

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

GOVERNMENT OF GUAM,	)	
	)	
Plaintiff and Counter-Defendant,	)	
	)	
v.	)	Case No. 1:17-cv-02487-JMC
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant and Counter-Claimant and	)	
	)	

**MEMORANDUM OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF UNOPPOSED MOTION FOR APPROVAL**  
**AND ENTRY OF PARTIAL CONSENT DECREE**

**I. INTRODUCTION**

The Government of Guam (“Guam”) respectfully requests that the Court enter the proposed partial consent decree (“Proposed Consent Decree”) attached hereto as Exhibit 1, which resolves claims between Guam and the United States (the “Parties”) for costs that Guam incurred in connection with the release or threatened release of hazardous substances at the Ordot dump in Guam (“Ordot Dump”), through August 10, 2022. The Parties are hopeful that claims for costs incurred after August 10, 2022 (“Future Costs”) may be resolved in ongoing mediation based in part on information that is being collected at this time. The United States does not oppose this motion.

In March 2017, Guam filed suit against the United States pursuant to 42 U.S.C. §§ 9607(a) and 9613(f) of the Comprehensive, Environmental Response, Compensation and Liability Act (“CERCLA”) seeking, in the alternative, recovery of, or contribution toward, costs incurred to close the Ordot Dump. *See* ECF 1. In May 2019, Guam filed an amended complaint (“Complaint”) again asserting claims against the United States pursuant to 42 U.S.C. §§ 9607(a) and 9613(f).

ECF 7. In the Complaint, Guam alleges that the United States established, owned, and operated the Ordot Dump from before World War II until the 1970s, and that the United States disposed of significant amounts of hazardous substances in the Ordot Dump. *Id.* Guam claims that the United States therefore is jointly and severally liable for Guam's response costs incurred pursuant to a 2004 Clean Water Act Consent Decree requiring Guam to close the Ordot Dump and stop discharges of leachate into the Lonfit River. ECF 7.

The United States also counterclaimed against Guam pursuant to 42 U.S.C. §§ 9607(a) and 113(f), seeking CERCLA costs that the United States incurred related to the Ordot Dump. ECF 39. The United States alleged that Guam owned and operated the Ordot Dump from 1950 to 2011, and therefore is liable for a share of the costs incurred by the United States and can only recover the United States' equitable share of the costs that Guam incurred. ECF 7.

Following lengthy negotiations that included one remote and two in-person mediation sessions,<sup>1</sup> the Parties agreed on a Proposed Consent Decree that would resolve Guam's claims for costs incurred through August 10, 2022. The Proposed Consent Decree is fair, adequate, reasonable, and appropriate, and has been formally approved by senior officials of both Parties with authority to settle such claims. It is procedurally fair and is the product of arms-length mediation between sophisticated Parties who are represented by experienced counsel. It also is substantively fair because it requires a \$48.9 million payment from the United State to Guam that reflects a reasonable evaluation of the Parties' comparative litigation risks and fair share of remediation costs. Further, the Proposed Consent Decree is in the public interest because it furthers CERCLA's goals of encouraging settlement and ensuring responsible parties pay a fair share of

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<sup>1</sup> The procedural history of this case also involves prior motions practice and interlocutory appeals to the U.S. Court of Appeals to the Columbia Circuit and the U.S. Supreme Court. This motion discusses only those aspects of the case that are pertinent to entry of the Proposed Consent Decree.

remediation costs, and it will avoid years of unnecessary litigation and expense for the Parties and the Court.

Accordingly, Guam respectfully requests, and the United States does not oppose Guam's request, that the Court grant this motion and enter the Proposed Consent Decree.

