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By Electronic Mail

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**Comments to Proposed Second Modification of Consent Decree
Regarding Bayer CropScience Plant Explosion,
DJ Ref. No. 90-5-2-1-10802**

Dear Mr. Wood:

On behalf of People Concerned About Chemical Safety, Inc. (PCACS), Natural Resources Defense Council, Inc., and NAACP’s Charleston Branch, we write to oppose the Department of Justice’s (DOJ) proposed second modification to the consent decree in *United States v. Bayer CropScience LP*, No. 2:15-cv-13331 (S.D.W.Va.). *See* 82 Fed. Reg. 42838 (Sept. 12, 2017).

The proposed modification, which decreases Bayer CropScience’s obligations to carry out Supplemental Environmental Projects (SEPs), does not further the public interest. *See United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 64 (D.D.C. 2015) (evaluating proposed Clean Air Act consent decree). Nor is it “suitably tailored to the changed circumstance” that Bayer invokes as the reason for the modification. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 404 F.3d 821, 827 (4th Cir. 2005) (internal quotation marks omitted).

DOJ and Bayer seek to replace a SEP that would have expanded a wastewater sump and reduced discharges of chemicals into a nearby river. In its place, the parties propose a far less costly SEP that entails the purchase of emergency response equipment for two local volunteer fire stations.

Under the terms of the original 2016 consent decree, which was updated this March, the SEPs collectively cost \$4.42 million. Agreed Non-Material Modification of Consent Decree at 2–3 (Dkt. 21-1).¹ The proposed second modification, if adopted, will lower the total value of SEPs to \$3.05 million. Second Modification of Consent Decree ¶ 2 (Dkt. 25-1). This represents a \$1.37 million reduction in Bayer’s obligations, not \$1.18 million, as the Federal Register notice suggests. *See* 82 Fed. Reg. at 42838.

¹ In March 2017, Bayer and DOJ agreed to the first modification of the consent decree. The parties represented that the modification was “non-material” and hence did not require court approval or opportunity for public comment.

Reducing Bayer's obligations is not a reasonable or equitable modification of an agreement intended to hold Bayer accountable for numerous serious violations of the Clean Air Act. *See, e.g., Env'tl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 70 (D.D.C. 2004) (a consent decree is "substantively fair if it incorporates 'concepts of corrective justice and accountability'").

While the equipment purchase SEP is a worthwhile project, Bayer should not be allowed to reduce its original commitment by more than \$1.37 million—roughly a third of what the corporation originally committed to spend. Even if there are changed circumstances justifying modification of the decree, this proposal is not "suitably tailored"—the changed circumstance calls for a new project or projects of equal or greater value, not one that substantially lowers Bayer's SEP costs. *See Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 391 (1992) ("[T]he focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances.").

The proposal awards Bayer a double windfall: the cost of the SEPs will decrease, but the civil penalties, which were calculated based on the original cost of the SEPs, will remain unchanged. This perverts the Environmental Protection Agency's (EPA) SEP policy, which allows the government to provide a "penalty mitigation credit" of up to 80% of the SEP cost, or up to 100% of the cost if the SEP implements pollution prevention technologies. *See* EPA, Supplemental Environmental Projects Policy—2015 Update, at 23–24 ("EPA SEP Policy"). Here, EPA "calculated the total civil penalty as including both the cash penalty and the cost of the proposed supplemental environmental projects," and the court accepted this calculation in accepting the consent decree. Mem. Op. & Order at 14 n.2 (Dkt. 18). If this modification is approved, DOJ will essentially have awarded Bayer approximately \$1 million in penalty mitigation credit based on costs for a project that Bayer will not complete.

Rather than endow Bayer with two windfalls, DOJ should require Bayer to fund a SEP valued, at minimum, at the amount Bayer saves by abandoning the wastewater SEP. A SEP that commits \$1.5 million for an independent public health study would provide data needed to evaluate the long-term consequences of the release of highly toxic chemicals from the facilities. The need for this study is further described below, and the outline of a proposed health study is attached (Att. A). Another potential SEP, also discussed below, would construct an alternate emergency escape route for the residents of Institute, West Virginia, in the event of another chemical plant accident.

A. The 2008 explosion and subsequent enforcement action

The underlying lawsuit filed by DOJ² in 2015 stems from a deadly explosion in 2008 at Bayer CropScience's plant in Institute, WV. A runaway chemical reaction caused a large residue treater to explode, killing two workers, injuring eight responders, damaging homes and other buildings outside the plant, and causing a fire that burned for more than four hours. *See* Complaint ¶¶ 88–97 (Dkt. 3). More than 40,000 residents, including students at the adjacent West Virginia State University, had to shelter-in-place for more than three hours. *Id.* ¶ 97.a.

