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14 *[Refer to signature pages for complete list of parties represented]*

16 IN THE UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA

21 UNITED STATES OF AMERICA AND  
22 PEOPLE OF THE STATE OF CALIFORNIA  
23 EX REL. CALIFORNIA AIR RESOURCES  
24 BOARD,  
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CASE NO. 20-00683

**NOTICE OF LODGING**

1 Plaintiff, the United States of America, on behalf of the United States Environmental  
2 Protection Agency (“EPA”), and the People of the State of California, acting by and through  
3 Xavier Bacerra, Attorney General of the State of California, *ex rel.* California Air Resources  
4 Board (“State of California”) (collectively “Plaintiffs”), herewith respectfully lodge with the  
5 Court two proposed Consent Decrees in the above-captioned action (“Consent Decrees”).  
6 Together, the Consent Decrees would resolve all claims alleged in the complaint against Kohler  
7 Co. (“Kohler”) under the Clean Air Act and California law.

8 The United States, the State of California, and Kohler are parties to the first Consent  
9 Decree (Attachment 1). Only the State of California and Kohler are parties to the second Consent  
10 Decree (Attachment 2).

11 Pursuant to 28 C.F.R. § 50.7, before entry of the first Consent Decree (Attachment 1),  
12 that proposed Consent Decree must be lodged with the Court, and notice of lodging must be  
13 published in the Federal Register. The United States withholds approval of the first Consent  
14 Decree pending publication of notice of the first Consent Decree in the Federal Register for  
15 public review and comment as provided in the first Consent Decree. The thirty-day public  
16 comment period begins on the date notice of the first Consent Decree is published in the Federal  
17 Register. After the public comment period has closed, the United States will inform the Court of  
18 its views regarding any comments that may be received and, if the United States believes that  
19 entry of the first Consent Decree remains warranted, it will at that time move the Court for entry  
20 of the first Consent Decree. *See* Attachment 1 ¶ 89. CARB reserves the right to withdraw or  
21 withhold its consent to the first Consent Decree if the United States does so. *Id.* California law  
22 does not require public comment on the second Consent Decree.

23 WHEREFORE, Plaintiffs respectfully request that this Court receive the two proposed  
24 Consent Decrees for lodging only, **and that it abstain from acting upon the same until the**  
25 **thirty-day public comment period has expired and Plaintiffs have moved for entry of the**  
26 **proposed Consent Decrees.**

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Respectfully submitted,  
FOR THE UNITED STATES OF AMERICA:

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24 UNITED STATES DISTRICT COURT  
25 NORTHERN DISTRICT OF CALIFORNIA

26 UNITED STATES OF AMERICA and  
27 PEOPLE OF THE STATE OF CALIFORNIA, *ex rel.*  
28 CALIFORNIA AIR RESOURCES BOARD,

29 *Plaintiffs,*

30 v.

Civil No. 20-00683

31 KOHLER CO.,

32 *Defendant.*

33  
34 **PARTIAL CONSENT DECREE**  
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**XXIII. 26 U.S.C. SECTION 162(F)(2)(A)(II) IDENTIFICATION** ..... 48

1 Plaintiff United States of America, on behalf of the United States Environmental  
2 Protection Agency (“EPA”), and Plaintiff People of the State of California, acting by and  
3 through Xavier Becerra, Attorney General of the State of California, *ex rel.* California Air  
4 Resources Board (“CARB”), have filed a complaint in this action concurrently with this Consent  
5 Decree, alleging in relevant part that Defendant Kohler Co. (“Defendant” or “Kohler”) violated  
6 Sections 203, 204, 205, and 213(d) of the Clean Air Act (the “CAA” or “Act”), 42 U.S.C. §§  
7 7522, 7523, 7524, 7547(d), and regulations promulgated pursuant to Section 213(a) of the Act,  
8 42 U.S.C. § 7547(a), and California Health and Safety Code Sections 43016, 43017, and 43154,  
9 and regulations promulgated pursuant to Sections 39600, 39601, 43013, 43016, 43017, 43101,  
10 43102, and 43104 of the California Health and Safety Code.

11 The Complaint alleges that Kohler manufactured and sold or offered for sale small,  
12 nonroad, nonhandheld spark-ignition engines nationwide (which include both Small Off-Road  
13 (“SORE”) engines and Large Spark-Ignition (“LSI”) engines with displacements equal to or less  
14 than 1.0 liter under California’s regulations) (collectively, “Small SI Engines”). The Complaint  
15 alleges that Kohler failed to comply with the applicable certification requirements set forth in 40  
16 C.F.R. Parts 90, 1054, 1065, and Title 13 California Code of Regulations (“CCR”) §§ 2403(d)  
17 and 2433(d), which incorporate test procedures (the “California Test Procedures”). The  
18 Complaint further alleges that these Small SI Engines do not conform in all material respects to  
19 the engine specifications described in the applications for the certificates of conformity  
20 (“COCs”) or CARB executive orders (“EOs”) that purportedly cover them. The Complaint  
21 alleges that Kohler violated Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1) and 13 CCR  
22 §§ 2403(b)-(e), 2408, and 2433 (b)-(d), by selling these uncertified Small SI Engines nationwide,  
23 including in California.

24 The Complaint also alleges that Kohler developed and installed a calibration on its  
25 electronic fuel-injected (“EFI”) Small SI Engines equipped with Delphi electronic control

1 modules (“ECMs”) (“Subject Engines”) that contained a fueling strategy that significantly  
2 reduced emissions of oxides of nitrogen (“NOx”) during certification testing when compared to  
3 in-use operation. The Complaint alleges that Kohler violated Sections 203(a)(1) and 203(a)(3)(B)  
4 of the CAA, 42 U.S.C. §§ 7522(a)(1), 7522(a)(3)(B), California Health and Safety Code §§  
5 43016, 43154, and 13 CCR §§ 2403(d) and 2433(d), by failing to disclose the fueling strategy  
6 equipped on the Subject Engines, and by manufacturing, selling, and installing defeat devices on  
7 these Subject Engines nationwide, including in California.

8 The Complaint also alleges that each certification application is a “report” within the  
9 meaning of Section 208(a) of the CAA, and 13 CCR §§ 2403(d) and 2433(d), and that Kohler’s  
10 failure to disclose AECs and adjustable parameters in EPA and CARB certification  
11 applications constituted violations of Section 203(a)(2) of the CAA, 42 U.S.C. § 7522(a)(2), and  
12 13 CCR §§ 2403(d) and 2433(d) (incorporating the requirements of California Test Procedures,  
13 §§ 1054.115(b), 1054.201, and 1054.205(b) and (q)). The Complaint alleges that Kohler also  
14 violated Section 203(a)(2) of the CAA and 13 CCR §§ 2403, 2407(c)(4)(E), 2408(i), and 2433,  
15 by submitting incomplete production line testing (“PLT”) reports and inaccurate averaging,  
16 banking, and trading (“ABT”) reports to EPA and CARB.

17 In the Complaint, CARB also alleges that Kohler manufactured and offered for sale in  
18 California SORE engines that did not conform in all material respects to the engine  
19 specifications described in the applications for the EO that purportedly covered them because the  
20 engines did not meet the applicable diurnal evaporative emission control requirements, in  
21 violation of 13 CCR §§ 2754-2765 (“California Evaporative Emissions Claims”).

22 Plaintiffs seek penalties and injunctive relief for all of the violations alleged in the  
23 Complaint. All violations alleged in the Complaint are being resolved by this Decree, except for  
24 the California Evaporative Emissions Claims, which are being resolved in a separate partial  
25 consent decree.

1 Nothing in this Consent Decree shall constitute an admission of any fact or law by  
2 Defendant arising out of the transactions or occurrences alleged in the Complaint, except for the  
3 purpose of enforcing the terms or conditions set forth herein.

4 Defendant self-disclosed violations to EPA and CARB in late 2015 and early 2016.  
5 Defendant has worked cooperatively with EPA and CARB following the self-disclosures to  
6 investigate, identify, and address the violations, including by commissioning a third-party audit  
7 of its internal emissions testing laboratory in 2016.

8 Defendant represents that, prior to lodging of this Consent Decree, Defendant took  
9 measures to enhance the regulatory compliance of its Engine Division, including: (1) initial and  
10 continuous review and revision of its internal policies, test procedures, standard operating  
11 procedures, and work instructions regarding compliance with Title II of the Clean Air Act and  
12 CARB's Small Off-Road Engine and Large Spark Ignition Requirements; (2) improvement of its  
13 training and organizational structure, including by revising its product development process to  
14 include regulatory engineering input; and (3) establishment of internal audits to verify  
15 compliance with applicable statutory and regulatory requirements. Plaintiffs take no position as  
16 to whether in fact these measures have enhanced the statutory or regulatory compliance of  
17 Kohler's Engine Division.

18 The Parties recognize, and the Court by entering this Consent Decree finds, that this  
19 Consent Decree has been negotiated by the Parties in good faith and will avoid litigation among  
20 the Parties and that this Consent Decree is fair, reasonable, and in the public interest.

21 **NOW, THEREFORE**, before the taking of any testimony, without the adjudication or  
22 admission of any issue of fact or law except as provided in Section I, and with the consent of the  
23 Parties, **IT IS HEREBY ADJUDGED, ORDERED, AND DECREED** as follows:  
24  
25

**I. JURISDICTION AND VENUE**

1  
2 1. This Court has jurisdiction over the subject matter of this action and the parties  
3 pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 205(b) and 304 of the Act, 42  
4 U.S.C. §§ 7524(b), 7604. This Court has supplemental jurisdiction over the state law claims  
5 pursuant to 28 U.S.C. § 1367 because they are part of the same case or controversy as the claims  
6 over which the Court has jurisdiction.

7 2. Venue lies in this District pursuant to Section 205(b) of the Act, 42 U.S.C. §  
8 7524(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because some of the acts for which Plaintiffs  
9 seek civil penalties occurred in this District.

10 3. For purposes of this Consent Decree, Defendant consents to the Court's  
11 jurisdiction, over any action to enforce this Decree and over Defendant, and consents to venue in  
12 this District. Defendant agrees that the Complaint states claims upon which relief may be granted  
13 pursuant to Sections 203, 204, 205, and 213(d) of the Act, 42 U.S.C. §§ 7522, 7523, 7524,  
14 7547(d), and California Health and Safety Code Sections 43016, 43017, and 43154.

**II. APPLICABILITY**

15  
16 4. The obligations of this Consent Decree apply to and are binding upon the United  
17 States and CARB, and upon Defendant and any successors, assigns, or other entities or persons  
18 otherwise bound by law.

19 5. No transfer of ownership or operation of the Engine Division, whether in  
20 compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its  
21 obligation to ensure that the terms of the Consent Decree are implemented, unless (a) the  
22 transferee agrees in writing to undertake the obligations of this Consent Decree and to be  
23 substituted for the Defendant as a Party under the Consent Decree and thus be bound by the  
24 terms thereof; and (b) the United States and CARB consent in writing to relieve Defendant of its  
25 obligations. The United States and CARB may refuse in their unreviewable discretion to consent

1 to the substitution of the transferee for Defendant. At least 30 Days prior to any such transfer,  
2 Defendant shall provide a copy of this Consent Decree to the proposed transferee, and shall  
3 simultaneously provide written notice of the prospective transfer, together with a copy of the  
4 proposed written transfer agreement, to the United States, EPA, the CA AG, and CARB in  
5 accordance with Section XIV (Notices). If the United States and CARB each provide written  
6 consent pursuant to this Paragraph, such written consent shall be treated as a material  
7 modification requiring Court approval pursuant to Section XVII (Modifications). Any attempt to  
8 transfer ownership or operation of the Engine Division without complying with this Paragraph is  
9 a violation of this Consent Decree.

10         6. No transfer of ownership or operation of any entity of Defendant other than the  
11 Engine Division, whether in compliance with the procedures of this Section or otherwise, shall  
12 relieve Defendant of its obligation to ensure that the terms of the Consent Decree are  
13 implemented.

14         7. Defendant shall provide a copy of this Consent Decree to all members of its board  
15 of directors and to executives, officers, employees, and agents whose duties might reasonably  
16 include compliance with any provision of this Decree, as well as to any contractor or auditor  
17 retained to perform work required under this Consent Decree. Defendant shall condition any  
18 such contract upon performance of the work in conformity with the terms of this Consent  
19 Decree. Defendant shall also ensure that any contractors, auditors, agents, and employees whose  
20 duties might reasonably include compliance with any provision of the Consent Decree are made  
21 aware of those requirements of the Consent Decree relevant to their performance.

22         8. In any action to enforce this Consent Decree, Defendant shall not raise as a  
23 defense the failure by any of its directors, executives, officers, employees, agents, contractors, or  
24 auditors to take any actions necessary to comply with the provisions of this Consent Decree.  
25

**III. DEFINITIONS**

1  
2 9. Terms used in this Consent Decree that are defined in the Act or California Health  
3 and Safety Code, or in regulations promulgated pursuant to the Act or the California Health and  
4 Safety Code, shall have the meanings assigned to them in those statutes and such regulations,  
5 unless otherwise provided in this Consent Decree. Whenever the terms set forth below are used  
6 in this Consent Decree, the following definitions shall apply:

7 “ABT” shall refer to the averaging, banking, and trading program codified at 40 C.F.R.  
8 Part 1054, Subpart H, and in California, 13 CCR §§ 2401, 2408;

9 “ABT Report” shall mean each report required by 40 C.F.R. Part 1054, Subpart H, and in  
10 California, 13 CCR § 2408;

11 “Applicable Requirements” shall mean Sections 203, 204, 205, and 213(d) of the Clean  
12 Air Act, 42 U.S.C. §§ 7522, 7523, 7524, 7547(d), and regulations promulgated pursuant to  
13 Section 213(a) of the Act, 42 U.S.C. § 7547(a), and codified at 40 C.F.R. Parts 1054, 1065, and  
14 1068 as well as California Health and Safety Code Sections 43016, 43017, and 43154, and  
15 regulations promulgated pursuant to Sections 39600, 39601, 43013, 43016, 43017, 43101,  
16 43102, and 43104 of the California Health and Safety Code and adopted in 13 CCR § 2400 *et*  
17 *seq.*; 13 CCR § 2407 *et seq.*; 13 CCR § 2408 *et seq.*; 13 CCR § 2430 *et seq.*, as applicable to  
18 Small SI Engines regulated under 40 C.F.R. Part 1054 and 13 CCR § 2400 *et seq.* and 13 CCR §  
19 2430 *et seq.*;

20 “California” means the State of California;

21 “CA AG” shall mean the California Attorney General’s Office and any of its successor  
22 departments or agencies;

23 “CARB” shall mean the California Air Resources Board;  
24  
25

1 “Class A Employees” shall mean non-administrative Engine Division personnel in  
2 managerial, business development, and sales roles, and any other non-administrative Engine  
3 Division personnel who cannot be classified as Class B Employees;

4 “Class B Employees” shall mean non-administrative Engine Division personnel involved  
5 in regulatory compliance, operations, or product development (including, but not limited to,  
6 personnel in Combustion Engineering or Certification) for Small SI Engines;

7 “Clean Air Act” or “Act” means 42 U.S.C. § 7401-7671q;

8 “Complaint” shall mean the complaint filed by the United States and CARB in this  
9 action;

10 “Consent Decree” or “Decree” shall mean this Decree;

11 “Day” shall mean a calendar day unless expressly stated to be a business day. In  
12 computing any period of time under this Consent Decree, where the last day would fall on a  
13 Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of  
14 the next business day;

15 “Defendant” shall mean Kohler Co.;

16 “Deliverable” shall mean any plan, report, or other item that is required to be submitted  
17 by Defendant pursuant to this Consent Decree;

18 “Effective Date” shall have the definition provided in Section XV;

19 “Engine Division” shall mean Kohler’s business division that develops, certifies,  
20 manufactures, and sells Small SI Engines;

21 “EPA” shall mean the United States Environmental Protection Agency and any of its  
22 successor departments or agencies;

23 “LSI Engine” or “Off-Road Large Spark-ignition Engine” shall mean any engine that  
24 produces a gross horsepower 25 and greater horsepower or is designed (e.g., through fueling,  
25 engine calibrations, valve timing, engine speed modifications, etc.) to produce 25 and greater

1 horsepower (greater than 19 kilowatts on or after January 1, 2007), as specified in 13 CCR  
2 § 2431(a)(28).

