

STATE OF VERMONT

SUPERIOR COURT
Bennington Unit

CIVIL DIVISION
Docket No. 205-7-17 Bncv

State of Vermont,
Plaintiff

v.

Saint-Gobain Performance,
Defendant

ENTRY ORDER RE: MOTION FOR
ENTRY OF CONSENT ORDER

This is an environmental contamination and remediation case under 10 V.S.A. §§ 1283 and 6615 regarding the alleged improper release into the environment of perfluorooctanoic acid (PFOA) by Defendant Saint-Gobain Performance Plastics Corporation. The parties have requested the Court approve their settlement, including a consent order and judgment. The proposed agreement contains nearly 70 pages of provisions, contemplating payment for past expenses incurred by the State, methods for continued payments by the Defendant for the State's costs, and commitments by Defendant to perform remedial work. Provisions included a fund secured by the Defendant to ensure resources would always be available to State. See Consent Order § VIII.

The parties filed pleadings by agreement on July 26, 2017, pursuant to V.R.C.P. 8(g), along with a stipulation of for entry of consent order and the proposed consent order itself. The proposed 68-page consent order also contains numerous and detailed attachments. The Attorney General requested a hold on the case for 30 days to allow public comment. The Court was informed by letter the public comment period was over and none of the comments affected the settlement. No specific motion had been filed by either party at this time.

On September 28, 2017, the Court held a status conference to determine precisely what action was being requested of the Court. Attorneys for the Agency of Natural Resources from the State of Vermont Attorney General's Office as well as the ANR's Office of General Counsel were present, as well as private attorneys for the Defendant. At this hearing, the Court was informed that the proposed consent order should be approved if the order is in the public interest, fair, reasonable, and adequate. Since the case has been filed, there have been no requests to intervene, nor any indication of any public dissatisfaction to the resolution. It was also stated at numerous times that this action would in no way interfere, preclude or affect any of the individual claims by any person or entity.

The instant motion was filed on September 29, 2017 by the State of Vermont and by the Agency of Natural Resources. The court grants the motions and will approve the consent order based upon the information contained in the pleading by agreement and the representations by the Attorney General for the State of Vermont providing a sufficient basis to defer to the Attorney General in determining public good, reasonableness, and fairness.

10 V.S.A. § 6615 is a provision of Vermont's Waste Management Act, a state analogue to the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See *State v. Howe Cleaners, Inc.*, 2010 VT 70, ¶ 61, 188 Vt. 303. The parties agree

that judicial review of consent orders proposed under 10 V.S.A. § 6615 should proceed under similar standards as judicial review of consent orders proposed under CERCLA. See Pl. Motion for Entry of Consent Order at 1–2, 5. “In order to approve a CERCLA consent decree, a district court must conclude that the agreement is procedurally and substantively fair, reasonable, and consistent with CERCLA’s objectives.” *Arizona v. City of Tucson*, 761 F.3d 1005, 1011–12 (9th Cir. 2014) (internal quotations omitted) (citing *U.S. v. Montrose Chemical Corp. of California*, 50 F.3d 741, 748 (9th Cir. 1995)). Generally speaking, federal policy encourages “early settlement between [potentially responsible parties] and environmental regulators.” *Anderson Bros, Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 929–30 (9th Cir. 2013). The Court believes that the merits of federal CERCLA early settlement are equally persuasive at the state level under the Vermont Waste Management Act.

A CERCLA consent decree is reasonable when it provides for an efficacious cleanup, and at the same time adequately compensates the public for the cost of that cleanup. *U.S. v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). Assuming an analogous standard applies here, the proposed consent decree provides for the continuation of currently-underway remediation efforts, memorializes Defendant’s commitment to expand water lines, and flexibly allows the State to bring other actions as necessary if new contamination or other facts come to light. The State is compensated for its remediation efforts to date as well as future remediation efforts, and Defendant’s performance is secured by a financial assurance provision (Consent Order § VIII) as well as a work takeover provision in the event Defendant can no longer perform remediation itself (Consent Order ¶ 60). In light of these specific provisions, as well as the detail and forethought obviously put into the consent order provisions in general, the Court finds that the proposed consent order is reasonable.

Fidelity with the intentions of CERCLA requires consistency with its goals of “accountability, the desirability of an unsullied environment, and promptness of response activities.” *U.S. v. Cannons Engineering Corp*, 899 F.2d 79, 91 (1st Cir. 1990). The Vermont Waste Management Act, CERCLA’s Vermont analogue, summarizes its policy and purpose at 10 V.S.A. § 6601, which reads as follows:

- (a) The developed world continues to pollute the environment and add to the depletion of the world’s resources by burning and burying resources as waste. Furthermore, inefficient and improper methods of managing solid and hazardous waste result in scenic blights, hazards to the public health, cause pollution of air and water resources, increase the numbers of rodents and vectors of disease, have an adverse effect on land values, create public nuisances, and otherwise interfere with proper community life and development.
- (b) The overall problems of solid waste management have become a matter statewide in scope and in concern and necessitate State action through planning, financial, and technical assistance and regulation to reduce the amount of waste generated and to promote environmentally acceptable and economical means of waste management.
- (c) The generators of waste should pay disposal costs that reflect the real costs to society of waste management and disposal...
- (e) It is the purpose of this chapter that the State provide technical and financial leadership to municipalities for the siting of solid waste, management facilities and the implementation of a program for the management and reduction of wastes that over the long term is sustainable, environmentally sound, and economically beneficial, and that encourages innovation and individual responsibility. The Program should give priority to reducing the

wastestream through recycling and through the reduction of nonbiodegradable and hazardous ingredients.

