UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

IN THE MATTER OF:	)	
	)	
United States Department of the Army,	)	
	)	
Respondent.	)	Docket No.
	)	CERCLA-08-2020-0001
Rocky Mountain Arsenal	)	
Commerce City, CO,	)	
	)	
Facility.	)	
	)	

MOTION TO WITHDRAW COMPLAINT

Pursuant to Rule 22.14(d) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Rules of Practice), 40 C.F.R. § 22.14(d), Complainant Kenneth C. Schefski, Regional Counsel, United States Environmental Protection Agency, Region 8 (EPA or Complainant) respectfully moves to withdraw the Complaint in the above-captioned matter. On June 12, 2020, EPA filed an Administrative Complaint in the above-captioned proceeding against Respondent, United States Department of the Army. The Complaint alleged that Respondent violated the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by failing or refusing to comply with a term or condition of a CERCLA section 120 Agreement. Specifically, the Complaint alleged that the Respondent "failed or refused to reimburse EPA's costs for Rocky Mountain Arsenal, as required by the CERCLA Section 120(e) interagency agreement. . ."

Throughout the pendency of this proceeding, the Parties have worked to resolve the payment of EPA's costs. Initially, the Parties sought a Congressional authorization to effectuate

an agreement in principle which would have settled the matter. Unfortunately, the proposal was not included in the FY22 National Defense Authorization Act. After it became evident that Congressional authorization would not be forthcoming in 2022, and after consultation with the Department of Justice (DOJ), EPA and the Army pursued modification of an existing Consent Decree to resolve the issue of payment of EPA Costs by allowing payment of EPA's costs from a different appropriation. The Presiding Officer has granted eight stays in the proceeding as the Parties worked to resolve this matter. The current stay expires on November 1, 2024.

On November 9, 2023, DOJ filed an Unopposed Motion to Modify Consent Decree Between United States of America and Shell Oil Company ("Motion to Modify CD") with the United States District Court for the District of Colorado ("District Court"). On September 18, 2024, the District Court issued an order granting the Motion to Modify CD. The approved Consent Decree Amendment (CDA) provides for a one-time payment of $10,208,767.60 to EPA on behalf of the Army, which fully and finally resolves payment of any past or future EPA costs that may be incurred by EPA related to the Rocky Mountain Arsenal Site. The total amount paid to EPA will be deposited by EPA in the RMA Special Account to be retained and used to conduct or finance response actions at or in connection with the RMA Site, including carrying out EPA's responsibilities in connection with the Settlement Agreement or the Federal Facility Agreement, or be transferred by EPA to the EPA Hazardous Substance Superfund. The Order granting the Motion to Modify CD and the First Amendment to the Consent Decree are included as attachments to this Motion.

Pursuant to Rule 22.14(d) of the Rules of Practice: "After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint or any part thereof, without prejudice only upon motion granted by the Presiding Officer."

Respondent filed an answer in this proceeding on August 6, 2020. In light of the District Court's approval of the CDA and the resulting payment to EPA, Complainant seeks withdrawal as moot of the Complaint in the above captioned matter. On September 24, 2024, counsel for Complainant consulted with counsel for Respondent on the instant Motion, and counsel for Respondent stated that Respondent would not oppose this Motion. Complainant respectfully requests that the Presiding Officer approve the withdrawal of the Complaint in this matter.

Respectfully submitted,

WILLIAM LINDSEY

Digitally signed by WILLIAM LINDSEY
Date: 2024.10.24 17:43:07 -06'00'

William Lindsey
Senior Assistant Regional Counsel
US EPA – Region 8 (8ORC-LE-C)
1595 Wynkoop Street
Denver, Colorado 80202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 83-cv-02379-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHELL OIL COMPANY,

Defendant.

ORDER

This matter is before the Court on the Unopposed Motion to Modify Consent Decree Between United States of America and Shell Oil Company [Docket No. 115], which seeks to modify a consent decree the Court entered in this case in 1993. *Id.* at 2.

