UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK and ALEXANDER B. GRANNIS, as Commissioner of the New York State Department of Environmental Conservation,

Plaintiffs,

-against-

NEXT MILLENNIUM REALTY, LLC; 101 FROST STREET ASSOCIATES, L.P.; 101 FROST STREET CORPORATION; ALAN EIDLER, PAMELA SPIEGEL SANDERS and LISE SPIEGEL WILKS, as co-executors of the Last Wills and Testaments of, and duly authorized administrators of the Estates of, defendants EMILY SPIEGEL and JERRY SPIEGEL; UTILIT MANUFACTURING CO., INC.; NEST EQUITIES, INC.; AUDIE KRANZ; WILBUR KRANZ; ARKWIN INDUSTRIES, INC.; WILLIAM MAGLIO and FRANK JACOBSON, as co-executors of the Last Will and Testament of, and duly authorized administrators of the Estate of, defendant DANIEL BERLIN; THOMAS MALLOY [sic]; TISHCON CORP. a/k/a TISHCON CORPORATION; KAMAL CHOPRA; JOE ELBAZ; C&O REALTY CO.; WILLIAM GROSS; EQUITY SHARE I ASSOCIATES; GRAND MACHINERY, INC. [sic]; PAUL MERANDI; IMC EASTERN CORPORATION, f/k/a IMC MAGNETICS CORP., NMB (USA) INC.; 2632 REALTY CORPORATION; ISLAND TRANSPORTATION CORPORATION; ATLAS GRAPHICS INC.; H.D.P. PRINTING INDUSTRIES CORP.; RICHARD DEGENHARDT; and BAROUH EATON ALLEN CORP.,

Defendants.

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NEXT MILLENNIUM REALTY, LLC, et al.,

Third-Party Plaintiffs,

-against-

ADCHEM CORP., et al.,

Third-Party Defendants,

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FEUERSTEIN, J.

CV-06-1133(SJF)(ARL)

Pending before the Court are the motions of plaintiffs State of New York and Joseph Martens, as Commissioner of the New York State Department of Environmental Conservation ("NYDEC") (collectively, "the State"), to approve (1) a Consent Decree they entered into with (a) defendants (i) Arkwin Industries, Inc., the Estate of Daniel Berlin and Thomas Molloy, i/s/h "Thomas Malloy" (collectively, "the Arkwin defendants"); (ii) Tishcon Corp., a/k/a Tishcon Corporation, Kamal Chopra and Joe Elbaz (collectively, "the Tishcon defendants"); (iii) Equity Share I Associates ("Equity"); (iv) Island Transportation Corp. and 2632 Realty Development Corp. (collectively, "the 299 Main Street defendants"); (v) C&O Realty Co. and William Gross (collectively, "the C&O defendants"); (vi) IMC Eastern Corporation, f/k/a Magnetics Corp., NMB (USA) Inc. ("IMC"); (vii) Grand Machinery Exchange, Inc., s/h/a "Grand Machinery, Inc." ("Grand Machinery"); and (viii) Atlas Graphics, Inc., H.D.P. Printing Industries Corp. and Richard Degenhardt, s/h/a "Richard Degenhart," (collectively, "the Atlas defendants")[1], and (b) third-party defendants (i) GTE Corporation, s/h/a "General Telephone and Electronic Corp.," GTE Operations Support Incorporated, Verizon Communications Inc., also sued as "Verizon Communications, Inc.," and Verizon New York Inc., s/h/a "Verizon New York, Inc.," (collectively, "the GTEOSI defendants"), and Osram Sylvania Inc., f/k/a GTE Sylvania Incorporated, and Sylvania Electric Products, Inc., s/h/a "Sylvania Electric Products Incorporated (collectively, "the Sylvania defendants")[2]; (ii) Vishay Intertechnology, Inc., improperly sued "Individually and as an alleged successor to Vishay General Semiconductor, Inc., General

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[1] The Arkwin defendants, the Tishcon defendants, Equity, the 299 Main Street defendants, the C&O defendants, IMC, Grand Machinery and the Atlas defendants will collectively be referred to as "the Settling Direct Defendants".

[2] The GTEOSI defendants and Sylvania defendants will collectively be referred to as "the GTEOSI/Sylvania defendants."

Semiconductor, Inc., and General Instruments Corporation," Vishay GSI, Inc., individually and as successor to Vishay General Semiconductor Inc., General Semiconductor, Inc. and General Instruments Corporation, Vishay Mic Technology, Inc., n/k/a Vishay Sprague, Inc., improperly sued "individually and as an alleged successor to General Semiconductor, Inc. and General Instruments Corporation," and General Instruments Corporation (collectively, "the Vishay/General Instruments defendants"); and (iii) Sulzer Metco (US) Inc., f/k/a Perkin Elmer, n/k/a Oerlikon Metco (US) Inc. ("Sulzer Metco")[3]; (2) a Supplemental Consent Decree they entered into with third-party defendants Lincoln Processing Corp., Adchem Corp., Northern State Realty Corp., Northern State Realty Co. and Pufahl Realty Corp. (collectively, "the Lincoln Processing defendants"); and (3) a Second Supplemental Consent Decree they entered into with defendants Utility Manufacturing Co., Inc., Nest Equities, Inc., Audie Kranz and Wilbur Kranz (collectively, "the Utility defendants").[4] Only defendants/third-party plaintiffs Next Millennium Realty, LLC, 101 Frost Street Associates, L.P., 101 Frost Street Corporation, the Estate of Emily Spiegel and the Estate of Jerry Spiegel (collectively, "the Frost Street Parties") oppose the State's motions.[5] For the reasons set forth below, the State's motions are granted.

