UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, Plaintiff, v. AVX CORPORATION, *et al*., Defendants. COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. AVX CORPORATION, *et al*., Defendants.	CIVIL ACTION NO. 83-3882-Y

MEMORANDUM IN SUPPORT OF MOTION TO ENTER SUPPLEMENTAL CONSENT DECREE

Plaintiffs, United States of America and Commonwealth of Massachusetts ("Governments"), submit this Memorandum in support of their Motion for Entry of the Supplemental Consent Decree ("Supplemental Decree") between the United States, the Commonwealth, and Defendant AVX Corporation ("AVX"). The United States and the Commonwealth respectfully request that the Court enter the proposed Supplemental Decree between the parties as a final judgment pursuant to Fed. R. Civ. P. 54(b). The Supplemental Decree resolves certain of the Governments' claims pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675 ("CERCLA"), in this action. These claims include AVX's liability for response costs and injunctive relief reserved by the Governments in the previous Consent Decree entered on February 3, 1992 (the "1992 Consent Decree").[1]

On October 10, 2012, the Governments lodged with the Court the proposed Supplemental Decree. Exhibit 1 of Notice of Lodging, Docket No. 2617. Following lodging of the Supplemental Decree, in accordance with 28 C.F.R. § 50.7 and Paragraph 22 of the Supplemental Decree, the United States published notice of lodging and invited the public to comment on the Supplemental Decree. 77 Fed. Reg. 63,871 (Oct. 17, 2012); 77 Fed. Reg. 67,025 (Nov. 8, 2012). A number of comments were submitted concerning the Supplemental Decree. The Governments have reviewed all comments received and, for the reasons summarized below and set forth in more detail in the attached Responses to Comments, have determined that none of the comments warrant the Governments' withdrawal of the Supplemental Decree. Therefore the Governments, in their Motion to Enter the Supplemental

[1] The 1992 Consent Decree is attached as Appendix A to the Supplemental Decree, which is attached to the Notice of Lodging, Docket No. 2617, as Exhibit 1. Citations in this Memorandum to the 1992 Consent Decree paragraphs are referenced as "1992 CD at ¶." Citations to the Supplemental Decree are referenced as "SCD at ¶."

Decree, request that the Court approve the Supplemental Decree as fair, reasonable, and consistent with the goals of CERCLA.

INTRODUCTION

The Governments initiated this action in the early 1980s pursuant to CERCLA against AVX and other Defendants in connection with the release or threatened release of hazardous substances into the environment at the New Bedford Harbor Superfund Site ("Site"). In the 1992 Consent Decree, after nine years of litigation, the United States, the Commonwealth, and AVX resolved certain claims of the Governments under CERCLA, in exchange for AVX's payments, plus interest, of $59 million for response costs and $7 million for natural resource damages.

The 1992 Consent Decree included exceptions from the Plaintiffs' covenants not to sue, reserving the Governments' rights to pursue AVX for additional relief related to performance of response actions and recovery of response costs. One reopener, Paragraph 16 of the 1992 Consent Decree ("Unknown Conditions Reopener"), reserves the Governments' rights in the event that the discovery of unknown conditions or the receipt of new information shows that the remedy is not protective. A second reopener, Paragraph 18 of the 1992 Consent Decree ("Cost Reopener") allows the Governments to seek additional relief from AVX should certain response costs exceed $130.5 million. The 1992 Consent Decree included a third exception from the Plaintiffs' covenants not to sue, reserving their rights to pursue AVX for additional relief related to the recovery of natural resource damages ("NRD Reopener"). The Governments exercised the Unknown Conditions Reopener and the Cost Reopener through the opening of settlement negotiations with AVX in 2008, the issuance by the U.S. Environmental Protection Agency

("EPA") of a Unilateral Administrative Order ("UAO") on April 18, 2012,[2] pursuant to CERCLA § 106(a), and the opening of mediated settlement negotiations with AVX later in 2012. After issuance of the UAO, the Governments and AVX agreed to hire a neutral third-party mediator to assist in settlement discussions. Following mediation, the parties agreed on the terms contained in the Supplemental Decree. EPA has stayed the effective date of the UAO.

