IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
v.	:	Civil Action No. 1:13cv29-SPM-GRJ
BEAZER EAST, INC.,	:	
Defendant.	:	

UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION TO ENTER CONSENT DECREE AND RESPONSE TO COMMENTS

SUMMARY

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (EPA), respectfully submits this Memorandum In Support of its Motion to Enter the Consent Decree lodged with the Court on February 7, 2013. By this Motion, the United States seeks Court approval of a Consent Decree that provides for the remaining cleanup required at the Cabot/Koppers Superfund Site ("Site") located in Gainesville, Florida. In brief, the Consent Decree requires Beazer East to perform remediation of contaminated soils, sediments and groundwater at the Site, all of which protect human health and the environment. The City of Gainesville and the Alachua County Commissioners have submitted comments supporting approval of the Consent Decree.

The proposed Consent Decree resolves all the claims of the United States set forth in the Complaint also filed in this matter on February 7, 2013. Pursuant to the Complaint, the United States sought injunctive relief and recovery of response costs under Sections 106(a) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9606(a) and 9607(a), to remedy the release or threatened release of hazardous substances into the environment at the Cabot/Koppers Superfund Site, located in the City of Gainesville, Alachua County, Florida (the Site). The Settlor under the proposed Consent Decree is a current owner of a portion of the Site at which hazardous substances have been disposed, and also owned and operated a portion of the Site at the time of disposal of hazardous substances. (Complaint at Paragraph 42).

As required by Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and the Department of Justice regulation 28 C.F.R. § 50.7, notice of the proposed settlement was published in the Federal Register on February 13, 2013. See 78 Fed. Reg. 10211. This notice established a thirty-day period for submission of public comments to the Department of Justice. Representatives of the Department of Justice and EPA also conducted a public meeting on February 27, 2013 to allow citizens the opportunity to put their remarks on the record. This meeting was not required by regulation or statute. However, because of past public interest in the Site, the United States provided this additional opportunity for public comment. The United States received 42 comments from individuals; a comment from the City of Gainesville; a comment from the Alachua County Commissioners; and a comment from a local citizen's group (Protect Gainesville Citizens), each of which is included at Exhibit 1 to this Memorandum.[1] The United States carefully considered each of the comments and is herewith responding to each

[1] The comments are arranged by date, with the transcript from the February 27, 2013 public meeting presented first, followed by individual comments. A list of the commenters' names in alphabetical order is also provided.

comment by topic as shown in the outlines included at Exhibit 2 to this Memorandum.

CERCLA requires that all comments received be filed with the Court, and Section 122(d)(2)(B) of CERCLA, 42 U.S.C. § 9622(d)(2)(B), authorizes the Attorney General to withdraw or withhold consent to the proposed judgment if the public comments received disclose facts or considerations which indicate that the proposed judgment is inappropriate, improper, or inadequate. The United States also reserved in the Consent Decree in this case its right to withdraw or withhold its consent if public comments disclosed facts or considerations which indicated that this Consent Decree was inappropriate, improper, or inadequate. See Consent Decree at Section XXXI. Paragraph 113.

None of the comments were found to be a cause for withdrawing the Consent Decree. Several of the comments, including those from the elected representatives in City of Gainesville and the Alachua County Commissioners, as well as a local citizen's group (Protect Gainesville Citizens), while expressing some concerns regarding the remedy, were in favor of entry of the decree and stressed the need to expedite the cleanup.[2] Only a few of the remaining comments even pertained to the consent decree, and most of those comments were in the nature of questions to which EPA has responded in detail in the outlines included at Exhibit 2 to this Memorandum. The large majority of the comments pertained to the nature of the remedy selected and the process of remedy implementation. These topics were the subject of a prior public meeting on the proposed plan for remediation held August 5, 2010. EPA responded to all comments received at that 2010 meeting in the Responsiveness Summary included with the

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[2] The citizens group comment was submitted through Dr. Patricia Cline, a PhD in Environmental Chemistry, who is a technical expert hired by the group using funds from a Technical Assistance Grant (TAG). Section 117(e) of CERCLA provides for TAGs to be used, "to obtain technical assistance in interpreting information with regard to the nature of the hazards, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or removal action at such facility." EPA awarded a TAG to Protect Gainesville Citizens in 2010 pursuant to 40 C.F.R. Subpart M, Section 35.400 et.seq. *See also* Amended ROD at p.12.

Amended Record Of Decision (Amended ROD). The Amended ROD is at Appendix A of the proposed Consent Decree. In fact, EPA has already responded to more than eighty percent of the most recently submitted comments in this subject area as reflected in the Amended ROD, and the Responsiveness Summary. However, the outlines at Exhibit 2 to this Memorandum set forth our responses again.[3] In addition, the United States provides summary responses to the most common comments in this brief at III. B. 2.