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[3] The GTEOSI/Sylvania defendants, the Vishay/General Instruments defendants and Sulzer Metco will collectively be referred to as "the Settling Upgradient Defendants."

[4] The Settling Direct Defendants, Settling Upgradient Defendants, Lincoln Processing defendants and Utility defendants will collectively be referred to as "the Settling Parties."

[5] The State has not submitted a proposed consent decree with respect to its claims against Barouh Eaton Allen Corp. ("Barouh Eaton"), but that defendant has not opposed the instant motions.

I. Background

A. Factual Background

In 1986, the Nassau County Department of Health ("NCDOH") discovered that the groundwater on the New Cassel Industrial Area ("NCIA"), a one hundred seventy (170)-acre site located in the Town of Hempstead ("the Town"), within the County of Nassau ("the County"), was contaminated with volatile organic compounds ("VOCs"). The NCIA sits on top of a sole source aquifier, i.e., an aquifier that supplies at least fifty percent (50%) of the drinking water consumed in the area overlying it.

In 1988, the NYDEC listed the NCIA as a Class 2 Site, i.e., a site containing hazardous waste that poses "a significant threat to public health or the environment," N.Y. Comp. Code R. & Regs. tit. 6, § 375.2.7(b)(3)(b)(ii), on the State registry of hazardous waste sites.

In 1989, the Town detected VOCs at levels approaching New York State Maximum Contaminant Levels for drinking water, as defined by N.Y. Comp. Codes R. & Regs. tit. 10, § 5-1.1(ap), in two (2) of its water supply wells in the Bowling Green Estates Water District ("the Bowling Green Site"), which is located approximately one thousand five hundred (1,500) feet down-gradient, i.e., in the direction of the flow of groundwater, from the NCIA. In November 1989, Dvirka and Bartilucci ("D&B"), the engineering firm hired by the Town to investigate, confirmed the presence of VOCs in the water and recommended the installation of a granulated activated carbon adsorption system ("GAC") to remove the VOCs.

In the fall of 1990, the Town bought and installed a GAC at the Bowling Green Site. On June 15, 1993, the NCDOH approved the GAC for full operation, and the GAC has remained in operation since that time.

From December 10, 1990 through May 30, 1995, the Town found that rising

concentrations of VOCs had markedly increased the cost of running the GAC system. In May 1995, D&B recommended that an air stripper tower be installed at the Bowling Green Site to supplement the GAC. Construction of the air stripper tower commenced in July 1995 and was completed in 1997, and it has remained in operation since that time.

In 1995, the NYDEC commenced its remedial investigation of the NCIA. Following a public meeting held by the NYDEC and the New York State Department of Health ("NYSDOH") on May 16, 1995, the Town began to suspect that the NCIA was the source of the groundwater contamination. By letter to the NYDEC, dated May 23, 1995, the Town, *inter alia*, (1) requested (a) consideration for funding for treatment under the New York State Superfund Program, and (b) that the NYDEC investigate to determine the identity of the polluters; and (2) declined to seek compensation for the GAC.

Between 1996 and 2000, the NYDEC sampled forty-one (41) groundwater monitoring wells, installed four (4) early warning groundwater wells and collected soil and groundwater samples.

On March 23, 1998, the Town formally requested that the NYDEC reimburse it for the cost of construction of the air stripper tower. The NYDEC and Town subsequently entered into an agreement, pursuant to which the NYDEC agreed to reimburse the Town for the cost of constructing and installing the air stripper tower and the Town agreed to own, maintain and operate it.

In 1999, engineers hired by the NYDEC confirmed the existence of three (3) VOC plumes migrating underground from the NCIA towards the Town. In September 2000, the NYDEC issued its final remedial investigation/feasability study report, dividing the remedial strategy into three (3) parts and separating the NCIA into three (3) corresponding operable units:

Operating Unit 1 ("OU-1"), to address on-site soil contamination at the NCIA; Operating Unit 2 ("OU-2"), to address on-site contaminated groundwater directly beneath the NCIA; and Operating Unit 3 ("OU-3"), to address groundwater contamination off-site and down-gradient resulting from the migration of VOC plumes emanating from the NCIA.

In October 2003, the NYDEC issued its final Record of Decision ("ROD") regarding OU-3, i.e., the down-gradient contamination, selecting a permanent remedy that (a) incorporated the existing GAC and air stripper tower and (b) involved pilot testing, removal of the contaminated soil, construction of additional in-well vapor stripping wells, installation of new monitoring wells and implementation of a long-term groundwater monitoring program. The ROD asserted that the off-site groundwater contamination was comprised of three (3) separate plumes, identified as the Eastern, Central and Western Plumes; that each plume had a particular contaminant or contaminants at issue; and that defendants, i.e., the owners and/or operators of thirteen (13) sites within the NCIA, each contributed hazardous materials to one (1) of the three (3) plumes.

