UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA and THE STATE OF MARYLAND Plaintiffs, v. AAI CORPORATION., et al., Defendants.	:	Civil Action No. 1:17-cv-02909

UNOPPOSED MOTION TO ENTER PROPOSED CONSENT DECREE

Plaintiff, the United States of America, on behalf of the Administrator of the Environmental Protection Agency ("EPA"), Department of the Interior, acting by and through the U.S. Fish and Wildlife Service, and the United States Department of Commerce, acting by and through the National Oceanic and Atmospheric Administration ("NOAA"), with the consent of co-plaintiff State of Maryland and Defendants, respectfully submits this Unopposed Motion to Enter Proposed Consent Decree, in the form filed herewith. The Consent Decree resolves Plaintiffs' claims under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607 at the 68th Street Dump Superfund Alternative Site ("Site") in Baltimore County, Maryland. Under the terms of the settlement, Defendants will perform injunctive relief, by carrying out the remedial action selected in the Record of Decision ("ROD") for the Site and also agree to perform additional projects at the Site to implement restoration of natural resource damages (NRDs). Defendants also agree to pay all of EPA's future response costs, past NRD assessment costs in the amount of $240,000, payment for NRD of $630,000, and the NRD Trustees' future oversight costs up to a

maximum of $250,000.

The United States lodged the Consent Decree on October 2, 2017. Notice of the lodging was published in the Federal Register on October 11, 2017, 82 Fed. Reg. 47251-01, and the public was invited to submit comments for the thirty day period ending November 13, 2017. No comments were received. For the reasons set forth in the Memorandum accompanying this Motion, the United States believes that the proposed Consent Decree is fair, reasonable, and in the public interest.

WHEREFORE, Plaintiff the United States of America respectfully moves this Court to approve the settlement by signing and entering the Consent Decree in the form filed herewith.

Respectfully submitted,

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I hereby certify that on November 27, 2017, I electronically filed the foregoing document with the Clerk of the Court using the ECF system. I hereby certify that I have caused to be sent by United States Postal Service the foregoing document to the following defendants:

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

UNITED STATES OF AMERICA and THE STATE OF MARYLAND Plaintiffs, v. AAI CORPORATION., et al., Defendants.	:	Civil Action No. 1:17-cv-02909

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS UNOPPOSED MOTION TO ENTER THE CONSENT DECREE

On October 2, 2017, the United States filed a Complaint (ECF No. 1), Notice of Lodging (ECF No. 2) and a proposed Consent Decree (ECF No. 2-1) with appendices (ECF Nos. 2-2; 2-3; 2-4; 2-5; 2-6; 2-7; 2-8; and 2-9) in this matter. The proposed Consent Decree resolves all claims alleged in the Complaint. In its Notice of Lodging, the United States requested that the Court refrain from signing the proposed Consent Decree at that time, so that the United States could initiate a public notice and comment period. The United States did so, publishing in the Federal Register a Notice that the proposed Consent Decree had been lodged with the Court and soliciting public comment for a period of 30 days. 82 Fed. Reg. 47251-01 (Oct. 11, 2017). The public comment period closed on November 13, 2017. As of 10:00 am on November 27, 2017, no comments have been received. The State of Maryland supports entry of the proposed Consent Decree, and pursuant to the terms of the proposed Consent Decree, Defendants have agreed not to oppose entry. ECF No. 2-1 ¶ 140.

For the reasons set forth below, the United States continues to believe that the proposed

Consent Decree is fair, reasonable, and in the public interest, and respectfully requests that the Court approve and sign the proposed Consent Decree that was lodged on October 2, 2017, and enter it as a final judgment.

BACKGROUND

The Complaint in this matter sought several forms of relief associated with the 68th Street Dump Superfund Alternative Site ("Site") located in Baltimore County, Maryland: 1) injunctive relief, pursuant to Section 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606; 2) recovery of response costs and costs to undertake the restoration of natural resources, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607; 3) all remedial costs and natural resource damages (NRD), pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, 43 C.F.R. Part 11, and under State law; and 4) a declaratory judgment that Defendants are liable for any future response costs incurred by the Plaintiffs at the Site, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2).

