



2013, NOAA published in the federal register notice of the availability of the RCDP. *See* 78 Fed. Reg. 20298. During the RCDP thirty-day public comment period, two public meetings were held. Enclosed as Appendix A with the Motion to Enter the Consent Decree is the Final Revised May 2013 RCDP (which now includes an Attachment M - Responsiveness Summary).<sup>1/</sup> The Final Revised May 2013 RCDP replaces the November 2012 RCDP as Appendix A of the Decree.

Plaintiffs have determined that the Decree is fair, reasonable, and consistent with the statutory scheme of CERCLA. Accordingly, the Plaintiffs respectfully request that this Court sign and enter the Decree as a final judgment. The Defendants consent to the entry of the Decree (Docket No. 2-2, Decree ¶¶ 77, 79).

## **I. BACKGROUND**

### **A. CERCLA**

Congress enacted CERCLA in response to widespread concern over the severe environmental and public health effects resulting from the improper disposal of hazardous wastes and other hazardous substances. *See United States v. Bestfoods*, 524 U.S. 51, 55 (1998); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). CERCLA has provisions that relate to the cleanup of hazardous waste sites in order to protect human health and the environment as well as provisions that allow the governments to bring natural resource damages claims. The natural resource damages provisions of CERCLA provide that federal, state and tribal natural resource trustees may bring actions against Potentially Responsible Parties ("PRPs") to recover damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss. *See* Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C). Pursuant to Section 107(a) of CERCLA, PRPs include the owners and operators of Superfund sites at the time of the disposal of hazardous substances at those sites, the current owners and operators of Superfund sites, as well as the generators and transporters of hazardous substances sent to Superfund sites. *See O'Neil v. Picillo*, 883 F.2d 176,

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<sup>1/</sup> Enclosed as Exhibit 1 is a Change Log, which indicates the changes from the November 2012 RCDP memorialized in the May 2013 RCDP.

178 (1st Cir. 1989). The federal natural resource trustees authorized to recover for natural resource injuries at the Sites are DOI and NOAA. The New York State Department of Environmental Conservation ("NYSDEC") and the St. Regis Mohawk Tribe are also trustees authorized to recover for natural resource injuries at the Sites. (NOAA, DOI, NYSDEC and the Tribe are referred to herein collectively as the "Trustees").

### **B. Complaint/NRD Claims**

On May 26, 2013, Plaintiffs filed a civil action against Alcoa and Reynolds for natural resource damages under Section 107(a) of CERCLA, for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from the release of hazardous substances at or from the Sites. Alcoa has owned and operated an aluminum product manufacturing facility located on the Alcoa Site since 1903. Reynolds has owned and operated an aluminum product manufacturing facility located on the Reynolds Site since 1958. In 2000, Alcoa acquired Reynolds and is the parent company of Reynolds.

Investigations conducted by the United States Environmental Protection Agency ("EPA"), and an assessment conducted by the Trustees have detected hazardous substances in the sediments, soils, groundwater, and waters of the Sites, including but not limited to polycyclic aromatic hydrocarbons, polychlorinated biphenyls, volatile organic compounds, total dibenzofurans, cyanide and fluorides.

The Trustees have engaged in natural resource injury studies, damage assessments, and restoration planning relating to the Sites since 1991. In January 1991, the Trustees, Alcoa, Reynolds and General Motors Corp. (n/k/a Motors Liquidation Company, or "MLC") entered into a funding agreement by which Alcoa, Reynolds and MLC agreed to provide funding for the performance of a natural resource assessment by the Trustees.<sup>2</sup> The Trustees performed a Habitat Equivalency Analysis together with other assessment measures at the Sites to determine the costs

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<sup>2</sup> GM also operated a manufacturing facility in Massena, NY.

of restoration needed to compensate for natural resource injury, recreational fishing loss, and remedial injury to aquatic resources due to releases of hazardous substances from the Sites. The Trustees determined that sediment, fish, birds, amphibians and mammals sustained ecological and remedial injuries from the hazardous substances released from the facilities. The recreational fishing assessment established the type and number of fishing trips lost as a result of the releases of hazardous substances from the facilities. These claims are joint by the Trustees. Further assessments determined that the release of hazardous substances from the facilities caused loss of cultural uses and impairment of natural resources of the Tribe.