In 2010, the NYDEC referred OU-3, i.e., the two hundred eleven (211)-acre area of contamination down-gradient of the NCIA, to the United States Environmental Protection Agency ("EPA") for listing on the National Priorities List ("NPL"). In 2011, the EPA listed that area on the NPL as Opearable Unit 1 of the New Cassel/Hicksville Ground Water Contamination Superfund Site ("State OU-3/EPA OU-1"), as a result of which the EPA assumed, and concomitantly relieved the State of, responsibility for remediating the groundwater contamination on State OU-3/EPA OU-1. Initially, EPA will seek to have the responsible parties remediate the down-gradient contamination themselves pursuant to either a cleanup agreement or abatement order. Only if that proves unsuccessful will the EPA fund the remedial work itself. In the latter event, the State will be responsible for paying ten percent (10%) of the cost of such

remediation and, if that occurs, will then seek reimbursement for those costs from any potentially responsible party ("PRP"), including the defendants herein.

The EPA issued its ROD for State OU-3/EPA OU-1 in September 2013, finding, *inter alia*, that "[i]ndividual facilities within the NCIA are considered to be among the sources of groundwater contamination for [State OU-3/EPA] OU-1." (State Ex. B at iii). The ROD identifies five (5) alternative remedies and estimates (a) that the capital cost of the EPA's selected remedy, i.e., the "Hybrid Alternative– In-well Stripping/Groundwater Extraction and Treatment; In-situ Chemical Treatment," with which the NYDEC concurs, will be ten million forty-four thousand dollars ($10,044,000.00); (b) that the operation and maintenance of that remedy will continue for thirty (30) years at an annual cost of six hundred eighty thousand dollars ($680,000.00); and (c) that the present-worth cost of that alternative is twenty-two million nine hundred thousand dollars ($22,900,000.00). (Id. at 20-24, 32).

Prior to the NPL listing, the State incurred response costs in the total amount of approximately five million six hundred sixty-two thousand eight hundred sixty dollars ($5,662,860.00) and reimbursed the Town approximately one million eighty-eight thousand eight hundred twenty-seven dollars ($1,088,827.00) for the air stripper, of which approximately four million nine hundred fifty-four thousand three hundred twenty-two dollars ($4,954,322.00) is attributable to the thirteen (13) properties owned and/or operated by defendants in this action.[6]

[6] Nine hundred seventy-nine thousand four hundred forty-one dollars ($979,441.00) is allocated as reimbursement to the Town for the air stripper, and the remaining three million nine hundred seventy-four thousand eight hundred eighty-one dollars ($3,974,881.00) is attributed to investigation costs.

B. Procedural History

In 2003, the Frost Street Parties, who are the owners of three (3) properties within the NCIA that the State found contributed to the Eastern Plume, commenced an action against certain parties, including the Lincoln Processing defendants, whom they identify as the former tenants and operators of those properties, to recover the costs they incurred in complying with the State's consent orders and conducting remedial activity relating to the pollution on, and emanating from, the NCIA. See Next Millennium Realty v. Adchem Corp., No. 03-cv-5985 (GRB). That case is currently *sub judice* before the Honorable Gary R. Brown, United States Magistrate Judge.[7]

Approximately three (3) years later, i.e., on March 13, 2006, the State commenced this action against the Frost Street Parties pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, to recover (a) the response costs it incurred, and will incur, in investigating and addressing the groundwater contamination caused by the pollution emanating from the NCIA, and (b) natural resource damages in the estimated amount of twenty-four million seven hundred thousand dollars ($24,700,000.00).[8] By order dated May 4, 2006, the 2003 action commenced by

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[7] All parties in that case consented to jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c) and Rule 73 of the Federal Rules of Civil Procedure.

[8] The State maintains that it has not yet performed a natural resource assessment, but estimated its natural resource damages "based on the market value of acquiring an equivalent but uncontaminated groundwater recharge area for the estimated fifty-year period of contamination." (State Mem. at 13). According to the State, it intends to use any natural resource damages it receives in this case "to purchase undeveloped land or development rights on Long Island, which will allow [it] to preserve a 'groundwater recharge area,' *i.e.*, an area where rain and melted snow are absorbed into the ground and eventually enter an aquifer." (Id.) (quotations and citation omitted).

the Frost Street Parties was consolidated with this action, (Docket Entry ["DE"] 4), but the actions were subsequently severed by order dated September 8, 2010. (DE 249).

On May 12, 2006, the State filed an amended complaint, *inter alia*, adding the Arkwin defendants, the Tishcon defendants, the C&O defendants, Grand Machinery, the Utility defendants and Equity, all of whom it contended owned and/or operated properties that contributed to the Central Plume contamination, as additional defendants in this action. (DE 3). On May 20, 2008, the State filed a second amended complaint ("SAC"), *inter alia*, adding IMC, the 299 Main Street defendants, the Atlas defendants and Barouh Eaton, all of whom it contended owned and/or operated properties that contributed to the Western Plume contamination, as additional defendants in this action. (DE 168).

On February 13, 2007, the Frost Street Parties filed an answer with cross-claims against all co-defendants, and a third-party complaint against, *inter alia*, the Lincoln Processing defendants and the Settling Upgradient Defendants, seeking contribution pursuant to Section 113(f) of CERCLA, 42 U.S.C. § 9613(f); recovery of their response costs pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607(a); a declaratory judgment under Sections 107(a)(4)(B) and 113(g)(2) of CERCLA, 42 U.S.C. §§ 9607(a)(4)(B) and 9613(g)(2); and common law contribution and indemnification. (DE 88). Most of the defendants and third-party defendants have asserted counterclaims against the State and Frost Street Parties, respectively, and cross-claims for contribution against each other, in their answers to the SAC and/or third-party complaint. (See, e.g. DE 102, 146; DE 155, 179, 218, 268, 269, 277, 279, 283, 295, 311 and 392 in 03-cv-5985).