I. BACKGROUND

On December 9, 1983, the United States filed a complaint in this action under § 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607, against Shell Oil Company ("Shell"). Docket No. 109 at 2, ¶ 2. This case and the related case captioned *State of Colorado v. United States of America*, Case No. 83-cv-02386, arise from environmental damage caused by the release of hazardous substances by the United States Army and Shell from the Rocky Mountain Arsenal ("RMA"), a federally-owned facility in Adams County, Colorado. *State of Colo.*, No. 83-cv-02386, Docket No. 89 at 2, 3, ¶¶ C., F (D. Colo. Sept. 22, 2008). The United States and Shell entered into a settlement agreement effective February 12, 1989. Docket No. 109 at 2, ¶ 3. Subsequently, the United States and

Shell consented to the entry of a consent decree on February 12, 1993, which adopted and incorporated the settlement agreement. *Id.*

As part of the consent decree, the Army agreed to pay the United States Environmental Protection Agency ("EPA") the costs the agency would incur by administering the clean-up of the environmental damage to the Rocky Mountain Arsenal. Docket No. 114-1 at 35–36, ¶¶ 12.1–12.6. The terms of the consent decree state that, "[o]n October 1, 1990, and every year for three years thereafter, the Army shall make annual payments to EPA for EPA Costs in the amount agreed upon by the Organizations" and that "[t]he Army shall continue to make annual payment to EPA . . . until EPA Certification that the Final Response Action for the Last Operable Unit has been completed in accordance with the requirements of this Settlement Agreement." *Id.* at 35, ¶¶ 12.3–12.4. The consent decree further provides that "[t]he Army and EPA agree that the execution of this Settlement Agreement by the Army and EPA shall constitute an obligation of all appropriated funds designated by the Army for transfer to EPA pursuant to this Settlement Agreement." *Id.* at 36, ¶ 12.6. In a separate section, the consent decree states that:

> Any requirement for the payment or obligation of funds by the United States or any agency thereof, established by the terms of this Settlement Agreement shall be subject to availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. It is the expectation of the Parties that all obligations of the United States under this Settlement Agreement will be fully funded. The United States, or any agency thereof, shall take all necessary steps and make every effort within its authority to assure that timely funding is available to meet all obligations of the United States under this Settlement Agreement. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established for payment or obligation shall be appropriately adjusted. Notwithstanding any such adjustment of the date established for payment, interest shall continue to accrue from and after the original due date pursuant to paragraph 7.7.

Id. at 49–50, ¶ 23.1.

The parties state that, pursuant to the terms of the consent decree, the Army has paid EPA costs out of the Army's Defense Environmental Restoration Program ("DERP") environmental restoration appropriation. Docket No. 115 at 4. Subsequently, the Department of Defense ("DOD") determined that, absent a specific congressional authorization, DERP funds are not properly used for payment of EPA CERCLA oversight costs pursuant to the settlement of litigation. *Id.* In June 2018, DOD informed EPA that DOD could no longer legally pay EPA costs from DERP or any other defense department appropriation without specific congressional authorization. *Id.*

To meet their obligations under the consent decree, the parties stipulate to an amendment whereby the Army would no longer has an obligation to EPA, but will instead make a one-time payment of $10,208,767.60 in full satisfaction of EPA's costs. *Id.* at 5. This proposed amendment to the consent decree was subject to notice and comment. *Id.* at 6. The United States received no public comment. *Id.*

II. LEGAL STANDARDS

A. Jurisdiction

Generally, a court does not retain jurisdiction to enforce settlements in closed cases. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377–78 (1994). A court may, however, retain jurisdiction in a case to enforce a consent decree and, "in addition, a district court can retain jurisdiction over a settlement agreement 'if the order of dismissal shows an intent to retain jurisdiction.'" *Floyd v. Ortiz*, 300 F.3d 1223, 1226 & n.3 (10th Cir. 2002) (quoting *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (citing *Kokkonen*, 511 U.S. at 381)).

B. Modification

A court is generally not entitled to alter the terms of a consent decree stipulated to by the parties; the court "is faced with the option of either approving or denying the decree" as a whole. *United States v. State of Colo.*, 937 F.2d 505, 509 (10th Cir. 1991). A court, "however, is not obliged to approve every proposed consent decree placed before it." *Id.* "[M]odifications of a consent decree should only be made to further the original goals of the agreement." *Id.* at 510.