The Complaint alleges that Defendants are jointly and severally liable to Plaintiffs for natural resource damages resulting from Defendants' release of hazardous substances at or from the Sites pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C).

### **C. Consent Decree<sup>3</sup>**

The total value of the proposed settlement is approximately \$19.4 million. To compensate for the ecological damages, the Defendants will pay \$7,279,883 to the Trustees to pay for Trustee-sponsored natural resource restoration projects selected in accordance with the RCDP (Decree ¶¶ 11.a, 18.(a) and 19). Additional compensation for the ecological damages is provided by the requirement for the Defendants to purchase and transfer two parcels of real property - Coles Creek and Wilson Hill - to the State to be added to the Wilson Hill Wildlife Management Area, and managed by the State. The two parcels total approximately 460 acres and will cost \$1,030,300 (Decree ¶ 5 and Section VII). To compensate for the recreational fishing loss, Defendants will construct five recreational fishing projects, estimated to cost approximately \$1,784,000 (Decree Section IX). Additionally, to compensate for the Tribal Cultural damages, Defendants will pay \$8,387,898 to the Tribe to pay for Tribal Cultural Restoration Projects selected in accordance with the RCDP (Decree ¶¶ 11.b. and 18.(b)).

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<sup>3</sup> On June 17, 2011, a settlement with MLC was entered resolving the Trustees NRD claims as to the MLC site located in Massena, New York. *In re: Motors Liquidation Company, et al*, Case No. 09-50026 (REG) ( Bank. S.D.N.Y. June 17, 2011). To date, the Trustees have received approximately \$1.84 million to fund restoration projects from that settlement.

Defendants will pay the following towards the Trustees unreimbursed assessment costs: \$638,644.25 to DOI; \$146,884.25 to NOAA; \$10,432.25 to Tribe; and \$137,989.25 to State (Decree ¶ 10).

The Decree provides the Defendants with a covenant not to sue or take administrative action for Natural Resource Damages (Decree Section XIV). The Decree contains the standard plaintiff reservation of rights, including for Defendants: liability for injunctive relief or administrative order enforcement under CERCLA Section 106; liability under CERCLA Section 107(a)(4)(A), for costs of removal or remedial action incurred by the United States, the State or the Tribe; and liability for any other costs incurred or to be incurred by the United States, the State or the Tribe that are not within the definition of Natural Resource Damages (Decree ¶ 52). The Decree also includes a Special Reservations Regarding Natural Resource Damages, which reserves Plaintiffs' rights to institute proceedings against Defendants in certain specified circumstances (Decree ¶ 53). The Decree states that Defendants are entitled to protection from contribution actions for "matters addressed" in the Decree, which is defined as Natural Resource Damages (Decree ¶ 58).

The Decree was lodged with the Court on March 27, 2013, and notice of the lodging of the Decree was published in the Federal Register on April 10, 2013. *See* 78 Fed. Reg. 21418. The thirty-day public comment period has ended, and the United States received no comments regarding the settlement.

#### **D. RCDP**

The Trustees prepared the RCDP, which describes the natural resource injuries and associated losses and outlines proposed restoration projects. Appendix A of the Decree is the November 2012 RCDP (Docket No. 2-3). On April 4, 2013, NOAA published in the federal register notice of the availability of the RCDP. *See* 78 Fed. Reg. 20298. During the RCDP thirty-day public comment period, two public meetings were held. Enclosed as Appendix A with the Motion to Enter the Consent Decree is the Final Revised May 2013 RCDP. The May 2013 RCDP replaces the November 2012 RCDP as Appendix A of the Decree.

Attachment M to the enclosed May 2013 RCDP is the Responsiveness Summary. That Attachment describes the written and verbal comments concerning the November 2012 RCDP and the Trustee responses. The changes to the November 2012 RCDP resulting from comments received from the public by the Trustees are listed in the Change Log, Exhibit 1, herein.

