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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA DEPARTMENT OF  
TOXIC SUBSTANCES CONTROL and  
the TOXIC SUBSTANCES CONTROL  
ACCOUNT,

Plaintiffs,

v.

JIM DOBBAS, INC., a  
California corporation;  
CONTINENTAL RAIL, INC., a  
Delaware corporation; DAVID  
VAN OVER, individually;  
PACIFIC WOOD PRESERVING, a  
dissolved California  
corporation; and WEST COAST  
WOOD PRESERVING, LLC, a  
Nevada limited liability  
company,

Defendants,

AND RELATED COUNTERCLAIMS AND  
CROSS-CLAIMS.

CIV. NO. 2:14-595 WBS EFB

MEMORANDUM AND ORDER RE: MOTION  
FOR ORDER APPROVING CONSENT  
DECREE

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Plaintiffs California Department of Toxic Substances  
Control and the Toxic Substances Control Account (collectively,

1 "DTSC") brought this action under the Comprehensive Environmental  
2 Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42  
3 U.S.C. §§ 9601 et seq., to recover cleanup costs incurred at 147  
4 A Street in Elmira, California (the "Elmira Site") from  
5 defendants Jim Dobbas, Inc. ("Dobbas"), Continental Rail, Inc.  
6 ("CRI"), Pacific Wood Preserving Corporation ("PWP"), West Coast  
7 Wood Preserving, LLC ("WCWP"), Collins & Aikman Products, LLC  
8 ("C&A Products"), and David van Over ("Van Over"). Presently  
9 before the court is DTSC's motion for approval of a proposed  
10 Consent Decree between plaintiffs and Dobbas. (Docket No. 146.)  
11 No party has filed an opposition.

12 I. Factual and Procedural Background

13 From 1972 to 1982, wood preserving operations at the  
14 Elmira Site contaminated the soil and groundwater with arsenic,  
15 chromium, and copper. (MacNicholl Decl. ¶¶ 4-5 (Docket No.  
16 144).) From the 1980s through 2005, the Wickes Corporation and  
17 its successor, C&A Products, took various actions at the Elmira  
18 Site to address environmental contamination under the oversight  
19 of DTSC. (Id. ¶ 6.) These actions included excavating soil,  
20 installing asphalt caps over contaminated soils, constructing a  
21 drainage system, installing a groundwater extraction and  
22 treatment system, and performing groundwater monitoring. (Id.)  
23 In 1997, C&A Products sold the Elmira Site to Dobbas and CRI.  
24 (Id.) However, C&A Products continued to perform environmental  
25 actions and maintain the existing measures.

26 In May 2005, C&A Products filed a petition for Chapter  
27 11 bankruptcy. (Id.) It informed DTSC in November 2005 that it  
28 would not perform any further actions at the Elmira Site. (Id.)

1 In 2006, DTSC requested that Dobbas and CRI carry out certain  
2 actions at the site. Dobbas and CRI refused. (Id. ¶ 7.) As a  
3 result, DTSC initiated and performed state-funded response  
4 actions from 2007 to the present, including excavating and  
5 backfilling soil, demolishing the groundwater extraction system,  
6 and monitoring groundwater. (See id. ¶¶ 7-10.) Dobbas and CRI  
7 sold the Elmira Site to Van Over in 2011, and DTSC continues to  
8 monitor the site and evaluate contamination trends. (See id. ¶¶  
9 9-11.) DTSC states that, as of May 5, 2015, its unreimbursed  
10 response costs relating to the site exceeded \$2.65 million,  
11 exclusive of interest. (Id. ¶ 13.) It further states that the  
12 costs for future investigation, remediation of contaminated soil,  
13 and treatment of surface and groundwater could reach  
14 approximately \$3.5 million by 2025. (Id.)

15 DTSC contends in this action that Dobbas is a  
16 responsible party pursuant to section 107(a) of CERCLA, 42 U.S.C.  
17 § 9607(a), and is therefore jointly and severally liable for the  
18 costs DTSC has incurred at the Elmira Site. (Docket No. 77 at  
19 2.) Dobbas has filed counterclaims against DTSC on the same  
20 grounds, (Docket Nos. 23-1 to 23-3, 25), and cross-claims against  
21 the other defendants, (Docket No. 101). In March 2015, Dobbas  
22 moved for summary judgment against DTSC, asserting, among other  
23 things, that DTSC's claims are barred by the applicable statute  
24 of limitations. (See Docket No. 116.) Before the court ruled on  
25 that motion, however, Dobbas and DTSC informed the court that  
26 they had reached a settlement. (See Docket Nos. 122-25.) DTSC  
27 lodged the proposed Consent Decree on July 15, 2015. (Docket No.  
28 135.)

