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September 20, 2018

**VIA ELECTRONIC MAIL**
Jeffrey H. Wood
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Environment and Natural Resources Division
United States Department of Justice
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**Re: Comments Opposing Entry of Consent Decree, United States v. Hercules, LLC, D.J. Ref. No. 90-11-3-11685**

Dear Acting Assistant Attorney General Wood:

On behalf of One Hundred Miles, Altamaha Riverkeeper, and Satilla Riverkeeper, the Southern Environmental Law Center submits the following comments opposing entry of the proposed Consent Decree for Interim Remedial Design and Remedial Action at Operable Unit One: Outfall Ditch of the Terry Creek Dredge Spoil Areas/Hercules Outfall Site, *United States v. Hercules LLC*, 2:18-cv-62-LGW-RSB, Doc. 3-1 (S.D. Ga. May 16, 2018) [hereinafter "Consent Decree"]. We appreciate the opportunity to provide these comments.

One Hundred Miles is a coastal advocacy organization dedicated to protecting, preserving, and enhancing Georgia's 100-mile coast. Altamaha Riverkeeper is a nonprofit environmental organization dedicated to protecting and restoring the habitat, water quality, and flow of the Altamaha River and its watershed. Satilla Riverkeeper is a nonprofit river advocacy organization dedicated to protecting, restoring, and educating about the Satilla River, its tributaries, and watershed. All three organizations have members who have been affected and continue to be affected by the pervasive and hazardous contamination stemming from Hercules, LLC's former pesticide plant in Brunswick, Georgia.

We urge the United States to withdraw the Consent Decree or withhold consent to its entry because, as our comments will demonstrate, the Consent Decree is inappropriate, improper, and inadequate to cleanup Operable Unit One ("OU1") at the site in compliance with the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 94 Stat. 2767, as amended, 42 U.S.C. §§ 9601–9675. Consent Decree at 66, ¶ 90. Alternatively, we urge the District Court, in its review of the Administrative Record, to deny entry of the Consent Decree because the terms of the Consent Decree are unreasonable and inequitable and are "inadequate to protect public health and the environment." *United States v. City of Fort Lauderdale*, 81 F.Supp.2d 1348, 1350 (S.D. Fla. 1999) (citing *United States v. City of Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975)).

Our primary concern with the Consent Decree is that it requires Hercules to perform the interim remedial action outlined in the June 2017 OU1 Interim Record of Decision ("IROD"),

rather than perform a final remedial action to clean the site and completely remove the toxaphene contamination. Contrary to the United States' contention, the chosen interim response action at OU1 is not consistent with CERCLA's criteria for selecting an appropriate remedy to clean up contamination, 40 C.F.R. § 300.430(e)(9)(iii), as explained in detail below. Moreover, the Consent Decree itself has a variety of troubling provisions that will ultimately lead to more delay, will limit future use of the property and surrounding areas, and will leave significant risks for the community for generations to come.

## I. Timeline and Background

### *A. Timeline – Hercules's long history of delay*

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|---|---|
| 1948-1980 | Hercules discharged toxaphene through OU1 into tidal creeks. |
| 1990 | Toxaphene was banned for all uses in the United States. |
| 1994 | The National Oceanographic & Atmospheric Administration discovered that sediments in Terry Creek near the site were toxic. |
| 1995-1997 | EPA conducted a site inspection and analyzed soils, groundwater, surface waters, sediments, and fish and shellfish for toxaphene. |
| 1997 | EPA proposed listing the site on the Superfund National Priorities List, but the listing was never finalized. |
| 1997 | Hercules and EPA entered into an Administrative Order by Consent ("AOC") which required Hercules to remove contaminated soils in OU1 and Terry and Dupree Creeks. |
| 1997 | Georgia Environmental Protection Division conducted fish tissue studies and found toxaphene in fish near the site. |
| 1999 | Hercules and EPA entered into a second AOC, which required Hercules to conduct a remedial investigation/feasibility study ("RI/FS") for each operable unit at the site. |
| 1999-2000 | Contaminated soils were removed from OU1 and the creeks in accordance with the 1997 AOC. |
| 2000-2012 | ……..Years of delay and inaction[1]…… |
| 2012 | Hercules finally began the field work for the RI/FS for OU1, 13 years after the 1999 AOC required the study. |
| 2015 | EPA and Hercules presented the RI/FS results and proposed plan for OU1, nearly 16 years after the 1999 AOC required the study. |

[1] From 2009 through 2012, it appears that Hercules's consultants prepared a number of "plans" for the RI/FS. In addition, fish tissue studies were conducted in 2001, 2005, 2007, 2009, 2011, 2013, and 2015. The results of each fish tissue study showed that fish continued to be contaminated with toxaphene.

2017 EPA released the IROD calling for an interim cleanup plan rather than a final remedial action at OU1.

2018 The United States lodged the Consent Decree with the District Court.

*B. Background*

For over 30 years, from 1948 to 1980, Hercules produced toxaphene, a chlorinated pesticide, at its plant in Brunswick, Glynn County, Georgia, along a tidal saltwater creek that empties into a fragile saltmarsh ecosystem and an important estuary. During that time, Hercules discharged toxaphene and wastewater through an outfall ditch—OU1—into Dupree Creek, which flows into Terry Creek. Toxaphene accumulated in the sediments at the bottom of OU1 and the two tidal creeks and remains there today. In 1990, the United States banned toxaphene for all uses because of its toxicity and potential to cause cancer. Over time, fish species in the area have become so contaminated with toxaphene that they are too dangerous to eat.

