

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CIVIL ACTION
 :
 v. :
 :
 ATOFINA CHEMICALS, INC. : No. 01-7087

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

August 5, 2002

The United States, filing a complaint against Atofina Chemicals, Inc. ("Atofina") on behalf of the Environmental Protection Agency ("EPA"), alleged Atofina failed to comply with multiple environmental statutes and regulations at six of its chemical processing facilities. The parties having negotiated a settlement, the United States published a proposed consent decree for public comment for thirty days as required by 28 C.F.R. § 50.7. A non-party, the LeMoyne Community Advisory Panel ("LCAP"), a community group allegedly affected by Atofina's wrongdoing, made the only objections. The United States now moves for entry of the consent decree.

The United States' Motion for Entry of a Consent Decree requires the court to evaluate if the proposed settlement fairly, adequately, and reasonably serves the public interest. The court has concerns about that portion of the consent decree objected to by LCAP, the "Supplemental Environmental Project" provision, but

the Motion of the United States for the Entry of the Consent Decree will be granted.

I. Factual and Procedural Background

A. Allegations Against Atofina

Atofina Chemicals, a Pennsylvania corporation, operates chemical product manufacturing facilities ("facilities") at: Axis, Alabama; Calvert City and Carrollton, Kentucky; Beaumont and Houston, Texas; and Piffard, New York. The United States brought fifteen claims against Atofina for alleged polluting activities at these facilities. The allegations of the complaint are summarized below.

1. Axis, Alabama

The Axis, Alabama facility violated provisions of the Clean Air Act, 42 U.S.C. §§ 7409 - 7411, by constructing, and modifying, the 200/300 process units, the thioglycolic acid process unit, Dryer A, Dryer B, and the Metablen I and Metablen II impact modifier units. Atofina failed to undergo the review and permit application process necessary when a company creates a major new source of pollution or makes a "major modification" to an old source.

The facility also violated the Clean Water Act, 33 U.S.C. § 1311, by discharging pollutants into the following waters of the United States: Mobile River; Cold Creek; and a tributary of Cold

Creek. These discharges exceeded the limits provided by NPDES Permit No. AL0042447.

2. Calvert City, Kentucky

The Calvert City, Kentucky facility violated provisions of the Clean Air Act by modifying its Kynar Monomer and Polymer plants and constructing a F134a plant. The company failed to receive the pre-approval necessary when a company creates a major new source of pollution or makes a "major modification" to an old source. The facility also failed to apply for a permit to "de-bottleneck" its K098 plant to increase production without performing the required analysis of the best available control technology at this location. See 40 C.F.R. § 52.21(j)(3).

This same facility violated the Clean Water Act by discharging pollutants into waters of the United States in levels exceeding those permitted by KPDES Permit No. KY003603, by modifying how it tested those discharges, and by failing to notify the State Department of Environmental Protection or the EPA of these discharges and modifications.

The Calvert City facility also violated the Emergency Planning and Community Right to Know Act ("EPCRA"), 42 U.S.C. § 11045(c)(1), by failing to report, or underreporting, on a chemical release form, releases of chlorine, carbon tetrachloride, and CFC-11 into the environment.

3. Carrollton, Kentucky

The Carrollton, Kentucky facility violated the Clean Water Act by discharging pollutants into the waters of the United States in levels exceeding those permitted by KPDES Permit No. KY0001431.

The facility also violated the Resource Conservation and Recovery Act ("RCRA"), as amended by the Hazardous and Solid Waste Amendments Act of 1984, 42 U.S.C. §§ 6922-25, by failing to install necessary equipment to control emissions from a hazardous waste stored in Treatment Tank TK-52-20 ("the Hydropulper").

Finally, the facility violated EPCRA by failing to report correctly the amounts of methyl-ethyl ketone, xylene, and chloromethane released into the environment from 1994 to 1997.

4. Beaumont, Texas

The Beaumont, Texas facility's Hydrogen Sulfide ("H₂S") plant had a permit, obtained in 1989, to vent pollution through a flare when an incinerator built for that purpose was not in service. The permit limited the flare's use to specified periods. In 1995, the flare's use exceeded the time limitation, in violation of Section 113(b) of the Clean Air Act.

The facility's second violation occurred in 1995, when it released visible emissions for a time exceeding that permitted by the applicable federal regulations. See 40 C.F.R. § 60.18(c)(1), (f).

The facility's third violation also occurred in 1995 when it had "39 upsets, 21 shutdowns, and 13 other events," in violation of the Clean Air Act. See 40 C.F.R. § 60.11(d).

