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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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|---------------------------|---|--------------------|
| UNITED STATES OF AMERICA, |) | CIVIL ACTION NO. |
| |) | C91-5528 B |
| Plaintiff, |) | |
| |) | PROPOSED |
| v. |) | FIFTH AMENDMENT |
| |) | TO CONSENT |
| POINT RUSTON, LLC |) | DECREE BETWEEN THE |
| |) | UNITED STATES AND |
| Defendant. |) | POINT RUSTON, LLC |
| |) | |
| |) | |

A. On January 3, 1997, the Court entered a consent decree in this action (the “Asarco Tacoma Smelter Consent Decree”) providing for the cleanup of the former Asarco Smelter and Slag Peninsula in Tacoma, Washington. Dkt. No. 20. The Asarco Tacoma Smelter Consent Decree was entered into by the United States Environmental Protection Agency (“EPA”) and Asarco pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”), as amended, 42 U.S.C. § 9601 *et seq.*

B. The Asarco Tacoma Smelter Consent Decree has been amended four times since it was originally entered: in 2000 to amend the stipulated penalty provisions applicable to Asarco Incorporated, Dkt. No. 27; in 2006 to add the new owner of the former Asarco property— Point

1 Ruston, LLC (“Point Ruston”) and delineate its cleanup obligations, Dkt. No. 49; in 2016 to
2 further delineate the cleanup obligations undertaken by Point Ruston, Dkt. No. 56 (hereinafter
3 the “Consent Decree”); and in 2019 to extend various remedial action deadlines and address
4 contaminated soil generated at an adjacent parcel, Dkt. No. 61.

5
6 C. The Consent Decree concerns Point Ruston’s obligation to remediate
7 approximately 97 acres of real property in Tacoma and Ruston, Washington that includes parts
8 of the former Asarco Smelter Site (Operable Unit 02) and parts of the Asarco
9 Sediments/Groundwater Site (Operable Unit 06) (hereinafter the “Site”), components of the
10 Commencement Bay, Near Shore/Tide Flats Superfund Site.

11
12 D. There are various parcels at the Site where the Remedial Action required by the
13 Consent Decree remains incomplete. Among the parties, the parcels are more commonly
14 referred to by the buildings or future developments associated with them: Buildings 9&11
15 (Parcel #0221231102), Building 10C (Parcel #0221231076 and #0221231033), Building 15
16 (Part of Parcel #0221231100), and Building 16 (Parcel #0221231087).

17
18 E. Under the Fourth Amendment to Consent Decree, Dkt. No. 61, the Remedial
19 Action was to be completed by June 30, 2021.

20
21 F. However, beginning in 2019 the two partners who controlled Point Ruston had a
22 business dispute and began litigating against each other and in the midst of the litigation the
23 managing partner died. The litigation was settled recently with the buyout of one of the partners,
24 and Point Ruston asserts it is no longer encumbered by these claims.

25
26 G. EPA later extended the deadlines associated with each of these buildings several
27 times pursuant to Paragraph 31(g). Presently, the Remedial Action deadlines are as follows:
28 October 31, 2021 for Buildings 9&11, and June 30, 2022 for Buildings 10C, 15, and 16.

1 H. The Remedial Action deadline for Buildings 9&11 was extended three times by
2 letters issued from EPA on May 15, 2020 (deadline extended to June 30, 2021), November 4,
3 2020 (deadline extended to September 30, 2021), and January 13, 2021 (deadline extended to
4 October 31, 2021). As a condition for each of these extensions, Point Ruston was obligated to
5 meet certain interim Remedial Action deadlines in accordance with Paragraph 31(g) of the
6 Consent Decree. Most recently, Point Ruston failed to meet all of the interim Remedial Action
7 deadlines set as a condition of the deadline extensions.
8

9 I. The United States cannot offer further extensions under Paragraph 31(g) of the
10 Consent Decree because Point Ruston does not presently meet each of the required conditions
11 for extension set forth in that Paragraph.
12

13 J. Point Ruston has been out of compliance with certain provisions of the Consent
14 Decree since December 2020. EPA described these violations in letters dated March 17, 2021,
15 May 12, 2021, June 9, 2021, and June 25, 2021.
16

17 K. EPA issued demand letters to Point Ruston on May 12, 2021 and June 25, 2021
18 seeking stipulated penalties arising from the various Consent Decree violations that were alleged
19 in the letters cited in Paragraph J above, including the failure to meet the interim Remedial Action
20 deadlines for Buildings 9&11.
21

22 L. The United States required the payment of these stipulated penalties and accrued
23 interest as a pre-requisite to this material modification of the Consent Decree.
24

25 M. In response, Point Ruston paid \$1,850,448.74 in stipulated penalties, including
26 interest assessed for failure to timely make the payments, pursuant to Section XX (Stipulated
27 Penalties) of the Consent Decree.
28

1 N. Upon entry of this Amendment, Point Ruston shall not have to pay the
2 stipulated penalties that accrued between December 6, 2021 and entry for failure to meet the
3 interim and Remedial Action deadlines associated with Buildings 9&11 set forth in the Fourth
4 Amendment to Consent Decree, Dkt. No. 61, and subsequent extension letters.
5

6 O. The United States required Point Ruston to pay all outstanding property taxes on
7 all remaining parcels at the Site where the Remedial Action was incomplete as a pre-requisite to
8 this material modification of the Consent Decree.
9

10 P. In response, Point Ruston paid all outstanding property taxes on all remaining
11 parcels at the Site where the Remedial Action was incomplete on October 27, 2021.

