IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

SEVERSTAL SPARROWS POINT, LLC	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Civil Action Nos. 97-cv-00558-JFM
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*	)	and 97-cv-00559-JFM
	)	
	)	
Respondents.	)	
	)	

UNITED STATES' RESPONSE TO PETITION OF SEVERSTAL SPARROWS POINT, LLC FOR RESOLUTION OF DISPUTE PURSUANT TO THE OCTOBER, 1997 CONSENT DECREE REGARDING CONDUCT OF OFFSHORE MEDIA INVESTIGATION

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I. INTRODUCTION

This matter concerns the cleanup of land and water extensively polluted by the Sparrows Point Steel Mill, which for over a century has manufactured a variety of steel products in facilities operated on a large spit of land in Baltimore Harbor ("Facility'). From approximately 1916 through 2003 the steel mill was owned and operated by the Bethlehem Steel Corporation ("BSC"). In 2003 it was sold to Petitioner Severstal Sparrows Point, LLC ("Severstal," between 2003 and 2008 operating under the name ISG Sparrows Point, LLC and/or ISG Acquisition Corp., collectively, "ISG"). Severstal has continued to own and operate the Sparrows Point Facility to the present day. Pet. at pp. 8-9.

By the 1990s the United States Environmental Protection Agency ("EPA") and the Maryland Department of the Environment's ("MDE," collectively, "Agencies")[1/] had identified extensive contamination at the Sparrows Point Steel Mill. After bringing several civil enforcement actions under a variety of federal and state statutes against BSC, in 1997 the Agencies and BSC entered into a Consent Decree under, *inter alia*, Section 3008(h) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(h), to complete, *inter alia*, a number of Interim Actions, a Site Wide Investigation ("SWI") of environmental conditions, including both on the Facility, and in the offshore surface waters, groundwater, and sediments adjacent to the Facility ("offshore media"), and a Corrective Measures Study ("CMS").[2/]

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[1] EPA and MDE originally brought separate civil actions in this matter, captioned United States v. Bethlehem Steel Corp., C.A. No. JFM-97-559 (under the auspices of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. ("RCRA")), and Maryland Department of the Environment v. Bethlehem Steel Corp., C.A. No. JFM-97-558 (under the auspices of several Maryland statutes), which this Court consolidated in a November 5, 1997 Order, designating MDE's matter as the lead case. While EPA has taken the lead in supervising Severstal's work under the Site Wide Investigation requirements at issue here, and issued several of the letters which led up to this dispute, the Agencies are jointly administering their responsibilities under the 1997 Consent Decree, and MDE joins in the filing of this Response.

[2] A copy of the 1997 Consent Decree between EPA, MDE and BSC is attached to the Severstal's Petition as Exhibit 1. As Severstal points out, and the Agencies acknowledge, the 1997 Consent Decree at times uses the terms "Facility" and "Site" interchangeably, with both terms referring to the real property owned by Severstal. *See* Pet. at p. 26, citing the 1997 Consent Decree at p. 5. However, as detailed below, elsewhere in the 1997 Consent Decree it is plain that

Contrary to repeated assertions by Severstal, Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), and thus the 1997 Consent Decree which is at the center of this dispute, is not limited to releases just at "Solid Waste Management Units" ("SWMUs"). Rather, and as detailed below, both the Consent Decree and the statute authorize EPA to take "Corrective Action" to investigate a release of "hazardous wastes" or "hazardous constituents" **anywhere** at, or from, a facility such as Sparrows Point.

The dispute raised by Severstal in its July 30, 2010 *Petition for Resolution of Dispute Pursuant to the October 1997 Consent Decree* ("Petition") concerns EPA's February 3, 2010 partial disapproval of a draft offshore media investigation workplan that Severstal submitted to the Agencies on October 13, 2009, entitled *Sediment, Surface, Water, and Groundwater Sampling Plan to Assess Current Groundwater Discharge Impacts to the Offshore Environment ("October 2009 Proposed Workplan").* Severstal had submitted this workplan in response to requests from MDE in August, 2009 that it propose and implement a comprehensive offsite sediment sampling plan, as required by the Consent Decree. Pet. Exhs. 4 & 5 (citing letters from MDE to Severstal dated August 6 and 13, 2009, Pet. Exhs. 15 and 16).

A close reading of Severstal's Petition reveals that it repeatedly mischaracterizes both the limited work it has in fact proposed to do, as well as the bases of the Agencies' repeated requests for that work, in a continued effort to delay the work called for under the Consent Decree.

The Consent Decree clearly empowers the Agencies to compel this work to investigate existing conditions in the offshore media, and the Agencies have determined, on the basis of

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the SWI is intended to investigate environmental conditions in the offshore media surrounding the real property which are potentially being impacted by the steelmaking activities. Therefore, in this Response the Agencies use the term "Facility" to refer to the property owned by Severstal at Sparrows Point (including all the steel making facilities, and real property including waste handling and disposal areas), and the term "Site" to refer to both the Facility and the offshore media to which contamination from the Facility has spread.

Severstal's own documents, that there is no reason for further delay.[3]

A. Severstal has Refused to Propose a Comprehensive Investigation of the Off-shore Media, Contrary to the Requirements of the Consent Decree, and Contrary to its Claims Before this Court

Severstal claims that in its *October 2009 Proposed Workplan* it proposed to "investigate and evaluate the impact that any current groundwater discharges from the site were having on the off-site (off-shore) sediments that included sediment, surface water, and groundwater sampling." Pet. at pp. 18-19. This is false.

Rather, Severstal proposed to conduct an investigation only at the Coke Oven and Coke Point ("CO/CP") Area where it has already admitted that high concentrations of benzene are impacting surrounding surface water. *October 13, 2009 Proposed Workplan*, Pet. Exh. 5, p. 1-1. Moreover, Severstal proposed only a limited investigation of surface water, and investigation of actual sediment "pore" water along only three transects, in the CO/CP Area. *Id.* at p. 2-3 - 2-5.[4] The rest of the offshore media areas which are adjacent to its Facility would be left uninvestigated by Severstal's proposal.

EPA partially disapproved Severstal's *October 13, 2009 Proposed Workplan* in a letter dated February 3, 2010, stating that the proposed Sediment Work Plan failed to meet the scope of work set forth in Attachment B, Section 4(b) of the Consent Decree, which requires collection of data necessary to support an ecological risk assessment showing the extent of risk posed to ecological receptors from **all** impacted media, and that "the geographic boundaries of work proposed should not be limited to the Coke Point peninsula, but must also include the entire

[3] An aerial photograph of the Severstal's Sparrows Point facility, showing the location of the AOCs, SWMUs, and of significant features at the Site, is attached as EPA Exh. 1.

[4] "Pore water" comprises water between sediment particles, and its analysis offers direct evidence of the potential impact of contaminated ground water on the surface waters of the Chesapeake Bay.

Sparrows Point shore line surrounding the steel mill, including the shipyard portion." Pet. Exh. 17, p. 1. In response, Severstal triggered the dispute resolution procedures of the Consent Decree by letter dated March 4, 2010. Pet. Exh. 7. Severstal subsequently submitted another draft workplan in April, 2010 entitled *Work Plan to Assess Offsite Ecological Impacts from Current Releases from the Five Special Study Areas* ("*April, 2010 Proposed Workplan*"), Pet. Exh. 6. Incredibly, Severstal proposes this second workplan as a basis to resolve this dispute, despite the fact that it actually represents a marked step **backward** from the inadequate plan it proposed in October, 2009. Pet. pp. 31-34.

In its *April, 2010 Proposed Workplan*, Severstal did nominally expand its geographic scope to include the Special Study Areas ("SSAs") originally identified in the 1997 Consent Decree. Pet. Exh. 6, pp. 2-1, 3-3 - 3-4. However, upon close review it is apparent that Severstal is still refusing to perform the kind of field work necessary to actually quantify the nature and extent of the contamination which is already known to be present at some parts of the shoreline, and which may (or may not) be elsewhere. Instead, Severstal proposes to keep using computer modeling employing "imaginary particles" of benzene to plot pathways. (Although the "imaginary particle" analysis done to date does confirm that "[m]ost of the groundwater in the Greys Landfill and COA/Coke Point Landfill is transported through the slag and into the adjacent rivers," *Id.* at p. 2-2, it does not provide robust enough data to complete a CMS.) Moreover, in its latest proposal Severstal no longer agrees to conduct chemical-specific investigation along 16 "transects," *i.e.* sampling locations running out into the surface water, at the CO/CP Area.[5]

[5] In its *October, 2009 Proposed Workplan*, Severstal had stated that the surface water samples "will be analyzed for the chemicals detected in groundwater above the aquatic benchmark screening values, primarily COPI VOCs, SVOCs, and metals." Pet. Exh. 5, at p. 2-1. That language is omitted from the *April, 2010 Proposed Workplan*. Pet. Exh. 6.

