UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	Chapter 11
LYONDELL CHEMICAL COMPANY, et al.,	:	Case No. 09-10023 (REG)
Debtors.	:	

UNITED STATES' MEMORANDUM IN SUPPORT OF DEBTORS' MOTION PURSUANT TO FED. R. BANKR. P. 9019 TO APPROVE SETTLEMENT AGREEMENT AMONG THE DEBTORS, THE ENVIRONMENTAL CUSTODIAL TRUST TRUSTEE, THE UNITED STATES, AND CERTAIN STATE ENVIRONMENTAL AGENCIES

PREET BHARARA
United States Attorney for the
Southern District of New York
PIERRE G. ARMAND
JEANNETTE A. VARGAS
ALICIA M. SIMMONS
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Tel. No.: (212) 637-2724/2678/2697
Fax No.: (212) 637-2686

US EPA RECORDS CENTER REGION 5
406946

TABLE OF CONTENTS

PRELIMINARY STATEMENT. 1

GENERAL STATUTORY/FACTUAL BACKGROUND 4

A. Statutory Background.. 4

B. Procedural Background. 6

C. The Proposed Settlement Agreement.. 6

1. Liquidated Sites. 8

2. Settlement of the Debtors' Objection to the U.S. Proofs of Claim. 8

3. Debtor-Owned/Operated Sites. 9

4. Environmental Custodial Trust. 10

5. Additional Sites. 11

6. Contribution Protection and Covenants Not to Sue.. 12

7. The Kalamazoo Site.. 12

D. Comments and Objections.. 13

1. Written Comments.. 13

2. Public Meeting Comments.. 20

3. Objections. 24

ARGUMENT.. 26

A. The Court Should Approve the Proposed Settlement Agreement Because It is Fair, Reasonable, and Consistent With Environmental Law.. 26

1. The Settlement is Fair. 27

2. The Settlement is Reasonable. 28

3. The Settlement is Consistent with the Goals of CERCLA. 29

B. The Public Comments Do Not Indicate that the Settlement Agreement Is Inappropriate, Inadequate, or Improper. 30

1. Amount of the Settlement Award. 30

2. Payout of General Unsecured Claims Against MHLLC. 35

3. Treatment of Cleanup Costs As General Unsecured General Unsecured Claims. 37

4. Lyondell Funding the Cleanup of the Kalamazoo Site. 38

5. Whether the District Court Should Approve the Settlement. 39

6. Whether Approval of the Settlement Agreement Should be Delayed Until After a Remedy for the Kalamazoo Site Has Been. 41

7. Whether the Bankruptcy Court Should Increase the Settlement Amount After a Remedy Is Selected. 42

8. Length of the Public Comment Period.. 43

9. Contribution Protection and Application of CERCLA Section 113(f)(2) Credits. 45

C. The Objections to Debtors' Motion Provides No Legitimate Basis For the United States to Withdraw From the Proposed Settlement Agreement. 49

1. Application of CERCLA Section 113(f)(2) Credits. 49

2. Length of Comment Period. 50

CONCLUSION. 50

I. PRELIMINARY STATEMENT

The United States, on behalf of the United States Environmental Protection Agency ("EPA"), the United States Department of the Interior ("DOI"), and the National Oceanic and Atmospheric Administration ("NOAA") (collectively, the "Settling Federal Agencies") respectfully submits this memorandum of law in support of Debtors' Motion Pursuant to Fed. R. Bankr. P. 9019 to Approve Settlement Agreement Among the Debtors, the Environmental Custodial Trust Trustee, the United States, and Certain State Environmental Agencies ("Debtors' Rule 9019 Motion"). For the reasons set forth below, the United States requests that this Court approve as a final judgment, the proposed Settlement Agreement among the Debtors, the Environmental Custodial Trust Trustee, the United States, and Certain State Environmental Agencies (the "Settlement Agreement") lodged with the Court on March 30, 2010.[1]

The proposed Settlement Agreement resolves the claims of the United States, on behalf of the Settling Federal Agencies, under, inter alia, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601 - 9675, against Lyondell Chemical Company ("Lyondell") and 93 of its affiliated debtors (collectively

---

1 While this brief is filed only on behalf of the United States, the state environmental agencies who are parties to the proposed Settlement Agreement have authorized the United States to inform the Court that they join in the United States' request that the Court approve and enter the Settlement Agreement.

A copy of the Settlement Agreement, containing the signatures of the parties, was attached to the Notice of Lodging filed with the Court on March 30, 2010. Another copy of the Settlement Agreement is attached hereto at Exhibit 1. The copy of the Settlement Agreement attached hereto contains a revised Exhibit B to the Environmental Custodial Trust Agreement (Legal Descriptions of the Transferred Real Properties). The Settlement Agreement lodged with the Court contained draft legal descriptions of the Allied Paper Mill and Beaver Valley Transferred Real Properties because final descriptions of those properties were not yet available at the time of filing. These legal descriptions were subsequently finalized, and a new exhibit reflecting the final descriptions has been added to the Settlement Agreement attached hereto.

with Lyondell, the "Debtors") for environmental liabilities for response costs, natural resource damages, and civil penalties in connection with 23 hazardous waste sites and facilities. Under the Settlement Agreement, the United States will receive approximately $1.1 billion in allowed general unsecured claims in connection with eleven non-debtor-owned sites. In addition, for six non-debtor-owned sites, the United States will receive approximately $53.6 million in cash in settlement of litigation concerning the dischargeability of environmental injunctions in bankruptcy. Furthermore, certain Debtors will transfer title to nine debtor-owned real properties to a custodial trust and contribute approximately $108.4 million in cash to the trust to fund the cleanup of these properties and the administrative expenses of the trust.

The proposed Settlement Agreement requires the Court's approval under two different sets of laws. First, pursuant to Federal Bankruptcy Rule of Procedure 9019, the Court must approve the proposed Settlement Agreement as in the best interest of the bankruptcy estate and as being consistent with applicable bankruptcy law. On March 30, 2010, the Debtors filed a motion for approval of the proposed Settlement Agreement pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

Second, the Court must approve the fairness of the proposed Settlement Agreement and its consistency with environmental law. Approvals of settlements under environmental law include a procedure for obtaining public comment. This memorandum of law in support of the Debtors' Rule 9019 Motion seeks approval of the proposed Settlement Agreement under environmental law.

Notice of the settlement was published in the Federal Register on April 5, 2010, 75 Fed. Reg. 17160-01. The United States accepted public comments on the proposed Settlement

Agreement through April 20, 2010. In addition, on April 15, 2010, the United States held a public meeting in Kalamazoo, Michigan, in response to requests for such a meeting, in accordance with Section 7003(d) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6973(d). At the meeting, counsel for the United States explained the terms of the proposed Settlement Agreement and answered factual questions regarding the proposed Settlement Agreement. The United States also accepted oral comments at the public meeting.

After reviewing the comments received, the United States has determined that the proposed Settlement Agreement is fair, reasonable and consistent with environmental law. The settlement memorialized in the proposed Settlement Agreement was reached after lengthy negotiations of its terms. In addition, the parties weighed the merits, costs, risks and delays that litigation would entail, against the value of settlement, in particular, the Settling Federal Agencies' ability to receive cash towards funding cleanup efforts at the sites.

Accordingly, for the reasons set forth herein, the United States respectfully requests that this Court approve and enter as a final judgment the proposed Settlement Agreement lodged with this Court on March 30, 2010. The function of the Court in reviewing such motions is not to substitute its judgment for that of the parties to the proposed Settlement Agreement, but to confirm that the terms of the proposed Settlement Agreement are fair and adequate and are not unlawful, unreasonable, or against public policy. United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), aff'd, 749 F.2d 968 (2d Cir. 1984). If the Court finds that these standards have been met, then the settlement should be approved. United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409, 1426 (6th Cir. 1991).

II. GENERAL STATUTORY/FACTUAL BACKGROUND

A. Statutory Background

CERCLA was enacted to provide a framework for cleanup of the nation's worst hazardous waste sites. The primary goal of CERCLA is to protect and preserve public health and the environment from the effects of releases or threatened releases of hazardous substances to the environment. See Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1386 (5th Cir. 1989); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); New York v. Shore Realty Corp., 759 F.2d 1032, 1040, n.7 (2d Cir. 1985); O'Neil v. Picillo, 682 F. Supp. 706, 726 (D.R.I. 1988), aff'd, 883 F.2d 176 (1st Cir. 1989).

CERCLA also created a Hazardous Substance Superfund, known simply as the Superfund, to finance federal response actions undertaken pursuant to Section 104(a) of CERCLA. The Superfund was established under 26 U.S.C. § 9507. Although CERCLA authorizes cleanup of hazardous waste sites using money provided by the Superfund, the Superfund is a limited source and cannot finance cleanup of all of the many hazardous waste sites nationwide. See S. Rep. No. 96-842, 848, 96th Cong., 2d Sess. at 17-18 (1980), reprinted in 1 Sen. Comm. on Env't & Pub. Works, Legislative History of CERCLA 305, 324-25 (1983). Replenishment of expended Superfund monies is crucial to the continuing availability of funds for future cleanups. Thus, the United States is tasked with seeking to ensure that potentially responsible parties ("PRPs") pay for or perform site cleanups, or that the limited Superfund monies expended by the federal government in response to a release or threatened release of hazardous substances are recovered through the liability scheme set forth in Section 107 of CERCLA wherever possible. See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir.

1992) (one statutory purpose of CERCLA is to hold responsible parties liable for the costs of the cleanup).

Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), permits the United States to recover its costs of responding to releases of hazardous substances from PRPs. Pursuant to Section 107(a), PRPs include the owners and operators of Superfund sites at the time of the disposal of hazardous substances at the sites, the current owners and operators of Superfund sites, as well as the generators and transporters of hazardous substances sent to Superfund sites. See United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993); O'Neil, 883 F.2d at 178; United States v. Monsanto, 858 F.2d 160, 168-171 (4th Cir. 1988). Section 107(a) of CERCLA creates strict, joint and several liability where environmental harm is indivisible. See Alcan Aluminum Corp., 990 F.2d at 722.

Sections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), authorize EPA to use Superfund monies to investigate the nature and extent of hazardous substance releases from contaminated sites and to clean up those sites. Moreover, pursuant to Section 106 of CERCLA, 42 U.S.C. § 9606, as an alternative to undertaking its own cleanup activities, EPA may issue unilateral administrative orders to PRPs, requiring them to clean up sites, may seek injunctive relief through a civil action to secure such relief, or may seek to reach agreements with PRPs through which they agree to perform the necessary cleanup of sites. See Sections 104, 106 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9622.

CERCLA also provides for the designation of governmental trustees who may assert claims for natural resource damages on behalf of the public. 42 U.S.C. § 9607(f)(2). DOI and NOAA are the relevant federal natural resource trustees for the sites covered under the proposed

Settlement Agreement.

Having created the liability system and enforcement tools to allow EPA to pursue responsible parties for Superfund cleanups, Congress expressed a strong preference that the United States settle with responsible parties in order to avoid spending resources on litigation rather than on cleanup. 42 U.S.C. § 9622(a).[2] CERCLA encourages settlements, inter alia, by providing parties who settle with the United States protection from contribution claims for matters addressed in the settlement. 42 U.S.C. § 9613(f)(2). This provision provides settling parties with a measure of finality in return for their willingness to settle.[3]

B. Procedural Background

On January 6, 2009, Lyondell and 78 affiliated entities filed Chapter 11 petitions in this Court. An additional 15 debtor entities filed Chapter 11 petitions during April and May 2009.

