IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

SEVERSTAL SPARROWS POINT, LLC Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STATE OF MARYLAND DEPARTMENT OF THE ENVIRONMENT, Respondents.	)	Case Nos. 97-cv-00558-JFM[1] and 97-cv-00559-JFM

PETITION FOR RESOLUTION OF DISPUTE PURSUANT TO THE OCTOBER 1997 CONSENT DECREE

ECKERT SEAMANS CHERIN & MELLOTT, LLC

1717 Pennsylvania Avenue, NW
Suite 1200
Washington, DC 20006
(202) 659-6600

Attorneys for Petitioner, Severstal Sparrows Point, LLC

[1] Pursuant to the Court's November 5, 1997 Order consolidating Cases JFM-97-558 and JFM-97-559 for all purposes, [Dckt. No. 7] and the Clerk's November 5, 1997 designation of Case No. JFM-97-558 as the lead case, the following Petition for Resolution of Dispute is being filed in the lead case only.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Statutes and Rules

State Statutes

Treatises

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

SEVERSTAL SPARROWS POINT, LLC, Petitioner, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and STATE OF MARYLAND DEPARTMENT OF THE ENVIRONMENT, Respondents.	)	Case Nos. 97-cv-00558-JFM and 97-cv-00559-JFM **ORAL ARGUMENT IS REQUESTED PURSUANT TO LOCAL RULE 105.6**

PETITION FOR RESOLUTION OF DISPUTE
PURSUANT TO THE OCTOBER 1997 CONSENT DECREE

Petitioner, Severstal Sparrows Point, LLC, by and through its attorneys, Eckert Seamans Cherin & Mellott, LLC, hereby submits the following Petition for Resolution of Dispute regarding the United States Environmental Protection Agency's and Maryland Department of the Environment's violation of, and refusal to acknowledge the effect of, a United States Bankruptcy Court's Section 363(f) Sale Order on the requirements of the 1997 Consent Decree in this action, and states in support thereof:

I. Preliminary Statement

This Petition is filed in order to resolve a dispute between Petitioner, Severstal Sparrows Point, LLC ("Severstal Sparrows"), and Respondents, the United States Environmental Protection Agency ("EPA") and the Maryland Department of Environment ("MDE"), pursuant to the Section XX dispute resolution provisions of the 1997 Consent Decree (the "Consent Decree") that was lodged with this Court in *United States v. Bethlehem Steel Corp.*, Civil Action

No. JFM-97-559 [Dckt. No. 6] and *Maryland Department of the Environment v. Bethlehem Steel Corp.*, Civil Action No. JFM-97-558 [Dckt. No. 6]. The Consent Decree is attached as Exhibit 1. The Consent Decree addressed certain environmental obligations of Bethlehem Steel Corporation ("Bethlehem Steel") for its Sparrows Point steel mill in Sparrows Point, Maryland ("Sparrows Point facility"). The Sparrows Point facility is now owned by Severstal Sparrows. Severstal Sparrows contends that EPA and MDE wrongfully seek to compel Severstal Sparrows to investigate historic off-site releases by Bethlehem Steel that were expressly excluded by the Bankruptcy Sale Order.

A. EPA and MDE's Wrongful Disregard of the Bankruptcy Court's Section 363(f) Sale Order

The issue before the Court is the effect of Bethlehem Steel's bankruptcy, and whether EPA and MDE can disregard and ignore the terms of the Asset Purchase Agreement through which the Sparrows Point facility was sold by Bethlehem Steel, and the terms of the Bankruptcy Court Section 363 Bankruptcy Sale Order authorizing the Asset Purchase Agreement and the sale of the facility free and clear of successor liability. *See* Bankruptcy Court Section 363(f) Sale Order ("Bankruptcy Sale Order") (attached as Exh. 2) and the Asset Purchase Agreement (attached as Exh. 3). In fact, the Bankruptcy Sale Order specifically enjoins EPA and MDE from seeking to impose liabilities of Bethlehem Steel on subsequent purchasers that were not assumed in the Asset Purchase Agreement. Exh. 2, ¶ 34, at pp. 21-22.

Specifically, this dispute was triggered by EPA's rejection of a proposed work plan by Severstal Sparrows to evaluate the nature and extent of ***current*** unpermitted releases of hazardous substances from the facility. Despite clear language in the Asset Purchase Agreement and Bankruptcy Sale Order, excluding liability for off-site historic contamination, EPA ignores the Bankruptcy Sale Order and seeks to compel Severstal Sparrows to investigate ***off-site***

historic contamination that exists, or may exist, in off-site/off-shore sediments in the waters outside the physical boundary of the Sparrows Point facility. The Sparrows Point facility is located on a peninsula in the Patapsco River, and is surrounded by water on three sides; at stake in this dispute is the obligation to conduct a massive investigation, potentially costing many millions of dollars, to search for possible contamination caused solely by Bethlehem Steel, the former owner of the Sparrows Point facility.

EPA and MDE are attempting to impose more than a century of potential environmental liability on a party that has been involved at the Sparrows Point facility for less than ten years, and which only acquired the property on the express condition that it was not assuming successor liability status for historical liabilities at the facility. Bethlehem Steel's century-old environmental legacy at Sparrows Point was addressed in Bethlehem Steel's 2001 bankruptcy. Severstal Sparrows is the current owner of the Sparrows Point facility, which is real property that was acquired through an Asset Purchase Agreement that was approved by a Section 363(f) Sale Order of the Bankruptcy Court "free and clear" of any successor liability for the liabilities of Bethlehem Steel. As discussed *infra*, responsibility for off-site contamination occurring prior to the Section 363(f) sale was specifically excluded from the assets purchased from Bethlehem Steel by ISG through the Asset Purchase Agreement and the Bankruptcy Sale Order.[2] ISG and its subsequent purchaser, Severstal Sparrows, did not acquire, and did not assume, Bethlehem Steel's responsibility for releases of hazardous substances from the facility that predate the 2003

[2] The ownership history of the Sparrows Point Facility since the 2003 Bankruptcy Sale Order is described *infra*.

Bankruptcy Sale Order. EPA and MDE had notice of, and did not object to, the Bankruptcy Sale Order.[3]

Also at issue is the question of whether Severstal Sparrows has any obligation to investigate releases from the adjacent shipyard that was historically part of Bethlehem Steel's property but was sold prior to Bethlehem Steel's bankruptcy to an unrelated third party, has never been owned by Severstal Sparrows, and which property was removed from the Consent Decree with EPA and MDE approval in 2006. This adjacent property was historically used as a shipyard, and is referred to herein as the "Shipyard Property." *See* January 1998 Facility Map (attached as Exh. 18). No obligations regarding the Shipyard Property were assumed, and instead any potential liabilities were expressly excluded by the Bankruptcy Sale Order. The imposition of investigation activities along the Shipyard Property would also greatly compound the substantial burden EPA and MDE are attempting to unjustly impose on Severstal Sparrows.

EPA's and MDE's wrongful disregard of the Bankruptcy Sale Order authorizing the Asset Purchase Agreement manifested itself in the rejection of a Work Plan submitted by Severstal Sparrows in October 2009 ("October 2009 Work Plan") (Work Plan and submittal letter attached hereto as Exhs. 4 and 5) that proposed to evaluate impacts from current releases from the Sparrows Point facility. The scope of the October 2009 Work Plan was guided by, and consistent with, the extent of assumed and excluded liabilities resulting from the Bankruptcy Sale Order.

---

[3] The Sale Motion ("Motion") was filed with the Bankruptcy Court on March 13, 2003. The Motion included the Asset Purchase Agreement (D.I. #1037). On March 19, 2003, the Motion was served and an affidavit of service was filed on March 19, 2003 (D.I. #1048). Both the MDE and the EPA are recited in the affidavit for service of the Motion. On April 1, 2003, the Notice of Sale ("Notice") was filed with the Bankruptcy Court (D.I.#1070). An Affidavit of Service was filed on April 7, 2003 for the service of the Notice (D.I. #1075). Both the MDE and EPA are recited in the affidavit for service of the Notice.