3 “Model Year” shall mean the model year as defined in 40 C.F.R. § 1054.801, and in  
4 California, 13 CCR §§ 2401(31), 2431(24);

5 “OTAQ” shall mean EPA’s Office of Transportation and Air Quality;

6 “Paragraph” shall mean a portion of this Decree identified by an arabic numeral;

7 “Parties” shall mean the United States, CARB, and Defendant;

8 “Section” shall mean a portion of this Decree identified by a roman numeral;

9 “SORE Engine” or “Small Off-Road Engine” shall mean any engine that produces a  
10 gross horsepower less than 25 horsepower (at or below 19 kilowatts for 2005 and later model  
11 year), or is designed (e.g., through fuel feed, valve timing, etc.) to produce less than 25  
12 horsepower (at or below 19 kilowatts for 2005 and later model year), that is not used to propel a  
13 licensed on-road motor vehicle, an off-road motorcycle, an all-terrain vehicle, a marine vessel, a  
14 snowmobile, a model airplane, a model car, or a model boat, as specified in 13 CCR  
15 § 2401(a)(39);

16 “Small SI Engines” shall mean small, nonroad, nonhandheld spark-ignition engines,  
17 which include both SORE Engines and LSI Engines with displacements equal to or less than 1.0  
18 liter under California’s regulations, that are subject to Applicable Requirements;

19 “State” shall mean the State of California;

20 “United States” shall mean the United States of America, acting on behalf of EPA.

#### 21 **IV. CIVIL PENALTY**

22 10. Within 30 Days after the Effective Date, Defendant shall pay the sum of  
23 \$20,000,000 as a civil penalty, together with interest accruing from the date on which the  
24 Consent Decree is lodged with the Court, at the rate specified in 28 U.S.C. § 1961 as of the date  
25 of lodging. The civil penalty shall be split as set forth in Paragraphs 11 and 13 below.

1           11. Of the sum set forth in Paragraph 10, Defendant shall pay \$16,000,000 to the  
2 United States by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice  
3 account, in accordance with instructions provided to Defendant by the Financial Litigation Unit  
4 (“FLU”) of the United States Attorney’s Office for the Northern District of California after the  
5 Effective Date. The payment instructions provided by the FLU will include a Consolidated Debt  
6 Collection System (“CDCS”) number, which Defendant shall use to identify all payments  
7 required to be made in accordance with this Consent Decree. The FLU will provide the payment  
8 instructions to:

9           Natalie Maciolek  
10           VP - General Counsel and Corporate Secretary  
11           Kohler Co.  
12           444 Highland Dr.  
13           Kohler, WI 53044  
14           (920) 457-4441  
15           Natalie.Maciolek@kohler.com

16 on behalf of Defendant. Defendant may change the individual to receive payment instructions on  
17 its behalf by providing written notice of such change to the United States and EPA in accordance  
18 with Section XIV (Notices).

19           12. At the time of payment, Defendant shall send notice that payment has been made:  
20 (i) to EPA via email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov) or via regular mail at EPA Cincinnati  
21 Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; and (ii) to the United  
22 States and EPA via email or regular mail in accordance with Section XIV. Such notice shall state  
23 that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States*  
24 *and CARB v. Kohler Co.*, and shall reference the civil action number, CDCS Number and DOJ  
25 case number 90-5-2-1-11892.

          13. Of the amount set forth in Paragraph 10, Defendant shall pay to CARB  
\$4,000,000. Payment shall be made by check accompanied by a Payment Transmittal Form

1 provided by CARB to the addressee listed in Paragraph 11 after the Effective Date, with each  
2 check mailed to:

3 California Air Resources Board  
4 Accounting Branch  
5 P.O. Box 1436  
6 Sacramento, CA 95812-1436

6 or by electronic wire transferred to:

7 State of California Air Resources Board  
8 c/o Bank of America, Inter Branch to 0148  
9 Routing No. 0260-0959-3 Account No. 01482-80005  
10 Notice of Transfer: Edna Murphy, Fax: (916) 322-9612  
11 Reference: CARB Case Nos. C00029

10 If paid by wire transfer, Defendant shall be solely responsible for any wire transfer fees. All  
11 penalties paid shall be deposited by CARB into the Air Pollution Control Fund, and used by  
12 CARB to carry out its duties and functions.

13 14. Defendant shall not deduct any penalties paid under this Consent Decree pursuant  
14 to this Section, or Section VIII (Stipulated Penalties), in calculating and submitting its federal,  
15 state, or local income tax.

16 15. The payment of stipulated penalties and interest, if any, shall not alter in any way  
17 Defendant's obligation to complete performance of the requirements of this Consent Decree.

## 18 V. COMPLIANCE MEASURES

19 16. Corporate Compliance. Within 60 Days of the Effective Date, Defendant shall  
20 implement and maintain the following policies and practices:

21 a. Code of Conduct. Defendant represents that it has corporate global  
22 policies that require employees to report to their management all violations of law, regulations,  
23 or company policy. Defendant shall conduct annual training related to these policies for all  
24 Engine Division managers, Class A Employees, and Class B Employees. Defendant shall require  
25 all such employees to certify annually that they have reviewed and understand these policies.

1           b.     Ethics Helpline. Defendant represents that it has a whistleblower system  
2 known as the Ethics Helpline that includes, among other things, elements (1) through (5)  
3 identified in this subparagraph 16.b, and shall within 60 Days of the Effective Date implement  
4 element (6) below. Defendant may, in its discretion, contract with a third party to implement the  
5 Ethics Helpline.

6                     (1)        Defendant retains professionally educated and trained employees  
7 to administer the Ethics Helpline;

8                     (2)        Defendant provides a means for all Engine Division employees to  
9 report possible violations of Applicable Requirements;

10                    (3)        Defendant conducts mandatory annual ethics training, which  
11 includes how to make reports to the Ethics Helpline, for all Engine Division managers, Class A  
12 Employees, and Class B employees;

13                    (4)        Defendant has a system for investigation and resolution of Ethics  
14 Helpline complaints relating to compliance with Applicable Requirements;

15                    (5)        Defendant provides a mechanism for tracking Ethics Helpline  
16 complaints and resolutions relating to compliance with Applicable Requirements; and

17                    (6)        Defendant provides for reporting of Ethics Helpline complaints  
18 and resolutions relating to compliance with Applicable Requirements or this Consent Decree to  
19 EPA and CARB pursuant to Section VII (Reporting Requirements).

20        17.     Management and Certification Improvements. Defendant shall:

21            a.     Incorporate Environmental Compliance Into Job Descriptions. No later  
22 than 60 Days from the Effective Date, add environmental compliance requirements to personnel  
23 job descriptions for all members of the Environmental Regulatory Compliance Team established  
24 in subparagraph 17.b, and all Class A Employees and Class B Employees.

25            b.     Environmental Regulatory Compliance Team. No later than 60 Days from

1 the Effective Date, prepare and provide to EPA and CARB for review and approval in  
2 accordance with Paragraphs 21-24 (Approval of Deliverables) a written organizational and  
3 implementation plan (the “ERC Plan”) for the establishment of an Environmental Regulatory  
4 Compliance Team (“Compliance Team”). The ERC Plan shall provide that:

5 (1) the Compliance Team operates independently from product  
6 engineering, sales, and marketing functions, with the understanding that the Senior Manager for  
7 Global Certification may serve on the Compliance Team, but may not be designated to lead the  
8 Compliance Team pursuant to Paragraph 17.b(6) below;

9 (2) the Compliance Team shall be accountable for compliance with  
10 Applicable Requirements and this Consent Decree;

11 (3) the Compliance Team shall be staffed with experts in compliance  
12 with Applicable Requirements;

13 (4) at least annually, the Compliance Team shall review and as  
14 necessary revise all internal policies, test procedures, standard operating procedures, and work  
15 instructions of the Engine Division to ensure compliance with Applicable Requirements and this  
16 Consent Decree;

17 (5) the Compliance Team shall monitor and understand developments  
18 in engine and emissions regulations and changes to Applicable Requirements, and define the  
19 tasks, authorities, and responsibilities of managers involved in product development and  
20 certification with respect to compliance with Applicable Requirements;

21 (6) Defendant shall designate one member of the Compliance Team to  
22 lead the Compliance Team, who shall have ultimate responsibility for compliance with  
23 Applicable Requirements and this Consent Decree, and decisions pertaining to certification,  
24 operations, and product development that relate to or affect compliance with Applicable  
25 Requirements and this Consent Decree;

1 (7) Compliance Team members shall be integrated into certification,  
2 product engineering, operations, and sales and marketing within the Engine Division, such that  
3 Compliance Team members can provide regulatory input during all stages of product  
4 development and certification;

5 (8) the Compliance Team shall implement enhanced certification  
6 processes to ensure compliance with Applicable Requirements; and

7 (9) the designated leader of the Compliance Team shall prepare an  
8 annual report (the “ERC Annual Report”), which shall be distributed to the President of the  
9 Engine Division, the head of engineering for the Engine Division, and the General Counsel and  
10 his or her designee within the General Counsel’s office, documenting compliance with the  
11 requirements of the ERC Plan.

12 c. Semiannual Meetings. Defendant shall conduct semiannual meetings  
13 regarding compliance with Applicable Requirements and this Consent Decree for all Engine  
14 Division managers and regulatory personnel, including but not limited to Class B Employees.  
15 Such meetings shall be chaired by the head of the Compliance Team established in Paragraph  
16 17.b, who shall set the agenda for each such meeting, and who shall include the agenda and a  
17 summary of the meeting in the ERC Annual Report.

18 18. Training. No later than 90 Days after the Effective Date, and annually thereafter,  
19 Defendant shall provide training on Applicable Requirements and this Consent Decree as  
20 follows:

21 a. For all Class A Employees, Defendant shall conduct training that includes:

- 22 (1) An overview of Kohler’s engine certification program;  
23 (2) An overview of the Applicable Requirements, including the  
24 requirement that all Small SI Engines introduced into commerce be covered by a valid  
25 Certificate of Conformity and (for engines to be introduced into California) Executive Order;

1 (3) An explanation and discussion of the prohibition against the use of  
2 defeat devices in Title II of the Clean Air Act, and implementing regulations, and Division 26,  
3 Part 5 of the California Health and Safety Code, and implementing regulations;

4 (4) An explanation and discussion of civil and criminal liability for  
5 violations of Title II of the Clean Air Act, and implementing regulations, and Division 26, Part 5  
6 of the California Health and Safety Code, and implementing regulations, including options for  
7 employees to raise compliance concerns directly with government authorities;

8 (5) An explanation and discussion of Defendant's obligations under  
9 the Consent Decree and penalties for noncompliance; and

10 (6) An explanation and discussion of the Code of Conduct and Ethics  
11 Helpline maintained under Paragraphs 16.a and 16.b.

12 b. For all Class B Employees, Defendant shall conduct training that  
13 addresses all of the above topics as well as the following topics:

14 (1) The regulatory requirements governing test cycle selection and  
15 Kohler's internal procedure for complying with the same;

16 (2) The 40 C.F.R. Part 1065 testing requirements;

17 (3) The process and regulatory requirements associated with  
18 establishing deterioration factors, along with the requirement to age emission-related  
19 components;

20 (4) Elements of design that can affect emissions, including but not  
21 limited to fueling strategies, engine speed, engine power, engine design, and calibration (spark  
22 timing, standard and alternative air-fuel ratio maps, performance enhancement strategies, etc.);

23 (5) AECDs and adjustable parameters, along with the requirement to  
24 disclose AECDs and adjustable parameters in certification applications;

25 (6) The requirement to amend certification applications when making

1 certain changes to production engines, as well as Kohler's internal procedure for complying with  
2 same;

3 (7) PLT requirements, including how to calculate the minimum  
4 number of engines to test and when to exclude initial or subsequent tests in the PLT averaging  
5 calculations, along with Kohler's internal procedure for complying with the same;

6 (8) The requirement to submit complete and accurate certification  
7 applications, ABT reports, and PLT reports; and

8 (9) The applicable evaporative emissions requirements.

9 c. Defendant shall develop a system to track training required under this  
10 Paragraph 18 that is completed by employees and develop post-training testing to evaluate  
11 employees' knowledge of the information included in the training.

12 d. Defendant shall train all new Class A and Class B Employees hired after  
13 the Effective Date within 30 Days of starting employment in accordance with Paragraph 18. All  
14 such employees shall be prohibited from work on certification or emissions-testing matters until  
15 completing the training.

16 19. Emissions Testing Validation.

17 a. The ETV Plan. To confirm the validity and accuracy of Defendant's  
18 emission testing program, Defendant shall submit to EPA and CARB within 60 Days of the  
19 Effective Date, an Emissions Testing Validation plan (the "ETV Plan") for review and approval  
20 in accordance with Paragraphs 21-24 (Approval of Deliverables). The Plan shall have three  
21 components, as further described in subsequent subparts of this Paragraph: (i) a plan for the  
22 auditing of Kohler's internal emissions testing laboratory to ensure compliance with Applicable  
23 Requirements (the "Lab Audit Component"); (ii) a plan for third-party observation and  
24 verification of specified emissions testing conducted by Kohler at its internal emissions testing  
25 laboratory (the "Kohler Lab Observation Component"); and (iii) a plan for third-party

1 confirmation emissions testing of select engines at a third-party laboratory (the “Outside Lab  
2 Component”).