The Environmental Protection Agency ("EPA") and other federal and state agencies began investigating the Hercules site in the 1990s following the toxaphene ban. Upon realizing the extent and seriousness of the toxaphene contamination both onsite and offsite, the Hercules site was proposed for listing on the Superfund National Priorities List ("NPL") in 1997. The listing was never finalized, however, so the site is treated as a Superfund Alternative Approach site, which follows the same standards and processes for cleanup as sites on the NPL under CERCLA. Because of the size and complexity of the site, EPA has divided the site into three "operable units" or OUs. The first is OU1, the outfall ditch to Dupree Creek. OU2 is comprised of various upland portions of the site where dredged contaminated soils from Dupree and Terry Creeks were dumped in the 1970s and 1980s. OU3 consists of approximately 65 acres of Dupree and Terry Creeks near the site.

In 1990 and 2000, Hercules removed some of the contaminated soils from OU1 and OU3, but large amounts of toxaphene remain in all operable units and continue to cause problems. In particular, fish surveys continue to show unacceptable levels of toxaphene in fish in the area. Unfortunately, the damage from Hercules's toxaphene production extends far beyond the issues of fish contamination. Hercules is one of four Superfund sites that are located in Glynn County, making Glynn County home to the most Superfund sites in a single county in Georgia. In addition, the Hercules site is located along U.S. 17 in Brunswick, an important gateway corridor that links various communities and serves as an important component to Brunswick and Glynn County's economic health. Hercules's characterization as a Superfund site and its location along U.S. 17 have contributed to a negative perception of the economic health of the area and has harmed boating, fishing, and other recreational opportunities for residents, tourists, and businesses. Moreover, education and outreach efforts to warn local fishermen about the dangers of eating fish in the area are insufficient, thereby exposing too many people to toxaphene.

Accordingly, it is imperative that Hercules be held accountable for the damage it has caused and that it permanently and effectively removes the contamination. But sadly, the proposed Consent Decree simply slaps Hercules on the wrist and allows the pesticide company to cover up the contamination, rather than remove it. Specifically, the Consent Decree would require Hercules to implement Alternative 4 (Concrete-Lined Channel Re-Routed with Limited

Sediment Removal), the interim remedy selected in the June 2017 OU1 IROD. This alternative would require Hercules to take the following actions:

- Re-routing the existing stormwater ditch into a newly constructed concrete-lined ditch.
- Excavation and offsite disposal of impacted sediment near Glynn Avenue to construct the new ditch.
- Removal of the existing weir across the Outfall Ditch.
- Placement of geo-textile fabric over existing sediment in the Outfall Ditch.
- Backfilling the Outfall Ditch with compacted clean soil over the fabric.
- Armoring the backfill slope at the confluence with Dupree Creek.
- Seeding and stabilization of disturbed areas.
- Periodic inspections, maintenance, and sediment removal in the newly constructed ditch.
- Development and implementation of a long term monitoring plan to ensure the effectiveness of the interim remedy.
- Implementation of institutional controls such as an environmental covenant prescribing land use and activity restrictions to prevent unauthorized disturbance of the soil cover and other interim remedy components.

## II. Standard of Review

Here, the Consent Decree is meant to resolve claims brought under CERCLA, 42 U.S.C. §§ 9601–9675. Congress enacted CERCLA in response to the serious environmental and health risks posed by industrial pollution. *Burlington Northern & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). The purpose of the Act is "to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Id.* (quotations omitted). CERCLA's overarching principles include "accountability, the desirability of an unsullied environment, and promptness of response activities." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 91 (1st. Cir. 1990).

A consent decree in a CERCLA case must be "fair, reasonable, and faithful to the objective of the governing statute." *Id.* at 84; *see also Jones Creek Investors, LLC v. Columbia Cnty., Ga.*, 2013 WL 164516, *2 (S.D. Ga. 2013) (requiring consent decree to be lawful, reasonable, and consistent with environmental statute at issue). When "a court considers approval of a consent decree in a CERCLA case, there can be no easy-to-apply check list of relevant factors." *Cannons*, 899 F.2d at 86. Rather, "the evaluation of a consent decree's reasonableness will be a multifaceted exercise." *Id.* at 89.

As demonstrated below, the Consent Decree in this case is unreasonable and inconsistent with CERCLA's objectives and overarching principles. Because the same facts support both a finding of unreasonableness and a finding of inconsistency with CERCLA, this comment letter does not differentiate between facts supporting unreasonableness and facts supporting inconsistency.

## III. The Consent Decree requires an interim cleanup remedy that fails to meet CERCLA's criteria for selecting an appropriate remedy.

Under the CERLCA regulations, nine criteria must be used to select a remedy to clean up a hazardous waste site. 40 C.F.R. § 300.430(f)(1)(i) (referring to paragraph (e)(9)(iii) criteria). Those criteria include the following:

- Overall protection of human health and the environment;
- Compliance with applicable or relevant and appropriate requirements ("ARARs") under federal environmental laws and state environmental or facility siting laws;
- Long-term effectiveness and permanence of the remedy;
- Reduction of toxicity, mobility, or volume through treatment;
- Short-term effectiveness of the remedy;
- Implementability of the remedy;
- Cost of the remedy;
- State acceptance; and
- Community acceptance.