From the early 1950s until the early 1970s, the Site was used for disposal of a large volume of municipal and industrial wastes, including wastes containing hazardous substances. ECF No. 1 ¶ 48. Investigations have shown the presence of numerous hazardous substances including but not limited to: nitrite, arsenic, chromium, benzene, tricholoroethane, and lead. *Id.* ¶¶ 52-53. The Site was determined to pose a risk to human health through contact with soils and potential contact with and consumption of groundwater. *Id.* ¶ 53.

As alleged in the Complaint, each Defendant is responsible for the contamination because, pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), it either: 1) owns or operates a portion of the Site; 2) owned or operated a portion of the Site at the time of disposal of hazardous substances; 3) by contract, agreement or otherwise, arranged for disposal of hazardous

substances at the Site or is a successor-in-interest to a person who did so; or 4) accepted hazardous substances for transport to the Site.[1] Likewise, each Defendant is responsible for natural resource damages associated with the Defendants' hazardous substance releases at or near the Site, in accordance with CERCLA sections 101(6);107(f), 43 C.F.R. Part 11 and appropriate State law.

Under the proposed Consent Decree, the Defendants[2] will perform injunctive relief, by carrying out the remedial action selected in the Record of Decision ("ROD") at the Site, which the Environmental Protection Agency ("EPA") has determined is necessary to abate the threat or danger at or from the Site. ECF No. 2-1 ¶¶ 10-16; *see also* ECF No. 1 ¶¶ 55-56, ECF No. 2-3. Defendants will also agree to perform additional projects at the Site to implement restoration of natural resource damages (NRDs). ECF No. 2-1 ¶ 64. Additionally, Defendants agree to pay all of EPA's future response costs at the Site that are not inconsistent with the National Contingency Plan (NCP), past NRD assessment costs in the amount of $240,000, payment for NRD of $630,000, and the NRD Trustees' future oversight costs up to a maximum of $250,000. ECF No. 2-1 ¶¶ 56-58, 64. In addition, the Consent Decree fully resolves potential federal liability at the Site, with a payment by Settling Federal Agencies of $2,218,600 to the Settling Performing Defendants. ECF No. 2-1 ¶ 59. The Consent Decree also fully resolves potential State liability at the Site, with the State Settling Agencies paying $1,400,972 to the Settling Performing Defendants. ECF No. 2-1 ¶ 59.

[1] Defendants have not admitted to such liability. *See* ECF No. 2-1 ¶ G.

[2] There are two categories of Defendants: Settling Performing Defendants and Settling Nonperforming Defendants. ECF No. 2-1 ¶ 4; ECF No. 2-4; ECF No. 2-5. Settling Performing Defendants will finance and perform the work set forth in the proposed Consent Decree and Settling Nonperforming Defendants have made and/or will make payments to the Settling Performing Defendants in furtherance of the work. ECF No. 2-1 ¶ 6. This Motion refers to both categories as "Defendants."

DISCUSSION

I. APPLICABLE STANDARD

It is well-settled that a district court should enter a consent decree if the decree is fair, reasonable, in the public interest, and consistent with the purposes of the underlying statute it is intended to serve, and the decree is not illegal or the product of collusion. *See United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999); *see also United States v. Atlas Minerals & Chems., Inc.*, 851 F. Supp. 639, 648 (E.D. Pa. 1994); *In Re: Tutu Water Wells CERCLA Litig.*, 326 F.3d 201, 210 (3d Cir. 2003); *United States v. Se. Pa. Transp. Auth. ("SEPTA")*, 235 F.3d 817, 823 (3d Cir. 2000); *Md. Dep't of Env't v. GenOn Ash Mgmt., LLC, et al.*, Civil Nos. PJM 10-826, PJM 11-1209, PJM 12-3755, Mem. Op. at 2 (D. Md. June 11, 2013). This standard is aligned with the legislative history of the SARA Amendments to CERCLA[3], which provides that a court's role in reviewing a Superfund settlement is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." H.R. Rep. No. 99-253 (III), 1986 U.S.C.C.A.N. 3038, 3042; *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) ("[r]easonableness, fairness, and fidelity to the statute are, therefore, the horses which district judges must ride").

The scope of a district court's review of a consent decree is limited. While a court "should not blindly accept the terms of a proposed settlement," *North Carolina*, 180 F.3d at 581, the court's inquiry need not be all-encompassing:

> [A] trial court approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy. In fact, it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees.

