

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

United States of America, and the State of Illinois,)	
)	
Plaintiffs,)	No. 16-cv-10672
)	
v.)	Judge Ronald A. Guzmán
)	
North Shore Gas Company,)	
)	
Defendant.)	

ORDER

The Court grants the United States’ motion for entry of consent decree [5].

STATEMENT

On November 16, 2016, the United States and the State of Illinois filed the instant action against defendant North Shore Gas Company (“NSG”) pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA), 24 U.S.C. §§ 9606, 9607. The complaint seeks injunctive relief compelling the remediation of an NSG gas plant located in Waukegan, Lake County, Illinois (hereinafter “the Site”), as well as reimbursement for future response costs associated with the cleanup of hazardous substances found at the Site. Soon after the complaint was filed, however, the parties negotiated a settlement and signed a Consent Decree, which was posted on the Federal Register for public comment, as required by applicable law. The public comment period has now passed, with one comment having been received by the Waukegan Port District, whose property is adjacent to the Site. The United States now moves the Court to approve the Consent Decree.

LEGAL STANDARD

In reviewing a CERCLA consent decree, a district court must satisfy itself that the settlement is reasonable, fair, and consistent with the statutory purposes of CERCLA. *United States v. George A. Whiting Paper Co.*, 644 F.3d 368, 372 (7th Cir. 2011) (citing *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 85 (1st Cir. 1990)). While approval of a consent decree is generally committed to the Court's discretion, the applicable principles of judicial review in CERCLA cases require "considerable deference" to both the expertise of the federal agencies involved and to the general federal policy in favor of settlement. *Cannons Eng'g*, 899 F.2d at 84; *see also United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991) (stating that judicial deference to settlements reached by the parties to CERCLA litigation is "particularly strong" when that settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency like EPA which enjoys substantial expertise in the environmental field"). The test is not whether this Court would have fashioned the same remedy or whether it is the best possible settlement; rather, it is whether the consent decree is procedurally and substantive fair, reasonable, consistent with CERCLA's policies, and that it adequately protects the public interest. *Cannons Eng'g*, 899 F.2d at 84.

ANALYSIS

I. Procedural and Substantive Fairness

(A) Procedural Fairness

Procedural fairness concerns the negotiation process, i.e., whether it was open and at arms-length. *Id.* at 85 ("CERCLA does not require an exhaustive and detailed recitation of every fact relating to the settlement [negotiations]. The parties need only present the terms of the agreement and facts sufficient to enable one to determine whether [it is fair]."). In that respect,

the United States represents that it began settlement discussions with Defendant and the State of Illinois in August 2015 and that the terms of the consent decree are the product arms-length, good-faith negotiations. As there have been no challenges to the consent decree in this regard, the Court accepts the government's representation and finds the settlement procedurally fair.

(B) Substantive Fairness

Substantive fairness concerns concepts of corrective justice and accountability. *Id.* at 87. The terms of a consent decree are substantively fair if they are based on the principles of comparative fault and if liability is apportioned in relation to rational estimates of the harm each party has caused. *Id.* The Consent Decree is sufficient in this regard: NSG will be required to finance all work provided for, *inter alia*, in the Environmental Protection Agency's ("EPA") detailed Record of Decision, such as the installation of a network of horizontal recovery wells, as well as enhanced recovery systems using groundwater extraction and injections for a period of at least seven years — a process that will cost roughly \$10,500,000.00 and be periodically reviewed by the EPA itself. Moreover, the Consent Decree provides that NSG will reimburse the United States and Illinois for any future response costs associated with the Site or overseeing the work. This is indeed a fair result and in keeping with principles of corrective justice and accountability.

II. Reasonableness

The evaluation of a consent decree's reasonableness is "a multifaceted exercise." *Id.* at 89. Factors to consider include the consent decree's efficaciousness as a vehicle for cleansing the environment, the extent to which it satisfactorily compensates the public for actual and anticipated costs of remedial and response measures, and the relative strength of the parties' litigating positions. *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 910 (E.D.

