IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. 3M COMPANY, et al., Defendants.	:	Case No. 3:14-cv-32 JUDGE WALTER H. RICE

DECISION AND ENTRY SETTING FORTH REASONING BEHIND THE COURT'S SUSTAINING THE UNOPPOSED MOTION TO APPROVE CONSENT DECREE OF PLAINTIFF THE UNTED STATES OF AMERICA (DOC. #3)

Although the Court sustained the unopposed Motion to Approve Consent Decree (Doc. #3) filed by Plaintiff the United States of America ("Plaintiff" or "United States"), on April 22, 2014, the Court feels it is important to set forth the reasons for said decision.

I. BACKGROUND

The United States brought this action under Sections 106, 107, and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607 and 9613, seeking recovery for costs associated with the release of hazardous substances at the Lammers Barrel

Superfund Site ("Site") in Beavercreek, Greene County, Ohio. Doc. #1. The United States also sought a declaratory judgment establishing the liability of all named Defendants for any future response costs incurred by the United States Environmental Protection Agency ("EPA") in connection with the Site. *Id.*

The Site includes a 2.5 acre property from which hazardous substances were released (the "Property"), an adjoining ditch, a contaminated aquifer underlying the property, and a contaminated portion of the aquifer that extends eastward and downgradient from the Property. From 1948 until 1969, several industrial operations were located on the Property. From 1948, until a fire burned down its operations in 1952, the Moran Paint Company manufactured paint, lacquers, and paint removers at the Site. Later, until 1969, Anthony Kohnen and Paul Lammers operated solvent recovery and barrel reconditioning businesses at the Site. Their businesses involved the pickup and storage of distilled and fractionalized waste industrial solvents, including chlorinated volatile organic compounds and aromatic hydrocarbons, which were emptied at the Site. Doc. #4 at 2-3. The current owner of the Property is Helen Gorby, referred to in the Consent Decree as the "Owner Settling Defendant." *Id.* at 5.

In 1985, the Ohio Environmental Protection Agency ("Ohio EPA") detected vinyl chloride in residential drinking water wells that were downgradient from the Site. By 2000, a total of thirteen area homes had been connected to an alternate water supply. A remedial investigation and feasibility study ("RI/FS") was conducted in 2002, for the purposes of determining the nature and extent of

contamination, and to study and compare the feasibility of potential remedies for the Site contamination. Originally, 20 parties ("Respondents") agreed to perform the RI/FS, pursuant to an Administrative Order on Consent ("AOC"). Twenty-one additional Respondents were added in 2008. The Respondents have paid over $1.1 million to date in response costs. Most of the 41 Respondents are Defendants in the present action and are parties to the Consent Decree. *Id.* at 3-4.

On October 29, 2003, the Site was added to the National Priorities List, a "list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States." 68 Fed. Reg. 55876 (Sept. 29, 2003) (codified at 40 C.F.R. § 300 App. B). The list is mandated by CERCLA and must be updated annually. 42 U.S.C. § 9605(a)(8)(B).

Based on the RI/FD, which was completed on September 27, 2011, EPA concluded that Site soils were "contaminated with high levels" of chlorinated volatile organic compounds, including trichloroethylene and vinyl chloride, as well as "high levels of benzene, toluene, ethylbenzene, and xylene." The contamination extended to the aquifer and groundwater beneath the property, as well as an off-property groundwater plume. Doc. #4 at 3-4.

The EPA expects a two-stage remedial action. The first remedial action, known as Operable Unit 1 ("OU 1"), is estimated to cost $3.4 million. It will involve biological treatment of the Site soils, dechlorination of the groundwater, and certain restrictions on the use of property located at the Site. Ohio EPA has concurred with the proposed remedy. In addition, EPA expects that a future

Operable Unit 1 ("OU 2") remedy will be required to respond to the remainder of the contamination, concentrated in the off-property groundwater plume, based on an RI/FS that is currently being conducted. *Id.*

The Consent Decree will resolve the claims of the United States arising from OU 1 with those parties that are considered the "major contributors of hazardous substances to the site," who are defined within the agreement as the "Settling Performing Defendants." Those parties will agree to perform the OU 1 remedial design and remedial action; pay $1.5 million for past and future cleanup costs; and will continue to perform the RI/FS for future OU 2 remedial action. *Id.* at 4-5.