Because it was submitted after Severstal had initiated dispute resolution, and presented even more limitations than had Severstal's prior *October, 2009 Proposed Workplan*, the Agencies did not initially respond to it. After confirming from Severstal that its approach for the offshore media investigation remained fundamentally different from, and on a much longer timeline than, the Agencies', *see* discussion below and August 12 and 18, 2010 e-mail exchange between EPA and Severstal, EPA Exhs. 2 & 3, on August 25, 2010 EPA notified Severstal that Severstal's *April, 2010 Proposed Workplan* was also unacceptable. EPA Exh. 4.

For the reasons given above and below, the Agencies have concluded that the *Proposed April, 2010 Workplan* is deficient and that the submittal does not provide an adequate basis for resolving this dispute.

B. Severstal Misrepresents the Nature and Basis of the Agencies' Requests to Investigate the Offsite Media

Severstal claims that EPA seeks to compel it to "investigate historic off-site releases from the Sparrows Point facility," Pet. at 5, and that EPA's position is based on a claim "arising from past contamination" on land that it does not own. Pet. at 23. *See also* Pet. at 17-18. This allegation is also false. As EPA has stated repeatedly, the Agencies require collection of data necessary to support an ecological risk assessment showing the **existing** extent of risk posed to ecological receptors from all impacted media, without regard to when the original contamination at the Facility took place. In its February 3, 2010 letter partially disapproving the workplan, EPA did write that the investigation must "not be limited to an evaluation of the current groundwater discharge impacts to offshore environment; rather, it must address current and past releases from groundwater, surface water, storm water, sediment transport and other environmental pathways." *Id.* EPA used this language in recognition that at this point Severstal (in one corporate form or another) has been operating the steel mill for over seven years.

After Severstal repeated its mischaracterization of EPA's position in its March 4, 2010 Notice of Dispute, Pet. Exh. 7, in its June 30, 2010 *Proposed Resolution* EPA reiterated that it is the **existing** conditions at the Sparrows Point Site that the 1997 Consent Decree, and that the Agencies today, require to be investigated. "As was set forth in detail in the attachment to EPA's February 3, 2010 letter [partially disapproving the *October 2009 Proposed Workplan*] as well as in prior correspondence, EPA and MDE are requiring Severstal to assess **current** releases (and potential releases) to the environment at and from the Facility." EPA's June 30, 2010 *Proposed Resolution,* Pet. Exh. 8 (emph. in the original).

Nevertheless, having created its straw man, Severstal goes on to devote the bulk of its Petition to the argument that the 2003 Asset Purchase Agreement–through which ISG (now Severstal) purchased the Sparrows Point Steel Mill plant from BSC, (under the auspices of a bankruptcy court-sanctioned Section 363(f) Bankruptcy Code sale[6])–modified the 1997 Consent Decree. Severstal asserts that the 2003 Asset Purchase Agreement and the April 23, 2003 Bankruptcy Sale Order implicitly stripped from the 1997 Consent Decree any obligation to investigate contamination in offshore media to the extent it was disposed of in such media by BSC prior to the 2003 sale, and that the SWI work can, and must, somehow, be restricted to avoid looking at the impacts of such prior disposal activity. As explained in detail below, the Agencies submit that Severstal's argument relies on a skewed reading of those documents, as well as an interpretationof bankruptcy law that is inconsistent with the Consent Decree and the law.

More importantly, this argument is irrelevant to this dispute, because, as the Agencies have repeatedly made clear: 1) it is the **existing** conditions in the offshore media that must be

[6] 11 U.S.C. § 363(f).

investigated under the Consent Decree; 2) Severstal has owned and operated the Sparrows Point facility since 2003, during which time its operations remained essentially unchanged from the date of acquisition; and 3) Severstal's own documents (including several attached as exhibits to its Petition) recognize that extensive contamination exists, today, in groundwater that is flowing from the Facility to the offshore media, and indeed at and beyond the Facility's shoreline.

Moreover, as Severstal acknowledges, it is established bankruptcy law that acquiring a property "free and clear" of prior liabilities pursuant to a Section 363(f) Bankruptcy Code sale does not absolve a property owner of its current legal responsibilities under environmental laws, including RCRA. Pet. at 22 (new owner of assets purchased pursuant to a Section 363(f) sale "becomes responsible under environmental laws such as RCRA and CERCLA as the current owner or operator of the property").

C. Severstal's Own Data Shows that Its Sparrows Point Facility is Extensively Contaminated Today

Regardless of the merits of Severstal's argument with respect to pre-2003 disposal in offshore media (which the Agencies do dispute), Severstal has offered no reason to believe that contamination from its own operations is not among the "hazardous wastes" or "hazardous constituents" which are admittedly already contaminating the offshore media, and thus Severstal's argument provides no support for its refusal to complete the SWI with regard to existing conditions. Indeed, Severstal's own data shows that portions of its Sparrows Point facility are pervasively contaminated with a wide variety of hydrocarbons and inorganic contaminants, including at its shoreline. Benzene, a known human carcinogen, is present in the groundwater at the Coke Point peninsula at levels as high as 790,000 parts per billion ("ppb") – over 150,000 times the Maximum Contaminant Level ("MCL") of 5 ppb allowed in public drinking water systems under the federal Safe Drinking Water Act – and presently is found in the

harbor waters adjacent to the Facility at levels as high as 330 ppb.[7] Additionally, naphthalene, a suspected human carcinogen, is present in the groundwater at the Coke Point peninsula at levels as high as 22,000 ppb, well over 1,000 times the Risk Based Concentration ("RBC") value established by EPA as protective of drinking water.[8] As Severstal itself acknowledges, "potentially impacted groundwater from the Sparrows Point facility is known to discharge to the water bodies surrounding the peninsula (lower Patapsco River, Bear Creek, Jones Creek, and Old Road Bay)." *See Ecological Risk Assessment Strategy Document,* URS (February, 2006), p. 2-1, Pet. Exh. 19, discussion at p. 14 below.

D. The Offshore Media Adjacent to the Shipyard are Subject to the Consent Decree

In addition to its arguments justifying its refusal to complete the SWI in the offshore media generally, Severstal argues that it is not obligated to conduct any SWI activities at the shipyard which is adjacent to its Facility ("Shipyard Property"), and which was sold by BSC to a third party prior to the BSC bankruptcy. The Agencies agree that Severstal is not required to conduct a SWI work within the Shipyard Property itself under the terms of the Consent Decree. However, the Agencies do assert that the Consent Decree does expressly obligate Severstal to collect information on offshore media along the perimeter of the Shipyard Property given 1) the presence of stormwater drains throughout Sparrows Point, some of which run from Severstal's Facility through the Shipyard Property, thus potentially discharging contaminated runoff,

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[7] 42 U.S.C. § 300f *et seq. See October, 2009 Proposed Workplan*, Pet. Exh. 5, at p. 1-1, ISG, *2005-07 Site Wide Investigation Report*, Fig. 1,benzene iso concentration, att. as EPA Exh. 5, February 19, 2009 letter from EPA to Severstal, att. as EPA Exh. 6. The Maximum Contaminant Level represents the maximum level of hazardous waste or hazardous constituents allowed to be present in the groundwater.