1 II. Discussion

2 "In order to approve a CERCLA consent decree, a  
3 district court must conclude that the agreement is procedurally  
4 and substantively 'fair, reasonable, and consistent with CERCLA's  
5 objectives.'" Arizona v. City of Tucson, 761 F.3d 1005, 1011-12  
6 (9th Cir. 2014) (quoting United States v. Montrose Chem. Corp. of  
7 Cal., 50 F.3d 741, 748 (9th Cir. 1995)). Parties seeking  
8 approval of a consent decree must provide "evidence sufficient to  
9 evaluate the terms of an agreement." Id. at 1012.

10 "Fair" and "reasonable" are comparative terms. Id.  
11 Accordingly, the court's "obligation to independently scrutinize  
12 the terms of [such agreements]" must involve, among other things,  
13 "comparing the proportion of total projected costs to be paid by  
14 the [settling parties] with the proportion of liability  
15 attributable to them." Id. at 1008 (quoting Montrose, 50 F.3d at  
16 747) (quotation marks omitted). The court must then "factor into  
17 the equation any reasonable discount for litigation risks, time  
18 savings, and the like . . . ." Id. at 1012. "A district court  
19 abuses its discretion where it does not fulfill its obligation to  
20 engage in this comparative analysis." Id.

21 "[W]here state agencies have environmental expertise  
22 they are entitled to 'some deference' with regard to questions  
23 concerning their area of expertise." Id. at 1014 (quoting City  
24 of Bangor v. Citizens Commc'ns Co., 532 F.3d 70, 94 (1st Cir.  
25 2008)). State agencies are not entitled to deference regarding  
26 areas outside their expertise, such as their interpretation of  
27 CERCLA's requirements. Id. at 1014-15.

28 A. Terms of the Proposed Consent Decree

1           The proposed Consent Decree provides that DTSC will  
2 release Dobbas from liability in this action in exchange for,  
3 among other things, payment of \$350,000. (See Consent Decree  
4 ¶¶ 12, 22.) Dobbas also agrees to provide DTSC with copies of  
5 all records, documents, and other information in its possession  
6 that relate to (1) the ownership, operation, or control of the  
7 Elmira Site; (2) the purchase, storage, use, handling,  
8 generation, treatment, transportation, or disposal of hazardous  
9 substances in connection with the Elmira Site; (3) releases or  
10 threatened releases of hazardous substances at the Elmira Site;  
11 and (4) response actions conducted by any person at the Elmira  
12 Site. (Id. ¶ 24.) The Consent Decree entitles Dobbas to  
13 contribution protection pursuant to section 113(f)(2) of CERCLA,  
14 42 U.S.C. § 9613(f)(2).<sup>1</sup> (Id. ¶¶ 33-35.) DTSC and Dobbas also  
15 agree not to file any claims against each other regarding  
16 response costs at the Elmira Site. (See id. ¶¶ 27, 32.)

17           B. Analysis

18               1. Procedurally Fair Process

19           The court must first determine whether the proposed  
20 Consent Decree is the "product of a procedurally fair process."  
21 Montrose, 50 F.3d at 746. Such a process generally involves good  
22 faith, arm's-length negotiations among experienced counsel,  
23 during which all parties have an opportunity to participate. See

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25           <sup>1</sup> Section 9613(f)(2) provides, in relevant part, "[a]  
26 person who has resolved its liability to the United States or a  
27 State in an administrative or judicially approved settlement  
28 shall not be liable for claims for contribution regarding matters  
addressed in the settlement." 42 U.S.C. § 9613(f)(2). However,  
such person "may seek contribution from any person who is not  
party to [the] settlement." Id. § 9613(f)(3)(B).

1 id.; see also United States v. Cannons Eng'g Corp., 899 F.2d 79,  
2 87 (1st Cir. 1990).

3           The settling parties represent that they engaged in  
4 arm's-length settlement negotiations in which all were  
5 represented by counsel. (MacNicholl Decl. ¶¶ 14-15.) DTSC and  
6 Dobbas jointly drafted the terms of the proposed Consent Decree.  
7 (Id. ¶ 15.) The arm's-length character of their negotiations is  
8 reinforced by the fact that the parties reached settlement after  
9 Dobbas filed counterclaims against DTSC, moved for summary  
10 judgment, and put forth substantial evidence in its defense,  
11 indicating that both parties had the opportunity to showcase the  
12 strengths of their positions before they reached settlement.

13           After lodging the proposed Consent Decree with the  
14 court, DTSC published notice of the Consent Decree in the  
15 California Regulatory Notice Register (2015, Volume No. 29-Z),  
16 pages 1210-11, and invited the public to comment on it until  
17 August 17, 2015. (MacNicholl Decl. ¶ 16, Ex. 1.) It also  
18 published such notice in a local newspaper, the Dixon Tribune,  
19 (id. ¶ 16, Ex. 2), and emailed notice to all parties in this  
20 lawsuit, (id. ¶ 16, Ex. 3). DTSC did not receive any comments  
21 on, or objections to, the proposed Consent Decree. (Id. ¶ 17.)  
22 Since the court can find no reason to doubt the integrity of  
23 these steps, the court concludes that the proposed Consent Decree  
24 resulted from a procedurally fair process.