3           b.       The Lab Audit Component. The Lab Audit Component shall provide for  
4 three annual internal or external audits of Defendant’s emissions testing labs, procedures,  
5 equipment, recordkeeping, and reporting. The first audit shall take place during 2020 and shall  
6 be completed by September 30, 2020. The second audit shall take place during 2021 and shall be  
7 completed by September 30, 2021. The third audit shall take place during 2022 and shall be  
8 completed by September 30, 2022. These audits may be combined with the annual compliance  
9 audits required under Paragraph 20. The Lab Audit Component shall specify who within  
10 Defendant’s organization will conduct the audit and how it will be conducted. Defendant shall  
11 require the auditor to prepare a report of each annual audit within 45 Days after completion of an  
12 audit, and submitted to EPA and CARB no later than November 15 in 2020, 2021, and 2022, as  
13 applicable, describing the procedures, processes, or methodologies used to conduct the audit; the  
14 labs, procedures, equipment, recordkeeping, and reporting reviewed during the audit; and the  
15 findings and recommendations of the auditor. Within 60 Days after submission of the auditor’s  
16 report, Defendant shall submit to EPA and CARB for review and approval a written response to  
17 the findings and recommendations, and an action plan for expeditiously addressing or responding  
18 to each finding and recommendation in the auditor’s report (“Lab Audit Action Plan”). The Lab  
19 Audit Action Plan shall include a schedule that is as expeditious as practicable of the steps that  
20 will be taken by Defendant to achieve full compliance with Applicable Requirements pertaining  
21 to laboratory compliance.

22           c.       The Kohler Lab Component. The Kohler Lab Component shall provide  
23 for a third party to observe specified periods of certification or production line emissions testing  
24 undertaken at Kohler’s laboratory for three years, calendar years 2020, 2021, and 2022.

25                   (1)       The Kohler Lab Component shall include a written statement of (a)

1 the qualifications for its proposed third-party observer (the “Independent Observer”) including  
2 its name, affiliation, address, and experience in conducting emissions testing for Small SI  
3 Engines; (b) a description of previous contracts or financial relationships of the proposed  
4 observer with Defendant; and (c) a description of how Defendant proposes the Independent  
5 Observer will perform its responsibilities, including how frequently the Independent Observer  
6 will be present during emissions testing, how the specific times of observation will be  
7 determined, and how the observations will take place.

8 (2) The Kohler Lab Component shall provide that the Independent  
9 Observer (i) will be present for at least two weeks and witness, in the Independent Observer’s  
10 judgment, the relevant portions of a total of at least 15 emissions tests involving engines in at  
11 least five different engine families, including at least one EFI and one carbureted engine, and  
12 including emission tests showing compliance with the adjustable parameter set in multiple  
13 positions (i.e., multiple emissions tests on an engine with adjustable parameters) on at least one  
14 engine from each of the five engine families as selected by the Independent Observer, in each of  
15 calendar years 2020, 2021, and 2022, and (ii) will visit at least once between January 1 through  
16 June 30, and once between July 1 and December 31, with the visits being at least one month  
17 apart.

18 (3) The selection of the Independent Observer shall be subject to EPA  
19 and CARB approval.

20 (4) The Independent Observer will report in writing to Kohler, EPA,  
21 and CARB any noncompliance with emissions testing provisions of the Applicable  
22 Requirements and this Consent Decree within 21 Days of identification, and will make  
23 recommendations on how to address any such noncompliance. Such report shall be submitted  
24 even if the Independent Observer has not completed its observation activities for the year, in  
25 which case, it shall continue and complete its observation activities and submit such additional

1 reports as are warranted.

2 (5) The Independent Observer shall prepare an annual report of all  
3 observation conducted that calendar year, to be submitted to Defendant, EPA, and CARB no  
4 later than 60 Days after the testing for the year specified in Paragraph 19(c)(2) is complete ,  
5 setting forth all findings and recommendations and any data supporting those findings and  
6 recommendations.

7 (6) Within 30 Days after submission of the Independent Observer's  
8 report, Defendant shall submit to EPA and CARB for review and approval a written response to  
9 the findings and recommendations in the report, and an action plan ("Independent Observer  
10 Action Plan") for expeditiously addressing or responding to each finding and recommendation in  
11 the report. The Independent Observer Action Plan shall include a schedule that is as expeditious  
12 as practicable of the steps that will be taken by Defendant to achieve full compliance with  
13 Applicable Requirements.

14 d. The Outside Lab Component. Defendant shall conduct third-party  
15 confirmation testing of up to 10 Small SI Engines per Model Year, to be selected jointly by EPA  
16 and CARB. The third-party emissions tester ("Third-Party Emissions Tester") shall select the test  
17 article(s) from Defendant's facility and then conduct low-hour exhaust emissions and break-in  
18 testing. The Outside Lab Component shall include: (i) a written statement of qualifications for its  
19 proposed independent Third-Party Emissions Tester, including its name, affiliation, address, and  
20 experience in conducting emissions testing for Small SI engines; (ii) a description of previous  
21 contracts or financial relationships of the proposed Third-Party Emissions Tester with  
22 Defendant; (iii) a list of all emissions and engine parameters that will be measured and recorded  
23 during each test performed under this Paragraph; (iv) a description of the test methods and  
24 supporting data Defendant proposes to use; and (v) a template for Defendant's summary report  
25 as described below.

1                   (1)           Within 30 Days of approval of the ETV Plan under Paragraph 19.a,  
2 Defendant shall retain a Third-Party Emissions Tester. No attorney-client relationship shall exist  
3 or be formed between Defendant and the Third-Party Emissions Tester. Defendant shall ensure  
4 that the Third-Party Emissions Tester conducts testing as set forth in the Outside Lab  
5 Component.

6                   (2)           For each of Model Years 2020, 2021, and 2022, Defendant shall  
7 ensure that the Third-Party Emissions Tester prepares, within 60 Days after the testing for the  
8 year is complete, a report (“Third-Party Emissions Tester Summary Report”) which shall include  
9 an executive summary of the data and methods for all testing the Third-Party Emissions Tester  
10 performed under this subparagraph 19.d for that Model Year, a description of the test facilities  
11 and test equipment/specifications, photographs of the test article on the test stand, a description  
12 of the testing performed (including emission test cycle) and the test results for each test run, a  
13 description of any adjustable parameters on the engine, a power curve for the engine tested,  
14 detailed test results data sheets, inspection information and photographs, and a test fuel report.  
15 Any deviations from normal test protocols shall be clearly recorded and explained in the official  
16 test report. The report shall also include a statement that the instrumentation used and the  
17 subsequent emission testing met all Applicable Requirements. The test results information shall  
18 be provided in a format that demonstrates whether an engine meets the applicable emission  
19 standards. The test results information shall include basic information about the test article, test  
20 fuel, test cell, test cycle data by mode, emissions measurements by mode, and final calculated  
21 emission levels. The deterioration factors for the engine and the final deteriorated test results  
22 shall also be included.

23                   (3)           To the extent the test results show an exceedance of any applicable  
24 emissions standards, Defendant shall conduct a root cause analysis for such deviations, and,  
25 within 60 Days of the submission of the Third-Party Emissions Tester Summary Report, submit

1 to EPA and CARB for review and approval a written report describing any root causes identified  
2 for the exceedance, whether the exceedance resulted from any noncompliance with Applicable  
3 Requirements by Kohler, and, if they did, an action plan (“Emissions Exceedance Action Plan”)  
4 for expeditiously addressing such noncompliance and achieving full compliance with Applicable  
5 Requirements. The Emissions Exceedance Action Plan shall include a schedule that is as  
6 expeditious as practicable of the steps that will be taken for Defendant to achieve full compliance  
7 with Applicable Requirements.

8       20.     Annual Compliance Audits. Defendant shall conduct three annual compliance  
9 audits, as follows:

10           a.     Compliance Audit Plan. Within 60 Days of the Effective Date, Defendant  
11 shall submit for review and approval in accordance with Paragraphs 21-24 (Approval of  
12 Deliverables) a plan for an annual assessment of compliance with Applicable Requirements.

13 Such Compliance Audit Plan shall include:

- 14                   (1)       a list of Applicable Requirements;
- 15                   (2)       procedures for the exchange of any documents or information that  
16 the Auditor needs to perform its duties;
- 17                   (3)       a list of the internal policies, test procedures, standard operating  
18 procedures, and work instructions to be audited annually;
- 19                   (4)       a list of all testing and data that will be reviewed during each  
20 annual audit;
- 21                   (5)       a statement of qualifications of the Compliance Auditor;
- 22                   (6)       a list of all steps the Compliance Auditor will perform during each  
23 annual compliance audit;
- 24                   (7)       a proposed timeline for performance of each of the steps identified  
25 in a compliance audit; and

1 (8) a template for the Annual Compliance Audit Report as described  
2 below.

3 b. Compliance Auditor. Within 30 Days of approval of the Compliance  
4 Audit Plan, Defendant shall appoint a Compliance Auditor to conduct audits pursuant to the  
5 Compliance Audit Plan. Defendant may, but is not required to, hire a third party to serve as  
6 Compliance Auditor. Defendant shall ensure that the Compliance Auditor meets the  
7 qualifications described in the Compliance Audit Plan and conducts the audits as set forth in the  
8 Audit Plan, and in accordance with the following requirements:

9 (1) Duties. The Compliance Auditor shall provide objective and fair  
10 assessments of Defendant's compliance with Applicable Requirements and with the  
11 requirements of this Consent Decree. The duties of the Compliance Auditor shall be carried out  
12 based on:

13 (a) review of relevant documents and procedures;

14 (b) on-site observation of selected systems and  
15 procedures, including internal controls, recordkeeping, and internal audit procedures;

16 (c) meetings and interviews;

17 (d) analyses and studies of Defendant's compliance  
18 program and associated processes;

19 (e) other reasonable audit procedures;

20 (f) the reports due under this Consent Decree,

21 including the Lab Audit, Independent Observer, and any Emissions Exceedance Action Plans, to  
22 the extent any such reports have been submitted in accordance with this Consent Decree during  
23 the calendar year for which the audit is being conducted; and

24 (g) such other information as may be necessary to  
25 verify compliance with Applicable Requirements and with this Consent Decree.

1                   (2)        Cooperation. The Compliance Auditor shall have the authority to  
2 take all steps necessary to become fully informed of Defendant’s compliance with Applicable  
3 Requirements. The Compliance Auditor shall have full access to the facilities, documents,  
4 employees, and information required to fulfill the duties listed in this Paragraph 20. In the event  
5 that Defendant elects to retain a third-party Compliance Auditor for purposes of this Paragraph  
6 and thereafter seeks to withhold from the Compliance Auditor access to information, documents,  
7 records, facilities, or current or former employees or contractors of the Defendant that may be  
8 subject to a claim of attorney-client privilege or to the attorney work product doctrine, or where  
9 the Defendant reasonably believes production or providing access would otherwise be  
10 inconsistent with applicable law, the Defendant shall work cooperatively with the Compliance  
11 Auditor to resolve the matter to the satisfaction of the Compliance Auditor consistent with  
12 applicable law and Paragraph 67 of this Consent Decree. If the Compliance Auditor believes  
13 Defendant has violated the requirements of this Paragraph with regard to providing access to  
14 facilities, documents, employees, and information, the Compliance Auditor shall promptly notify  
15 the United States, EPA, the CA AG, and CARB, and the notice shall include a description of the  
16 alleged violations and supporting documentation as necessary;

17                   (3)        Waiver. Defendant shall not assert that communications with the  
18 Compliance Auditor are in any way privileged or that the work of the Compliance Auditor is  
19 protected from disclosure by the attorney work product doctrine; and

20                   (4)        Removal. Defendant may only replace the Compliance Auditor for  
21 good cause shown and with the prior written consent of EPA and CARB. Such consent shall not  
22 be unreasonably withheld.

23                   c.        Annual Compliance Audit Report. Defendant shall require the Compliance  
24 Auditor to prepare and Defendant shall submit a report (“Annual Compliance Audit Report”) to  
25 EPA and CARB for review and approval. The Annual Compliance Audit Report shall contain:

1 (1) a detailed description of all work performed to conduct the annual  
2 audit;

3 (2) an executive summary of findings, conclusions, and action items;

4 (3) a detailed discussion of findings;

5 (4) a detailed discussion of conclusions;

6 (5) a list of action items and recommendations for Defendant to take  
7 or that Defendant has taken to achieve compliance with Applicable Requirements and this  
8 Consent Decree; and

9 (6) all data necessary for EPA and CARB to evaluate the findings and  
10 recommendations in the Annual Compliance Audit Report.

11 d. Due Dates. The first Annual Compliance Audit Report shall address  
12 Defendant's compliance during calendar year 2019 and shall be due by September 30, 2020.  
13 Subsequent Annual Compliance Audit Reports shall address calendar years 2020 and 2021, and  
14 shall be due by June 30 of the calendar year following the year for which the audit was  
15 conducted.

16 e. Audit Action Plans. Within 60 Days after submission of the Annual  
17 Compliance Audit Report to EPA and CARB, Defendant shall submit to EPA and CARB for  
18 review and approval a written response to the Annual Compliance Audit Report findings and  
19 recommendations, and an action plan ("Audit Action Plan") for expeditiously addressing the  
20 findings and recommendations in the Annual Compliance Audit Report. The Audit Action Plan  
21 shall include a schedule that is as expeditious as practicable.

22 f. Certification of Audit Action Plan Implementation. By no later than 30  
23 Days after completion of the implementation of all actions, if any, required by an Audit Action  
24 Plan, Defendant shall submit a report to EPA and CARB certifying that Defendant has  
25 implemented the requirements of the Audit Action Plan and is in compliance with Applicable

1 Requirements and this Consent Decree.

2 21. Approval of Deliverables. After review of any Deliverable that is required to be  
3 submitted for approval pursuant to Paragraphs 17.b (ERC Plan), 19.a (ETV Plan), 19.b (Lab  
4 Audit Action Plans), 19.c(3) (Selection of Independent Observer), 19.c(6) (Independent Observer  
5 Action Plan), 19.d(3) (Emissions Exceedance Action Plan), 20.a (Compliance Audit Plan),  
6 20.b(4) (Removal of Compliance Auditor), 20.c (Annual Compliance Audit Report), and 20.e  
7 (Audit Action Plans) of this Consent Decree, EPA and CARB shall in writing:

- 8 a. approve the submission,  
9 b. approve the submission upon specified conditions,  
10 c. approve part of the submission and disapprove the remainder, or  
11 d. disapprove the submission.