Generally speaking, the statutory scheme for waste management is intended to hold all parties responsible for hazardous materials contamination accountable for the costs associated with its proper clean-up and disposal. *State v. Carroll*, 171 Vt. 395, 399 (2000). Here, Defendant contests liability, and the Court respects that Defendant has not been found to be responsible for the alleged improper release of PFOA at issue. The consent order is consistent with the legislature's stated principle that generators of waste should pay disposal costs that reflect waste management and disposal's real costs in three ways: first, Defendant has agreed to make significant payments and efforts to remediate PFOA contamination here, second, the agreement permits the State to bring further actions for other contaminated areas or for new contamination in the current areas, and third, the consent order does not implicate or in any way diminish the rights and responsibilities of third parties. Accordingly, the Court finds that the proposed consent order is in keeping with the intentions of the Vermont Waste Management Act.

Fairness in the CERCLA settlement context has both procedural and substantive components. *Cannons*, 899 F.2d at 86. To measure procedural fairness, a court ordinarily should look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance. Here, both parties represent to the Court that the negotiation process was fair. The cooperation between the parties and the extent to which they agree on the outcome of their year-long negotiation process is indicated at least in part by their mode of filing this action: the parties came together and collaborated prior to filing, resulting in a relatively rare pleadings by agreement under V.R.C.P. 8(g) rather than a more adversarial vehicle. The parties are both highly sophisticated, and there is no reason to believe there was a disparity in bargaining balance. See *Charles George Trucking*, 34 F.3d at 1088 ("Sophisticated actors know how to protect their own interests, and they are well equipped to evaluate risks and rewards."). There is no reason to believe any party acted not in accordance with good faith. Accordingly, the Court finds that the consent order is procedurally fair.

Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of harm for which it is legally responsible. *Cannons*, 899 F.2d at 87 (citing *Developments in the Law — Toxic Waste Litigation*, 99 Harv.L.Rev. 1458, 1477 (1986)). Here, the agreement has significant provisions for linking Defendant's obligation to pay to the State's incurred remedial costs, as well as dispute resolution provisions in the event there is a disagreement between the parties. The agreement does not profess itself to be a complete reckoning of all possible PFOA acid contamination in the Site, leaving open the possibilities both of other parties being held accountable for harms they cause, and parties and injuries not contemplated the agreement being made whole or remedied in separate actions. The agreement requires that Defendant obtain financial assurances, and that Defendant forfeit those assurances in the event the State is required to take over the work, ensuring it bear the cost of the PCAO contamination contemplated by the order. Because the consent order allows the State and other parties to bring separate actions to recover in the event further contamination is discovered it does nothing to sever the potential connection between Defendant and hypothetical future harm for which it is adjudicated responsible. Accordingly, the Court finds that the consent order is also substantively fair.

Finally, the underlying purpose of each of the above inquiries is to determine whether the consent decree The Attorney General acting on behalf of the people of the State of Vermont submitted the consent order including a multitude of contingencies that would allow the remediation of PFOA contamination in Corrective Action Area I to continue until it is completed, as well as in other areas in the event further PFOA contamination is discovered. See,

e.g. Consent Order § XIV. The fact that there was an opportunity for public comment is of special relevance. During the public comment period, which followed the filing the parties' pleadings by agreement, any member of the public potentially aggrieved by the consent order had an opportunity to voice a concern. Likewise, the documents filed with the Court were publicly available, allowing anyone the chance to review the pleadings, including the settlement. 3. V.S.A. § 159 specifically contemplates the Attorney General making settlement decisions on the basis of the best interests of the State, which must include in some way the public interest. With this specific legislative authorization, it can be presumed that the Attorney General acts on behalf of the public and, in general, in accordance with the public interest. There has been no indication here that this presumption has been rebutted.

In light of the above, the Court finds that the consent order satisfies the requirements of being reasonable, procedurally and substantively fair, consistent with the Vermont Waste Management Act's objectives, and in the public interest.

So Ordered.

Electronically signed on October 02, 2017 at 04:22 PM pursuant to V.R.E.F. 7(d).

A handwritten signature in black ink, appearing to read "W.D. Cohen", is written over a horizontal line.

William D. Cohen
Superior Court Judge