In July and August 2009, the United States filed, on behalf of the Settling Federal Agencies, ten proofs of claim against various Debtors, alleging more than $5.2 billion in liabilities for response costs, natural resource damages, and civil penalties. The proofs of claim assert, in part, that certain Debtors are jointly and severally liable, along with other responsible

---

2 See also United States v. Alcan Aluminum, Inc., 25 F.3d 1174, 1184 (3d Cir. 1994); United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991); In re Cuyahoga Equipment Corporation, 980 F.2d 110 (2d Cir. 1992) (citing City of New York v. Exxon Corp., 697 F. Supp. 677, 693 (S.D.N.Y. 1988)); United States v. Cannons Engineering Corp., 899 F.2d 79, 92 (1st Cir. 1990); United States v. DiBiase, 45 F.3d 541, 545-46 (1st Cir. 1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 2862.

3 Cannons Engineering, 899 F.2d at 92; O'Neil v. Picillo, 883 F.2d 176, 178-79 (1st Cir. 1989), cert. denied, 493 U.S. 1071 (1990); United Technologies Corp. v. Browning-Ferris Industries, Inc., 33 F.3d 96 (1st Cir. 1994), cert. denied, 115 S. Ct. 1176 (1995); H.R. Rep. No. 253, pt. 1, 99th Cong., 1st Sess. 80 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 2862.

parties, for approximately $59.3 million in past response costs, an estimated $4.8 billion in future response costs, and approximately $363.8 million in natural resources damages and assessment costs. The proofs of claim also included protective claims for work that the Debtors are or may be required to perform in the future pursuant to regulatory requirements or in compliance with court or administrative orders under CERCLA or RCRA.

On September 4, 2009, the Debtors filed objections to the proofs of claim filed by the United States, as well as proofs of claim filed by the California Department of Toxic Substances Control, the California State Water Resources Control Board, and the California Regional Water Quality Control Board for the Los Angeles Region (collectively, the "California Environmental Agencies"). In the objections, the Debtors asserted that the protective claims filed by the United States and the California Environmental Agencies concerning injunctive obligations to perform at sites that are neither owned nor operated by the Debtors constitute "claims" as defined in 11 U.S.C. § 101(5), and therefore may be discharged in bankruptcy. In response, the United States and the California Environmental Agencies filed on September 30, 2009, a brief in opposition to the Debtors' objections, arguing, inter alia, that injunctive obligations performed pursuant to orders requiring the amelioration of ongoing pollution are not "claims," regardless of whether the orders concern debtor-owned sites or properties owned by third parties. Concurrently, the United States and the California Environmental Agencies filed a motion, pursuant to 28 U.S.C. § 157(d), to withdraw the reference of the Debtors' objections to the district court, given that the objections required consideration of both bankruptcy law and federal environmental statutes such as CERCLA. Pending the negotiation and approval of this potential settlement, the objections have been adjourned, and the action filed in district court to withdraw the reference has been

dismissed subject to reinstatement.

C. The Proposed Settlement Agreement

1. Liquidated Sites

Pursuant to Section V of the Settlement Agreement, the United States will receive, on behalf of EPA, DOI and NOAA, allowed general unsecured claims totaling $1,134,916,010 in connection with eleven non-debtor-owned sites. See Table 1 (Exhibit 2 hereto). The amount of the allowed claim(s) for each site was determined, for settlement purposes, on a site-by-site basis taking into account: (1) estimated total past and future response costs and natural resource damages (if any) for the site; (2) the Debtors' estimated percentage allocation or fair share of liability for the site; and (3) litigation considerations. Under the Settlement Agreement, only the amount or value that the United States receives from the Debtors, not the total amount of the allowed claim, will be credited by EPA, DOI and NOAA to their accounts for a particular site, which credit will reduce the liability of non-settling PRPs for the particular site by the amount of the credit. See Settlement Agreement ¶ 10.

2. Settlement of the Debtors' Objection to the U.S. Proofs of Claim

Pursuant to Section VI of the Settlement Agreement, the Debtors have agreed to pay the United States $53,628,150 in cash to resolve litigation concerning whether Debtors must comply with pre-petition judicial or administrative work orders at six non-debtor-owned sites. The specific cash amounts that the Debtors have agreed to pay for each of the six sites are as follows:

- 68th Street Dump Site in Maryland ("68th Street") – $40,000
- Allied Paper/Portage Creek/Kalamazoo River Site in Michigan (the "Kalamazoo Site") – $49,549,379
- Barefoot Disposal Site in Pennsylvania ("Barefoot Disposal") – $1,400,000

- Berks Landfill Site in Pennsylvania ("Berks Landfill") – $67,771
- Diamond Alkali/Lower Passaic River Study Area Site in New Jersey ("Diamond Alkali") – $400,000
- French Limited Site in Texas – $2,171,000

These cash payments are in addition to general unsecured claims for four of the six sites: 68th Street, Barefoot Disposal, Diamond Alkali, and the Kalamazoo Site. Other, non-debtor PRPs at these sites will receive a reduction in their liability equal to the amount in cash paid by the Debtors pursuant to the settlement. See CERCLA § 113(f)(2), 42 U.S.C. § 9613(f)(2).

3. Debtor-Owned/Operated Sites

Section VII of the Settlement Agreement memorializes the Debtors' responsibility to meet ongoing environmental obligations at debtor-owned or operated sites. Specifically, the Settlement Agreement provides that the following obligations of the Debtors with respect to debtor-owned or operated sites are not discharged or impaired by the bankruptcy: (i) any obligation to perform response actions, corrective actions, or other cleanup actions under CERCLA or RCRA; (ii) any obligation to pay natural resource damages due to post-petition or ongoing releases of hazardous substances; or (iii) any obligation to pay civil penalties for post-petition violations of the law.

Paragraphs 6 and 7 of the proposed Settlement Agreement provide for allowed general unsecured claims for penalties for alleged pre-petition violations at two debtor-owned sites: (1) the Brunswick Facility in Georgia (the "Brunswick Facility"), and (2) the Houston Refinery Facility in Texas (the "Houston Refinery"). With respect to the Brunswick Facility, the Debtors have agreed to an allowed general unsecured claim of $499,980 to settle EPA's claim for civil

penalties for pre-petition violations of RCRA. With respect to the Houston Refinery, the Debtors have agreed to an allowed general unsecured claim of $480,000 to settle EPA's claim for civil penalties for pre-petition violations of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. The amount of the allowed claim for each site was arrived at separately taking into account, inter alia, the gravity of the violations, the economic benefit Debtors realized from noncompliance, and litigation considerations.

4. Environmental Custodial Trust Agreement

Pursuant to Section XI of the Settlement Agreement and Section 2.4 of the Environmental Custodial Trust Agreement (which is attached as Exhibit B to the Settlement Agreement), certain Debtors will transfer all title, rights, and interests in nine contaminated real properties to an Environmental Custodial Trust. The Debtors will also transfer $108,421,850 to fund the cleanup of these properties and the administrative expenses of the trust. See Table 2 (Exhibit 2, hereto).

The Settlement Agreement appoints Le Petomane XXIII, Inc., by and through Jay A. Steinberg, not individually but solely in their representative capacities, as the Environmental Custodial Trustee. Mr. Steinberg has served as trustee of environmental custodial trusts in connection with a number of other bankruptcy matters involving large environmental cleanups.

The Environmental Custodial Trust Agreement sets forth the specific terms establishing the custodial trust. For example, Article II of the Environmental Custodial Trust Agreement establishes the trust and sets forth its purpose, which is, among other things, to own the properties, provide funding for cleanup of the properties as approved by the lead government agencies, sell or otherwise dispose of the properties, and make distributions of the trust funds. Section 2.5 of the Environmental Custodial Trust Agreement provides for the creation of

accounts for, inter alia, the cleanup work at each property and administrative expenses of the trust. Section 2.7 of the Environmental Custodial Trust Agreement sets forth the manner in which funds are to be managed, including the circumstances under which funds remaining in a site account after a cleanup is complete may be applied to other properties in the trust or elsewhere.

Article III of the Environmental Custodial Trust Agreement governs the manner in which funds are to be budgeted and distributed under the trust. The Settling Federal Agencies and the applicable state agencies may seek reimbursement from the trust for work performed, and may also seek advances from the trust on an annual basis to pay for specific projects to be performed. Article IV sets forth the powers of the trustee, which include, inter alia, authority to invest the trust assets and hire environmental consultants, contractors, attorneys, and other professionals.

5. Additional Sites

Under Section XII of the Settlement Agreement, approximately 380 non-debtor-owned sites are designated as "Additional Sites." These are sites that were identified in the Debtors' Statement of Financial Affairs (the "SOFAs"), and with respect to which the United States did not file proofs of claim. Under the Settlement Agreement, the Debtors agree that the United States may pursue claims for response costs and natural resource damages with respect to the Additional Sites as if the Chapter 11 cases had never been commenced. In return, the United States agrees not to issue or seek injunctive orders against the Debtors under CERCLA Section 106 or RCRA Section 7003 based on the Debtors' pre-petition conduct with respect to the Additional Sites. The United States, however, has reserved its right to seek injunctive relief under RCRA Section 7003 with respect to nine "Reserved Additional Sites" of potential concern

to EPA. Once the Debtors' liability for any Additional Site is liquidated by settlement or judgment, the liquidated amount will be paid as if it had been an allowed general unsecured claim under the Plan of Reorganization.

6. Contribution Protection and Covenants Not to Sue

Under the proposed Settlement Agreement, the Debtors will receive contribution protection and covenants not to sue from the United States and the participating state agencies with respect to the liquidated sites and the nine properties transferred to the custodial trust. See Settlement Agreement, Sections XVI and XV. The Debtors will not receive contribution protection for pre-petition response costs incurred by PRPs who have filed proofs of claim in the bankruptcy. Id. at ¶ 45.

7. The Kalamazoo Site

Because most of the comments received by the United States pertain to the Kalamazoo Site, key terms of the proposed Settlement Agreement applicable to that Site are summarized separately here. Under the proposed Settlement Agreement, the Kalamazoo Site is addressed pursuant to the terms described above in connection with Liquidated Sites, settlement of the Debtors' objections to the United States' proofs of claim, and the Environmental Custodial Trust. More specifically, the proposed Settlement Agreement provides for three distinct settlement amounts for the Kalamazoo Site. First, EPA will receive an allowed general unsecured claim of $908,261,837 against debtor Millennium Holdings, LLC ("MHLLC") for the Kalamazoo Site, and DOI and NOAA will receive an allowed general unsecured claim against MHLLC of $124,231,125 for the Site. See Settlement Agreement ¶ 4(a)(2). Second, EPA will receive a cash payment of $49,549,379 for the Kalamazoo Site as part of the settlement of litigation with

the Debtors concerning the dischargability of injunctive environmental obligations at non-debtor-owned property. Id. at ¶ 5(a)(2). Last, certain Debtors will transfer $53,721,850 in cash to the Environmental Custodial Trust to be used for the cleanup and restoration of the Allied Paper Mill property, a debtor-owned portion of the Kalamazoo Site known as Operable Unit One ("Kalamazoo OU1"). Id. at ¶ 18(a), (b), (c).

D. Comments and Objections

The United States received 37 written comments regarding the Settlement Agreement. These comments are attached hereto as Exhibit 3. In addition, at the public meeting, 22 individuals presented oral comments recorded by a stenographer. The transcript of the public meeting is attached hereto as Exhibit 4. Finally, Georgia-Pacific, LLC ("Georgia-Pacific") and Weyerhaeuser Company ("Weyerhaeuser") each filed objections to Debtors' Rule 9019 Motion.[4] The objections by Georgia-Pacific and Weyerhaeuser pertain to the Kalamazoo Site, as do all of the written and oral comments received by the United States, with the exception of a written comment by the Lower Passaic River Study Area Cooperating Parties Group (the "CPG") concerning the Diamond Alkali Site, and a written comment by KIK Custom Products, Inc. ("KIK"), which pertains to the Hegeler Zinc Site in Danville, Illinois (the "Hegeler Zinc Site").