Disagreement over the scope of the original October 2009 Work Plan led to the submittal of a March 4, 2010 Notice of Dispute letter by Severstal Sparrows. *See* Exh. 7. In good faith, Severstal Sparrows also submitted a revised Work Plan on April 2, 2010 ("April 2, 2010 Revised Work Plan"). *See* Exh. 6. EPA and MDE have failed to comment, respond to or reject the April 2, 2010 Revised Work Plan, but instead, on June 30, 2010, issued a proposed resolution of the dispute. *See* Exh. 8. The June 30, 2010 proposed resolution, however, (i) failed to acknowledge, reference or respond to the April 2, 2010 Revised Work Plan; (ii) ignored the direct and clear terms of the Bankruptcy Sale Order; and (iii) continued to confuse Severstal Sparrows' responsibilities as a current owner of the facility with Bethlehem Steel's obligations. As the dispute resolution provisions of the Consent Decree require the submission of a petition within 30 days of receipt of EPA's issuance of a proposed resolution, Severstal Sparrows has timely submitted this dispute to the Court. *See* Exh. 1, Section XX.A.3.

As set forth below in detail, Severstal Sparrows requests oral argument pursuant to Local Rule 105.6 and seeks relief from this Court in the form of an Order:

a. Upholding the Bankruptcy Sale Order and confirming that Severstal Sparrows does not have an obligation under the Consent Decree to investigate historic off-site releases from the Sparrows Point facility and that Severstal Sparrows only has an obligation under the Consent Decree to investigate current unpermitted releases, defined as those occurring since the 2003 Bankruptcy Sale Order, at or from the Sparrow Point facility.

b. Confirming that Severstal Sparrows does not have an obligation to investigate any releases from the Shipyard property;

c. Approving the April 2, 2010 Revised Work Plan and/or directing EPA and MDE to review the April 2, 2010 Work Plan based on the Court's rulings with respect to items (a) and (b), above;

d. Enjoining EPA and MDE from continuing to violate the Bankruptcy Sale Order; and

e. Awarding such further relief as the Court deems equitable and just.

II. Jurisdiction

This Petition is to resolve a dispute arising out of the implementation of the Consent Decree issued by this Court imposing corrective action on the Sparrows Point facility. This Petition is brought in accordance with the formal dispute resolution provisions contained in Section XX.A.4 of the Consent Decree, which provides "[t]he dispute shall be resolved in accordance with EPA's and/or MDE's proposed resolution unless, within thirty (30) days after receipt of such proposed resolution, BSC files a petition for resolution of dispute with the Court. Any such petition shall describe the nature of the dispute and BSC's proposal for resolution of the dispute." *See* Exh. 1. As the Consent Decree was entered by this Court, this Court is the appropriate forum for a dispute resolution petition arising out of the Consent Decree.

In accordance with the dispute resolution provisions in Section XX.A.4, Severstal Sparrows submitted a Notice of Dispute by letter dated March 4, 2010 (Exh. 7), and EPA sent Severstal Sparrows a proposed resolution of the dispute on June 30, 2010 (Exh. 8) after no agreement could be reached during the informal dispute resolution procedure (although apparently without any review by EPA or MDE of the April 2, 2010 Revised Work Plan). Severstal Sparrows is timely filing this Petition within 30 days of the receipt of EPA's proposed resolution.

III. Standard of Review

The issues presented in this Petition are subject to *de novo* review by the Court. *See United States v. Western Electric Co.*, 900 F.2d 283, 293 (D.C. Cir. 1990) (contracts, and consent decrees, are subject to *de novo* review); *see also Huguley v. General Motors Corp*, 67 F.3d 129, 132 (6th Cir. 1995); *Sinclair Oil v. Scherer*, 7 F.3d 191, 192 (10th Cir. 1993). Although EPA and MDE are administrative agencies, they are entitled to no deference here, because the question presented in this case - the effect of the Bankruptcy Sale Order in Bethlehem Steel's 2003 bankruptcy on the responsibility of subsequent owners of the Sparrows Point facility for Bethlehem Steel's historic off-site contamination - is a legal question of enforcement of the bankruptcy laws that is not charged to the discretion of either EPA or the MDE.

The provisions in Section XX.A.4 of the Consent Decree are not to the contrary, and do not provide a basis for other than *de novo* review of the questions presented. Although the Consent Decree provides that for disputes regarding Section V of the Consent Decree (the corrective action section) Severstal Sparrows has the burden of demonstrating EPA's decision was "arbitrary or capricious ***or otherwise not in accordance with law***," the question presented here is one of application of the Bankruptcy Code, a Bankruptcy Court Order and contract interpretation. *See* Exh. 1, at p. 72 (emphasis added). EPA's position in this dispute is based on an incorrect and incomplete application of the Bankruptcy Code and the Bankruptcy Sale Order. EPA and MDE are not entitled to deference here.

Case law is clear that government agencies are not entitled to deference with respect to statutes that they are not charged with administering. *See Shanty Town Associates v. Environmental Protection Agency*, 843 F.2d 782, 790 (4th Cir. 1988); *Burgin v. Office of Personnel Management*, 120 F.3d 494, 497-98 (4th Cir. 1997); *see also Department of Treasury v.*

FLRA, 837 F.2d 1163, 1167 (D.C. Cir. 1988) ("[W]hen an agency interprets a statute other than that which it has been entrusted to administer, its interpretation is not entitled to deference"). In *Shanty Town*, the Fourth Circuit held that not only was EPA not entitled to receive deference with respect to interpretation of two statutes that it was not charged with administering (the Coastal Zone Management Act and the National Flood Insurance Act), but to the extent there was a conflict between either of those two statutes and the Federal Water Pollution Control Act, which EPA is charged with administering, that EPA does not receive deference with respect to resolving a conflict between those statutes. 843 F.2d at 790, n. 12. As noted in *Burgin*, when an agency is afforded deference, it is because of the agency's expertise in the field in question. 120 F.3d at 497. When the question at issue is one relating to other legal principles and issues, including construction of a contract, then review by the court is *de novo*. *Id.* at 497-98.

EPA is not entitled to any deference in interpreting the Bankruptcy Code, or the Asset Purchase Agreement and Bankruptcy Sale Order pursuant to which the Sparrows Point facility was sold by Bethlehem Steel. EPA has no particular expertise in bankruptcy law, and is certainly not charged with implementation of the bankruptcy laws. Further, to the extent this dispute turns on contract interpretation, such as the Asset Purchase Agreement under which Bethlehem Steel sold the facility, then that is also a matter for the courts, and not one where EPA is entitled to deference.

IV. Sparrows Point Facility Background and History

A. History of the Sparrows Point Facility

Pennsylvania Steel built the first furnace at Sparrows Point in 1887. The first iron was cast in 1889. Bethlehem Steel purchased the Sparrows Point facility in 1916 and enlarged it by building mills to produce hot rolled sheet, cold rolled sheet, galvanized sheet, tin mill products,

and steel plate. These products are still produced at the facility today (with the exception of steel plate).

During peak production in 1959, the facility operated 12 coke oven batteries, 10 blast furnaces, and four open hearth furnaces. The coke ovens ceased operations in December 1991 and were subsequently demolished. Nine blast furnaces have been demolished leaving the "L" blast furnace as the sole operating furnace. The open hearth furnaces ceased operation and have been demolished, and steel is currently made in two Basic Oxygen Furnaces (BOFs).

B. Ownership History Since 2003 Bankruptcy Sale Order

On or about April 5, 2005, ownership of ISG, including ISG Sparrows Point, LLC, the ISG entity that then owned the Sparrows Point Facility, was acquired by Mittal Steel. On or about June 26, 2006, Mittal Steel merged with Arcelor, to form ArcelorMittal as the new parent entity of ISG Sparrows Point LLC. On or about May 7, 2008, pursuant to a divestiture order from the U.S. Department of Justice, ownership of ISG Sparrows Point LLC was transferred and the company was renamed Severstal Sparrows Point LLC.