Under the terms of the Supplemental Decree, AVX will pay the Governments an additional $366.25 million with interest in three payments over two years and will provide financial assurance to secure the payments. Thus, under the two Consent Decrees, AVX will have paid $432.25 million plus interest for response costs and natural resource damages at the Site. The Governments will release their claims for all past and future response costs and injunctive relief and these releases would no longer be subject to the Unknown Conditions Reopener or the Cost Reopener. The Governments retain their rights to additional relief for natural resource damages pursuant to the NRD Reopener.

The settlement contained in the Supplemental Decree reflects the Governments' careful consideration and balancing of the benefits of settlement today against the risks and delays they would face in litigating against AVX over the coming years. At this Site, the Governments face two options: (1) settle with AVX now on the terms reached through mediated negotiations and greatly accelerate the pace of the cleanup; or (2) litigate with AVX, which could involve: (a) years or even decades of delay to the most efficient performance and completion of the cleanup, with continued harm to human health and the environment; (b) extensive costs to the Governments in terms of the continued expense of both performing the remedy and significant inflation, (c) costs of litigation, and (d) risk of obtaining less funding from AVX following

[2] The UAO is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www2.epa.gov/sites/production/files/documents/507998.pdf.

litigation due to potential adverse judicial findings.

BACKGROUND

I. THE CERCLA ENFORCEMENT PROGRAM

Sections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), authorize EPA to use Superfund monies to investigate the nature and extent of hazardous substance releases from hazardous waste sites and to clean up those sites. As an alternative to undertaking its own cleanup activities, EPA may issue unilateral administrative orders to potentially responsible parties ("PRPs") requiring them to clean up sites. CERCLA §§ 104, 106, 42 U.S.C. §§ 9604, 9606. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), permits the United States and the Commonwealth to recover their costs of responding to releases of hazardous substances from PRPs. Pursuant to Section 107(a), these PRPs include the past owners and operators of Superfund sites, as well as the generators of hazardous substances sent to such sites. See O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 168-171 (4th Cir. 1988). Section 107(a) of CERCLA creates strict, joint and several liability where environmental harm is indivisible. See United States v. Alcan Aluminum Corp., 990 F.2d 711, 721-22 (2nd Cir. 1993).

II. THE NEW BEDFORD HARBOR SUPERFUND SITE

The New Bedford Harbor Superfund Site covers about 18,000 acres from the northern reaches of the Acushnet River estuary, south through the harbor of the City of New Bedford, and into Buzzards Bay. OU1 ROD at 1.[3] The Site is contaminated with high concentrations of hazardous substances, notably polychlorinated biphenyls ("PCBs") and heavy metals, which

[3] The 1998 Record of Decision for Operable Unit 1 ("OU1 ROD") is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www.epa.gov/region1/superfund/sites/newbedford/38206.pdf .

adversely affect public health and the environment. OU1 ROD at 1. PCBs and metals at the Site result in unacceptable risks to human health, with the primary routes of human exposure including ingestion of contaminated local seafood, direct contact with shoreline contamination, and incidental ingestion of contaminated shoreline sediment. OU1 ROD at 11. In 1979, the Massachusetts Department of Public Health promulgated regulations prohibiting fishing and lobstering in three closure areas in and around the Site, due to the identification of high concentrations of PCB levels in local seafood. OU1 ROD at 2.

The Aerovox Facility, which is not part of the Site, but which has been subject to response actions being performed by AVX and overseen by EPA and the Massachusetts Department of Environmental Protection, is located near the northern boundary of the Site along the western shoreline of the Upper Harbor. 1992 CD at ¶ 5(B), SCD at ¶ 6(A), OU1 ROD at 2. EPA's investigations determined that the Aerovox Facility was the primary source of PCBs released at and to the Site. OU1 ROD at 2. A corporate predecessor of AVX, Aerovox Corp., manufactured PCB-impregnated electrical capacitors at the Aerovox Facility from at least 1947 through 1973. UAO at ¶ 34. The Governments allege that Aerovox Corp.'s operations and disposal practices at the Aerovox Facility involved the use of PCBs and solvents and resulted in the release and disposal of these hazardous substances to the Site. UAO at ¶¶ 36-41.