The explosion also propelled metal and other debris into the blast blanket surrounding a large tank containing approximately 37,000 pounds of methyl isocyanate (MIC).³ MIC is a highly toxic gas: In 1984, leaks from a Union Carbide pesticide plant in Bhopal, India, resulted in thousands of deaths. Individuals who survived suffered serious health problems.⁴ Following the 2008 explosion at Bayer's facility, the U.S. Chemical Safety Board investigated the accident and concluded that, had the trajectory of the exploding vessel taken it in a different direction, the MIC tank may well have ruptured, with dire consequences for the thousands of residents in communities immediately adjacent to and in close proximity to the plant.

The thirteen-count complaint filed by the United States in 2015 recites Bayer's many failures to comply with the Clean Air Act and implementing regulations. This

² DOJ's enforcement action post-dates community members' lawsuit. In February 2011, individual members of PCACS and West Virginia State University and residents of Institute filed a complaint in the U.S. District Court for the Southern District of West Virginia. The court issued a temporary restraining order enjoining Bayer from producing methyl isocyanate (MIC). *See* Order of February 10, 2011, Dkt. 16, *Nye v. Bayer CropScience, LP*, No. 2:11-cv-00087 (S.D.W.Va.). Shortly thereafter, Bayer announced that it would no longer manufacture, transport, or store MIC at the Institute facility. *See* Transcript of Proceedings of Motion Hearing of Mar. 18, 2011, Dkt. 99, *Nye v. Bayer CropScience, LP*, No. 2:11-cv-00087 (S.D.W.Va.).

³ U.S. Chemical Safety Board, Bayer CropScience Explosion Report Summary, at <http://www.csb.gov/csb-issues-report-on-2008-bayer-cropscience-explosion-finds-multiple-deficiencies-led-to-runaway-chemical-reaction-recommends-state-create-chemical-plant-oversight-regulation/>; *see also* U.S. Chemical Safety Board, Investigation Report: Pesticide Chemical Runaway Reaction, Pressure Vessel Explosion 7, 40–43, at http://www.csb.gov/assets/1/19/Bayer_Report_Final.pdf.

⁴ *See, e.g.*, Alan Taylor, The Atlantic, "Bhopal: The World's Worst Industrial Disaster, 30 Years Later" (Dec. 2, 2015), at <https://www.theatlantic.com/photo/2014/12/bhopal-the-worlds-worst-industrial-disaster-30-years-later/100864/>.

includes Bayer’s (1) failure to follow appropriate operating procedures, including by shutting off a safety mechanism; (2) failure to perform a hazard evaluation to identify and address risks of accidents; (3) failure to adequately train employees on standard operating procedures; and (4) withholding of information after the accident from county emergency response agencies and failure to communicate a shelter-in-place instruction to 911 operators. Compl. ¶¶ 101–238.

Under the terms of the consent decree entered in 2016, Bayer was required to undertake a set of SEPs and pay a civil penalty of \$975,000—far less than the penalties the government could have sought.⁵ The most significant SEP, the West Sump Expansion SEP, called for the installation of an 840,000 gallon collection sump to provide surge capacity and prevent the overflow of raw chemical wastewater into the Kanawha River. *See* Appx. B to Consent Decree, at 1 (Dkt. 19-1). The chemicals contained in the process sewer flows from Bayer, Dow, and tenant operating areas on the west end of the facility include methomyl and thiodicarb from the production of Carbamate (a pesticide); and naphthalene, methyl isobutyl ketone, pyridine, and tetrahydronaphthalene from the production of Thiodicarb (another pesticide). *Id.* at 1–2. The West Sump SEP would have avoided overflow into the Kanawha River of hundreds of thousands of gallons of untreated wastewater, and thus had the potential of improving drinking water intakes. *Id.* at 2–3. Bayer now seeks to abandon this SEP and substitute another project that costs considerably less. This is not equitable or in the public interest.

B. Rather than reap a windfall, Bayer should be required to fund a public health study

Kanawha County has historically been a non-attainment area, failing to meet the air quality requirements of the Clean Air Act. *See* Nat’l Response Center, Standard Report, Institute (Att. B) (documenting chemical releases from 1990 to 2009). The area is referred to as “Chemical Valley,” and the county is among the top ten in the state with the highest incidents of cancer.⁶ Institute residents have endured decades of air and water pollution and soil contamination from the operation

⁵ Under the Clean Air Act and Federal Civil Penalties Inflation Adjustment Act, as amended, the government could have sought a civil penalty of \$32,500 per day for each violation occurring between March 2004 and January 2009, and \$37,500 per day for each violation occurring after January 2009. Compl. ¶¶ 23–24, 240–242 (“relief sought”). Given the 13-count complaint, Bayer may well have been assessed a far larger penalty than what it negotiated under the consent decree.

