STATE OF VERMONT

SUPERIOR COURT
BENNINGTON UNIT

CIVIL DIVISION
Docket No. 205-7-17 Bncv

STATE OF VERMONT, AGENCY OF NATURAL RESOURCES
Plaintiff,

v.

SAINT-GOBAIN PERFORMANCE PLASTICS CORPORAITON
Defendant.

MOTION FOR ENTRY OF CONSENT ORDER

The State of Vermont, Agency of Natural Resources, by and through Vermont Attorney General Thomas J. Donovan, Jr., hereby moves that the Court approve and enter the *Consent Order and Final Judgment* submitted by the parties on July 26, 2017. On September 28, 2017, the Court held a status conference and requested a motion and guidance on legal standards for entering a consent order. In response to that request, the State respectfully provides the following.

The matter before the Court was brought under Vermont's Waste Management Act, 10 V.S.A. § 6615, and Vermont's Environmental Contingency Fund, 10 V.S.A. § 1283. The Vermont Waste Management Act is a state analog for, and "largely tracks" its federal precursor, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). *State v. Howe Cleaners, Inc.*, 2010 VT 70, ¶ 61, 188 Vt. 303, 9 A.3d 276. Actions brought

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under CERCLA, and by analogy the Vermont Waste Management Act, should be reviewed by the Court with a presumption to favor settlement. *See, e.g., Cuyahoga Equipment Corp. v. United States*, 980 F.2d 110, 119 (2d Cir. 1992) (CERCLA "aimed to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation."). Additionally, courts "ordinarily defer to the agency's expertise and the voluntary agreement of the parties in proposing the settlement." *Id.* at 118.

Similarly, in Vermont courts, stipulated settlements "are commonplace" and "save the judicial system valuable time and money by freeing trial judges to focus on those disputes that litigants are unable to resolve themselves." *Kellner v. Kellner*, 2004 VT 1, ¶ 10, 176 Vt. 571, 844 A.2d 743; *see also Dutch Hill Inn, Inc. v. Patten*, 131 Vt. 187, 192 (1973), 303 A.2d 811, 814 (public policy strongly favors settlement to "encourage compromise between the adverse parties before resorting to the judicial system to resolve disputes").

In reviewing a settlement, the question for a Vermont court is "one of fairness and equity viewed from the perspective of the standards and factors set forth in [the relevant] statutes." *Pouech v. Pouech*, 2006 VT 40, ¶ 23, 180 Vt. 1, 904 A.2d 70. This is consistent with how federal courts review settlements under CERCLA. *See, e.g., United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990) ("Reasonableness, fairness, and fidelity to the statute are . . . the horses which district judges must ride."); *United States v. Akzo Coatings of America, Inc.*, 949 F. 2d 1409, 1426 (6th Cir. 1991) (standard of

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"fairness, reasonableness and consistency with the statute" is the court's "general test for consent decrees"). The underlying purpose of each of these inquiries is to determine whether the consent decree "adequately protects the public interest." *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982).

First, the proposed Consent Order is in the public interest. The Attorney General, pursuant to 3 V.S.A. § 159, has general supervision of matters and actions in favor of the State and may settle such matters and actions as the interests of the State require. Here, the Attorney General has determined that the settlement is in the State's interest and should be approved by the Court because it will: (a) facilitate the prompt remediation and long-term management of groundwater and drinking water in the area identified in the Consent Order as "Corrective Action Area I[1]"; (b) expedite investigation and remediation for the remainder of the Site[2]; and (c) further the goals of the statutory program established in the Vermont Waste Management Act, 10 V.S.A. Chapter 159. *See Stipulation for the Entry of Consent Order* at 3.

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[1] Corrective Action Area I is the area depicted in blue on Appendix B to the Consent Order. *See Consent Order and Final Judgment* at 8; Appendix B.

[2] The Site is defined as "any location in the Town of Bennington, Town of Shaftsbury, or the Village of North Bennington where the release of PFOA associated with former operations at the Northside Drive or Water Street Facilities has come to be located." *See Consent Order and Final Judgment* at 12.

Second, the settlement is fair because the State and Saint-Gobain have agreed on a plan that will "provide for the investigation, design, and implementation of corrective actions in Corrective Action Area I, and for site investigation in Corrective Action Area II[3]" and will also "pay the State's Response Costs" while resolving the State's claims against Saint-Gobain "under 10 V.S.A. §§ 1283 and 6615 with respect to the release of PFOA in Corrective Action Area I." *See Consent Order and Final Judgment* ¶ 6. As the parties represented to the Court during the September 28th status conference, this agreement was negotiated between the parties at arms' length. Moreover, Saint-Gobain disputes its liability, and entering into this settlement allows the parties to proceed with the work provided for under the Consent Order without the costs or delays associated with litigation. Further, as also explained at the status conference, the State engaged in an extensive public outreach process regarding the settlement. And, other than contribution protection for Saint-Gobain, the settlement by its terms is not intended to effect third-party rights. *See Consent Order and Final Judgment* at 56-58.

Third, the settlement is adequate. For example, it will provide clean drinking water to all homes in Corrective Action Area I with PFOA concentrations at or above 20 parts per trillion (ppt); it ensures that all wells in Corrective Action Areal I will be tested, and clean drinking water provided,

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[3] Corrective Action Area II is the area depicted in yellow on Appendix B to the Consent Order. *See Consent Order and Final Judgment* at 8; Appendix B.

until PFOA is at a stable or decreasing trend below 20 ppt; it provides for site investigation in Corrective Action Area II and preserves the State's ability to require corrective actions in Corrective Action Area II going forward; and it reimburses the State for its response costs. *See, e.g., Consent Order and Final Judgment* at 15, 32-35, 49, *Appendix A.*

Finally, the settlement is consistent with Vermont's statutes because the terms of the settlement are within the statutory framework of Vermont's environmental laws, specifically 10 V.S.A. § 1283 and 10 V.S.A. § 6615, which, with respect to a release of hazardous materials, provide for the State to seek reimbursement, investigation, and remediation related to the release. Section 6615 also specifically contemplates "judicially approved settlement[s]." 10 V.S.A. § 6615(*i*) (providing that judicially approved settlement could provide contribution protection).

For the reasons set forth above, the State respectfully requests that the Court enter the Consent Order and Final Judgment Order that has been stipulated to and agreed upon by the parties.

Undersigned counsel has conferred with counsel for Saint-Gobain and Saint-Gobain does not oppose this Motion.

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DATED at Montpelier, Vermont this 29th day of September, 2017.

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