On April 6, 1990, EPA issued a Record of Decision for portions of the Upper Harbor at the Site ("OU2"), which was later modified.[4] On September 25, 1998, EPA issued a ROD concerning the Upper and Lower Harbors at the Site ("OU1"), which was subsequently modified

[4] The 1990 Record of Decision for Operable Unit 2 ("OU2 ROD") is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www.epa.gov/region1/superfund/sites/newbedford/218788.pdf. The modifications to the OU2 ROD are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www2.epa.gov/new-bedford-harbor/harbor-cleanup-plans-and-legaladministrative-records#1990RODESDs.

(collectively, the "OU1 Remedy").[5] UAO at ¶ 1. Following the issuance of the OU1 ROD, from 1999 through 2004, EPA performed remedial design and remedial action activities including early action dredging and restoration of the area north of Wood Street and preparation for "full scale dredging" (hydraulic dredging, desanding, dewatering, wastewater treatment, and off-site disposal of PCB-contaminated sediment). UAO at ¶ 25. The preparation for full scale dredging included relocation of combined sewer overflow outfalls, relocation of businesses, construction of the desanding facility, and construction of the dewatering facility. UAO at ¶ 25.

In August 2004, EPA began full scale dredging of contaminated sediment. UAO at ¶ 28. Such activities include mechanical dredging and hydraulic dredging of contaminated Harbor sediment, desanding and dewatering of the sediment prior to disposal off-site at a licensed facility, and treatment of the water from the dewatering process to acceptable levels prior to discharge back into the Harbor. UAO at ¶ 28. EPA has been implementing these response activities to the present, with the typical annual funding rate from the EPA Hazardous Substance Superfund of approximately $15 million allowing for the operation of approximately 2.5 to 3 months per year (or an average of about 40 days of dredging), resulting in the off-site disposal of approximately 20,000 to 25,000 cubic yards of contaminated sediment per year. UAO at ¶ 28. The Commonwealth has funded and continues to fund the statutory ten per cent State cost share of approximately $1.5 million annually, pursuant to contract with EPA. See SCD at 2-3; CERCLA § 104(c)(3), 42 U.S.C. § 9604(c)(3).

As of December 31, 2011, Remedial Costs, as defined in Paragraph 5(K) of the 1992 Consent Decree, total just over $430 million. UAO at ¶ 69. Under the typical $15 million annual

[5] The four Explanation of Significant Differences ("ESDs") modifying the OU1 ROD are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www2.epa.gov/new-bedford-harbor/harbor-cleanup-plans-and-legaladministrative-records.

funding level from Superfund, inflation adjusted, it would take approximately 40 years to complete the OU1 Remedy and cost $1.2 billion. OU1 ESD4 at 2 and 12[6]; UAO at ¶ 92. However, if the Site's dredging and treatment facility can be operated at full capacity, the OU1 Remedy can be completed in 5-7 years. Id. EPA estimates the net present value costs to complete the OU1 Remedy to be $393 million if the Site's dredging and treatment facility is operated at full capacity. Id.

III. THE SUPPLEMENTAL CONSENT DECREE

The $366.25 million to be paid by AVX to the Governments under this settlement will be deposited into a site-specific account to be retained and used for future response actions at or in connection with the Site that will allow EPA to accelerate the cleanup by providing over 90% of the estimated funds needed to complete the remedy in 5-7 years. SCD at ¶ 10; Stanley Decl. at ¶ 25.[7] The Supplemental Decree contains stipulated penalties for any late payments by AVX, and also requires AVX to provide certified reports to satisfy its financial assurance obligations. SCD at ¶¶ 11 and 18. The Supplemental Decree reserves the Governments' rights pursuant to the NRD Reopener in the 1992 Consent Decree and reserves the Governments' rights concerning criminal liability. SCD at ¶¶ 15-16.

The Supplemental Decree is a cash-out settlement and does not require AVX to perform any of the cleanup work at the Site. Nor does the Supplemental Decree alter the remedy that EPA selected for the Site in the RODs. The administrative authority of EPA (and the

[6] The fourth ESD modifying the OU1 ROD ("OU1 ESD4") was issued on March, 14, 2011 and is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: http://www.epa.gov/region1/superfund/sites/newbedford/479471.pdf.

[7] Declaration of Elaine T. Stanley in Support of Motion to Enter Supplement Consent Decree ("Stanley Decl.") is attached to this Memorandum as Exhibit 2.

Commonwealth) to conduct the cleanup, or to make any necessary modifications to the remedy at the Site contained in the RODs through appropriate administrative process, is unaffected by the terms of the Supplemental Decree.