A consent decree may be modified under Federal Rule of Civil Procedure 60(b)(5) in the event that applying it prospectively is no longer equitable or because the judgment has been satisfied. *Jackson v. Los Lunas Cmty. Program*, 880 F.3d 1176, 1201 (10th Cir. 2018). In *Jackson*, the Tenth Circuit reviewed the law on modification of consent decrees, focusing in particular on *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367 (1992), and *Horne v. Flores*, 557 U.S. 433 (2009), which were institutional reform cases. *Id.* at 1191–204. The court observed that:

> A motion for relief from a consent decree based on an assertion that applying it prospectively is no longer equitable demands a different focus than a motion based on an assertion that the judgment has been satisfied, released or discharged. With respect to the latter ground for relief, it is appropriate for a court to focus on whether the movant has satisfied each obligation set forth in the consent decree. But where . . . the movant contends that changed circumstances have rendered further enforcement of the consent decree no longer equitable, the inquiry is whether the movant has shown (a) that a significant change in factual circumstances or in law warrants revision of the decree, and (b) that the requested modification is suitably tailored to the changed circumstance. A movant may establish that changed factual circumstances warrant modification when (i) the changed circumstances make compliance with the decree substantially more onerous, (ii) a decree proves to be unworkable because of unforeseen obstacles, or (iii) enforcement of the decree without modification would be detrimental to the public interest.

Id. at 1201 (citations and quotations omitted). "It is an abuse of discretion for a district court to deny a motion for modification where the moving party meets this burden." *Id.*

III. ANALYSIS

Although the parties do not address whether the Court has jurisdiction to amend the consent decree, the Court finds that it has jurisdiction to do so because the Court's 1993 order retained jurisdiction over the enforcement of the decree and any dispute subject to judicial review concerning compliance with the consent decree. Docket No. 114-1 at 5; *Floyd*, 300 F.3d at 1226.

The parties argue that the Court should modify the consent decree because it is no longer equitable. Docket No. 115 at 4. The parties assert that the Army's inability to pay EPA from DERP funds or any other funds without express congressional approval, constitutes a significant change in factual circumstance that warrants revision of the decree. *Id.* at 5 (quotation omitted). This is especially true, they claim, because forcing the Army to meet its continuing obligation under the consent decree may force it to violate the Anti-Deficiency Act. *Id.* at 4. The parties state that "as funds under DERP are no longer available to pay for EPA Costs, the decree has proven to be unworkable because of this unforeseen obstacle." *Id.* at 5 (citation, quotation, and alterations omitted).

The Court finds instructive the cases of *Environmental Defense Center v. Babbitt*, 73 F.3d 867, 870 (9th Cir. 1995), and *Center for Biological Diversity v. Norton*, 2003 WL 22225620, at *4 (S.D. Cal. Sept. 9, 2003). In *Environmental Defense Center*, the Ninth Circuit found that, although the Endangered Species Act required the Secretary of the

Interior to list the California red-legged frog as endangered, a moratorium on funding the agency prohibited the Secretary from taking such action. 73 F.3d at 871 ("Although the appropriations rider does not repeal the Secretary's duty to make a final determination whether the California red-legged frog is endangered, the rider (and the budget resolution continuing the rider's moratorium on funding) necessarily restrict the Secretary's ability to comply with this duty by denying him funding."). The court remanded the case to the district court to modify its order and judgment to "provide that compliance with the requirement that the Secretary make a final determination as to the endangered status of the California red-legged frog [be] delayed until a reasonable time after appropriated funds are made available." *Id.* at 872. In *Center for Biological Diversity*, the court determined that changed circumstances warranted revision of a prior order under Federal Rule of Civil Procedure 60(b)(5). 2003 WL 22225620, at *4. The court found that, to comply with the timeline set by a previous court order, the Fish and Wildlife Service would have been required to expend funds it did not have in violation of the Anti-Deficiency Act. *Id.* "[D]efendants have demonstrated that the expenditure of additional funds for habitat designations at this time would violate the Anti–Deficiency Act. Therefore, the Court finds that defendants have met their initial burden of demonstrating changed circumstances that warrant a modification to the July 1, 2002 Order under Rule 60(b)(5).").

Here the parties have shown that DOD's determination that it can no longer pay EPA from DERP funds means that further adherence to the consent decree would force the Army to violate the Anti-Deficiency Act. Docket No. 115 at 4. As such, the parties have demonstrated that changed circumstances warrant revision of the consent decree.