---

4 An objection was also filed by Century Indemnity Company and Pacific Employers Insurance Company and joined by certain other insurers (collectively, the "Insurers"). It is the Government's understanding that the objection has been resolved. To the extent that the Insurers' objection is unresolved, the United States adopts the Debtors' response to the Insurers' objections as set forth in the Debtors' Reply in Support of Motion Pursuant to Fed. R. Bankr. P. 9019 to Approve Settlement Agreement Among the Debtors, the Environmental Custodial Trustee, the United States, and Certain State Environmental Agencies ("Debtors' 9019 Reply Brief").

1. Written Comments

a. Chris Bartley

At the public meeting, Chris Bartley ("Bartley") submitted a written comment dated April 14, 2010, criticizing what he characterized as remedies for the Kalamazoo Site proposed by EPA at "hearings" in 2007. See Exhibit 3 at US_000001.

b. Susan Bennett

On April 20, 2010, Susan Bennett ("Bennett") submitted a written comment in opposition to the settlement, stating that MHLLC should not be permitted to "walk away" from its environmental obligations at the Kalamazoo Site. Id. at US_000153. Bennett also stated that the settlement amounts are insufficient to clean up the Site.

c. Donald J. Brown

On April 19, 2010, Donald J. Brown ("Brown") submitted a written comment declaring as "unfair" the amount of settlement funds allocated to Kalamazoo OU1 and the 0.36 percent estimated payout for general unsecured claims against MHLLC. Id. at US_000002. Brown stated that "[i]f any claim were to be considered 'secure,' one would think that a claim based on twenty years of company negotiations under Federal liability would be so considered." Id.

d. Art Cole, Helen Magas, Brutus Tenbrink and Cheryl Tenbrink

On or about April 21, 2010, the United States received four identical letters signed by Art Cole, Helen Magas, Brutus Tenbrink and Cheryl Tenbrink stating that $53.7 million is insufficient to remediate Kalamazoo OU1, and that a draft feasibility study indicated that it would cost more than $200 million to remove all of the PCB waste from Kalamazoo OU1. Id. at US_000329-337.

e. Jennifer Clark

At the public meeting, Jennifer Clark ("Clark") submitted a written comment which raised three questions. First, Clark asked how much of Debtors' environmental liability "is going unfunded?" Id. at US_000003. Second, Clark inquired, "[H]ow does this figure compare to other environmental liabilities that go unfunded?" Id. Last, Clark asked, "[H]ow much does Len Blavatnik/Access Industries stand to profit?" Id.

Three days later, on April 18, 2010, Clark submitted a separate written comment stating that the proposed Settlement Agreement is unacceptable because it allows polychlorinated biphenyls ("PCBs") to remain at or near aquifers in the vicinity of residential neighborhoods near the Kalamazoo Site. Id. at US_000154. Clark's comment states that the cash payments and general unsecured claims allotted for the Kalamazoo Site in the proposed Settlement Agreement provide insufficient funding for the complete removal and off-site disposal of PCBs.

f. Kathy Cooney

On April 19, 2010, Kathy Cooney ("Cooney") submitted a written comment expressing her concern "that Lyondell and Georgia Pacific are walking away from years of damage they committed against the environment of Kalamazoo and Allegan Counties." Id. at US_000155. Cooney's comment summarized her understanding of the health risks associated with the hazardous waste present at the Kalamazoo Site, and stated that the Debtors should be required "to pay what it owes for the damage they've done." Id.

g. Matt Dunstone

On April 19, 2010, the United States received a written comment from Matt Dunstone ("Dunstone"), in which he expressed his frustration with the settlement amounts designated for

the Kalamazoo Site. Id. at US_000156. Dunstone stated that the settlement amounts do not adequately address the cleanup required at the Site. Dunstone's comment added that the public has not been provided with sufficient time to review the proposed Settlement Agreement.

h. Alison Geist

On April 19, 2010, the United States received a written comment from Alison Geist stating that the settlement amount is insufficient to remove hazardous waste from the Kalamazoo Site, and that "the corporations" who profited from destroying the environment should be responsible for cleaning it up. Id. at US_000004.

i. Stephen Hamilton

On April 19, 2010, Stephen Hamilton ("Hamilton") submitted a written comment stating that, although the proposed Settlement Agreement is "a fair deal" for Kalamazoo OU1, it is "far from fair" for Operable Unit Five of the Kalamazoo Site ("Kalamazoo OU5"). Id. at US_000157. Hamilton requested that the settlement be reconsidered because "[i]f the company is allowed to walk away with such minimal obligations, we will be stuck with the problem for generations." Id.

j. Dean Hauck

On April 19, 2010, Dean Margaret Hauck of the Michigan News Agency ("Hauck") submitted a written comment stating that she is "appalled" at both the settlement amounts allotted for the Kalamazoo Site and the 15-day comment period "being forced upon the citizens of this area." Id. at US_000005-6.

k. D. James and Mary M. Heaton

D. James and Mary M. Heaton (collectively, the "Heatons") submitted two identical

written comments on April 8, 2010, requesting a public hearing, pursuant to RCRA Section 7003(d), concerning the Kalamazoo Site. Id. at US_000007-9. The Heatons expressed "great reservations" about the Settlement Agreement because "the proposed figure falls far short of the $224.7 million it would cost to remove all of the nearly 1.1 million cubic yards of PCB-laden material" at the Kalamazoo Site. Id. at US_000007-8.

l. Richard and Patricia Kirschner

On April 20, 2010, the United States received a written comment from Richard and Patricia Kirschner (collectively, the "Kirschners") stating that MHLLC "should not be allowed to evade its responsibility to clean up the toxic mess for which it has responsibility." Id. at US_000158. The Kirschners asked that all proposals to remedy the Kalamazoo Site be presented to the public.

m. Barb Miller

The United States received a written comment from Barb Miller ("Miller") on April 20, 2010, in which Miller concluded that the settlement amounts were insufficient to clean up the Kalamazoo Site. Id. at US_000159. In the comment, Miller also questioned whether the Debtors will have sufficient cash to satisfy their obligations under the proposed Settlement Agreement.

n. Keely Novotny

On April 13, 2010, the United States received a written comment from Keely Novotny akin to that submitted by Clark. Id. at US_000010. Keely Novotny's comment states that the proposed Settlement Agreement is unacceptable because it allows PCBs to remain at or near aquifers in the vicinity of residential neighborhoods near the Kalamazoo Site, and concludes that the cash payments and general unsecured claims allotted for the Kalamazoo Site in the proposed

Settlement Agreement provide insufficient funding for the complete removal and off-site disposal of PCBs.

o. Jason Novotny

On April 19, 2010, Jason Novotny submitted a written comment requesting a delay in the approval of the proposed Settlement Agreement until the EPA has selected a remedy at the Kalamazoo Site. Id. at US_000160. To the extent such delay is impossible, Jason Novotny stated, the United States should demand that the Debtors fund the entire estimated costs for cleanup.

p. Carol Powell

On April 20, 2010, Carol Powell ("Powell") submitted a written comment similar to that submitted by Clark and Keely Novotny. Id. at US_000161. In the comment, Powell stated that the proposed Settlement Agreement is unacceptable because it allows PCBs to remain at or near aquifers in the vicinity of residential neighborhoods near the Kalamazoo Site. Powell also stated that larger settlement awards are needed to accomplish a realistic, long-term remediation effort at the Kalamazoo Site.

q. Michael Ringelberg

On April 13, 2010, Michael Ringelberg ("Ringelberg") submitted a written comment raising two questions concerning the Settlement Agreement, in particular its impact on the Kalamazoo Site. Id. at US_000011. First, Ringelberg asked for the name of the firm that will serve as the Custodial Trustee. Second, Ringelberg inquired about the status of "the various options for clean up at the Allied Paper site." Id. Ringelberg also stated that insufficient funds have been allotted for cleanup at the Kalamazoo Site.

r. Carol Urban

Carol Urban ("Urban") submitted a written comment on April 14, 2010, arguing that the settlement amounts for the Kalamazoo Site are insufficient to cover the cost of removing the contamination there. Id. at US_000012-13. Urban contended that Lyondell should be held responsible for its share of the cleanup costs associated with the Kalamazoo Site because it purchased MHLLC, the Debtor whose corporate predecessor owned and operated the Allied Paper Mill at the time of disposal, with knowledge of MHLLC's liabilities.

s. Mel Visser

On April 17, 2010, the United States received a written comment from Mel Visser ("Visser") stating that, when "Kalamazoo was a major paper recycling center . . . waste NCR paper flowed into its processes" containing ink with PCBs. Id. at US_000014-15. According to Visser, "[t]he companies, at that time, did nothing illegal in their recycling process." Visser continued on to state that, although "[l]evels [of PCBs] in the river, as levels in Lake Michigan, will continue to reduce, [they will] not go to zero." Id. at US_000014. Visser then poses the following questions: "So, it may be legal to beat on bankrupt companies for atonement, but is it moral and ethical? Wouldn't we be better off reassessing our capabilities and limitations? If we realized that magically removing all PCBs tomorrow would not really make a difference five years from now, would our plans change? Shouldn't we reassess our priorities and work toward global banning while taking a more adaptive approach at home?" Id. at US_000015.

t. Robert Whitesides

On April 20, 2010, Robert Whitesides ("Whitesides") submitted a written comment asserting that the proposed Settlement Agreement "shows disregard for the public interest in

completing a full remediation of the Allied Paper/Portage Creek/Kalamazoo River Superfund Site." Id. at US_000162-000166. Whitesides demanded full recovery, rather than a general unsecured claim, to remediate the Kalamazoo Site and restore its damaged environmental resources. Whitesides cited language from the Plan and the Disclosure Statement which he believes highlights Debtors' efforts to minimize its environmental obligations. Whitesides also stated that the public has not been provided with information explaining why the payout of MHLLC's general unsecured claims has decreased to 0.36 percent.

u. Ben Zimont

On April 20, 2010, Ben Zimont ("Zimont") submitted a letter to the United States in which he expressed his dissatisfaction with the proposed Settlement Agreement, specifically its impact on the Kalamazoo Site. Id. at US_000167-168. Zimont stated that, while the settlement may address the short-term cleanup needs at Kalamazoo OU1, it does not address the cleanup needs at Kalamazoo OU5. Zimont also stated that Lyondell should be held responsible for MHLLC's liabilities, including its environmental obligations.

v. City of Kalamazoo

On April 20, 2010, the United States received a letter from Mayor Bobby J. Hopewell and City Attorney Clyde J. Robinsion of the City of Kalamazoo. Id. at US_000169-176. In this comment, the City of Kalamazoo asserted that: (1) the approximately $53.7 million to be placed in trust for cleanup and restoration of Kalamazoo OU1 is insufficient to complete the necessary remedy and protect regional drinking water; (2) the settlement amount for Kalamazoo OU1 dictates a less than optimal remediation; (3) a draft feasibility study indicated that the remedy could cost $224.7 million, and the City of Kalamazoo estimates that at least $100 million is

required; and (4) the Bankruptcy Court is not the appropriate forum to consider the appropriateness of the settlement. The City of Kalamazoo requested in its comment that the United States explain how the settlement amount was determined, explain how the funds will be spent on the remedy, and withdraw from the settlement.

w. Edison Business Association

The Edison Business Association ("EBA") submitted a written comment dated April 16, 2010, in which it objected to the proposed Settlement Agreement because it "resolves them [Lyondell] from their clean-up responsibility for the Allied Paper, Kalamazoo River, and Portage Creek Superfund sites." Id. at US_000016-17.

x. Edison Neighborhood Association

At the public meeting, Tammy Taylor submitted a written comment dated April 12, 2010, on behalf of the Edison Neighborhood Association (the "ENA"). Id. at US_000018. In the comment, Taylor stated that Lyondell should not be absolved of responsibilities to pay for cleanup costs associated with Kalamazoo OU1.

y. Georgia-Pacific

Georgia-Pacific, which has been identified by EPA as a PRP with respect to the Kalamazoo Site, submitted a written comment on April 9, 2010, in which it requested an extension of the public comment period. Id. at US_000019-26. In the comment, Georgia-Pacific contended that the 15-day public comment period is an insufficient amount of time for the public to review and comment on the Settlement Agreement, and that CERCLA provides for a minimum 30-day comment period under 42 U.S.C. §§ 9622(d)(2)(A), (i)(3). Georgia-Pacific also argued that, to the extent the United States is relying on the "extraordinary circumstances"

exception to the 30-day public comment period found in 28 C.F.R. 50.7(a), there exist no such extraordinary circumstances warranting a truncated comment period. Georgia-Pacific further requested a public meeting, pursuant to RCRA Section 7003(d).