In exchange for AVX's payment of $366.25 million, plus interest, and in recognition of the litigation risks which the Governments would face absent a settlement, the Governments agreed to compromise the right to recover past response costs that could be sought under the 1992 Consent Decree and forego recovery of any additional future costs attributable to EPA's cleanup and the Commonwealth's cost share. The Governments also release AVX for liabilities based upon further unknown conditions and new information, further response costs pursuant to the Cost Reopener, and further actions seeking injunctive relief. SCD at ¶ 15.

IV. SUMMARY OF COMMENTS RECEIVED

The United States received approximately 21 sets of comments on the proposed Supplemental Decree, 21 of which either oppose or support the terms of the settlement.[8] The comments are attached as Exhibit 4 to this Memorandum. The Governments have carefully reviewed each comment received, and have prepared Responses to Public Comments, attached hereto as Exhibit 1.

Commenters opposing entry of the Supplemental Decree raised numerous issues including: asserting that the Governments exaggerate the risks of litigation; asserting that the Governments must include a reopener; asserting that the $366.25 million is an insufficient settlement amount; and asserting that EPA's previously selected remedy for the Site cleanup is insufficient. Commenters supporting entry of the Supplemental Decree also addressed numerous issues including: noting that an accelerated cleanup would lessen human health risks at the Site;

[8] There were two additional sets of comments which neither support nor oppose the Supplemental Decree.

noting that an accelerated cleanup would improve the community's economic environment; agreeing that a settlement is preferred over the risks and costs of protracted litigation; requesting that EPA maintain flexibility in conducting the cleanup; and asserting that EPA should continue to provide funding for the cleanup even while spending the money obtained from this settlement.

ARGUMENT

I. STANDARD OF REVIEW FOR THE MOTION TO ENTER A CONSENT DECREE

A district court reviews a consent decree to ensure that it is "fair, reasonable, and faithful to the objectives of the governing statute." United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990). See also Conservation Law Found. of New England, Inc. v. Franklin, 989 F.2d 54, 58 (1st Cir. 1993); United States v. Davis, 261 F.3d 1, 26 (1st Cir. 2001). The approval of settlements is a judicial act that is committed to the informed discretion of the trial court. Donovan v. Robbins, 752 F.2d 1170, 1176-77 (7th Cir. 1985); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348, 351 (6th Cir. 1986). In reviewing a settlement, the inquiry is directed not to whether the Court itself would have reached the particular settlement, but rather, to whether the proposed settlement is a fair and reasonable compromise. See Cannons, 899 F.2d at 84. The Court is not "empowered to rewrite the settlement agreed upon by the parties," or to "delete, modify, or substitute certain provisions of the consent decree." Officers for Justice v. Civil Serv. Comm'n of City and County of San Francisco, 688 F.2d 615, 630 (9th Cir. 1982). The question to be resolved in reviewing the settlement, and the degree of scrutiny to be applied, are distinct from the merits of the underlying action.

In general, public policy strongly favors settlements of disputes without litigation. Donovan, 752 F.2d at 1177; Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1013 (7th Cir. 1980). Settlements conserve the resources of the courts,

the litigants and the taxpayers and "should...be upheld whenever equitable and policy considerations so permit." Aro Corp. v. Allied Witan Co., 531 F.2d 1368, 1372 (6th Cir. 1976), cert. denied, 429 U.S. 862 (1976); Equal Employment Opportunity Comm'n v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985), cert. denied, 478 U.S. 1004 (1986).

The policy of encouraging settlements has "particular force, where, as here, a government actor committed to the protection of the public interest has [engaged in the construction of the] proposed settlement," Cannons, 899 F.2d at 84, and where that government actor is "specially equipped, trained, and oriented in the field." United States v. National Broadcasting Co., Inc., 449 F. Supp. 1127, 1144 (C.D. Cal. 1978). In reviewing a settlement involving a governmental agency, "the district court must exercise some deference to the agency's determination that settlement is appropriate." Conservation Law Found., 989 F.2d at 58 (quoting Federal Trade Comm'n v. Standard Fin. Management Corp., 830 F.2d 404, 408 (1st Cir. 1987)). This limited standard of review for governmental actions reflects a public policy "in favor of encouraging settlements[,] especially in complicated regulatory settings." Conservation Law Found., 989 F.2d at 59 (citations omitted). A consent decree is a "highly useful tool for government agencies [because] it maximizes the effectiveness of limited law enforcement resources" by permitting the government to obtain compliance with the law without lengthy litigation. United States v. City of Jackson, Miss., 519 F.2d 1147, 1151 (5th Cir. 1975). Indeed, courts have held that, "sound policy would strongly lead [the court] to decline...to assess the wisdom of the Government's judgment in negotiating and accepting [a]...consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in such action." Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961).