## 25           2. Substantively Fair and Reasonable Terms

26           Next, the court must determine whether the proposed  
27 Consent Decree is "substantively fair to the parties in light of  
28 a reasonable reading of the facts." Montrose, 50 F.3d at 746;

1 see also Cannons, 899 F.2d at 87 (“Substantive fairness  
2 introduces into the equation concepts of corrective justice and  
3 accountability: a party should bear the cost of the harm for  
4 which it is legally responsible.”).

5 Dobbas has agreed to pay \$265,000 of the approximately  
6 \$2.65 million that DTSC says it incurred in responding to  
7 contamination at the Elmira Site. The parties agreed to a  
8 covenant not to sue each other in the future for response costs  
9 relating to the site, meaning that Dobbas will not face further  
10 liability for any of the \$3.5 million that DTSC estimates it will  
11 incur by 2025. (See MacNicholl Decl. ¶ 13.) The proportion of  
12 costs recouped by DTSC is relatively small: Dobbas will pay 10%  
13 of the costs that DTSC has incurred to date and approximately  
14 7.6% of the estimated costs it will incur by 2025.

15 DTSC states that Dobbas’s proportionate liability for  
16 response costs at the Elmira Site is approximately 20% because  
17 Dobbas held half of the site’s property interest, never conducted  
18 wood preserving operations at the site, and did not cause the  
19 contamination there. (DTSC’s Mem. at 9 (Docket No. 143).  
20 Because DTSC is the lead agency responsible for enforcing  
21 California’s Hazardous Substance Account Act (“HSAA”) and for  
22 investigating and responding to hazardous substance releases in  
23 California,<sup>2</sup> the court affords “some deference” to DTSC’s  
24 estimation of Dobbas’s proportionate liability of the agency’s

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25 <sup>2</sup> See Cal. Health & Safety Code § 25354.5. HSAA is the  
26 state analogue to CERCLA. See Coppola v. Smith, 935 F. Supp. 2d  
27 993, 1011 (E.D. Cal. 2013) (Ishii, J.) (“Although the HSAA is not  
28 identical to CERCLA, the HSAA expressly incorporates the same  
liability standards, defenses, and classes of responsible persons  
as those set forth in CERCLA.” (citations omitted)).

1 response costs. See City of Tuscon, 761 F.3d at 1014.

2 DTSC justifies discounting Dobbas's proportionate  
3 liability to 10% of DTSC's current unreimbursed costs by  
4 factoring in several risks that arise from continued litigation  
5 between the parties. Dobbas had previously moved for summary  
6 judgment on the basis that DTSC's claims were time-barred by the  
7 applicable statute of limitations. Such an argument was viable,  
8 as this court has found in the past that DTSC's CERCLA claims  
9 were in fact time-barred. See, e.g., State of Cal. ex rel Cal.  
10 Dep't of Toxic Substs. Control v. Hyampom Lumber Co., 903 F.  
11 Supp. 1389, 1394 (E.D. Cal. 1995). If Dobbas prevailed on this  
12 argument, it would not have faced any liability for DTSC's  
13 response costs.

14 In addition, Dobbas had filed counterclaims against  
15 DTSC asserting that the agency's direction and oversight of  
16 response actions at the Elmira Site contributed to the site's  
17 contamination and incurred unnecessary costs. (E.g., Docket No.  
18 25 ¶¶ 11-12, 17, 26.) DTSC and Dobbas presumably factored into  
19 the settlement amount the possibility that DTSC's negligently  
20 selected or implemented response actions may have inflated the  
21 agency's asserted unreimbursed costs.

22 Moreover, both parties face costly and time consuming  
23 discovery from continued litigation. Since DTSC requested  
24 additional time for discovery in opposing WCWP's motion for  
25 summary judgment, (see Docket No. 107 at 17-20), it is likely  
26 that DTSC would have required additional discovery in opposing  
27 Dobbas's summary judgment motion as well. Because the discovery  
28 cutoff set by the court's Pretrial Scheduling Order is March 30,



1 2016, (Docket No. 20 at 2-3), early settlement also saves DTSC  
2 and Dobbas at least four months of additional discovery,  
3 research, and related costs and eliminates the parties' costs of  
4 going to trial in this case. It is reasonable that DTSC and  
5 Dobbas wish to free themselves from these burdens by settling  
6 their claims. The court thus finds it reasonable that DTSC  
7 discounted Dobbas's proportional liability based on these  
8 factors.