On April 20, 2010, Georgia-Pacific submitted a second comment with respect to the Kalamazoo Site. Id. at US_000027-77. In its second comment, Georgia-Pacific argued that the Settlement Agreement is unfair and/or unreasonable because: (1) the settlement fails to address Lyondell's alleged direct liability as an operator of the Kalamazoo Site; (2) the United States allegedly is providing the Debtors contribution protection "without any guarantee of any consideration" to Georgia-Pacific or other PRPs, namely an assurance that funds allocated under the Settlement Agreement to the Kalamazoo Site will actually be spent at that Site, see Id. at US_0000033; and (3) the Settlement Agreement allegedly does not provide sufficient funding for cleanup of the Kalamazoo Site and is inconsistent with positions the United States has taken in another bankruptcy matter, namely In re Chemtura Corp., Case No. 10 Civ. 503 (RMB).

z. Homecrest Circle Neighborhood

On April 10, 2010, Dick DeVisser submitted, on behalf of the Homecrest Circle Neighborhood in Kalamazoo, Michigan ("Homecrest"), a comment concerning the settlement amounts for the Kalamazoo Site. Id. at US_000078. Specifically, the comment states that, "in order to secure a realistic, long-term safe solution to this health risk, significantly larger amounts of funding must be secured from Lyondell Chemical Company." Id.

aa. Kalamazoo River Cleanup Coalition

On April 15, 2010, the United States received a written comment by Gary Wager on behalf of the Kalamazoo River Cleanup Coalition (the "Cleanup Coalition"). Id. at US_000079-

81. The comment requests that the settlement amounts for the Kalamazoo Site be increased "to at least $225 million" in order to account for the total cost of "the cleanup option that is most protective of human health, the environment, and is acceptable to the people of Kalamazoo." Id. at US_000080-81.

bb. Kalamazoo River Protection Association

Dayle Harrison submitted a written comment on behalf of the Kalamazoo River Protection Association (the "River Protection Association") supporting approval of the proposed Settlement Agreement. Id. at US_000082-84. Although the River Protection Association recommends an audit and examination of Lyondell and MHLLC "to determine if the 'books were cooked,'" the River Protection Association believes that the proposed Settlement Agreement is "the best solution" because it provides funding that does not risk the delay associated with protracted litigation. Id. at US_000083.

cc. Kalamazoo River Watershed Council

On April 7, 2010, Robert Whitesides ("Whitesides") submitted a letter on behalf of the Kalamazoo River Watershed Council (the "Watershed Council"). Id. at US_000085-88. In addition to requesting a public meeting pursuant to RCRA Section 7003(d), Whitesides asserted that the Settlement Agreement does not explain the derivation of the amount of money secured for the Kalamazoo Site.

dd. KIK Custom Products, Inc.

On April 19, 2010, KIK, which has been identified by EPA as a PRP with respect to the Hegeler Zinc Site in Danville, Illinois, submitted a letter containing three comments. Id. at US_000089-92. First, KIK asserted that it is a PRP at only two of the three operable units at the

Hegeler Zinc Site, and requested that the United States clarify how the settlement proceeds will be spent and accounted for at the site for purposes of determining how much of a credit KIK will receive and whether it will have access to these proceeds if it performs work at the site. Second, KIK requested information about projected future remedies at the Hegeler Zinc Site for purposes of assessing the reasonableness of the settlement amount. Finally, KIK asked why the Debtors will receive contribution protection for response costs incurred after the Debtors filed their chapter 11 petitions, as opposed to after the date of the Settlement Agreement.

ee. Lower Passaic River Study Area Cooperating Parties Group

On April 20, 2010, the United States received a comment from the Lower Passaic River Study Area Cooperating Parties Group (the "CPG"), a group of PRPs at the Diamond Alkali Site, concerning the Diamond Alkali Site. Id. at US_000093-100. The CPG argued in its comment that the Settlement Agreement is unfair and/or unreasonable because: (1) it does not explain that the negotiation process was candid, open or the product of balanced bargaining; (2) it does not provide a measurement of comparative fault or explain how the settlement amounts were derived or how they will be used; (3) the Debtors' percentage of liability at the Diamond Alkali Site may ultimately be larger than is currently known; (4) the United States should not afford the Debtors contribution protection for all future response costs at the Diamond Alkali Site, but instead should seek a judgment holding them jointly and severally liable for all site costs; and (5) the settlement amount should account for a potential orphan share of liability.

ff. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians

On April 19, 2010, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the "Match-E-Be-Nash-She-Wish") submitted a comment stating that Lyondell should retain an

appropriate portion of CERCLA liability at the Kalamazoo Site. Id. at US_000177-179. In addition, the Match-E-Be-Nash-She-Wish requested that the bankruptcy court not permit MHLLC's liabilities at the Site to be treated as general unsecured claims.

gg. Michigan Senators and Congressman

On April 20, 2010, the United States received a letter from Senators Carl Levin and Debbie Stabenow and Representative Fred Upton, stating that it is unacceptable that a company emerging from bankruptcy as a profitable entity can only pay pennies on the dollar for the cleanup of the Kalamazoo Site, and claiming that this bankruptcy proceeding has derailed the cleanup process at the Kalamazoo Site. Id. at US_000101-102. The letter requests that the United States: (1) respond to public questions about the settlement; (2) explain how the settlement for the Kalamazoo Site was reached, how the settlement is in the public's best interest, and to what extent additional funds from the Debtors' estates could be committed to the clean up; and (3) extend the public comment period and seek to delay the upcoming April 23, 2010 hearing concerning the Settlement Agreement if the United States "cannot justify that the settlement is in the public's best interest."[5] Id. at US_000102.

hh. Weyerhaeuser

On April 20, 2010, the United States received a comment from Weyerhaeuser, a PRP at the Kalamazoo Site. Weyerhaeuser requested in its comment that the United States clarify that: (1) funds recovered by the United States for the Kalamazoo Site will be spent only at Kalamazoo OU5; and (2) the effect of the Settlement Agreement on non-settling parties – in particular

---

5 On April 20, 2010, the Kalamazoo Regional Chamber of Commerce submitted a letter concurring with the concerns raised in the letter from Senators Carl Levin and Debbie Stabenow and Representative Fred Upton. Id. at US_000180-182.

Weyerhaeuser's claim that it is entitled to a credit in the amount of the United States' allowed general unsecured claim – will be left for determination in subsequent proceedings. Id. at US_000189-328. If the United States does not confirm these clarifications, Weyerhaeuser objected to the Settlement Agreement as unfair and/or unreasonable on the grounds that: (1) the 15-day public comment period was too short; (2) the Settlement Agreement does not recover sufficient funds from Debtors for cleanup of the Kalamazoo Site; (3) the Settlement Agreement does not require EPA to spend the settlement proceeds at Kalamazoo OU5; and (4) the Settlement Agreement precludes Weyerhaeuser from arguing that it is entitled to a credit for the amount of the United States' allowed general unsecured claim for the Kalamazoo Site, as opposed to the amount of cash the United States actually recovers on that claim.

2. Public Meeting Comments

The following oral comments were recorded at the public meeting concerning the proposed Settlement Agreement's impact on the Kalamazoo Site:

- Bruce Merchant (Public Services Director, City of Kalamazoo) – Merchant commented on behalf of the City of Kalamazoo that bankruptcy court is not the appropriate forum to make environmental cleanup decisions, and requested that the United States "remove" the issue concerning the Debtor's liability for environmental damages to the district court. See Exhibit 4 at Tr. 51:1-4. Merchant also stated that it is improper to set aside money for cleanup of Kalamazoo OU1 before a remedy is selected for the Site, and that the bankruptcy court should abstain from approving the Settlement Agreement until a revised feasibility study has been approved by EPA. Tr. 51:5-15; 52:18-25. Merchant also commented that the settlement amount allotted for cleanup of the Kalamazoo Site "falls well short of the expected cost of any viable remedial option for this site." Tr. 51:16-19. Finally, Merchant requested that the bankruptcy court "retain proper oversight" to revise the settlement amount after a remedy is selected by EPA. Tr. 53:20-54:4.[6]

---

6 Merchant's oral comment derived from a written statement he presented at the public meeting, and which he subsequently submitted to counsel for the United States at the end of the

- John Dillworth (President/CEO, Goodwill Industries) – Dillworth commented that MHLLC's payout for general unsecured claims is inadequate, and that Lyondell's assets should be examined to determine whether they should be held liable for the environmental contamination. See Exhibit 4 at Tr. 55:2-22.

- George Magas – Magas stated that the United States should "evaluate these properties that they [MHLLC] own and see . . . which can be leased off for cash, what can be used as a brownfield so our city as well as other cities could start generating billions of dollars and millions of dollars in revenues with the property not sitting empty as a vacant piece of property . . . ." Tr. 57:3-13. Magas also stated that the settlement amounts are insufficient to remove the hazardous wastes from the Kalamazoo Site. Tr. 89:10-16.

- Rob Backus – Backus commented that Lyondell should be held responsible for the costs of cleanup at the Kalamazoo Site after they emerge from bankruptcy. Tr. 59:15-17.

- Robert Jones (State Representative, 60th District) – Jones noted that the Settlement Agreement may be approved before the remedy for the Kalamazoo Site is selected, and encouraged EPA to find the necessary additional money to adequately clean up the Site. Tr. 60:7-18.

- Dayle Harrison (President, Kalamazoo River Protection Association) - Harrison expressed a favorable opinion of the Settlement Agreement, stating that the United States "has done a fairly good job" of securing "a big chunk out of a small pie." Tr. 63:11-15; 98:20-25; 99:1-8. Harrison commented, however, that some of the settlement cash secured for Kalamazoo OU1 should be used to restore and remediate Kalamazoo OU5. Tr. 63:17-20. Harrison also remarked that "the consensus here is that Lyondell has a lot that they are hiding." Tr. 96:15-16. Last, Harrison commented that approval of the Settlement Agreement may set a precedent for other PRPs to avoid liability under CERCLA. Tr. 97:23-25; 98:1-19.

- Michael Seals (President, Kalamazoo River Coalition) – Seals commented that Lyondell and the entities that comprise the Millennium Holdings Group should "be held responsible for the entire clean up" of the Kalamazoo Site. Tr. 67:10-12.

- Steward Sandstrom (President/CEO, Kalamazoo Regional Chamber of Commerce) – Sandstrom commented that the Debtors' estimated 0.36 percent payout for general unsecured claims against MHLLC "is not in the public

---

meeting. See Exhibit 3 at US_000103-107.

interest." Tr. 69:12-13.