II. THE SUPPLEMENTAL CONSENT DECREE IS FAIR, REASONABLE AND CONSISTENT WITH CERCLA

A. The Settlement is Fair

The fairness of a CERCLA settlement involves both procedural fairness and substantive fairness. Cannons, 899 F.2d at 86-88. To measure procedural fairness, the Court "should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." Id. at 86. The negotiation of the Supplemental Decree was procedurally fair because AVX has significant financial resources and was represented by sophisticated counsel and technical experts. Stanley Decl. at ¶ 21. The substantial involvement of a third-party, neutral mediator in settlement discussions also ensured that the parties engaged in a candid and open negotiation process. Id. at ¶ 21.

With respect to the issue of "substantive" fairness, the settlement should be approved if it is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability…according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." Cannons, 899 F.2d at 87. See also United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1089 (1st Cir. 1994); United States v. DiBiase, 45 F.3d 541, 544-45 (1st Cir. 1995). The settlement is substantively fair. In the Supplemental Decree, AVX has agreed to pay $366.25 million, plus interest, into a site-specific special account to be used to fund future cleanup work at the Site. SCD at ¶ 7. The total costs to finish cleaning up the Upper and Lower Harbors of the Site are currently estimated by EPA as $393 million in net present value. OU1 ESD4 at 2 and 12; UAO at ¶ 92. With the funds being paid by AVX under the Supplemental Decree, the Governments will have over 90% of the estimated funds needed to complete the PCB cleanup of the Upper and Lower Harbors at the Site in 5-7 years, in contrast to

the approximately 40 years it would take EPA to complete the cleanup at the typical current annual funding rate of approximately $15 million. Stanley Decl. at ¶¶ 24-24; OU1 ESD4 at 2. Both the estimates of the future costs to clean up the Site and the years to clean up the Site are EPA's best estimates at this time and are based on years of actual cost data. Stanley Decl. at ¶ 24; OU1 ESD4 at 17.

While the Governments aspire to recover 100% of all the remaining costs to clean up the Site, settlements by their very nature involve some compromise. Based on the experiences of the United States and the Commonwealth in settling the liability of parties at numerous hazardous waste cleanup sites across the nation and in Massachusetts, under circumstances such as these, where the cost to complete the cleanup is so significant and the Governments face substantial litigation risks as discussed hereafter, the Governments consider a compromise where one party pays over 90% of the estimated remaining costs to clean up a site to be substantively fair.

B. The Settlement is Reasonable

Three factors are relevant to determining whether a CERCLA settlement is reasonable: technical adequacy of work to be performed in cleaning the environment; satisfactory compensation for response costs; and risks and delays inherent in litigation. See Davis, 261 F.3d at 26; Charles George Trucking, 34 F.3d at 1085; Cannons, 899 F.2d at 89-90. The risks of litigation factor into the analysis of whether a proposed settlement is reasonable, as the Court in Cannons found "…if the case is less than robust, or the outcome problematic, a reasonable settlement will ordinarily mirror such factors. In a nutshell, the reasonableness of a proposed settlement must take into account foreseeable risks of loss." Id. at 90.