[3] CERCLA was enacted in 1980 as Public Law 96-510, and it was amended in 1986 by the Superfund Amendment and Reauthorization Act of 1986 ("SARA").

Bragg v. Robertson, 83 F. Supp. 2d 713, 717 (S.D. W. Va. 2000) (citations omitted). Indeed, "the general principle [is] that settlements are encouraged." *North Carolina*, 180 F.3d at 581. As the Sixth Circuit explained, settlement agreements, which would include consent decrees, "[spare] the burdens of trial . . . to the parties, to other litigants waiting their turn before over-burdened courts, and to the citizens whose taxes support the latter." *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir. 1976).

A district court's review of a consent decree should be "highly deferential." *Atlas Minerals*, 851 F. Supp. at 648. "Although entry of a consent decree is committed to the informed discretion of the trial court, strong policy considerations favor entry." *Id.* This is especially true when a consent decree has been lodged by the United States. First, courts should show deference to an administrative agency acting in its area of expertise:

> Where a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility.

Bragg, 83 F. Supp. 2d at 717. Second, deference should also be granted to the Attorney General, who has "exclusive authority and plenary power to control the conduct of litigation in which the United States is involved, unless Congress specifically authorizes an agency to proceed without the supervision of the Attorney General." *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992) (citing 28 U.S.C. § 516; *FTC v. Guignon*, 390 F.2d 323, 324 (8th Cir. 1968)).

A district court is generally not entitled to change the terms of a consent decree and cannot, under any circumstances, modify the terms of a consent decree without first notifying the parties of its intent and providing them with an opportunity to present relevant evidence and argument on the proposed modification. *United States v. Colorado*, 937 F.2d 505, 509-10 (10th

Cir. 1991). Ultimately, a district court must either approve or deny a consent decree as a whole. *Id.* 509.

In sum, if the proposed Consent Decree is fair, reasonable, and consistent with the goals of the statute that underlies it, it ought to be approved without modification. And in determining whether the proposed Consent Decree ought to be approved, the Court should defer to the EPA's expertise in protecting human health and the environment and to the Attorney General's expertise in controlling government litigation, assessing litigation risk and determining settlement terms that are in the public interest.

II. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND CONSISTENT WITH THE GOALS OF CERCLA

A. The Proposed Consent Decree is Reasonable.

"Reasonableness" is a fact-sensitive inquiry that depends on the terms of the settlement and the nature of the relief sought. *Atlas Minerals*, 851 F. Supp. at 652. The proposed Consent Decree is reasonable because the relief sought -- performance of the remedial action set forth in the Record of Decision ("ROD") -- abates the danger or threat presented by a release or threatened release of hazardous substances at or from the Site. *See* ECF No. 1 ¶¶ 66-68.

The remedial action set forth in the ROD provides for, *inter alia*: off-Site disposal of hazardous debris, access barriers and a Site security program, removal of contaminated surface waters, construction of soil covers, re-vegetation of certain areas, treatment of groundwater by enhanced wetlands, excavation of contaminated sediments, stabilization of eroded stream banks, and implementation of monitoring and institutional controls. *See* ECF No. 2-1 ¶ 14, ECF No. 2-3 ¶¶ 1-3. Additional relief restores the value of natural resources and compensates the Plaintiffs for NRDs. *See* ECF No. 2-1 ¶ 64; ECF No. 2-6.

In determining this as the appropriate remedial action for the Site, EPA evaluated several

remedial action alternatives against nine criteria set forth in the NCP, including overall protection of human health and the environment, long-term effectiveness, implementability, cost, and community acceptance. ECF No. 2-2 at 59-62; *see also* 40 C.F.R. § 300.430(e)(9)(iii). Based on that evaluation, EPA selected a preferred alternative and sought public comment before finalizing the selection in the ROD. ECF No. 2-2 at 63. In the ROD, EPA determined that the selected remedial action is protective of human health and the environment, complies with Federal and State requirements that are applicable or relevant and appropriate to the remedial action, and is cost-effective. ECF No. 2-2 at 60-62. Moreover, the selected remedial action meets CERCLA's preference for permanent solutions to the maximum extent possible, by addressing the principal threat waste, the oily free-product, by extracting it from the ground and either recycling it or otherwise treating it. The enhanced wetlands and biowall also provide a permanent solution by treating leachate and groundwater prior to its discharge into adjacent streams. ECF No. 2-2 at 61.