*Id.* § 300.430(e)(9)(iii)(A)-(I). Overall protection of human health and the environment and compliance with ARARs are threshold requirements that a chosen remedy must meet. *Id.* § 300.430(f)(1)(i). The long-term effectiveness and permanence; reduction of toxicity, mobility, or volume through treatment; short-term effectiveness; implementability; and cost are the balancing criteria. State acceptance and community acceptance are modifying criteria that also must be considered in remedy selection. *Id.*

The interim remedy to cleanup OU1 identified in the Consent Decree fails, however, to meet a majority of the nine criteria outlined above. Our comments address those criteria in turn, in reverse order.

### *A. Community Acceptance – The Community Overwhelmingly Opposes the Remedy*

The community has forcefully and soundly rejected the Consent Decree's selected interim remedy for OU1. The City of Brunswick, Glynn County, local environmental

organizations, and individual community members all submitted written comments on the June 2015 proposed cleanup plan for OU1 of the Terry Creek Superfund Site and opposed the selection of Alternative 4.[2] Those local governments and community members overwhelmingly expressed a desire for Hercules to remove all contaminated soils from the site, and also specifically requested the use of box culverts at OU1, as described in Alternatives 5 and 5A, to aid in the redevelopment of the U.S. 17 Gateway Corridor and adjacent parcels.

EPA ignored the community's concerns and requests, however, and issued the June 2017 OU1 IROD selecting Alternative 4. In its response to the comments, EPA asserted that the City of Brunswick and Glynn County were free to meet with Hercules to discuss potential reuse plans and to negotiate a change in ownership of OU1.[3] EPA noted that if Hercules agreed to sell, lease, provide an easement, or donate the OU1 parcel to the City or County, then it "may be able to design and implement the OU1 interim remedy to support the City's potential reuse plans, such as construction of a roadway."[4] This response is absurd. Local governments should not be required to acquire and assume liability for contaminated property simply to convince EPA to select a remedy that meets the community's needs.

Furthermore, just this week, on September 18, 2018, the Brunswick City Commission and Glynn County Board of Commissioners unanimously adopted a joint resolution opposing the Consent Decree and calling for the complete removal of all contamination in OU1.[5] The City and County assert that new information demonstrates a dire need for the complete removal and remediation of all contamination to ensure the prevention of future contamination at the site. Likewise, the governments argue that the Consent Decree does not go far enough to fully remove and remediate the contaminants in OU1.[6]

State Sen. William Ligon, who represents Glynn County, wrote in a separate statement, "I'm dismayed that the consent decree would fall short of requiring a complete removal and remediation of all the contamination. That is the only way to ensure the long-term viability of the site, and our water supply and our fisheries."[7] Similarly, the Brunswick-Golden Isles Chamber of Commerce, Brunswick and Glynn County Development Authority, and the Golden Isles Convention and Visitors Bureau are planning to submit a joint statement opposing entry of the Consent Decree and calling for the complete removal of the contamination in OU1.[8]

Because the community overwhelmingly opposes entry of the Consent Decree and the selection of Alternative 4 as the interim remedy, the United States should withdraw the proposed Consent Decree and work towards a solution that removes the contamination and is acceptable to community members. See 40 C.F.R. § 300.430(e)(9)(iii)(I).

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[2] *United States v. Hercules LLC*, 2:18-cv-62-LGW-RSB, Doc. 3-3 at 307–482.
[3] *Id.* at 131.
[4] *Id.*
[5] Wes Wolfe, *Commissioners Unanimous on Full Terry Creek Cleanup*, THE BRUNSWICK NEWS, Sept. 19, 2019, https://thebrunswicknews.com/news/local_news/commissioners-unanimous-on-full-terry-creek-cleanup/article_21efd879-dd74-5b71-8524-d9c8ee9831ce.html.
[6] *Id.*
[7] *Id.*
[8] *Id.*

*B. Implementability – Storm Surges from Hurricanes and High Tide Events Make the Remedy Unreliable.*

There are numerous concerns with the implementability of the Consent Decree's chosen interim remedy. Under the regulations, the ease or difficulty of implementing a remedy must be assessed by considering technical feasibility, including "the reliability of the technology, ease of undertaking additional remedial actions, and the ability to monitor the effectiveness of the remedy." 40 C.F.R. § 300.430(e)(9)(iii)(F)(1).

The reliability of the technology to be used here is highly questionable, particularly given the site's location on the Georgia coast. As a reminder, the interim remedy required by the Consent Decree would include re-routing the existing stormwater ditch into a newly constructed concrete-lined ditch; removal of the existing weir across the Outfall Ditch; placement of geo-textile fabric over the contaminated sediment in the Outfall Ditch; backfilling the Outfall Ditch with compacted clean soil over the fabric; armoring the backfill slope; seeding and stabilization of disturbed areas; and inspection, maintenance, and monitoring plans. Essentially, the plan is to cover up the contaminated soil and hope that it remains undisturbed.