1. Technical Adequacy of the Work

As a cash-out settlement, the proposed Supplemental Decree does not alter the remedy

previously selected for the Upper and Lower Harbors at the Site—an administrative decision EPA made in 1998 by issuing the OU1 ROD, as modified, consistent with the public involvement procedures required by CERCLA and 40 C.F.R. Part 300. All components of the selected OU1 Remedy, including dredging, dewatering, off-site disposal, and on-site disposal in containment facilities, have been previously determined by EPA to be protective of human health and the environment. OU1 ESD4 at 16. If approved, the Supplemental Decree will provide the funds for EPA to perform the selected remedy at a significantly accelerated pace. Stanley Decl. at ¶¶ 24-26. In addition, the appropriateness of EPA's previously selected remedy for OU1 is not an issue that is properly before this Court. Pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), federal courts do not have jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

2. Compensation for Response Costs

In addition to the technical adequacy of the work that the Supplemental Decree will fund, the public will be adequately compensated given that AVX will provide over 90% of the estimated funds needed to complete the PCB-cleanup of the Upper and Lower Harbors on an accelerated schedule. Stanley Decl. at ¶¶ 25-26. Although the settlement will not provide 100% recovery of the Governments' future costs and does not provide any additional recovery of the Governments' past costs, settlements by their nature do not require 100% recovery. As this Court has noted in a prior settlement related to the Site:

> It is self-evident that generally defendants do not settle litigation for the full value of the asserted damages. Faced with a demand for full damages, a defendant might just as well go to trial, save for the litigation costs and possible interest on a resulting judgment. Thus, in the general run of CERCLA cases, this Court imagines that defendants will generally settle for substantially less—indeed, often for far less given the inherent problems of proof in these cases—than the asserted damages.

In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1028 (D. Mass. 1989) (citations omitted) (Young, J.). Moreover, "[d]iscounts on maximum potential liability as an incentive to settle are considered fair and reasonable under Congress's statutory scheme." Davis, 261 F.3d at 26. Both the First Circuit and this Court have recognized a common maxim of any settlement—that settlements by their very nature involve some level of compromise. In CERCLA cases against liable parties, that compromise usually relates to the costs of the cleanup. As noted above, the Governments have not compromised on the technical aspects of the cleanup but have compromised the amount of the costs recovered to achieve a settlement, and the determination of whether a CERCLA settlement is reasonable does not hinge exclusively on a comparison of the amount of the settlement with the amount of a 100% recovery.

3. Litigation Risks

The compromise embodied in the Supplemental Decree is reasonable in light of the risks inherent in litigation that the Governments would face. There are foreseeable risks to the Governments' case against AVX, and the settlement with AVX properly considers these risks, a consideration that is appropriate in examining whether a settlement under CERCLA is reasonable. The Governments need not, and do not, assign a particular value to any risk they face in litigation. As the First Circuit found in its assessment of the United States' compromise of the monetary dollar figure based in part on the risks of litigation, "…a court must once again allow for the agency's lack of 'mathematical precision,' as long as the figures derive from a plausible interpretation of the record." Davis, 261 F.3d at 26 (citations omitted).

In this case, the Governments face risks in further litigation, discussed herein and in more detail in Section I(A)(1) of the attached Responses to Comments. Although the 1992 Consent Decree resolved approximately nine years of litigation, many of the same litigation risks that

existed back in the 1980s and early 1990s remain. Significant additional litigation risks now exist because the Court's analysis of the terms of the 1992 Consent Decree would govern the extent of the Governments' claims against AVX. The Governments only have further claims against AVX to the extent that they can successfully exercise the reopener provisions of the 1992 Consent Decree. The risk in further litigation is that an adverse ruling could, at worst, eliminate the Governments' claims against AVX, or reduce the monetary amount of the Governments' claims, which in turn would lengthen the time to complete the cleanup of the Site.

In the litigation leading up to the 1992 Consent Decree, there was no judgment by the Court regarding AVX's liability under CERCLA, nor an admission by AVX that it is liable under CERCLA. 1992 CD at ¶ 3. The Governments face litigation risks in establishing AVX's liability. It is likely that AVX would vigorously defend each allegation as it did during the 1980s litigation. Even if the Governments obtained a ruling that AVX is liable, AVX would likely argue that the harm from the hazardous substances it released is divisible, following Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009), based on temporal and geographic divisibility. A successful divisibility defense by AVX could reduce the monetary amount of the cleanup costs at the Site for which it is liable.

The Governments also face litigation risks arising from the operation and interpretation of the 1992 Consent Decree's covenants not to sue and reservations of rights, including the Unknown Conditions Reopener and Cost Reopener. AVX would likely argue that the Governments cannot exercise the 1992 Consent Decree's Unknown Conditions Reopener or Cost Reopener, because the factual predicates to trigger these reopeners have not occurred.