IV. Public Comments

The Waukegan Port District (“Port District”) raises two concerns: (1) that contamination from a nearby sub-surface and groundwater petroleum spill will be drawn onto Port District property as a consequence of the groundwater extraction contemplated by the remediation, which could alter the hydraulic gradient; and (2) that the uncertainty on the timing and overall duration of the cleanup could impact future Port District projects.

With respect to the first concern, the United States explains that, based on the EPA’s assessment, the remediation is expected only to locally increase hydraulic gradients, which means only the groundwater immediately adjacent to the Site will be affected. The Port District’s property, in contrast, is located approximately 500 feet upgradient from the relevant area. Moreover, the design phase of the remediation allows the EPA to review the hydraulic gradients to avoid any adverse impact to surrounding parcels, and the Record of Decision requires that all reinjected groundwater will be treated to meet applicable water quality standards, thereby reducing the threat of further contamination. Taken together, the Court is convinced that the remediation plan sufficiently protects against migrating contamination to the Port District’s property.

Regarding the Port District’s concerns over timing, there is no easy answer. As the government explains: “[t]he timeframe for [remediation] is driven by the continuing presence of [contamination] at the cleanup location. The exact amount . . . is difficult to determine and thus the cleanup could take less, or more, time than estimated. Eliminating all ambiguity [in terms of timing], as [the Port District’s] comment requests, is not possible.” (Mot. for Consent Order [Dkt. # 5] at 5.) That said, the government maintains that it is currently working with the Port

Wis. 2004) (citation omitted). Other possibly relevant considerations are the availability and likelihood of alternatives to the consent decree and the extent to which approval of it serves the public interest. *Id.* (citation omitted). Based on these considerations, the Court concludes that the Consent Decree is reasonable. The only imaginable alternative to settlement would be complex and probably lengthy litigation. NSG, moreover, has agreed to take on and absorb the costs of a complex and lengthy remediation project, which was designed by the EPA after a detailed review of the contamination and possible methods of remediation.

III. Fidelity to the Statute

The final criterion on which to judge a consent decree is its consistency with the policies of the underlying law. *Cannons Eng'g*, 899 F.2d at 90. In that respect, CERCLA embodies several major policy concerns:

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.

Id. at 90-91; *Fort James Operating Co.*, 313 F. Supp at 910 (explaining that CERCLA's purposes include the expeditious remediation of waste sites, adequate compensation to the public, and the imposition of accountability). Further, as stated, there is also a strong statutory preference for settlement in CERCLA cases. *See Akzo Coatings of Am., Inc.*, 949 F.2d at 1435.

The Consent Decree promotes all of these goals: remediation will begin expeditiously; NSG has assumed responsibility for the remediation; the government (and thus the public) will be reimbursed for future expenses associated with cleanup and monitoring; and the settlement itself promotes the efficient use of government resources by avoiding protracted litigation.

District to overcome any potential business obstacles created by the remediation and that it will continue to do so. In the Court's view, this is simply the best that can be done under the circumstances, and it does not preclude approval of the Consent Decree.

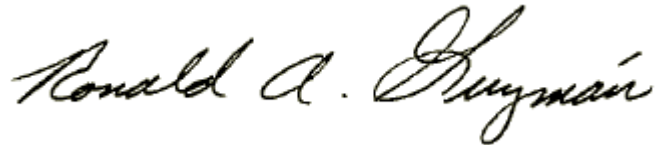
In sum, the Court finds that the Consent Decree is fair, reasonable, consistent with CERCLA's policies, and adequately protects the public interest.

CONCLUSION

For the reasons set forth above, the Court grants the United States' motion for entry of consent decree [5].

SO ORDERED.

ENTERED: February 13, 2017



HON. RONALD A. GUZMÁN
United States District Judge