This plan is completely unreliable on the Georgia coast, leading to serious concerns about implementability. Even a cursory examination of readily available data shows that the proposed site is already vulnerable to damage and flooding. According to geospatial models and reports from locals, this site and especially OU1 are already exposed to flooding from regular tides as well as "king tides."[9] Just last year, storm surge from Hurricane Irma flooded portions of the site, moving highly contaminated soils into nearby creeks, and damaging the underflow weir in OU1.[10] At the time, Irma had already been downgraded to a tropical storm, and the center of the storm was over 100 miles away. Even in the storm's weakened state, Irma's storm surge broke Brunswick's 6.2 foot surge record set by Hurricane Matthew a year earlier.[11] In fact, the tide gauge in Brunswick broke while measuring Irma's storm surge at 6.9 feet over mean high tide.[12]

To compound this issue, climate change is fueling more powerful hurricanes that will bring even stronger storm surges. The National Oceanic and Atmospheric Administration ("NOAA") has prepared National Storm Surge Maps that estimate how much storm surge could be expected in the event of future hurricanes. Examining this data for the Hercules site reveals that OU1 could be inundated with 6 feet to over 9 feet of water during a Category 3 hurricane.[13]

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[9] King tides are exceptionally high tides that typically occur during a new or full moon and/or when the Moon is at its closest to Earth. https://oceanservice.noaa.gov/facts/kingtide.html.

[10] Joshua Sharpe, *One Georgia Superfund Site Damaged by Irma; Others Under Review*, THE ATLANTA JOURNAL-CONSTITUTION, Sept. 19, 2017, https://www.ajc.com/news/local/one-georgia-superfund-site-damaged-irma-others-under-review/8VFYQVdwJM9PeKW9ctxU1I/; Wes Wolfe, *Superfund Sites Receive Tentative Thumbs Up from EPA*, THE BRUNSWICK NEWS, Sept. 20, 2017, https://thebrunswicknews.com/news/local_news/superfund-sites-receive-tentative-thumbs-up-from-epa/article_f4dcf8f2-5dff-5a00-b3d9-e1f2e2460da4.html.

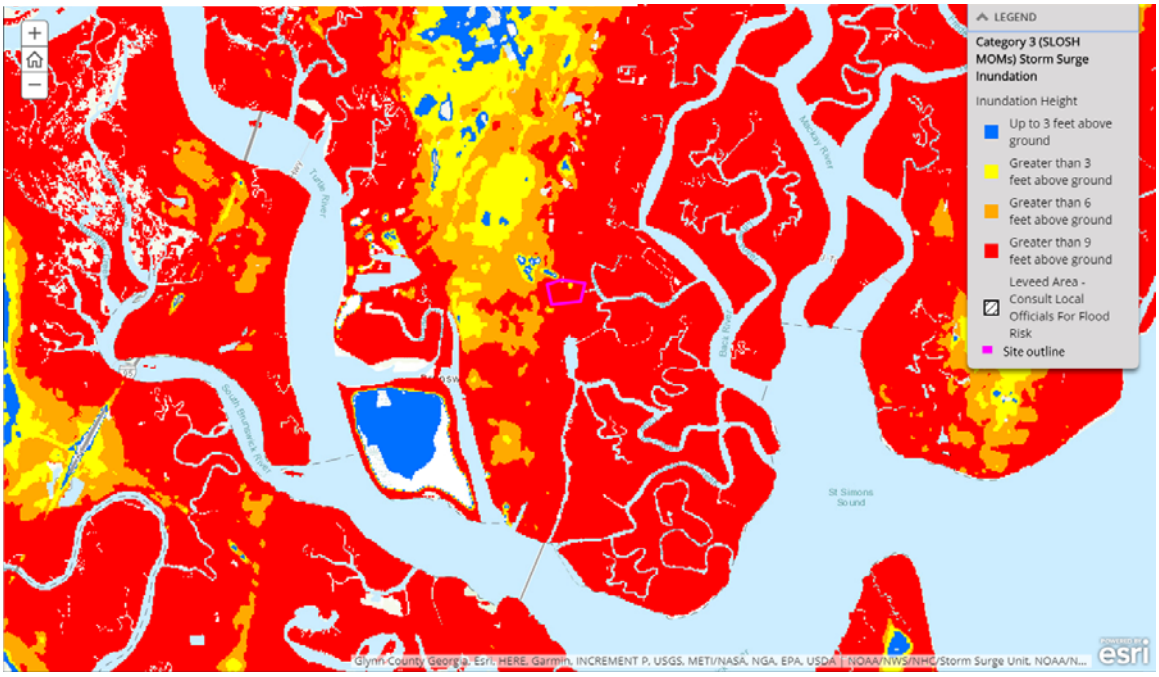
[11] Larry Hobbs, *Irma's Wrath Brings Floods, Wind Damage*, THE BRUNSWICK NEWS, Sept. 11, 2017, https://thebrunswicknews.com/news/local_news/irma-s-wrath-brings-floods-wind-damage/article_570de98c-fe78-54da-8fda-409b3237fcb0.html.