Under the terms of the Cost Reopener, the Governments can only seek to recover certain additional costs that fall under the definition of "Remedial Costs," which excludes any increase

in costs resulting from any amendments to the RODs for the Site. 1992 CD at ¶¶ 5(K) and 18. AVX would argue that the bulk of the Governments' costs that were incurred after and resulting from the issuance of ESDs cannot be recovered pursuant to the Cost Reopener because these costs are excluded from the 1992 Consent Decree's definition of "Remedial Costs." Regarding the Unknown Conditions Reopener, AVX would argue in litigation that the unknown conditions and new information cited by the EPA in its UAO were known, or at least knowable, at the time the RODs were issued in 1990 and 1998.

The Governments face litigation risks regarding EPA's selection and implementation of the Site's cleanup plan, as challenged by AVX in litigation prior to the 1992 Consent Decree. Following the entry of the 1992 Consent Decree, AVX submitted numerous comments on EPA's proposed cleanup plans, in which AVX made clear its arguments that EPA's conduct has been arbitrary and capricious, including AVX's arguments that EPA's selected cleanup levels are too stringent and that EPA insisted on extensive dredging despite dredging's "deleterious environmental impacts[, including] wetlands destruction." If AVX were successful in arguing that EPA's actions and decisions were arbitrary and capricious, then there is a risk of a reduction of the Governments' recovery, as the Governments are entitled by CERCLA to recover only "…all costs of removal or remedial action incurred…not inconsistent with the national contingency plan". 42 U.S.C. § 9607(a)(4)(A).

Therefore, while the Governments have not attempted to assign any level of mathematical precision to any of the litigation risks (see Davis, 261 F.3d at 26 (citations omitted)), the risks are based on the arguments regarding the facts and legal determinations that AVX would undoubtedly make in this case, and the Governments' assessment of the risks is reasonable.

C. The Settlement is Consistent with the Goals of CERCLA

The Supplemental Decree between the Governments and AVX will advance the primary goal of CERCLA—to clean up the Site as soon as possible. As courts have found, the overarching goal of CERCLA "…is remedial: to clean up hazardous waste sites." United States v. Rohm & Haas, 2 F.3d 1265, 1270 (3d Cir.1993), See Charles George Trucking, 34 F.3d at 1086; Cannons, 899 F.2d at 91. This settlement advances the goals of CERCLA by ensuring that the Governments receive over 90% of the estimated funds needed to complete the cleanup of the Upper and Lower Harbors in 5-7 years, instead of the four decades it would take without the funds from this settlement. Stanley Decl. at ¶ 25; OU1 ESD4 at 2 and 12. EPA designed enough capacity in the infrastructure at the Site to undertake dredging operations approximately nine months per year; however, EPA's $15 million in annual funding over the past 10 years has limited actual dredging operations to an average of only 40 days per year. UAO at ¶¶ 28-29. In addition, with limited annual funds, dredging operations have to be started and stopped each year, resulting in reduced efficiency and additional costs, such as increased costs to remobilize and redeploy equipment annually. With the funds from this settlement, the Governments will be able to fully utilize the infrastructure at the Site in a manner that most efficiently spends each dollar available for the cleanup and will be able to conduct the cleanup at a greatly accelerated pace. Stanley Decl. at ¶ 24.

EPA has a high degree of confidence in its cost estimate, which is based on many years of actual past cost data. Stanley Decl. at ¶ 24; OU1 ESD4 at 17. For this reason, the Governments determined that they would not make the inclusion of a cost reopener a requirement of the settlement, recognizing that finality for AVX would be worth a higher lump sum payment in the settlement. Furthermore, a cost reopener is not required for this settlement

by statute or EPA policy. While the parties to the 1992 Consent Decree included a cost reopener because the early settlement was reached before a Record of Decision was issued for the Upper and Lower Harbor Operable Unit of the Site, the implementation of the remedy for the Site has now been underway for almost two decades.