C. The Consent Decree

i. Consent Decree Background

A number of enforcement and compliance issues raised by both the EPA and the MDE in the mid-1980s were resolved when EPA, MDE, and Bethlehem Steel settled the cases by executing the Consent Decree in 1997, which was entered by this Court on or about October 8, 1997 and titled *United States v. Bethlehem Steel Corp.*, Civil Action No. JFM-97-559 and *Maryland Department of the Environment v. Bethlehem Steel Corp.*, Civil Action No. JFM-97-558. Exh. 1.

Beginning in or about 1985, both the MDE and EPA pursued civil enforcement action against the facility, seeking among other things the implementation of corrective action to address the hazardous wastes and hazardous constituent contamination in and around the facility. The United States' Complaint sought injunctive relief under RCRA to require Bethlehem Steel to conduct corrective action. *See* JFM-97-559, Dckt No. 1 (attached as Exh. 9) Maryland's Complaint asserted claims under both federal and state law, including a citizen's suit pursuant to RCRA and claims for violation of state air and water protection laws and regulations. *See* JFM-97-558, Dckt. No. 1 (attached as Exh. 10). These actions were consolidated and were ultimately resolved via the Consent Decree. The Consent Decree terminated and superseded MDE's prior administrative complaint in order C-O-85-179, and addressed the contaminant investigation and corrective measures requirements of its previous orders C-O-92-056, 057, and 058. Exh. 1 at p. 78.

ii. **Consent Decree Overview**

Under the RCRA corrective action provisions of the Consent Decree, Bethlehem Steel was required to conduct a site-wide investigation to define the horizontal and vertical extent of hazardous wastes and hazardous constituents in the groundwater system and to identify, characterize and determine the full impact of releases of hazardous wastes and hazardous constituents to the air, groundwater, surface water, sediment and soil throughout the facility. Exh. 1 at p. 13-14. In short, the Consent Decree required Bethlehem Steel to implement interim remedial measures, conduct a site-wide investigation and then to conduct a corrective measures study. *Id.* at pp. 13-15. The Consent Decree defines the "facility" with reference to a map, referenced therein as Exhibit 1, and attached here as Exhibit 12 to this Petition, that shows the boundary of the facility follows the shoreline and does not extend into the water.

The Consent Decree also requires specific ongoing compliance requirements related to two on-site landfills, the Coke Point Landfill and Greys Landfill. Exh. 1, Section VII.C. Pursuant to the Consent Decree, the landfills may only accept non-hazardous solid wastes produced by activities at the Facility. The Consent Decree also establishes compliance measures for the operation of the landfills, including slope stability and erosion and sedimentation controls. The Consent Decree also established certain Clean Air Act compliance requirements relating to kish reduction and visible emissions from the basic oxygen furnace roof monitor as well as a number of waste minimization and pollution prevention activities.

D. Bethlehem Steel Bankruptcy

Subsequent to the entry of the Consent Decree, Bethlehem Steel filed for bankruptcy protection pursuant to Chapter 11 of Title 11 of United States Bankruptcy Code on October 15, 2001. On March 12, 2003, Bethlehem Steel Corporation entered into the Asset Purchase Agreement with ISG Acquisition, Inc., and International Steel Group (collectively "ISG") for ISG to purchase specified assets and assume certain liabilities from Bethlehem Steel, including the Sparrows Point Facility. *See* Exh. 3. On April 23, 2003, the Bankruptcy Court entered the Bankruptcy Sale Order approving, among other things, Bethlehem Steel's sale of the Sparrows Point Facility pursuant to the terms of the Asset Purchase Agreement and enjoining third parties from pursuing ISG and its subsequent purchasers for successor liability issues. *See* Exh. 2.

The Asset Purchase Agreement specifies assumed and excluded liabilities. The Asset Purchase Agreement excluded from assumption by ISG any liabilities or obligations for environmental contamination located, or which came to be located, outside the physical boundaries of the acquired properties (which included the Sparrows Point Facility). *See* Exh. 3

at Section 1.4. Excluded Environmental Liabilities are defined by Section 1.4 and 1.4(a) of the Asset Purchase Agreement, which state, in relevant part:

> The Excluded Liabilities include, without limitation, the following liabilities and obligations:
>
> (a) all liabilities and obligations of Sellers for (i) any environmental, health or safety matter (including, without limitation, any liability or obligation arising under any Environmental Law) (A) relating to any property or assets other than the Acquired Assets; **(B) resulting from the transport, disposal or treatment of any Hazardous Materials by any Seller on or prior to the Closing Date to or at any location other than the Real Property**; and (C) relating to any personal injury or any Person resulting from exposure to Hazardous Materials or otherwise, where such exposure or other event or occurrence occurred on or prior to the Closing Date and (ii) and any fine or other monetary penalty imposed on or prior to the Closing Date by any Government for acts or omissions of any Seller or any Joint Venture relating to any environmental, health or safety matter;

Exh. 3 at p. 6 (emphasis added).

The Bankruptcy Court sanctioned the sale to ISG by issuing a Sale Order under Section 363(f) of the Bankruptcy Code, which expressly authorizes the sale of property "free and clear of all Interests of any kind or nature whatsoever", thus authorizing the transfer of the property free and clear of successor liability. *See* Exh. 2, ¶ 7 at p. 11. As stated in the Bankruptcy Sale Order, the "ISG Buyer is a good faith purchaser under Section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby." Exh. 2, ¶ M at p. 5. Further, the Bankruptcy Sale Order also affirmatively and expressly states that ISG was not assuming any successor liability, and would not have entered into the transaction if it were not purchasing the assets free and clear of any successor liability. Exh. 2 at ¶ R at pp. 7-8, and ¶¶ 33-34 at pp. 20-22. Collectively, these documents establish that Bethlehem Steel's obligations for contamination

outside the boundaries of the Sparrows Point Facility were not transferred to, or assumed by, ISG in its purchase of the Sparrows Point Facility.[4]

It should be noted that the sale of the Sparrows Point Facility to ISG (and now Severstal Sparrows Point) under these terms is beneficial to the environment. Without the sale, there was no viable entity to investigate or address on-site contamination at the facility, or to address any current unpermitted releases from the facility. With the assumption of ownership by ISG (and now Severstal Sparrows), a viable entity was found to take on those responsibilities.

E. The Shipyard Property

EPA is also demanding that Severstal Sparrows investigate the environment off-shore of the Shipyard Property, which is adjacent to and surrounded by the Sparrows Point facility on three sides. *See* Exh. 18. The Shipyard property had been owned by Bethlehem Steel, but was purchased from Bethlehem Steel by Baltimore Marine prior to the Bankruptcy Sale Order selling the remainder of the Sparrows Point facility to ISG. *See* Exh. 14. SPS Partnership Limited, LLC bought the shipyard in March of 2004 as the result of Baltimore Marine's bankruptcy and still owns the property. *Id.* Additionally, in February 2004, SPS initially filed an application for the inclusion of the shipyard in Maryland's Voluntary Cleanup Program. On June 15, 2006, the EPA and MDE approved the removal of the shipyard from the Consent Decree. *See* Exh. 13. In fact, it is Severstal Sparrows understanding that the Shipyard Property was removed from the Consent Decree, at least in part, because its current and previous owners are pursuing cleanup of

[4] Consistent with this purchase of assets, free and clear, the Consent Decree was subsequently amended in 2005 to substitute ISG for Bethlehem Steel with respect to ISG's ongoing obligations at the property. Exh. 11. The ongoing obligations are those only assumed by ISG pursuant to the Asset Purchase Agreement and the Bankruptcy Sale Order. In fact, the 2005 amendment recognizes that ISG was subject to the Consent Decree "as amended", which is clear recognition that the Bankruptcy Sale Order, through its terms and its approval of the terms of the Asset Purchase Agreement, had effectively amended the Consent Decree. *Id.* There have been no other amendments of the Consent Decree.

the Facility under Maryland's voluntary cleanup plan, as a program consistent with the purposes of Section V of the Consent Decree.[5]

The Shipyard Property was removed from the Consent Decree, is currently being addressed by Maryland's Voluntary Cleanup Program, and was never owned by ISG or Severstal Sparrows. Accordingly, Severstal Sparrows has no responsibility to conduct any evaluation of current or historical releases from the Shipyard Property. EPA has no legal basis to demand such an undertaking.