Furthermore, the Consent Decree will also function as a *de minimis* Consent Decree, in accordance with 42 U.S.C. § 9622(g), with regards to the parties identified as "Non-Performing Defendants." Those parties will make payments to a trust fund set up by the Settling Defendants. The funds will be used to pay for the OU 1 remedy, the continuing RI/FS for OU 2, and the future OU 2 remedial action. The amounts that each Settling Non-Performing Defendant will pay are set forth in Appendix G of the Consent Decree. *Id.* at 5. In consideration for the actions and payments of the Defendants, the United States covenants not to sue or take administrative action against them under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 & 9607. Under Paragraph 79 of the Consent Decree, the extent of the covenant is based on each party's status as a Settling Performing Defendant, Settling Non-Performing Defendant, or the Owner Settling Defendant. *Id.* at 5-7; Doc. #2-1 at 75-79.

The United States published notice of the Consent Decree in the Federal Register and solicited public comments for a 30-day period, in accordance with 42 U.S.C. § 9622(d)(2)(A). 79 Fed. Reg. 7700-03 (Feb. 10, 2014). No comments were received, and no party opposed the United States' Motion to Approve the Consent Decree. For the reasons set forth below, the Court sustained said motion, and entered the Consent Decree as a final judgment on April 22, 2014. Doc. #5.

II. ANALYSIS

CERCLA authorizes the President "to remove or arrange for the removal of, and provide for remedial action relating to [any] hazardous substance, pollutant, or contaminant at any time . . . or take any other response measure . . . necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9604. The statute also grants the President the authority to enter into settlements "with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person ["PRP"]), to perform any response action . . . if the President determines that such action will be done properly by such person." *Id.* § 9622(a).

When asked to enter such a proposed settlement as a consent decree, "a court need only 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1424 (6th Cir. 1991) (quoting H.R. Rep. No. 99-253, pt. 3, at 19 (1985)). "Protection of the public interest is the key

consideration in assessing whether a decree is fair, reasonable and adequate." *Id.* at 1435 (citations omitted). The court's role is "limited, yet important," because, "[w]hile the district court should not mechanistically rubberstamp the agency's suggestions, neither should it approach the merits of the contemplated settlement de novo." *Id.* (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d 79 (1st Cir. 1990)). Thus, according to the Sixth Circuit:

> The consent decree, as a judicial act, requires court approval. However, the court's role is limited to approval or rejection of the decree, and it remains EPA's responsibility to select the remedy and to take the steps necessary to bring the decree to the court for approval. We must respect Congress' intent that the President develop such decrees, and that the courts review them on the administrative record under an arbitrary and capricious standard.

Azco Coatings, 949 F.2d at 1425.

A. Procedural Fairness

"Procedural fairness is one aspect of a settlement that is reasonable, fair, and consistent with CERCLA." *United States v. Cantrell*, 92 F. Supp. 2d 718, 724 (S.D. Ohio 2000). Procedural fairness requires a conclusion that "the negotiators bargained in good faith." *Id.* "To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *Cannons Eng'g Corp.*, 899 F.2d at 86 (citations omitted).

According to the United States, the parties and their counsel negotiated the present settlement over a period of twenty-one months. The Court believes that the lengthy settlement period suggests that a degree of thoroughness and

deliberation permeated the negotiations, which supports a finding of procedural fairness.

However, the bargaining balance among the parties is another factor that must be considered. "Procedural fairness requires that settlement negotiations take place at arm's length." *In re Tutu Water Wells CERCLA Litigation*, 326 F.3d 201, 207 (3rd Cir. 2003). Courts emphasize not only the fact that a party has representation but also the quality of counsel's efforts when evaluating the procedural fairness of a CERCLA settlement. *See, e.g., State of N.Y. v. Panex Indus., Inc.*, No. 94-CV-0400E(H), 2000 WL 743966 (W.D.N.Y. June 6, 2000) (settlement was procedurally fair where "the consent decrees were negotiated over a period of two years by experienced counsel, at arm's length and with the participation of this Court"); *55 Motor Ave. Co. v. Liberty Indus. Finishing Corp.*, 332 F. Supp. 2d 525, 530 (E.D.N.Y. 2004) (settlement was procedurally fair where case was "supervised very closely and carefully" by a magistrate judge and the parties' representation was "zealous and competent").

The United States has indicated that Helen Gorby, the Settling Owner Defendant, was unrepresented by counsel during the settlement negotiations:

> Although Settling Owner Defendant chose to not have counsel during the negotiations, the Consent Decree was drafted to clearly identify her obligations; she was given the opportunity to ask, and did ask through her nephew, over a period of several months, questions of both the Government's and Settling Defendants' counsel about her obligations and the environmental covenant that she agreed to record.

Doc. #4 at 9.

