



U.S. Department of Justice

Environment and Natural Resources Division

90-1-24-04788

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VIA ELECTRONIC CASE FILING

July 25, 2018

Clerk of Court
United States District Court
Eastern District of North Carolina
P.O. Box 25670
Raleigh, NC 27611

Re: *N.C. Environmental Justice Network et al. v. Taylor et al.*, United States District Court for the Eastern District of North Carolina, No. 4:12-cv-154-D

Dear Clerk of the Court,

I am writing to notify you that the United States has reviewed the proposed consent decree in the above-referenced matter and does not object to its entry by this court.

On July 5, 2018, the Citizen Suit Coordinator for the Department of Justice received the proposed consent decree. The document is subject to review pursuant to the Clean Water Act, 33 U.S.C. §1365(c)(3).¹ This provision provides, in relevant part:

No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgement by the Attorney General and the Administrator.

See also 40 C.F.R. § 135.5 (service on Citizen Suit Coordinator in the U.S. Department of Justice). A settlement that does not undergo this federal review process is at risk of being void.

¹ For the purposes of the United States' right of review, the term "consent judgment" in the Clean Water Act citizen suit provisions has a broad meaning and encompasses all instruments entered with the consent of the parties that have the effect of resolving any portion of the case. For example, the United States views a document stipulating to dismissal of a case of any part thereof would be within the scope of this language. Such documents and any associated instruments (even if not submitted to the Court) must be submitted to the United States for review, notwithstanding any provisions purporting to maintain the confidentiality of such materials. The Department monitors citizen suit litigation to review compliance with this requirement.

Pursuant to 11 U.S.C. § 362, this action was stayed on June 3, 2015 pending resolution of the bankruptcy case. ECF No. 164. On March 23, 2018, the plaintiffs and Taylor defendants (debtors in the bankruptcy case) filed a motion in the Bankruptcy Court for an order approving a settlement agreement that would resolve claims raised in this Clean Water Act case as well as the issues in the bankruptcy proceeding, including the plaintiffs' objections to the reorganization plan and the Taylor defendants' objections to plaintiffs' proofs of claim. *See* ECF No. 166-1. A copy of that motion was received by the Department of Justice on April 16, 2018. The decision as to whether the settlement agreement is permissible under Bankruptcy Rule 9019 was made by the Bankruptcy Court for the Eastern District of North Carolina, which granted the motion on April 20, 2018, *see id.*, however, the United States is filing its comment letter in this Court because the terms of the settlement agreement resolve issues arising from the above-referenced Clean Water Act case.

In its review, the United States seeks to ensure that the proposed consent judgment complies with the requirements of the relevant statute and is consistent with its purposes. *See Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525-56 (1986) (a consent decree should conform with and further the objectives of the law upon which the complaint was based). For example, if the defendant has been out of compliance with statutory or permit requirements, the proposed consent judgment should require the defendant to come into prompt compliance and should include a civil penalty, enforceable remedies, injunctive relief, and/or a supplemental environmental project (SEP) payment sufficient to deter future violations, or combinations of the above.

Section V of the proposed consent decree incorporates by reference the terms of the settlement agreement entered by the Bankruptcy Court. Under that agreement, the Taylor defendants must conduct periodic inspections of the sludge levels in the facility lagoons, complete a sludge survey, and remove sludge from the lagoons such that sludge levels do not exceed 50% of the design volume for the respective lagoon. The agreement further requires that the removed sludge be taken off site for land application and that the use of offsite land for management of swine waste continue at the same level, or greater than it was during the bankruptcy proceeding. The Taylor defendants also agree to modify the Bankruptcy Reorganization Plan to remove language that could be interpreted to relieve them of liability for future violations (*i.e.*, post-petition violations) of state or federal environmental laws. The plaintiffs agree to not take water samples, conduct soil testing, or file any new citizen suit against the Taylor defendants for three years from the effective date of the settlement agreement.

The parties further agree in the settlement to bear their own attorneys' fees and to not seek to recover fees. The United States notes for the record that the settlement does not incorporate civil penalties, which are an available and typically appropriate remedy under the Clean Water Act.

Given the facts of this case, the United States has no objection to the proposed consent decree. We accordingly notify the Court.

The United States affirms for the record that it is not bound by this settlement. *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (Attorney General is not bound by cases to which he is not a party); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found. Inc.*, 484 U.S.

49, 60 (1987) (explaining that citizen suits are intended to “supplement rather than supplant governmental action”); *Sierra Club v. Electronic Controls Design*, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (explaining that the United States is not bound by citizen suit settlements, and may “bring its own enforcement action at any time”); 131 Cong. Rec. S15, 633 (June 13, 1985) (statement of Senator Chafee, on Clean Water Act section 505(c)(3), confirming that the United States is not bound by settlements when it is not a party). The United States also notes that, if the parties subsequently propose to modify further the consent judgment entered in this case, the parties should so notify the United States, and provide a copy of the proposed modifications, 45 days before the Court enters any such modifications. *See* 33 U.S.C. § 1365(c)(3).

We appreciate the attention of the Court. Please contact the undersigned at (202) 305-0641 if you have any questions.

Sincerely,

/s/ Frederick H. Turner

Frederick H. Turner, Attorney

U.S. Department of Justice

Environmental and Natural Resources Division

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cc: Counsel of Record via ECF