F. Post-Bankruptcy Corrective Action

Severstal Sparrows has been engaged in an extensive amount of work implementing various elements of the corrective action required by the Consent Decree. Since acquisition of the facility in May of 2008, in addition to the October 2009 Work Plan and the April 2, 2010 Revised Work Plan at issue in this Petition, Severstal Sparrows has addressed, completed and/or continued the activities listed below. (Note – this information is provided for background and context, but is not believed to be materially in dispute. Accordingly, and in the interests of brevity, the referenced documents are not being attached to this Petition as exhibits. They are part of the administrative record for the Consent Decree, and are subject to this Court's review to the extent necessary to adjudicate this Petition):

* Severstal Sparrows has implemented interim measures at the Coke Oven Area to address current releases, which have been approved by EPA, and has also provided more

[5] The Consent Decree, in its Conceptual Plan for the Site Wide Investigation, provides that releases do not have to be investigated if the release "has been or is being addressed under another program consistent with the purpose of the SWI." Exh. 1, Attachment B at pp. 2-3. Maryland's Voluntary Cleanup program provides a state analog to the cleanup requirements of RCRA and is consistent with the goals of the Consent Decree.

immediate interim measures in this area at its own risk, without waiting for advance approval by EPA.[6]

* Since acquiring the Facility in 2008, Severstal Sparrows has continued to operate the groundwater pump and treat interim measures at the former rod and wire mill sludge bin storage area in accordance with the approved work plan for this area.

* With respect to furthering the site-wide investigation, in 2009 Severstal Sparrows conducted analytic sampling of ponds in the county land parcel 1B to supplement the on-site risk assessment completed in January of 2009.

* Throughout the bulk of 2009, Severstal Sparrows completed work that provided for the submittal of a final report titled: Screening Level Ecological Risk Assessment For On-Site Areas per EPA's approved Work Plan for Ecological Risk Assessment for on-site areas.

* In May 2009 Severstal Sparrows submitted a final report titled: A Supplemental Report for County Land Parcel 1B Ponds; again, this was pursuant to EPA's approved work plan for ecological risk assessment for on-site areas.

The foregoing efforts establish a strong foundation for which to develop a final report for the Onsite Baseline Ecological Risk Assessment, which is slated for submittal to EPA and the MDE in August of 2010.

[6] In April of 2009, Severstal Sparrows submitted a work plan to conduct pilot testing for soil vapor extraction and air sparging for recovery of hydrocarbons from groundwater in the Coke Oven Area. This work plan was revised pursuant to EPA comments to include evaluation of dual phase Interim Measures systems, re-submitted in July of 2009, and subsequently approved by EPA on August 24, 2009. Pilot testing pursuant to this work plan was conducted in October and November of 2009. In January of 2010, Severstal Sparrows submitted the Coke Oven Area Interim Measures Pilot Test Results and Prototype Systems Plan for approval by EPA and the MDE. This Work Plan received partial approval by EPA on March 2, 2010. In response to EPA's comments Severstal Sparrows then submitted a revised Coke Oven Area Interim Measures Work Plan on April 2, 2010 and a Supplemental Work Plan on June 18, 2010.

V. Background on the RCRA Corrective Action Process

A. Consent Decree Scheme

RCRA authorizes the Administrator of the EPA to issue an order requiring that the owner and operator of a facility engaged in treatment storage or disposal of hazardous waste to undertake corrective action to investigate and remediate releases of hazardous substances. 42 U.S.C. § 6928(h). Section V of the Consent Decree sets forth the basic components of the corrective action work required pursuant to the Consent Decree. *See* Exh. 1, pp. 8-15. The Consent Decree's corrective action requirements have three components – (i) interim measures (short-term measures to address releases while investigation continues and long-term remedial measures are identified); (ii) a Site Wide Investigation; and (iii) a Corrective Measures Study. The current dispute primarily relates to the Site Wide Investigation component.

The Consent Decree's Site Wide Investigation (SWI) provisions include a Conceptual Plan for the SWI, as Consent Decree Attachment B, and a generic SWI scope of work, as Attachment C to the Consent Decree. Exh. 1, Attachments B and C. The provisions of Section V of the Consent Decree direct that the bulk of the corrective action work required by the Consent Decree shall be "generally consistent" with the Conceptual Plan contained in Attachment B and developed with an eye to Attachment C's generic description of work which "may need to be performed". *See* Exh. 1, p. 9. Together, Attachments B and C lay out a multi-step, multi-phase process typical to corrective action.

B. SWMUs and AOCs

Section V(B)(2) of the Consent Decree requires that Bethlehem Steel submit for approval a work plan for conducting an SWI. According to Attachment B to the Consent Decree, the SWI should begin with an evaluation of the solid waste management units ("SWMUs") and areas of

concern ("AOCs") listed in EPA's August 12, 1993 RCRA Facility Assessment ("RFA"). SWMUs are those locations at a facility where solid or hazardous waste was generated, stored or otherwise managed. Since RCRA corrective action applies only to solid and hazardous waste management activities, but not to hazardous materials or hazardous substances generally, waste management units are the essential starting point of any RCRA investigation. AOCs are those areas where there is a concern over releases or potential releases of hazardous materials to the environment.

The Consent Decree stipulates that Bethlehem Steel "remains responsible for identifying and evaluating all releases of hazardous wastes and hazardous constituents at or from the facility (i.e. releases from SWMUs and AOCs identified in the RFA and any additional SWMUs and AOCs identified during the pendency of this Consent Decree)". Exh. 1, Attachment B. The one important caveat is that Bethlehem Steel could eliminate from consideration any permitted releases pursuant to the Clean Air Act, Clean Water Act, RCRA or other authorized programs. *Id.* Additionally, a release that is being addressed by another program, such as the Maryland Voluntary Cleanup Program, is not a release subject to investigation. *Id.*

VI. The Current Dispute

The current dispute revolves around EPA and MDE's impermissible disregard for, and failure to comply with, the Bankruptcy Sale Order through their attempt to require Severstal Sparrows to investigate historic contamination in off-site sediments and waters – i.e. off-site contamination caused by Bethlehem Steel prior to the 2003 sale of the facility to ISG. As previously discussed, due to the Bankruptcy Sale Order Severstal Sparrows has not assumed responsibility for historic off-site contamination and should not now be required to investigate that which is Bethlehem Steel's. However, EPA's proposed resolution requires such an

investigation. Severstal Sparrows disagrees that EPA and MDE can simply ignore the Bankruptcy Sale Order and the Bankruptcy Court's enjoining of the position that they are now asserting.

The position advanced by the EPA and MDE, through their refusal to acknowledge the Bankruptcy Sale Order, would impose an immense burden on Severstal Sparrows. As described above, the Sparrows Point facility operated for well over a century before it was acquired in 2003 by ISG, Severstal Sparrows' predecessor. This hundred year plus time frame included almost eighty years of operation before the first modern environmental laws were enacted, and included the time periods of highest production at the facility. Severstal Sparrows, including the ISG time frame, has been at Sparrows Point for only seven years. This context explains why ISG would have insisted on protection from successor liability prior to purchasing the facility from the bankrupt Bethlehem Steel, and why it is completely logical that such protection would have been granted in order to effectuate the sale. As such, this is not a technical dispute over details in a work plan, but rather a hugely significant issue and a test of the viability and validity of the Bankruptcy Code which EPA and MDE may not disregard.

This issue first arose in the summer of 2009 when MDE, in a July 2009 meeting and August 2009 correspondence, stated that Severstal Sparrows was required to sample and evaluate off-site sediments without limitation. *See* Exhs. 15 and 16. Specifically, without any further clarification, MDE requested a "work plan for evaluating the impacts to off-site sediment" on August 13, 2009 and requested this work plan to be submitted within 60 days. *See* Exh. 16.