12 22. If the Deliverable is approved pursuant to Paragraph 21, Defendant shall take all  
13 actions required by the Deliverable, in accordance with the schedules and requirements of the  
14 Deliverable, as approved. If the Deliverable is conditionally approved or approved only in part  
15 pursuant to Paragraph 21.b or 21.c, Defendant shall, upon written direction, take all actions  
16 required by the approved plan, report, or other item that EPA and/or CARB determine are  
17 technically severable from any disapproved portions, subject to Defendant's right to dispute only  
18 the specified conditions or the disapproved portions, under Section X (Dispute Resolution).

19 23. If the Deliverable is disapproved in whole or in part pursuant to Paragraph 21.c or  
20 21.d, Defendant shall, within 45 Days or such other time as the Parties agree to in writing,  
21 correct all deficiencies and resubmit the plan, report, or other item, or disapproved portion  
22 thereof, for approval, in accordance with the preceding Paragraphs. If the resubmitted  
23 Deliverable is approved in whole or in part, Defendant shall proceed in accordance with the  
24 preceding Paragraph.



1 ABT reports such that Defendant's resulting credit balance is 271,834.720 kg of credits less than  
2 would be the balance if calculated using the HC + NOx emission data Defendant originally  
3 submitted in its original end-of-year ABT reports for these Model Years. The credit adjustments shall  
4 be permanent.

5 28. Within 60 Days of the Effective Date, or within 60 Days after OTAQ and CARB  
6 provide credit processing instructions, whichever is later, Defendant shall provide written notice to  
7 EPA and CARB that it has complied with this Section by sending a Notice in accordance with  
8 Section XV of this Consent Decree (Notices).

## 9 VII. REPORTING REQUIREMENTS

10 29. Defendant shall submit the following reports:

11 a. Semi-Annual Compliance Reports. By July 31<sup>st</sup> and January 31<sup>st</sup> of each  
12 year after the lodging of this Consent Decree, until termination of this Consent Decree pursuant  
13 to Section XVIII, Defendant shall electronically submit a semi-annual report with a certification  
14 in accordance with Paragraph 32 for the preceding six months (or, in the case of the initial semi-  
15 annual report, for the period from the Effective Date through either June 30<sup>th</sup> or December 31<sup>st</sup>,  
16 whichever is appropriate) that shall include:

17 (1) A description of all work performed under the Consent Decree  
18 since the last Semi-Annual Compliance Report was submitted;

19 (2) A list of all reports and action plans submitted during that period  
20 under Sections V and VII of this Consent Decree;

21 (3) A description of any Ethics Helpline complaints relating to  
22 compliance with Applicable Requirements or this Consent Decree and their resolution;

23 (4) The ERC Annual Report required by Paragraph 17.b(9);

24 (5) Third-Party Emissions Tester Summary Reports prepared in  
25 accordance with Paragraph 19.d(2);

1 (6) Problems encountered or anticipated, together with implemented or  
2 proposed solutions; and

3 (7) An accounting of all stipulated penalties assessed and paid  
4 pursuant to Section VIII.

5 b. Initial Semi-Annual Compliance Report. In addition to the items in the  
6 preceding Paragraph 29.a, the initial semi-annual report shall include:

7 (1) Evidence of Defendant's payment of civil penalties pursuant to  
8 Section IV (Civil Penalty);

9 (2) Evidence of Defendant's correction of ABT reports pursuant to  
10 Section VI (Correction of ABT Reports);

11 (3) Examples of descriptions of environmental compliance  
12 requirements to be included in personnel job descriptions pursuant to Paragraph 17.a; and

13 (4) All training materials developed by Defendant pursuant to  
14 Paragraph 18.

15 c. Reporting of Violations. Each of the Semi-Annual Compliance Reports  
16 submitted pursuant to Paragraph 29.a above shall also include a description of any  
17 noncompliance with the requirements of this Consent Decree and an explanation of the  
18 violation's likely cause and of the remedial steps taken, or to be taken, to prevent or minimize  
19 such violation. If Defendant violates, or has reason to believe that it may violate, any  
20 requirement of this Consent Decree, Defendant also shall notify the United States, EPA, and  
21 CARB in writing of such violation within 14 Days of the Day Defendant first becomes aware  
22 that a violation has occurred or may occur. Such notice shall include the date of the violation, a  
23 description of the violation, its likely duration, and an explanation of the violation's likely cause  
24 and of the remedial steps taken, or to be taken, to prevent or minimize such violation. If the  
25 cause of a violation cannot be fully investigated and explained at the time the notice is due,

1 Defendant shall so state. Defendant shall then complete its investigation of the cause of the  
2 violation and submit a written report, including a full explanation of the cause of the violation,  
3 within 30 Days of the Day Defendant becomes aware of the cause of the violation. Nothing in  
4 this Paragraph or the following Paragraph relieves Defendant of its obligation to provide the  
5 notice required by Section IX (Force Majeure).

6 30. Whenever any violation of this Consent Decree or any other event affecting  
7 Defendant's performance under this Decree may pose an immediate threat to the public health or  
8 welfare or the environment, Defendant shall notify EPA, the CA AG, and CARB by electronic or  
9 facsimile transmission as soon as possible, but no later than 24 hours after Defendant first  
10 becomes aware of the violation or event. This procedure is in addition to the requirements set  
11 forth in the preceding Paragraph.

12 31. All reports, including action plans, shall be submitted to all persons designated in  
13 Section XIV (Notices).

14 32. Each report, including action plans, submitted by Defendant under this Section  
15 shall be signed by an official of the submitting party and include the following certification:

16 I certify under penalty of law that this document and all attachments were prepared under  
17 my direction or supervision in accordance with a system designed to assure that qualified  
18 personnel properly gather and evaluate the information submitted. Based on my inquiry  
19 of the person or persons who manage the system, or those persons directly responsible for  
20 gathering the information, the information submitted is, to the best of my knowledge and  
21 belief, true, accurate, and complete. I have no personal knowledge or belief that the  
22 information submitted is other than true, accurate, and complete. I am aware that there  
23 are significant penalties for submitting false information, including the possibility of fine  
24 and imprisonment for knowing violations.



Penalty Per Violation Per Day ..... Period of Noncompliance

\$2,500 ..... 1st through 14th Day

\$5,000 ..... 15th through 30th Day

\$7,500 ..... 31st Day and beyond

b. The following compliance obligations shall be subject to stipulated penalties under this Paragraph:

(1) Establishment of the Environmental Regulatory Compliance Team required by Paragraph 17.b;

(2) Conducting the training required by Paragraphs 16.a, 16.b(3), and 18, provided that these penalties shall only accrue after EPA or CARB has reviewed the information provided pursuant to Paragraph 29.b(4), notified Defendant of any deficiencies in writing, and Defendant has had 45 Days to correct any such deficiencies;

(3) Submission and implementation of the Emissions Testing Validation Plan required by Paragraph 19;

(4) Conducting the annual compliance audits required by Paragraph 20;

(5) Implementation of any Audit Action Plan developed pursuant to Paragraph 20.e;

(6) Correction of ABT reports pursuant to Section VI (Correction of ABT Reports); and

(7) Adhering to the certification requirement of Paragraph 32.

40. Reporting Requirements. The following stipulated penalties shall accrue per violation per Day for each violation of the reporting requirements of this Consent Decree, except to the extent such reporting requirements are subject to stipulated penalties under the preceding Paragraph:

Penalty Per Violation Per Day.....Period of Noncompliance

\$1,000.....1st through 30th Day

\$2,000.....31st Day and beyond

41. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the Day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

42. Defendant shall pay stipulated penalties to the United States and CARB within 30 Days of a written demand by either Plaintiff. Defendant shall pay 80 percent of the total stipulated penalty amount due to the United States and 20 percent to CARB. The Plaintiff making a demand for payment of a stipulated penalty shall simultaneously send a copy of the demand to the other Plaintiff.

43. Either Plaintiff may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree. However, no action by either Plaintiff may reduce or waive stipulated penalties due to the other.

44. Stipulated penalties shall continue to accrue as provided in Paragraph 41 during any Dispute Resolution, but need not be paid until the following:

a. If the dispute is resolved by agreement of the Parties or by a decision of EPA or CARB that is not appealed to the Court, Defendant shall pay accrued penalties demanded, together with interest, to the United States and/or CARB within 30 Days of the effective date of the agreement or the receipt of EPA’s or CARB’s decision or order.

b. If the dispute is appealed to the Court and the United States and/or CARB prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court’s decision or order, except as provided in subparagraph 44.c, below.

1 c. If any Party appeals the District Court's decision, Defendant shall pay all  
2 accrued penalties determined to be owing, together with interest, within 15 Days of receiving the  
3 final appellate court decision.

4 45. Defendant shall pay stipulated penalties owing to the United States in the manner  
5 set forth and with the confirmation notices required by Paragraph 11, except that the transmittal  
6 letter shall state that the payment is for stipulated penalties and shall state for which violation(s)  
7 the penalties are being paid.

8 46. Defendant shall pay stipulated penalties owing to CARB by check accompanied  
9 by a Payment Transmittal Form provided by CARB pursuant to Section XIV (Notices) after the  
10 Effective Date, with each check mailed to:

11 California Air Resources Board  
12 Accounting Branch  
13 P.O. Box 1436  
Sacramento, CA 95812-1436

14 or by wire transfer, in which case Defendant shall use the following wire transfer information  
15 and send the Payment Transmittal Form to the above address prior to each wire transfer:

16 State of California Air Resources Board  
17 c/o Bank of America, Inter Branch to 0148  
Routing No. 0260-0959-3 Account No. 01482-80005  
18 Notice of Transfer: Edna Murphy, Fax: (916) 322-9612  
Reference: Case Nos. C00029

19 Defendant is directly responsible for any fees associated with the wire transfer. Stipulated  
20 penalties paid to CARB shall be deposited into the Air Pollution Control Fund and used by  
21 CARB to carry out its duties and functions.

22 47. If Defendant fails to pay stipulated penalties according to the terms of this  
23 Consent Decree, Defendant shall be liable for interest on such penalties, as provided for in  
24 28 U.S.C. § 1961, accruing as of the date payment became due. Nothing in this Paragraph shall  
25

1 be construed to limit the United States or CARB from seeking any remedy otherwise provided  
2 by law for Defendant's failure to pay any stipulated penalties.

3 48. The payment of penalties and interest, if any, shall not alter in any way  
4 Defendant's obligation to complete performance of the requirements of this Consent Decree.

5 49. Non-Exclusivity of Remedy. Stipulated penalties are not the United States' or  
6 CARB's exclusive remedy for violations of this Consent Decree. Subject to the provisions of  
7 Section XII (Effect of Settlement/Reservation of Rights), the United States and CARB each  
8 expressly and separately reserve the right to seek any other relief it deems appropriate for  
9 Defendant's violation of this Consent Decree or applicable law, including but not limited to an  
10 action against Defendant for statutory penalties, additional injunctive relief, mitigation or offset  
11 measures, and/or contempt. However, the amount of any statutory penalty assessed for a  
12 violation of this Consent Decree shall be reduced by an amount equal to the amount of any  
13 stipulated penalty assessed and paid pursuant to this Consent Decree for the same violation.

14 **IX. FORCE MAJEURE**

15 50. "Force majeure," for purposes of this Consent Decree, is defined as any event  
16 arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of  
17 Defendant's contractors, which delays or prevents the performance of any obligation under this  
18 Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that  
19 Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate  
20 any potential force majeure event and best efforts to address the effects of any potential force  
21 majeure event (a) as it is occurring and (b) following the potential force majeure, such that the  
22 delay and any adverse effects of the delay are minimized. "Force Majeure" does not include  
23 Defendant's financial inability to perform any obligation under this Consent Decree.

24 51. If any event occurs or has occurred that may delay the performance of any  
25 obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant

1 shall provide notice to the United States, EPA, the CA AG, and CARB by electronic or facsimile  
2 transmission pursuant to Section XIV (Notices), within 5 Days of when Defendant first knew  
3 that the event might cause a delay. Within 14 Days thereafter, Defendant shall provide in writing  
4 to EPA and CARB an explanation and description of the reasons for the delay; the anticipated  
5 duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a  
6 schedule for implementation of any measures to be taken to prevent or mitigate the delay or the  
7 effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it  
8 intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such  
9 event may cause or contribute to an endangerment to public health, welfare or the environment.  
10 Defendant shall include with any notice all available documentation supporting the claim that the  
11 delay was attributable to a force majeure. Failure to comply with the above requirements shall  
12 preclude Defendant from asserting any claim of force majeure for that event for the period of  
13 time of such failure to comply, and for any additional delay caused by such failure. Defendant  
14 shall be deemed to know of any circumstance of which Defendant, any entity controlled by  
15 Defendant, or Defendant's contractors knew or should have known.

16       52. If EPA and CARB agree that the delay or anticipated delay is attributable to a  
17 force majeure event, the time for performance of the obligations under this Consent Decree that  
18 are affected by the force majeure event will be extended by EPA and CARB for such time as is  
19 necessary to complete those obligations. An extension of the time for performance of the  
20 obligations affected by the force majeure event shall not, of itself, extend the time for  
21 performance of any other obligation. EPA and/or CARB will notify Defendant in writing of the  
22 length of the extension, if any, for performance of the obligations affected by the force majeure  
23 event.

24       53. If EPA or CARB disagrees that the delay or anticipated delay has been or will be  
25 caused by a force majeure event, EPA or CARB will notify Defendant in writing of the decision.



1 the informal negotiation period, Defendant invokes formal dispute resolution procedures as set  
2 forth below.

3 57. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution  
4 procedures, within the time period provided in the preceding Paragraph, by serving on the United  
5 States, EPA, the CA AG, and CARB a written Statement of Position regarding the matter in  
6 dispute. The Statement of Position shall include, but need not be limited to, any factual data,  
7 analysis, or opinion supporting Defendant's position and any supporting documentation relied  
8 upon by Defendant.

9 58. The United States/CARB shall serve its/their Statement of Position within 45  
10 Days of receipt of Defendant's Statement of Position. The United States'/CARB's Statement of  
11 Position shall include, but need not be limited to, any factual data, analysis, or opinion  
12 supporting that position and any supporting documentation relied upon by the United  
13 States/CARB. The United States' Statement of Position shall be binding on Defendant, unless  
14 Defendant files a motion for judicial review of the dispute in accordance with the following  
15 Paragraph.

16 59. Defendant may seek judicial review of the dispute by filing with the Court and  
17 serving on the United States, EPA, the CA AG, and CARB, in accordance with Section XIV  
18 (Notices), a motion requesting judicial resolution of the dispute. In any such motion, Defendant  
19 shall be prohibited from raising issues that were not first raised during informal dispute  
20 resolution pursuant to Paragraph 56. The motion must be filed within 21 Days of receipt of the  
21 United States'/CARB's Statement of Position pursuant to the preceding Paragraph. The motion  
22 shall contain a written statement of Defendant's position on the matter in dispute, including any  
23 supporting factual data, analysis, opinion, or documentation, and shall set forth the relief  
24 requested and any schedule within which the dispute must be resolved for orderly  
25 implementation of the Consent Decree.