[12] *Id.*

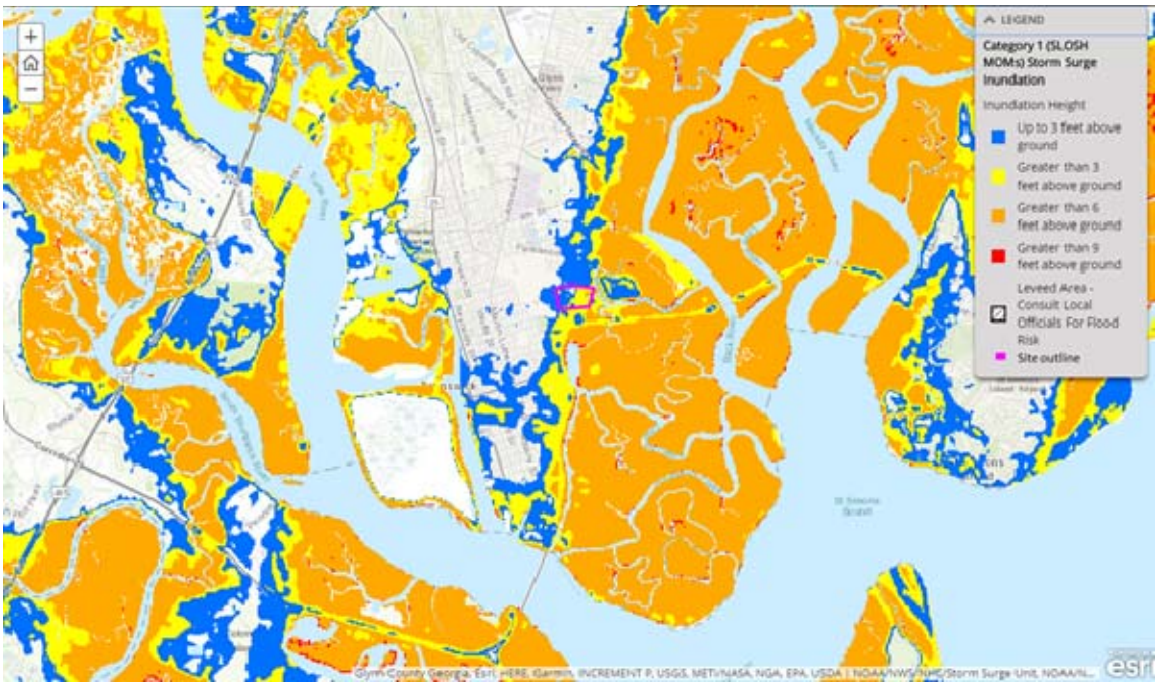
[13] NOAA's National Storm Surge Hazard Maps can be found at http://noaa.maps.arcgis.com/apps/MapSeries/index.html?appid=d9ed7904dbec441a9c4dd7b277935fad&entry=1.

Even a Category 1 hurricane could inundate the site with up to 6 feet of water, as depicted in the maps below.

CATEGORY 3 STORM SURGE INUNDATION




CATEGORY 1 STORM SURGE INUNDATION



Overall, storm surges of that magnitude have the potential to completely undo the selected interim remedy by eroding vegetation and clean soils from the site, revealing the contaminated soils below, and causing them to enter Dupree Creek and eventually Terry Creek, exacerbating human health and environmental concerns. Simply armoring the backfill slope of the covered up soil will not prevent water from entering the site. And even if the geo-fabric cover and soils remain relatively undisturbed by storm surge, repeated flooding of OU1 could easily result in toxaphene and its breakdown products leaving the site as flood waters move in and out of the former ditch. Should the interim remedy be the only remedial action taken at the site for many years to come—which is what we would anticipate due to Hercules's long history of delaying cleanup at this site—these concerns will only increase as sea levels rise and storms get stronger and more frequent.

In addition, the chosen interim remedy would make subsequent additional remedial actions much harder, raising more concerns about implementability. EPA notes in the IROD that Alternative 4 is not meant to be a final remedy at OU1 and that EPA will continue to develop final remedial alternatives for OU1. Given new information about "weathered toxaphene" and toxaphene breakdown products (discussed in much greater detail below), it is not far-fetched to assume that removal of contaminated soils may be required in the future at OU1. In that case, Hercules would have to completely reverse the Alternative 4 remedial action in order to access the contaminated soils.

Finally, implementing Alternative 4 at OU1 would be difficult due to the inability to monitor the effectiveness of the remedy. Historically, Hercules and EPA have monitored the contamination at the site by analyzing tissues in fish found in Dupree and Terry Creeks. The problem here, however, is that OU2 and OU3 both contain toxaphene-contaminated soils and sediments that could be contributing to the fish contamination. For this reason, we object to any Consent Decree that does not also require Hercules to begin remediating OU2 and OU3. We provide additional comments on this objection later in this letter.

In sum, because the interim remedy could be completely reversed by a single storm event on the coast, would make a final remediation action more difficult, and would be difficult to monitor for effectiveness, it fails to meet the implementability criterion under the regulations, 40 C.F.R. § 300.430(e)(9)(iii)(F).

### *C. Reduction of Toxicity, Mobility, or Volume through Treatment – New Information Provides Evidence that the Interim Remedy Could Result in Increased Toxicity of Contaminated Soils in OU1*

The primary excuse given by EPA and Hercules to support an interim remedy, rather than a final remedy, is that EPA currently lacks a toxicity value for the breakdown products of toxaphene, which are referred to as degraded toxaphene, weathered toxaphene, or just breakdown products. As toxaphene breaks down naturally in the environment, it transforms into different toxaphene mixtures containing congeners with different numbers of chlorines. During the RI/FS process, EPA did not have toxicity information on those breakdown mixtures, or information about how harmful those breakdown products are. As a result, EPA allowed Hercules to perform the RI/FS to allow for an "expedited selection of a remedy at OU1 that is not further delayed by development of weathered toxaphene analytical measures or toxicity

reference values."[14] Because of Hercules's continued delay and inaction at the site, however, we now have toxicity information on weathered toxaphene.