Ms. Gorby's unrepresented status during settlement talks makes it impossible to find that her interactions with the United States were conducted at arm's length. This is not to say that the negotiations were unfairly conducted, and the Court stresses that there is no indication that the United States acted in anything but good faith. However, "arm's length," as defined by Black's Law Dictionary (9th ed. 2009), refers to "dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power." An interaction in which an administrative agency of the United States allows an individual landowner to ask questions before her legal obligations are presented to her in a binding consent decree cannot reasonably be described as a negotiation in which the parties have equal bargaining power. Furthermore, the imbalance is exacerbated by the technical and scientific issues inherent in the present controversy and the complexities of the CERCLA statute. *E.g.*, *Carson Harbor Village, Ltd. v. Unocal corp.*, 270 F.3d 863, 880 (9th Cir. 2001) ("Complex regulatory statutes, in particular, often create a web—or, in the case of CERCLA, perhaps a maze—of sections, subsections, definitions, exceptions, defenses, and administrative provisions").

Furthermore, the fact that Ms. Gorby (or her nephew) also asked questions of Settling Defendants' counsel adds minimal or no weight to her imbalanced position. As the Settling Owner Defendant, Ms. Gorby was in a position unlike any other Defendant. She owns the Property in question, and the settlement process resulted in the imposition of a significant number of restrictive covenants that will

burden her property for the indefinite future. *See* Doc. #2-6, Environmental Restrictive Covenant, App. D to Consent Decree. For example, the restrictive covenants imposed by the Consent Decree forbid the use of any groundwater from beneath the Property, any residential use of the Property, and place other restrictions on the its use, all of which run with the land. Again, this is not to say the covenants are unreasonable or unfair. All indications are that they are not only fair and reasonable, but necessary for the implementation of the environmental remedies that the United States has selected. The Court merely observes that, because she lacked counsel, the settlement between the United States and Ms. Gorby cannot be considered the result of an arm's length bargaining process.

Nevertheless, several factors lead the Court to the ultimate conclusion that the settlement was procedurally fair. First, the Motion to Approve the Consent Judgment filed by the United States is unopposed by all parties, including the Settling Owner Defendant. There is a strong presumption in favor of voluntary settlements in CERCLA litigation. *Akzo Coatings of Am.*, 949 F. 2d at 1436. Second, the statutorily imposed 30-day comment period passed with no objection lodged to indicate that the proposed settlement "is inappropriate, improper, or inadequate." Thus, in spite of the unrepresented status of the Settling Owner Defendant, other factors weigh favor of a finding of procedural fairness. The procedural safeguards imposed by the statute, the unopposed status of the Government's motion, and the lengthy settlement period in which all parties

participated all lead the Court to conclude that the proposed settlement is procedurally fair.

B. Substantive Fairness

"Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 87 (1st Cir. 1990). Thus, the settlement terms must demonstrate "some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." *Id.* However, acknowledging the EPA's expertise in making comparative fault determinations and the standard of review applicable to settlements under CERCLA, courts routinely defer to the agency's determinations. *See id.* ("Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs"); *see also United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 373 (7th Cir. 2011) (citing *Cannons Eng'g Corp.*, 899 F.2d at 87)).

Here, the Defendants hired a "professional allocator" for the purpose of preparing a proposed apportionment of obligations among the Settling Performing

Defendants, the Settling Non-Performing Defendants, and other non-parties.[1] The allocator's findings were based on Site documents, depositions taken by the EPA and the Department of Justice, and other documents. Based upon the apportioned responsibility suggested by the allocator's findings, the Defendants categorized themselves as Settling Performing Defendants or Settling Non-Performing Defendants. The Settling Performing Defendants were those whose allocations exceeded 1¼% of the responsibility for the site, and they agreed to be jointly and severally responsible for both the implementation of the OU 1 remedial action and the payment of response costs. *See* Doc. #2-8 (Consent Decree, App. F, "List of Settling Performing Defendants"). The Settling Non-Performing Defendants, whose responsibility was less than 1¼%, were required to contribute monetarily, and in proportion to each one's defined allocation. *See* Doc. #2-8 (Consent Decree, App. G, "List of Settling Non-Performing Defendants"). The EPA reviewed the findings of the allocator and approved the Defendant's agreed apportionment of obligations.

