

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA
Plaintiff,

v.

DAVENPORT REALTY TRUST and
RED HILL TRUST,

Defendants.

CIVIL ACTION NO. 1:07-cv-00010-PB

BEEDE WASTE OIL SUPERFUND SITE PARTIAL CONSENT DECREE

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter on January 8, 2007, pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9607, seeking, reimbursement of response costs incurred and to be incurred for response actions taken or to be taken in connection with the release or threatened release of hazardous substances at or in connection with the Beede Waste Oil Superfund Site (“Site”) in Plaistow, New Hampshire.

B. The defendant that has entered into this Consent Decree (“Settling Defendant”) does not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

C. Information currently known to EPA indicates that the amount of hazardous substances contributed to the Site by the Settling Defendant, Davenport Realty Trust, is minimal in comparison to other hazardous substances at the Site, and that the toxic or other hazardous effects of the hazardous substances contributed to the Site by the Settling Defendant do not contribute disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site. Accordingly, pursuant to 122(g)(1)(A) of CERCLA, 42 U.S.C. § 9622(g)(1)(A), EPA has determined that the amount and the toxic or other hazardous effects of the substances contributed by the Settling Defendant is minimal in comparison to other hazardous substances at the Site. EPA has also determined that this settlement involves only a minor portion of the Plaintiff’s response costs at the Site with respect to the Settling Defendant.

D. The United States and the Settling Defendant agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, with the consent of the Parties to this Decree, it is hereby Ordered, Adjudged, and Decreed:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9607 and 9613(b). This Court also has personal jurisdiction over the Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaints, the Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. The Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon the Settling Defendant and its heirs, successors and assigns. Any change in ownership or corporate status of the Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

- a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*
- b. "Consent Decree" shall mean this Decree and all appendices, if any, attached hereto. In the event of conflict between this Decree and any appendix, this Decree shall control.
- c. "Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.
- d. "DOJ" shall mean the United States Department of Justice.
- e. "Effective Date" shall be the effective date of this Consent Decree as provided in Paragraph 25.
- f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

g. "Interest," shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

i. "Parties" shall mean the United States, and the Settling Defendant, Davenport Realty Trust.

j. "Plaintiff" shall mean the United States.

k. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

l. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on January 9, 2004, by the Regional Administrator, EPA Region 1, or his/her delegate and all attachments thereto.

m. "Response Costs" shall include all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

n. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

- o. "Settling Defendant" shall mean Davenport Realty Trust of South Yarmouth, Massachusetts.
- p. "Site" shall mean the Beede Waste Oil Superfund Site, encompassing two parcels totaling approximately 40 acres, located at 11 Kelley Road and 42 Old County Road, Plaistow, Rockingham County, New Hampshire.
- q. "United States" shall mean the United States of America, including all of its departments, agencies, and instrumentalities.
- r. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

V. PAYMENT

4. Payment by Settling Defendant. Within thirty (30) days of entry of this Consent Decree, the Settling Defendant shall pay to EPA \$120,000, plus an additional sum for Interest on that amount calculated from the date of lodging of this Consent Decree through the date of payment. This payment shall be made by certified or cashier's check made payable to the "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall identify the name and address of the party making payment, the Site name (Beede Waste Oil Superfund Site), the EPA Region and Site Spill ID Number 011T, DOJ Case Number 90-11-3-07039/9 , as well as the Docket Number of this action (1:07-cv-00010-PB), and shall be sent to:

**U.S. Environmental Protection Agency
Superfund Payments
Cincinnati Finance Center
P.O. Box 979076
St. Louis, MO 63197-9000**

A copy of the transmittal letter and the payment simultaneously shall be sent to EPA and DOJ in accordance with Paragraph 6. The total amount to be paid by Settling Defendant pursuant to this Paragraph shall be deposited in the Beede Waste Oil Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

5. The Settling Defendant's payment includes an amount for: a) past response costs incurred at or in connection with the Site by the United States; and b) projected future response costs to be incurred at or in connection with the Site.

6. At the time that payment is made, the Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions. Such notice shall reference the EPA Region and Site Spill ID Number 011T, DOJ Case Number 90-11-3-07039/9, and the Civil Action Number of this matter (1:07-cv-00010-PB).

VI. FAILURE TO COMPLY WITH CONSENT DECREE

7. Interest on Late Payments. If Settling Defendant fails to make any payment under Paragraph 4 (Payment by Settling Defendant) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

8. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

9. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of the Settling Defendant's failure to comply with the requirements of this Consent Decree. The Settling Defendant shall make its payment required by this Paragraph in the manner described in Section V (Payment).

VII. COVENANT NOT TO SUE BY PLAINTIFF

10. Except as specifically provided in Section VIII (Reservation of Rights by United States), the United States covenants not to sue or take administrative action against the Settling Defendant pursuant to Section 106 or 107(a) of CERCLA, and Section 7003 of RCRA relating to the Site. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Paragraph 4 of Section V (Payments for Response Costs by Settling Defendant) and any amount due under Section VI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by the Settling Defendant of its obligations under this Consent Decree. This covenant extends only to the Settling Defendant and does not extend to any other person.