1           60.     The United States/CARB shall respond to Defendant's motion within the time  
2 period allowed by the Local Rules of this Court. Defendant may file a reply memorandum to the  
3 extent permitted by the Local Rules.

4           61.     Standard of Review

5           a.     Disputes Concerning Matters Accorded Record Review. Except as  
6 otherwise provided in this Consent Decree, in any dispute brought under Paragraph 57 pertaining  
7 to the adequacy or appropriateness of plans, procedures to implement plans, schedules or any  
8 other items requiring approval by EPA and CARB under Paragraphs 19-20 of this Consent  
9 Decree, or the adequacy of the performance of work undertaken pursuant to Paragraphs 19-20  
10 and 26-27 of this Consent Decree, Defendant shall have the burden of demonstrating, based on  
11 the administrative record, that the action, determination, or position of the United States and  
12 CARB is arbitrary and capricious or otherwise not in accordance with law.

13           b.     Other Disputes. Except as otherwise provided in this Consent Decree, in  
14 any other dispute brought under Paragraph 57, Defendant shall bear the burden of demonstrating  
15 by a preponderance of the evidence that its position complies with this Consent Decree and  
16 better furthers the objectives of the Consent Decree.

17           62.     In any disputes brought under this Section, it is hereby expressly acknowledged  
18 and agreed that this Consent Decree was jointly drafted in good faith by the Parties. Accordingly,  
19 the Parties hereby agree that any and all rules of construction to the effect that ambiguity is  
20 construed against the drafting party shall be inapplicable in any dispute concerning the terms,  
21 meaning, or interpretation of this Consent Decree.

22           63.     The invocation of dispute resolution procedures under this Section shall not, by  
23 itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent  
24 Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with  
25 respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but

1 payment shall be stayed pending resolution of the dispute as provided in Paragraph 44. If  
2 Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid  
3 as provided in Section VIII (Stipulated Penalties).

4 **XI. INFORMATION COLLECTION AND RETENTION**

5 64. The United States, CARB, and their representatives, including attorneys,  
6 contractors, and consultants, shall have the right of entry into any facility covered by this  
7 Consent Decree, at all reasonable times, upon presentation of credentials, to:

- 8 a. monitor the progress of activities required under this Consent Decree;
- 9 b. inspect records related to this Consent Decree;
- 10 c. verify any data or information submitted to the United States or CARB in  
11 accordance with the terms of this Consent Decree;
- 12 d. observe emissions testing performed by Defendant or its representatives,  
13 contractors, or consultants;
- 14 e. require that Defendant provide or make available any Small SI Engine for  
15 confirmation testing by EPA and CARB;
- 16 f. obtain documentary evidence, including photographs and similar data  
17 related to implementation of this Consent Decree;
- 18 g. assess Defendant's compliance with this Consent Decree; and
- 19 h. for all other purposes as set forth in the 42 U.S.C. § 7542(b) and Cal.  
20 Gov't Code § 11180.

21 65. Until three years after termination of this Consent Decree, Defendant shall retain,  
22 and shall instruct its contractors and agents to preserve, all non-identical copies of all documents,  
23 records, reports, or other information (including documents, records, or other information in  
24 electronic form) in its or its contractors' or agents' possession or control, or that come into its or  
25 its contractors' or agents' possession or control, and that relate in any manner to Defendant's

1 performance of its obligations under this Consent Decree. This information-retention  
2 requirement shall apply regardless of any contrary corporate or institutional policies or  
3 procedures. At any time during this information-retention period, upon request by the United  
4 States or CARB, Defendant shall provide copies of any documents, records, or other information  
5 required to be maintained under this Paragraph.

6 66. At the conclusion of the information-retention period provided in the preceding  
7 Paragraph, Defendant shall notify the United States and CARB at least 90 Days prior to the  
8 destruction of any documents, records, or other information subject to the requirements of the  
9 preceding Paragraph and, upon request by the United States or CARB, Defendant shall deliver  
10 any such documents, records, or other information to EPA or CARB.

11 67. With respect to any submission of information or request for information under  
12 this Consent Decree, Defendant may assert that certain documents, records, or other information  
13 is privileged under the attorney-client privilege or any other privilege recognized by federal or  
14 California law. If Defendant asserts such a privilege, it shall provide the following: (a) the title  
15 of the document, record, or information; (b) the date of the document, record, or information; (c)  
16 the name and title of each author of the document, record, or information; (d) the name and title  
17 of each addressee and recipient; (e) a description of the subject of the document, record, or  
18 information; and (f) the privilege asserted by Defendant. However, no documents, records, or  
19 other information created or generated pursuant to the requirements of this Consent Decree shall  
20 be withheld on grounds of privilege.

21 68. Defendant may also assert that information required to be provided under this  
22 Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2 or  
23 equivalent California law as applicable. As to any information that Defendant seeks to protect as  
24 CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2. If no claim of  
25

1 confidentiality accompanies records when they are submitted to EPA and/or CARB, the public  
2 may be given access to the records without further notice to the Defendant.

3 69. This Consent Decree in no way limits or affects any right of entry and inspection,  
4 or any right to obtain information, held by the United States or CARB pursuant to applicable  
5 federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of  
6 Defendant to maintain documents, records, or other information imposed by applicable federal or  
7 state laws, regulations, or permits.

8 **XII. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS**

9 70. This Consent Decree resolves the civil claims of Plaintiffs for the violations  
10 alleged in the Complaint filed in this action through the date of lodging, except for violations  
11 alleged only by CARB in the ninth claim of the Complaint related to Defendant's evaporative  
12 emissions, which Defendant and CARB are resolving separately. Plaintiffs reserve and this  
13 Consent Decree is without prejudice to all claims, rights, and remedies against Defendant with  
14 respect to all matters not expressly resolved in this Consent Decree.

15 71. Defendant agrees not to contest the revocation by OTAQ of COCs EPA issued for  
16 Defendant's Model Year 2016 engine families designated GKHXS.6942PC, GKHXS.7472NC,  
17 GKHXS.7472ND, GKHXS.8242ND, and GKHXS.8242PD. Defendant cannot use emissions  
18 data from these engine families to certify any engine family after the Effective Date either  
19 through EPA or through CARB.

20 72. The United States reserves all legal and equitable remedies available to enforce  
21 the provisions of this Consent Decree. This Consent Decree shall not be construed to limit the  
22 rights of the United States to obtain penalties or injunctive relief under the Act and its  
23 implementing regulations, or under other federal laws, regulations, or permit conditions,  
24 including for violations identified through the emissions testing validation and annual  
25 compliance auditing required by Paragraphs 19-20. The United States further reserves all legal

1 and equitable remedies to address any imminent and substantial endangerment to the public  
2 health or welfare or the environment whether related to the violations addressed in this Consent  
3 Decree or otherwise.

4 73. CARB reserves all legal and equitable remedies available to enforce the  
5 provisions of this Consent Decree. This Consent Decree shall not be construed to limit the rights  
6 of CARB to obtain penalties or injunctive relief under the California Health and Safety Code,  
7 and its implementing regulations, or under other state laws, regulations, or permit conditions,  
8 including for violations identified through the emissions testing validation and annual  
9 compliance auditing required by Paragraphs 19-20. CARB further reserves all legal and  
10 equitable remedies to address any imminent and substantial endangerment to the public health or  
11 welfare or the environment whether related to the violations addressed in this Consent Decree or  
12 otherwise.

13 74. In any subsequent administrative or judicial proceeding initiated by the United  
14 States or CARB for injunctive relief, civil penalties, other appropriate relief relating to  
15 Defendant's violations, Defendant shall not assert, and may not maintain, any defense or claim  
16 based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim  
17 preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by  
18 the United States or CARB in the subsequent proceeding were or should have been brought in  
19 the instant case, except with respect to claims that have been specifically resolved pursuant to  
20 Paragraph 70.

21 75. This Consent Decree is not a permit, or a modification of any permit, under any  
22 federal, State, or local laws or regulations. Defendant is responsible for achieving and  
23 maintaining complete compliance with all applicable federal, State, and local laws, regulations,  
24 and permits; and Defendant's compliance with this Consent Decree shall be no defense to any  
25 action commenced pursuant to any such laws, regulations, or permits, except as set forth herein.

1 The United States and CARB do not, by their consent to the entry of this Consent Decree,  
2 warrant or aver in any manner that Defendant's compliance with any aspect of this Consent  
3 Decree will result in compliance with provisions of the Act and the California Health and Safety  
4 Code, or their implementing regulations, or with any other provisions of federal, State, or local  
5 laws, regulations, or permits.

6 76. This Consent Decree does not limit or affect the rights of Defendant or of the  
7 United States or CARB against any third parties, not party to this Consent Decree, nor does it  
8 limit the rights of third parties, not party to this Consent Decree, against Defendant, except as  
9 otherwise provided by law.

10 77. This Consent Decree shall not be construed to create rights in, or grant any cause  
11 of action to, any third party not party to this Consent Decree.

### 12 **XIII. COSTS**

13 78. The Parties shall bear their own costs of this action, including attorneys' fees,  
14 except that the United States and CARB shall be entitled to collect the costs (including attorneys'  
15 fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated  
16 penalties due but not paid by Defendant.

### 17 **XIV. NOTICES**

18 79. Unless otherwise specified in this Decree, whenever notifications, submissions, or  
19 communications are required by this Consent Decree, they shall be submitted electronically as  
20 described below, unless such notices are unable to be uploaded in the CDX electronic system (in  
21 the case of EPA) or transmitted by email (in the case of any other Party). For all notices to EPA,  
22 Defendant shall register for the CDX electronic system and upload such notices at  
23 <https://cdx.epa.gov>. Any notice that cannot be uploaded or transmitted via email shall be  
24 provided in writing (and if any attachment is voluminous, it shall be provided on a disk, hard  
25 drive, or other equivalent successor technology) to the addresses below:

1 As to the United States by email: [Patricia.Hurst@usdoj.gov](mailto:Patricia.Hurst@usdoj.gov)  
2 [eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)  
3 Re: DJ # 90-5-2-1-11892

4 As to the United States by mail: EES Case Management Unit  
5 Environment and Natural Resources Division  
6 U.S. Department of Justice  
7 P.O. Box 7611  
8 Washington, D.C. 20044-7611  
9 Re: DJ # 90-5-2-1-11892

10 As to EPA by email: [Bickmore.Ryan@epa.gov](mailto:Bickmore.Ryan@epa.gov)

11 As to EPA by mail: Director  
12 Enforcement and Compliance Assurance Division  
13 U.S. Environmental Protection Agency, Region 9  
14 75 Hawthorne St.  
15 San Francisco, CA 94105

16 As to CARB by email: [Shannon.Dilley@arb.ca.gov](mailto:Shannon.Dilley@arb.ca.gov)  
17 [Marco.Banaga@arb.ca.gov](mailto:Marco.Banaga@arb.ca.gov)

18 As to CARB by mail: Shannon Martin Dilley  
19 Senior Counsel  
20 California Air Resources Board  
21 Legal Office  
22 1001 I Street  
23 Sacramento, CA 95814  
24 (916) 322-3940

25 Marco Banaga  
Air Pollution Specialist  
California Air Resources Board  
9480 Telstar Avenue, No. 4  
El Monte, CA 91731  
(626) 450-6270

As to CA AG by email: [Kurt.weissmuller@doj.ca.gov](mailto:Kurt.weissmuller@doj.ca.gov)  
[Josh.Caplan@doj.ca.gov](mailto:Josh.Caplan@doj.ca.gov)

As to CA AG by mail: Kurt Weissmuller  
Deputy Attorney General  
Office of the California Attorney General  
300 S. Spring Street, Suite 1702  
Los Angeles, CA 90013

(213) 269-6353

Joshua M. Caplan  
Deputy Attorney General  
Office of the California Attorney General  
600 West Broadway, Suite 1800  
San Diego, CA 92816-5266  
(619) 738-9303

As to Defendant by mail:

Natalie Maciolek  
VP - General Counsel and Corporate Secretary  
Kohler Co.  
444 Highland Dr.  
Kohler, WI 53044  
(920) 457-4441

Michael Read  
Director - Product Compliance  
Kohler Co.  
444 Highland Dr. MS100,  
Kohler, WI 53044  
(920) 453-6398

As to Defendant by email:

Natalie.Maciolek@kohler.com  
Michael.Read@kohler.com

80. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

81. Notices submitted pursuant to this Section shall be deemed submitted upon uploading electronically, emailing, or mailing as required, except as provided elsewhere in this Consent Decree or by mutual agreement of the Parties in writing.

#### **XV. EFFECTIVE DATE**

82. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

1 **XVI. RETENTION OF JURISDICTION**

2 83. The Court shall retain jurisdiction over this case until termination of this Consent  
3 Decree, for the purpose of resolving disputes arising under this Consent Decree or entering  
4 orders modifying this Consent Decree, pursuant to Sections X and XVII, or effectuating or  
5 enforcing compliance with the terms of this Consent Decree.

6 **XVII. MODIFICATION**

7 84. The terms of this Consent Decree, including any attached appendices, may be  
8 modified only by a subsequent written agreement signed by all the Parties. Where the  
9 modification constitutes a material change to this Consent Decree, it shall be effective only upon  
10 approval by the Court.

11 85. Any disputes concerning modification of this Decree shall be resolved pursuant to  
12 Section X (Dispute Resolution), provided, however, that, instead of the burden of proof provided  
13 by Paragraph 61, the Party seeking the modification bears the burden of demonstrating that it is  
14 entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

15 **XVIII. TERMINATION**

16 86. After Defendant has completed the requirements of Section V (Compliance  
17 Measures), Section VI (Correction of ABT Reports), and Section VII (Reporting Requirements);  
18 has maintained continuous satisfactory compliance with this Consent Decree for a period of three  
19 years; and has paid the civil penalty and any accrued stipulated penalties as required by this  
20 Consent Decree, Defendant may serve upon the United States and CARB a Request for  
21 Termination, stating that Defendant has satisfied those requirements, together with all necessary  
22 supporting documentation.

23 87. Following receipt by the United States and CARB of Defendant's Request for  
24 Termination, the Parties shall confer informally concerning the Request and any disagreement  
25 that the Parties may have as to whether Defendant has satisfactorily complied with the

1 requirements for termination of this Consent Decree. If the United States and CARB agree that  
2 the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint  
3 stipulation terminating the Decree.