5. Houston, Texas

The Houston, Texas facility discharged pollutants into the Houston Ship Channel (United States waters), in levels exceeding those permitted by NPDES Permit No. TX0007064, in violation of the Clean Water Act. The facility also discharged more than 3.9 million gallons of untreated storm water and wastewater into United States waters; it lacked adequate retention capacity in times of heavy rain.

6. Piffard, New York

The Piffard, New York facility violated EPCRA by failing to report correctly the amounts of methyl-ethyl ketone released into the environment from 1994 to 1996, and t-butyle alcohol released from 1994 to 1995.

The government demanded that Atofina comply with the applicable regulations immediately, and that the court assess civil penalties.

B. The Consent Decree

Atofina, without admitting liability for any of the charges of the Complaint, assents to the following injunctive, monetary, and supplemental relief.

1. Injunctive Relief

a. Clean Air Act Violations

Atofina will: (1) operate its existing thermal oxidizer to destroy 95% of volatile organic compounds from the Calvert City Monomer Plant; (2) use an existing incinerator to destroy 95% of ozone depleting substance emissions from its Calvert City K-98 Plant; (3) install a thermal oxidizer to destroy 95% of organic compound emissions from the Carrollton facility; and (4) install a "Nitrogen Demand System" at the Carrollton facility.

b. Clean Water Act Violations

Atofina will: (1) install and operate continuous pH monitoring equipment at its Calvert City and Carrollton facilities, and report results to the permitting authority; (2) apply for and obtain modification of permits to reflect the new system of continuous monitoring; and (3) construct stormwater facilities and develop a management plan for the Houston facility.

c. RCRA violations

Atofina will install a fixed cover and slide gate system on the Hydropulper at the Carrollton facility.

2. Civil Penalties

Atofina will pay a fine in the amount of \$1,900,000 to the United States Treasury.

3. Supplemental Environmental Project

The United States, as part of the consent decree, allowed Atofina to pay less in civil penalties and perform a Supplemental Environmental Project ("SEP") instead.

The proposed SEP would beautify and remediate a mile-long section of the Montlimar Canal, in Mobile, Alabama, at a total cost of \$300,000. The Montlimar Canal is a tributary of the Dog River that in turn flows into the Mobile Bay. Pollutants from Atofina's Axis, Alabama facility also flow into Mobile Bay, through different waterways.

The SEP will have the following characteristics:

- a. A "greenway" will be built along the Canal. This greenway will reduce erosion into the Canal;
- b. A hiking, biking, and exercise trail will transverse the western bank of the Canal;
- c. The trail will include educational stations focusing on the relationship between water quality in the City of Mobile and water quality in the Mobile Bay;
- c. The remediation project, when combined with a series of "Greenway Parks" along the Canal, will double the acreage of existing parks in the City of Mobile.

4. Continuing Jurisdiction

The consent decree provides that the court will retain jurisdiction over this action to enforce the terms of the settlement and to adjudicate disputes between the parties about

its provisions. Disputes will be brought to court only after the parties engage in private negotiation. The court's continuing jurisdiction will terminate: (1) on the United States' motion; or (2) on Atofina's motion, if the company certifies that it has complied with the decree and the United States does not object within sixty (60) days.

C. Objections to the Consent Decree

LCAP provided the only comment during the public notice period. LCAP's objections, fairly read, state: (1) no part of the SEP will be performed in the LeMoyne Community where Atofina's Axis plan is located; (2) no member of LCAP was advised of the proposed SEP while it was being developed; (3) alternative projects in LeMoyne County would directly help those harmed by Atofina's wrongdoing.

LCAP renewed its objections with the court: an evidentiary hearing was held to consider LCAP's claims that it had no notice of the consent decree and the local community would derive no benefit from the SEP. Later its representative asserted that the SEP would replace projects already funded by the United States or Alabama's Department of Environmental Management.

D. Supplemental Evidence about the SEP

The government presented no evidence at the evidentiary hearing, but requested leave to file supplemental evidence about the genesis and impact of the SEP. The government, Atofina, and

LCAP have all filed materials about the genesis and value of the SEP.

1. The Government's Supplemental Submissions

The United States submitted the affidavit of Thomas C. Welborn, Chief of the Wetlands, Coastal, and Watersheds Branch of the Water Management Division of the EPA, Region 4. EPA Region 4 is responsible for administering Federal environmental programs in Alabama. Welborn avers that he is knowledgeable of federal funds directed toward remediation efforts in the Mobile Bay Estuary program, and no federal or state "monies have been used, or are planned to be used, for restoration of the Montlimar Canal or associated projects."

2. Atofina's Supplemental Submissions

Atofina submitted the affidavit of Treena Piznar, one of its employees. Piznar was a Senior Environmental Engineer at Atofina's Axis plant when the SEP was being developed. She avers that she obtained a list of possible SEP projects from the Alabama Department of Environmental Management.