⁶ *See* W. Va. Univ. Cancer Inst. & W. Va. Dept. of Health & Human Resources, “West Virginia Cancer Burden Report,” at 56 (2016), at <http://www.dhhr.wv.gov/oeps/cancer/Documents/burdenreport2016.pdf>.

of the pesticide plants. Indeed, soil contamination—put forth by Bayer as a reason for abandoning the original SEP (*see* Second Modification of Consent Decree at 2)—is the subject of a pending lawsuit brought by West Virginia State University.⁷ These pollution concerns will only increase as new production facilities are added. Just last month, chemical manufacturer U.S. Methanol broke ground on a plant with the capacity to produce 200,000 metric tons of methanol per year.⁸

In light of the historical legacy of pollution and persistent toxic contaminant issues, a health study is long overdue. Such a study would produce important information for neighboring communities, allowing residents and researchers to assess the health consequences of the 2008 explosion which “released extremely hazardous substances to the atmosphere.” *See* Compl. ¶ 2. This study can be funded using the more than \$1 million that Bayer is saving by substituting a less expensive project for the West Sump project. *See* Att. A.

Rather than reap windfalls in abandoning the West Sump SEP, Bayer should be required to fund a public health study. This SEP bears a nexus to Bayer’s violations, which endangered public health. The project would further both the purpose of the Clean Air Act—to protect human health and the environment—and better satisfy the requirement that a consent decree be adequate, fair, and in the public interest.

C. In the alternative, the modified consent decree should require the construction of an emergency evacuation route

Another potential SEP that DOJ should consider is the construction of an alternative emergency route out of the Institute residential area. Such a project bears a nexus to Bayer’s Clean Air Act violations and would reduce the risk to public health from any future accidental releases of toxic chemicals. *Cf.* EPA SEP Policy, at 9.

As additional chemical facilities are added to the site, the need for a safe evacuation route will become even more critical. The current escape route is untenable.⁹ Institute is physically shaped like a bowl, meaning chemical releases

⁷ *See, e.g.*, Colin Dwyer, NPR, “West Virginia State University Says It Is Suing Dow Chemical for Contamination” (Apr. 27, 2017), at <http://www.npr.org/sections/thetwo-way/2017/04/27/525926237/west-virginia-state-university-sues-dow-chemical-for-contamination>.

⁸ Max Garland, Charleston Gazette-Mail, “Institute plant breaks ground” (Sept. 7, 2017) (Att. C).

⁹ *See* Rebecca Catalanello, Charleston Daily Mail, “Public must stay aware of danger, advocate says Bhopal chemical leak made industry answer to people” (Dec. 3, 1991) (Att. D).

settle in the town rather than disperse outward. The town is bounded by the location of highways and roads, which leaves Institute residents with only one exit route, to the *west*, in the event of an accident at the facilities. That route bottlenecks in Institute at Route 25, which connects to the next exit route at Interstate 64. The nearest onramp to get to this exit route is in the direction of the very facilities that residents will need to avoid in the event of accidental chemical releases. *See* Att. E (map).

An alternate evacuation route to the *east* would benefit nearly 15,000 residents who live within a two-mile radius of the facilities. The affected population also includes more than 3,000 students and professors at West Virginia State University, which is located across the fence from the east end of the chemical facilities; and more than two hundred trainees and instructors at the West Virginia State Police Academy, which is located just across Interstate 64, a very short distance from the facilities. The university and police academy are both situated downwind of the chemical facilities, meaning that in the event of another accident, the prevailing winds would carry toxic emissions toward the two institutions. And in an evacuation, these residents, students, and employees would be funneled to Route 25, a two-lane road.

A safe alternative route out of the Institute residential area could be created by extending the roads and streets leading north, up to the top of the “bowl,” and opening a passage in the opposite direction east, away from the chemical plant and toward the neighboring community of Dunbar. This would provide residents with a way to evacuate from Institute through a route that avoids the chemical facilities.

* * *

It is critically important that Bayer not be allowed to evade the full scope of its obligations under the original consent decree. The important projects detailed in the consent decree must not be modified without good reason, and neither the Federal Register notice nor the proposed modified decree establishes why this modification is fair and in the public interest. DOJ and Bayer also fail to explain why Bayer’s civil penalties should not be increased to reflect the decrease in mitigation credit from implementing an equipment purchase SEP instead of the more costly West Sump SEP. At a minimum, the modified decree cannot allow Bayer to commit \$1.37 million less toward environmental and safety projects benefitting neighboring communities.

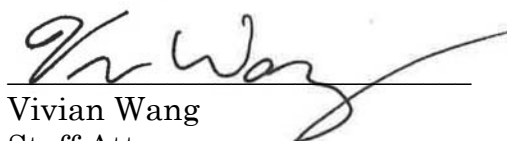
We urge DOJ to amend the proposed modification by requiring Bayer to fund an independent public health study, or, in the alternative, to construct an alternative emergency evacuation route, using the funds Bayer is saving by not implementing a SEP of equal value to the original.

Thank you for your consideration of these comments. Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,



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The following groups join in support of these comments:

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