4 88. If the United States or CARB disagrees that the Decree may be terminated,  
5 Defendant may invoke Dispute Resolution under Section X. However, Defendant shall not seek  
6 Dispute Resolution of any dispute regarding termination until 60 Days after service of its  
7 Request for Termination.

8 **XIX. PUBLIC PARTICIPATION**

9 89. This Consent Decree shall be lodged with the Court for a period of not less than  
10 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States  
11 reserves the right to withdraw or withhold its consent if the comments regarding the Consent  
12 Decree disclose facts or considerations indicating that the Consent Decree is inappropriate,  
13 improper, or inadequate. CARB reserves the right to withdraw or withhold its consent if the  
14 United States does so. Defendant consents to entry of this Consent Decree without further notice  
15 and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to  
16 challenge any provision of the Consent Decree, unless the United States has notified Defendant  
17 in writing that it no longer supports entry of the Consent Decree.

18 **XX. SIGNATORIES/SERVICE**

19 90. Each undersigned representative of Defendant, the Assistant Attorney General for  
20 the Environment and Natural Resources Division of the Department of Justice, the Attorney  
21 General for the State of California, and CARB, certifies that he or she is fully authorized to enter  
22 into the terms and conditions of this Consent Decree and to execute and legally bind the Party he  
23 or she represents to this document.

24 91. This Consent Decree may be signed in counterparts, and its validity shall not be  
25 challenged on that basis.



**XXIII. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION**

1  
2 96. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the  
3 Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section II (Applicability),  
4 Paragraph 7; Section V (Compliance Measures), Paragraphs 16-19, 20 (except with respect to the  
5 disapproval of Action Plans), 21-22; Section VII (Reporting Requirements), Paragraphs 29  
6 (except with respect to reporting on Correction of ABT Reports), 31-32; and Section XI  
7 (Information Collection and Retention), Paragraphs 64-66; is restitution or required to come into  
8 compliance with law.

9  
10 Dated and entered this \_\_\_ day of \_\_\_\_\_, 2020.

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13 \_\_\_\_\_  
14 UNITED STATES DISTRICT JUDGE  
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et*  
2 *al. v. Kohler Co.*

3 FOR THE UNITED STATES OF AMERICA:

4  
5 Date: 11/29/20

  
\_\_\_\_\_  
JEFFREY BOSSERT CLARK  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

8  
9  
10 PATRICIA L. HURST (DCBN 438882)  
11 Senior Counsel  
12 Environmental Enforcement Section  
13 Environment and Natural Resources Division  
14 U.S. Department of Justice



15 Date: \_\_\_\_\_

\_\_\_\_\_  
DAVID L. ANDERSON  
United States Attorney  
SARA WINSLOW (DCBN 457643)  
Chief, Civil Division  
MICHELLE LO (NYBN 4325163)  
Assistant United States Attorney

25

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et*  
2 *al. v. Kohler Co.*

3 FOR THE UNITED STATES OF AMERICA:

4  
5 Date: \_\_\_\_\_

6 \_\_\_\_\_  
7 JEFFREY BOSSERT CLARK  
8 Assistant Attorney General  
9 Environment and Natural Resources Division  
10 U.S. Department of Justice

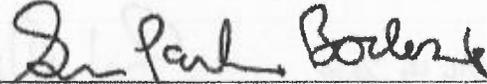
11 \_\_\_\_\_  
12 PATRICIA L. HURST (DCBN 438882)  
13 Senior Counsel  
14 Environmental Enforcement Section  
15 Environment and Natural Resources Division  
16 U.S. Department of Justice

17 Date: 01/28/2020

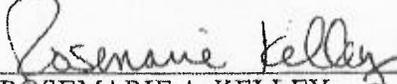
18 \_\_\_\_\_  
19 *Michelle Lo*  
20 DAVID L. ANDERSON  
21 United States Attorney  
22 SARA WINSLOW (DCBN 457643)  
23 Chief, Civil Division  
24 MICHELLE LO (NYBN 4325163)  
25 Assistant United States Attorney

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et*  
2 *al. v. Kohler Co.*

3 FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

4 Date: 1/29/2020 

SUSAN PARKER BODINE  
Assistant Administrator  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

9 Date: 1/24/2020 

ROSEMARIE A. KELLEY  
Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

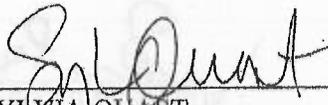
14 Date: 1/13/2020 

PHILLIP A. BROOKS  
Director, Air Enforcement Division  
EVAN BELSER  
Associate Director, Air Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et*  
2 *al. v. Kohler Co.*

3 FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 9:  
4

5 Date: January 13, 2020

  
6 SYLVIA QUAST  
7 Regional Counsel  
8 U.S. Environmental Protection Agency, Region 9  
9 Office of Regional Counsel  
10 75 Hawthorne St.  
11 San Francisco, CA 94105

11 OF COUNSEL:

12 RYAN BICKMORE  
13 Attorney-Advisor  
14 U.S. Environmental Protection Agency, Region 9  
15 75 Hawthorne Street (ORC-2-2)  
16 San Francisco, CA 94105  
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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et*  
2 *al. v. Kohler Co.*

3 FOR THE CALIFORNIA OFFICE OF THE ATTORNEY GENERAL:

4  
5 Date: 1/28/2020

  
6 KURT WEISSMULLER (CABN 117187)  
7 Deputy Attorney General  
8 Office of the California Attorney General  
9 300 S. Spring Street, Suite 1702  
10 Los Angeles, CA 90013  
11 [Kurt.Weissmuller@doj.ca.gov](mailto:Kurt.Weissmuller@doj.ca.gov)  
12 Phone: (213) 269-6353  
13 Fax: (213) 897-2802

14 Date: 1/28/2020

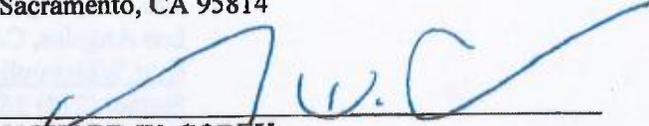
  
15 JOSHUA M. CAPLAN (CABN 245469)  
16 Deputy Attorney General  
17 Office of the California Attorney General  
18 600 West Broadway, Suite 1800  
19 San Diego, CA 92816-5266  
20 [Josh.Caplan@doj.ca.gov](mailto:Josh.Caplan@doj.ca.gov)  
21 Phone: (619) 738-9303  
22 Fax: (619) 645-2271  
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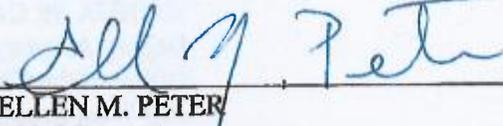
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THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et al. v. Kohler Co.*

FOR THE CALIFORNIA AIR RESOURCES BOARD:

Date: 1/22/2020   
MARY D. NICHOLS  
Chair  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

Date: 1/22/2020   
RICHARD W. COREY  
Executive Officer  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

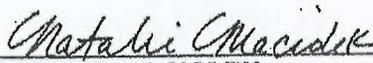
Date: 1/22/2020   
ELLEN M. PETER  
Chief Counsel  
D. ARON LIVINGSTON  
Assistant Chief Counsel  
SHANNON MARTIN DILLEY (CABN 297804)  
Senior Counsel  
California Air Resources Board  
Legal Office  
1001 I Street  
Sacramento, CA 95814  
[shannon.dilley@arb.ca.gov](mailto:shannon.dilley@arb.ca.gov)  
Phone: (916) 322-3940  
Fax: (916) 322-3928

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THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et al. v. Kohler Co.*

FOR KOHLER CO.:

Date: 1/29/20

  
NATALIE MACIOLEK  
VP - General Counsel and Corporate Secretary  
Kohler Co.  
444 Highland Dr.  
Kohler, WI 53044  
Natalie.Maciolek@kohler.com  
Phone: (920) 457-4441

1 XAVIER BECERRA  
 Attorney General of California  
 2 ROBERT BYRNE  
 Senior Assistant Attorney General  
 3 GARY E. TAVETIAN (CA Bar No. 117135)  
 Supervising Deputy Attorney General  
 4 KURT WEISSMULLER (CA Bar No. 117187)  
 JOSHUA CAPLAN (CA Bar No. 245469)  
 Deputy Attorneys General  
 5 300 South Spring Street, Suite 1702  
 Los Angeles, CA 90013  
 6 Telephone: (213) 269-6353  
 E-mail: Gary.Tavetian@doj.ca.gov  
 7 E-mail: Kurt.Weissmuller@doj.ca.gov  
 E-mail: Josh.Caplan@doj.ca.gov  
 8

9 *Attorneys for Plaintiff the People of the State of California*

10 IN THE UNITED STATES DISTRICT COURT  
 11 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 12 SAN FRANCISCO DIVISION  
 13

14  
 15 UNITED STATES OF AMERICA AND  
 PEOPLE OF THE STATE OF  
 16 CALIFORNIA EX REL. CALIFORNIA  
 AIR RESOURCES BOARD,  
 17

CASE NO. 20-00683  
 CALIFORNIA PARTIAL  
 CONSENT DECREE

18 Plaintiffs,

19 v.

20 KOHLER CO.,

21 Defendant.  
 22  
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1 Plaintiff United States of America, on behalf of the United States  
2 Environmental Protection Agency (“EPA”), and Plaintiff People of the State of  
3 California, acting by and through Xavier Becerra, Attorney General of the State of  
4 California, *ex rel.* California Air Resources Board (“CARB”), have filed a  
5 complaint in this action concurrently with this Partial Consent Decree  
6 (“Complaint”), alleging in relevant part that Defendant Kohler Co. (“Defendant”)  
7 violated Sections 203, 204, 205, 213(d), and 304 of the Clean Air Act (the “CAA”  
8 or “Act”), 42 U.S.C. §§ 7522, 7523, 7524, 7547(d), 7604, and regulations  
9 promulgated pursuant to Section 213(a) of the Act, 42 U.S.C. § 7547(a), and  
10 California Health and Safety Code Sections 43016, 43017, and 43154, and  
11 regulations promulgated pursuant to Sections 39600, 39601, 43013, 43016, 43017,  
12 43101, 43102, and 43104 of the California Health and Safety Code.

13 The Complaint alleges that Defendant manufactured and sold, or offered for  
14 sale, small, nonroad, nonhandheld spark-ignition engines nationwide (which  
15 included sale or offer for sale of both Small Off-Road (“SORE”) engines and Large  
16 Spark-Ignition (“LSI”) engines with displacements equal to or less than 1.0 liter  
17 under California’s regulations (collectively, “Small SI Engines”). The Complaint  
18 alleges that Defendant failed to comply with the applicable certification  
19 requirements set forth in 40 C.F.R. Parts 90, 1054, 1065, and Title 13 California  
20 Code of Regulations (CCR) §§ 2403(d) and 2433(d), which incorporate applicable  
21 California Test Procedures. The Complaint further alleges that these Small SI  
22 Engines do not conform in all material respects to the engine specifications  
23 described in the applications for the certificates of conformity (“COCs”) or CARB  
24 executive orders (“EOs”) that purportedly cover them. The Complaint alleges that  
25 Defendant violated Section 203(a)(1) of the CAA, 42 U.S.C. § 7522(a)(1) and 13  
26 CCR §§ 2403(b)-(e), 2408, and 2433 (b)-(d), by selling these uncertified Small SI  
27 Engines nationwide, including in California.

1 The Complaint also alleges that Defendant manufactured and offered for sale  
2 in California over 10,000 SORE engines that did not conform in all material  
3 respects to the engine specifications described in the applications for the EO that  
4 purportedly covered them because the engines did not meet the applicable diurnal  
5 evaporative emission control requirements, in violation of 13 CCR §§ 2754-2765  
6 (the “California Evaporative Emission Control Claims”).

7 Defendant and CARB intend to resolve certain aspects of the Complaint  
8 through the entry of a consent decree among the United States, CARB, and  
9 Defendant (the “Kohler/US/CARB Consent Decree”) concerning the Small SI  
10 Engines, lodged on January [\*\*], 2020, that, among other things, requires  
11 Defendant to (1) correct certain ABT emissions credits, (2) implement certain  
12 corporate compliance reforms, and (3) make a civil penalty payment of  
13 \$20,000,000, of which \$4,000,000 shall be paid to CARB.

14 Defendant and CARB have agreed, through this partial consent decree, to  
15 resolve certain remaining aspects of the Complaint related to the Small SI Engines,  
16 including the CARB Evaporative Emission Control Claims.

17 Nothing in this partial consent decree (the “Partial Consent Decree”) shall  
18 constitute an admission of any fact or law by Defendant arising out of the  
19 transactions or occurrences alleged in the Complaint, except for the purpose of  
20 enforcing the terms or conditions set forth herein.

21 The Parties recognize, and the Court by entering this Partial Consent Decree  
22 finds, that this Partial Consent Decree has been negotiated by the Parties in good  
23 faith and will avoid litigation among the Parties and that this Partial Consent  
24 Decree is fair, reasonable, and in the public interest.

25 This Partial Consent Decree and the Kohler/US/CARB Consent Decree  
26 together form an integrated resolution of certain aspects of the claims asserted by  
27 CARB in the Complaint, and that, as set forth herein, this Partial Consent Decree  
28

1 will not become effective unless and until the Kohler/US/CARB Consent Decree is  
2 entered or the Court grants a motion entering the Kohler/US/CARB Consent  
3 Decree.

4 **NOW, THEREFORE**, before the taking of any testimony, without the  
5 adjudication of any issue of fact or law, and with the consent of the Parties, **IT IS**  
6 **HEREBY ADJUDGED, ORDERED, AND DECREED** as follows:

7 **I. JURISDICTION AND VENUE**

8 1. This Court has jurisdiction over the subject matter of this action and  
9 the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Sections 205(b) and  
10 304 of the Act, 42 U.S.C. §§ 7524(b), 7604. This Court has supplemental  
11 jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367 because they are  
12 part of the same case or controversy as the claims over which the Court has  
13 jurisdiction.

14 2. Venue lies in this District pursuant to Section 205(b) of the Act, 42  
15 U.S.C. § 7524(b), and 28 U.S.C. §§ 1391(b) and 1395(a), because some of the acts  
16 for which CARB seeks civil penalties occurred in this District.

17 3. For purposes of this Consent Decree, Defendant consents to the  
18 Court's jurisdiction over any action to enforce this Partial Consent Decree and over  
19 Defendant, and consents to venue in this District. Defendant agrees that the  
20 Complaint states claims upon which relief may be granted pursuant to Sections 203,  
21 204, 205, 213(d), and 304 of the Act, 42 U.S.C. §§ 7522, 7523, 7524, 7547(d),  
22 7604, and California Health and Safety Code Sections 43016, 43017, and 43154.