The Court next considers whether the proposed revision is suitably tailored to the changed circumstance. *Jackson*, 880 F.3d at 1201. The parties describe the amendment as "chang[ing] the Army's obligation to pay EPA Costs on an ongoing basis to obligating the Army to pay to EPA $10,208,767.60, in full satisfaction of EPA Costs. In other words, EPA will be paid a one-time 'cash out' sum of $10,208,767.60 to fully and finally resolve payment of any past or future EPA Costs that may be incurred by EPA related to RMA." Docket No. 115 at 5. The parties state that:

> [T]he proposed modification provides for a settlement as between EPA, Shell, and the Army of the issue of reimbursement of EPA's Costs. This resolution of claims related to EPA Costs in a final manner brings a cessation of disputes and potential litigation concerning EPA Costs among the three entities. The public interest is served by providing funds for EPA to accomplish oversight of the cleanup at RMA, and removing obstacles to implementation of the original settlement which were unforeseen at the time of its entry. And these ends are accomplished with minimal, narrowly tailored changes to the original settlement.

Id. at 5–6.

Specifically, the proposed amendment modifies paragraphs 12.1 through 12.6 of the consent decree as follows:

> 12.1 As soon as reasonably practicable after this First Amendment to the Consent Decree becomes effective, the United States on behalf of the Army shall pay to EPA $10,208,767.60, in full satisfaction of EPA Costs.
>
> 12.2 In the event that the payment in Paragraph 12.1 is not made within 120 days after this First Amendment to the Consent Decree becomes effective, Interest shall be paid on the unpaid balance, with such Interest beginning to accrue on the 121st day following this First Amendment to the Consent Decree becoming effective, and accruing through the date of the payment.
>
> 12.3 The Parties to this First Amendment to the Consent Decree recognize and acknowledge that the payments in this Section can be paid only from appropriated funds legally available for such purpose. Nothing in this First Amendment to the Consent Decree will be interpreted or construed as a commitment or requirement that the United States on behalf of the Army obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

> 12.4 The total amount to be paid to EPA pursuant to this Section shall be deposited by EPA in the RMA Special Account to be retained and used to conduct or finance response actions at or in connection with the RMA Site, including carrying out EPA's responsibilities in connection with the Settlement Agreement or the Federal Facility Agreement, or to be transferred by EPA to the EPA Hazardous Substance Superfund.
>
> 12.5 Except as specifically provided in Paragraph 12.6, EPA covenants not to take administrative action against the Army, and EPA covenants not to sue or take administrative action against Shell Oil, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for EPA Costs. These covenants shall take effect upon the date that this First Amendment to the Consent Decree becomes effective. These covenants are conditioned upon the satisfactory performance by the Army of its obligations under this First Amendment to the Consent Decree. These covenants extend only to the Army and Shell Oil, and do not extend to any other person. EPA further covenants to seek withdrawal as moot In the Matter of United States Department of the Army, Docket Number CERCLA-08-2020-001 (EPA Region 8). Upon dismissal of Docket No. CERCLA-080-2020-001 (EPA Region 8), the Administrative Law Judge's July 14, 2021, orders regarding the parties' motions for accelerated decision and EPA's motion in limine are moot and shall have no precedential value.
>
> 12.6 Notwithstanding any other provision of this First Amendment to the Consent Decree, EPA reserves, and this First Amendment to the Consent Decree is without prejudice to, all rights against the Army with respect to liability for the Army's failure to meet a requirement of this First Amendment to the Consent Decree.

Docket No. 114-2 at 5–7. In addition, proposed amendment adds the following paragraph to Section XII:

> 12.7 The Army agrees not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through sections 106(b)(2), 107, 111, 112, 113 of CERCLA, or any other provision of law with respect to this First Amendment to the Consent Decree.

Id. at 7. For consistency purposes, the proposed amendment modifies paragraphs 3.2, 3.29, and 6.1(b) of the consent decree by removing references to EPA costs which are inapplicable under the modified provisions of paragraphs 12.1 through 12.7. *Id.* at 4–5.