12 Q. The United States required Point Ruston to sample the groundwater at the Site
13 and submit the results of that groundwater monitoring, per the Statement of the Work and the
14 Groundwater Long-Term Plan, as a pre-requisite to this material modification of the Consent
15 Decree.
16

17 R. In response, Point Ruston conducted a groundwater monitoring sampling event
18 during the week of October 18, 2021 and submitted the preliminary results to EPA on December
19 17, 2021.

20 S. As identified and described below, the Parties have reached an agreement wherein
21 Point Ruston will accelerate the Remedial Action deadlines for three of the buildings (10C, 15,
22 and 16) to March 30, 2022, and EPA will extend the Remedial Action deadline for Buildings
23 9&11 to June 30, 2022. If Point Ruston satisfies various criteria described herein, EPA will
24 further extend the Remedial Action deadline for Buildings 9&11 until February 1, 2023.
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27

1 T. Pursuant to a prior agreement between EPA and Point Ruston, the Remedial
2 Action associated with the Nearshore Sediments in the Yacht Basin is removed as a requirement
3 of the Consent Decree and is no longer a responsibility of Point Ruston's to complete.
4

5 U. Paragraph 124 of the Consent Decree allows material modifications with the
6 "written approval of the United States, Point Ruston, and the Court."

7 V. In accordance with Paragraph 62 of the Consent Decree, and as set forth in the
8 Guarantee Agreement in Appendix G of the Consent Decree, MC Construction Consultants, Inc.,
9 Michael A. Cohen (deceased), Kenneth J. and Kathryn Thomas, and their marital communities
10 have executed personal guarantees associated with the Consent Decree. The United States
11 informed the remaining Guarantors of this Amendment.
12

13 W. The Parties recognize, and the Court by entering this Consent Decree finds, that
14 this Amendment has been negotiated by the Parties in good faith and implementation of this
15 Amendment will expedite the remediation of the Site and will avoid prolonged and complicated
16 litigation between the Parties, and that this Amendment is fair, reasonable, and in the public
17 interest.
18

19 NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed that the Consent
20 Decree is amended as follows:

21 1. The Remedial Action deadlines set forth in the Fourth Amendment to Consent
22 Decree, Dkt. No. 61, are revised as follows:

23 a. Buildings 10C, 15, and 16: March 30, 2022.

24 b. Buildings 9&11: June 30, 2022.
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1 2. The Remedial Action deadline for Buildings 9&11 shall, without further order of
2 the Court, be further extended to February 1, 2023 if Point Ruston meets each of the following
3 criteria and provides sufficient evidence of the same to EPA:

4 a. Point Ruston shall timely pay EPA’s FY 2021 oversight costs in
5 accordance with Paragraphs 70-72 of the Consent Decree; and

6 b. By no later than March 30, 2022, Point Ruston shall demonstrate to EPA’s
7 satisfaction that financing is secured to fund the development and complete the permanent
8 capping of the parcels associated with Buildings 9&11.

9 3. Point Ruston shall provide to EPA, upon request, copies and all documents and
10 information within its possession or control, or that of its contractors or agents, relating to
11 compliance with this Amendment. Nothing in this Paragraph shall be read to supersede, narrow,
12 or otherwise modify Paragraph 112 of the Consent Decree.

13 4. The definition of “Remedial Action” in the Consent Decree is revised to remove
14 the obligation to cap the Nearshore/Offshore sediments area as specified in the Operable Unit 06
15 ROD and to dredge the shallow sediments in the Yacht Basin, as described in the Statement of
16 Work (“SOW”). These revisions nullify Paragraph 31(d)(i) and these obligations are also
17 removed from the “scope of the remedy selected” as set forth in Paragraph 32. The SOW,
18 attached as Appendix F to the Consent Decree, is also so modified to remove only these
19 obligations.

20 5. Failure to meet any of the revised Remedial Action deadlines or other
21 requirements set forth in this Amendment shall be subject to the stipulated penalties set forth at
22 Paragraph 87 of the Consent Decree.

23 6. All other provisions of the Consent Decree shall remain in effect.

1 7. The Effective Date of this Amendment shall be the date upon which this
2 Amendment is entered by the Court.

3 8. This Amendment shall be lodged with the Court for a period of not less than thirty
4 (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA,
5 42 U.S.C. § 9622(d)(2) and 28 C.F.R. § 50.7. The United States reserves the right to withdraw
6 or withhold its consent if the comments regarding this Amendment disclose facts or
7 considerations which indicate that the Amendment is inappropriate, improper, or inadequate.
8 Point Ruston consents to the entry of this Amendment without further notice.

9 9. If, for any reason, the Court should decline to approve this Amendment in the
10 form presented, this Amendment is voidable at the sole discretion of either Party and the terms
11 of this Amendment may not be used as evidence in any litigation between the Parties.

12 10. Point Ruston hereby agrees not to oppose entry of this Amendment by this Court
13 or to challenge any provision of this Amendment unless the United States has notified Point
14 Ruston in writing that it no longer supports entry of the Amendment.

15 11. Each of the undersigned representatives certifies that he or she is fully authorized
16 to enter into this Amendment on behalf of the applicable Party, and to execute and to bind such
17 Party to this Amendment.

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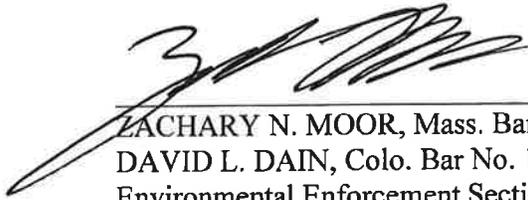
Dated this _____ day of _____, 2022.

UNITED STATES DISTRICT JUDGE

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FOR THE UNITED STATES OF AMERICA:

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12-17-2021

CALVIN J. TERADA
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