- Jennifer Clark – Clark commented that she does "not agree with this settlement," and requested a 30-day extension of the comment period. Tr. 70:23-24; 71:1-3.

- Don Cooney (Commissioner, City of Kalamazoo) – Cooney expressed his "dismay and anger" that the settlement amounts to "twenty percent . . . of what it takes to clean up" the Kalamazoo Site. Tr. 71:18; 72:2-7. Cooney also commented that the settlement should not be accepted without knowledge of "how much resources" the Debtors have. Tr. 72:17-21.

- Keely Novotny – Novotny commented that, before deciding whether to support the Settlement Agreement, the United States should take into consideration that the Kalamazoo Site is in the middle of city neighborhoods and nearby schools. Tr. 74:12-15.

- Jeff Hawkins (Chair, Public Policy Council for the Kalamazoo Regional Chamber of Commerce) – Hawkins stated that the settlement amounts are insufficient to accomplish cleanup at the Kalamazoo Site. Tr. 75:1-13.

- Gary Wager (Kalamazoo River Cleanup Coalition) – Wager noted his discomfort with the bankruptcy court approving the Settlement Agreement. Tr. 76:20-25. Wager also requested an additional 30 days for the comment period. Tr. 77:15-18.

- Don Brown – Brown stated that the bankruptcy court's approval of the Settlement Agreement would "ha[ve] the effect of biasing the cleanup towards the less costly alternatives which the community consider not to be protective of human health." Tr. 79:3-8. Brown requested that the settlement amounts be increased. Tr: 79:13-15. In the alternative, Brown asked that a trust be created from which funds may be drawn for the cleanup if the settlement amounts are inadequate. Tr. 79:15-18. Last, Brown commented that Lyondell should "retain its appropriate portion of CERCLA liability." Tr. 80:21-25.[7]

- Claus Globig – Globig questioned whether PCBs in the sediments of the Kalamazoo River are imminent threats to human health and the environment. See Exhibit 4 at Tr. 81:13-18. Globig submitted reports, newspaper articles and

---

7 Brown's oral comment derived from a written statement he presented at the public meeting, and which he subsequently submitted to counsel for the United States at the end of the meeting. See Exhibit 3 at US_000108-00109. Brown also submitted to the United States a duplicate copy of the statement on April 16, 2010. Id. at US_000183-187.

correspondence in support of his conclusion.[8] See Exhibit 3 at US_000110-152.

- Ben Zimont – Zimont stated that the settlement amounts do not contain sufficient cash to clean up the Kalamazoo River. See Exhibit 4 at Tr. 82:23-83:1. Zimont also commented that Lyondell should contribute more money to the settlement. Tr. 83:15-18.

- Jeff Spoelstra (Member, Kalamazoo River Watershed Council) – Spoelstra commented that it is unfair that "polluters have walked away with unfortunately figures like 0.36 percent settled on unsecured claims," and that the settlement awards secured for the Kalamazoo Site are too low. Tr. 86: 1-10.

- Iris Potter (Member, Kalamazoo Green Justice) – Potter stated that corporations should be made to take responsibility for the costs of cleanup at sites such as the Kalamazoo Site. Tr. 87:3-7, 13-14. In addition, Potter commented that the settlement amounts for the Kalamazoo Site are "just pittance in terms of what it's going to cost to clean it [the Kalamazoo Site] up." Tr. 87:17-19.

- Robert Barnard (County Commissioner, Third District, Kalamazoo County) – Barnard stated that the United States should not allow the Debtors to "[s]pin off the toxic assets and continue on with life, making more money . . . ." Tr. 91:9-14.

- Dean Hauck (Owner, Michigan News Agency) – Hauck stated that she is "appalled at the minuscule amount that is being committed to this clean up." Tr. 92:16-19. Hauck urged the United States to "find a solution that cleans this [hazardous waste] up . . . ." Tr. 93:20-21.

- Robert Whitesides (Board Member, Kalamazoo River Watershed Council) – Whitesides commented that the settlement amounts reserved for cleanup at the Kalamazoo Site are "galling" because "it's not a result of any environmental problem. It's a result of corporate greed." Tr. 94:12-14. Whitesides also stated that information in the Debtors' Plan is "wildly incorrect." Tr. 95:13-19.

- Eric Sweet – Sweet commented that the Debtors should not be permitted to escape their liabilities through bankruptcy, stating: "[T]he corporation isn't . . . going under. I mean if that was the case, we would take what we could and divvy it up the best and work with it." Tr. 101:16-25.

---

8 On April 17, 2010, Globig submitted a written comment to confirm that the reports, articles and correspondence were presented to counsel for the United States at the public meeting, for the United States' consideration. Id. at US_000188.

3. Objections

As noted above, Georgia-Pacific and Weyerhaeuser each filed an objection to the Debtors' Rule 9019 Motion. Georgia-Pacific contends that the Settlement Agreement cannot be approved because the United States provided 15 days for public comment, rather than the 30-day period required for certain settlements under sections 122(d) and 122(i) of CERCLA, 42 U.S.C. §§ 9622(d), (i). Weyerhaeuser has joined in this objection and further asserted that certain payments by the Debtors under the Settlement Agreement for the Kalamazoo Site must be used at Kalamazoo OU5.

III. ARGUMENT

A. The Court Should Approve the Proposed Settlement Agreement Because It is Fair, Reasonable, and Consistent With Environmental Law

Approval of a settlement agreement is a judicial act committed to the informed discretion of the Court. In re Cuyahoga Equipment Corp., 908 F.2d 110, 118 (2d Cir. 1992) United States v. Hooker Chem. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), aff'd, 749 F.2d 968 (2d Cir. 1984); United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1035 (D. Mass 1989), aff'd 899 F.2d 79 (1st Cir. 1990). Judicial review of a settlement negotiated by the United States is subject to special deference; the Court should not engage in "second-guessing the Executive Branch." Cannons Eng'g Corp., 899 F.2d at 84; In re Cuyahoga, 980 F.2d at 118 (noting the "usual deference given the EPA"); New York v. Solvent Chemical Corp., 984 F. Supp. 160, 165 (W.D.N.Y. 1997) ("This Court recognizes that its function in reviewing consent decrees apportioning CERCLA liability is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy.") (internal quotation marks omitted). An

evidentiary hearing is not required in order to evaluate a proposed CERCLA consent decree. United States v. Charles George Trucking Co., 34 F.3d 1081, 1085 (1st Cir. 1994); Cannons, 899 F.2d at 94. For the reasons discussed below, the Court should approve the Settlement Agreement because it is fair, reasonable, and furthers the goals of CERCLA. See Charles George Trucking Co., 34 F.3d at 1084; Cannons, 899 F.2d at 85. This "limited standard of review reflects a clear policy in favor of settlements." Solvent Chem. Corp., 984 F. Supp. at 165.

1. The Settlement is Fair

The fairness of a CERCLA settlement involves both procedural fairness and substantive fairness. Cannons, 899 F.2d at 86-88. To measure procedural fairness, the Court "should look to the negotiation process and gauge its candor, openness, and bargaining balance." Id. at 86. The negotiation of the Settlement Agreement was procedurally fair because it was negotiated at arm's length over a period of nine months and the parties were represented by experienced counsel.

To measure "substantive" fairness, the Court should consider whether the settlement 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. Davis, 261 F.3d 1, 24 (1st Cir. 2001); Charles George Trucking, Inc., 34 F.3d at 1087; United States v. DiBiase, 45 F.3d 541, 544-45 (1st Cir. 1995).

Here, the proposed Settlement Agreement is "substantively" fair. The proposed Settlement Agreement is the product of a complex analysis of the Debtors' environmental liabilities, as well as litigation risks, the existence of other PRPs, the circumstances under which contamination occurred, and multiple other factors. These issues formed the backdrop for

lengthy negotiations between the parties. The resulting terms of the settlement, which permit the United States to recover past and estimated future response costs for non-debtor-owned sites, as well as cleanup costs for debtor-owned sites, are substantively fair.

2. The Settlement is Reasonable

Courts evaluating the reasonableness of CERCLA settlements have considered three factors: technical adequacy of the cleanup work to be performed; satisfactory compensation to the public for response costs; and the risks, costs and delays inherent in litigation. See Charles George, 34 F.3d at 1087; Cannons, 899 F.2d at 89-90.

Although the first prong of the reasonableness inquiry is not at issue in this settlement, as the Debtors are not performing any cleanup, the proposed Settlement Agreement does satisfy the other, necessarily intertwined, considerations relevant to reasonableness. As discussed above, the United States will receive allowed general unsecured claims totaling approximately $1.1 billion in connection with eleven non-debtor-owned sites. The United States will also receive approximately $53.6 million in cash to resolve litigation concerning the Debtors' obligations to comply with pre-petition administrative and judicial orders with respect to non-debtor-owned property. In addition, certain Debtors must pay approximately $108 million to the Environmental Custodial Trust for the cleanup of nine debtor-owned properties, as well as for the administrative costs of the trust.

These settlement terms satisfactorily compensate the public, and reasonably balance myriad competing factors, including the strength of the United States' case against the Debtors; the Debtors' bankruptcy; the Debtors' objections to the United States' proofs of claims; and the need to recover funds for cleanup and minimize the expense and potential delay of protracted

litigation. Accordingly, the proposed Settlement Agreement is reasonable.

3. The Settlement is Consistent with the Goals of CERCLA

The primary goals of CERCLA are to "encourage prompt and effective responses to hazardous waste releases and to impose liability on responsible parties," and to "encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." In re Cuyahoga, 980 F.2d at 119. This settlement furthers these statutory goals. As discussed above, the proposed Settlement Agreement accounts for past and estimated future response costs at non-debtor-owned sites, cleanup costs at sites owned by Debtors, and a cash settlement of the Debtors' objection to the United States' proofs of claim. The settlement further meets CERCLA's statutory goal of providing final resolution of liability for settling parties. Moreover, the proposed Settlement Agreement serves CERCLA's goal of reducing, where possible, the litigation and transaction costs associated with response actions, as well as the public policy favoring settlement to reduce costs to litigants and burdens on the courts. See Winberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983).

B. The Public Comments Do Not Indicate that the Settlement Agreement Is Inappropriate, Inadequate, or Improper

The public comments received by the Department of Justice concerning the proposed Settlement Agreement raise many of the same issues and can be generally grouped into the following categories: (1) the amount of cash that the United States will receive for the Kalamazoo Site is insufficient; (2) the estimated 0.36 percent payout for allowed general unsecured claims against MHLLC is insufficient; (3) cleanup costs should not be treated as general unsecured claims; (4) Lyondell should fund the cleanup of the Kalamazoo Site; (5) the District Court should decide whether to approve the Settlement Agreement; (6) the Settlement

Agreement should not be approved until after a remedy has been selected for the Kalamazoo Site; (7) the Bankruptcy Court should retain jurisdiction to increase the settlement amounts after a remedy has been selected for the Kalamazoo Site; (8) the 15-day public comment period is insufficient; and (9) the Settlement Agreement does not explain why the Debtors are receiving contribution protection for post-petition costs. The United States has considered these comments and, as set forth below, has determined that none of them indicates that the Settlement Agreement is inappropriate, inadequate or improper.[9]

1. Amount of the Settlement Award

Comments by Ringelberg, Whitesides, Novotny, the Heatons, Urban, Homecrest, Geist, the Cleanup Coalition, Brown, Georgia-Pacific, Weyerhaeuser, the City of Kalamazoo and members of Congress, as well as 13 commenters at the Public Meeting, express concern that the net cash to be received by EPA under the proposed Settlement Agreement is insufficient to satisfy the cost of cleanup at the Kalamazoo Site. Certain of these comments suggest that: (1) the Settlement Agreement will somehow dictate a remedy for the Kalamazoo Site that is inadequate; and/or (2) the amount recovered by the United States for the Kalamazoo Site will not be sufficient to implement whatever remedy is selected. These comments do not warrant rejection of the proposed Settlement Agreement. In particular, as explained below, the Kalamazoo commenters fail to take into consideration the significant risk that the United States

---

9 Comments from Ringelberg and Magas simply requested further information concerning the Custodial Trust Trustee. The United States notes again that the proposed Settlement Agreement appoints Le Petomane XXIII, Inc., by and through Jay A. Steinberg, not individually but solely in their representative capacities, as the Environmental Custodial Trustee. Among other things, the Environmental Custodial Trust and the Trustee may, subject to certain limitations, sell, transfer or otherwise dispose of the Transferred Real Properties. See Custodial Trust Agreement at ¶ 2.3.

would recover less for the Kalamazoo Site if the settlement were not to be approved.