Remaining comments pertained to issues which included (1) alleged toxicological health effects of living near the Site; (2) the effect on sale and rental values of homes in the proximity of the Site, and (3) an alleged lack of responsiveness from EPA to comments and questions of the community.[4] In response, the United States notes first that EPA conducted additional indoor sampling to assure the residents that there is no danger associated with living near the Site at this time. (Exhibit 2, Responses Outline, Section II. A.1. pp. 3-4). Second, CERCLA does not provide the United States or the EPA the authority to address the issue of rental or property values in cleanups. (Exhibit 2, Responses Outline, Section IV. B. p.21). And third, EPA has very seriously considered all of the comments and concerns of the public regarding the chosen remedy and has worked closely with a technical stakeholder group consisting of members from the City of Gainesville, the Gainesville Regional Utility, and the Alachua County Environmental Protection Department over the last 6 years to address concerns, as reflected in the 22 separate public outreach and involvement events conducted by EPA. (Exhibit 2, Responses Outline,

[3] For ease of reference there are two outlines setting forth the public comments by topic areas. The first outline entitled : "Cabot/Koppers Superfund Site Public Comments – Outline of Responses" (Responses Outline), provides EPA's response to each comment. The second outline entitled "Cabot/Koppers Superfund Site Public Commenters – Names /Dates" provides the names of each commenter under each topic area and the date of their comments (Commenters Outline).

[4] Some of these comments had not been previously raised during the comment period on the proposed plan and Amended ROD, but have been addressed in the outlines attached as Exhibit 2.

Section IV(K) pp. 24-29). Finally there were comments to which the United States does not respond either because the federal government was not privy to the stated or requested information; the comment did not pertain to the Site, the current remedy or the current consent decree; or they were comments upon which the government takes no position.

After consideration of these comments, the United States believes that the Consent Decree is adequate, reasonable, consistent with the goals of CERCLA, and in the public interest. This Consent Decree will allow a cleanup worth over $50 million to take place at a Site located in a mixed residential and industrial neighborhood, which has been in need of remediation for decades. Therefore, the United States has determined that it should not withdraw or withhold its consent. Accordingly, the United States respectfully moves this Court for entry of the Consent Decree.[5]

DISCUSSION

I. BACKGROUND

A. <u>History of Cabot/Koppers Site</u>

1. <u>Facility Operations and Site Contamination</u>

The Cabot/Koppers Superfund Site encompasses nearly 170 acres in a mixed commercial and residential area in Gainesville, Alachua County, Florida. Koppers Company, Inc. (Koppers) conducted a woodtreating operation (Koppers Facility) on approximately 90 acres in the western portion of the Site from 1954 until 1998, and owned and operated the woodtreating facility at the Site from 1984 until 1988 when Beazer PLC, through its wholly owned subsidiary, BNS

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[5] No evidentiary hearing is required in order to evaluate a consent decree proposed by the United States. *See United States v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("requests for evidentiary hearings are, for the most part, routinely denied — and rightly so — at the consent decree stage in environmental cases"); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 94 (1st Cir. 1990) ("In general, we believe that evidentiary hearings are not required . . .").

Acquisitions, Inc. acquired 90 percent of all the common stock of Koppers Company, Inc. Beazer East, Inc. (Beazer) is the corporate successor in interest to Koppers Company, Inc. Cabot Carbon Corporation operated a pine tar and charcoal generation facility (Cabot Facility), from 1945 until 1966, on approximately 50 acres in the southeast portion of the Site. The 30 acres located in the northeast portion of the Site are undeveloped forest and wetland. (Complaint at Para. 4, 6, 8, 9; Amend ROD pp. 1-3).

The Site has been the subject of several remedial investigations from 1980 up to the present time. The operations at both the Koppers and Cabot Facilities resulted in the disposal of hazardous substances into on-Site soils which are now contaminated with many hazardous substances including: chromated copper arsenic (CCA); pentachlorophenol (PCP); Naphthalene; 2-Methylnaphthalene; 1.1 Biphenyl; Acenaphthene; Fluorene; Phenanthrene; Carbazole; Phenol; 2,4-dimethylphenol; Benzene; Toluene; and Ethylbenzene . (Complaint at Para. 8-11). As a result, contamination by these hazardous substances has been found in the groundwater aquifer (Surficial Aquifer), the confining soils underlying the Surficial Aquifer (Hawthorn Group), and the Upper Floridan Aquifer underlying the confining soils. (Complaint at Para. 17-18). The sediments of nearby Springstead and Hogtown Creeks have also become contaminated. (Complaint at Para. 15, 16).

2. Enforcement and Site Remediation

As described below, EPA has required Beazer and its predecessor and Cabot Koppers to investigate and remediate contamination at the Site throughout the last twenty-five years. In August of 1983, the Site was listed on the National Priorities List promulgated by EPA pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. part 300, App. B. (1990 ROD at p. 1-1 (EPA Site Administrative Record); Amended ROD at p.1). Pursuant to a Consent

Order with EPA, dated October 26, 1988, Koppers Company, Inc. and Cabot Corporation conducted a remedial investigation and feasibility study (RI/FS). The RI/FS confirmed the presence of hazardous substances on the Site specifically in the soil source areas on the Koppers Facility, and in the shallow Surficial Aquifer throughout the Site and in the surface water and sediments in the North Main Street Ditch which borders the Site and collects surface water and Surficial Aquifer groundwater. (1991 Beazer UAO at p. 9- EPA Site Administrative Record).

EPA issued the initial Record of Decision for this Site on September 27, 1990 (1990 ROD) and designated the entire Site as an operable unit (OU-00). (Amended ROD at p. 17). OU-00 addressed the remediation of the surface soil and Surficial Aquifer at both the Cabot portion and the Koppers portion of the Site. The 1990 ROD provided for excavation of contaminated on-site soils from the Koppers facility; bioremediation and/or solidification/stabilization of soils and deposition of treated soils on-site. The remedy also included extraction of contaminated groundwater from the Surficial Aquifer underlying the site, and pretreatment and discharge to the publicly owned treatment works of Gainesville. The remedy also included the construction of a groundwater interceptor trench and lining of the North Main Street Ditch to prevent further leachate discharge to the ditch and to Springstead and Hogtown Creeks. (1990 ROD at pp. 1-50, 1-52-53, 1-57; *See Also* 1991 Beazer UAO at p.11).