On July 31, 2018, EPA's National Center for Environmental Assessment ("NCEA") released the "Provisional Peer-Review Toxicity Values for Technical Toxaphene CASRN 8001-35-2, Weathered Toxaphene, and Toxaphene Congeners."[15] Accordingly, the purported excuse for choosing an interim remedy no longer exists, and EPA and Hercules can select a final remedy, memorialized in a final record of decision, that adequately cleans the site and protects human health and the environment. In other words, the need for an interim remedy no longer exists.

Moreover, the NCEA study demonstrates that the interim remedy is insufficient to protect human health and the environment, because toxaphene may become more toxic the longer it remains on site. Specifically, the longer toxaphene mixtures remain in the environment, the more likely they are to lose chlorines. The study recognizes that toxaphene mixtures enriched in congeners with less chlorines per molecule can be more toxic than toxaphene mixtures enriched in congeners with more chlorines per molecule.[16] The toxaphene mixtures in OU1 have been there since the late 1940s, which means that the toxaphene mixtures in OU1 may be much more toxic now than they originally were as a result of losing chlorines over time.

Because the interim action would allow soils contaminated with weathered toxaphene to remain exactly where they are, there is a significant risk that those soils could become even more toxic. As a result, leaving those soils in place is unacceptable to protect human health and the environment, and this interim remedy is inconsistent with the reduction of toxicity through treatment criterion, 40 C.F.R. § 300.430(e)(9)(iii)(D).

For this reason alone, the United States should withdraw the Consent Decree or withhold consent to its entry by the District Court.

*D. Long-term Effectiveness and Permanence*

Under the regulations, the remedy must be assessed for the long-term effectiveness and permanence it affords, along with the degree of certainty that the remedy will prove successful. *Id.* § 300.430(e)(9(iii)(C). Moreover, "[e]ach remedial action shall utilize permanent solutions . . . to the maximum extent practicable." *Id.* § 300.430(f)(1)(ii)(E). In making this determination, "the modifying criteria of state acceptance and community acceptance . . . shall also be considered." *Id.*

As an initial matter, we recognize that the selected remedy in this case is presented as an interim remedy based on an interim record of decision that is not necessarily meant to be final and permanent. According to EPA, the purpose of an interim action is to "take quick action to

[14] *Supra* n.2, Doc. 3-3 at 22.
[15] Environmental Protection Agency, "Provisional Peer-Reviewed Toxicity Values for Technical Toxaphene (CASRN 8001-35-2) Weathered Toxaphene, and Toxaphene Congeners," (July 31, 2018) [hereinafter PPRTV for Weathered Toxaphene], https://hhpprtv.ornl.gov/issue_papers/ToxapheneWeathered.pdf.
[16] *Id.* at 82, 87–88 (focusing on the studies examining congeners with fewer than or greater than seven chlorines per molecule).

protect human health and the environment from an imminent threat in the short term, while a final remedial solution is being developed."[17] But nothing about this process has been quick. Toxaphene accumulated on the site for over 50 years before any contaminated soils were removed in 1999 and 2000. After that, it took Hercules and EPA another 16 years to decide on another interim remedy in the June 2017 IROD. And let's be clear, that interim remedy involves covering up OU1 with dirt and building a separate ditch to channel wastewater and stormwater runoff. That action could have been taken—and should have been taken—in the early 2000s, when fish tissue studies continued to show detectable concentrations of toxaphene even after the sediment removal action in 1999 and 2000. Now, the interim action is nothing more than another delay tactic that will leave dangerous contaminants in the ground, posing an unnecessary risk to the community for years to come.

To elaborate further, we are strongly concerned that Hercules views the interim action as the final action to be taken at OU1. The basis for that concern is Hercules's long history of delaying cleanup activities and inaction at this site, as well as its insistence that the interim remedy—Alternative 4—is adequate to contain the contamination and limit exposure. The majority of toxaphene-related cleanup activities at the Hercules site occurred between 1994 and 2000, a period of 6 years that ended over 18 years ago. Between 2000 and 2012, Hercules essentially did nothing to improve conditions at the site, even though it had agreed in 1999 to conduct the RI/FS for OU1.[18] Once it finally began conducting field studies for the RI/FS in 2012, it argued for this limited interim cleanup measure, rather than a final solution to the contamination problem.

By allowing Hercules to implement this interim remedy instead of a final action that permanently and effectively protects human health and the environment, the United States is signaling to Hercules and other polluters that delay and avoidance will be rewarded with lenient consent decree terms. The Brunswick/Glynn County community deserves better.

And as we have already discussed, the interim action required by the Consent Decree is highly unlikely to be permanent or effective in the long-term, due to current and future flooding and damage from storm surges and higher tides. In addition, as sea levels rise, the site's inundation risk will increase further, as will the potential for contaminants to spread to nearby areas through that flooding. Critically, toxaphene contamination remains in OU2 and OU3, and Hercules has essentially done nothing since 2000—interim or final—to remove or immobilize the contamination in those locations. See 40 C.F.R. § 300.430(e)(9)(iii)(C).

*E. Overall Protection of Human Health and the Environment*

The most important threshold criterion that a proposed remedy must meet is overall protection of human health and the environment. The selected remedy must "adequately protect human health and the environment, in both the short- and long-term, from unacceptable risks posed by hazardous substances, pollutants, or contaminants present at the site by eliminating, reducing, or controlling exposures to levels establishing during development of remediation

[17] *Supra* n.2, Doc. 3-3 at 127.