[8] ISG, *2005-07 Site Wide Investigation Report*, Fig. 2, naphthalene iso concentration, att. as EPA Exh. 7. EPA has developed RBCs using risk assessment guidance from the EPA Superfund program. They are risk-based concentrations derived from standardized equations combining exposure information assumptions with EPA toxicity data. SLs are considered by the Agency to be protective for humans (including sensitive groups) over a lifetime. *See* http://www.epa.gov/reg3hwmd/risk/human/rb-concentration_table/index.htm.

sediments, and infiltrated groundwater from Severstal's Facility to offshore areas; and 2) the fact that water and sediments can move back and forth across the shoreline property boundaries along the peninsula as a whole. Thus the Agencies have directed Severstal to collect reference samples along the shipyard shore area as part of the overall characterization of Site conditions for the SWI.[9]

In sum, EPA did not partially disapprove Severstal's proposed Workplan because it was limited to "current" rather than "historic off-site" releases; rather, it partially disapproved it because it was inadequate to its claimed task of comprehensively investigating potential impacts on all of the offshore media. Severstal's principal concern has always been not whether, but when, it would undertake that work, and indeed over the past several years Severstal has taken every opportunity, however specious, to delay completion of its obligations under the Consent Decree.[10]

The Agencies respectfully submit that this Petition is nothing more than an attempt by Severstal to further delay completion of the SWI and CMS, by recasting what is plainly a technical dispute under the Consent Decree (for which it has no basis) into an issue of interpretation of the bankruptcy sale, and thus should be rejected by this Court.

For the reasons set forth here and below, the Agencies request that the Court issue an Order directing Severstal to submit a revised Offshore media investigation workplan that provides for an ecological assessment in the offshore media as required under Section V, Paragraph B of the 1997 Consent Decree, including Attachments B and C, in accord with the terms of EPA's

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[9] As discussed below, the water table is relatively shallow at Sparrows Point, and storm drains are designed to allow infiltration of ground water. Thus contaminated ground water can be transported to storm drain outfalls. *See* discussion at p. 13 below.

[10] See discussion at p. 38 below.

February 3, 2010 partial disapproval letter.

II. JURISDICTION

The Agencies agree with Severstal that this dispute arises out of implementation of this Court's 1997 Consent Decree (described below), whose Section XX.A.4 provides that disputes shall be resolved pursuant to the Agencies' determination made under informal dispute resolution in accord with Section XX.A.3 unless "within thirty (30) days after receipt of such proposed resolution, BSC files a petition for resolution with the court. Any such resolution shall describe the nature of the dispute and BSC's proposal for resolution of the dispute." 1997 Consent Decree, Pet. Exh. 1, p. 71. Thus this Court is the appropriate forum to resolve this dispute.

III. STANDARD OF REVIEW

Notwithstanding Severstal's strenuous attempts to ground its arguments in the bankruptcy sale, it s readily apparent that the crux of Severstal's dispute is not whether, but when, it must complete a comprehensive study that includes the offshore media, and that this is precisely the kind of dispute which, under the express terms of the Consent Decree, is to be reviewed by this Court on the administrative record, under an arbitrary and capricious standard of review.

District courts can exercise authority over an entered consent decree in one of two ways: (1) "interpret and enforce a decree to the extent authorized by the decree" or (2) "modify the decree pursuant to Federal Rule of Civil Procedure 60(b)(5)." *Pigford v. Veneman*, 292 F.3d 918, 923 (D.C. Cir. 2002). In enforcing a consent decree, the district court's "authority depends on the terms of the decree." *Id.* at 924 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994)). *See also*, *Wheeling-Pittsburgh Steel Corp. v. U.S. EPA*, 1997 WL 697100, *2 (4th Cir. 1997) (applying the standard in the consent decree, stating that defendants "shall have the burden of proving that EPA's position is arbitrary and capricious"); *U.S. v. Knote*, 29 F.3d 1297,

1301 (8th Cir. 1994) (applying an arbitrary and capricious standard, as dictated by the terms of the consent decree, to settle a dispute arising under the consent decree). As the Fourth Circuit has stated,

> we recognize that the [federal Safe Drinking Water Act] like most environmental statutes, is complex and requires sophisticated evaluation of complicated data. Accordingly, we do [] not sit as a scientific body, meticulously reviewing all data under a laboratory microscope. . . Rather, if EPA fully and ably explains its course of inquiry, its analysis, and its reasoning sufficiently enough for us to discern a rational connection between its decision-making process and its ultimate decision, we will not disturb EPA's action.

Trinity American Corp. V. U.S. Env. Prot. Agency, 150 F.3d 389, 395 (4th Cir. 1998) (*internal quot. and cit. omitted*).

In this case, the Consent Decree is clear and unambiguous. Section XX of the Decree provides that all disputes "involving this Consent Decree" shall be resolved in accordance with the terms of that section. 1997 Consent Decree, Pet. Exh. 1, p. 70. Section XXA.4. of the Decree states that

> [T]he standard of judicial review of a final agency action shall be applied, and BSC shall have the burden of demonstrating under such standard that the decision of EPA and/or MDE was in error. For any disputes arising under Section V of this Consent Decree, BSC shall have the burden of demonstrating that the decision of EPA is arbitrary and capricious or otherwise not in accordance with law.

1997 Consent Decree, Pet. Exh. 1, p. 72. Section V of the Decree governs the "Corrective Measures Work to be Performed," which includes the offshore media investigation work which the Agencies are seeking here. As mandated by the Decree, Severstal availed itself of the dispute resolution process contained within the Consent Decree to settle this dispute. Thus, to prevail, Severstal must demonstrate that EPA's decision was "arbitrary and capricious or otherwise not in accordance with law." 1997 Consent Decree, Pet. Exh. 1, p. 72.

Hewing to its view that this dispute is solely about a bankruptcy issue, Severstal argues that the issues in this Petition are subject to *de novo* review by this Court. Pet. at 7. For reasons given below, the Agencies believe that the bankruptcy issue is irrelevant to the crux of this dispute, which is about the nature and schedule of Severstal's investigation of the offshore media, and therefore the "arbitrary and capricious" standard remains appropriate for this court.

IV. BACKGROUND

Preliminarily, before turning to the basis for Severstal's refusal to complete the SWI, it is important to note that there are few if any factual disputes among the parties, apart from issues directly related to the nature of what Severstal has proposed (or refused) to do to complete the SWI.

A. Site Ownership and Operational History

Located approximately nine miles southeast from downtown Baltimore on an approximately 2,300 acre peninsula on the north side of the Patapsco River in Baltimore Harbor, Sparrows Point has been a steelmaking facility since 1887. Its operations have produced "hot rolled sheet, cold rolled sheet, galvanized sheet, tin mill products, and steel plate," all of which (other than steel plate) to this day Severstal produces at the Facility. Pet. at 8-9.[11/]

The Facility (apart from the Shipyard Property, discussed below) was owned and operated by BSC from 1917 through its bankruptcy in 2003, at which point it was acquired by the ISG Acquisition Corporation and ISG Sparrows Point, LLC pursuant to a sale approved by the U.S. Bankruptcy Court under Section 363 of the U.S. Bankruptcy Code. Pet. at pp. 8-9 & 11 (referencing Pet. Exh. 3). Details of the bankruptcy sale are discussed below.

[11] *See* Severstal's description of its current operations, attached as EPA Exh. 8.

Mittal Steel acquired the Sparrows Point Facilities when it merged with or acquired ISG on or about April 5, 2005, and in June, 2006 it merged with Arcelor to form Arcelor Mittal. Pet. at p. 9. In 2007, the Department of Justice ordered ISG to sell the Facility to settle antitrust concerns, and on May 7, 2008, Severstal acquired the Facility. Pet. at p. 9. From April, 2003 to this day it appears that one entity – ISG Sparrows Point, LLC – has actually owned the Facility, which is today named Severstal Sparrows Point, LLC.[12/]

Severstal's ongoing steelmaking activities include operation of a sintering plant, a blast furnace (for iron production), a basic oxygen furnace (for steel production), a continuous strip castor (two lines), hot strip mills, cold reduction mills, and tin mills.

B. The Shipyard

Concerning the Shipyard Property, BSC sold the shipyard portion of the Facility to Baltimore Marine Industries, Inc., in 1997, and it was subsequently sold to its current owner, SPS Limited Partnership, LLP, in 2004. Pet. at pp. 13-14 & Pet. Exh. 14. By letter dated June 15, 2006, and at the request of the shipyard owner, EPA and MDE approved removal of the "shipyard area" from the definition of "Facility" under the Consent Decree, allowing the shipyard to apply for and pursue clean up under MDE's Voluntary Cleanup Program. *Id.* & Pet. Exh. 13. However, nothing in this letter or otherwise suggests that the surface water and sediments adjacent to the shipyard were also removed from the scope of the Consent Decree.