Under the terms of the proposed Consent Decree, Defendants will deliver the relief sought by performing the selected remedial action set forth in the ROD, ECF No. 2-1 ¶¶ 10-16, and by successfully implementing the requirements of restoration work outlined in the Scope of Work appended to the Consent Decree. These restoration projects were identified by the Natural Resource Trustees to compensate for injuries to the environment, their services and related NRDs. ECF No. 2-1 ¶ 64. The United States has agreed to forego its unreimbursed past costs as part of its orphan share policy, which recognizes that certain of the potentially responsible parties are no longer viable entities and forgives some portion of the costs accordingly. *See Interim Guidance on Orphan Share Compensation for Settlors of Remedial Design/Remedial Action and Non-Time-Critical Removals,* June 4, 1996. Defendants will reimburse the United States for all

future response costs and past NRD assessment costs of $240,000, and payment for NRD of $630,000, as well as the NRD Trustees' future oversight costs up to $250,000. ECF No. 2-1 ¶¶ 56-58, 64.

B. The Proposed Consent Decree is Procedurally and Substantively Fair.

The fairness of a consent decree must be evaluated in both procedural and substantive aspects. *Tutu*, 326 F.3d at 207. Procedural fairness is measured by the level of candor, openness, and bargaining balance involved in the negotiation process. *Cannons Eng'g Corp*, 899 F.2d at 86.

The proposed Consent Decree resulted from procedurally fair settlement negotiations and was lawfully entered into pursuant to the statutory authority delegated to officials in the U.S. Department of Justice, EPA, Department of the Interior, acting by and through the U.S. Fish and Wildlife Service, and the United States Department of Commerce, acting by and through the National Oceanic and Atmospheric Administration ("NOAA"), and the State of Maryland. The proposed Consent Decree is not the product of collusion; the negotiations were conducted at arms' length over more than two years. Each side was represented by counsel with significant experience and expertise in environmental law, including CERCLA.

The proposed Consent Decree is substantively fair as well. The injunctive relief, once complete, will abate the danger or threat presented by a release or threatened release of hazardous substances at or from the Site. And the costs of abating that danger or threat will be borne by Defendants -- parties that "benefited from the [substances] that caused the harm" -- not by the taxpayers. *See OHM Remediation Services v. Evans Cooperage Co., Inc.*, 116 F.3d 1574, 1578 (5th Cir. 1997). In return, under the proposed Consent Decree, the Defendants receive from the United States and Maryland a covenant not to sue or to take administrative action against

Defendants pursuant to Sections 106, 107(a), and 107(f) of CERCLA or equivalent Maryland statute or common law relating to the Site, so long as Defendants satisfactorily perform their obligations under the Consent Decree, and subject to a reservation of rights. ECF No. 2-1 ¶¶ 91-92, 94-98. Additionally, the proposed Consent Decree provides Defendants with protection from contribution claims by third parties for matters addressed in the Consent Decree. ECF No. 2-1 ¶ 113.

C. The Proposed Consent Decree is Consistent with the Goals of CERCLA.

The purposes of CERCLA are to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington Northern and Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (internal quotation marks and citations omitted). The proposed Consent Decree achieves both of these purposes. Under the terms of the proposed Consent Decree, the Site will be cleaned up, and Defendants -- not the taxpayers -- will pay for that cleanup, including the United States' future response costs. Moreover, the proposed Consent Decree promotes a *timely* cleanup of the Site, as it obviates the need for time-consuming and costly litigation. Indeed, CERCLA itself encourages settlement agreements, such as the proposed Consent Decree, "whenever practicable and in the public interest …to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a).

III. NO PUBLIC COMMENTS WERE RECEIVED ON THE PROPOSED CONSENT DECREE

The United States accepted public comment on the proposed Consent Decree for a period of thirty days, and did not receive any comments during that period. Nothing has called into question the fairness, adequacy, or reasonableness of the proposed Consent Decree.

CONCLUSION

For the reasons set forth above, the United States believes that the proposed Consent Decree is fair, reasonable, and in the public interest; it serves the purposes and goals of CERCLA. The United States respectfully requests that the proposed Consent Decree be entered as an order of the Court.

Respectfully submitted,

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