

Settlement Agreement
In the Matter of: Former Kaiser Smelter Site
EPA Region X, CERCLA Docket No. 10-2020-0142

Response to Comments

The U.S. Department of Justice (DOJ) and the U.S. Environmental Protection Agency (EPA) would like to thank everyone that took the time to provide comments on the proposed settlement with one of the current owners of the Former Kaiser Smelter Site, Spokane Recycling Company, LLC (SRC). The settlement is embodied in an administrative Settlement Agreement between DOJ, EPA, and SRC. Two comments were submitted in response to the Settlement Agreement. All comments are being provided along with this response to comments. Comments and responses are grouped by submitter.

Background

The Former Kaiser Smelter Site is a former aluminum smelter, and associated properties, located in Mead, Spokane County, Washington (Site). The Site includes three tax parcels. One parcel covers approximately 170 acres and includes the former aluminum smelter facility which contains dozens of large industrial buildings, a baghouse, administrative buildings, a network of stormwater catch basins, sumps, storage tanks, a rail spur, and other facility operational features. The former facility's system of catch basins and storm sewers collect and divert stormwater through a half-mile long aqueduct flowing north from the facility to a pair of settling ponds located on the second parcel, a 425-acre undeveloped parcel. At the northern end of the lower pond, a pipe transfers the water through a second aqueduct that runs approximately 1.25 miles to a third parcel where an effluent outfall discharges stormwater into Deadman Creek. Deadman Creek is a tributary of the Little Spokane River which flows into the Spokane River. The Site is contaminated with asbestos, polycyclic aromatic hydrocarbons (PAHs), and polychlorinated biphenyls (PCBs), among other hazardous substances, and EPA has documented the migration of PCBs and PAHs from the Site into Deadman Creek. EPA selected time-critical removal actions, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), in two EPA Action Memoranda: one to address source material on the facility parcel; and one to address stormwater and the settling ponds on the undeveloped parcel. This Settlement Agreement is with the owner of the facility parcel, SRC. A separate Administrative Settlement Agreement and Order on Consent, CERCLA Docket No. 10-2020-0152, was entered into with the owner of the undeveloped parcel, Kaiser Aluminum Investments Company (KAIC).

Submitter Information: None provided
Comment Tracking No. 1k4-9jak-dpzt

Comment Summary: The comment contains one statement and one attachment. The comment states "they want money from them, they need to leave people alone.trump and admin." The attachment to the comment is a notice of removal of personal property, dated March 31, 2020, regarding property located in Phoenix, Arizona. The comment and attachment provide no specific connection with or comments related to the Settlement Agreement.

Comment Response: The United States acknowledges receipt of this comment. The comment appears to address an unrelated property and has no connection to the Settlement Agreement with SRC. This Settlement Agreement and EPA's recovery of response costs from SRC is in accordance with Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1).

Submitter Information: Kaiser Aluminum Investments Company
Comment Tracking No. kh1-1ik2-j6xd

Comment Summary: The comment contains KAIC's position in opposition of the Settlement Agreement, including 14 attachments. The attachments are titled by KAIC as: May EPA Action Memo; Easement Agreement; KAIC Administrative Settlement Agreement and Order on Consent for Removal Actions CERCLA Document No. 10-2020-0152; Prior NPDES Permit; Current ISGP Permit; Corrections Required; KAIC Notice of Intent to Sue Under CWA; July EPA Action Memo; Inspector Letter 2018; Notice of Penalty Letter 2019; PCHB Settlement Agreement; Notice of Violation Letter 2016; EPA Policy Memo 1997; KAIC FOIA Request. KAIC's primary comment in opposition is that the "matters addressed" definition in the Settlement Agreement should not cover the entire Site, but rather should be limited to property owned by Spokane Recycling Company, LLC, so that contribution protection from cost recovery lawsuits under CERCLA will not extend to removal work undertaken by KAIC at the Site. KAIC's comment relies in part on the EPA memorandum titled "Defining 'Matters Addressed' in CERCLA Settlements," dated March 14, 1997, which states, in part, that settlements under CERCLA should be "fair, reasonable, and consistent with the goals of CERCLA." KAIC's comment further highlights that potential costs incurred by the Washington State Department of Ecology are excluded from the "matters addressed" definition in the Settlement Agreement, therefore allowing cost recovery from SRC for costs incurred by the state, but not for KAIC's costs incurred at the Site pursuant to CERCLA.

Comment Response: EPA entered into the proposed Settlement Agreement with SRC pursuant to Section 122(h)(1) of CERCLA, 42 U.S.C. § 9622(h)(1), after conducting an ability to pay analysis in accordance with EPA guidance titled, "General Policy on Superfund Ability to Pay Determinations," dated September 30, 1997 (ATP Guidance). The ATP Guidance states that "the ATP settlement process is reserved for business potentially responsible parties ('PRPs') who demonstrate that payment of the amount sought by the government is likely to put a company out of business or otherwise jeopardize its viability, and...who demonstrate to the Agency that payment of such an amount is likely to create an undue financial hardship." The ATP Guidance further states, "an undue financial hardship occurs if, in the opinion of EPA, satisfaction of the environmental claim will deprive a PRP of ordinary and necessary assets or cause a PRP to be unable to pay for ordinary and necessary business expenses..." (ATP Guidance, page 1).