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[12] Attached as EPA Exh. 9 is an August 31, 2010 Certification by the Secretary of State for the State of Delaware attesting to the authenticity of the following public records, which are appended to the Certification:
• the Certificate of Incorporation of Grantee ISG Sparrows Point Inc. filed April 3, 2003;
• the Certificate of Conversion by which ISG Sparrows Point Inc. was converted to a limited liability company and renamed "ISG Sparrows Point LLC", filed Dec. 30, 2003;
• the Certificate of Formation of ISG Sparrows Point LLC filed Dec. 30, 2003; and
• the Certificate of Merger of Severstal Sparrows Point Holding LLC into ISG Sparrows Point LLC, which renamed the surviving entity "Severstal Sparrows Point, LLC," filed May 13, 2008.
These documents were submitted as Attachment "C" to the Motion to Dismiss of ArcelorMittal USA, Inc., filed September 14, 2010, in *Chesapeake Bay Foundation v. Severstal Sparrows Point, LLC*, Case No. 1:10-cv-01861, which is also before this court.

There are two storm water discharge points (Outfalls #12 and #13) at the Shipyard Property which originate from the steel mill, thus discharging contaminated runoff, sediments, and infiltrated groundwater from the steel mill to the offshore media, *see April, 2010 Proposed Workplan*, Fig. 8, Pet. Exh. 6, and the Graving Dock dewatering wells have been pulling and discharging untreated contaminated groundwater originating from the Coke Oven area. *See* March 30, 2006 Memo from EPA, Pet. Exh. 19.

C. Environmental Conditions at the Site

There is no dispute that the steelmaking activities at the Facility have left behind large quantities of "hazardous constituents," and "hazardous wastes," at numerous locations on the Facility. Various studies conducted by Severstal (including ISG) and BSC have found elevated levels of a broad range of contaminants at the Site that are associated with steel making processes, including: antimony, arsenic, cadmium, chromium, copper, iron, lead, manganese, nickel, tin, zinc, ammonia, benzene, cyanide, ethyl benzene, ethylene glycol, hydrogen cyanide, hydrogen sulfide, naphthalene, PAHs, PCBs, pentachlorophenol, phenols, pyrene, sodium phenolate, styrene, sulfuric acid, toluene, trichloroethylene, xylene, coal tar, oils, lime sludge, waste alkaline rinses, and mill scale.[13] Contamination has been found in soils, ground water, and sediment both on the Facility and in the shorelines surrounding it. Of direct relevance to this dispute, Severstal itself has acknowledged that "[g]roundwater with elevated VOCs [volatile organic carbons] has migrated toward the southwest and northwest of the Coke Oven SSA [Special Study Area] and is present at the shoreline." Severstal's Coke Oven Area Special Study Area Interim Measures Work Plan Phase 1, p. 2, EPA Exh. 10. Moreover, benzene and naphthalene at levels of 790,000

[13] Like Severstal the Agencies here reference some documents which are not attached to this Response, but which are part of the administrative record and are available for review by the Court. *Id.*

ppb, and 22,000 ppb, presently exist in the Coke Oven Area, and harbor waters immediately adjacent to the Facility have levels of benzene as high as 330 ppb.[14] Severstal itself admits that the "benzene concentrations and their distribution within the Patapsco River indicate that surface water is impacted by discharge of benzene-contaminated shallow groundwater from the northwestern portion of the CO/CP [Coke Oven/Coke Point Area] Area." *See October 2009 Proposed Workplan*, Pet. Exh. 4, p. 1-1, and that "potentially impacted groundwater from the Sparrows Point facility is known to discharge to the water bodies surrounding the peninsula (lower Patapsco River, Bear Creek, Jones Creek, and Old Road Bay)." *See Ecological Risk Assessment Strategy Document,* URS (February, 2006), p. 2-1, Pet. Exh. 19.

In short, there is simply no question that Facility-related contamination exists at elevated concentrations above background, today, along at least certain portions of the shoreline of Severstal's Facility, or that groundwater flow under the Sparrows Point Facility emanates from the facility in multiple directions to the adjacent water bodies and sediments. *See, e.g., April, 2010 Proposed Work Plan*, Pet. Exh. 4, pp. 1-1 - 1-4, 2-3 ("[m]ost of the groundwater in the Greys Landfill and COA/Coke Point Landfill is transported through the slag and into the adjacent rivers. *Id.*, p. 2-3.) "The results of the perimeter groundwater well screening indicate that groundwater releases to the Patapsco River from Coke Point Peninsula and to Bear Creek from the Greys Landfill SSA contain levels of site-related constituents above ecological surface water screening levels." *April, 2010 Proposed Workplan*, p. 2-4, Pet. Exh. 6.[15]

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[14] *See ISG Sparrows Point Site-Wide Investigation Report of Nature & Extent of Releases to Groundwater from the Special Study Area*, (USR 2007) (maps showing benzene and naphthalene shallow plumes, EPA Exhs. 5 & 7.

[15] *See also* URS (January, 2005, 2007 Supplemental Figures), p. 3-10 (in the Greys Landfill area, groundwater moves "radially from the area with the steeper gradients to the south towards the Tin Mill Canal and the west towards Bear Creek"), p. 5-2 ("Shallow groundwater flow in the Coke Oven and Coke Point SSA areas is generally to the southwest, however as the groundwater approaches the former shoreline, the gradient decreases sharply, and flow direction becomes more radial towards the surrounding surface water").

Collectively, Severstal's own documents offer substantial evidence that there is substantial contamination at the Facility shoreline as well as in the Offshore Media, and demonstrate the need to conduct a comprehensive offshore media investigation to more specifically characterize the impact of Severstal's Sparrows Point Facility on its surrounding environment.

D. 1997 Consent Decree

1. Consent Decree Background

In 1997, after extensive negotiations among the parties, an agreement was reached pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h), among other authorities, for BSC to complete a comprehensive SWI of the Site. That settlement was embodied in a Consent Decree which resolved allegations that contamination at and around BSC's Facility created an "endangerment to public health, welfare or the environment," and "there has been a release of hazardous wastes and/or hazardous constituents into the environment at and/or from the Site." 1997 Consent Decree at p. 1-2, Pet. Ex. 1.

MDE brought its Complaint against BSC under numerous sections of the Environment Article of the Annotated Code of Maryland, including Sections 2-101 through 2- 613 (Air Pollution Control), 7-201 through 7-268 (Controlled Hazardous Substances), 9-204 through 9-229 and 9-252 through 9-270 (Refuse Disposal Systems), and 9-301 through 9-351 (Water Pollution Control). *Id.* at p. 2. MDE also brought a citizen suit claim under Section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), alleging an "endangerment to human health and the environment from contamination at and around the Site." *Id.* MDE further alleged that BSC's operations "have caused the release or threatened release of hazardous substances to the environment, that BSC violated hazardous waste management and solid waste laws, that BSC has

unlawfully discharged pollutants to waters of the State, and that BSC has discharged pollutants into the air which violate air pollution standards." *Id.*

On October 8, 1997 this court entered separate Consent Decrees resolving EPA's and MDE's respective Complaints, which were subsequently consolidated.[16]

2. Consent Decree Requirements Generally

The Consent Decree required BSC to undertake the following tasks:

1. Complete a SWI to investigate releases of hazardous constituents from the facility to determine the need for potential corrective action,

2. Use interim measures to address releases that require immediate action,

3. Meet applicable compliance standards for two solid waste landfills (Greys Landfill and Coke Point Landfill),

4. Meet a compliance standard for visible emissions from the roof monitor at the Basic Oxygen Furnace,

5. Implement projects to minimize "kish" emissions,

6. Inspect and perform associated repairs of (a) all active sumps and associated trenches located in the Cold Sheet Mill and the Tin Mill that contain significant amounts of acid, caustic, plating, and coating solutions, and (b) all above ground storage tanks with capacity greater than 500 gallons that store hazardous substances,

7. Implement projects to minimize waste production, and

8. Complete a CMS.[17]

1997 Consent Decree, Pet. Exh. 1, pp. 8 - 44.

3. Consent Decree Requirements with Respect to Offshore Media

EPA generally agrees with Severstal's characterization of the work called for under the 1997 Consent Decree, *see* Pet., pp. 10 - 11, 14 - 17, with one important caveat: Severstal's

[16] *See* n. 1, *supra.*

[17] EPA uses the CMS to prepare a proposed and final remedy decision document (a Statement of Basis and a Final Decision and Response to Comments, respectively) for a site.

principal argument (apart from its bankruptcy sale issue) is that it is not required to investigate offshore media until it has established that there are current releases from the identified Solid Waste Management Units ("SWMUs") and Areas of Contamination ("AOCs") that are reaching the offshore media. Pet., pp. 16 - 17, 31. For reasons that EPA set forth in detail in its June 30, 2010, Proposed Resolution of the Dispute of the *October, 2009 Proposed Workplan*, Pet. Exh. 8, pp. 7-8, as well as below, it is plain that this is a fundamentally flawed reading of the Consent Decree.