In March 1991, EPA issued to Beazer a separate Unilateral Administrative Order (1991 Beazer UAO) which included a Remedial Design/Remedial Action Scope of Work (Appendix 2 of the 1991 Beazer UAO). The Remedial Design/Remedial Action Scope of Work (1991 SOW) for the Cabot/Koppers Site required Beazer and Cabot to work together to construct a groundwater remediation system. EPA divided the Site into two units: the Koppers Facility for which Beazer was responsible; and the Cabot Facility for which Cabot was responsible.

Although the groundwater remediation for the Site was to be treated as two distinct units, Beazer and Cabot coordinated their efforts. (1991 SOW at pp.1-4). Pursuant to the 1991 SOW, Beazer constructed a Surficial Aquifer hydraulic containment system which extracts contaminated groundwater from the Surficial Aquifer underlying the Site, pretreats the groundwater and discharges the groundwater to the publicly owned treatment works of Gainesville. (1991 Beazer UAO at p. 13 and 1991 SOW at pp. 2-4). This was part of the remedy provided under the 1990 ROD. To date, Beazer has treated in excess of 280 million gallons of groundwater. (Amended ROD at p. 7).

Beazer also performed additional site characterization under the 1991 Beazer UAO and 1991 SOW, and found that dense non-aqueous liquids (DNAPLs) were underlying the soils at depths up to twenty-five feet, and the DNAPLs were also a source of contamination for the groundwater and Surficial Aquifer. As a result of these findings, the full scale excavation of contaminated on-site soils from the Koppers facility and the bioremediation and/or solidification/stabilization of soils provided for in the 1990 ROD and 1991 SOW was not implemented, as EPA required Beazer to conduct supplemental remedial investigations to determine the proper remedy as regards the DNAPL contamination. (1994 Beazer UAO at p. 2; 1991 SOW at p. 4.)[6]

In April, 1992, EPA completed a consent decree with Cabot Carbon Corporation (Cabot) under which Cabot agreed to develop the remedial design and implement the remedial action under the 1990 ROD, and the 1991 SOW, for the Cabot portion of the Site (*United States of America v. Cabot Corporation* N.D.Fla. CA # 91-10130) (the 1992 Cabot CD). Pursuant to the 1992 Cabot CD, and the 1991 SOW, Cabot performed a groundwater extraction remedial action

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[6] Beazer has excavated, consolidated and solidified some on-site soils and sediments, but did not perform the full soil remedy under the 1990 ROD. See Responses Outline at Section III(a)(2) p. 14.

which consisted of the removal of contaminated sediments from the on-Site ditches leading to the Hogtown and Springstead Creeks (Creeks); lining the North Main Street Ditch to prevent further leachate discharge to the Creeks; and construction of a groundwater interceptor trench. To date, Cabot has treated in excess of 500 million gallons of groundwater. (Amended ROD at p. 7). Cabot also performed additional soil sampling in the former Cabot lagoon area; and performed additional sampling of the Surficial Aquifer. Finally, Cabot performed the work to safely abandon the Cabot plant supply well and underground tanks at the Cabot Facility. (1992 Cabot CD at pp. 8-9 and 1991 SOW at pp. 1-4).

At the Koppers portion of the Site, the work performed by Beazer under the 1991 Beazer UAO revealed the DNAPL contamination, and other Site conditions that were not contemplated by the 1990 ROD or 1991 Beazer UAO. EPA amended the 1991 Beazer UAO in April 1994 to require Beazer to conduct supplemental remedial investigations and prepare a Supplemental Feasibility Study in 1997 which was revised in 1999. (Beazer 1994 UAO at pp. 2-3; Amended ROD at p. 5). The data gathered during that process, in conjunction with data from two five-year reviews from the Site conducted in 2001 and 2006, were the basis for environmental investigation and interim measures completed through 2010. (Amended ROD at pp. 4-7). EPA determined from the subsequent studies that further remediation was needed of the contaminated soil, sediment, and groundwater on-site and offsite. EPA executed a subsequent Record of Decision amending the 1990 ROD in February of 2011 (the Amended ROD).

3. Amended ROD

The components of the Site wide remedy have been defined under the Amended ROD as six operable units (OUs) for purposes of the remediation. OU-00 has now been superseded by the operable units OU-1 through OU-5 pursuant to the Amended ROD. OU-1 is all remedial

actions related to the former Cabot Facility and remediation of contaminated sediment in Hogtown and Springstead Creeks attributable to the former Cabot Facility. OU-2 is all remedial actions related to soil at the former Koppers Facility and the Surficial Aquifer underlying the former Koppers Facility. OU-3 is all remedial actions in the Hawthorn Group that are taken in response to conditions attributable to the former Koppers or Cabot Facilities, and OU-4 is all remedial actions in the Upper Floridan Aquifer that are taken in response to conditions that are attributable to the former Koppers Facility. OU-5 is remediation of the areal extent of soil and sediment contamination attributable to the former Koppers Facility located offsite of the former Koppers Facility and remediation of contaminated sediment in Hogtown and Springstead Creeks attributable to the former Koppers Facility. (Amended ROD at p. 17).