[18] The purpose of an RI/FS is to assess site conditions and evaluate alternatives to the extent necessary to select a remedy to clean up hazardous contamination. 40 C.F.R. § 300.430(a)(2).

goals." 40 C.F.R. § 300.430(e)(9)(iii)(A). Overall protection of human health and the environment draws on the assessments of the other evaluation criteria. *Id.*

As demonstrated by our analysis of the other evaluation criteria above, the interim remedy selected by the Consent Decree will not adequately protect human health and the environment from the unacceptable risks posed by toxaphene present in OU1. Covering up the contamination does not eliminate the risks, particularly when that cover could be removed easily by storm surges and wave action. Repeated flooding of the area could result in toxaphene migrating from the covered soils and into the neighboring tidal creeks even if the cover remains intact. As highlighted in the NCEA report on weathered toxaphene, the proposed interim remedy may actually result in toxaphene mixtures becoming more toxic over time, and those toxic mixtures could eventually end up in public waters and in the seafood that people consume. And importantly, the community strongly objected to this interim remedy when it was first proposed and continues to object to its inclusion in the Consent Decree.

Overall, EPA should never have selected Alternative 4 as the interim remedy in the June 2017 IROD. This remedy is inconsistent with a majority of the regulatory criteria for selecting a remedy under CERLCA. Accordingly, because the Consent Decree requires the implementation of that interim remedy, the Consent Decree is unreasonable and inconsistent with CERCLA. For that reason, the United States should withdraw the Consent Decree and negotiate a new settlement with Hercules that requires a final, effective, and permanent solution at OU1.

## IV. The Consent Decree fails to address or even acknowledge the risks associated with toxaphene contamination and fails to hold Hercules accountable for releasing toxaphene into the environment for decades.

The ultimate purpose of this Consent Decree is to force Hercules to finally take additional remedial action at OU1 to protect human health and the environment from the risks associated with toxaphene, which was banned for all uses in the United States in 1990. Breathing, eating, or drinking toxaphene causes damage to the nervous system, liver, and kidneys, and EPA has determined that toxaphene is a probable carcinogen.[19] Toxaphene can stay in the environment for a very long time, and it accumulates in fatty tissues of fish and mammals.[20] The chemical has been present on Hercules's site and in surrounding creeks for roughly 70 years. Community members have been warned not to eat fish or other seafood caught in the vicinity of the Hercules site because of the pervasive contamination.

Remarkably, the Consent Decree explains none of this, and it mentions toxaphene only one time. Moreover, the Consent Decree allows Hercules to avoid admitting "any liability to Plaintiff arising out the transactions or occurrences alleged in the complaint, nor does [Hercules] acknowledge that the release or threatened release of hazardous substance(s) from the Site constitutes an imminent and substantial endangerment to the public health or welfare or the environment." Consent Decree at 2, ¶ E. We recognize that the Consent Decree is the result of settlement negotiations between Hercules and the United States, and that defendants often refuse

[19] Agency for Toxic Substances & Disease Registry, Center for Disease Control, *ToxFAQs for Toxaphene,* https://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=547&tid=99.
[20] *Id.*

to admit liability in settlements. Nevertheless, this term is a slap in the face to Brunswick/Glynn County residents who have had to live with this contamination for 70 years.

This shortcoming, along with the Consent Decree's chosen interim remedy for OU1, will only perpetuate Hercules's attempts to avoid responsibility in the future at the site and will provide grounds for Hercules to pretend that the toxaphene contamination is not serious. But Hercules is clearly responsible for the contamination in OU1 and surrounding creeks and for denying community members the option of eating local fish. Hercules is responsible for contributing to the negative perception of the community's public health, environmental health, and economic health along the U.S. 17 corridor.

The United States should withdraw the Consent Decree and negotiate a new agreement with Hercules, in which Hercules is required to admit responsibility for its actions and to acknowledge the harms and risks associated with the toxaphene contamination stemming from its operations.

## V. The Consent Decree fails to address the contamination at the Hercules site in a comprehensive manner.

Here, the Hercules site has been divided into three operable units because of the size of the site and the complexity of the contamination: OU1, the Outfall Ditch; OU2, various upland portions of the site east of Highway 17; and OU3, portions of Terry Creek and Dupree Creek. While we recognize the utility in dividing up the site for the purpose of selecting appropriate remedies, we nevertheless believe that the entire site must be looked at holistically to expedite and obtain a total site cleanup. Under the pertinent regulations, interim action operable units "should not be inconsistent with nor preclude implementation of the expected final remedy" of the entire site. 40 C.F.R. § 300.430(a)(1)(ii)(B). In other words, the remedial action at OU1 should not be inconsistent with or preclude implementation of remedial actions at OU2 and OU3.

But sadly, remedial actions at OU2 and OU3 have been put on hold because of Hercules's delay and its insistence for more information about the toxicity of weathered toxaphene. Hercules should not be allowed to delay cleanup at those other operable units any longer. The NCEA study on weathered toxaphene has been released, and while it does not contain everything we would like to know about weathered toxaphene and individual congeners, it has enough evidence to support removing all contaminated soils. In addition to requiring a full and final cleanup of OU1, the United States should require Hercules to start taking active steps to remediate OU2 and OU3. In addition, contaminated soils are not the only concern here. We understand that the site also contains contaminated groundwater that is being addressed separately and not under CERCLA. Regardless, the OU1 remediation should be tied to <u>all other efforts</u> to clean up contamination caused by Hercules's operations, including groundwater remediation efforts under other state or federal programs. Without more, the community has no assurance that Hercules will take necessary actions to remediate the site as a whole.

