be brought in a new action, consistent with 15 U.S.C. § 2605(i). Petitioners reserve whatever rights they may have to bring such a challenge and to challenge the final risk management rule promulgated by EPA based on the Part 2 risk evaluation.

11. Nothing in the terms of this Settlement Agreement shall be construed to limit or modify the discretion accorded EPA by TSCA or general principles of administrative law, nor shall it in any way be deemed to limit EPA's discretion in determining the final scope of Part 2 of the risk evaluation for asbestos.

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

13. EPA's obligations under this Settlement Agreement are subject to the availability of appropriated funds applicable for such purpose. No provision of this Settlement Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other provision of law.

14. This Agreement's introductory clauses and Paragraphs 1 through 4 contain statements of EPA's intent. If EPA does not meet the terms in those clauses or Paragraphs, Petitioners' sole remedy shall be to reopen the Case pursuant to the terms of Paragraphs 6, 8 and 9. The United States, including EPA, reserves any claims or defense it may have in the Case. Petitioners reserve any claims they may have in the Case. The Parties agree that contempt of court is not an available remedy under this Agreement.

15. Any term set forth in this Settlement Agreement may be modified by written agreement of the Parties.

16. This is the entire Settlement Agreement between the parties. All prior conversations, meetings, discussions, drafts, and writings of any kind are superseded by this Settlement Agreement and may not be used by the Parties to vary or contest the terms of this Settlement Agreement or as evidence of the Parties' intent in entering into this Settlement Agreement.

17. Nothing in this Settlement Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed the Settlement Agreement, nor shall the Settlement Agreement be construed to make any such persons or entity a third-party beneficiary of the Settlement Agreement.

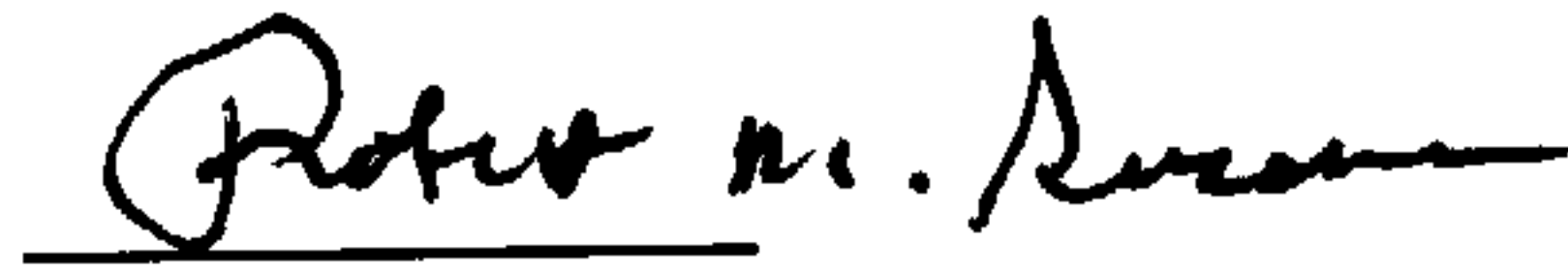
18. Except as provided in this Settlement Agreement, none of the parties hereto waives or relinquishes any legal rights, claims, or defenses it may have.

19. Each undersigned representative of the Parties certifies that he or she is fully authorized by the Party to enter into this Settlement Agreement and to bind such Party to comply with the terms and conditions herein.

SO AGREED:

FOR THE PLAINTIFFS:

Dated: October 12, 2021

A handwritten signature in black ink, appearing to read "Robert M. Sussman", written over a horizontal line.

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FOR EPA:

Dated: October 12, 2021

Debra J. Carfora

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14 [Additional counsel listed on signature page]

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

18 ASBESTOS DISEASE AWARENESS
19 ORGANIZATION, *et al.*,
20 Plaintiffs,

21 v.

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

25 Defendant.

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

**JOINT MOTION TO ENTER
CONSENT DECREE**

26 Plaintiffs, Asbestos Disease Awareness Organization, American Public Health
27 Association, Center for Environmental Health, Environmental Information Association,
28 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

DEBRA J. CARFORA
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Attorneys for Defendant

7 Date: October 13, 2021

9 /s/ Robert M. Sussman

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Attorneys for Plaintiffs

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

Senior Trial Counsel

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Counsel for Defendants

**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:

Robert M. Sussman
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3101 Garfield Street, NW
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(202) 716-0118
bobsussman1@comcast.net

For EPA:

Susanna W. Blair, PhD
Special Assistant/Advisor
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Debra J. Carfora
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Environment and Natural Resources Division
Environmental Defense Section
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Tel: (202) 616-9174
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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
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4 FOR PLAINTIFF


ROBERT M. SUSSMAN
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3101 Garfield Street, NW
Washington, DC 20008
(202) 716-0118
bobsussman1@comcast.net


Attorney for Plaintiffs

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10 DATED:

OCTOBER 12, 2021

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12 FOR DEFENDANT

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division


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Attorneys for Defendants

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19 DATED:

OCTOBER 12, 2021