## **II. STANDARD OF REVIEW**

To approve the Proposed Consent Decree, this Court must, in its discretion, determine that it is "fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties." *See In re Idaho Conservation League*, 811 F.3d 502, 515 (D.C. Cir. 2016); *see also D.C. v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011); *United States v. Hyundai Motor Co.*, 77 F. Supp. 3d 197, 199 (D.D.C. 2015) (internal quotation marks omitted)). Courts also consider whether a consent decree is in the public interest. *Potomac Elec. Power Co.*, 826 F. Supp. 2d at 237 (internal citation and quotation marks omitted). This Court need not "inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *See In re Idaho Conservation League*, 811 F.3d at 515. And it is not appropriate for a reviewing court "to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and are not unlawful, unreasonable or against public policy." *United States v. Dist. of Columbia*, F. Supp. 42, 47 (D.D.C. 1996).

## **III. THE COURT SHOULD APPROVE THE PROPOSED CONSENT DECREE**

### **A. The Proposed Consent Decree is Fair**

In CERCLA settlements, fairness requires assessing both procedural and substantive components. "To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 86 (1st Cir. 1990). Further, when determining whether the consent

decree is substantively fair, the court must analyze “concepts of corrective justice and accountability.” *Potomac Elec. Power Co.*, 826 F. Supp. 2d at 237.

The Proposed Consent Decree is procedurally fair. The Proposed Consent Decree was the product of a voluntary settlement process and an arms-length negotiation. Both Parties are represented by sophisticated counsel, experienced in handling complex environmental matters. The Parties conducted two in-person mediation sessions with an experienced JAMS mediator, Ms. Linda Singer, and held a technical meeting with the Parties’ representatives and experts. The mediation occurred after years of litigation and investigation by the Parties into the legal and factual bases for their claims and defenses.

The Proposed Consent Decree is also substantively fair. Substantive fairness exists when there is a “reasonable linkage” in the Parties’ evaluation of comparative fault. *Cannons Eng’g*, 899 F.2d at 87. Courts are not required to analyze whether the Parties chose the best method for assessing potential liability and litigation risk and must uphold their evaluation unless it is “arbitrary, capricious, and devoid of a rational basis.” *Id.*

When performing a CERCLA allocation, the trial judge may consider “such equitable factors as the court determines are appropriate.” 42 U.S.C. § 9613(f)(1). A court has “significant discretion” and “broad” authority when performing an allocation analysis. *Lockheed Martin Corp. v. United States*, 833 F.3d 225, 234-35 (D.C. Cir. 2016).

The Parties differ on the amount of recoverable response costs in the case and their relative fair share of those costs pursuant to a CERCLA equitable allocation. Guam’s Complaint claims that response costs will exceed \$160,000,000. ECF 7. Guam contends that the United States created and operated the Ordot Dump until 1970, and that the United States disposed of substantial

amounts of military munitions and other waste there, making the United States liable for a substantial portion of response costs in an equitable allocation. *See id.*

The United States agrees that many of Guam's costs claimed are recoverable pursuant to CERCLA. The United States contends, however, that it never created, owned or operated the Ordot Dump, that only the National Park Service disposed of a *de minimis* quantity of waste there, and that Guam's ownership and operation of the Ordot Dump makes Guam liable for nearly all CERCLA-recoverable response costs. ECF 39.

After thorough settlement negotiations, and in consideration of the relative strengths and weakness of their cases and litigation risks, the Parties believe that the United States' payment of \$48.9 million to Guam and the terms of the Proposed Consent Decree represent a fair and reasonable resolution of the Parties' claims related to the Matters Addressed in that Proposed Consent Decree (i.e., all costs incurred by Guam before August 10, 2022). The Parties agree that \$48.9 million falls within a reasonable range of the United States' potential fair share of Guam's response costs through August 2022 if the case were to be litigated. The Proposed Consent Decree therefore is substantively fair. *See Potomac Elec. Power Co.*, 826 F. Supp. 2d at 238.

**B. The Proposed Consent Decree is in the Public Interest**

The Proposed Consent Decree is in the public interest because it furthers the goals of CERCLA, which was designed to effectuate the prompt clean-up of hazardous waste sites and ensure that responsible parties bear the cost of remediation. *General Elec. Co. v. Jackson*, 610 F.3d 110, 114 (D.C. Cir. 2010); *Jach v. Am. Univ.*, 245 F. Supp. 2d 110, 113 (D.D.C. 2003). Courts also recognize the public and judicial interest in encouraging settlement of CERCLA cases. *See, e.g., Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 915 (9th Cir. 2010); *Assassination Archives Research Center v. C.I.A.*, 48 F. Supp. 2d 1, 14 (D.D.C. 1999).

