UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK VICINAGE

UNITED STATES OF AMERICA

Plaintiff,

v.

ALDEN LEEDS, INC., *et al.*,

Defendants.

Hon. Madeline Cox Arleo
Hon. Magistrate Leda D. Wettre

Civil Action No. 2:22-cv-07326

REPLY OF INTERVENOR PASSAIC VALLEY SEWERAGE COMMISSIONERS IN SUPPORT OF UNITED STATES OF AMERICA'S MOTION TO ENTER CONSENT DECREE

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Intervenor Passaic Valley Sewerage Commissioners ("PVSC") hereby submits this reply brief in support of the United States of America's Motion to Enter Consent Decree ("CD") (ECF No. 288). Recognizing that the Court will receive comprehensive reply briefs from other parties in support of the CD, this brief primarily (1) focuses on particularly egregious mischaracterizations made by Intervenor Occidental Chemical Corporation ("OxyChem") in its response to the United States' CD motion, and (2) addresses the misguided effort by Intervenors Nokia of America Corporation ("Nokia") and Pharmacia LLC ("Pharmacia") to air grievances in their response briefs that are irrelevant to the legal questions currently before the Court.

I. NEITHER PVSC NOR THE PUBLIC ARE "HARMED BY THE PROPOSED CONSENT DECREE."

OxyChem argues that the CD "undermines the public interest," stating that "[n]earby municipalities and their taxpayers are clearly harmed by the proposed settlement." (ECF No. 309, PageID 11028). As a public entity with 48 taxpayer-funded municipal members, PVSC is far better equipped to speak to public interests than OxyChem—the company engaged in a scorched earth campaign to deflect its lion share of responsibility onto others (including public entities).

As PVSC explained in its response brief (ECF No. 206), the CD is fair, reasonable, and consistent with the principles of CERCLA. From a public interest standpoint (which as OxyChem notes, is relevant to whether the CD is consistent

with CERCLA principles), the public has been clamoring for the Lower Passaic River to be remediated for 40 years. Contentious litigation and other disputes among PRPs have extended the delay. But now, the CD covering a large swath of Potentially Responsible Parties ("PRPs") that is pending would—among other things—obtain a monetary premium for taxpayers, reduce liability for remaining PRPs, and enable the United States to focus its limited enforcement resources on the private parties primarily responsible for contamination. Failure of this consent decree would not be a win for the public, but instead a win for the party that has benefited most from the status quo of infighting and inaction: OxyChem. That's why it is sparing no expense trying to derail it.

Contrary to OxyChem's suggestion, nothing in PVSC's public comment on the CD said otherwise. In that comment, PVSC acknowledged that the lodged consent decree *on its face* was fair, reasonable, and consistent with the purposes of CERCLA. (ECF No. 288-16). The concern PVSC expressed was focused on the United States' settlement strategy to put the lodged consent decree first in line ahead of a consent decree with PVSC and its municipal members, thereby exposing the public entities to excessive joint and several liability risk under operation of CERCLA. *Id*. at PageID 4761. PVSC viewed this risk as excessive given the public entities' limited resources and their tenuous connection to the hazardous substances at-issue—including the fact they never actually generated the substances, but only

operated sewer infrastructure through which contaminants generated and discharged by corporate parties allegedly migrated to the Passaic River. So, PVSC encouraged the United States to exercise its settlement discretion differently by moving for Court approval of a public entity consent decree concurrently with the CD currently before the Court. *Id*. at PageID 4762.

That did not happen, but the procedural posture has since changed. Now, the Court must decide a strictly legal question: does the CD meet the legal standard for approval. That answer is yes, even if PVSC's first choice would have been for a public entity consent decree to have been presented to the Court alongside this one.[1]

II. OXYCHEM WAGED AN AGGRESSIVE CAMPAIGN TO SOLICIT AND INFLUENCE PUBLIC COMMENTS.

In arguing that the CD "undermines the public interest," OxyChem points to the public comments submitted on the lodged CD, noting that many more comments opposed the CD than supported it. (ECF No. 309, PageID 11028).[2] As an initial matter, the United States modified the CD based on those public comments. (ECF 288-1, Page ID 3149).