On October 13, 2009, Severstal Sparrows timely submitted the Work Plan in response to MDE's request by proposing 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. *See* Exh. 5. In a cover letter to this October 2009 Work Plan, Severstal Sparrows explained that the approach in the Work Plan was designed to identify current releases and was guided by the scope of Severstal Sparrows' responsibilities, including the fact that the Bethlehem Steel bankruptcy did not transfer Bethlehem Steel's responsibility for historic (pre-2003) off-site contamination to ISG (and thus not to Severstal Sparrows). *See* Exh. 4. In other words, Severstal Sparrows explained why legally it was not obligated to evaluate historic off-site/off-shore sediment contamination.

Nearly four months after Severstal Sparrows submitted the Work Plan, EPA responded (not MDE, who made the original request) on February 3, 2010 with a letter partially disapproving the October Work Plan. *See* Exh. 17. This partial disapproval ignored the Bankruptcy Sale Order and without limitation directed an evaluation of historic releases to the off-shore environment and evaluation of the sediments around the entire perimeter of the Sparrows Point shoreline. *Id.* EPA's February 3, 2010 letter even sought investigation along the shoreline of the Shipyard Property, which, although previously owned by Bethlehem Steel, was sold by Bethlehem Steel before the 2003 Bankruptcy Sale Order, and continues to be independently owned. *Id.* As noted above, the Shipyard Property was never owned by ISG or Severstal Sparrows, was entered into the Maryland Voluntary Cleanup Program in or about 2004, and was specifically removed by EPA and MDE from being subject to Consent Decree requirements in June 2006. *See* Exhs. 13 and 14. EPA's February 3, 2010 also requested a Revised Work Plan within sixty days of the receipt of the letter. *See* Exh. 17.

Because EPA (i) refused to acknowledge the impact of Section 363(f) sale "free and clear" without successor liability on the Consent Decree obligations; (ii) required sampling of areas that were officially removed from the Consent Decree (the Shipyard); and (iii) had vague

and ambiguous requirements in its partial disapproval letter of February 3, 2010, Severstal Sparrows instituted the informal dispute resolution procedures of the Consent Decree and provided EPA with a Notice of Dispute on March 4, 2010. *See* Exh. 7. Further, in good faith, Severstal Sparrows submitted a Revised Work Plan on April 2, 2010 that responded to EPA's comments, to the extent consistent with the effect of the Bankruptcy Sale Order on the Consent Decree obligations *See* Exh. 6. To date, neither EPA nor MDE has responded to the April 2, 2010 Revised Work Plan.

Severstal Sparrows met with EPA, MDE, and the U.S. Department of Justice on April 26, 2010 as part of the Consent Decree's informal dispute resolution process in an attempt to resolve this dispute. A resolution was not reached and EPA on June 30, 2010 sent a proposed resolution in accordance with the Section XX.A.3 and A.4 Dispute Resolution provisions of the Consent Decree. Exh. 8. Severstal Sparrows', EPA's, and MDE's inability to informally resolve this dispute, and Severstal Sparrows' strong disagreement with the EPA's and MDE's failure to consider or comply with the Bankruptcy Sale Order, are the basis for this Petition to this Court.

VII. Effect of the Bethlehem Steel Bankruptcy

Bankruptcy law in the United States is as old as the Constitution itself. Its "principal purpose" is to "grant a 'fresh start.'" *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007). Accordingly, the Bankruptcy Code provides a Bankruptcy court with an abundance of power in order to accomplish this purpose, including the ability to reorganize debtor companies, sell assets under such terms as is necessary to effectuate their sale, and eliminate claims.

Likewise, Bankruptcy Courts in the environmental context have extraordinary power not only to discharge pre-existing environmental claims, but also to effectuate a sale of a debtor's

assets by eliminating successor environmental liability through a Section 363(f) sale "free and clear"[7] in order to accomplish this purpose. The Bankruptcy Code grants the Bankruptcy Courts the power to approve the transfer of assets without the imposition of successor liability, which thereby effectively eliminates or cuts off liability for off-site contamination (i.e. contamination on land or in the environment, which a company does not own). Such power is necessary to effectuate the important "fresh-start" goal of the bankruptcy code.

A. Effect of Section 363(f) Sale on the Sparrows Point Facility

In this case, Bethlehem Steel's assets, including the Sparrows Point facility, were sold to ISG in 2003 through an Asset Purchase Agreement as authorized by the Bankruptcy Sale Order pursuant to Section 363(f) sale and "free and clear" of any assumption of successor liability. The purpose of the Section 363(f) sale is to allow a quick and orderly liquidation of assets in bankruptcy. 11 U.S.C. § 363(f). The incentive for a purchaser in buying these potentially risky assets is that Section 363(f) will convey the assets "free and clear of any interest" without imposing successor liability. *Id.* As detailed below, courts have held that a Section 363(f) sale conveys assets "free and clear" of any liens or encumbrances, which includes freedom from having successor liability attached to those assets (unless any liabilities are expressly assumed by the purchaser).

[7] It is important to distinguish between the concept of a bankruptcy sale being "free and clear" and the concept of a claim being discharged in a bankruptcy proceeding. Claims against a debtor or its successors may be discharged in bankruptcy proceedings under 11 U.S.C. § 1141(d)(1). If a claim is not discharged, the debtor remains liable for that claim. However, this liability does not necessarily become the liability of the purchaser of an asset formerly owned by the debtor, unless successor liability is imposed. In this case, the 2003 Bankruptcy Sale Order authorizing the sale pursuant to the Asset Purchase Agreement explicitly provided that ISG was not a successor to Bethlehem Steel and that the sale of property to ISG was "free and clear" under Section 363 of the Bankruptcy Code without successor liability. Exh. 2. Thus, Severstal Sparrows is not claiming that liability for historic off-site contamination was "discharged" as part of the bankruptcy proceedings, but rather that the liability did not pass to ISG in the bankruptcy sale because the sale was "free and clear" and without successor liability. The question of whether Bethlehem Steel was discharged from its liabilities at the facility is not at issue here.

Courts have clearly held that a purchaser of assets through a Section 363 sale can take those assets free and clear of successor liability, including liability relating to environmental claims of the seller under the general principle that a purchaser of assets does not acquire the liabilities of the seller corporation.[8] *See In re General Motors Corp.*, 407 B.R. 463, 505-08 (Bankr. S.D.N.Y. 2009) (rejecting the New York Attorney General's objections to the sale and finding that the purchaser had no successor liability for environmental claims relating to historical contamination); *see also Clean Harbors, Inc. v. Arkema, Inc. (In re Safety-Kleen Corp.)*, 380 B.R. 716, 739-40 (Bankr. D. Del. 2008) (recognizing that a Section 363(f) sale eliminates successor liability for environmental claims except for those expressly assumed).

The new owner of the assets only becomes responsible under environmental laws such as RCRA and CERCLA as the current owner or operator of the property. *See In re General Motors, Inc.*, 407 B.R. at 508 ("Any Old GM properties to be transferred will be transferred free and clear of successor liability, but New GM will be liable from the day it gets any such

---

[8] It is a general rule at common law that "where one corporation sells or transfers all or a substantial part of its assets to another, the transferee does not become liable for the debts and liabilities, including torts, of the transferor." *See Brzozowski v. Correctional Physician Services, Inc.*, 360 F.3d 173, 177 (3d Cir. 2004); *Aluminum Co. of Am. v. Beazer East, Inc.*, 124 F.3d 551, 565 (3d Cir. 1997); *Clean Harbors, Inc. v. Arkema, Inc. (In re Safety-Kleen Corp.)*, 380 B.R. 716, 739-40 (Bankr. D. Del. 2008); *Rosener v. Majestic Mgmt. (In re OODC, LLC)*, 321 B.R. 128, 135-37 (Bankr. D. Del. 2005); *Nissen Corp. v. Miller*, 323 Md. 613, 617, 594 A.2d 564, 565-66 (Md. 1991). However, there are four commonly noted exceptions "to this general rule of successor nonliability: (1) where the purchaser of assets expressly or impliedly assumes the liabilities of the transferor; (2) where the transaction amounts to a de facto merger; (3) where the purchasing corporation is merely a continuation of the transferor corporation; and (4) where the transaction is fraudulently intended to escape liability." *Beazer East*, 124 F.3d at 565; *see also Brzozowski*, 360 F.3d at 177; *Safety-Kleen*, 380 B.R. at 740, *OODC*, 321 B.R. at 135-36. Bankruptcy Courts apply the general rule in the context of Section 363 sales, and a purchaser ordinarily will purchase assets free and clear of liabilities, except for those liabilities explicitly assumed. In the instant case, the only applicable exception to the general rule regarding successor liability would be the first – i.e. did ISG, through the APA or Bankruptcy Sale Order, expressly or impliedly assume liabilities of the debtor regarding off-site contamination that occurred prior to the entry of the Bankruptcy Sale Order. As will be demonstrated below, the answer to this question is "no," as ISG did not assume Bethlehem Steel's liabilities for off-shore/off-site contamination.