On April 8, 2014 and April 16, 2014, the parties participated in settlement conferences held before the Honorable Arlene R. Lindsay, United States Magistrate Judge. In its settlement

demands, the State allocated its past costs and natural resource damages to the individual properties owned and/or operated by defendants and third-party defendants based upon the amount of alleged contamination at, or migrating from, the properties and the resources used to address such contamination by apportioning the harm first among the three (3) plumes, then among the properties within each of the plumes. The Frost Street Parties and Utility defendants are the only defendants alleged to have contributed to the Eastern Plume[9], which has the most contamination of the three (3) plumes and, therefore, the highest response costs incurred by the State. In contrast, the Western Plume is alleged to have the least contamination of the three (3) plumes and, thus, the lowest response costs incurred by the State.

Under the proposed Consent Decree and Supplemental Consent Decree, the State will receive the following amounts:

> (1) with respect to the Central Plume, (a) four hundred seventy-five thousand dollars ($475,000.00) from both the Arkwin defendants and the Tishcon defendants, (b) two hundred seventy-five thousand dollars ($275,000.00) from both Equity and the C&O defendants, and (c) two hundred thirty-five thousand dollars ($235,000.00) from Grand Machinery, for a total of one million seven hundred thirty-five thousand dollars ($1,735,000.00) from the Settling Direct Defendants associated with the properties contributing to the Central Plume;
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> (2) with respect to the Western Plume, (a) two hundred twenty-five thousand dollars ($225,000.00) from the 299 Main Street defendants, and (b) three hundred fifty thousand dollars ($350,000.00) from IMC, for a total of five hundred seventy-five thousand dollars ($575,000.00) from the Settling Direct Defendants associated with the properties contributing to the Western Plume, plus (c) ninety percent (90%) of the net proceeds of a property transfer from the Atlas defendants; and
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> (3) with respect to the Eastern Plume, (a) four hundred fifty thousand dollars

[9] The Frost Street parties contend, however, that the Settling Upgradient Defendants and Lincoln Processing defendants, against whom the State has not asserted direct claims, contributed to the contamination in the Eastern Plume.

($450,000.00) from the Lincoln Processing defendants[10], i.e., the third-party defendants whom the Frost Street Parties claim are associated with their properties contributing to the Eastern Plume, plus (b) an additional (i) eight hundred fifty thousand dollars ($850,000.00) from the GTEOSI/Sylvania defendants; (ii) seven hundred seventy-five thousand dollars ($775,000.00) from the Vishay/General Instruments defendants; and (iii) two hundred twenty-five dollars ($225,000.00) from Sulzer Metco, for a total of one million eight hundred fifty thousand dollars ($1,850,000.00) from the Settling Upgradient Defendants, whom the Frost Street Parties contend contributed to the contamination in the Eastern Plume.

Thus, under the Consent Decree and Supplemental Consent Decree, the State will receive a total of four million six hundred ten thousand dollars ($4,610,000.00), plus ninety percent (90%) of the net proceeds of a property transfer from the Atlas defendants, of which approximately three million twenty-five thousand dollars ($3,025,000.00) is allocated as reimbursement for the State's past response costs at OU-3; one million five hundred sixty-five

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[10] Of the four hundred fifty thousand dollars ($450,000.00) from the Lincoln Processing defendants, three hundred forty thousand dollars ($340,000.00) is allocated as reimbursement of the State's past response costs at OU-3; ninety thousand dollars ($90,000.00) is allocated as natural resource damages; and twenty thousand dollars ($20,000.00) is allocated as reimbursement of the State's past response costs associated with the Frost Street Sites at OU-1 and OU-2. Although the Supplemental Consent Decree does not allocate any amount to any future costs incurred for remediation of groundwater contamination at OU-2, it gives the Lincoln Processing defendants full contribution protection only with respect to the reimbursement of the State's past response costs at OU-3, and limits their contribution protection with respect to the reimbursement of response costs at OU-1 and OU-2. Specifically, the Supplemental Consent Decree does not provide contribution protection with respect to, *inter alia*, "claims by the Frost Street [Parties] * * * asserted against current and/or former owners and/or operators of the Frost Street Sites in the [NCIA] for response costs incurred or to be incurred insofar as those costs arise out of or in connection with the disposal, release, and/or threat of release of hazardous substances at or from the Frost Street Sites and arise out of or in connection with response actions taken with respect to OU-1 and/or OU-2 of the Frost Street Sites * * * and any future modifications of the OU-1 and OU-2 RODs approved by [NY]DEC." (Supplemental Consent Decree ["SCD"], ¶ 2). Significantly, as set forth below, the Frost Street Parties' attorney participated in the negotiation of the Supplemental Consent Decree, and that contribution protection provision specifically incorporates revised language suggested by him.

thousand dollars ($1,565,000.00) is allocated as natural resource damages[11]; and the remaining twenty thousand dollars ($20,000.00) is allocated as reimbursement for the State's past response costs associated with the Frost Street Sites at OU-1 and OU-2.[12]

Under the Second Supplemental Consent Decree, the State will receive a total of seven hundred thousand dollars ($700,000.00) from the Utility defendants, of which three hundred ten thousand dollars ($310,000.00) is allocated as reimbursement for the State's past response costs at OU-3; one hundred sixty-five thousand dollars ($165,000.00) is allocated as natural resource damages; and two hundred twenty-five thousand dollars ($225,000.00) is allocated as reimbursement for the State's response costs at OU-1 and OU-2.[13] Since the State attributes