[1] PVSC is currently negotiating with the United States public entity resolution terms and trusts the United States will recognize that public interests will be best served by finalizing and lodging a public entity consent decree as soon as possible.
[2] OxyChem mistated the number of comments that "oppose" the settlement, as seven out of the seventy-seven it cited as being in opposition neither objected nor endorsed. *See* Ex. A.

Just as important, a closer look at these public comments shows there is much more to the story. By way of background, around the time of the public comment period, OxyChem was engaged in a massive campaign to influence public opinion on the CD. This included OxyChem's lobbying firm—GTB Partners—seeking meetings with PVSC and its municipal members, which raised ethical concerns given OxyChem and the public entities were litigation adversaries in *21st Century Fox* over the exact same contamination at issue in the CD, and OxyChem's lobbyists were not contacting the public entities through legal counsel. OxyChem's campaign also included OxyChem running full page ads in the Washington Post (Ex. B) and maintaining a website called "Passaic River Clean-Up" (Ex. C)[3]—both of which contained inaccurate and irresponsible statements (e.g., stating that the deal "will delay the river's cleanup even further," which is patently false, and stating that EPA is "taking New Jersey residents to the cleaners," even though the agency is obviously comprised of well-intentioned public servants trying to advance cleanup of the Lower Passaic River). At the same time, PVSC was informed by one of its municipal members that it was approached by a lobbying firm that offered to provide the municipality an initial draft of a public comment opposing the CD.

Not surprisingly, the public comments submitted in opposition contained striking similarities. They routinely used the same phrases, such as "off the hook,"

[3] *Available at* https://www.passaicrivercleanup.com/.

"accountable," "wrong message," and often were structured similarly by starting with an opening paragraph "applauding" EPA on its efforts, but going on to say the settlement "falls short" by not making the settling parties "pay their fair share." *See* Ex. D. Some public comments were actually *identical* despite being submitted by different commentors. *See* Exs. E & F. Another comment—submitted by email—had a subject line that simply showed the URL for OxyChem's website (PassaicRiverCleanup.com). Ex. G.

In sum, OxyChem exerted enormous influence on the public comment process using means that were unconventional and sometimes ethically dubious. Its campaign should not distort the Court's analysis of whether the CD serves the public interest.

III. NY/NJ BAYKEEPER'S PUBLIC COMMENT IN SUPPORT OF THE CD MERITS SPECIAL ATTENTION.

NY/NJ Baykeeper ("Baykeeper") is an independent non-profit whose mission is to "protect, preserve and restore the ecological integrity and productivity of the NY-NJ Harbor Estuary," which includes the Lower Passaic River. Ex. H.[4] The organization was founded in 1989, just a few years after the Lower Passaic River became a Superfund site in 1984 as a result of OxyChem's dioxin releases. Exs. I,

[4] *Available at* https://www.nynjbaykeeper.org/about-us.

J.[5] Baykeeper submitted a public comment in support of the lodged CD that is compelling and warrants special attention given the credibility of the organization. Ex. K.

As noted in its comment, the organization "has been engaged with the clean-up of the Passaic River (and other Superfund and contaminated site clean-ups) for 30 years and serves as Co-Chair of the Passaic River Community Advisory Group . . . ." *Id*. at 2. Its "singular goal is for a safe, remediated Passaic River to be returned to the communities along it, and one that is achieved without financially burdening the communities along its banks or subjecting the public to further harm to human health and the environment." *Id*.

Baykeeper took the unequivocal position that "it has every reason to trust and support EPAs settlement agreements with each of these eighty-five PRPs," noting that the settling parties are "paying their share." *Id.* at 1-2. The comment recognizes that the settling parties "have chosen to settle (rather than delay)," unlike "some PRPs [that] seek to delay paying their allocated share." *Id*. In Baykeepers' view, the CD "will help move the work along . . . ." *Id.* at 1.