The Proposed Consent Decree serves the public interest by resolving Guam’s CERCLA claims for costs that it actually incurred through August 10, 2022, through settlement—thereby avoiding years of related litigation and expense. As discussed above, the Parties agree that the payment amount is reasonable. The Proposed Consent Decree therefore also serves the public interest of fairly allocating response costs. Further, there are no other parties in this case, and only Guam and EPA are incurring CERCLA-recoverable response costs with respect to the Ordot Dump. Neither EPA nor Guam has sought contribution from any other parties. Thus, providing contribution protection to the United States based on its payment of a share of Guam’s past costs through August 10, 2022 in the Proposed Consent Decree will not prejudice third parties.

The Parties also anticipate that at least some if not all of the remaining claims in this case will be resolved through one or more additional partial consent decrees negotiated in their ongoing mediation. In the unlikely event that those efforts are not successful, the Proposed Consent Decree nonetheless will have significantly narrowed the scope of the remaining litigation.

**C. The Proposed Consent Decree is Adequate, Reasonable and Appropriate**

“The factors for determining the adequacy, reasonableness and appropriateness of a consent decree focus on the extent to which the decree is confined to the dispute between the parties and whether the decree adequately accomplishes its purported goal.” *Potomac Elec. Power Co.*, 826 F. Supp. 2d at 237 (citing *Envil’ Def. v. Leavitt*, 329 F. Supp. 2d 55, 71 (D.D.C. 2004)). In doing so, a court should not “impose its own judgments as to how it would prosecute and resolve a particular case. *Id.* Instead, “the court must determine whether the proposed consent decree is reasonable from an objective point of view.” *Id.* (internal quotations and citations omitted).

The Proposed Consent Decree clearly is confined to the CERCLA response cost and contribution claims between the Parties. It provides for a \$48.9 million payment from the United States to Guam and resolves federal liability for costs that Guam incurred through August 10,

2022. The Proposed Consent Decree is tailored toward the relief sought in the Complaint. Providing a reasonable payment from the United States to Guam and providing corresponding contribution protection to the United States is adequate, reasonable, and appropriate.

**D. The Proposed Consent Decree Has the Valid Consent of the Parties**

The Proposed Consent Decree has valid consent. The mediation sessions that resulted in the Proposed Consent Decree were attended by counsel for both Parties, including representatives for the Governor of Guam and the Attorney General of Guam, and several federal agencies and branches of the United States' armed forces. Further, prior to execution, the Governor of Guam, Lou Leon Guerrero, through her designated representatives, and Guam's Attorney General, Douglas Moylan, reviewed and approved the Proposed Consent Decree. Similarly, the United States obtained approval from the Associate Attorney General.

**IV. CONCLUSION**

The Proposed Consent Decree is fair, adequate, reasonable, and appropriate under the particular facts, and there has been valid consent by senior officials of the concerned parties with authority to settle the claims at issue. Entry of the Proposed Consent Decree at this time will resolve claims that comprise a significant part of this case, and will enable the United States to expeditiously issue payment to Guam. Accordingly, Guam respectfully requests the Court grant the Unopposed Motion for Entry and approve and enter the Proposed Consent Decree.

Respectfully submitted this 22<sup>nd</sup> day of September 2023.

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***Attorneys for Plaintiff and Counterclaim  
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**CERTIFICATE OF SERVICE**

I hereby certify that, on September 22, 2023, a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Unopposed Motion for Approval and Entry of Partial Consent Decree was filed with the Clerk using the CM/ECF system, which effectuates service upon all parties and attorneys of record.

/s/ *Melissa E. Byroade*  
Melissa E. Byroade