The 1997 Consent Decree requires that BSC submit to EPA and MDE for approval a Description of the Current Conditions at the Facility," Para. V.B. SITE WIDE INVESTIGATION, Pet. Exh. 1 at p. 13, which in turn sets the stage for the disputed work plan at issue here. The specifics of the Consent Decree's requirements with respect to the Site-wide investigation work plan are set forth in Attachment B to the Consent Decree, entitled "Bethlehem Steel Sparrows Point Plant and Shipyard Conceptual Plan for the Site Wide Investigation," and Attachment C to the Consent Decree, entitled "SITE WIDE INVESTIGATION SCOPE OF WORK." Pet. Exh. 1.

First, regarding timing of the original contamination, both Attachments B and C to the Consent Decree are replete with references to BSC's obligations to comprehensively assess current conditions at the Facility (including offsite impacts), in aid of addressing current and future risk, without regard to when the original disposal activities that led to a release may have taken place. For example, BSC is required to "[d]efine the horizontal and vertical extent of hazardous waste and hazardous constituents in the groundwater system," Att. B, p. 2, Pet. Exh. 1, and to

> [i]dentify, characterize and determine the full impact of releases of any hazardous wastes or hazardous constituents from the

> SWMUs/AOCs to air, groundwater, surface water, sediment and soil, throughout the Facility, including on-site and off-site as appropriate.

Att. B, p. 3, Pet. Exh. 1.

Similarly, Attachment C states that the

> "…purpose of [the SWI] is to determine the nature and extent of releases consistent with Attachment B of the Consent Decree . . . and to gather all necessary data to support the Corrective Measures Study. The SWI includes the collection of site specific data to evaluate any human health or ecological impacts of contamination from the site."

Att. C, p. 1, Pet. Exh. 1.

Nor is there any geographic limitation with regard to the SWI. Paragraph 1 of SWI Conceptual Plan requires an investigation of groundwater throughout the entire Site. Consent Decree, Att. B, pp. 2-3 Pet. Exh. 1 (the SWI shall "[d]efine the horizontal and vertical extent of hazardous wastes and hazardous constituents in the groundwater system"). This comprehensive groundwater investigation is a necessary predicate to the Ecological Risk Assessment required under Paragraph 4.b. of the SWI Conceptual Plan, which requires Severstal to "assess the risk posed by Facility-impacted media to terrestrial, avian and aquatic receptors representative of the local ecosystem on **and offsite**." Consent Decree, Att. B, p. 5, Pet. Exh. 1, *emph. added.* Severstal's limited view of the scope of the Sediment Work Plan would render this required risk assessment impossible to complete.

While it has been the Agencies' intent, as expressed in the Consent Decree, to have the SWI initially focused on the SWMUs and AOCs originally identified in the Consent Decree, as well as the Special Study Areas, the Consent Decree also makes clear that SWMUs and AOCs are not to be viewed as somehow limiting the SWI:

> BSC may begin a phased, SWI at the perimeter of the Facility . . . to assess off-site releases. . . However, BSC remains responsible for identifying and evaluating all releases of hazardous wastes and hazardous constituents at or from the facility . . . Each release of hazardous wastes or hazardous constituents discovered during the SWI that cannot attributed to a SWMU or AOC identified in the RFA will be investigated and, unless the release is an 'allowed release' or is a release that has been or is being addressed under another program consistent with the purpose of the SWI, it will be incorporated into the SWI.

Id. at pp. 1-2.

In short, as shown above, the investigatory activities that the Agencies are requesting Severstal to undertake as part of the SWI offshore media workplan are plainly directed at current site conditions, and (although perhaps not within an identified AOC or SWMU) are authorized by the Consent Decree.

4. Tasks Remaining Under the Consent Decree

In recent months, Severstal and the Agencies have been unable to reach agreement on schedules to accomplish much of the remaining Interim Measures that are required under the 1997 Consent Decree. Apart from the implementation of the Interim Measures, the principal remaining tasks under the 1997 Consent Decree are completion of the SWI, and preparation of the final CMS (for which the SWI is a prerequisite).

E. 2003 Bankruptcy Sale of the Sparrows Point Facility

The nominal core of Severstal's basis for refusing to "investigate historic off-site releases from the Sparrows Point facility," Pet. at 5, is its reading of the Asset Purchase Agreement ("APA") executed on March 12, 2003 under which BSC sold a large number of BSC assets, identified as "Acquired Assets," to ISG, Pet. Exh. 3, and of a Bankruptcy Court Sale Order approving that sale pursuant, entered on April 23, 2003 ("April 23, 2003 Sale Order"). Pet. at 11-

12 & Exh. 2. For Severstal, the issue is whether, under the APA and the subsequent April 23, 2003 Sale Order, ISG assumed BSC's liabilities with respect to investigating the offshore media.

Preliminarily, there is no question that the APA initially provided for ISG's acquisition of the "Acquired Assets," of which the Sparrows Point Facility was only one of many.[18] APA Section 1.1, p. 2, Pet. Exh. 3. Understandably not mentioned by Severstal, the APA *ab initio* also transfers to ISG the type of environmental liabilities at issue here with respect to the Acquired Assets, including the Sparrows Point Facility. Section 1.3 of the APA provides that

> At the Closing, Buyer shall assume, and thereafter pay, perform and discharge when due, all of the following liabilities (the "Assumed Liabilities"):
> ….
> (c) except as set forth in Section 1.4(a), all liabilities and obligations of any Seller relating to the Acquired Assets and arising under any Environmental Law; ….

Severstal does not dispute that the Sparrows Point Facility is included among the "Acquired Assets," or that BSC's obligations under the Consent Decree would be included among "all liabilities and obligations of any Seller relating to the Acquired Assets and arising under any Environmental Law." Nor does it even suggest that somehow the phrase "relating to," in the phrase "all liabilities and obligations of any Seller relating to the Acquired Assets" in Section 1.3 of the APA, only encompasses work directly on the Acquired Assets themselves. Therefore, the only question is whether BSC's liabilities with respect to the offshore media at the Sparrows Point Facility are excluded by Section 1.4(a) of the APA. But for the reasons set forth, below, analysis of Section 1.4(a) of the APA is not required as nothing contained therein abrogates Severstal's responsibilities as established under RCRA and the Consent Decree.

[18] Schedule 1.1(b) of the APA lists 47 pieces of real property, and numerous additional leased interests, among the Acquired Assets.

F. Severstal's 2005 Assumption of Obligations Under the Consent Decree

On August 1, 2005, this Court entered an order entitled "Stipulated Order Implementing Modifications to Consent Decree" (the "Substitution Order"), which substituted ISG (now Severstal) for BSC "in all provisions of the Consent Decree where Bethlehem's name appears." Stipulated Order, p. 2, Pet. Exh. 11. Of particular significance, given the importance that Severstal attaches to the March 12, 2003 APA, and the April 23, 2003 Bankruptcy Sale Order approving that sale, this Court stated that ISG had agreed "to assume all of the ongoing obligations of the Consent Decree" from the date ISG took possession of the Sparrows Point Facility, April 30, 2003, i.e. seven days after the April 23, 2003 entry of the Bankruptcy Sale Order and over a month after the execution of the APA on March 12, 2003. *Id.* Notwithstanding the temporal proximity of the effective date of this Court's Substitution Order to the APA and the Bankruptcy Court sale, this Court's Order makes no reference to these events that are so seminal for Severstal, and thus offers no reason to believe that it somehow was ratifying an amendment to its 1997 Consent Decree that might have been implicitly made by the Bankruptcy Court. This Substitution Order remains in effect.