In short, Baykeepers' pure public interest motivations are verifiable and beyond reproach, and no public commenter has more intimate familiarity with the

[5] *Available at* https://www.nynjbaykeeper.org/history; https://www.cerc.usgs.gov/orda_docs/CaseDetails?ID=127.

impact of the Lower Passaic River's contamination on surrounding communities. It's extremely telling that when such a credible organization is asked to comment on the CD, the positions are polar opposite to what OxyChem says.

IV. OXYCHEM'S CRITIQUE OF THE ALLOCATOR'S TREATMENT OF DIOXIN-LIKE PCB IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING.

Oxychem argues that the Allocation Report's risk calculations are "unsupportable" because they are inconsistent with EPA's OU2 risk assessment and ROD, in that they "ignore the sizable, independent risk posed by dioxin-like PCBs . . . ." (ECF No. 309, PageID: 11013). This is incorrect.

A. What the Allocator and EPA actually did.

The Allocation Report is entirely consistent with EPA's OU2 risk assessments and ROD. In those comprehensive technical evaluations, EPA recognized that there were two well-established, rational approaches for calculating PCB risk. *See* Ex. L, Baker Decl., ¶ 8. The first was referred to as the "Total PCBs" calculation, which designated all PCBs (encompassing both dioxin-like and non-dioxin-like PCBs) as "high-risk and persistence," using an upper bound (highest potency) factor to estimate cancer risk for them. *See id*. The second method performed separate risk calculations for dioxin-like vs. non-dioxin-like PCBs using alternative assumptions and data, and then summed the two risk values to obtain a single risk value for all PCBs. *See id*. In essence, both methods are designed to estimate total risk from all

PCBs (including dioxin-like PCBs), and in turn the total PCB risk relative to the risk for other contaminates of concern (COCs) for the Site. The difference is the data and math used to get there. Ultimately, after running the calculations for both methods, EPA used the "Total PCBs" calculation to estimate the contribution of PCB risk relative to other COCs. *Id.* at ¶ 8-9. Given the Allocation's faithful reliance to the EPA risks assessments and ROD, that method fed through to the risk values used in the Allocation. *See id.*

The following analogy illustrates how EPA considered the two PCB risk methods. Assume that scientists are tasked with estimating the nutrient needs for a fruit orchard consisting of 50% apple trees and 50% pear trees. They then identify two scientifically valid methods for estimating these needs. The first method—like EPA's Total PCBs calculation—is based on the data at the orchard-level from other orchards with a similar 50/50 split between apple and pear trees. The second method—like separate risk calculations for dioxin-like and non-dioxin-like PCBs—is based on two distinct sets of data: one based purely on apple trees and the other based purely on pear trees, which can be averaged to estimate nutrient needs for an orchard split 50/50 between the two types of fruit. Both methods are rational, and illustrate that using the orchard-level method includes full consideration of apple and pear trees in such a combined orchard, just like the "Total PCBs" method used by

EPA and the Allocator fully considered dioxin-like PCB risks within a mixed area of contamination also involving non-dioxin-like PCB risks.

One should recognize that it's infeasible to develop PCB risk values that reflect actual risk at the site with anything close to 100% certainty, and each method has limitations. *See id.* at ¶ 11. For example, using the dioxin-like vs. non-dioxin-like PCB method would have suffered from the shortcoming that the composition of the PCB mixtures are simply not known for much of the PCB data available to the Allocator, requiring an additional assumption that would have introduced unknown error. *Id*. at ¶ 10. Conversely, the "Total PCBs" method used by the Allocator applies a conservative upper bound (highest potency) cancer risk factor to the mass of all PCBs (including non-dioxin-like PCBs), *id.* at ¶ 12, which PVSC views as overestimating overall PCB risk, and which effectively reduced OxyChem's allocation share.

What ultimately matters is that a rational methodology is used based on sound scientific principles and the best available data, which is what happened here. *See id.* at ¶ 8. In fact, EPA actually went further, by performing calculations under two methods—"Total PCBs" and the dioxin-like vs. non-dioxin-like PCB method—to be able to offer a comparison of the two prior to selecting one for the final risk values in the OU2 ROD (which was subject to a public comment process).