23 **II. APPLICABILITY**

24 4. The obligations of this Partial Consent Decree apply to and are binding  
25 upon CARB, and upon Defendant and any successors, assigns, or other entities or  
26 persons otherwise bound by law.

1           5.     No transfer of ownership or operation of the Engine Division, whether  
2 in compliance with the procedures of this Paragraph or otherwise, shall relieve  
3 Defendant of its obligation to ensure that the terms of this Partial Consent Decree  
4 are implemented, unless (a) the transferee agrees in writing to undertake the  
5 obligations of this Partial Consent Decree and to be substituted for the Defendant as  
6 a Party under the Partial Consent Decree and thus be bound by the terms thereof;  
7 and (b) CARB consents in writing to relieve Defendant of its obligations. CARB  
8 may refuse in its unreviewable discretion to consent to the substitution of the  
9 transferee for Defendant. At least 30 Days prior to any such transfer, Defendant  
10 shall provide a copy of this Partial Consent Decree to the proposed transferee, and  
11 shall simultaneously provide written notice of the prospective transfer, together  
12 with a copy of the proposed written transfer agreement, to the CA AG, and CARB.  
13 If CARB provides written consent pursuant to this Paragraph, such written consent  
14 shall be treated as a material modification requiring Court approval pursuant to  
15 Section XVII (Modification). Any attempt to transfer ownership or operation of the  
16 Engine Division without complying with this Paragraph is a violation of this Partial  
17 Consent Decree.

18           6.     No transfer of ownership or operation of any entity of Defendant other  
19 than the Engine Division, whether in compliance with the procedures of this  
20 Section or otherwise, shall relieve Defendant of its obligation to ensure that the  
21 terms of the Consent Decree are implemented. Defendant shall retain responsibility  
22 for implementing the Zero-Emission Generators program, regardless of any  
23 approved transfer of the Engine Division.

24           7.     Defendant shall provide a copy of this Partial Consent Decree to all  
25 members of its board of directors and to executives, officers, employees, and agents  
26 whose duties might reasonably include compliance with any provision of this  
27 Partial Consent Decree, as well as to any contractor or auditor retained to perform  
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1 work required under this Partial Consent Decree. Defendant shall condition any  
2 such contract upon performance of the work in conformity with the terms of this  
3 Partial Consent Decree. Defendant shall also ensure that any contractors, auditors,  
4 agents, and employees whose duties might reasonably include compliance with any  
5 provision of the Partial Consent Decree are made aware of those requirements of  
6 the Partial Consent Decree relevant to their performance.

7 8. In any action to enforce this Partial Consent Decree, Defendant shall  
8 not raise as a defense the failure by any of its directors, executives, officers,  
9 employees, agents, contractors, or auditors to take any actions necessary to comply  
10 with the provisions of this Partial Consent Decree.

11 **III. DEFINITIONS**

12 9. Terms used in this Partial Consent Decree that are defined in the Act  
13 or California Health and Safety Code, or in regulations promulgated pursuant to the  
14 Act or the California Health and Safety Code, shall have the meanings assigned to  
15 them in those statutes and such regulations, unless otherwise provided in this Partial  
16 Consent Decree. Whenever the terms set forth below are used in this Partial  
17 Consent Decree, the following definitions shall apply:

- 18 a. "California" means the State of California;
- 19 b. "CA AG" means the California Attorney General's Office and any  
20 of its successor departments or agencies;
- 21 c. "CARB" means the California Air Resources Board;
- 22 d. "Clean Air Act" or "Act" means 42 U.S.C. § 7401-7671q;
- 23 e. "Complaint" shall mean the complaint filed by the United States  
24 and CARB in this action;
- 25 f. "Day" shall mean a calendar day unless expressly stated to be a  
26 business day. In computing any period of time under this Partial Consent Decree,
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1 where the last day would fall on a Saturday, Sunday, or federal or state holiday, the  
2 period shall run until the close of business of the next business day;

3 g. “Defendant” shall mean Kohler Co.;

4 h. “Effective Date” shall have the definition provided in Section XIII  
5 below;

6 i. “Electric Loading-Serving Providers” means all investor owned  
7 utilities that provide electricity to California residents, including Pacific Gas and  
8 Electric Company (PG&E), Southern California Edison (SCE), and San Diego Gas  
9 and Electric Company (SDG&E).

10 j. “Engine Division” shall mean Defendant’s business division that  
11 develops, certifies, manufactures, and sells Small SI Engines;

12 k. “EPA” shall mean the United States Environmental Protection  
13 Agency and any of its successor departments or agencies;

14 l. “LSI Engine” or “Off-Road Large Spark-ignition Engine” shall  
15 mean any engine that produces a gross horsepower 25 and greater horsepower or is  
16 designed (e.g., through fueling, engine calibrations, valve timing, engine speed  
17 modifications, etc.) to produce 25 and greater horsepower (greater than 19 kilowatts  
18 on or after January 1, 2007), as specified in 13 CCR § 2431(a)(28).

19 m. “Paragraph” shall mean a portion of this Decree identified by an  
20 arabic numeral;

21 n. “Parties” shall mean CARB and Defendant;

22 o. “Project Administrator” shall mean the third-party contractor  
23 charged with administering and implementing the Mitigation Project.

24 p. “Public Safety Power Shutoffs” or “PSPS” means preemptive de-  
25 energization of Electric Load-Serving Providers’ power lines in response to  
26 extreme weather events to prevent utility-caused wildfires.

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1 q. "Section" shall mean a portion of this Partial Consent Decree  
2 identified by a roman numeral;

3 r. "SORE Engine" or "Small Off-Road Engine" shall mean any  
4 engine that produces a gross horsepower less than 25 horsepower (at or below 19  
5 kilowatts for 2005 and later model year), or is designed (e.g., through fuel feed,  
6 valve timing, etc.) to produce less than 25 horsepower (at or below 19 kilowatts for  
7 2005 and later model year), that is not used to propel a licensed on-road motor  
8 vehicle, an off-road motorcycle, an all-terrain vehicle, a marine vessel, a  
9 snowmobile, a model airplane, a model car, or a model boat, as specified in 13 CCR  
10 § 2401(a)(39);

11 s. "State" shall mean the State of California;

12 t. "United States" shall mean the United States of America, acting on  
13 behalf of EPA.

#### 14 IV. CIVIL PENALTY

15 10. CARB Civil Penalty Payment. Within 30 days of the Effective Date  
16 (as described in Section XIII below), or 30 days of the entry of this Partial Consent  
17 Decree, whichever comes later, Defendant shall pay directly to CARB the sum of  
18 **two-hundred thousand dollars (\$200,000.00)** as a civil penalty related to the  
19 CARB Evaporative Emission Control Claims (the "CARB Evaporative Emission  
20 Control Penalty Payment"). These funds shall be deposited by CARB into the Air  
21 Pollution Control Fund, and used by CARB to carry out its duties and functions.  
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23 11. Payments required to be made under this Partial Consent Decree shall  
24 be issued to CARB by check, accompanied by a Payment Transmittal Form (which  
25 CARB will provide to the addressee listed in Section XI (Notices) after the  
26 Effective Date in Section XIII (Effective Date), mailed to:  
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1 California Air Resources Board  
2 Accounting Branch  
3 P.O. Box 1436  
4 Sacramento, CA 95812-1436;

5 or by wire transfer, in which case Defendant shall use the following wire transfer  
6 information and send the Payment Transmittal Form to the above address before  
7 each wire transfer:

8 State of California Air Resources Board  
9 c/o Bank of America, Inter Branch to 0148  
10 Routing No. 0260-0959-3 Account No. 01482-80005  
11 Notice of Transfer: Edna Murphy Fax: (916) 322-9612  
12 Reference: Case No. C00187

13 Defendant is directly responsible for any fees associated with processing wire  
14 transfer.

15 12. Defendant shall not deduct any penalties paid under this Partial  
16 Consent Decree pursuant to this Section in calculating and submitting its federal,  
17 state, or local income tax.

18 13. The payment of stipulated penalties and interest, if any, shall not alter  
19 in any way Defendant's obligation to complete performance of the requirements of  
20 this Partial Consent Decree.

#### 21 V. CALIFORNIA MITIGATION PROJECT

22 14. Mitigation Project. As further set forth in this Section, Defendant shall  
23 mitigate excess emissions through the provision of zero-emission solar powered  
24 EnCUBE 1.8 generators, including the solar panels that power the generators  
25 (collectively, "Zero-Emission Generators") to low income residents in California  
26 that are in locations subject to Public Safety Power Shutoffs, including California  
27 Native America Tribal lands ("Mitigation Project") at a cost of no less than **\$1.8**  
28 **million** ("Mitigation Project Cost"). No later than 60 days after the Effective Date,

1 Defendant shall order for distribution to the Program Administrator Zero-Emission  
2 Generators that consume the entire Mitigation Project Cost as determined in  
3 accordance with the terms of this Section V. Defendant may include any applicable  
4 government tariffs in calculating the cost of the Zero-Emission Generators, except  
5 that if Defendant orders the Zero-Emission Generators more than 60 days after the  
6 Effective Date, and the government tariffs are greater than what was in place within  
7 the first 60 days following the Effective Date, the increase in government tariffs  
8 shall not be included in calculating the cost of the Zero-Emission Generators.  
9 Defendant may also include, in calculating the cost of the Zero-Emission  
10 Generators, its distribution costs, as well as costs of the Project Administrator.  
11 Defendant shall provide evidence of the manufacture, ordering, amount of tariffs,  
12 and shipment of these Zero-Emission Generators and collect and provide  
13 reasonably available Zero-Emission Generator distribution data as set forth in  
14 Section VII below.

15 15. Project Administrator(s): Distribution of Zero-Emission Generators.

16 Defendant, in its sole discretion, shall select a third-party administrator(s) (“Project  
17 Administrator(s)”) to distribute the Zero-Emission Generators to low income  
18 residents that live in areas in California subject to public safety power shutdowns.  
19 Defendant shall require Project Administrator(s) to distribute all Zero-Emission  
20 Generators required under this Partial Consent Decree on a rolling basis until the  
21 \$1.8 million Mitigation Project Cost is consumed. In the event all Electric-Loading  
22 Service Providers publicly announce they are no longer going to implement public  
23 safety power shutdowns, then the geographic location for distribution shall be  
24 disadvantaged communities and tribal lands served by the Electric Loading-Serving  
25 Entities. Defendant may use one or more suppliers, contractors, or consultants in  
26 planning and implementing the Mitigation Project, but Defendant remains  
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1 responsible for ensuring the manufacture and shipment to residents in California, as  
2 determined by this Section V.

3 16. Zero-Emission Generator Recipients. The Project Administrator(s)  
4 selected by Defendant under this Section shall only distribute Zero-Emission  
5 Generators to individuals who qualify for low-income assistance programs through  
6 Investor-Owned Utilities, Publicly Owned Load-Serving Utilities, Rural Electric  
7 Cooperatives, Community Choice Aggregators, and Electric Service Providers, or  
8 other local power utilities (collectively, "Electric Load-Serving Entities").

9 Defendant shall ensure that the Project Administrator(s) does not distribute Zero-  
10 Emission Generators to individuals who do not qualify for low-income assistance  
11 programs through Electric Load-Serving Entities.

12 17. Collection of Information. Defendant shall require the Project  
13 Administrator(s) to collect and provide to Defendant the following information  
14 pertaining to the distribution of Zero-Emission Generators: (1) the number of Zero-  
15 Emission Generators distributed to the Project Administrator(s); (2) the date of such  
16 Zero-Emission Generators distributions; (3) the geographic location of each Zero-  
17 Emission Generators distributed by the Project Administrator(s), including city and  
18 zip code; and (4) all advertising and outreach performed by the Project  
19 Administrator(s) related to the distribution of Zero-Emission Generators under this  
20 Partial Consent Decree.

## 21 VI. REPORTING REQUIREMENTS

22 18. Defendant shall submit quarterly reports to CARB that provide  
23 information in accordance with the requirements of Section V, above, including the  
24 following information: (1) the number of Zero-Emission Generators distributed to  
25 the Project Administrator(s); (2) the date of such Zero-Emission Generators  
26 distributions; (3) the geographic location of each distributed Zero-Emission  
27 Generator, including city and zip code; (4) all advertising and outreach performed;

1 (5) proof of the relevant tariffs in place at the time of purchase; (6) proof of the cost  
2 of distribution and shipment; (7) proof of any manufacturer delays.

3 19. Defendant shall continue to implement the Mitigation Project and  
4 submit quarterly reports to CARB until Defendant provides evidence to CARB that  
5 Defendant has distributed to the Project Administrator(s) Zero-Emission Generators  
6 consuming the Mitigation Project Cost in accordance with Section V.

7 20. Defendant shall not submit to CARB any personal identifying  
8 information with respect to consumers who acquired Zero-Emission Generators  
9 from the Project Administrator(s) under the terms of this Partial Consent Decree.

10 21. All reports shall be submitted to all persons designated in Section XI  
11 (Notices). Defendant may assert that information submitted under this Partial  
12 Consent Decree is protected as Confidential Business Information (“CBI”) as set  
13 out in 17 CCR §§ 91000 to 91022.

14 22. Each report submitted by Defendant under this Section shall be signed  
15 by an official of the submitting party and include the following certification:

16 I certify under penalty of law that this document and all attachments  
17 were prepared under my direction or supervision in accordance with a  
18 system designed to assure that qualified personnel properly gather and  
19 evaluate the information submitted. Based on my inquiry of the person  
20 or persons who manage the system, or those persons directly  
21 responsible for gathering the information, the information submitted is,  
22 to the best of my knowledge and belief, true, accurate, and complete. I  
23 have no personal knowledge or belief that the information submitted is  
24 other than true, accurate, and complete. I am aware that there are  
25 significant penalties for submitting false information, including the  
26 possibility of fine and imprisonment for knowing violations.





1 stipulated penalties and shall state for which violation(s) the stipulated penalties are  
2 being paid.

### 3 **VIII. FORCE MAJEURE**

4 34. "Force majeure," for purposes of this Partial Consent Decree, is  
5 defined as any event arising from causes beyond the control of Defendant, of any  
6 entity controlled by Defendant, or of Defendant's contractors, which delays or  
7 prevents the performance of any obligation under this Partial Consent Decree  
8 despite Defendant's best efforts to fulfill the obligation. The requirement that  
9 Defendant exercise "best efforts to fulfill the obligation" includes using best efforts  
10 to anticipate any potential force majeure event and best efforts to address the effects  
11 of any potential force majeure event (a) as it is occurring and (b) following the  
12 potential force majeure, such that the delay and any adverse effects of the delay are  
13 minimized. "Force Majeure" does not include Defendant's financial inability to  
14 perform any obligation under this Partial Consent Decree.