All remedial actions for OU1 and the portion of OU3 with contaminants attributable to Cabot are being remediated by Cabot under the 1992 Cabot CD. Cabot is remediating all contamination attributable to its operations. OU2, OU4, OU5, and the portion of OU3 attributable to contamination by Beazer, are the only portions of the Site left to be remediated. The Amended ROD addresses these areas and, thus, contains the final remedy for the Site.

The Amended ROD provides for a remedy which includes the following: (A) For on-Site soil: Establishment of an on-Site soil consolidation area that includes a single continuous vertical barrier wall extending 65 feet deep, encircling all four principal contaminant source areas from the land surface to the Hawthorne Group middle clay; Establishment of a low permeability cap/cover over the consolidation area to protect against rain infiltration and contaminant migration; In-Situ biogeochemical stabilization of the former Process Area and South Lagoon source areas within the vertical barrier wall boundaries; In-Situ solidification/stabilization of the former North Lagoon and Drip Track source areas within the

vertical barrier wall boundaries; (B) For on-Site groundwater contamination: Use existing Hawthorn Group monitoring wells as treatment injection points for solutions of peroxide and/or permanganate and continue to monitor the concentration of contaminants to ensure that contamination stays on-Site; (C) For off-Site soil: Excavation of soil that exceeds clean up goals based on current land use and removal of impacted soil to the on-Site soil consolidation area; Institutional controls in the form of a Site property deed restriction to protect accessibility and use of the land; (D) For surface water and sediment in Hogtown and Springstead Creeks: Excavation of contaminated sediment and removal to the on-Site soil consolidation area; Monitored natural attenuation for the surface water; (E) For the upper Floridan Aquifer: Continuation and expansion of the existing groundwater extraction and treatment system, including installation of additional groundwater extraction wells; Continued monitoring and collection of groundwater samples; and institutional controls to prevent extraction of water from the upper Floridan aquifer for potable use. (Amended ROD at pp. 17-19).

4. Response Costs

The United States filed a case in 1993 against Beazer, CSX Transportation Inc. (CSX), and Koppers for recovery of past and future response costs under Sections 106 and 107 of CERCLA incurred by the United States at the Koppers portion of the Site. (*United States v. Koppers Indus., et al.* Case No. 93-10136 N.D.Fla.). In September 1996, the United States, Beazer, CSX and Koppers entered into a Consent Decree (the 1996 Consent Decree Case No. 93-10136, DN56) and lodged that decree in the United States District Court for the Northern District of Florida. Under the 1996 Consent Decree, Beazer is obligated to, has been, and must continue to reimburse EPA's ongoing oversight costs at the Site.

B. The Proposed Consent Decree Terms

The proposed Consent Decree is based upon EPA's Revised Model CERCLA Remedial Design/Remedial Action Consent Decree, which was published at 60 Fed. Reg. 38817 (July 28, 1995). It contains standard terms and procedures found in numerous settlements of Superfund cases nationwide that the United States is a party to as well as site-specific terms unique to the specific facts of this case.

Pursuant to the proposed Consent Decree, Beazer is agreeing to implement all remedy components of the Amended ROD addressing contamination attributable to its operations at the Site, including surrounding neighborhood soils. (Decree at Section V. General Provisions, Paragraph 6). This work will effect a final remedy for the Site as set forth in the Amended ROD. (Amended ROD – Declaration Page 1, and page 117) The remedial action to be performed by Beazer under this Consent Decree is estimated to cost $55,000,000, and is not expected to increase.[7] At this time, all of the past costs (contracts, payroll, travel, and indirects) incurred by the government in connection with the Site have been paid. Beazer is agreeing to pay all of EPA's future costs, including oversight costs currently estimated at $2,767,100. (Decree at Section XVI. Payment of Response Costs, Paragraph 55). Prior to entry of the Decree, the United States will file a motion to terminate the 1996 Consent Decree under which Beazer is currently paying response costs related to the Site. (See Section I. Paragraph p. of Decree). The United States covenants not to sue under CERCLA Sections 106 and 107 relating to the Site subject to

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[7] The initial cost estimate of $63,164,00 for the proposed final remedy was tentative (amount was plus or minus 30 percent) because the actual design and implementation of the remedy will take place after Consent Decree entry. (Amended ROD at Page 132). This estimate was also rough because EPA had yet to fully delineate the area of off-site soil remediation. This area was subsequently determined to be much smaller than previously anticipated. Moreover, EPA had not completed its groundwater sampling to determine the amount of reagent needed to treat the former Process Area and South Lagoon. The refined costs were, again, lower than anticipated. Thus, EPA has revised the estimate cost of the remedial action downward to $55,000,000. Admin. Rec. November 15, 2011, Cost Estimate Remedy for the 2011 ROD Remedy submitted by TetraTech, Inc. *See* Decree at Section XIII, Para.44.

statutory reopeners. (Decree at Section XXI. Covenants By Plaintiff, Paragraph 84). There are no federal claims remaining after the entry of this proposed decree.

C. CERCLA Statutory Framework

Section 106(a) of CERCLA provides in pertinent part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and the environment.

42 U.S.C. § 9606(a). By Executive Order 12580 of January 23, 1987, 52 Fed. Reg. 2923 (Jan. 29, 1987), the President's functions under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), have been delegated to the Administrator of EPA.