Courts have also noted that the same principles of successor liability apply in the environmental context. *See Beazer East*, 124 F.3d at 565 ("Although CERCLA is silent on the matter of successor liability, we have held that the same general rule of successor nonliability, and the same exceptions to that rule, apply in the CERCLA context."); *Ferguson v. Arcata Redwood Co., LLC*, No. C 03-05632, 2004 U.S. Dist. LEXIS 23613, at *16-*17 (N.D. Ca. Aug. 4, 2005) (dismissing "plaintiff's RCRA claims without leave to amend, for failure to sufficiently allege claims under a successor liability theory" against the defendant"). Likewise, a Section 363(f) sale "free and clear" is no different when there are potential environmental liabilities involved.

properties for its environmental responsibilities going forward"). However, in the current instance, any successor liability for historic ***off-site*** environmental claims (those arising from past contamination on land that is not owned by the purchaser) were eliminated under the Section 363(f) sale.

As such, Severstal Sparrows is not be required to investigate the nature and extent of contamination outside of the Sparrows Point facility for which it is not responsible. EPA's position to the contrary ignores the power of the Bankruptcy Sale Order with respect to environmental liability and its ability to modify pre-existing obligations (such as the Consent Decree) that relate to off-site historical contamination, as well as the expressly negotiated terms of under which Sparrows Point facility was acquired out of bankruptcy. EPA's position would vastly increase the scope of investigation to be undertaken by Severstal Sparrows without any basis for requiring such an undertaking.

B. The Express Language of the Bankruptcy Sale Order and Asset Purchase Agreement Further Establish that there is No Successor Liability for Off-Site Contamination in a Section 363(f) Sale

The plain language of the Asset Purchase Agreement between Bethlehem Steel and ISG, and the Bankruptcy Sale Order authorizing the sale of the facility pursuant to the Asset Purchase Agreement, make clear that the sale of the Sparrows Point facility to ISG was "free and clear" of any and all of the seller's liabilities (except for those expressly assumed), including successor liability for environmental claims for off-site contamination that occurred prior to the sale. *See* Exh. 2, ¶¶ R, 33, 34, at pp. 7-8, 20-21 and Exh. 3, Sec. 1.4(a), at p. 6.

Specifically, the Bankruptcy Sale Order states:

> Except for the Assumed Liabilities or as expressly permitted or otherwise specifically provided for in the Agreement or this Order, . . . **ISG shall have no successor or vicarious liabilities of any kind or character including but not limited to any theory of . . .**

> **environmental law**, whether known or unknown as of the Closing, now existing or hereafter arising. . .with respect to the Sellers or any obligations of the Sellers arising prior to the Closing.
>
> Except for the Assumed Liabilities, all persons holding interests against or in the Sellers or Acquired Assets of any kind or nature whatsoever (including, but not limited to. . .administrative agencies, governmental units. . .) shall be, and hereby are, forever barred, estopped, and permanently **enjoined** from asserting, prosecuting, or otherwise pursuing such Interests of any kind or nature against ISG, its property, its successors and assigns, or the Acquired Assets. . .

Exh. 2, ¶¶ 33, 34, at pp. 20-21 (emphasis added). [9]

The Bankruptcy Sale Order itself is very clear that ISG would have not bought these assets without such protection from environmental liability from Bankruptcy Court. *See* Bankruptcy Sale Order , Exh. 2, ¶ R, at pp. 7-8, which states:

> ISG would not have entered into the Agreement and would not consummate the transactions contemplated thereby, . . .if the sale of the Acquired Assets (which includes all owned real property) to ISG Buyer. . ., and the assumption of the Assumed Liabilities by ISG Buyer were not, except as otherwise provided in the Agreement,. . .free and clear of all Interests of any kind or nature whatsoever, or if ISG would, or in the future could, be liable for any of the Interests including, but not limited to . . .(5) environmental Claims or Liens arising from conditions first existing on or prior to the Closing (including, without limitation, the presence of hazardous, toxic, polluting, or contaminating substances or waste) that may be asserted on any basis, including, without limitation, under [CERCLA] or similar state statute. . . .

In the instant case, ISG did not explicitly or implicitly assume liabilities for off-site pre-sale contaminations with regard to the Sparrows Point facility. As is clear from the Bankruptcy Sale Order, ISG did precisely the opposite. Therefore ISG (and now Severstal Sparrows) is not obligated for the off-site contamination that occurred prior to the sale.

[9] In fact, the EPA and MDE, despite having full knowledge of the Sale Order, are in violation of the Sale Order by attempting to force Severstal Sparrows to address liabilities of Bethlehem Steel that are outside of the Assumed Liabilities.

Under the Asset Purchase Agreement, ISG assumed all liabilities of Bethlehem Steel "relating to the Acquired Assets arising under any Environmental Law" ***except*** liability for "any environmental. . .matter. . .relating to any property or assets other than the Acquired Assets or resulting from the transport, disposal or treatment of any Hazardous Materials by Seller on or prior to the Closing Date to or at any location other than the Real Property." Exh. 3, Sec. 1.3(c), 1.4(a), at pp. 5-6. As specifically stated in the Asset Purchase Agreement:

> The Excluded Liabilities include, without limitation, the following liabilities and obligations:
>
> (a) all liabilities and obligations of Sellers for (i) any environmental, health or safety matter (including, without limitation, any liability or obligation arising under any Environmental Law) (A) relating to any property or assets other than the Acquired Assets; **(B) resulting from the transport, disposal or treatment of any Hazardous Materials by any Seller on or prior to the Closing Date to or at any location other than the Real Property**; and (C) relating to any personal injury or any Person resulting from exposure to Hazardous Materials or otherwise, where such exposure or other event or occurrence occurred on or prior to the Closing Date and (ii) and any fine or other monetary penalty imposed on or prior to the Closing Date by any Government for acts or omissions of any Seller or any Joint Venture relating to any environmental, health or safety matter;

Exh. 3, at p. 6 (emphasis added).

Historical off-site sediment contamination falls within 1.4(a)(A) and (B) of the above-referenced Excluded Liabilities in the Asset Purchase Agreement. First, under (A) historical off-site sediment contamination would be an excluded liability because it is not part of the Acquired Assets. Under Maryland law, unless expressly granted, one cannot own or lease property beyond the high tide line, so therefore off-shore sediments could not be included in acquired Real Property. *See Van Ruymbeke v. Patapsco Industrial Park,* 261 Md. 470, 475, 276 A.2d 61, 64 (1971) (absent an express grant of title to the land beneath the navigable water, an owner of land bordering on the navigable water was deemed to own the land only to the mean high tide mark);

Hirsch v. Maryland Dep't of Natural Resources, Water Administration, 288 Md. 95, 98-99, 416 A.2d 10, 12 (1980) (under common law principles, title to the bed of navigable waters, the land beneath the mean high tide mark, rests in the state for the benefit of the citizens); *see also* Md. Code. Ann. Envir. Section 16-101(n) (2010) (providing that "State Wetlands" means any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide). There is nothing in the Asset Purchase Agreement that is inconsistent with this basic tenet of state property law.