G. History of the Dispute Regarding Investigation of Offshore Media

The genesis of this dispute was a July 29, 2009 meeting among the parties in which Severstal apparently raised for the first time the possibility that, notwithstanding the requirements of the 1997 Consent to conduct a SWI that addressed both onshore and offshore areas at the Site, see discussion at p. 18 *supra*, and indeed despite its prior SWI work, it was reconsidering whether it was legally obligated to look at offshore media. *See* August 6, 2009 letter from the Maryland Office of the Attorney General ("Md. AG") to Severstal, Pet. Exh. 15. Alarmed at Severstal's change in course, the Md. AG's office responded to Severstal in a August 6, 2009 letter, referring

Severstal to the provisions of the Consent Decree that required this work, and requesting a prompt response. *Id.* MDE reiterated its position in an August 13, 2009 letter, reminding Severstal that the Consent Decree did specifically require Severstal to submit a "workplan for evaluating the impacts to off-site sediment" within 60 days, while noting that Severstal could rely in part on other offshore media investigations that had recently been performed by the Maryland Port Authority ("MPA") and AES Sparrows Point LNG. MDE August 13, 2009 letter, Pet. Exh. 16, p. 2.

1. Severstal's *October 13, 2009 Proposed Workplan* and EPA's Partial Disapproval

Under cover of a letter dated October 13, 2009, Pet. Exh. 4, Severstal submitted its *October 13, 2009 Proposed Workplan*, Pet. Exh. 5. Severstal's letter laid out its legal arguments as to why it was "not responsible for any investigation or cleanup of historical off-site contamination" because of the bankruptcy sale, Pet. Exh. 4 at p. 4, the same arguments that are the cornerstone for Severstal's Petition to this Court. Of greater significance, and contrary to Severstal's claim before this Court, is the fact that its *October 13, 2009 Proposed Workplan* did not propose to "investigate and evaluate the impact that any current groundwater discharges from the site were having on the off-site (off-shore) sediments that included sediment, surface water, and groundwater sampling." Pet. at pp. 18-19. Rather, Severstal proposed to conduct an investigation only at the "Coke Oven and Coke Point (CO/CP) Area where high concentrations of benzene are confirmed in shallow groundwater and data indicate shallow groundwater discharge is impacting surrounding surface water. " *October 13, 2009 Proposed Workplan,* Pet. Exh. 5, p. 1-1. Moreover, it only proposed a limited scoping assessment along 16 "transects," *i.e.* sampling locations running out into the surface water, at the CO/CP Area, which would be analyzed for the chemicals detected in groundwater above the aquatic benchmark screening values. *Id.* at p. 2-1.

To "assess" potential groundwater to surface water migration pathways as well as offshore sediments, Severstal proposed to use existing benzene contamination as "tracer" to plot the apparent pathways, admittedly because benzene is a good fingerprinting tracer of site-related contamination here due to the extremely high concentrations found at the Coke Oven source area.[19]

In a letter dated February 3, 2010 EPA partially disapproved Severstal's *October 13, 2009 Proposed Workplan*, stating that

> [f]irst, the work proposed must not be limited to an evaluation of the current groundwater discharge impacts to offshore environment; rather, it must address current and past releases from groundwater, surface water, storm water, sediment transport and other environmental pathways. Second, the geographic boundaries of work proposed should not be limited to the Coke Point peninsula, but must also include the entire Sparrows Point shore line surrounding the steel mill, including the shipyard portion.

Pet. Exh. 17, p. 1.

EPA also provided detailed guidance regarding how Severstal should revise its workplan, and allowing for use of existing data from other sources such as the MPA.

2. Severstal's Notice of Dispute; EPA's Proposed Resolution

By letter dated March 4, 2010 Severstal notified the Agencies that it was triggering a period of informal dispute resolution, in accord with Section XX of the Consent Decree, and set forth a number of arguments which are virtually the same arguments it makes here, including its principal concern that the Agencies are somehow flouting the will of the Bankruptcy Court, as expressed in its April 23, 2003 Sale Order approving the APA (and, according to Severstal, its

[19] "The consistent presence of benzene in groundwater at the northwestern portion of the CO/CP Area make it a good tracer to track groundwater seepage into surrounding surface water and potentially into/through sediments. Positive tracer attributes are: 1) it is present in very high concentrations in site groundwater, and 2) its potential presence in sediments is most likely a consequence of active groundwater seepage through the sediments due to benzene's relative low environmental persistence." *Id.* at 2-3.

implicit modification of the 1997 Consent Decree) by seeking to impose on it BSC's historic liabilities for the offshore media, and by expanding the geographic scope of its SWI obligations to the entire perimeter of the Sparrows Point Facility. Pet. Exh. 7. The Parties met on April 26, 2010 as part of the Consent Decree's informal dispute resolution process to review the matters raised by Severstal in its Notice, and discussed possible resolution of the Parties' disagreements. While some matters were clarified, there remained fundamental differences between EPA and Severstal regarding Severstal's obligations under the Consent Decree. EPA responded to Severstal's Notice of Dispute with a detailed Proposed Resolution on June 30, 2010, in which it set forth the basis for its position that it was only seeking to have Severstal investigate current releases at and from its Facility, and that it was entirely appropriate for that work to investigate the Facility as a whole, as required under the Consent Decree. Pet. Exh. 8.

3. Severstal's *April, 2010 Proposed Workplan*

In early April, 2010 Severstal submitted its *April, 2010 Proposed Workplan* to the Agencies. Pet. Exh. 6. Because it was submitted after Severstal had initiated dispute resolution, and presented even more limitations than had Severstal's prior *October, 2009 Proposed Workplan*, the Agencies did not initially respond to it.

Like its prior *October, 2009 Proposed Workplan*, Severstal's *Proposed April, 2010 Workplan* would partially fulfill the requirements of a SWI workplan required under the Consent Decree, by providing for a groundwater discharge pathway assessment, a surface water pathway assessment, and a bathymetric survey of the harbor bottom adjacent to Severstal's Facility. Moreover, the *Proposed April, 2010 Workplan* nominally expanded its scope to address potential impacts from the five SSAs originally identified in the Consent Decree, not just the Coke Point Peninsula, *Id.* at pp. 3-3 - 3-4, presumably in response to EPA's February, 2010 comments.

However, upon close review it became apparent that Severstal is still refusing to perform the kind of field work necessary to actually determine the nature and extent of the contamination which is already known to be at some parts of the shoreline, and which may (or may not) be elsewhere.

As with the *October, 2009 Proposed Workplan*, the *Proposed April, 2010 Workplan* would begin with "pathway assessments." *Id.* at pp. 3-1 - 3-3. However, rather than conducting sampling at the shoreline, as repeatedly requested by the Agencies, Severstal proposes to continue using computer modeling, which uses "imaginary particles" which are "inserted in rectangular arrays at the water table in each SSA, and the flow trajectories of the particles [are] subsequently traced." *Id.* at 2-2.

As noted above, Severstal's "imaginary particle" analysis does apparently show that "[m]ost of the groundwater in the Greys Landfill and COA/Coke Point Landfill is transported through the slag and into the adjacent rivers." *Id.*

When EPA asked Severstal in an August 12, 2010 e-mail whether "it is correct that sediment and surface water samples will only be collected in the next phase investigation on the condition that pathway assessments confirm current release from the 5 Special Study Areas?, " EPA Exh. 2, Severstal replied that

> the current work plan presents a step-wise investigation that has been developed to address USEPA and MDE concerns over offsite releases from the Site. In the first instance, the scope of this work plan focuses on investigating and providing pathway assessments for potential current offsite releases from the five Special Study Areas (SSAs). Should pathways exist to the offshore environment from the SSAs that also exhibit site-related chemicals above relevant screening levels, sediment and surface water characterization of potentially off-site affected areas would be conducted. To the extent that additional areas of the Site identified in the Description of Current Conditions report (Rust 1998) will need to be investigated to assess their potential current contribution of Site-related chemicals to the offshore environment, this work will be completed as a separate work plan. Severstal is proposing

> to implement and complete the investigation of the potential current groundwater and stormwater releases from the five SSAs prior to initiating any activities related to this additional, Balance of Site work.