Some of the comments addressed by the Trustees relate to selection of the locations of the boat ramps for the Recreational Fishing Projects (*see* May 2013 RCDP Attachment M, pages 8-11). The Town of Louisville expressed concern that Defendants purchase and transfer of two parcels of real property - Coles Creek and Wilson Hill - to the State to be added to the Wilson Hill Wildlife Management Area, would deprive the Town of annual tax revenue (*see* May 2013 RCDP Attachment M, page 18). While it is correct that those parcels of property would be removed from the tax rolls, the Trustees noted that:

the overall public will benefit from the lands becoming part of the Wilson Hill Wildlife Management Area. Protection of the Coles Creek parcel will further benefit the state threatened Blanding's turtle that nests on this parcel. In New York, habitat destruction is a threat to this turtle species (NYSDEC 2013d).

May 2013 RCDP Attachment M, page 11.

## **II. DISCUSSION**

### **A. Standard of Review**

A district court reviews a consent decree to ensure that it is “fair, reasonable, and faithful to the objectives of the governing statute.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1<sup>st</sup> Cir. 1990); *United States v. Ashland*, 2008 WL 2074079, 1 (W.D.N.Y. May 14, 2008). The approval of settlements is a judicial act that is committed to the informed discretion of the trial court. *United States v. Hooker Chems. & Plastics Corp.*, 776 F.2d 410, 411 (2<sup>nd</sup> Cir. 1985); *Donovan v. Robbins*, 752 F.2d 1170, 1176-77 (7<sup>th</sup> Cir. 1985). In reviewing a settlement, the inquiry is directed not to whether the Court itself would have reached the particular settlement, but rather, to whether the proposed settlement is a fair and reasonable compromise. *See Cannons Eng’g Corp.*, 899 F.2d at 84; *United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982). The Court is not “empowered to rewrite the settlement agreed

upon by the parties,” or to “delete, modify, or substitute certain provisions of the consent decree.” *Officers for Justice v. Civil Serv. Comm’n of City and County of San Francisco*, 688 F.2d 615, 630 (9<sup>th</sup> Cir. 1982). The question to be resolved in reviewing the settlement, and the degree of scrutiny to be applied, are distinct from the merits of the underlying action.

In general, public policy strongly favors settlements of disputes without litigation. *Donovan v. Robbins*, 752 F.2d at 1177; *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1013 (7<sup>th</sup> Cir. 1980). Settlements conserve the resources of the courts, the litigants and the taxpayers and “should...be upheld whenever equitable and policy considerations so permit.” *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6<sup>th</sup> Cir. 1976), cert. denied, 429 U.S. 862 (1976); *Equal Employment Opportunity Comm’n v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7<sup>th</sup> Cir. 1985), cert. denied, 478 U.S. 1004 (1986).

The policy of encouraging settlements has “particular force, where, as here, a government actor committed to the protection of the public interest has [engaged in the construction of the] proposed settlement,” *Cannons Eng’g Corp.*, 899 F.2d at 84, and where that government actor is “specially equipped, trained, and oriented in the field.” *United States v. National Broadcasting Co., Inc.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978). In reviewing a settlement involving a governmental agency, “the district court must exercise some deference to the agency’s determination that settlement is appropriate.” *Conservation Law Found.*, 989 F.2d at 58 (quoting *Federal Trade Comm’n v. Standard Fin. Management Corp.*, 830 F.2d 404, 408 (1<sup>st</sup> Cir. 1987)). This limited standard of review for governmental actions reflects a public policy “in favor of encouraging settlements[,] especially in complicated regulatory settings.” *Conservation Law Found.*, 989 F.2d at 59 (citations omitted). A consent decree is a “highly useful tool for government agencies [because] it maximizes the effectiveness of limited law enforcement resources” by permitting the government to obtain compliance with the law without lengthy litigation. *United States v. City of Jackson, Miss.*, 519 F.2d 1147, 1151 (5<sup>th</sup> Cir. 1975). Indeed, courts have held that, “sound policy would strongly lead [the court] to decline....to assess the wisdom of the Government’s judgment in negotiating and accepting [a]...consent decree, at least

in the absence of any claim of bad faith or malfeasance on the part of the Government in such action.” *Sam Fox Publ’g Co. v. United States*, 366 U.S. 683, 689 (1961).