This is consistent with the definitions of "Facility" and "Site" in the Consent Decree, as both were delineated by the waterline of the surrounding rivers and bay. *See* Exh. 1 at p. 5 and Exh. 12 (the Consent Decree map marked as Exhibit 1 thereto). Similarly, under the Asset Purchase Agreement, "Acquired Assets" is defined to include only the owned and leased real property of Bethlehem Steel, which includes the Sparrows Point facility.[10] *See* Exh. 3, at p. 2.

Next, responsibility for historical off-site contamination, including off-site sediment, is also excluded under 1.4(a)(B) of the Asset Purchase Agreement (quoted above) because the off-site sediment contamination resulted from the "transport" and "disposal" of hazardous contaminants, either from direct disposal at off-site locations or by a release from, or migration from, the facility. The import of the term "transport" does not require translation, but it is important to note that the term "disposal" is a well defined term under applicable law, and the

[10] Under the Asset Purchase Agreement, "Acquired Assets" is defined as "all of the properties and assets of Sellers, wherever located, whether real or personal, tangible or intangible, existing or hereafter acquired and whether or not reflected on the books or financial statements of Sellers, excluding only the Excluded Assets, including without limitation. . .all owned real property and leased real property (the Leased Real Property together with the Owned Real Property, the "Real Property") of any Seller, together with all appurtenant, subsurface and mineral rights, licenses, rights-of-way,. . . including, without limitation, the Real Property listed on Schedule 1.1(b)." Exh. 3, at p. 2. In turn, the referenced Schedule 1.1(b) states, in relevant part, "All of Sellers' right, title and interest in and to the Owned Real Property located in: Sparrows Point. . ." *See* Exh. 3, at Schedule 1.1(b).

migration and releases of contaminants to off-site locations constitutes "disposal" for purposes of RCRA under Fourth Circuit law.

Specifically, under RCRA, "disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). The Fourth Circuit has explicitly held that this definition of disposal includes passive migration of contaminants off-site. *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992) (held that Congress intended the 42 U.S.C. § 6903(3) definition of disposal "to have a range of meanings," including not only active conduct, but also the reposing of hazardous waste and its subsequent movement through the environment); *see also Westfarm Assocs. Ltd. v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 680 (4th Cir. 1995) ("The Fourth Circuit has interpreted the words 'leaking' and 'spilling' in CERCLA's parallel, extremely broad definition of 'disposal,' to include passive conduct."); *Sherwin-Williams Co. v. ARTRA Group, Inc.*, 125 F. Supp. 2d 739, 749 (D. Md. 2001) ("[A] disposal may occur by spilling or leaking 'without any active human participation'") (citing *Nurad, Inc. v. William E. Hooper & Sons Co.*).

Therefore, the exclusion of liability in Section 1.4(a)(i)(B) applies here to exclude any successor liability for the pre-Bankruptcy Sale Order off-site contamination of Bethlehem Steel. As per this exclusion in the Asset Purchase Agreement, any off-site contamination that is not the result of a current, post-bankruptcy, release is contamination that resulted from the transport or "disposal", via direct disposal off-site or migration from on-site to off-site, of hazardous materials by Seller (Bethlehem Steel) as the entity in control of the facility prior to 2003.

Because the Bankruptcy Sale Order specifically provides that subsequent bona fide purchasers, like Severstal Sparrows, are not "successors" of Bethlehem Steel, Severstal cannot be held responsible for any of Bethlehem Steel's historic off-site contamination. Exh. 2, ¶¶ 33-34 at pp. 20-22.

The relevant exceptions to assumed liabilities in Section 1.4(a)(A) and 1.4(a)(B) of the Asset Purchase Agreement are clearly designed to preclude EPA and MDE from asserting liability against Severstal Sparrows relating to ***historical*** (pre-Bankruptcy Sale Order) off-site contamination (i.e. not on the Real Property which comprises the Sparrows Point facility (see Map at Exh. 12)) including that resulting from the release or migration of contaminants from the facility to off-site locations. The provisions of the Bankruptcy Sale Order enjoin them from doing so.

C. The EPA Misconstrues the Excluded Liability Provision of the Asset Purchase Agreement

Section 1.4 of the Asset Purchase Agreement provides that the "Excluded Liabilities" include a broad spectrum of environmental, health and safety matters. Exh. 3, Section 1.4(a), at p. 6. The Asset Purchase Agreement sets forth three areas of environmental, health or safety matters specifically excluded. *See* Exh. 3, Sections 1.4(a)(i)(A-C), at p. 6. Based on EPA's June 30, 2010 letter, it appears that the Respondents construe this provision far too narrowly and in a manner which is inconsistent with other provisions of the Asset Purchase Agreement. *See* Exh. 8. Specifically, they contend that as a result of the presence of "and" at the end of subsection 1.4(a)(i)(B), Section 1.4(a)(i) thereby excludes only those liabilities and obligations that satisfy any of the criteria of subsections A thru C. Thus, according to Respondents, an excludible liability must meet all of the following criteria: relate to personal injury claims, arise pre-sale, involve an environmental, health or safety matter, arise in the context of the transport, disposal or

treatment of Hazardous Materials by a Seller to or at any location other than the Real Property, *and* relate to any property or assets other than the Acquired Assets. Under EPA's view, any other set of facts would not constitute an excludible liability.

Such a narrow reading is inconsistent with the express provisions of Section 1.4, which states "Buyer is assuming only the Assumed Liabilities and is not assuming any other liability or obligation of whatever nature, whether presently in existence or arising hereafter." *See* Exh. 3, Section 1.4. Further, EPA's reading is directly contrary to the provisions in Paragraphs 33 and 34 of the Bankruptcy Sale Order where it is clearly stipulated that ISG was only agreeing to acquire the assets of the bankrupt Bethlehem Steel so long as it would have no successor liability under any theory, including environmental law. *See* Exh. 2, ¶¶ 33,34, at pp. 20-21.

Respondents claim that Paragraph 1.4(a)(1) is ambiguous. *See* Exh. 8. Assuming *arguendo* that the provision is ambiguous, their interpretation of this contract (for which EPA and MDE are not accorded deference) is unreasonable and not favored by the law. "Reasonable rather than unreasonable interpretations are favored by the law...[a] practical and equitable construction of ambiguous terms of a contract should be adopted." *Crestview Bowl, Inc. v. Womer Constr. Co.,* 225 Kan. 335, 340, 592 P.2d 74, 79 (1979); s*ee also Capital Commer. Props v. C.B.S. Assocs., L.L.P.,* 2004 U.S. Dist. LEXIS 10480 *6 (D. Md. May 20, 2004) (When faced with ambiguity in a contract courts look to a reasonable person's interpretation at the time the contract was effectuated) (internal citations omitted). Further, when faced with an unclear contract provision, it is a well-settled principle of contract interpretation that words are interpreted in light of *all* circumstances and that a writing is interpreted as a whole. *See e.g.* Restatement (Second) of Contracts Section 202 (1981). Respondents' interpretation is clearly at odds with express provisions excluding successor liability in the Bankruptcy Sale Order. Both

the practical and equitable interpretation of Section 1.4 mandates that subsections A thru C be construed broadly so that the Excluded Liabilities provision is consistent with the intent of the parties (as stated in the Bankruptcy Sale Order ¶ R) to limit the obligations and liabilities of the Buyers to those specifically enumerated in the Asset Purchase Agreement. *See* Exh. 2. EPA's interpretation of subsections A thru C, which are accorded no deference, are thus clearly unreasonable.

VIII. Severstal Sparrows' Proposed Resolution and Relief Sought

The Consent Decree allows, and indeed requires, this Petition to identify Severstal Sparrows' proposed resolution to this dispute. Exh. 1, Section XX.A.3. As is shown above, Severstal Sparrows' dispute with EPA and MDE exists on several levels. At the uppermost level is a determination of the bankruptcy issues – i.e. recognition and compliance with the Bankruptcy Sale Order through confirmation that no responsibility to investigate pre-bankruptcy releases from the Sparrows Point facility was assumed by ISG (now Severstal Sparrows) via the asset purchase of the facility from Bethlehem Steel's bankruptcy proceedings and that Severstal Sparrows does not have successor liability to Bethlehem Steel. The second question is whether Severstal Sparrows has any obligation to investigate the off-shore environment adjacent to the Shipyard property, which was sold by Bethlehem Steel pre-bankruptcy, never owned by ISG or Severstal Sparrows, and was affirmatively removed from the scope of the Consent Decree. Third, after resolving these issues, the question then becomes one of how Severstal Sparrows should proceed with its plan to begin investigation of current unpermitted releases from the facility. In this regard, Severstal Sparrows has put forward the April 2, 2010 Revised Work Plan, which EPA and MDE have failed to review.