Section 107(a) of CERCLA provides in pertinent part:

> (1) the owner and operator of a vessel or a facility,
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> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity and containing such hazardous substances, and
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> (4) any person who accepts or accepted any hazardous substances for transport to sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance,
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> shall be liable for–
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan . . .

42 U.S.C. § 9607(a).

Congress has specifically recognized the importance of entering into negotiations and reaching settlements with potentially responsible parties (PRPs) to allow them to conduct or finance response actions at hazardous waste sites. See Section 122(a) of CERCLA, 42 U.S.C. § 9622(a). Section 122(a) provides as follows:

> ...Whenever practicable and in the public interest, as determined by [EPA Administrator], [EPA] shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

Id.

In CERCLA settlements, the United States may provide a settlor(s) with a covenant not to sue regarding its liability for conditions at a site. See 42 U.S.C. §§ 9622(c), (f), and (g)(2), 42 U.S.C. §§ 9622(c), (f), and (g)(2). Once a settlement is finalized between PRPs and the United States, those PRPs are protected by operation of law from liability "for matters addressed in the settlement" from any other PRP that may seek contribution from the settlors. 42 U.S.C. § 9613(f)(2). Section 113(f)(2) further provides that, "[s]uch settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." In the proposed Decree, the "matters addressed" are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person except for the State of Florida (Consent Decree at Section XXIII. Effect of Settlement; Contribution, Paragraph 97.)

II. STANDARD OF REVIEW APPLICABLE TO CONSENT DECREES

As stated by the Fifth Circuit Court of Appeals: "A Consent Decree is in many respects a contract between the parties thereto. Although the court must approve a consent decree, in so doing it does not inquire into the precise legal rights of the respective parties, but only assures itself that there has been valid consent by the concerned parties and that the terms of the decree are not unlawful, unreasonable, or inequitable." *United States v. City of Jackson, Miss.*, 519 F.2d 1147, 1151 (5th Cir. 1975) (Internal citations omitted). As stated by the United States District Court for the Southern District of Florida, with reference to the above standard, "Applying this standard to the CERCLA context, the Court looks to compliance with CERCLA, the reasonableness of the consent decree, and whether the decree is inadequate to protect public health and the environment. However, this court cannot tinker with the consent decree, and must either accept or reject the terms." *United States v. City of Fort Lauderdale*, 81 F. Supp. 2d 1348, 1350 (S.D. Fla. 1999).

Further, federal courts have long recognized "the strong policy favoring voluntary settlement of litigation." *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001) (citing *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *United States v. Hooker Chem. & Plastics Corp.*, 776 F.2d at 410, 411 (2d Cir. 1985)). "This presumption is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal agency, like the Environmental Protection Agency . . . , which enjoys substantial expertise in the environmental field." *BP Exploration*, 167 F. Supp. 2d at 1050 (citing *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991)); *Hooker*, 776 F.2d at 411; *SEC v. Randolph*, 736 F.2d 525, 529 (9th Cir. 1984); *Kelley v.*

Thomas Solvent Co., 717 F. Supp. 507, 515 (W.D. Mich. 1989)).

III. ARGUMENT

A. THE COURT SHOULD APPROVE THE CONSENT DECREE BECAUSE IT IS IN COMPLIANCE WITH CERCLA; IT IS REASONABLE; AND IT IS ADEQUATE TO PROTECT THE PUBLIC HEALTH AND THE ENVIRONMENT

The United States District Court for the Southern District of Florida in the *City of Fort Lauderdale* case, discussed the element of CERCLA compliance in the context of public participation and cleanup standards. 81 F. Supp.2d at 1351. As previously discussed, EPA has involved the public and technical stakeholder groups throughout the process of deciding on a remedy for this Site. (*Infra*. at 3-4). This process also included a discussion of cleanup standards. Although at least one commenter was requesting higher cleanup levels for neighborhood soil (Exhibit 2, Responses Outline, Section II(F) p. 10), EPA has previously indicated that the chosen site soil cleanup levels are the stringent default State of Florida risk-based correction action levels found in Florida Administrative Code 62-780. *Id*. There are no higher cleanup levels available for the neighborhood soils. *Id.* Thus, under the *City of Fort Lauderdale* test this decree is in compliance with CERCLA.

Moreover, in the general context of compliance with CERCLA, the settlement furthers CERCLA's goal of encouraging voluntary settlements in order to expedite cleanup of Superfund Sites and minimize litigation. See Section 122(a) of CERCLA, 42 U.S.C. § 9622(a). In this case, the United States has worked cooperatively to fashion a resolution of the federal claims that will make Beazer responsible for the cleanup of its portion of the Site, and for the reimbursement of future response costs of the federal government relating to its portion of the Site. The City of Gainesville and the County of Alachua have concurred in this settlement.

The proposed settlement is also reasonable. In *Cannons,* the court set forth several criteria relevant to determining whether a Superfund settlement is "reasonable": (1) the decree's likely efficacy as a vehicle for cleansing the environment; (2) whether the settlement adequately compensates the public for the costs of the response action; and (3) the degree to which the settlement is appropriate in light of the parties' respective legal positions. *Cannons,* 899 F.2d at 89-90 (citing other CERCLA cases). The proposed Consent Decree is reasonable as measured against all three criteria. (1) Beazer has agreed to fully implement the final remedy for its portion of the Site which has been selected by EPA as being protective of human health and the environment; (2) the United States is being compensated for all of its response costs; and (3) Beazer as an owner of its portion of the Site risks strict liability under Section 107(a) (1) of CERCLA, 42 U.S.C. § 9607(a) (1).[8]

The proposed Decree is also adequate to protect the public health and the environment. The public receives the direct benefit of the remedy, and the recovery of costs for the Superfund benefits the public at large because those funds are now available for cleanups at other Sites. The public's interest in minimizing litigation is also served by the settlement. The proposed Consent Decree is, therefore, in the public interest.