3. LCAP's Supplemental Submissions

LCAP submitted evidence to establish that the Montlimar Canal will soon receive, or has received, Federal and/or State environmental funding. For example, LCAP has submitted a National Estuary Program map listing the Mobile Bay as an area receiving Federal funds for study and environmental repair.

II. Discussion

A. Standard of Review

A consent decree must fairly, adequately, and reasonably resolve the pending controversy, while remaining consistent with the public interest. See Walsh v. Great Atlantic & Pacific Tea Co., Inc. 726 F.2d 956, 965 (3d Cir. 1983). District courts have discretion either to accept, or to reject, a proposed consent decree: the court may not modify the settlement into one which it "considers as ideal." United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990); see also United States v. Southeastern Pennsylvania Transp. Auth. ["SEPTA"], 235 F.3d 817, 822 (3d Cir. 2000) (describing limited discretion of district court); Officers for Justice v. Civil Service Com., 688 F.2d 615, 630 (9th Cir. 1982) (lack of power to modify).

In the context of environmental litigation brought by the United States, the court owes "deference ... to [the] EPA's expertise and to the law's policy of encouraging settlement." SEPTA, 257 F.3d at 822. Because the EPA is invested with special expertise about environmental torts, and uses that expertise in crafting judicious compromises, settlements approved by the EPA are especially favored. See United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990).

In determining if the settlement is fair and adequate, an important consideration is its application to the purposes of the environmental statutes forming the basis of the complaint.¹

The rationale for deference to the EPA's judgment about the costs of Atofina's alleged wrongdoing, and the societal benefits accruing from the consent decree, is clear. The EPA, unlike the court, is well-placed to evaluate fairly the social harms caused by events like the H₂S flare. The EPA, unlike the court, has considered the complex benefits flowing to society from requiring 95% destruction of polluting gases at Atofina's facilities, building a stormwater drainage facility in Texas, and constructing a fixed cover and slide gate system on the Hydropulper in Kentucky. The EPA is best placed to balance

¹In passing the Clean Water Act, Congress undertook the "restoration and maintenance of chemical, physical and biological integrity of Nation's waters. 33 U.S.C. § 1251. To achieve these objectives, Congress hoped to: (1) immediately end discharge of pollutants into waters of the United States; and (2) provide federal funds to construct waste treatment facilities. Id. at 1251(a). The Clean Air Act's goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare ..." 42 U.S.C. § 7401(b)(1). RCRA's primary policy goal is to "reduce[] or eliminate[] the creation of hazardous waste] as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. 6902(b). ECPRA, as its title suggests, aids emergency preparedness by enabling authorities to know the nature and location of hazardous chemicals in their jurisdictions. See U.S. v. BP Exploration & Oil Co., 167 F.Supp.2d 1045, 1054 (N.D. Ind. 2001).

environmental harms and benefits against each other: the court's discretion to re-weigh the balance is necessarily limited.

B. Injunctive and Civil Relief

Although this consent decree does not provide for injunctive relief from each and every alleged violation of the environmental laws (for example, ECPRA and RCRA violations apparently are remedied only through civil fines), the EPA's judgment that the civil penalties and remedial provisions fairly, adequately, and reasonably resolve this action is unchallenged.²

By this settlement, the United States avoids prolonged litigation with its attendant risks. Atofina's willingness to settle the claims against it makes it more likely that it will comply, in good faith, with the terms of the decree. Those terms create new waste management facilities, and new air pollution control mechanisms, and penalize the Atofina almost two million dollars. The court finds that the consent decree's substantive components serve the policies of the allegedly violated environmental statutes and the public interest.

C. The SEP

The EPA's Supplemental Environmental Projects Policy (the "Policy") provides an Agency guideline for allowing an environmentally beneficial project to mitigate civil penalties

²LCAP raises no objection to the substantive components of the consent decree.

due the United States for environmental violations. See Final EPA Supplemental Environmental Projects Policy, 63 Fed. Reg. 24796 (1998); see also EPA, Supplemental Environmental Projects (last modified Jun. 19, 2002) <<http://www.epa.gov/Compliance/planning/data/multimedia/seps/sep.html>>. The Policy was intended to clarify the EPA's authority to negotiate SEPs in the response to claims by the General Accounting Office, and the Department of Justice, that the EPA's use of SEPs exceeded its delegated authority. See Quan B. Nghiem, Comment, Using Equitable Discretion to Impose Supplemental Environmental Projects Under the Clean Water Act, 24 B. C. Env'tl. Aff. L. Rev. 561, 570-71 (1997); Kathleen Boergers, The EPA's Supplemental Environmental Projects Policy, 26 Ecology L.Q. 777, 784 (1999). The United States has not provided the court with clear Congressional authorization for the EPA's agreeing to the SEP in this consent decree.³ But, in the absence of any challenge by LCAP, the court declines to rule on this issue sua sponte.