The terms and cost of the remedy selected for the Kalamazoo Site will be determined by EPA pursuant to an administrative process independent of the Settlement Agreement. According to applicable federal regulations, remedies are determined pursuant to a three-step administrative process in which members of the public will have an opportunity to participate. See 40 C.F.R. §§ 300.430.[10] To determine a remedy for a site, EPA considers a set of nine criteria set forth in 40 C.F.R. § 300.430(e)(9)(iii).[11] None of these criteria concerns the terms of any settlement reached with a PRP at the contaminated site.

Contrary to suggestions that cleanup of the Kalamazoo Site has been derailed, EPA is committed to a cleanup of the Kalamazoo Site that is protective of human health and the

---

10 The three steps are as follows. First, either the PRP or EPA conducts a study and prepares a report called a remedial investigation and feasibility study ("RI/FS"), which determines the extent of contamination at a particular site or operable unit and the alternatives available to remediate the site. 40 C.F.R. § 300.430(a), (d), (e) (detailing purpose and content of RI/FS). Second, the PRP or EPA uses the findings from the RI/FS to evaluate nine criteria relied upon to develop a proposed remedy for a particular hazardous waste site. See 40 C.F.R. §§ 300.430(a)(2), (e)(9)(iii), (f)(1)(i). The proposed remedy will be made available to the public in a proposed plan, for review and comment. 40 C.F.R. § 300.430(f)(1)(ii). In the third and final step, EPA reviews and responds to comments received from the public concerning the proposed remedy, and consults with the affected state and other agencies where appropriate, before making a final decision. Id. The remedy selected by EPA is documented in a Record of Decision ("ROD"), which is also made available to the public before the commencement of any remedial action. See 40 C.F.R. § 300.430(f)(5), (6).

11 The nine criteria considered when evaluating a proposed remedy include (a) overall protection of human health and the environment; (b) compliance with applicable or relevant and appropriate requirements under federal and state environmental laws; (c) long-term effectiveness and permanence; (d) reduction of toxicity, mobility, or volume through recycling or treatment; (e) short-term effectiveness; (f) ease or difficulty of implementing the remedy; (g) the costs associated with the remedy, including capital costs, annual operation and maintenance costs, and net present value of capital and operation and maintenance costs; (h) state acceptance; and (i) community acceptance. See 40 C.F.R. 300.430(e)(9)(iii).

environment, irrespective of the net cash allotted for the Kalamazoo Site in the proposed Settlement Agreement. To the extent that members of the public are dissatisfied with any proposed remedy ultimately selected by EPA for the Kalamazoo Site, these concerns can be raised during the administrative process after the proposed remedy is presented to the public in a proposed plan. In addition to soliciting public input into site decisions, EPA is required to provide a written response to comments received from the public. EPA has and will continue to keep the public informed of the proposed remedies for the Kalamazoo Site. In short, the proposed Settlement Agreement does not pre-determine the remedy to be selected or implemented for the Kalamazoo Site or restrict the public's important role in the remedy selection process.

To the extent the aforementioned comments – as well as those of KIK and the CPG – challenge the amount of the cash awards and general unsecured claims secured by the United States under the proposed Settlement Agreement, the United States responds that the settlement awards set forth in the proposed Settlement Agreement are fair, reasonable and consistent with environmental law. The purpose of CERCLA is to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts are borne by those responsible for the contamination." Burlington Northern & Santa Fe Ry. Co. v. United States, 129 S.Ct. 1870, 1874 (2009); Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005). The purpose of RCRA is to "reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, 'so as to minimize the present and future threat to human health and the environment.'" Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996) (citing 42 U.S.C. § 6902(b)). The United States has negotiated a

settlement that seeks to further these statutory goals by securing substantial settlement awards in a manner that efficiently and expeditiously resolves the United States' proofs of claim.[12] In so doing, the United States took into account, for every site or facility, the Debtors' bankruptcy; the nature of the United States' claims in the bankruptcy; whether or not the site or facility is debtor-owned; whether the Debtors had outstanding work obligations at the site or facility; the applicable Debtor's equitable share or allocation of fault or liability at a site or facility; litigation risk; and considerations of preserving resources through settlement without protracted litigation.[13]

---

12 The CPG's suggestion that the Settlement Agreement was not the product of candid or balanced settlement negotiations is unfounded. As set forth above, the Settlement Agreement was the product of nine months of intensive arms-length negotiations among experienced counsel. The CPG further argues that the United States may simply be wrong about the Settlement Amount for the Diamond Alkali Site because further investigation may reveal that the Debtors' equitable share is greater than currently known. However, it is not possible to delay resolution of the settlement amount until after investigative work at the various sites in this matter is complete. The United States utilized the best information available at the time to arrive at a settlement amount that is fair, reasonable, consistent with environmental law. The CPG also comments about the potential "orphan share" that might be attributable to the Debtors for the Diamond Alkali Site, appearing to request that when and if EPA enters into a settlement with responsible parties for the Site, EPA will apply the orphan share policy. The orphan share policy, as described in EPA guidance documents, has several components. The particular formula used to determine the orphan share for a given site depends on the nature of the site and the claims being resolved in the settlement (e.g., past costs, future costs, and/or performance of remedial work). These concerns and applicable information will influence how the United States would apply the orphan share policy to potential future settlements related to the Diamond Alkali Site. Assuming that at some future time the United States: (1) enters into settlement discussions with viable PRPs aimed at resolving liability for response costs or obtaining an agreement to perform remedial actions at one or more portions of the Site, and (2) determines that it would be appropriate to apply the orphan share policy in the context of those settlement discussions, only then could the United States be able to properly analyze the relevance of the proposed Settlement Agreement to the calculation of an orphan share.

13 KIK's comment requests descriptions of projected remedies with respect to the Hegeler Zinc Site. This information will be provided to the public by EPA through the administrative remedy selection process. Again, the United States relied upon the best information available

As to comments concerning the adequacy of the settlement amount for the Kalamazoo Site, the approximately $1 billion allowed general unsecured claim is fair and reasonable in that it takes into account the total past and estimated future response costs and natural resources damages with respect to the non-debtor-owned portions of the Site, the Debtor's equitable share or allocation of liability, as well as bankruptcy and litigation risk considerations. Although allowed general unsecured claims against MHLLC, the corporate successor of Allied Paper Corporation, will be paid out at a substantially reduced rate, this is a function of the bankruptcy which applies to all general unsecured creditors of this Debtor. The United States will also be receiving a substantial cash payment of approximately $49.5 million to resolve litigation concerning MHLLC's obligation to comply with pre-petition work orders at non-debtor-owned portions of the Kalamazoo Site, which the Debtors had contended should be paid out as general unsecured claims.[14] In addition, the Debtors must pay more than $53.6 million cash to the Environmental Custodial Trust towards the cleanup and restoration of Kalamzoo OU1, which is owned by a subsidiary of MHLLC. The amount to be transferred to the Environmental Custodial Trust for the cleanup and restoration of Kalamazoo OU1 takes into account estimated response and restoration costs, the fact that MHLLC has limited assets and will be liquidating after

---

concerning estimated future responses, along with numerous other considerations, to arrive at a settlement amount that is fair, reasonable and consistent with environmental law.

14 Contrary to Georgia-Pacific's claims, the United States' position with regard to the dischargeability of injunctive obligations in bankruptcy has been exactly the same in this case and in In re Chemtura Corp., Case No. 10 Civ. 503 (RMB). As a simple review of the United States' motions to withdraw the reference in both cases will indicate, the United States contends that injunctive obligations are unaffected by bankruptcy, not general unsecured claims subject to discharge as debtors in both cases have argued. Unlike in Chemtura, which is still in litigation, the parties in this case have settled the litigation on this issue for a substantial cash payment, not "pennies on the dollar" as Georgia-Pacific alleges.

confirmation of the Debtors' plan, as well as litigation risks, including defending potential motions of MHLLC to abandon Kalamazoo OU1 and/or to determine cleanup costs for Kalamazoo OU1 through an estimation proceeding. Accordingly, the amount of the settlement award allocated to the Kalamazoo Site is a fair and reasonable settlement that is in the interest of the public.

2. Payout of General Unsecured Claims Against MHLLC

Comments of Whitesides, Brown and Spoelstra challenge the propriety of the recovery for general unsecured claims against MHLLC estimated by the Debtors in the Third Amended Disclosure Statement (the "Disclosure Statement"). The Congressional comment also stated that it was "unacceptable" for the United States to receive pennies on the dollar. These comments, however, do not call into question the fairness or reasonableness of the proposed Settlement Agreement.

At or after the petition date, a chapter 11 debtor must file a plan that, among other things, "provides adequate means for the plan's implementation." See 11 U.S.C. §§ 1121(a), 1123(a). The plan must be accompanied by a disclosure statement approved by the Court which contains adequate information for an investor to make an informed judgment about the plan. See 11 U.S.C. § 1125(a)(1). By operation of bankruptcy law, holders of general unsecured claims may be impaired by the limited assets held by a debtor. Therefore, in order to confirm the plan, this Court must determine, inter alia, that each holder of an impaired class of claims will receive an amount "that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 . . . ." 11 U.S.C. § 1129(a)(7)(A)(ii).

Here, the Disclosure Statement contained information concerning the estimated recovery

for holders of general unsecured claims against MHLLC – 0.36 percent– as compared to the estimated recover yielded from a liquidation under Chapter 7 of the Bankruptcy Code – 0.2 percent. See Disclosure Statement 12, Ex. B. To support this estimate, the Debtors provided information concerning MHLLC's available assets and their value, as well as the amount of MHLLC's scheduled claims. Specifically, the Disclosure Statement provides that MHLLC's assets include only $8.5 million in cash, that its net estimated proceeds available for distribution amount to approximately $8.3 million, and that it has approximately $5.3 million in administrative claims and approximately $1.408 billion in general unsecured claims.. The Disclosure Statement, therefore, provides an explanation supporting the Debtors' assertion that MHLLC's payout to holders of general unsecured claims will exceed that yielded from a Chapter 7 liquidation.

None of the comments cite information or evidence explaining why MHLLC should be able to provide a higher percentage payout to its general unsecured claims. Accordingly, the comments provide no basis for the United States to withdraw its consent to the Settlement Agreement.