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[8] Although not raised in the public comments regarding the extant proposed decree, fairness is another issue often considered by courts in reviewing a CERCLA Consent Decree. *Cannons Eng'g*, 899 F.2d 79, 85 (1st Cir. 1990). In determining whether a settlement is fair, courts look to factors such as "the strength of plaintiffs' case, the good faith efforts of the negotiators, the opinions of counsel, and the possible risks involved in the litigation if the settlement is not approved." *Kelley v. Thomas Solvent Co.*, 717 F. Supp. at 517 (quoting *Hooker Chem. & Plastics Corp.*, 607 F. Supp. 1052, 1057 (W.D.N.Y.) *aff'd* 776 F.2d 410 (2d Cir. 1985)); *United States v. Rohm & Haas Co.*, 721 F. Supp. 666, 680-81 (D.N.J. 1989). The United States has a very strong case against Beazer as an owner and operator of a portion of the Site. Beazer, however, can argue a divisibility defense as regards the contamination on the Cabot Carbon portion of the Site. The negotiations were conducted in manifest good faith, at arms length, between experienced counsel over a one year period of time. Both parties are of the view that this settlement is fair and it avoids the risks involved with complex litigation. If the settlement is not approved, the parties may need to engage in extensive discovery, at least on the issue of divisibility, and perhaps also costs, as well as engage in extensive motions practice and detailed judicial findings of fact and law on the issues of liability and costs. Under all the factors, the proposed settlement is fair.

B. NONE OF THE COMMENTS SHOW THAT THE CONSENT DECREE IS NOT IN COMPLIANCE WITH CERCLA, UNREASONABLE OR NOT ADEQUATE TO PROTECT THE PUBLIC HEALTH AND THE ENVIRONMENT.

The United States received 45 comments, only a few of which pertained to the Consent Decree. Several of the comments, including those from the elected representatives in the City of Gainesville and the Alachua County Commissioners, as well as a local citizen's group (Protect Gainesville Citizens), were in favor of entry of the decree and stressed the need to expedite the cleanup. The large majority of the comments pertained instead to the nature of the remedy selected and the process of remedy implementation. These topics were the subject of a prior public meeting on the proposed plan for remediation held on August 5, 2010. In fact, EPA previously responded to more than eighty percent of the most recently submitted comments in this subject area as reflected in the Amended ROD and attached Responsiveness Summary. However, the outlines at Exhibit 2 to this Memorandum set forth our responses again. None of the comments have been found to be a cause for withdrawing the Consent Decree in this case.

1. Comments Related to the Consent Decree

The one comment received regarding the proposed Consent Decree was from Dr. Patricia Cline, the Technical Advisor for a local citizen's group called "Protect Gainesville Citizens", who urged entry of the Decree stating: "My review of the CD suggests that the process and documents are consistent with CERCLA and Florida environmental laws." (Comment letter dated March 15, 2013). Dr. Cline also stated at the public meeting on February 27, 2013 that, "…we have to get the Consent Decree signed so that we can actually get the documents that have the meat [sic] that we can actually continue the debate and get the remediation going as soon as possible." (Exhibit 1 – February 27th Public Meeting, Transcript p. 92).

A few submitted comments which pertained to the proposed Consent Decree were really questions. One set dealt with the Settlor's obligations if the remedy fails. Under the terms of the Consent Decree, Beazer is responsible for correction of any remedy failure within the scope of the Amended ROD. (Decree at Section VI. Performance Of The Work By Settling Defendant, Paragraph 14). A second set of questions related to the operation of the performance guarantee in Section XIII of the proposed Decree. As per Paragraph 44(d)(2) of the proposed Decree, the Settlor is using its own captive insurance policy known as the P97 Policy to fund the performance guarantee. Lehigh Hanson Inc., the parent corporation of Koppers, funds this policy and maintains $800 million in that policy for environmental remediation costs at Beazer Sites.[9] The remaining Consent Decree questions pertained to the process of community relations and how the community will be updated and informed during the remediation. Each question is specifically addressed in Exhibit 2, Responses Outline, Section I(C) pp. 1-2.

2. Comments On The Remedy Itself

There were numerous adverse comments pertaining to remedy selection and remedy implementation, the most numerous of which pertained to the following three areas: (a) In-home exposure to dioxin through airborne dust; (b) Permanent relocation; and (c) Treatment of the on-site contaminated soils. The time for raising these issues was when EPA published the

[9] Exhibit 2 – Responses Outline at Section I.B – While all terms of the policy and its total value are confidential, Beazer provided the following information from a news release which is attached to the Responses Outline- "News Release dated Friday August 7, 1998, Sedgewick Global Insurance Strategy and Sedgwick Environmental Services placed an $800 million environmental remediation and designated products liability insurance policy (P97) on behalf of [Lehigh] Hanson [Inc.], the parent company of Koppers." The news release explained that, "The [P97] policy covers environmental remediation costs at various Beazer sites related to Koppers Company former operations."

proposed plan for Site remediation and had a meeting on that plan in August of 2010.[10] In fact, these same issues were raised at that time and were addressed in EPA's Responsiveness Summary attached to the Amended ROD. EPA's responses are also included in the Responses Outline attached hereto at Exhibit 2 in Sections II and III with some additional information. The three most prevalent issues are also addressed here for the Court's convenience and to provide assurance to this Court and the affected community that this Consent Decree is reasonable; i.e., the Decree is an effective vehicle for cleansing the environment; and that it is adequate to protect the public health and the environment.