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[11] Under the Consent Decree, the Settling Direct Defendants and Settling Upgradient Defendants will pay the State two million six hundred eighty-five thousand dollars ($2,685,000.00) as reimbursement for the State's past response costs in connection with the groundwater contamination at OU-3 and one million four hundred seventy-five thousand dollars ($1,475,000.00) for natural resource damages. Under the Supplemental Consent Decree, the Lincoln Processing defendants will pay the State an additional three hundred forty thousand dollars ($340,000.00) as reimbursement for the State's past response costs associated with OU-3, and ninety thousand dollars ($90,000.00) for natural resource damages, as well as twenty thousand dollars ($20,000.00) as reimbursement of the State's past response costs associated with the Frost Street Sites at OU-1 and OU-2. Thus, under the Consent Decree and Supplemental Consent Decree, the State will recover more than sixty-one percent (61%) of the approximate four million nine hundred fifty-four thousand three hundred twenty-two dollars ($4,954,322.00) in total response costs it incurred at OU-3, and more than sixty-three percent (63%) of its discounted estimate of natural resource damages.

[12] Since the State incurred past response costs associated with the Frost Street Sites at OU-1 and OU-2 of approximately one hundred eighty thousand dollars ($180,000.00), it would recover approximately eleven percent (11%) of those costs from the Lincoln Processing defendants under the Supplemental Consent Decree.

[13] Unlike the Settling Direct Defendants, against whom the State does not assert claims seeking reimbursement for response costs incurred by it with respect to OU-1 and OU-2, the Utility defendants are potentially liable for the response costs incurred by the State with respect to their property at OU-1 and OU-2 ("the Utility Site"). Since the State estimates those response costs to total approximately nine hundred forty-three thousand dollars ($943,000.00), it will recover approximately twenty-four (24%) of those response costs from the Utility defendants

approximately four hundred fifty-five thousand six hundred thirty-six dollars ($455,636.00) of the total response costs it incurred with respect to OU-3 to the Utility Site, the Utility defendants will pay approximately sixty-eight percent (68%) of the response costs for which they are potentially liable in connection with OU-3.[14]

Only the Frost Street Parties oppose the proposed Consent Decree, Supplemental Consent Decree and, presumably, the Second Supplemental Consent Decree (collectively, "the consent decrees" or "the proposed settlements"), and do so on the grounds: (1) that absent "a description of the methodology utilized by the State in reaching the settlement based upon some measure of comparative fault, * * * it is impossible for the Court to * * * determin[e] if the settlements are substantively fair, reasonable, and consistent with CERCLA's objectives," (Frost Street Parties' Memorandum of Law in Opposition to the Approval of the Consent Decree and Supplemental Consent Decree ["FSP Mem."], at 10); and (2) that the proposed settlements are not fair and reasonable because (a) "the State releases the [Settling Upgradient Defendants] * * * and grants them contribution protection for the [OU-2] deep groundwater remedy without allocating a single dollar of the settlement proceeds [there]to * * *[,]" (id. at 11), (b) "the State arbitrarily and inconsistently allocates a disproportionate share of the settlement proceeds to a Natural Resource Damage ('NRD') claim that is factual [sic] and legally unsupportable[,]" (id.), and (c) "the State uses a per-capita allocation of past cost damages across the 13 NCIA sites, deviates from the per-capita allocation without explanation or reason, and fails to do a comparative fault evaluation." (Id.)

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under the Second Supplemental Consent Decree.

[14] The State will recover from the Utility defendants approximately three hundred ten thousand dollars ($310,000.00) of the approximate four hundred fifty-five thousand six hundred thirty-six dollars ($455,636.00) in response costs that the State attributes to the Utility Site.

II. Discussion

"When reviewing a proposed consent decree in the CERCLA context, a trial court's [] function is circumscribed: it must ponder the proposal only to the extent needed to satisfy itself that the settlement is [1] reasonable, [2] fair, and [3] consistent with the purposes that CERCLA is intended to serve." 55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., 332 F. Supp. 2d 525, 529-30 (E.D.N.Y. 2004) (quotations, alterations and citations omitted); see also United States v. General Elec. Co., 460 F. Supp. 2d 395, 401 (N.D.N.Y. 2006), aff'd sub nom Town of Ft. Edward v. United States, — F. App'x —, 2008 WL 45416 (2d Cir. Jan. 3, 2008) (summary order) ("In reviewing a proposed consent decree, a district court must determine if it is fair, reasonable, and faithful to the objectives of CERCLA." (quotations and citation omitted)). "[T]he function of the reviewing court is not to substitute its judgment for that of the parties to the decree but to assure itself that the terms of the decree meet this standard." 55 Motor Ave., 332 F. Supp. 2d at 530 (quoting United States v. Hooker Chems. and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), aff'd on other grounds, 749 F.2d 968 (2d Cir. 1984)); accord State of New York v. Solvent Chem. Co., Inc., 984 F. Supp. 160, 165 (W.D.N.Y. 1997). "While the Court cannot act as a 'rubber stamp' for the Consent Decree, the Court cannot review the proposed settlement *de novo*." United States v. Town of Moreau, N.Y., 751 F. Supp. 1044, 1050 (N.D.N.Y. 1990). "The Court's task is to determine whether the settlement represents a reasonable compromise, all the while bearing in mind the law's generally favorable disposition toward the voluntary settlement of litigation and CERCLA's specific preference for such resolutions." Town of Moreau, 751 F. Supp. at 1050; see also State of New York v. Air-Flo Mfg. Co., Inc., No. 02-cv-762S, 2004 WL 1563081, at * 1 (W.D.N.Y. June 3, 2004) ("Approval

of a proposed consent decree falls squarely within the court's discretion and should be considered in light of the strong policy of encouraging voluntary settlement of litigation. * * * '[T]he usual federal policy favoring settlements is even stronger in the CERCLA context.'" (quoting B.F. Goodrich v. Betkoski, 99 F.3d 505, 527 (2d Cir. 1996), abrogation on other grounds recognized by New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682 (2d Cir. 2003))).