9 Dobbas's status as the second defendant<sup>3</sup> to settle in  
10 this case also justifies a discount from its estimated  
11 proportional liability. "Given CERCLA's joint and several  
12 liability scheme, the government may find it appropriate to offer  
13 relatively favorable terms to early settlers, thereby encouraging  
14 other parties to settle based on the possibility that late  
15 settlers and non-settlers bear the risk that they might  
16 ultimately be responsible for an enhanced share of the total  
17 claim."<sup>4</sup> United States v. Fort James Operating Co., 313 F. Supp.  
18 2d 902, 909 (E.D. Wis. 2004); see also Cannons, 899 F.2d at 92  
19 ("Disproportionate liability, a technique which promotes early  
20 settlements and deters litigation for litigation's sake, is an  
21 integral part of the statutory plan.").

22 CERCLA enables this strategy through 42 U.S.C.  
23 § 9613(f)(2). "The statute immunizes settling parties from  
24 liability for contribution and provides that only the amount of  
25 the settlement--not the pro rata share attributable to the  
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27 <sup>3</sup> The court approved a consent decree between DTSC and  
28 WCWP on September 2, 2015. (Docket Nos. 139, 141.)

<sup>4</sup>

1 settling party--shall be subtracted from the liability of the  
2 nonsettlers." Cannons, 899 F.2d at 91. It would thus be  
3 reasonable for DTSC to discount Dobbas's proportionate liability  
4 and provide Dobbas favorable terms to leverage the remaining  
5 defendants' comparatively greater liability in resolving the  
6 claims against them.

7 Accordingly, after conducting the required comparative  
8 fault analysis and considering facts in the record that justify a  
9 discounted settlement amount, the court concludes that the terms  
10 of the proposed Consent Decree are substantively fair and  
11 reasonable.

### 12 3. Consistent with CERCLA's Objectives

13 Finally, the court must determine whether the proposed  
14 Consent Decree is consistent with CERCLA's objectives. See  
15 Montrose, 50 F.3d at 746. This includes holding accountable the  
16 parties who are legally responsible for the contamination at  
17 issue. See Cannons, 899 F.2d at 90-91. Having addressed  
18 Dobbas's accountability at length above, the court sees no need  
19 to reiterate the same points here except to note that, by  
20 requiring Dobbas to pay for a portion of DTSC's cleanup costs,  
21 the Consent Decree advances that objective. See Cannons, 899  
22 F.2d at 90 (noting "consideration of the extent to which consent  
23 decrees are consistent with Congress' discerned intent involves  
24 matters implicating fairness and reasonableness" and that the  
25 approval criteria "were not meant to be mutually exclusive").

26 In addition, "one of the core purposes of CERCLA is to  
27 foster settlement through its system of incentives and without  
28 unnecessarily further complicating already complicated

1 litigation.” Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.,  
2 710 F.3d 946, 971 (9th Cir. 2013) (citation omitted). DTSC and  
3 Dobbas’s settlement of their claims and counterclaims at the  
4 pretrial stage advances this purpose and increases the pressure  
5 on the remaining defendants to reach a settlement. See Cannons,  
6 899 F.2d at 92.

7           Lastly, CERCLA was intended to give regulators “the  
8 tools necessary for a prompt and effective response to . . .  
9 hazardous waste disposal.” Cannons, 899 F.3d at 90. The court  
10 does not find this objective directly relevant here because the  
11 proposed Consent Decree focuses on recovering response costs that  
12 DTSC has already expended responding to contamination. However,  
13 the Consent Decree may indirectly advance this objective because  
14 funds from the settlement reinforce DTSC’s ability to respond  
15 promptly and effectively to contamination. It also enables DTSC  
16 to use state funds with the knowledge that similar consent  
17 decrees may be used to bypass the uncertainties of litigation and  
18 recover those expenses in the future.

19           Accordingly, because the court concludes from the  
20 evidence before it that the proposed Consent Decree is  
21 procedurally and substantively fair, reasonable, and consistent  
22 with CERCLA’s objectives, the court will order its approval. See  
23 City of Tucson, 761 F.3d at 1011-12.

24           IT IS THEREFORE ORDERED that plaintiffs’ motion for  
25 approval of the Consent Decree between plaintiffs and Jim Dobbas,  
26 Inc. (Docket No. 146) be, and the same hereby is, GRANTED.

27           IT IS FURTHER ORDERED that all claims for contribution  
28 or indemnity against Jim Dobbas, Inc. arising out of response

1 costs incurred at the Elmira Site be, and the same hereby are,  
2 DISMISSED pursuant to 42 U.S.C. § 9613(f)(2).

3 Dated: November 13, 2015

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5 **WILLIAM B. SHUBB**  
6 **UNITED STATES DISTRICT JUDGE**

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