VIII. RESERVATION OF RIGHTS BY UNITED STATES

11. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by United States in Paragraph 10. Notwithstanding any other provision of

this Consent Decree, the United States reserves all rights against the Settling Defendant with respect to:

- a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability based upon the Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of Waste Material at or in connection with the Site, after the signature of this Consent Decree by the Settling Defendant; and
- d. liability for damages for injuries to, destruction of, or loss of natural resources, and for the cost of any natural resource damage assessments.

12. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

IX. COVENANT NOT TO SUE BY SETTLING DEFENDANT

13. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States, pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, related to the Site;

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State of New Hampshire, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

d. any direct or indirect claim for disbursement from the Beede Waste Oil Superfund Site Special Account.

Except as provided in Paragraph 15 (Waiver of Claims) and Paragraph 16 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 11 and 12, but only to the extent that the Settling Defendant's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

14. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

15. The Settling Defendant agrees not to assert any claims or causes of action (including claims for contribution under CERCLA) that it may have for all matters relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that the Settling Defendant may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against the Settling Defendant.

16. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, the Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the applicable covenants not to sue.

X. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

17. Except as provided in Paragraph 15 (Waiver of Claims) and Paragraph 16 (Waiver of Claim-Splitting Defenses), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraphs 15 and 16, each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States,

pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

18. The Parties agree, and by entering this Consent Decree the Court finds, that this settlement constitutes a judicially-approved settlement for purposes of Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), and that the Settling Defendant is entitled, as of the Effective Date of this Consent Decree, to protection from contribution actions or claims as is provided by CERCLA, Sections 113(f)(2) and 122(g)(5), 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), or as may be otherwise provided by law, for “matters addressed” in this Consent Decree. Matters addressed in this Consent Decree with respect to the Settling Defendant are all Response Costs incurred or to be incurred and all response actions taken or to be taken at or in connection or with respect to the Site by the United States or any other person; provided, however, that if the United States exercises rights under the reservations in Section IX (Reservation of Rights by United States), other than in Paragraphs 11.a (claims for failure to meet a requirement of the Consent Decree) or 11.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions that are within the scope of the exercised reservation.

19. The Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to initiation of such suit or claim. The Settling Defendant also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint

or claim upon it. In addition, the Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

20. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiffs set forth in Section VII.

XI. RETENTION OF RECORDS

21. Until three (3) years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records, reports, or information (hereinafter referred to as "records") now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary.

22. After the conclusion of the document retention period in the preceding paragraph, the Settling Defendant shall notify EPA and DOJ at least ninety (90) days prior to the destruction of any such records to EPA. The Settling Defendant shall deliver such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any

other privilege recognized by federal law. If the Settling Defendant asserts such a privilege, they shall provide the Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name and title of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

23. The Settling Defendant certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

XII. NOTICES AND SUBMISSIONS

24. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change

to the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, DOJ, EPA, and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-07039/9)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

Director, Office of Site Remediation and Restoration
United States Environmental Protection Agency
Region 1

and

EPA Remedial Project Manager - Beede Waste Oil Superfund Site
United States Environmental Protection Agency
Region 1

and

EPA Site Attorney/Senior Enforcement Counsel - Beede Waste Oil Superfund Site
United States Environmental Protection Agency
Region I

As to Settling Defendant:

Gregory L. Benik, Esq.
Benik & Associates P.C.
931 Jefferson Boulevard
Suite 2008
Warwick, Rhode Island 02886

Counsel for Davenport Realty Trust

XIII. EFFECTIVE DATE

25. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

XIV. RETENTION OF JURISDICTION

26. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

27. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. The Settling Defendant consent to entry of this Decree without further notice, and the United States reserves the right to oppose an attempt by any person to intervene in this civil action.

28. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVI. SIGNATORIES/SERVICE

29. Each undersigned representative of the Settling Defendant and the Acting Assistant Attorney General for the Environment & Natural Resources Division of the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

30. The Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of the Consent Decree.

31. The Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. The Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XVII. FINAL JUDGMENT

32. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Consent Decree.

The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

33. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ___ DAY OF _____, 20__.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Davenport Realty Trust, et. al. relating to the Beede Waste Oil Superfund Site.

FOR THE UNITED STATES OF AMERICA

1/6/10
Date

JOHN C. CRUDEN
Deputy Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

1/8/10
Date

JEREMY K. SANDS
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

JOHN P. KACAVAS
United States Attorney
District of New Hampshire

GRETCHEN L. WITT
Assistant United States Attorney
District of New Hampshire

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Davenport Realty Trust, et. al. relating to the Beede Waste Oil Superfund Site.

10/28/09

Date

IRA W. LEIGHTON J
Acting Regional Administrator, Region I
U.S. Environmental Protection Agency
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

10/9/09

Date

CYNTHIA A. LEWIS
Senior Enforcement Counsel
U.S. Environmental Protection Agency
Region I
One Congress Street, Suite 1100
Boston, Massachusetts 02114-2023

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Davenport Realty Trust, et. al., relating to the Beede Waste Oil Superfund Site.

Name of PRP: Davenport Realty Trust

Party Identification Number: _____

FOR Davenport Realty Trust

Sept. 29, 2009
Date

Signature: _____
Name (print): Gregory L. Benik
Title: Counsel for Davenport Realty Trust
Address: Benik & Associates PC
931 Jefferson Blvd. Suite 2008
Warwick, RI 02886
(401) 454-0054

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Gregory L. Benik
Title: _____
Address: same as above
Ph. Number: _____
401 454-0054