Similarly, the Governments determined that the removal of the Unknown Conditions Reopener, and its effect on the Supplemental Decree's finality, would likely leverage a higher payment from AVX. Nor does CERCLA require the inclusion of an unknown conditions reopener in cost recovery settlements. See CERCLA § 122(f), 42 U.S.C. § 9622(f). Section 122(f) of CERCLA requires an unknown conditions/new information reopener for settlements involving the performance of the cleanup work by the settling party; however, an unknown conditions reopener provision is not required when a settling party is reimbursing the governments for costs and is not performing the cleanup. See United States v. Hercules, 961 F.2d 796, 799 (8th Cir. 1992); United States v. Atlas Lederer, 494 F. Supp. 2d 629, 639 (S.D. Ohio 2005). As the Eighth Circuit held in Hercules, Section 122(f) applies only to settlements where the responsible party is completing the remedial action; this section does not apply to covenants in cost recovery settlements where EPA is performing the cleanup. See Hercules, 961 F.2d at 799.

Therefore, because this settlement only involves the reimbursement of costs, CERCLA § 122(f) does not require the inclusion of an unknown conditions reopener. Nevertheless, the CERCLA § 122(f) factors can be considered when determining whether a settlement is consistent with the goals of CERCLA. See United States v. Pesses, Civ. A. No. 90–654, 1994 WL 741277 at *12 (W.D. Pa. Nov. 7, 1994). The Governments have considered the CERCLA §§ 122(f)(4) and (f)(6) factors, including "conditions at the site, the remedy chosen 'and volume,

toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors…'" United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1032 & n.2 (D. Mass. 1989). A full description of the Governments' consideration of these factors is contained in Section I(A)(2) of the Responses to Comments. However, the main reasons this settlement meets these factors are discussed below and include public interest considerations, the litigation risks discussed above, and that the remedy will be effective and reliable. In addition, because of EPA's performance of the cleanup at the Site, there are "reasonable assurances that public health and the environment will be protected from any future releases…" See 42 U.S.C. § 9622(f)(6)(B).

The public interest considerations argue strongly in favor of this settlement. Without the funds obtained through the Supplemental Decree, the Governments estimate that the cleanup would take 40 years at the funding levels that they have been able to obtain for the Site—funds that come from the source of funds for all hazardous waste sites in the United States. That delay has several costs: the costs to the community of waiting for a harbor PCB cleanup to conclude; the increased costs of performance inherent in a 40-year rather than a 5-7-year timeframe; the cost of further degradation of the harbor environment; and the increased costs to the Governments of likely litigation. Instead of a 40-year cleanup, this settlement will result in a greatly accelerated cleanup consistent with CERCLA.

In contrast to 1992, EPA has now selected the remedy in the RODs for the Site and has been performing work pursuant to these RODs, as modified, for almost two decades. UAO at ¶¶ 18 and 92. Upon completion, the OU1 remedy will be reliable in that it will be protective of human health and the environment. OU1 ESD4 at 16. The risks from PCB exposure will be reduced to acceptable levels upon completion of the cleanup, and will be achieved much more

quickly with the funds made available by the Supplemental Decree. Stanley Decl. at ¶ 26.

After considering the CERCLA § 122(f) factors and the unique status of this case, including the 25 years of information available regarding the Site, the Governments determined that the proposed settlement and its covenant not to sue are in the public interest and are consistent with the goals of CERCLA. The Governments have resolved the case with AVX for a presumably larger lump sum payment than if the Governments had insisted upon an unknown conditions reopener. Moreover, it is not at all apparent that any settlement would have been reached with AVX on the reopeners from the 1992 Consent Decree if the Governments had insisted that the reopeners would need to remain in effect even after the entry of the Supplemental Decree.

Finally, the Governments acknowledge that the amount of funds paid by AVX may not be enough to complete all the work set forth in the RODs, even with the timetable for completion vastly reduced. EPA may need to seek additional funding from the Superfund, as well as the statutorily mandated share of such funding from the Commonwealth, for the completion of any cleanup work remaining when, and if, the settlement funds are spent. EPA is committed to assuring that sites reach completion, whether the site is being funded by the Superfund or where cleanup has been substantially performed or funded by responsible parties. Woolford Decl. at ¶¶ 17-18. [9] In sum, the Supplemental Decree is consistent with CERCLA even though it does not contain a cost reopener or an unknown conditions reopener because it would significantly advance the primary goal of CERCLA to clean up the Site as soon as possible.

[9] Declaration of James E. Woolford in Support of Motion to Enter Supplement Consent Decree is attached to this Memorandum as Exhibit 4.

CONCLUSION

For the reasons stated above, the Court should enter the proposed Supplemental Consent Decree.

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