**B. The Consent Decree is Fair, Reasonable and in the Public Interest**

The Decree meets the three-part test for district court approval of a settlement: the settlement is fair, reasonable, and is faithful to the objectives of CERCLA. Accordingly, we request that the Court sign and enter the Decree.

First, the Decree is fair. The fairness of a settlement involves both procedural fairness and substantive fairness. *Cannons Eng’g*, 899 F.2d at 86 - 88. To measure procedural fairness, the Court “should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance.” *Id.* at 86. The negotiation of the Decree was procedurally fair because it was negotiated at arm’s length and Defendants were represented by sophisticated counsel.

With respect to the issue of “substantive” fairness, the settlement should be approved if it is “based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability . . . according to rational (if necessarily imprecise) estimates of how much harm each PRP has done.” *Id.* at 87. *See also United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1089 (1st Cir. 1994); *United States v. DiBiase*, 45 F.3d 541, 544 - 45 (1st Cir. 1995).

Substantive fairness derives from concepts of corrective justice and accountability: how much or how little should a settling party be expected to do or pay in order to correct environmental wrongs? *United States v. Comunidades Unidas Contra La Contaminacion (“CUCCo”)*, 204 F.3d 275, 281 (1<sup>st</sup> Cir. 2000). Because these concepts are not easily quantified in environmental cases, the governments’ expertise and conclusions receive “the benefit of the doubt when weighing substantive fairness.” *Cannons Eng’g Corp.*, 899 F.2d at 88; *City of Bangor v. Citizens Communications Co.*, 532 F.3d 70, 97 (1<sup>st</sup> Cir. 2008) (“Usually, there is deference to the EPA’s judgment on fairness, and no independent court inquiry.”).

Plaintiffs complaint alleges that Defendants are parties liable under CERCLA for natural resource damages. To address this, the Decree requires Defendants to perform natural resource

restoration projects selected by the Trustees, pay for the Trustees to perform natural resource and cultural restoration projects and pay for the Trustees assessment costs.

A factor in assessing the reasonableness of a proposed consent decree depends upon how well the relief is "tailored" to redressing the injuries alleged in the complaint. *CUCCo*, 204 F.3d at 281. Courts need not examine the reasonableness of proposed consent decrees for "mathematical precision," but should defer to the governments' judgment on whether the decree is reasonable. *United States v. Davis*, 261 F.3d 1, 26 (1<sup>st</sup> Cir. 2001). The proposed Decree is also reasonable because it requires Defendants to perform and fund restoration projects designed by the Trustees to address the injuries caused by the discharge of hazardous substances from their Sites.

The May 2013 RCDP discusses how the Defendants funding and performance of Trustee selected ecological and recreational fishing projects pursuant to the Decree sufficiently compensates for the injuries and associated losses due to the contamination from the Defendants' facilities (Attachment A, ES-3 through 6). Similarly, the May 2013 RCDP discusses how the Defendants funding of cultural restoration projects pursuant to the Decree addresses the harm to the Tribal culture due to the contamination from the Defendants' facilities (Attachment A, ES-6). As noted above, the Defendants have contributed to the Trustee assessment costs since 1991. Pursuant to the GM bankruptcy settlement the Trustees received funds toward unreimbursed assessment costs. Pursuant to the Decree, the Trustees will be reimbursed most of the remaining unreimbursed assessment costs.

Finally, the settlement is consistent with the goals of CERCLA and in the public interest. The primary goals of CERCLA are accountability and the desirability of an unsullied environment. *Charles George*, 34 F.3d at 1086; *Cannons*, 899 F.2d at 91. Defendants are being held accountable for the release of hazardous substances at or from the Sites. The \$19.4 million settlement will provide significant natural resource benefits. Finally, the Decree also has a "reopener" provision for new information and unknown conditions. *See, In re Acushnet River & New Bedford Harbor Proceedings*, 712 F. Supp. 1019, 1032 - 38 (D.Mass. 1989).

**III. CONCLUSION**

For the reasons stated above, we respectfully request that the Court sign and enter the proposed Decree.

Respectfully submitted,

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