In considering the modification, the court "focuses on whether the proposed modification 'is tailored to resolve the problems created by the change in

circumstances.'" *Jackson*, 880 F.3d at 1194 (quoting *Rufo*, 502 U.S. at 391). In doing so, a court must bear in mind the public interest and should give appropriate deference to the government officials tasked with the front-line responsibility of administering the program. *See id.* at 1192, 1194 ("[P]rinciples of federalism require that federal courts give significant weight to the views of government officials, and that state officials with front-line responsibility for administering a state program be given latitude and substantial discretion. . . . [T]he public interest and principles of federalism require a federal court to defer to state or local government officials and to consider a state or local government's financial constraints." (citation, quotation, and alterations omitted)); *Am. Council of Blind v. Mnuchin*, 396 F. Supp. 3d 147, 178 (D.D.C. 2019), *aff'd*, 977 F.3d 1 (D.C. Cir. 2020) ("While *Rufo* concerned institutional reform directed at state and local governments that were seeking relief from an injunction, similar deference is owed to assessments by a federal agency with particular expertise and knowledge in understanding relevant resource constraints in the context of the agency's overall mission in service of the public interest.").

Here, both the EPA and the Army stipulate to modifying the consent decree. Docket No. 115 at 1. The Court recognizes the Army's resource constraints caused by the need for congressional appropriations and the EPA's expertise on the costs associated with administering the clean-up of RMA given its thirty years of experience with the issue. Furthermore, the parties identify a particular public interest served by the modification, namely, a final resolution of all issues arising from the annual payment of EPA costs. That such issues have occupied the time and resources of both the Army and EPA is evidenced by the modification's resolution of the dispute in Docket No.

CERCLA-080-2020-001 (EPA Region 8). Docket No. 114-2 at 6. The Court finds that modification is in the public interest. Furthermore, the Court finds that the modification is narrowly tailored because it provides an appropriate sum to cover EPA's annual costs while alleviating the uncertainty regarding annual congressional appropriations and the unavailability of DERP funds to meet the Army's obligations under the consent decree. The modification also leaves unmodified the primary focus of the consent decree, which is the continuing efforts of the government to ameliorate the environmental damage at the RMA. *See Jackson*, 880 F.3d at 1195 ("a court modifying a consent decree may do no more to the consent decree than is warranted by the change in circumstances . . . . Thus, even where a change in circumstances occurs, the plaintiff will retain those benefits secured under the consent decree that are not impugned by the change in circumstances." (citation and quotation omitted)). The Court finds that the prospective application of the consent decree is no longer equitable and will grant the parties' stipulated motion to modify the consent decree.

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED that the Unopposed Motion to Modify Consent Decree Between United States of America and Shell Oil Company [Docket No. 115] is **GRANTED**. It is further

ORDERED that the Court's Consent Decree entered on February 12, 1993, Docket No. 76, shall be amended as follows:

1. Settlement Agreement, Section III, Paragraph 3.29

"EPA Costs" means all costs incurred by EPA or its Contractors on or after October 1, 1987, in carrying out its responsibilities in providing technical

assistance for any activity in connection with this Settlement Agreement or the Federal Facility Agreement. ~~**The term does not include any costs incurred by EPA solely to pursue an enforcement action or to defend against litigation brought by Shell [Oil]**~~.

2. Settlement Agreement, Section III, Paragraph 3.2

"Allocable Costs" means (I) all Response Costs, including Data Management Costs, but excluding all Army-only Response Costs and all Shell-Only Response Costs; (2) all Off-Site Response Costs; (3) all ~~**EPA Costs**~~, ATSDR Costs and DOI Costs; (4) all Natural Resource Damages; (6) the salary and benefits, if any, of the Custodian of the JARDF; (7), if the Central Repository is located off the Arsenal, all costs associated with the Central Repository and the JARDF (if the JARDF is also located off the Arsenal), including without limitation costs for office space and utilities, but excluding: (a) all Army-Only Response Costs and Shell-Only Response Costs associated with the Central Repository and the JARDF; (b) all salaries and any benefits of the clerk or clerks of the Central Repository and the JARDF; and (c) all office supplies used by them in the performance of their official duties; and (8) all other costs that the Army and Shell may agree in writing constitute Allocable Costs.

3. Settlement Agreement, Section VI, Paragraph 6.1(b)

All payments pursuant to paragraph 6.1(a) shall be due and owing only for costs that have actually been incurred and shall be made in accordance with Section VII. ~~**EPA Costs,**~~ ATSDR Costs, and DOI Costs shall be deemed to have been actually incurred for purposes of this paragraph when the Army pays ~~**EPA,**~~ ATSDR~~,~~ or DOI in accordance with Sections XII, XIII and XIV respectively.