Although a state agency proposing a CERCLA consent decree may not be entitled to the same degree of deference afforded to the EPA, it is entitled to "some deference" with respect to matters concerning its area of expertise. See Arizona v. City of Tucson, 761 F.3d 1005, 1014 (9th Cir. 2014), petition for cert. filed, 83 U.S.L.W. 3661 (U.S. Feb. 9, 2015) (No. 14-972); City of Bangor v. Citizens Commc'ns Co., 532 F.3d 70, 95 (1st Cir. 2008). Moreover, CERCLA's policy of encouraging settlements, see B.F. Goodrich, 99 F.3d at 514; Publicker Indus. Inc. v. United States (In re Cuyahoga Equip. Corp.), 980 F.2d 110, 119 (2d Cir. 1992), "has particular force where * * * a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990); see also General Elec., 460 F. Supp. 2d at 402 (holding that CERCLA's policy of encouraging settlements "is particularly strong where the settlement is proposed by a government agency acting in the public interest.") "That so many affected parties, themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree, itself deserves weight in the ensuing balance." Cannons Eng'g, 899 F.2d at 84.

A. Fairness

"The fairness inquiry has two facets, procedural and substantive fairness." General Elec., 460 F. Supp. 2d at 401; see also 55 Motor Ave., 332 F. Supp. 2d at 530 ("The fairness of a CERCLA settlement is judged in both procedural and substantive terms.")

1. Procedural Fairness

Procedural fairness requires the court to review the negotiation process in order to "gauge its candor, openness, and bargaining balance." General Elec., 460 F. Supp. 2d at 401 (quotations and citation omitted); accord 55 Motor Ave., 332 F. Supp. 2d at 530. Courts consider, *inter alia*, the following factors in determining procedural fairness: "[1] whether negotiation was adversarial and conducted at arms length; [2] whether the counsel was skilled; [and] [3] whether extensive formal discovery or other information-sharing procedures provided the parties with adequate information." 55 Motor Ave., 332 F. Supp. 2d at 530. "[T]o the extent that the [negotiation] process was fair and full of adversarial rigor, the results come before the court with a much greater assurance of substantive fairness." Id. (quotations and citation omitted).

The Frost Street Parties do not challenge the procedural fairness of the consent decrees, nor is there indication in the record of any issue during the negotiation process that would render the consent decrees procedurally unfair. In any event, it is clear that the negotiations in this case were at arms length and rigorous, and that the parties were represented by skilled counsel and provided sufficient information.[15] Accordingly, the consent decrees are procedurally fair.

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[15] For example, according to Monica Wagner, the Deputy Bureau Chief of the New York Attorney General's Environmental Protection Bureau and "primary negotiator for the State of New York in the recent settlement negotiations in this action," (Declaration of Monica Wagner in Support of New York's Reply Memorandum ["Wagner Reply"], at ¶ 2), counsel for the Frost

2. Substantive Fairness

"Substantive fairness deals with corrective justice and accountability; a party should bear the cost of the harm for which it is legally responsible." General Elec., 460 F. Supp. 2d at 401 (quotations and citation omitted); accord 55 Motor Ave., 332 F. Supp. 2d at 530-31. "The terms of a consent decree are substantively fair if they are based on [] comparative fault and if liability is apportioned in relation to rational estimates of the harm each party has caused." Air-Flo Mfg., 2004 WL 1563081, at * 2 (quotations and citation omitted); see also 55 Motor Ave., 332 F. Supp. 2d at 531 (holding that substantive fairness "means ensuring that liability is apportioned according to comparative fault.") "Once the [government agency] has selected a reasonable method of weighing comparative fault, the agency need not show that it is the best, or even the fairest, of all conceivable methods." 55 Motor Ave., 332 F. Supp. 2d at 531 (quotations and citation omitted). "Where * * * sophisticated actors know how to protect their own interest, and they are well equipped to evaluate risks and rewards, the court has little need [] to police the substantive fairness of a settlement as among settling parties." Id. (quotations, alterations and citation omitted).

"Although accountability is of paramount importance, practical considerations prevent liability from being apportioned with absolute certainty or exacting precision." United States v. Davis, 11 F. Supp. 2d 183, 190 (D. R.I. 1998), aff'd in relevant part, 261 F.3d 1 (1st Cir. 2001). "A rough approximation of the responsibility borne by each party is sufficient provided that the method of allocation is rational." Id. "[T]he evidence need not be exhaustive or conclusive in

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Street parties participated in negotiating, *inter alia*, the Supplemental Consent Decree, "including reviewing and revising the language regarding the scope of the contribution protection granted to the [Lincoln Processing] defendants with respect to OU-1 and OU-2 costs[;] [and] [t]he changes [he] proposed * * * were incorporated into the Supplemental Consent Decree." (Id.)

order to determine whether a proposed settlement is substantively fair[,]" id. at 191, because to require otherwise, "would be impractical and would frustrate CERCLA's objective of encouraging [] settlement * * *." Id. at 191-92. "In short, the requirement of substantive fairness is satisfied when a proposed settlement reflects a rational method of allocating liability in a manner that reasonably approximates each party's share of responsibility; the method is applied evenhandedly with respect to all PRP's [sic] and sufficient information is presented to enable the Court to determine whether that has been done." Id. at 192.