(a) In-Home Exposure to Dioxin Through Airborne Dust

Many commenters are of the view that there are unsafe levels of dioxin in their homes. One basis for this concern was the migration of onsite soils which were transported off site through wind dispersion creating low levels of contamination in the soils of residential yards, well below federal cleanup standards but above State of Florida standards. To address the concern of potentially unsafe dioxin levels, EPA convened a work group in July 2011 consisting of representatives of EPA, the Centers for Disease Control, the Florida Department of Health and the Florida Department of Environmental Protection, and sampled 30 homes – half of them nearby the Site and half of them at 2 miles or greater from the Site. No site related contamination has been found. (Exhibit 2, Responses Outline, Section II(A)(1) pp. 3-4).

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[10] Pursuant to the National Contingency Plan at 40 C.F.R. §300.430 (f)(3)(Community Relations to Support the Selection of Remedy) the only time EPA is required by the regulations to allow the public to comment regarding remedy selection is after the issuance of the proposed plan and prior to execution of the Record of Decision (ROD), with one exception not applicable here. If, after execution of the ROD, EPA chooses a remedial action which fundamentally alters the basic features of the ROD remedy then EPA is required to allow further public comment. 40 C.F.R. §300.435(c)(2)(ii).

The workgroup was careful to review at least three different methods for conducting dioxin sampling including the methodology used by the commenters when they had conducted their own in-home sampling. (Exhibit 2, Responses Outline, Section II(A)(1) p. 4). The workgroup chose a methodology which has been successfully used for decades at other Superfund sites, including wood treating facilities, throughout the United States. The sampling methodology utilized by the commenters, by contrast, included compounds that are not related to the operation of the former Koppers Site and that are known to be included in common household items. *Id*. at p. 4. The sampling results of the EPA and its workgroup indicated that no unacceptable exposures to contaminants were found inside any of the homes. *Id*. at p. 4. Moreover, EPA's experience, as it relates to its 30-year history of remediating wood-treater hazardous waste sites, is that typically there are no unacceptable exposures created in living spaces located nearby former wood-treating sites. *Id*. at p. 4.

With regard to the low levels of contamination in the soils of residential yards, as part of the remedial action, residential yards with contamination concentrations above the Florida soil cleanup levels will be removed and replaced with clean soils. (Exhibit 2, Responses Outline, Section II(A)(1) p. 4). Moreover, contaminated soils found on the former Koppers Facility will be remediated to prevent any further soil dispersion, thereby eliminating any routes of exposure to residents of any site contamination. *Id*. at p.4.

As both Craig Lowe, the Mayor of the City of Gainesville (the City), and the Alachua County Board of County Commissioners (the County) point out in their comments, EPA has not identified a significant concern about the levels of dioxins. (Letter from the City at page 2; Letter from the County at page 3; Letters dated March 12, 2013). Moreover, the United States Department of Health and Human Services, Agency for Toxic Substances and Disease Registry

and the Florida Department of Health have also issued a preliminary health review determining that the levels of dioxins inside homes do not pose an imminent health threat to the community near the Site. (Report on-line at www.doh.state.fl.us/chdalachua/). However, both the City and the County are concerned that future health consultations from the Florida Department of Health may indicate a significant long term health risk. Therefore, both the City and the County requested and urged EPA to re-evaluate this issue as part of the 5 year review process. (Letter from the City at pages 2-3; Letter from the County at page 3; Letters dated March 12, 2013). EPA agrees and will re-evaluate the issue of indoor dust contamination at the time of the five year review of the remedy. (Exhibit 2, Responses Outline, Section II(A)(4) p. 5).

With regard to the clean up of residential soils, both the City and the County state as follows: "We believe that expeditious clean-up of this contaminated soil will have a major impact on relieving resident concerns about indoor dust contamination in the neighborhood. We urge EPA to take all appropriate actions to make sure this critical remediation task is given the highest priority in the schedule for remediation activities planned for this site." (Letter from the City at page 2; Letter from the County at page 2- Letters dated March 12, 2013). In fact, Beazer is remediating the neighborhood soils prior to the other remedial components. (Exhibit 2, Responses Outline, Section II(A)(1) p. 4).

(b) Permanent Relocation.

Eighteen of the Forty-Four commenters, including the City and the County, expressed concern that EPA did not provide an option for permanent relocation to residents living nearby the Site whose properties have been impacted by contamination. When this concern was raised previously, EPA advised in its responsiveness summary that the preference is to address the risks posed by contamination using well-designed methods of cleanup which allow people to remain

safely in their homes and businesses. (Responsiveness Summary at pp. 167-68; Responses Outline, Section II(B) p. 5).