3. Treatment of Cleanup Costs As General Unsecured General Unsecured Claims

Comments from Whitesides, Harrison, Sandstrom, Brown and Spoelstra assert that cleanup costs for the Kalamazoo Site should not be treated as a general unsecured claim subject to discharge. Specifically, certain commenters have argued that the Debtors should not be allowed to "walk away" from their liability and that this sets a bad precedent for other bankruptcies. However, as a matter of law, the United States' monetary claims for past costs, estimated future response costs, and natural resource damages, with respect to portions of the

Kalamazoo Site that the Debtors do not own (i.e., Kalamazoo OU2 and OU5), are general unsecured claims. See, e.g., In re Chateaugay, 944 F.2d 997, 1005 (2d Cir. 1991). By contrast, estimated future response costs and natural resource damages with respect to Kalamazoo OU1, which is part of the bankruptcy estate that the Debtors have an obligation to maintain, are not general unsecured claims under the Bankruptcy Code. See, e.g., id. at 1009-1010. Consequently, the proposed Settlement Agreement requires the Debtors to contribute cash to the Environmental Custodial Trust for the cleanup and restoration of Kalamzoo OU1. The Debtors are also making a substantial cash payment to the United States under the Settlement Agreement to resolve litigation concerning the dischargeability of injunctive obligations at non-debtor-owned property, which the United States contends are unimpaired by the bankruptcy, but the Debtors assert are general unsecured claims. This cash settlement of approximately $53.6 million strikes an appropriate balance between the two parties' litigation positions.

The United States appreciates the commenters' concerns regarding the tension between environmental law and bankruptcy law, as "the goal of CERCLA – cleaning up toxic waste sites promptly and holding liable those responsible for the pollution – is at odds with the premise of bankruptcy, which is to allow debtors a fresh start by freeing them of liability." In re Combustion Equipment Associates, Inc., 838 F.2d 35, 37 (2d Cir.1988). Notwithstanding the constraints created under the Bankruptcy Code and the applicable case law, however, the United States finds that the proposed Settlement Agreement constitutes a fair and reasonable settlement which aims to balance the competing statutory goals.

4. Lyondell Funding the Cleanup of the Kalamazoo Site

A number of commenters, including the ENA, Urban, EBA, Georgia-Pacific, and 12 attendees of the public meeting, have argued that Debtor Lyondell Chemical Company ("Lyondell"), which has more assets that MHLLC, should be held liable for the cleanup costs associated with the Kalamazoo Site. In particular, Georgia-Pacific asserts in its April 20, 2010, comment that Lyondell is liable as an operator at the Kalamazoo Site on account of the involvement of its personnel in MHLLC's remediation activities at the Site.

The United States asserted claims in the bankruptcy with regard to the Kalamazoo Site against MHLLC. Like the United States, Georgia-Pacific filed a proof of claim for cleanup costs associated with the Kalamazoo Site against MHLLC. As set forth in the United States' proof of claim, MHLLC is the corporate successor to Allied Paper Corporation, which owned and operated a portion of the Site and, during its operation between approximately 1954 and 1985, disposed of PCB-contaminated wastes at the Site. Neither the United States, nor Georgia-Pacific, filed proofs of claim against Lyondell, which acquired an interest in MHLLC during the 1990s, years after the contamination occurred. Given that Georgia-Pacific worked with Lyondell personnel on cleanup work at the Kalamazoo Site for many years, it is puzzling that Georgia-Pacific would wait until after the United States had reached a proposed Settlement Agreement with the Debtors to claim that Lyondell has direct liability at the Site on account of the participation of its personnel in the same cleanup work.

Georgia-Pacific's claim that Lyondell is now a PRP at the Kalamazoo Site does not render the Settlement unfair or unreasonable or otherwise provide a basis for the United States to withdraw its support from the proposed Settlement Agreement. As a threshold matter, even if

proofs of claim had been filed against Lyondell, it is unclear whether the involvement of Lyondell personnel in remediation work would subject Lyondell to direct liability under the authorities cited by Georgia-Pacific. Furthermore, even if Lyondell could be viewed as being liable as an operator at the site, cleanup costs with respect to most of the Kalamazoo Site, which is not debtor-owned, would be treated as a general unsecured claim. Although Lyondell's estimated payout under the Debtors' plan is 16.8 percent, Lyondell would likely argue that its percentage of the liability would be small under these facts. In any event, the more than $100 million in cash that the Debtors are paying under the Settlement Agreement for the Kalamazoo Site is coming not from MHLLC, which has limited assets, but from Lyondell or other reorganizing entities. Thus, the Settlement Agreement does in fact address Lyondell's alleged direct liability at the Kalamazoo Site, and there is no reason to believe that Georgia-Pacific's theory of liability would yield any further recovery beyond what the United States has already secured in the Settlement Agreement.

5. Whether the District Court Should Approve the Settlement

Merchant and Wager contend, incorrectly, that approval of the proposed Settlement Agreement is beyond the powers of this Court. Despite the fact that district courts have "original and exclusive jurisdiction of all cases under title 11," 28 U.S.C. § 1334(a), a district court may "refer[] to the bankruptcy judges for the district" any or all bankruptcy cases. 28 U.S.C. § 157(a). Since 1984, all bankruptcy cases in this district have been referred to the bankruptcy courts. See Standing Order of Referral of Cases to Bankruptcy Court Judges of the District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.). The Judicial Code provides that upon a timely request of a party, a district judge shall withdraw the reference back

from the bankruptcy court to exercise jurisdiction under 28 U.S.C. § 1334 where a bankruptcy proceeding requires substantial and material consideration of "both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d). See, e.g., In re Dana Corp., 379 B.R. 449, 453-54 (S.D.N.Y. 2007). However, unless the District Court finds that a request is timely and that a matter requires substantial and material consideration (and not simply routine application) of federal environmental law, the matter is within the Bankruptcy Court's referred jurisdiction under 28 U.S.C. §§ 1334 and 157(a). Accordingly, numerous bankruptcy courts have approved settlements under environmental law. See In re Chateaugay Corp., 2002 WL 484950, at *2 (S.D.N.Y. 2002) (noting that bankruptcy court approved two settlement agreements between the debtor and EPA). See also In re Eagle Picher Indus., Inc., 197 B.R. 260, 271 (S.D. Ohio 1996), aff'd, 1997 U.S. Dist. LEXIS 15436, No. 1-96-821 (S.D. Ohio July 14, 1997); In re U.E. Systems, Inc., 1992 WL 472113 (Bankr. N.D. Ind. Sept. 28, 1992). Because in this case, as in the above-cited cases, the reference to the Bankruptcy Court has not been withdrawn, this Court has jurisdiction to approve the proposed Settlement Agreement.

6. Whether Approval of the Settlement Agreement Should Be Delayed Until After a Remedy for the Kalamazoo Site Has Been Selected

Contrary to the comments provided by Merchant and Jones, this Court should not delay approval of the proposed Settlement Agreement until EPA selects a remedy for the Kalamazoo Site. The administrative process by which EPA selects a remedy can take months or years to complete. As noted above, nothing in this proposed Settlement Agreement, in particular the amount of money received pursuant to the settlement, will affect the United States' determination of the appropriate remedy for the Kalamazoo Site. Approval of the proposed Settlement

Agreement cannot be delayed by days, let alone months or years. As represented in the Debtors' 9019 Reply Brief, the timing of the April 23 hearing to approve the proposed Settlement Agreement, "in conjunction with the hearing on confirmation of the Debtors' Plan of Reorganization on April 23 is . . . key to the Debtors' ability to close their financing and exit transactions and emergence by the end of the month," as "[t]he Debtors will be subject to significant costs and additional risk if their exit from chapter 11 is delayed even a matter of days." See Debtors' 9019 Reply Brief at ¶ 18. The Debtors also assert that "the longer the Debtors remain in chapter 11, they risk that financing markets could become less favorable, making it more difficult for them to raise exit financing in the future if they are unable to keep the current financing in place as a result of delays in exiting." Id. at ¶ 19. "Finally, there is always the business risk associated with staying in chapter 11 - the longer a company takes to exit from bankruptcy, the longer there is a possibility that something will change (either at the company, in the market, or in the economy as a whole) and make the ability of the company to exit from chapter 11 more difficult than it would have been at an earlier date, or even impossible." Id. Delay in approving this proposed Settlement Agreement therefore may significantly impact the amount of funds available for the Debtors to effectuate the settlement terms agreed upon by the parties, and may result in a lower recovery by the Settling Federal Agencies. In light of these risks associated with delayed approval, the United States respectfully requests this Court to approve the proposed Settlement Agreement at this time.

7. Whether the Bankruptcy Court Should Increase the Settlement Amount After a Remedy Is Selected

A comment from Merchant suggests that this Court should unilaterally increase the settlement amounts set forth in the proposed Settlement Agreement for the Kalamazoo Site after

a remedy is selected. Such action would not only second-guess the results of the arms-length negotiation in which the parties engaged, but also prevent the parties from relying upon the finality of the agreed-upon settlement terms. As discussed earlier, the United States took into account a number of factors while negotiating this settlement, including the uncertainty of the final remedy to be selected at the Kalamazoo Site and the costs that may be associated with that undetermined remedy. Based on these and other considerations, the United States reached an agreement with the Debtors that is fair, reasonable, and furthers the goals of CERCLA.

Moreover, the United States emphasizes again the deference paid to settlements negotiated by the United States. See Cannons Eng'g Corp., 899 F.2d at 84; In re Cuyahoga, 980 F.2d at 118. "The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." Cannons, 899 F.2d at 84. Accordingly, the United States reaffirms its conclusion that the settlement amounts set forth in the proposed Settlement Agreement are fair, reasonable, and consistent with environmental law.

8. Length of the Public Comment Period

Certain commenters requested a period of public comment on the proposed Settlement Agreement longer than 15 days. For example, Georgia-Pacific and Weyerhaeuser contend erroneously that the 15-day public comment period for the Settlement Agreement violates Sections 122(d) and (i) of CERCLA, 42 U.S.C. 9622(d),(i).[15] However, neither CERCLA provision applies to the proposed Settlement Agreement. Section 122 of CERCLA establishes

---

15 The United States notes that Weyerhaeuser previously entered into a Consent Decree with the United States concerning the Kalamazoo Site which provided a public comment period of 15 days. See Exhibit 5 hereto at 93 (relevant excerpt).

public notice and comment procedures for three specific categories of settlements: (1) settlements with potentially responsible parties that will undertake to perform a response action under CERCLA §§ 104 and 106, see CERCLA §§ 122(a)-(f); (2) de minimis settlements of cost recovery claims under CERCLA § 107(a), see CERCLA § 122(g); and (3) administrative settlements by executive agencies of CERCLA § 107(a) cost recovery claims that have not been referred to the Justice Department for further action, see CERCLA § 122(h).

The proposed Settlement Agreement does not fall under any of these settlement categories. Here, the proposed Settlement Agreement does not provide for the performance of a "response action" under CERCLA Section 104, or a "remedial action" under CERCLA Section 106. Instead, the Debtors are contributing cash in settlement of litigation concerning the dischargeability of environmental injunctions under the Bankruptcy Code, and transferring certain properties to a custodial trust. See 42 U.S.C. § 9622(a) (d); United States v. Hercules, Inc., 961 F.2d 796, 799 (8th Cir. 1992) (rejecting application of CERCLA § 122 to a cash cost recovery settlement under CERCLA, and stating: "Subsections (a) through (f) of CERCLA § 122 . . . consistently refer to agreements for actual remedial action as opposed to agreements for the recovery of costs occasioned by environmental damage.").

Section 122(i) of CERCLA – the other statutory provision relied upon by Georgia-Pacific in addition to § 122(d) – is also inapposite. By its terms, Section 122(i) covers only de minimis settlements under Section 122(g) and administrative settlements under Section 122(h). The proposed Settlement Agreement is not a de minimis settlement within the meaning of CERCLA § 122(g), nor does it constitute an "administrative settlement" achieved without the involvement of the Justice Department.