Moreover, since "[t]he ultimate measure of accountability is the extent of the overall recovery, not the amount of money paid by any individual defendant[,]" Davis, 261 F.3d at 25 (quoting United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1086 (1st Cir. 1994)), "a consent decree need not specify each [PRP's] degree of culpability." Id.

Contrary to the Frost Street Parties' contentions, the proposed settlements are substantively fair. It is clear that the parties entering into the consent decrees fully considered the issue of comparative fault and allocated their liability thereunder accordingly, and the State has provided a rational explanation for the manner in which it has allocated the various costs and damages among the Settling Parties, which reasonably approximates their share of responsibility therefor.[16]

Moreover, at most, the Frost Street parties, who are liable under CERCLA as past and current owners of certain properties within the NCIA, will be liable to reimburse the State for

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[16] The Frost Street parties' contention that the settlements should not be approved because the State has not sufficiently documented how it allocated damages among the parties is misplaced since under CERCLA, it is the defendant, not the State, that "bear[s] the burden of proving that a reasonable basis for apportionment exists" in order to avoid joint and several liability. Burlington N. & Sante Fe Ry. v. United States, 556 U.S. 599, 614, 129 S. Ct. 1870, 173 L. Ed. 2d 812 (2009).

only approximately thirty percent (30%) of the response costs it incurred with respect to OU-3, notwithstanding that their three (3) properties contributed to the Eastern Plume, which contains the highest concentrations of contamination, and which has migrated further, than the other two (2) plumes.[17] See 42 U.S.C. § 9613(f)(2). Accordingly, the Frost Street Parties cannot establish that the proposed settlements result in any substantive unfairness to them.

B. Reasonableness

Important considerations for a determination of the reasonableness of a proposed consent decree include, *inter alia*, (1) "whether the settlement compensates the public for the actual (and anticipated) costs of remedial and response measures," General Elec., 460 F. Supp. 2d at 401 (quotations and citation omitted); accord 55 Motor Ave., 332 F. Supp. 2d at 531-32, (2) "whether a settlement that does not fully compensate for costs is nonetheless a cost-effective alternative to litigation that will conserve public and private resources[,]" General Elec., 460 F. Supp. 2d at

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[17] The Frost Street Parties' contention that so much of the Supplemental Consent Decree as affords the Lincoln Processing defendants contribution protection with respect to their claim for contribution with respect to "Deep Groundwater remediation" at OU-2, at an estimated cost of ten million one hundred fifty thousand dollars ($10,150,000.00), is without merit. Initially, as noted above, the Supplemental Consent Decree provides only limited contribution protection with respect to the response costs incurred at OU-1 and OU-2, and that very provision was reviewed and revised by the Frost Street Parties' attorney. Moreover, unlike all of the Settling Parties who own property within the NCIA, and who implemented the remediation measures demanded of them by the State at their own cost with respect to OU-2, the Frost Street Parties "have declined to implement the OU-2 Deep Groundwater remedy" themselves. (FSP Mem. at 17). Some of those Settling Parties have also agreed to conduct further on-site remediation at their own expense, or to reimburse the State for such on-site remediation costs, as a condition of their settlements. Yet none of the Settling Parties will be able to seek contribution from any other party with respect to those costs as a result of the proposed settlements. Thus, even if the Frost Street Parties' claim for contribution regarding costs to be incurred for remediation at OU-2 is foreclosed by the proposed settlements, the Frost Street Parties are in the same position as every one of the Settling Parties who own property in the NCIA, which is the essence of fairness.

401; and (3) the relative strength of the parties' litigating positions. 55 Motor Ave., 332 F. Supp. 2d at 532.

The proposed settlements will adequately compensate the public for the costs of remediation, insofar as, *inter alia*, the State (1) will be reimbursed approximately three million three hundred thirty-five thousand dollars ($3,335,000.00), or approximately sixty-eight percent (68%), of the four million nine hundred fifty-four thousand three hundred twenty-two dollars ($4,954,322.00) in response costs it incurred with respect to OU-3, plus ninety percent (90%) of the net proceeds of a property transfer from the Atlas defendants; and (2) will recover approximately one million seven hundred thirty thousand dollars ($1,730,000.00), or approximately seventy percent (70%), of its estimated natural resource damages, as discounted to reflect the relative weakness of that claim, in the amount of approximately two million four hundred seventy thousand dollars ($2,470,000.00). See, e.g. Charles George, 34 F.3d at 1081 (holding that proposed settlement amounts properly reflect discounts for, *inter alia*, litigation risks, time savings, etc.) Since, under the proposed consent decrees, the Settling Parties will be paying the majority of the response costs attributed to their conduct, the public interest is clearly met. See, e.g. Air-Flo Mfg., 2004 WL 1563081, at * 2 ("[T]he public interest is met by Defendants' paying the remediation costs attributable to their conduct.")