The option of permanent relocation is rarely used (only at 1 site out of 244 Superfund sites in Region 4) and only if one of four situations exist: (1) Where structures cannot be decontaminated, or (2) have to be destroyed because they interfere with the cleanup, or (3) if there are unreasonable use restrictions associated with the cleanup, or (4) if the remedy includes a temporary relocation expected to last longer than one year). (Responsiveness Summary at pp. 167-68; Exhibit 2, Responses Outline, Section II(B) pp. 5-6). None of the situations exist here. Moreover, residents surrounding the Site are not located on a direct source area or a highly contaminated groundwater plume. Based on low concentrations of contaminants in surface soil at surrounding residences and the practical remedial alternatives that exist for preventing exposure to these soils, relocation is not warranted. (Responsiveness Summary at p. 168; Exhibit 2, Responses Outline, Section II(B) p. 6).

EPA has routinely conducted cleanups in the State of Florida and throughout the United States that include the residential soil remedy chosen in the Amended ROD. The remedy is simple from an engineering perspective in that it involves removing up to two feet of top soil from an affected property and replacing it with clean fill, reseeding the yard, and reinstalling any landscaping that had to be removed from the yard to remove the soil. After the soil removal, in most instances there will be no use restrictions required for the yards as there is now clean fill in the yard. It is expected that the yard cleanups would take significantly less than one year based on the number of parcels believed to be affected and the simple implementation approach needed to complete the soil remediation. (Exhibit 2, Responses Outline, Section II(B) p. 6).

(c) Treatment of On-Site Contaminated Soils

Some of the commenters want all contaminated soils removed from the Site because of a concern that leaving the contaminated soils on-site (in-situ remediation) would allow the contamination to migrate further down into the Floridan Aquifer and possibly contaminate the drinking water. (Exhibit 2, Commenter's Outline, Section II(C)(1) page 3). Under the selected remedy, Beazer is placing a continuous vertical barrier wall extending 65 feet deep around all four principal contaminant source areas (the consolidation area) as well as a low permeability cap over the consolidation area. Beazer is also utilizing biogeochemical stabilization and in-situ solidification/stabilization in the consolidation area to keep the contaminated soil from migrating. Beazer is also placing two feet of soil over the entire Site outside of the consolidation area to address any remaining low levels of contamination in the soil. (Amended ROD at pp. 17-19).

EPA selected this final remedy for onsite soil contamination after taking into account the nine statutory criteria for evaluation of remedial alternatives that are required under Section 121 of CERCLA (i.e., overall protection of human health and the environment; compliance with applicable or relevant and appropriate requirements; long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; implementability; cost; and state and community acceptance). (Responsiveness Summary at pp. 75-77; Exhibit 2, Responses Outline, Section II(C)(1) pp. 7-8).

Applying the nine CERCLA criteria for evaluating remedial options, the in-situ remedy chosen by EPA is preferable to removing all contaminated soils. With this remedy, there is less short term risk of public exposure to Site contaminants. Similarly, the long term risk-reduction benefits associated with EPA's selected remedy do not differ significantly from the risk-

reduction benefits associated with excavation. This is because there is little risk that the contaminated soil and sediments at the Site, once solidified and encased in a subterranean wall descending 65 feet below land-surface to the top the Middle Hawthorne Aquifer, will be able to leach further contamination into the groundwater. (Exhibit 2, Responses Outline, Section II(C)(1) p. 8).

Moreover, since Beazer instituted the groundwater pump and treat system in 1995, and expanded it in 2010, there has been no off-site migration of contaminants. Beazer will continue that groundwater pump and treat system under the proposed decree. (Exhibit 2, Responses Outline, Section II(C)(1) p. 8).

There was also a concern raised about the possible re-disposal of soil pollutants off-site when the Site is redeveloped. However, the United States is requiring institutional controls in Section IX and Appendix D of the proposed Consent Decree under which no such re-disposal in an unsafe manner can take place. (Exhibit 2, Responses Outline, Section II(C)(1) p. 8). There was also a concern from some residents that their remediated yards may be recontaminated if a neighbor chose not to have his/her yard remediated, but just opted for institutional controls. Due to the relatively low levels of contamination in the residential yards in the area surrounding the Site, it is improbable that any individual yard would constitute a source of contamination that would significantly impact other properties. The highest offsite level is 60 parts per trillion dioxin TEQ, which is much lower than the contaminant levels observed on the Site, itself. (Exhibit 2, Responses Outline, Section III(a)(3)(b) p. 15).

The City and the County, both of which were concerned about all three of the issues discussed above, ultimately concluded as follows:

> "It is critical that the remedial design and remedial actions be initiated
> as soon as possible in order to protect the water supply, public health, and the

environment of our community."

Letter from the City at page 4; Letter from the County at page 4- Letters dated March 12, 2013).

"It is imperative that the remediation begin as soon as possible to protect our community's drinking water, protect public health and the environment, and allow restoration of the site and surrounding neighborhoods."
City of Gainesville – 3/12/13 Alachua County Commissioners – 03/12/13

(Letter from the City at page 1; Letter from the County at page 1- Letters dated March 12, 2013).

Entry of the proposed Consent Decree is supported by the City of Gainesville and the County of Alachua. The comments by individuals opposed to entry deal mainly with technical issues that have been addressed by EPA during the remedy selection process. As shown herein, these comments do not change the United State's view that the Decree should be entered by the Court. The proposed Consent Decree is not only appropriate, proper, and adequate, it also complies with CERCLA, and is reasonable and protective of the public health, and the environment.

CONCLUSION

For the foregoing reasons, the United States respectfully move to enter the proposed Consent Decree as a final judgment in this case.

For the United States of America

Date: June 28, 2013

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