Simply reserving the United States' rights against Hercules with respect to liability for OU2, OU3, or additional operable units at the site is not enough. Consent Decree ¶ 62(j). Because the Consent Decree does not require Hercules to take active steps to remediate the entire

site, and not just OU1, we respectfully request the United States to withdraw the proposed Consent Decree or withhold consent to its entry by the District Court.

## VI. The Consent Decree contains other provisions that are troubling, and it is missing requirements that should be included.

### *A. Community Involvement*

The Consent Decree notes that "[i]f requested by EPA, [Hercules] shall conduct community involvement activities under EPA's oversight as provided for in, and in accordance with, Section 2 (Community Involvement) of the [Statement of Work]." Consent Decree at 16, ¶ 12. Community involvement must be mandatory, not contingent upon a request by EPA. The Brunswick/Glynn County community has been involved in the Hercules remediation efforts since they began, and putting any loopholes in the Consent Decree that could result in no community involvement is inappropriate and inequitable.

### *B. Warranty of Representation by the United States*

One provision in particular demonstrates that the United States itself lacks confidence in the chosen interim remedy to clean up the site. Specifically, the proposed Consent Decree states the following: "Nothing in this [Consent Decree, the Statement of Work], or any deliverable required under the [Statement of Work] constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the [Statement of Work] or related deliverables will achieve the Performance Standards." Consent Decree at 17, ¶ 14. Performance Standards are defined as "the cleanup levels and other measures of achievement of the remedial action objectives, as set forth in the IROD." *Id.* at 9.

Essentially, the United States is stating that it will not guarantee that the Consent Decree, if implemented, will actually result in a cleaner and safer site. Clearly, the United States will not amend the proposed Consent Decree to make any such warranty or representation, but at a minimum, it should include some next steps or consequences for Hercules in the event that the interim action will not achieve the Performance Standards.

### *C. Retention of Records*

The Consent Decree should be amended to clarify that paragraph 82 on page 61 applies to all records relating to the entire site, including records relating to OU1, OU2, OU3, and other future operable units. In addition, the 5-year time period for preservation of records should not begin to run until EPA has certified completion of work for all operable units at the site. Given the history of delay and the pushback we have seen from Hercules, it is important for records to remain accessible until the entire site is cleaned sufficiently.

### *D. Public Notice and Comment for Modifications*

The Consent Decree states that before "providing its approval to any modification to the [Statement of Work], the United States will provide the State with a reasonable opportunity to

review and comment on the proposed modification." Consent Decree at 65, ¶ 88. We strongly object to the lack of public notice and comment on proposed modifications. The United States should provide the public with a reasonable opportunity to review and comment on all proposed material modifications.

The same paragraph states that "[s]chedules specified in this [Consent Decree or Statement of Work] for completion of the Work may be modified by written approval of the EPA after written request by [Hercules]." *Id.* We have serious concerns about this latter term, given Hercules's long history of delay at this site. No schedules for completion of work should be modified unless Hercules clearly and convincingly demonstrates that a new schedule is necessary to protect human health and the environment. Any proposed Consent Decree should explain the specific instances when schedules for completion of work can be modified and set forth the requirements to demonstrate compliance with those instances.

*E. Enhanced Public Outreach for Fish Consumption Advisories*

Missing from the Consent Decree is a requirement that Hercules develop and implement a more robust public outreach and education campaign on toxaphene contamination and ongoing fish consumption advisories. Given the severe health risks associated with consuming toxaphene, Hercules has a duty to the community to educate them about those risks and to improve awareness of the fish advisories.

*F. Pathways Monitoring Program*

Also missing from the Consent Decree is a requirement that Hercules conduct a more thorough analysis of the pathways in which plants and animals are exposed to the onsite toxaphene and to continue to monitor those plants and animals as the site is remediated. As Satilla Riverkeeper mentioned in comments on the 2015 proposed cleanup plan for OU1, covering soil does not eliminate pathways via fish and birds, which may continue to eat small organisms that accumulate toxaphene underneath caps on the soil. In addition, marsh grass and other plants may remove toxaphene from the soils when they grow in contaminated areas. Those plants could be eaten by other organisms or leave the site during storms, winter dieback, or outgoing tides.

*G. Quantifiable Goals*

Finally, the Consent Decree fails to include any quantifiable goals for achieving success. One of the main objectives for cleaning up OU1 is to prevent additional toxaphene from entering Dupree Creek and Terry Creek and eliminating the bioaccumulation of toxaphene in fish. The United States can and should set a quantifiable goal for Hercules to reduce fish contamination by a certain percent within a certain time frame. This could also be tied in to the requirements that Hercules must begin remediation efforts at both OU2 and OU3.

## VII. Conclusion

As discussed above, we have numerous concerns about the proposed Consent Decree. We respectfully request the United States withdraw the Consent Decree and negotiate a new agreement that requires Hercules to take adequate final, not interim, remedial action at the site. Alternatively, we request the District Court, in reviewing the Administrative Record, to find that the proposed Consent Decree and chosen remedial actions are unreasonable and inconsistent with the objectives of CERCLA.

Thank you for your timely consideration of these comments. If you have any questions or concerns, please contact me at (404) 521-9900 or alipscomb@selcga.org.

Sincerely,

April Lipscomb
Staff Attorney