The United States has established public comment periods of 15 days or less in bankruptcy settlements where circumstances warrant. See 69 Fed. Reg. 15900 (Mar. 26, 2004) (20 day comment period for Washington Group International, Inc. settlement); 69 Fed. Reg. 20641 (Apr. 16, 2004) (15-day comment period for GenTek, Inc. settlement); 71 Fed. Reg. 31214 (June 1, 2006) (15-day comment period for W.R. Grace settlement); 71 Fed. Reg. 38660 (July 7, 2006) (14 day comment period for the Eagle-Picher settlement).

Although Georgia-Pacific also suggests that "the United States may be relying on a DOJ policy provision in 28 C.F.R. § 50.7 to set the public comment period at 15 days, this regulation applies to "consent judgments in actions to enjoin discharges of pollutants," and thus is not applicable to the proposed Settlement Agreement. To the extent it applies, though, Section 50.7(c) expressly accords the Justice Department discretion to specify a comment period of less than 30 days in the case of "extraordinary circumstances." As discussed above in Section III.B.6, the Debtors have represented that delaying approval of the proposed Settlement Agreement beyond April 23, 2010, would cause substantial costs to the estate and risks to the Debtors' emergence from bankruptcy. It is for that reason that the United States has not extended the public comment period in response to requests from a number of commenters, nor requested that the Court delay the April 23, 2010 confirmation hearing at which the Court will consider the Settlement Agreement.

In addition to accepting written comments for a period of 15 days, the United States, as noted above, held a public meeting during the comment period in Kalamazoo, Michigan, pursuant to Section 7003(d) of RCRA, 42 U.S.C. § 6973(d). The United States accepted both oral and written comments on the proposed settlement at that meeting. In total, the United States

received 37 written comments and 22 oral comments on the settlement. The United States has fully responded to all of these comments in this brief. Accordingly, the 15-day comment period does not render the proposed Settlement Agreement inappropriate, inadequate or improper.[16]

9. Contribution Protection and Application of CERCLA Section 113(f)(2) Credits

A number of commenters, namely Georgia-Pacific, KIK and the CPG, have contended that the United States has not adequately explained its rationale for affording the Debtors contribution protection and/or argued that the Settlement Agreement somehow prevents non-settling PRPs from receiving credits for the amount of the settlement pursuant to CERCLA Section 113(f)(2).

As discussed above, CERCLA affords contribution protection in order to encourage settlements by providing settling parties finality. See Section II.A, supra. Finality is precisely what the proposed Settlement Agreement provides here. Moreover, the CPG's suggestion that the United States, instead of providing the Debtors with contribution protection, should require the Debtors to pay 100 percent of the cleanup costs for the Diamond Alkali Site, would render settlement impossible, as debtors would have no incentive to settle if they could not thereby

---

16 Georgia-Pacific's complaint that it was not permitted to participate in the settlement negotiation process is inaccurate. Counsel for the United States had multiple meetings and telephone calls with counsel for Georgia-Pacific concerning a potential settlement with the Debtors. Indeed, Georgia-Pacific participated in a settlement meeting between the United States and the Debtors. In any event, the law is clear that non-parties such as Georgia-Pacific have no right to participate in, or be kept aware of, the United States' settlement negotiations with other parties. See, e.g., General Time Corp. v. Bulk Materials, Inc., 826 F. Supp. 471, 477 (M.D. Ga. 1993); United States v. Serafini, 781 F. Supp. 336, 339 (M.D. Pa. 1992). See also United States v. Cannons Eng'g Corp., 889 F.2d 79, 93 (1st Cir. 1990) ("In the CERCLA context, the government is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes.").

avoid joint and several liability.

A number of PRPs have incorrectly argued in their comments that they are somehow unfairly prejudiced by the Debtors' receipt of contribution protection. Specifically, the PRPs contend that it is not clear whether they will receive a credit for the amounts the United States will recover under the Settlement Agreement because EPA retains the discretion to deposit the settlement proceeds in site-specific accounts or the Superfund. Certain PRPs request that the United States specify now precisely where the settlement proceeds will be spent, assuming erroneously that they will not receive a credit unless EPA uses the funds at the portions of the sites where they have liability. One PRP, Weyerhauser, seeks to preserve its right to argue incorrectly that it is entitled to a credit for the full amount of the United States' allowed general unsecured claim, although that claim will be paid out at a substantially reduced rate. None of these comments has merit.

CERCLA Section 113(f)(2) provides that parties who resolve their liability with the United States are entitled to contribution protection, and the potential liability of other non-settling PRPs will be reduced by the amount of the settlement. 42 U.S.C. § 9613(f)(2). Specifically, Section 113(f)(2) states:

> A person who has resolved its liability to the United States or a State in an administratively or judicially approved settlement shall not be liable for contribution for matters addressed in the settlement. Such settlement does not discharge any of the other potentially responsible persons unless its terms so provide, <u>but it reduces the potential liability of the others by the amount of the settlement.</u>

42 U.S.C. § 9613(f)(2) (emphasis added).

Courts have regularly approved CERCLA bankruptcy settlements which provide, for purposes of Section 113(f)(2), that the amount of the settlement is the amount received by the settling governmental parties, not the face value of their claims. See, e.g., Eagle-Picher Indus., 197 B.R. at 271-72. Accordingly, Paragraph 10 of the Settlement Agreement states that PRPs shall receive a credit for the amount of cash the United States recovers for a site:

> With respect to the Allowed General Unsecured Claims set forth in Paragraph 4 for the Settling Federal Agencies . . . only the amount of cash received by such entity (and net cash received upon sale of any non-cash distributions) from the Debtors under this Settlement Agreement for the Allowed General Unsecured Claim for a particular site, and not the total amount of the allowed claim against the Debtors, shall be credited by each such entity to its account for a particular site, which credit shall reduce the liability of non-settling potentially responsible parties for the particular site by the amount of the credit.

Congress has made clear that the United States can pursue non-settlors if settling parties have not made the United States whole, as will frequently be the case where, for example, PRPs file for bankruptcy or have an inability to pay. Section 113(f)(3) of CERCLA plainly contemplates that the United States can pursue non-settlors whenever it obtains "less than complete relief" from settlors. See 42 U.S.C. § 9613(f)(3) ("If the United States . . . has obtained less than complete relief from a person who has resolved its liability to the United States . . . in a[] . . . judicially approved settlement, the United States . . . may bring an action against any person who has not so resolved its liability."). As the legislative history indicates, nonsettling persons "remain potentially liable for the amounts not received by the government through the settlement." See 131 Cong. Rec. 34,646 (Dec. 5, 1985) (remarks of Rep. Glickman incorporating House Judiciary Committee explanations of amendments to CERCLA); H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. 3, at 19 (1985), reprinted in 1986 U.S. Code Cong. & Ad. News 3042

(emphasis added). This also furthers the fundamental Congressional purposes in enacting CERCLA: responsible persons bear the costs for remedying the harmful conditions they created. Cannon's Engineering, 899 F.2d 79, 90-91.

This result is not unfair to PRPs, who already are potentially jointly and severally liable under CERCLA and could be required to pay all of the United States' response costs. While PRPs are losing their right of contribution against Debtors for future costs, such a right of contribution is worth no more than the PRPs' claim in bankruptcy for contribution. The PRPs' general unsecured claims for contribution would be paid out at the same percentage as that of the United States. Conversely, Weyerhaeuser's position is contrary to the public interest and to the interest of most PRPs, because it would provide a severe disincentive against the United States pursuing debtors for CERCLA liabilities where there are other non-bankrupt PRPs.[17]

While EPA retains the right in Paragraph 11 to deposit the funds it receives from the settlement in site-specific accounts or the general Superfund, that will have no impact on PRPs' realization of a credit. PRPs will receive the credit to which they are entitled under CERCLA § 113(f)(2) regardless of where EPA ultimately applies the funds. The commenters have cited no authority that would require EPA to deposit settlement proceeds into particular accounts. Nor have they identified any support for the assertion that settlement funds must be spent at particular

---

17 If whenever the United States entered into a bankruptcy settlement, the United States' claims against other jointly and severally liable parties were reduced by more than the United States actually receives, it would not be in the United States' interest to pursue debtors. The United States would recover significantly more by pursuing fully viable non-debtors that are jointly and severally liable with debtors so that the United States could maximize its recovery without any reduction on account of the bankruptcy. The PRPs would then have the burden of pursuing debtors and would themselves face a significant risk that their claims for future costs would be disallowed as contingent claims for contribution.

areas in order for PRPs to receive § 113(f)(2) credits.[18]

C. The Objections to Debtors' Motion Provides No Legitimate Basis For the United States to Withdraw From the Proposed Settlement Agreement

As described above in Section II.C.3, Georgia-Pacific and Weyerhaeuser filed objections challenging two discrete issues concerning the terms and publication of the proposed Settlement Agreement. However, these meritless objections do not alter the United States' position that the proposed Settlement Agreement is fair, reasonable and in the public's interest.

1. Application of CERCLA Section 113(f)(2) Credits

Weyerhaeuser's objection requests information concerning how the settlement proceeds will be allocated among the operable units within the Kalamazoo Site, claiming, in error, that such information is necessary to determine the amount of the credit it shall receive pursuant to Paragraph 10 of the proposed Settlement Agreement.[19] For the reasons set forth above in Section III.B.9, the Settlement Agreement affords PRPs the credits they are due under CERCLA Section 113(f)(2), and the Settling Federal Agencies' retention of discretion to direct the settlement awards will in no way impact the amount of credits provided to PRPs.

2. Length of Comment Period

Georgia-Pacific objected to the 15-day comment period for the same reasons asserted in Georgia-Pacific's comment. Weyerhaeuser joined in this objection. For the reasons set forth

---

18 In response to KIK's inquiry about why contribution protection runs from the date of the Debtors' chapter 11 petitions, the parties did not consider pre-petition response costs incurred by PRPs in arriving at the settlement amounts reflected in the Settlement Agreement. Accordingly, the parties agreed that the Debtors should not receive contribution protection for such claims.

19 KIK and the CPG made similar assertions in their comments to the Settlement Agreement. See Section II.D.1.r and II.D.1.s, supra.

above in Section III.B.8, the United States has determined that the 15-day comment period does not render the proposed Settlement Agreement inappropriate, inadequate or improper.

III. CONCLUSION

For the reasons stated above, the Court should approve and enter the proposed Settlement Agreement.

Dated: New York, New York
April 22, 2010

PREET BHARARA
United States Attorney for the
Southern District of New York
Attorney for the United States of America

By: */s/ Pierre G. Armand*
PIERRE G. ARMAND
JEANNETTE A. VARGAS
ALICIA SIMMONS
Assistant United States Attorneys
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2724
Facsimile: (212) 637-2730
Email: pierre.armand@usdoj.gov

CERTIFICATE OF SERVICE

I, PIERRE G. ARMAND, an Assistant United States Attorney for the Southern District of New York, hereby certify that on April 22, 2010, I caused a copy of the United States' Memorandum in support of Debtors' Motion Pursuant to Fed. R. Bankr. P. 9019 to Approve the Settlement Agreement Among the Debtors, the Environmental Custodial Trust Trustee, the United States, and Certain State Environmental Agencies (the "Memorandum") to be served upon the following by Federal Express:

Deryck A. Palmer
Cadwalader, Wickersham & Taft LLP
One World Financial Center
New York, NY 10281
Counsel for Debtors

Edward S. Weisfelner, Esq.
Brown Rudnick LLP
Seven Times Square
New York, NY 10036
Counsel for Unsecured Creditors Committee

On April 22, 2010, I further caused the foregoing Memorandum to be served on the remaining parties to these proceedings electronically, through the ECF system.

Dated: New York, New York
April 22, 2010

/s/ Pierre G. Armand
PIERRE G. ARMAND
Assistant United States Attorney