15 35. If any event occurs or has occurred that may delay the performance of  
16 any obligation under this Partial Consent Decree, whether or not caused by a force  
17 majeure event, Defendant shall provide notice to the CA AG and CARB by  
18 electronic or facsimile transmission pursuant to Section XI (Notices), within 5 Days  
19 of when Defendant first knew that the event might cause a delay. Within 14 Days  
20 thereafter, Defendant shall provide in writing to CARB an explanation and  
21 description of the reasons for the delay; the anticipated duration of the delay; all  
22 actions taken or to be taken to prevent or minimize the delay; a schedule for  
23 implementation of any measures to be taken to prevent or mitigate the delay or the  
24 effect of the delay; Defendant's rationale for attributing such delay to a force  
25 majeure event if it intends to assert such a claim; and a statement as to whether, in  
26 the opinion of Defendant, such event may cause or contribute to an endangerment  
27 to public health, welfare or the environment. Defendant shall include with any  
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1 notice all available documentation supporting the claim that the delay was  
2 attributable to a force majeure. Failure to comply with the above requirements shall  
3 preclude Defendant from asserting any claim of force majeure for that event for the  
4 period of time of such failure to comply, and for any additional delay caused by  
5 such failure. Defendant shall be deemed to know of any circumstance of which  
6 Defendant, any entity controlled by Defendant, or Defendant's contractors knew or  
7 should have known.

8       36. If CARB agrees that the delay or anticipated delay is attributable to a  
9 force majeure event, the time for performance of the obligations under this Partial  
10 Consent Decree that are affected by the force majeure event will be extended by  
11 CARB for such time as is necessary to complete those obligations. An extension of  
12 the time for performance of the obligations affected by the force majeure event  
13 shall not, of itself, extend the time for performance of any other obligation. CARB  
14 will notify Defendant in writing of the length of the extension, if any, for  
15 performance of the obligations affected by the force majeure event.

16       37. If CARB disagrees that the delay or anticipated delay has been or will  
17 be caused by a force majeure event, CARB will notify Defendant in writing of the  
18 decision.

19       38. If Defendant elects to invoke the dispute resolution procedures set  
20 forth in Section IX (Dispute Resolution), it shall do so no later than 15 Days after  
21 receipt of the notice. In any such proceeding, Defendant shall have the burden of  
22 demonstrating by a preponderance of the evidence that the delay or anticipated  
23 delay has been or will be caused by a force majeure event, that the duration of the  
24 delay or the extension sought was or will be warranted under the circumstances,  
25 that best efforts were exercised to avoid and mitigate the effects of the delay, and  
26 that Defendant complied with the requirements of Paragraphs 34 and 35. If  
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1 Defendant carries this burden, the delay at issue shall be deemed not to be a  
2 violation by Defendant of the affected obligation of this Partial Consent Decree.

3 **IX. DISPUTE RESOLUTION**

4 39. Unless otherwise expressly provided for in this Partial Consent  
5 Decree, the dispute resolution procedures of this Section shall be the exclusive  
6 mechanism to resolve disputes arising under or with respect to this Partial Consent  
7 Decree. Defendant's failure to seek resolution of a dispute under this Section shall  
8 preclude Defendant from raising any such issue as a defense to an action by CARB  
9 to enforce any obligation of Defendant arising under this Partial Consent Decree.

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11 40. Informal Dispute Resolution. Any dispute subject to Dispute  
12 Resolution under this Partial Consent Decree shall first be the subject of informal  
13 negotiations. The dispute shall be considered to have arisen when Defendant sends  
14 the CA AG and CARB a written Notice of Dispute. Such Notice of Dispute shall  
15 state clearly the matter in dispute including, where applicable, whether the dispute  
16 arises from a decision made by CARB. The period of informal negotiations shall  
17 not exceed 30 Days from the date the dispute arises, unless that period is modified  
18 by written agreement. If the Parties cannot resolve a dispute by informal  
19 negotiations, then the position advanced by CARB shall be considered binding  
20 unless, within 21 Days after the conclusion of the informal negotiation period,  
21 Defendant invokes formal dispute resolution procedures as set forth below.

22 41. Formal Dispute Resolution. Defendant shall invoke formal dispute  
23 resolution procedures, within the time period provided in the preceding Paragraph,  
24 by serving on the CA AG and CARB a written Statement of Position regarding the  
25 matter in dispute. The Statement of Position shall include, but need not be limited  
26 to, any factual data, analysis, or opinion supporting Defendant's position and any  
27 supporting documentation relied upon by Defendant.

1           42. CARB shall serve its Statement of Position within 45 Days of receipt  
2 of Defendant's Statement of Position. CARB's Statement of Position shall include,  
3 but need not be limited to, any factual data, analysis, or opinion supporting that  
4 position and any supporting documentation relied upon by CARB. CARB's  
5 Statement of Position shall be binding on Defendant, unless Defendant files a  
6 motion for judicial review of the dispute in accordance with the following  
7 Paragraph.

8           43. Defendant may seek judicial review of the dispute by filing with the  
9 Court and serving on the CA AG and CARB, in accordance with Section VIV  
10 (Notices), a motion requesting judicial resolution of the dispute. In any such  
11 motion, Defendant shall be prohibited from raising issues that were not first raised  
12 during informal dispute resolution pursuant to Paragraph 33. The motion must be  
13 filed within 21 Days of receipt of CARB's Statement of Position pursuant to the  
14 preceding Paragraph. The motion shall contain a written statement of Defendant's  
15 position on the matter in dispute, including any supporting factual data, analysis,  
16 opinion, or documentation, and shall set forth the relief requested and any schedule  
17 within which the dispute must be resolved for orderly implementation of the Partial  
18 Consent Decree.

19           44. CARB shall respond to Defendant's motion within the time period  
20 allowed by the Local Rules of this Court. Defendant may file a reply memorandum  
21 to the extent permitted by the Local Rules.

22           45. Standard of Review

23           a. Disputes Concerning Matters Accorded Record Review. Except as  
24 otherwise provided in this Partial Consent Decree, in any dispute brought under this  
25 Section pertaining to Defendant's implementation of the Mitigation Project,  
26 Defendant shall have the burden of demonstrating, based on the administrative  
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1           52. This Partial Consent Decree shall not be construed to limit the rights of  
2 CARB to obtain penalties or injunctive relief, except as specifically provided in  
3 Paragraph 48. CARB further reserves all legal and equitable remedies to address  
4 any imminent and substantial endangerment to the public health or welfare or the  
5 environment whether related to the violations addressed in this Partial Consent  
6 Decree or otherwise.

7           53. In any subsequent judicial proceeding initiated by CARB for  
8 injunctive relief, civil penalties, or other relief, Defendant shall not assert, and may  
9 not maintain, any defense or claim based upon the principles of waiver, res judicata,  
10 collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other  
11 defenses based upon any contention that the claims raised by CARB in the  
12 subsequent proceeding were or should have been brought in the instant case, except  
13 with respect to the claims that have been specifically released pursuant to Paragraph  
14 48.

15           54. This Partial Consent Decree is not a permit, or a modification of any  
16 permit, under any federal, State, or local laws or regulations. Defendant is  
17 responsible for achieving and maintaining complete compliance with all applicable  
18 federal, State, and local laws, regulations, and permits; and Defendant's compliance  
19 with this Partial Consent Decree shall be no defense to any action commenced  
20 pursuant to any such laws, regulations, or permits, except as set forth herein.  
21 CARB does not, by its consent to the entry of this Partial Consent Decree, warrant  
22 or aver in any manner that Defendant's compliance with any aspect of this Partial  
23 Consent Decree will result in compliance with provisions of the Clean Air Act, or  
24 with any other provisions of United States, State, or local laws, regulations, or  
25 permits.

26           55. Nothing in this Partial Consent Decree releases any private rights of  
27 action asserted by entities or persons not releasing claims under this Partial Consent  
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1 Decree, nor does this Partial Consent Decree limit any defense available to  
2 Defendant in any such action.

3 56. This Partial Consent Decree does not limit or affect the rights of  
4 Defendant or of CARB against any third parties, not party to this Partial Consent  
5 Decree, nor does it limit the rights of third parties, not party to this Partial Consent  
6 Decree, against Defendant, except as otherwise provided by law.

7 57. Except for any person or entity released by Paragraph 48, this Partial  
8 Consent Decree shall not be construed to create rights in, or grant any cause of  
9 action to, any third party not a party to this Partial Consent Decree. No such third  
10 party shall be entitled to enforce any aspect of this Partial Consent Decree or claim  
11 any legal or equitable injury for a violation of this Partial Consent Decree.

12 58. Nothing in this Partial Consent Decree shall be construed as a waiver  
13 or limitation of any defense or cause of action otherwise available to Defendant in  
14 any action. This Partial Consent Decree is made without trial or adjudication of any  
15 issue of fact or law, without any admission of fact or law, and without any finding  
16 of liability of any kind.

17 **XI. NOTICES**

18 59. Unless otherwise specified in this Partial Consent Decree, whenever  
19 any notification, or other communication is required by this Partial Consent Decree,  
20 or whenever any communication is required in any action or proceeding related to  
21 or bearing upon this Partial Consent Decree or the rights or obligations under this  
22 Partial Consent Decree, it shall be made in writing (except that if any attachment is  
23 voluminous, it shall be provided on a disk, hard drive, or other equivalent successor  
24 technology), and shall be addressed as follows:

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26 As to CARB by email: Shannon.Dilley@arb.ca.gov  
27 Marco.Banaga@arb.ca.gov

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As to CARB by mail:

Shannon Martin Dilley  
Senior Attorney  
California Air Resources Board  
Legal Office  
1001 I Street  
Sacramento, California 95814  
(916) 322-3940

Marco Banaga  
Air Pollution Specialist  
California Air Resources Board  
9480 Telstar Avenue, No. 4  
El Monte, CA 91731  
(626) 450-6270

As to CA AG by email:

[gary.tavetian@doj.ca.gov](mailto:gary.tavetian@doj.ca.gov)  
[kurt.weissmuller@doj.ca.gov](mailto:kurt.weissmuller@doj.ca.gov)  
[josh.caplan@doj.ca.gov](mailto:josh.caplan@doj.ca.gov)

As to CA AG by mail:

Gary Tavetian  
Supervising Deputy Attorney General  
Office of the California Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013

Kurt Weissmuller  
Deputy Attorney General  
Office of the California Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, CA 90013  
(213) 269-6353

Joshua M. Caplan  
Deputy Attorney General  
Office of the California Attorney General  
600 West Broadway, Suite 1800  
San Diego, CA 92816-5266  
(619) 738-9303

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As to Defendant by email: Natalie.Maciolek@kohler.com  
Michael.Read@kohler.com

As to Defendant by mail: Natalie Maciolek  
VP – General Counsel and Corporate  
Secretary  
444 Highland Drive  
Kohler, WI 53044  
(920) 457-4111

Michael Read  
Director - Product Compliance  
Kohler Co.  
444 Highland Dr. MS100,  
Kohler, WI 53044  
(920) 453-6398

60. Any party may, by written notice to the other parties, change its designated notice recipient or notice address provided above.

61. Notices submitted pursuant to this Section shall be deemed submitted upon uploading electronically, emailing, or mailing as required, except as provided elsewhere in this Partial Consent Decree or by mutual agreement of the Parties in writing.

## XII. COSTS

62. The Parties shall bear their own costs of this action, including attorneys' fees, except that CARB shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

## XIII. EFFECTIVE DATE

63. The Effective Date of this Partial Consent Decree shall be the date upon which this Partial Consent Decree is entered by the Court or the Effective Date of the Kohler/US/CARB Consent Decree, whichever is later.

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**XIV. RETENTION OF JURISDICTION**

64. The Court shall retain jurisdiction over this case until termination of this Partial Consent Decree, for the purpose of resolving disputes arising under this Partial Consent Decree, entering orders modifying this Partial Consent Decree, or effectuating or enforcing compliance with the terms of this Partial Consent Decree.

**XV. SIGNATORIES/SERVICE**

65. Each undersigned representative of Defendant and CARB certifies that he or she is fully authorized to enter into the terms and conditions of this Partial Consent Decree and to execute and legally bind the Party he or she represents to this document.

66. This Partial Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. For purposes of this Partial Consent Decree, a signature page that is transmitted electronically (e.g., by facsimile or e-mailed "PDF") shall have the same effect as an original.

**XVI. INTEGRATION**

67. This Partial Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Partial Consent Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein, with the exception of the Kohler/US/CARB Consent Decree. The Parties acknowledge that there are no documents, representations, inducements, agreements, understandings or promises that constitute any part of this Partial Consent Decree or the settlement it represents other than the Kohler/US/CARB Consent Decree and any others expressly contained or referenced in this Partial Consent Decree.

**XVII. MODIFICATION**

68. The terms of this Partial Consent Decree, including any attached

1 appendices, may be modified only by a subsequent written agreement signed by the  
2 Parties. Where the modification constitutes a material change to this Partial  
3 Consent Decree, it shall be effective only upon approval by the Court. CARB will  
4 file any nonmaterial modifications with the Court.

5 **XVIII. TERMINATION**

6 69. Termination of this Partial Consent Decree shall occur upon  
7 Defendant's submission of the CARB Evaporative Emission Control Penalty  
8 Payment, and any stipulated penalties required under this Partial Consent Decree,  
9 and completion of the California Mitigation Project under Section V.

10 **XIX. FINAL JUDGMENT**

11 70. Upon approval and entry of this Partial Consent Decree by the Court,  
12 this Partial Consent Decree shall constitute a final judgment of the Court as to  
13 CARB and the Defendant. The Court finds that there is no just reason for delay and  
14 therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

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16 Dated and entered this day of \_\_\_\_\_, 2020,

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18 \_\_\_\_\_  
19 UNITED STATES DISTRICT JUDGE  
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THE UNDERSIGNED PARTY enters into this California Partial Consent Decree in the matter of *United States et al. v. Kohler Co.*

FOR THE CALIFORNIA OFFICE OF THE ATTORNEY GENERAL:

Office of the California Attorney General

Date: 1/28/2020



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Date: 1/28/2020



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1 THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et al. v. Kohler Co.*

2 FOR THE CALIFORNIA AIR RESOURCES BOARD:

3  
4 Date: 1/22/2020



5 MARY D. NICHOLS  
6 Chair  
7 California Air Resources Board  
8 1001 I Street  
9 Sacramento, CA 95814

10 Date: 1/22/2020



11 RICHARD W. COREY  
12 Executive Officer  
13 California Air Resources Board  
14 1001 I Street  
15 Sacramento, CA 95814

16 Date: 1/22/2020



17 ELLEN M. PETER  
18 Chief Counsel  
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THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States et al. v. Kohler Co.*

FOR KOHLER CO.:

Date: 24 Jan. 2020

  
\_\_\_\_\_  
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