Furthermore, the fact that the State substantially discounted its claim for natural resource damages in order to effectuate the settlements is reasonable given that its claim for such damages involves substantial uncertainties and does not appear to be particularly strong.[18] In any event, the State can seek to recover the remainder of its response costs and natural resource damages

[18] Indeed, the Frost Street Parties have recently filed a motion for summary judgment dismissing the State's claim for natural resource damages, which is *sub judice*.

from the non-settling Frost Street Parties (and Barouh Eaton), who remain jointly and severally liable under CERCLA. That the Frost Street Parties (and Barouh Eaton) may bear disproportionate liability as a result of the proposed settlements does not render them substantively unfair or unreasonable since CERCLA specifically contemplates that "non-settling defendants may bear disproportionate liability for their acts," B.F. Goodrich, 99 F.3d at 527, and, thereby, encourages parties to settle. See id.; United States v. Coeur d'Alenes Co., 767 F.3d 873, 877 (9th Cir. 2014) ("[T]he potential for disproportionate liability is an integral and purposeful component of CERCLA[] * * * [and] promotes early settlements * * *." (quotations and citation omitted)). "Far more important than the exact share to be paid by each responsible party is the fact that the settlement is clearly in the public interest." Solvent Chem., 984 F. Supp. at 166. Therefore, the proposed settlements are reasonable.

C. Faithfulness to CERCLA Objectives

"[T]he two main objectives underlying CERCLA[] * * * [are] to encourage prompt and effective responses to hazardous waste releases and to impose liability on responsible parties." In re Cuyahoga Equip. Corp., 980 F.2d at 119 ("A district court reviewing CERCLA is required to rule on the fairness of any proposed settlement.") In addition, Congress sought through CERCLA "to encourage settlements that would reduce the inefficient expenditure of public funds on lengthy litigation." Id.; see also B.F. Goodrich, 99 F.3d at 514 (holding that the purposes of CERCLA include "facilitating efficient responses to environmental harm, holding responsible parties liable for the costs of the cleanup, * * * and encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation." (citation omitted)). In evaluating a

proposed consent decree, the court must not "overemphasize[] the importance of its potential effect on the non-settlors," Solvent Chem., 984 F. Supp. at 165-66 (quotations and citation omitted), as to do so would frustrate those objectives. See id.

The consent decrees are clearly faithful to CERCLA's objectives, particularly insofar as they significantly reduce the litigation surrounding the NCIA which has already spanned more than a decade, while also reimbursing the State for a majority of its response costs by those parties responsible therefor under CERCLA. See, e.g. In re Cuyahoga Equip. Corp., 980 F.2d at 119-20; Air-Flo Mfg., 2004 WL 1563081, at * 3; United States v. McGraw-Edison Co., 718 F. Supp. 154, 159 (W.D.N.Y. 1989). Moreover, settlement of the State's claims against all defendants except the Frost Street Parties (and Barouh Eaton) "implements the strong federal policy favoring resolution of CERCLA [claims] by way of settlement." Air-Flo Mfg., 2004 WL 1563081, at * 3.

Since the proposed settlements are procedurally and substantively fair, reasonable and consistent with the objectives of CERCLA, the State's motions are granted; the Consent Decree, Supplemental Consent Decree and Second Supplemental Consent Decree are approved in their entirety, with the exception that so much of paragraph thirty (30) of the Consent Decree as purports to retain this Court's jurisdiction over this matter "until the Settling Defendants have fulfilled their obligations [t]hereunder" is redacted; and the State's claim for future response costs, and the Frost Street Parties' claims for contribution which are not otherwise foreclosed by the consent decrees, are severed and administratively closed with leave to reopen on ten (10) days notice within sixty (60) days of (1) the State incurring any future response costs, or (2) the Frost Street Parties being found liable to reimburse the State for any future response costs

incurred by it in connection with remediation of the NCIA.[19] Accordingly, the Clerk of the Court shall enter the Consent Decree, redacted as set forth herein; the Supplemental Consent Decree; and the Second Supplemental Consent Decree, and, there being no just reason for delay, enter judgment accordingly pursuant to Rule 54(b) Federal Rules of Civil Procedure.

SO ORDERED.

/s/
SANDRA J. FEUERSTEIN
United States District Judge

Dated: July 27, 2015
Central Islip, New York

[19] Since, *inter alia*, there is nothing in the record suggesting that the State will incur future response costs now that the EPA has assumed responsibility for remediation of the NCIA, there is "no potential for injury that is sufficiently immediate and real so as to warrant declaratory relief pursuant to section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2)." Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 291 n. 11 (3d Cir. 2000) (quotations and citation omitted). Moreover, as the EPA is not a party to this case, and is not seeking herein to recover any response costs it has, or may, incur in connection with the NCIA from the Frost Street Parties, the Frost Street Parties cannot maintain a speculative claim for contribution for a potential claim the non-party EPA may, or may not, assert against them in the future.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL

DIVISION OF ADMINISTRATION
BUREAU OF BUDGET AND FISCAL MANAGEMENT

May 17, 2017

NYS Department of Environmental Conservation
ATTN: Ms. Elissa Armater, Legal Assistant
Office of General Counsel
625 Broadway, 14th Floor
Albany, NY 12233-7010

Re: NYS & Erin Crotty v. Next Millenium

Dear Ms. Armater:

Enclosed please find check number 075000665, in the amount of $225,000.00 in the above-referenced case. The check is made payable to New York State in payment of a penalty.

This case was handled by Dan Mulvihill, Assistant Attorney General in our NYC Environmental Protection Bureau. If you have any questions regarding the payment enclosed, please feel free to contact him at (212) 416-8446.

Best regards,

Cory Hall
Revenues and Restitutions Unit
Budget and Fiscal Management Bureau
776-2132

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