EPA requested, and SRC provided, financial documentation from 2015 through 2019, including bank statements, cash flow documents, balance sheets, federal income tax returns (including Schedule K-1 forms), and written statements in response to questions about SRC's finances. In accordance with the ATP Guidance, EPA conducted, with support from a financial analyst and application of the ABEL computer model, a two-phase analysis: the balance sheet phase; and the income and cash flow statement phase. (ATP Guidance, pages 6-13). EPA determined that SRC had no ability to pay an up-front amount without an undue financial hardship, but that SRC could

generate future income if it sold the property in the future. The Settlement Agreement provides for a payment to EPA upon a future sale of the property to reimburse EPA's response costs at the Site. Therefore, the Settlement Agreement is fair, reasonable, and consistent with the goals of CERCLA.

The date for sale of the property in the Settlement Agreement is not specified. This provides flexibility for SRC to sell the property when markets are favorable, thus potentially increasing the payment to reimburse EPA for response costs (up to 50% of the net sale proceeds of the property or \$325,000, whichever is less). Although EPA's response costs incurred at the Site are much greater than the potential costs to be recovered from a sale of the property, EPA considered incentives and disincentives for SRC to sell the property, potential undue financial hardship on SRC upon sale of the property, and the estimated property value, in reaching the settlement amount. Furthermore, given the requirement for SRC to make the payment upon sale of the property, whenever such sale occurs, the Settlement Agreement provides for recovery of response costs potentially beyond the expiration of the statute of limitations. The Settlement Agreement also provides for cost recovery without the time and expense of filing and enforcing a lien on the property pursuant to Sections 107(l) or 107(r) of CERCLA, 42 U.S.C. §§ 9607(l), 9607(r). Therefore, the Settlement Agreement is consistent with the goals of CERCLA to provide broad authority for EPA to recover costs incurred in response actions.

EPA's memorandum titled "Defining 'Matters Addressed' in CERCLA Settlements," dated March 14, 1997 (Matters Addressed Guidance), contains specific guidance regarding contribution protection in settlements based on ability to pay. The Matters Addressed Guidance states, "'matters addressed' can be broader if the settlement is intended to resolve a wider range of response actions or costs, regardless of who undertakes the work or incurs those costs. This broader contribution protection is typical in most de minimus and ability to pay settlements..." (Matters Addressed Guidance, page 4). The Matters Addressed Guidance further states, "it may be difficult to secure such [ATP] settlements without some assurance of broad contribution protection, because PRPs with limited resources may be unwilling to settle if they must retain resources to defend against contribution actions. Therefore, ordinarily 'matters addressed' should include all site costs..." (Matters Addressed Guidance, page 11). Paragraph 34 of the Settlement Agreement contains the specific matters addressed language recommended in the Matters Addressed Guidance for ATP settlements (page 11, referring to page 7 and footnote 7).¹ EPA purposefully excluded the state's response costs from the contribution protection language because any potential response actions or response costs incurred by the state were not considered when arriving at the ATP settlement amount. (Matters Addressed Guidance, footnote 7). Therefore, the Settlement Agreement is fair, reasonable, and consistent with the goals of CERCLA.

¹ Excerpt from Paragraph 34 of the Settlement Agreement: "The 'matters addressed' in this Settlement Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person, except for the State; provided, however, that if EPA exercises rights under the reservations in Section IX (Reservations of Rights by EPA), other than in Paragraphs 26.a (liability for failure to meet a requirement of the Settlement Agreement) or 26.b (criminal liability), the 'matters addressed' in this Settlement Agreement will no longer include those response costs or response actions that are within the scope of the exercised reservation."

It is also important to note that the contribution protection provided in the Settlement Agreement is limited to response actions taken and response costs incurred pursuant to CERCLA. There is no protection against claims under the Clean Water Act, such as the potential claims raised by KAIC in its notice of intent to sue SRC pursuant to Section 505 of the Clean Water Act, 33 U.S.C. § 1365, dated October 19, 2020 (Attachment G to the KAIC comment). Furthermore, there is no protection provided for myriad claims under other federal or state laws. Finally, the contribution protection applies only to claims against the Settling Party to the Settlement Agreement. Settling Party is defined in the Settlement Agreement as Spokane Recycling Company, LLC. The contribution protection provided in the Settlement Agreement does not extend to any principals, shareholders, affiliates, etc. of SRC.

In sum, EPA adhered to its ATP Guidance in negotiating and reaching the Settlement Agreement, and to its Matters Addressed Guidance in selecting the specific language regarding contribution protection in the Settlement Agreement. The Settlement Agreement is consistent with EPA's determination of SRC's ability to pay and provides for recovery of a portion of EPA's response costs at the Site. Accordingly, the Settlement Agreement is fair, reasonable, and consistent with the goals of CERCLA.