The Policy imposes several conditions that a SEP must meet. Of those conditions, three are relevant here. A proposed SEP: (1) must have an "adequate nexus" with the underlying violation,

³The sole exception is the Clean Air Act, which provides that up to \$100,000 of any civil penalty may be used in "beneficial mitigation projects." 42 U.S.C. § 7604(g) (1994). The SEP in this consent decree remedies violations of the Clean Water Act.

63 Fed. Reg. 24796, at 24798;⁴ (2) can not duplicate remedies the defendant is not otherwise obligated to perform, *id.*; and (3) should be informed by local community input, *id.* at 24803.

The Policy states that it is "not intended for use by EPA, defendants, respondents, courts or administrative law judges at a hearing or in trial." *Id.* at 24797. The decision to accept an SEP is "purely within EPA's discretion," *id.*, and the Policy itself may be modified "with the advance approval of Headquarters." *Id.* The Policy "does not create any rights, duties, or obligations, implied or otherwise, in any third parties." *Id.* at 24804. In light of this language, it is unclear if violations of the Policy require, or allow, a court to reject a consent decree.

Even if the court had the clear authority to enforce the terms of the EPA policy, it lacks the power to modify the consent

⁴An "adequate nexus" exists if:

- a. The project is designed to reduce the likelihood that similar violations will occur in the future; or
- b. The project reduces the adverse impact to public health or the environment to which the violation at issue contributes; or
- c. The project reduces the overall risk to public health or the environment potentially affected by the violation at issue. 63 Fed. Reg. 24796, at 24798.

One factor in nexus inquiry is geographic proximity: an adequate nexus is easier to establish if the proposed SEP is within 50 miles of the location of the violations. The SEP may have a sufficient nexus even if it addresses a different pollutant in a different medium.

decree by striking the SEP and leaving the rest of the agreement intact. Given the choice of rejecting or accepting the agreement as written, the public interest is served by entering the consent decree.

The proposed SEP does have an adequate nexus with the violations at the Axis, Alabama factory. The Policy provides that the geographic nexus requirement is 50 miles: LCAP admits that Mobile is within 50 miles of Axis. Runoff from both the Axis facility and the Canal flows into the Mobile Bay Estuary system, part of the waters of the United States. By improving the drainage of the Canal, the United States asserts the Mobile Bay system will be remediated. This conclusion is entitled to substantial deference.

The proposed SEP does not replicate existing programs, or clearly supplant future programs. The affidavit submitted by the United States is dispositive. Although the court has carefully considered LCAP's submissions, there is no evidence of record that the Mobile Bay study area has given, or plans to give, funding to the Montlimar Canal Greenway project, as LCAP contends.

However, the government did not comply with its own recommended policy of community notification and participation in project design. Rather than conduct a public meeting, the United States delegated to Atofina, the allegedly polluting entity, the

task of locating and designing an appropriate project. Atofina, in turn, contacted the Alabama State Department of Environmental Management, which recommended the Montlimar Canal project (among others). This process failed to follow the EPA's procedure for community notification: there is no evidence the EPA held a public meeting with the local community, as the policy recommends. See 63 Fed. Reg. 24796, at 24803. Instead, Atofina alone solicited some limited organizational input: this delegation undermined the "primary role" the EPA should play in managing community involvement. Cf. Draft EPA Guidance for Community Involvement in Supplemental Environmental Projects, 65 Fed. Reg. at 40639 (2000). The SEP was not designed with the benefit of prior comment by citizen groups of the local community most directly affected by Atofina's polluting activities; that community had the ability to comment only after the SEP had been negotiated and defined.⁵ By not requiring the alleged polluter to comply with the community notification policy, the EPA potentially allowed Atofina to give priority to irrelevant political considerations while ignoring local groups who should have been at least consulted in the SEP's design. The United States reviewed the SEP before agreeing to it, but if it had

⁵The proposed SEP is supported by other "community" groups like the Alabama Rivers Alliance, the Mobile Tricentennial Board, and the Hearin-Chandler Family YMCA. There is no evidence that these groups participated in the design of the SEP.

conditioned approval on compliance with its community notification policy, it might have clarified whether the proposed SEP serves public, rather than private, ends.

The court understands the frustration of the citizens' group in Axis, Alabama. It may have been adversely affected by Atofina's violation of the environmental laws. But that frustration does not permit rejecting a consent decree that, as a whole, serves the public interest.

III. Conclusion

The consent decree fairly, adequately, and reasonably resolves this action. As a whole, it serves the public interest. The Motion for Entry of a Consent Decree will be granted.