4. Settlement Agreement, Section XII, Paragraphs 12.1 through 12.6

Section XII, paragraphs 12.1 through 12.6 shall be stricken in their entirety, and shall be replaced with the following:

> XII. EPA COSTS
>
> 12.1 As soon as reasonably practicable after this First Amendment to the Consent Decree becomes effective, the United States on behalf of the Army shall pay to EPA $10,208,767.60, in full satisfaction of EPA Costs.
>
> 12.2 In the event that the payment in Paragraph 12.1 is not made within 120 days after this First Amendment to the Consent Decree becomes effective, Interest shall be paid on the unpaid balance, with such Interest beginning to accrue on the 121st day following this First Amendment to the Consent Decree becoming effective, and accruing through the date of the payment.

12.3 The Parties to this First Amendment to the Consent Decree recognize and acknowledge that the payments in this Section can be paid only from appropriated funds legally available for such purpose. Nothing in this First Amendment to the Consent Decree will be interpreted or construed as a commitment or requirement that the United States on behalf of the Army obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

12.4 The total amount to be paid to EPA pursuant to this Section shall be deposited by EPA in the RMA Special Account to be retained and used to conduct or finance response actions at or in connection with the RMA Site, including carrying out EPA's responsibilities in connection with the Settlement Agreement or the Federal Facility Agreement, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

12.5 Except as specifically provided in Paragraph 12.6, EPA covenants not to take administrative action against the Army, and EPA covenants not to sue or take administrative action against Shell Oil, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for EPA Costs. These covenants shall take effect upon the date that this First Amendment to the Consent Decree becomes effective. These covenants are conditioned upon the satisfactory performance by the Army of its obligations under this First Amendment to the Consent Decree. These covenants extend only to the Army and Shell Oil, and do not extend to any other person. EPA further covenants to seek withdrawal as moot In the Matter of United States Department of the Army, Docket Number CERCLA-08-2020-001 (EPA Region 8). Upon dismissal of Docket No. CERCLA-080-2020-001 (EPA Region 8), the Administrative Law Judge's July 14, 2021, orders regarding the parties' motions for accelerated decision and EPA's motion in limine are moot and shall have no precedential value.

12.6 Notwithstanding any other provision of this First Amendment to the Consent Decree, EPA reserves, and this First Amendment to the Consent Decree is without prejudice to, all rights against the Army with respect to liability for the Army's failure to meet a requirement of this First Amendment to the Consent Decree.

12.7 The Army agrees not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through sections 106(b)(2), 107, 111, 112, 113 of CERCLA, or any other provision of law with respect to this First Amendment to the Consent Decree.

5. Integration

The consent decree shall be amended to include the following:

Except as provided in this First Amendment to the Consent Decree, the Consent Decree is unchanged.

6. Effective Date

The consent decree shall be amended to include the following:

This First Amendment to the Consent Decree is effective as of September 18, 2024**.**

DATED September 18, 2024.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 83-cv-02379-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHELL OIL COMPANY,

Defendant.

FIRST AMENDMENT TO THE CONSENT DECREE

INTRODUCTION

Pursuant to Paragraph 5.1 of the Consent Decree in this case signed by Judge James R. Carrigan on February 12, 1993, the United States of America and Shell Oil Company (the "Parties"), stipulate and agree to the following First Amendment to the Consent Decree.

BACKGROUND

This case involves the Rocky Mountain Arsenal Superfund Site ("RMA Site"), located near Denver, Colorado. The United States of America on behalf of the U.S. Environmental Protection Agency ("EPA"), the U.S. Army ("Army"), the U.S. Department of the Interior ("DOI"), and the Agency for Toxic Substances and Disease Registry ("ATSDR"), together with Shell Oil Company ("Shell Oil") entered into the Consent Decree to resolve various claims and counterclaims under, among other things, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. The Consent Decree incorporated a February 12, 1989, Settlement Agreement ("Settlement Agreement") between the United States and Shell Oil, which