After reviewing the Consent Decree and the Appendices thereto, the Court concludes that the settlement terms are substantively fair. The use of an independent allocator, the Defendants' agreement as to the apportionment of liability, and the EPA's approval of the apportionment all suggest that fair accountability will result from implementation of the Consent Decree. The division

---

[1] The Department of the Army and the Department of the Air Force ("the Settling Federal Agencies") are also parties to the Consent Decree. However, the Defendants and the EPA are in agreement that the contributions of the Settling Federal Agencies were so negligible as to not require any contribution. Doc. #2-1 at 11; Doc. #4 at 6.

of Defendants into one group that is joint and severally liable for the implementation of the remedial action and the cleanup costs (the Settling Performing Defendants), and another group that must contribute in proportionality to their responsibility (the Settling Non-Performing Defendants), suggests that the allocator made rational estimates of liability to which the parties ultimately agreed. Furthermore, no party has objected to the foregoing terms, nor did any non-party during the public comment period. The Court, therefore, concludes that the results of the settlement process were substantively fair.

C. Reasonableness

The reasonableness of a consent decree under CERCLA requires consideration of several factors, including "the nature/extent of hazards; the degree to which the remedy will adequately address the hazards; possible alternatives for remedying hazards; and the extent to which the decree furthers the goals of the statute." *Azco Coatings*, 949 F.2d at 1436 (citing *Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1038 (D. Mass. 1989)).

The hazards posed by the contamination at the Site to the surrounding community are significant. There are concentrations of contaminants in the soil and the groundwater at the site. As noted previously, there was contamination to drinking water wells discovered in 1985, causing nearby residences to be connected to county water supply lines in 1986 and again in 2000. The EPA has determined that "there is a significant potential risk to children and adults from

direct exposure to contaminated soil and groundwater." Doc. #2-2 at 13. Water contamination from various concentrations of contaminants in the soil and groundwater appears to be the greatest hazard, as the Property at the Site is currently vacant. However, the EPA has also determined that "cancer risks for a future commercial worker exposed to surface and subsurface soils, and a future recreator exposed to surface soils exceed the acceptable benchmark . . . ." *Id.* at 15.

The OU 1 remedy will address these hazards in several ways. There will be restrictive covenants that prohibit residential use of the property and the installation of potable wells until the achievement of groundwater cleanup. OU 1 will also involve "Biological Treatment of impacted soils using soil mixing to treat principal threat wastes, including chlorinated volatile organic compounds" at the Site. Furthermore, there will also be groundwater treatment to address the contaminated groundwater.

OU 1 will not treat the off-property groundwater plume, which is the subject of an ongoing investigation. The groundwater plume contamination will be addressed by the future OU 2 remedy. Thus, although the selected remedy is not complete, it could not be at this point. However, the current Consent Decree addresses this ongoing need by providing for the contribution of funds to pay for the future OU 2 remedy.

The Court also reviewed the six alternative remedies discussed in the Record of Decision and agrees with the United States that the selected remedy is the best

alternative. Only one remedy was less expensive, but it would not have been nearly as effective as OU 1. The selected remedy was also one of the most efficacious for long term effectiveness, permanent reduction of toxicity, as well as being one of the fastest to implement. The State of Ohio supported the selected remedy, and it was one of two remedies for which the local community expressed support. Thus, of the possible alternatives, the selected remedy was the reasonable choice. Doc. #2-2 at 24-32.

Finally, the Court finds that the Consent Decree is reasonable because it furthers the goals of CERCLA. Two major policy concerns underlie the statute:

> First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

United States v. Cannons Eng'g Corp., 899 F.2d 79, 90-91 (1st Cir. 1990) (citations omitted).

The Consent Decree satisfies Congress' intent to give the EPA the tools it needs to decontaminate the Site. Specifically, the Settling Performing Defendants will perform the remedy at the Site, and the Settling Non-Performing Defendants will contribute to the financial burden of cleanup for both the OU 1 remedy and the future OU 2 remedy. The goal is eventual cleansing of the Site soil and the groundwater of the industrial pollutants that were introduced there decades ago. Furthermore, the Consent Decree satisfies Congress' intent to hold the persons or

entities responsible for the cleanup of hazardous pollution by requiring Defendants to pay for both remedies. Thus, the settlement serves the purposes of CERCLA.

Based on an examination of the hazards of the Site contamination, the remedies proposed, the possible alternatives, and the policies of CERCLA, the Court concludes that the Consent Decree is reasonable.

III. CONCLUSION

"Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate." *Azco Coatings*, 949 F.2d at 1435 (citations omitted). After reviewing the proposed settlement, the Court concludes that the public interest will be served by implementing the OU 1 Remedy and the future OU 2 Remedy at the Site. The Consent Decree fairly and reasonably apportions financial responsibility for the Site's cleanup. The EPA has set forth an adequate plan for the first steps required to eliminate the contamination at the Lammers Barrel Superfund Site, which the environment and citizens of Greene County have endured for far too long.

Date: May 5, 2014

WALTER H. RICE
UNITED STATES DISTRICT JUDGE