B. OxyChem's misunderstanding.

OxyChem's fundamental mistake is not realizing that the "Total PCBs" method used in EPA's OU2 ROD (and in turn, the Allocation) did actually consider all forms of PCBs, including dioxin-like congeners. *See id.* at ¶ 13. Put differently, OxyChem is correct that the Allocator did not use the separate risk values listed in the OU2 risk assessments and ROD that were labeled "dioxin-like PCBs." But the reason isn't because dioxin-like PCBs were ignored. Rather, it's because the method where separate risk values were provided for dioxin-like and non-dioxin-like PCBs was ultimately presented for illustrative purposes only, alongside the equally rational but different "Total PCBs" method that was ultimately used, under which a single PCB risk value was calculated for all types of PCBs, including dioxin-like PCBs. *See id.* at ¶ 8. This mistake unravels OxyChem's entire critique of how dioxin-like PCBs were handled in the Allocation.[6]

As for OxyChem's accusation that "the government can assert Batson's profound errors should not matter only by *repeating* them," (ECF No. 309, PageID: 11017) (emphasis in original), the United States did no such thing.[7] OxyChem

[6] Even if OxyChem's preferred PCB risk method was applied, OxyChem fails to recognize that it would only impact cancer risk, and the impact on overall PCB risk would be diluted after combining cancer risk with non-cancer risk and ecological risks. *See id.* at ¶ 12.

[7] Ironically, Oxychem's own calculations contain a math error by commingling risk data for fish and crabs. *Id.* at ¶ 14.

cherry-picked summary language from EPA describing the risks posed by dioxins and dioxin-like PCBs, which is not uncommon for communicating risks present at a contaminated site to the public. *See id.* at 13. But the reality is that neither EPA nor the Allocator ever conflated or combined true dioxin and dioxin-like PCBs in the actual risk assessments or relative risk values.

V. THE COURT SHOULD DISREGARD NOKIA'S AND PHARMACIA'S RESPONSE BRIEFS BECAUSE THEY ARE IRRELEVANT TO THE COURT'S DECISION ON WHETHER TO ENTER THE CD.

In their response briefs, Nokia and Pharmacia do not oppose entry of the CD. *See* ECF No. 307, 308. Instead, they express frustration that EPA is not negotiating a consent decree with them that is similar to the CD currently before the Court, and ask the Court to compel EPA to negotiate a similar consent decree.

PVSC takes no position as to whether EPA should be exercising its settlement discretion with Nokia and Pharmacia differently. But one thing is clear: this is not the time nor place to be airing such grievances. The public comment period has passed. Now, the Court must decide the United States' motion to enter the CD, applying the legal standard of whether the CD is fair, reasonable, and consistent with the principles of CERCLA. Nokia's and Pharmacia's briefs do not even pretend to speak to that issue.

Some of Nokia's and Pharmacia's grumblings refer to PVSC. Specifically, they claim that PCBs generated by industrial parties were released from PVSC's

sewer system on the way to PVSC's wastewater treatment plant. In turn, they claim that PVSC's exclusion from the Batson allocation inflated their allocated share of PCB contributions, and ultimately contributed to them not being included in the CD.

Nokia's and Pharmacia's characterizations regarding PVSC are factually and scientifically unsound. However, to avoid compounding the distraction they already created, PVSC will not be rebutting Nokia and Pharmacia on these issues unless and until the issues are properly before the Court. Rather, PVSC will reserve all rights on those issues at this time.

VI. CONCLUSION

For the reasons above, and those stated in PVSC's response brief (ECF No. 306), PVSC supports approval of the CD as fair, reasonable, and consistent with the principles of CERCLA.

Respectfully submitted,

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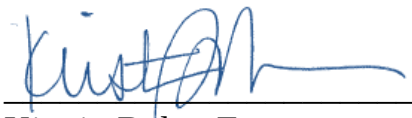
Dated: May 8, 2024

CERTIFICATION OF SERVICE

I hereby certify that on May 8, 2024, a true and correct copy of Passaic Valley Sewerage Commissioners' Reply in Support of United States of America's Motion to Enter Consent Decree was served upon all counsel of record via the Electronic Court Filing system, where it is available for viewing.



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