Settlement Agreement referenced a Federal Facility Agreement ("FFA") of the same date between EPA, the Army, DOI, ATSDR and Shell Oil entered pursuant to section 120 of CERCLA, 42 U.S.C. § 9620, regarding response actions at the RMA Site.[1]

Among other things the incorporated Settlement Agreement requires reimbursement of "EPA Costs" (a defined phrase) at the RMA Site. EPA Costs have not been reimbursed in full. There is an outstanding dispute regarding the reimbursement of EPA Costs at the RMA Site for costs incurred since 2015. This First Amendment to the Consent Decree fully and finally resolves that dispute. The First Amendment to the Consent Decree replaces the provisions in the Consent Decree relating to the payment of EPA Costs with a new provision which calls for a single "cash out" payment that fully and finally resolves EPA Costs at the RMA Site, including amounts previously incurred in the past and amounts that may be incurred in the future.

Paragraphs 4.1 and 4.2 of the Consent Decree require lodging modifications of the Consent Decree with the Court, and publication of public notice and solicitation of public comment. The Parties lodged the proposed First Amendment to the Consent Decree with the Court, published notice of the proposed First Amendment to the Consent Decree and solicited public comment, and separately moved the Court to enter the First Amendment to the Consent Decree.

---

[1] The Settlement Agreement is adopted and incorporated into the Consent Decree by reference. *See* Consent Decree Paragraph 3.1. Consequently, we refer to the Consent Decree and Settlement Agreement interchangeably.

CONSENT DECREE AMENDMENTS

The Consent Decree is hereby amended in the following respects:

1. Settlement Agreement, Section III, Paragraph 3.29

"EPA Costs" means all costs incurred by EPA or its Contractors on or after October 1, 1987, in carrying out its responsibilities in providing technical assistance for any activity in connection with this Settlement Agreement or the Federal Facility Agreement. ~~**The term does not include any costs incurred by EPA solely to pursue an enforcement action or to defend against litigation brought by Shell [Oil]**~~.

2. Settlement Agreement, Section III, Paragraph 3.2

"Allocable Costs" means (l) all Response Costs, including Data Management Costs, but excluding all Army-only Response Costs and all Shell-Only Response Costs; (2) all Off-Site Response Costs; (3) all ~~**EPA Costs,**~~ ATSDR Costs and DOI Costs; (4) all Natural Resource Damages; (6) the salary and benefits, if any, of the Custodian of the JARDF; (7), if the Central Repository is located off the Arsenal, all costs associated with the Central Repository and the JARDF (if the JARDF is also located off the Arsenal), including without limitation costs for office space and utilities, but excluding: (a) all Army-Only Response Costs and Shell-Only Response Costs associated with the Central Repository and the JARDF; (b) all salaries and any benefits of the clerk or clerks of the Central Repository and the JARDF; and (c) all office supplies used by them in the performance of their official duties; and (8) all other costs that the Army and Shell may agree in writing constitute Allocable Costs.

3. Settlement Agreement, Section VI, Paragraph 6.1(b)

All payments pursuant to paragraph 6.1(a) shall be due and owing only for costs that have actually been incurred and shall be made in accordance with Section VII. ~~**EPA Costs,**~~ ATSDR Costs, and DOI Costs shall be deemed to have been actually incurred for purposes of this paragraph when the Army pays ~~**EPA,**~~ ATSDR~~,~~ or DOI in accordance with Sections XII, XIII and XIV respectively.

4. Settlement Agreement, Section XII, Paragraphs 12.1 through 12.6

Strike Section XII, paragraphs 12.1 through 12.6, in its entirety, and replace it with the following:

XII. EPA COSTS

12.1 As soon as reasonably practicable after this First Amendment to the Consent Decree becomes effective, the United States on behalf of the Army shall pay to EPA $10,208,767.60, in full satisfaction of EPA Costs.

12.2 In the event that the payment in Paragraph 12.1 is not made within 120 days after this First Amendment to the Consent Decree becomes effective, Interest shall be paid on the unpaid balance, with such Interest beginning to accrue on the 121st day following this First Amendment to the Consent Decree becoming effective, and accruing through the date of the payment.

12.3 The Parties to this First Amendment to the Consent Decree recognize and acknowledge that the payments in this Section can be paid only from appropriated funds legally available for such purpose. Nothing in this First Amendment to the Consent Decree will be interpreted or construed as a

commitment or requirement that the United States on behalf of the Army obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.