August 18, 2010 E-Mail from Severstal to EPA, EPA Ex. 3.

In its August 25, 2010 letter disapproving the *April, 2009 Proposed Workplan*, EPA wrote that the workplan "fails to include a specific plan to collect surface water and sediment samples necessary to characterize the extent and nature of contamination, which is fundamental to the performance of the offsite ecological risk assessment." EPA Exh. 4, at 1. Instead, Severstal's *April, 2010 Proposed Workplan* proposes "to collect offsite water and sediment samples only after Severstal completes its proposed pathway assessments," and then only if those assessments identify current releases to the offsite environment from the five Special Study Areas" defined in the Consent Decree. *Id.* Severstal repeats this proposal in its Petition, pp. 31-34.

V. ARGUMENT

Against this background set forth above, it is readily apparent that Severstal has devoted substantial energy to attacking legal and factual positions that EPA simply has never taken, while trying to disguise the fact that this dispute is simply about Severstal's unwillingness to move more expeditiously to complete its obligations under the Consent Decree.

A. The Agencies Seek an Investigation of Current Conditions in the Offsite Media, for Which Work Severstal is Responsible Under the Consent Decree, and as the Owner and Operator

As was set forth in EPA's February 3, 2010 letter, as well as its June 30, 2010 Proposed Resolution of Dispute, the Agencies are asking nothing more of Severstal than that it assess existing releases (and potential releases) to the environment at and from its Facility, in accord with the process set forth in the Consent Decree. Based in part on the discussion among the parties during the May 26, 2010 meeting, it appears that Severstal is confused by references in the

Consent Decree and EPA's correspondence to the effect that the current site conditions that Severstal is required to investigate may be the result of both "current" and "historic" (Severstal's as well as BSC's) activities at the Facility.

While, for reasons set forth below, EPA and MDE believe that ISG (and thus Severstal) did expressly assume liability for BSC's Facility-related environmental liabilities, this issue is irrelevant to Severstal's obligation to submit and implement a comprehensive SWI that addresses current site conditions, including impacts on all media (air, soils, sediments, surface and groundwater) at or from the Facility. Section 3008(h) of RCRA empowers the Agency to require corrective action anywhere at a facility when a release is identified at an interim status hazardous waste storage or disposal facility, even where the required response action addresses part of the facility outside defined solid waste management units. *See* Memorandum from J. Winston Porter & Courtney M. Price to EPA Regional Offices, Interpretation of Section 3008(h) of the Solid Waste Disposal Act, at 8 (Dec. 16, 1985) ("3008(h) Guidance ("Section 3008(h) broadly authorizes corrective action for any release from a 'facility.' It does not require the Agency to find that a release originated in a discernable waste management 'unit.'"); *see also id.* at 9 ("Section 3008(h) will also be used to address releases that have migrated from the facility."). *C.f. United Technologies Corp. v. EPA*, 821 F.2d 714, 721-22 (D.C. Cir. 1987). Section 3008 does not distinguish between current and historic releases, rather EPA can act where "there is or has been a release of hazardous waste into the environment from a facility." 42 U.S.C. § 6928(h)(1).

Moreover, any owner or operator of property purchased from a bankruptcy debtor must comply with the same environmental laws that apply to all owners and operators of property, even if contamination on the property originated before the sale; no one is entitled to maintain a nuisance or threat to public health. See, e.g., *Ohio v. Kovacs*, 469 U.S. 274, 284–85 (1985).

Section 363(f) of the Bankruptcy Code does not allow purchasers to acquire a debtor's property free and clear of the obligation to comply with environmental laws. *See, e.g.*, *In re General Motors Corp.*, 407 B.R. 463, 508 (Bankr. S.D.N.Y 2009), *aff'd* 428 B.R. 43 (S.D.N.Y. 2010) (holding that although a "free and clear" sale protects a purchaser from liability as a successor for the debtor's obligation to pay costs of a pre-sale environmental cleanup, the purchaser must comply with its environmental responsibilities upon taking ownership of the property); *Ninth Ave. Remedial Group v. Allis-Chalmers Corp.*, 195 B.R. 716, 732 (N.D. Ind. 1996) (holding that a bankruptcy court's order approving the sale of a Chapter 11 debtor's assets "free and clear" of all claims cannot relieve the purchaser of liability on future claims that did not arise until after the sale).

> Under section 363(f), there could be no successor liability imposed on the purchaser for the seller['s] monetary obligations related to cleanup costs, or any other obligations that were the obligations of the seller. But the purchaser would have to comply with its environmental responsibilities starting with the day it got the property, and if the property required remediation as of that time, any such remediation would be the buyer's responsibility.

In re General Motors, 407 B.R. at 508.

Of significance here (and unmentioned by Severstal), Section 9 of the April 23, 2003 Sale Order, p. 9, Pet. Exh. 2, provides that "[n]othing in this Order or Agreement shall be construed to release or nullify any liability to any government entity under police or regulatory requirements that any entity would be subject to as the owner or operator of property after the closing except to the extent otherwise compromised." There is nothing in the Bankruptcy Order that suggests that the Bankruptcy Court intended such post-sale liability to be "otherwise compromised" (or indeed had such power).

Thus, regardless of this Court's resolution of the bankruptcy sale issue, Severstal is obligated to comply with its responsibilities as an owner of an active steel mill, which includes

abiding by the mandate of RCRA § 3008(h), 42 U.S.C. § 6928(h), to " . . . protect human health or the environment," as further expressed in the relevant portions of the Consent Decree, which would include preparation of a comprehensive SWI that addresses current site conditions, including impacts on all media (air, soils, sediments, surface and groundwater) at or from the Facility.

Severstal claims that EPA's view of its obligations under the 1997 Consent Decree could saddle it with "many millions of dollars" of costs looking for "possible contamination caused solely by" BSC, Pet. at p. 3. It is important to note that Severstal has made no attempt to explain how releases from the Facility under its admitted tenure, from 2003 on, are distinguishable from such releases under BSC's ownership. Furthermore, it is the enforcement scheme in RCRA Section 3008, and the provisions of the 1997 Consent Decree for which Severstal has assumed responsibility, that is the source of its financial concern. The Bankruptcy Sale Order and the APA did not modify the terms of the Decree and they were not a "free pass" to allow Severstal to shirk its responsibilities under RCRA.

B. The 2003 APA and Bankruptcy Sale Did Not Relieve Severstal of Liability under RCRA and the Consent Decree

Severstal argues that its obligations under the 1997 Consent Decree have been narrowed by virtue of the April 23, 2003 Section 363 bankruptcy sale of the Facility to ISG, in whose shoes it admittedly now stands. Pet. at pp. 8-9 & 11. However, Severstal's reliance on the bankruptcy sale documentation is misplaced. The statutory language and the August 1, 2005 modification of the Consent Decree make Severstal liable for completing the SWI and fulfilling the other obligations of the Decree.

The 1997 Consent Decree was entered into pursuant to Section 3008(h) of RCRA, 42 U.S.C. § 6928(h). Section 3008(h) provides:

> Whenever . . . the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment . . . .

The statute does not carve out an exception for "historic" contamination. Rather, the party subject to the order (in this case, the Consent Decree) is required to undertake the corrective action or other response measure as issued by the Agencies. The express terms of the 1997 Consent Decree (including the attachments thereto) obligated BSC to conduct the SWI. In the 2005 Stipulated Order Implementing Modifications to the Consent Decree (Docket Entry No. 9), Severstal (then ISG) expressly assumed the BSC's obligations under the Consent Decree. That modification provided for three things: 1) ISG was substituted for BSC in all provisions of the Decree where BSC's name appears; 2) ISG was not required to comply with any provisions of the Decree with which BSC had already *fully and finally complied* (emphasis added); and 3) all other provisions of the Consent Decree remain in full force and effect. Those are the only modifications that were made to the Consent Decree. There is no mention of the 2003 APA or the Bankruptcy Sale Order.[20/]

Moreover, it should be noted that the APA was a contractual agreement between BSC and ISG. The Agencies were not parties to this agreement and should not be bound by the terms of that contract. Severstal strenuously argues that the Section 363(f) Bankruptcy Sale Order incorporates the APA and that Bankruptcy Sale Order precludes the Agencies from enforcing the terms of the Consent Decree. However, a sale pursuant to Section 363(f) of the Bankruptcy Code does not relieve the new owner of a property of its legal obligations under the environmental laws

[20] In its Petition, Severstal surmises that the use of the phrase "as amended" in the Stipulated Order *must imply* that the Consent Decree has been modified by the bankruptcy sale documents. However, there is no evidence that this Court intended to modify the terms of the Decree based on the bankruptcy sale. Rather, a more reasoned interpretation of the phrase would be that it refers to the substitution of ISG for BSC.

after the sale. This basic tenet is acknowledged by Severstal, Pet. At 22, and is expressly set out in the Bankruptcy Sale Order. Pet. Exh. 2 at pp. 11-12.

C. Severstal Remains Responsible for Investigating the Surface Waters and Shoreline Adjacent to the Shipyard

With respect to the shipyard portion of the Sparrows Point shoreline, EPA agrees that Severstal is not required to conduct an evaluation of the impact from activities at the shipyard itself. However, as plainly stated in the Consent Decree, Severstal is required to collect information on the surface water and sediment through"conduct[ing] a program to characterize the surface water bodies **in the vicinity of** the Facility" as part of the SWI. Pet. Exh. 1, *emph. added*. Moreover, it is clear from the plain language of the Consent Decree that Severstal is required to collect information regarding contamination along the shoreline, as the Consent Decree uses the phrase "in the vicinity of the Facility" multiple times. For example, "BSC shall collect analytical data on groundwater, soils, surface water, sediment, and subsurface gas contamination in the vicinity of the Facility." *Id.* p. 20.

Of particular significance, given Severstal's obligation to conduct a comprehensive SWI at its Facility, there are two storm water discharge points (Outfalls #12 and #13) at the shipyard which originate from the steel mill, *see April, 2010 Proposed Workplan*, Fig. 8, Pet. Exh. 6. Additionally, the Graving Dock de-watering wells at the Shipyard Property have been pulling and discharging untreated contaminated groundwater originating from the Coke Oven area. Thus, contamination from the Facility, for which Severstal is unarguably responsible, is being discharged into the waters and sediments around the Shipyard Property. Plainly, the SWI requires assessment of the offshore media adjacent to the Shipyard.

D. Severstal Should be Ordered to Complete a Comprehensive Offshore Media Investigation Promptly, as Part of a Final Site Wide Investigation

This Court entered the Consent Decree at the heart of this case over thirteen years ago, and significant obligations remain unmet. Over the past year the Agencies have struggled to reach agreement with Severstal to complete a number of tasks called for over a decade ago, including interim measures for the Coke Oven Area.[21] The penultimate task is completion of the SWI, which in turn requires completion of the offsite media investigation. Severstal's own documents confirm groundwater is generally flowing toward the bay in areas such including the Coke Point peninsula; that extremely high levels of benzene and naphthalene exist, today, on the shoreline of Sparrows Point, likely flowing into Baltimore Harbor; that benzene presently exists in the harbor waters immediately adjacent to the Facility at levels as high as 330 ppb; and that the extensive storm sewer system that runs throughout Severstal's Facility is likely entraining contaminated groundwater.

For over a year the Agencies have been asking for a workplan that will sufficiently quantify the impact of that contamination on the surrounding surface water, and Severstal offers "imaginary particles" and a Catch 22: It refuses to conduct a comprehensive shoreline sampling program before having data showing a pathway from one of the five SSAs to the surface water, but it will not collect the data that might show there is a pathway, because there is no proof of a

[21] In 2009 the Agencies determined that, apart from the offshore media SWI work at issue here, enough investigation work in support of the SWI has been completed to enable Severstal to complete CMSs at three discrete areas of the Facility. (A CMS, which EPA will use to prepare a Statement of Basis, followed by a Final Decision and Response to Comments, regarding future corrective actions, is the ultimate goal of the Consent Decree. See discussion at p. 17 below.) However, Severstal refused, claiming that the Consent Decree requires that one, sitewide CMS be completed, and then only after completion of the SWI. *See* Dec. 24, 2009 letter from Severstal to EPA, att. as EPA Exh. 11. As EPA stated in its May 3, 2010 response, "Severstal's refusal to complete CMSs at the three requested areas is of a piece with its position with respect to its work going forward at the facility as a whole. . . We are deeply concerned with Severstal's declared intent to focus . . . on work that has been done to date . . . and areas of the facility that may not require further work . . . rather than work that remains to be done to satisfy the Consent Decree." *See* EPA Exh. 12 (*citing Final Guidance on Completion of Corrective Action Activities at RCRA Facilities*, 68 Fed. Reg. 8757, Feb. 25, 2003 (recognizing that CMSs for portions of a facility may be appropriate in certain situations) (copy available at http://epa.gov/osw/hazard/correctiveaction/resources/guidance/gen_ca/compfedr.pdf).

pathway. Instead, Severstal insists on undertaking its SWI work in a staged approach, beginning with the SSAs and AOCs. Pet. at. Pp 31-32.

There are several flaws with Severstal's approach as set forth in its *April, 2009 Proposed Workplan*, which EPA and MDE have several times explained to Severstal. First, there is already evidence from existing storm sewer configuration (designed to allow groundwater infiltration), groundwater flow directions, and offshore sampling data from Severstal and the Maryland Port Administration confirming that there are current releases from onshore contaminated media to the offshore environment. Thus more "modeling" using "imaginary particles" is at most an adjunct to, not a substitute for, actual, comprehensive, sampling. Second, Severstal is incorrect in its premise that, under the Consent Decree, it is only required to investigate current releases from the five SSAs, and that pathway assessments are prerequisites to identifying locations to collect offsite water and sediment samples. *See 3008(h) Guidance, supra*. Finally, the proposed storm water sampling does not include sediment sampling, and will not generate representative samples that can be used to project contamination in receiving sediments due to the high temporal variability of storm water. *See* August 25, 2010 EPA letter to Severstal, EPA Exh. 4.

While Severstal brought this dispute with the express intent of avoiding being held responsible for investigating "historic" contamination left behind by BSC in the offshore media under the 1997 Consent Decree, it is readily apparent that the real need is for Severstal to complete the SWI for the entire Site, both onshore and offshore.

Severstal exercised its rights under the terms of the Consent Decree. That same Decree clearly establishes the standard of judicial review that this Court must apply here. This Court must decide whether the Agencies acted in a manner that was "arbitrary and capricious or otherwise not in accordance with law," in resolving this dispute. The Decree further mandates that for any issues

"arising under Section V" of the consent decree ("Corrective Measures Work to be Performed") the burden of showing that EPA's decision was arbitrary and capricious or otherwise not in accordance with law. Pet. Exh. 1 at 72. For the reasons set forth herein, Severstal has not satisfied that burden of proof.

In this case, the Consent Decree is clear and unambiguous. Severstal availed itself of the dispute resolution process contained within the Consent Decree to settle this dispute. Likewise, this Court should must hold Severstal to the terms of the Decree it entered in 1997, including the obligation to perform the SWI in the manner prescribed in the Decree.

VI. CONCLUSION

Therefore, for these reasons, the Court should dismiss this Petition, and order Severstal to: (i) submit a revised workplan consistent with EPA's June 30, 2010 Proposed Resolution of the Dispute; and (ii) promptly complete an investigation of the offshore sediments and surface and ground water in accordance with the Agencies' prior directives.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the UNITED STATES' RESPONSE TO PETITION OF SEVERSTAL SPARROWS POINT, LLC FOR RESOLUTION OF DISPUTE PURSUANT TO THE OCTOBER, 1997 CONSENT DECREE REGARDING CONDUCT OF OFFSHORE MEDIA INVESTIGATION was filed on October 15, 2010 using the Court's ECF system and that, therefore, service was accomplished upon counsel of record by the Court's system.

/s/ Jeffrey K. Sands