A. Proposed Solution for the Bankruptcy Issues

The dispute here over the extent of assumption of Bethlehem Steel's liabilities – i.e. whether Severstal Sparrows has an obligation to investigate off-site in order to determine whether such areas were contaminated by Bethlehem Steel – is an underlying baseline legal issue, and is subject to a simple "yes" or "no" answer. In this regard, Severstal Sparrows' proposed resolution of the dispute is a finding that, due to the Section 363(f) Bankruptcy Sale Order, under which the facility was acquired free and clear and without successor liability, Severstal Sparrows does not have an obligation under the Consent Decree to investigate historical off-site releases from the Sparrows Point Facility.

B. Proposed Solution for the Shipyard Property

The question of the Shipyard Property is again a legal issue subject to a clear "yes" or "no" answer. It is Severstal Sparrows' position that since the liabilities of Bethlehem Steel for property outside of the assets acquired in the Asset Purchase Agreement were not assumed, and since the Shipyard Property was sold by Bethlehem Steel to an independent third party prior to the bankruptcy and the asset sale to ISG, and further since the Shipyard Property was explicitly removed from the Consent Decree, that Severstal Sparrows has no obligation under the Consent Decree to investigate current releases from the Shipyard Property.

C. Proposed Solution for Investigation of Current Releases

At a technical level, this dispute arises in the context of a work plan for investigation of current off-site releases. To the extent that the Consent Decree's requirement to identify a proposed solution is flexible enough to allow Severstal Sparrows to also propose investigation work as a component of the proposed solution, then Severstal Sparrows' proposed solution is the April 2, 1010 Revised Work Plan.

The April 2, 2010 Revised Work Plan, which EPA and MDE have not commented on or responded to, sets forth a comprehensive approach to investigate current unpermitted releases from the facility to off-shore/off-site sediments and surface water consistent with the scope of Severstal Sparrows' responsibilities as a site owner and under the Bankruptcy Sale Order.

The April 10, 2010 Revised Work Plan begins the process by focusing on current releases from five special study areas, because those are areas of particular environmental concern at the facility, as identified in the Consent Decree. These areas are specified by the Consent Decree and are referred to in the April 2, 2010 Revised Work Plan. *See* Exh. 1, Attachment B, at p. 4 and Exh. 6. The opening paragraphs of Severstal Sparrows' April 2, 2010 Revised Work Plan, on page 1-1, clearly recognize: "To the extent that additional areas of the Site identification 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 off-shore environment, this work will be completed as a separate work plan." Exh. 6 (emphasis added).

It is important to note that identification of appropriate off-site sampling locations to address possible current releases from the facility is far from a blank slate. The Agencies and the facility's current and previous owners have already identified the SWMUs and AOCs to be investigated as part of the corrective action under the Consent Decree. This task was completed more than ten years ago through identification of SWMUs and AOCs in EPA's investigation of the facility and Bethlehem Steel's Description of Current Conditions report. *See* Exh. 1, Attachment B and Attachment C (at p. 3). Despite significant ongoing investigations, there is no additional data or other information that would demonstrate that are current releases from anywhere other than the already identified SWMUs and AOCs.

The differences in position stated in Severstal Sparrows' March 4, 2010 Notice of Dispute and EPA's response and proposed resolution of June 30, 2010 letter, can be reduced to a disagreement over whether Severstal Sparrows must investigate historic off-site contamination. Although those letters identify, and respond to, seven specific objections raised by Severstal Sparrows, the core underlying disagreement is that of the extent of off-site responsibilities undertaken by ISG, and now Severstal Sparrows, for historical Bethlehem Steel contamination located off-site. The April 2, 2010 Revised Work Plan sets forth a comprehensive approach toward investigating current releases from the Sparrows Point Facility, without requiring investigation of areas where there is no justification that there is a current release of hazardous materials to the off-shore/off-site environment. As such, implementation of the April 2, 2010 Revised Work Plan is consistent with the Bankruptcy Sale Order and an appropriate resolution to this dispute.

Moreover, the April 2, 2010 Work Plan is consistent with the approach to the corrective action taken to date, with EPA and MDE approval, by ISG and Severstal Sparrows. Specifically, submittals involving investigative work have been done in accordance with EPA's and MDE's approved risk-based strategy for the Facility. *See* Exh. 19 (strategy document for the Ecological Risk Assessment, dated February 14, 2006 (and as revised pursuant to EPA's March 30, 2006 comments)). This strategy document formed the basis for the development of subsequent submittals that were commented on and approved by EPA including the Ecological Risk Assessment work plan for on-site areas and the Screening Level Ecological Risk Assessment for on-site areas. Consistent with the requirements of the Consent Decree and the prior agency approvals, Severstal Sparrows' April 2, 2010 Revised Work Plan includes analysis and evaluation of off-site surface water and off-site sediment pore water, as a basis for developing a

conceptual site model. This conceptual site model is designed to provide a basis to determine the off-site impacts from current releases at or from SWMUs and AOCS located within the boundaries of the Facility. Once current releases are identified, then subsequent work will investigate the nature and extent of risk-based impacts from such current releases. EPA and MDE have inappropriately rejected this approach through their unlawful disregard of the Bankruptcy Sale Order.

WHEREFORE, for the reasons set forth above, Severstal Sparrows petitions this Court for a decision:

a. Upholding the Bankruptcy Sale Order and confirming Severstal Sparrows does not have an obligation under the Consent Decree to investigate historic off-site releases from the Sparrows Point facility and that Severstal Sparrows only has an obligation under the Consent Decree to investigate current unpermitted releases, defined as those occurring since the 2003 Bankruptcy Sale Order, at or from the Sparrows Point facility.

b. Confirming that Severstal Sparrows does not have an obligation to investigate any releases from the Shipyard property;

c. Approving the April 2, 2010 Revised Work Plan and/or directing EPA and MDE to review the April 2, 2010 Work Plan based on the Court's rulings with respect to items (a) and (b), above;

d. Enjoining EPA and MDE from continuing to violate the Bankruptcy Sale Order; and

e. Awarding such further relief as the Court deems equitable and just.

ORAL ARGUMENT REQUESTED

Pursuant to Local Rule 105.6, Severstal Sparrows requests Oral Argument on this Petition.

Respectfully submitted,

ECKERT SEAMANS CHERIN & MELLOTT, LLC

/s/ Edward J. Longosz, II

Edward J. Longosz, II (#07509)
Mark A. Johnston (#15973)
Gabriella V. Cellarosi (#28292)
1717 Pennsylvania Avenue, N.W.
Suite 1200
Washington, DC 20006
(202) 659-6600
elongosz@eckertseamans.com
mjohnston@eckertseamans.com
gcellarosi@eckertseamans.com

Attorneys for Petitioner, Severstal Sparrows Point, LLC

Of Counsel:
Scott R. Dismukes, Esq.
David A. Rockman, Esq.
Jessica L. Sharrow, Esq.
Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
412-566-6000
sdismukes@eckertseamans.com
drockman@eckertseamans.com
jsharrow@eckertseamans.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **Petition for Resolution of Dispute Pursuant to the October 1997 Consent Decree** was electronically filed and served via certified mail, return receipt requested, this 30th day of July, 2010, to:

Andrew Fan
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19103

Barbara Brown, Project Coordinator
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

Environmental Enforcement Section
U.S. Department of Justice
Land and Natural Resources Division
Chief, Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Attn: DOJ No. 90-7-1-830

/s/ Edward J. Longosz, II
Edward J. Longosz, II