12.4 The total amount to be paid to EPA pursuant to this Section shall be deposited by EPA in the RMA Special Account to be retained and used to conduct or finance response actions at or in connection with the RMA Site, including carrying out EPA's responsibilities in connection with the Settlement Agreement or the Federal Facility Agreement, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

12.5 Except as specifically provided in Paragraph 12.6, EPA covenants not to take administrative action against the Army, and EPA covenants not to sue or take administrative action against Shell Oil, pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for EPA Costs. These covenants shall take effect upon the date that this First Amendment to the Consent Decree becomes effective. These covenants are conditioned upon the satisfactory performance by the Army of its obligations under this First Amendment to the Consent Decree. These covenants extend only to the Army and Shell Oil, and do not extend to any other person. EPA further covenants to seek withdrawal as moot In the Matter of United States Department of the Army, Docket Number CERCLA-08-2020-001 (EPA Region 8). Upon dismissal of Docket No. CERCLA-080-2020-001 (EPA Region 8), the Administrative Law Judge's July 14, 2021, orders regarding the parties' motions for accelerated decision and EPA's motion in limine are moot and shall have no precedential value.

12.6 Notwithstanding any other provision of this First Amendment to the Consent Decree, EPA reserves, and this First Amendment to the Consent Decree is without prejudice to, all rights against the Army with respect to liability for the Army's failure to meet a requirement of this First Amendment to the Consent Decree.

12.7 The Army agrees not to assert any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund through sections 106(b)(2), 107, 111, 112, 113 of CERCLA, or any other provision of law with respect to this First Amendment to the Consent Decree.

5. Integration

Except as provided in this First Amendment to the Consent Decree, the Consent Decree is unchanged.

6. Effective Date

This First Amendment to the Consent Decree is effective as of September 18, 2024.

DATED September 18, 2024.

BY THE COURT:

PHILIP A. BRIMMER
Chief United States District Judge

BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: July 18, 2023

Acting For

BEN BIELENBERG
Acting Division Director
Superfund and Emergency Management Division
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop St.
Denver, CO 80202

KENNETH C. SCHEFSKI
Regional Counsel
U.S. Environmental Protection Agency
Region 8
1595 Wynkoop St.
Denver, CO 80202

BY THE UNITED STATES DEPARTMENT OF THE ARMY:

Date: 17 July 2023

AMY L BORMAN
Deputy Assistant Secretary of the Army
Environment, Safety and Occupational Health

BY THE UNITED STATES DEPARTMENT OF THE INTERIOR:

8-02-2023

SHANNON A. ESTENOZ
Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior

BY THE AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES:

Aaron S Bernstein Date: 7-18-23

AARON BERNSTEIN, MD, MPH
Director
Center for Disease Control National Center for Environmental Health
Agency for Toxic Substances and Disease Registry

7.14.23

DEBORAH TRESS
Deputy Associate General Counsel
U.S. Department of Health and Human Services Office
Center for Disease Control
Agency for Toxic Substances and Disease Registry

BY THE UNITED STATE DEPARTMENT OF JUSTICE:

Date: Sept. 27, 2023

PHILLIP R. DUPRE
Senior Attorney
U.S. Department of Justice
Environment and Natural Resources Division

BY SHELL USA, INC., fka SHELL OIL COMPANY:

Date: 7-11-23

WILLIAM E. PLATT
Portfolio Manager, PCRO
Shell USA, Inc.

CERTIFICATION

I certify that a copy of the foregoing Motion to Withdraw Complaint, Docket No. CERCLA-08-2020-0001 has been filed via the OALJ E-filing system constituting service on the Presiding Officer and sent via email to the following Counsel for Respondent:

Andrew J. Corimski
Litigation Branch
Environmental Law Division
US Army Legal Services Agency
9275 Gunnison Road, Fort Belvoir, VA 22060

WILLIAM LINDSEY Digitally signed by WILLIAM LINDSEY Date: 2024.10.24 17:49:21 -06'00'

_____

William Lindsey, Senior Assistant Regional Counsel
CERCLA Enforcement Section
Office of Regional Counsel
USA EPA Region 8
1595 Wynkoop Street (MC 8ORC-C)
Denver, CO 80202
303-312-6282

Counsel for Complainant