LWG
LOWER WILLAMETTE GROUP

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January 19, 2016

Kristine Koch
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Seattle, WA 98101-3140

Re: Request for Dispute Resolution on EPA January 4, 2016 Decision to Take Over Portland Harbor Feasibility Study (Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240)

Kristine:

The Lower Willamette Group (LWG) is in receipt of the United States Environmental Protection Agency, Region 10 (EPA) letter dated January 4, 2016. Pursuant to Section XVIII of the above-captioned 2001 Administrative Settlement Agreement and Order on Consent for Remedial Investigation/Feasibility Study (Consent Order), the LWG hereby invokes the dispute resolution process. The LWG objects to EPA's January 4, 2016 decision to take over the Portland Harbor Feasibility Study and requests formal dispute resolution for the reasons described in this letter.

The LWG requests that EPA withdraw the January 4, 2016 letter. The LWG continues to be willing to work with EPA to assist EPA in meeting its schedule for the FS, Proposed Plan and Record of Decision (ROD). However, we are unable to accept a determination by EPA that the LWG is not in compliance with the Consent Order, and we are unable to accept the abrogation of our dispute resolution rights. We request a meeting with EPA leadership as soon as possible to continue our discussions about how we might resolve this matter.

Background

The LWG submitted its draft Feasibility Study (FS) to EPA on March 30, 2012. The draft FS was prepared in accordance with the Consent Order and the EPA-approved 2004 RI/FS Programmatic Work Plan. Shortly after the LWG submitted the draft FS report, EPA released a fact sheet stating that it would "use the Feasibility Study to help prepare a plan to clean up Portland Harbor."[1] In April and May of 2012, EPA and the LWG jointly conducted a series of community information sessions to present the alternatives evaluated in the draft FS to the public.

On December 18, 2012, EPA advised the LWG that "[a]t this time … the draft FS is not adequate for its intended purpose and is not approved by EPA." EPA's December 18, 2012 letter stated that

[1] EPA fact sheet, *Learn More About the Portland Harbor Superfund Site Cleanup* (April 2012), attached at Tab 1.

> EPA intends to work cooperatively with the LWG in completing the FS and expects that revisions to the FS by both parties will be shared for review and comment as they are developed in order to proceed in an iterative manner.
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> EPA will only be providing detailed comments on the portions of the draft FS that we will require the LWG to revise or perform more analysis. General areas of concern on the draft FS are therefore noted in this letter and the attached comments, but specific requests to LWG will be provided under separate cover throughout the revision process. In keeping with the shared goal of completing this document in a timely manner, we will work with the LWG to develop a process and schedule for revising this document that targets November 2013 as a completion date for the FS.
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> We look forward to working with the LWG on revisions to the document that will be needed to support EPA's proposed cleanup plan for the Portland Harbor Site. We would be happy to meet with the LWG's project managers in the near future to discuss EPA's process for completing the draft FS, including next steps and our vision for completing the work.[2]

After the LWG received EPA's letter, Jim McKenna, the LWG's lead consultant, contacted Chip Humphrey, one of EPA's project managers at the time, and specifically asked whether EPA's December 18, 2012 letter was intended to trigger a deadline for the LWG to initiate dispute resolution under the AOC. Mr. Humphrey assured Mr. McKenna that it did not and stated that he had purposely drafted the letter to convey EPA's initial concerns about the draft FS without specifically asking the LWG to do anything at that time beyond meeting with EPA to discuss the process to complete the FS.[3] Mr. Humphrey stated that EPA would work with the LWG to develop a process for the FS that mirrored the parties' process for completing the Remedial Investigation, including deferring dispute resolution until the end of the FS process.[4]

The fact that EPA did not approve the LWG's first draft of the FS report was not a surprise to the LWG. Indeed, the Consent Order contemplates revisions to the draft FS report:

> If EPA disapproves or requires revisions to the draft FS report, in whole or in part, Respondents shall amend and submit a revised FS report to EPA which is responsive to the directions in all EPA comments, within thirty (30) days of receiving EPA's comments.

Consent Order, §VII.4.H.ii. Nearly every RI/FS order provides for the same submittal-comment-resubmittal process.[5] Based upon EPA's Dec. 18, 2012 letter, Mr. Humphrey's assurances to Mr. McKenna, and the terms of the Consent Order itself, the LWG met with EPA throughout 2013 and the first half of 2014, providing technical information to EPA on a jointly compiled list of key FS issues.

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[2] Humphrey and Koch letter to Wyatt dated December 18, 2012, attached at Tab 2.
[3] McKenna Declaration, attached at Tab 3.
[4] *Id*.
[5] See EPA's Model Administrative Order on Consent for Remedial Investigation/Feasibility Study, January 21, 2004, Section X (http://www.epa.gov/sites/production/files/2013-10/documents/rev-aoc-rifs-mod-04-mem.pdf).

Meanwhile, EPA and LWG senior and project managers negotiated a detailed agreement for the process to finalize the FS.[6] The *Revision Process for Feasibility Study* (the FS Process Agreement), adopted June 11, 2014 and amended December 15, 2014,[7] provides that EPA and the LWG would meet and attempt to resolve technical issues, "seeking consensus." Following these discussions, EPA would "consider LWG positions and decide how to move forward with FS revisions." The FS Process Agreement clarified that

> Any technical discussions or decisions are non-binding on either party, and any materials provided to the LWG in connection with these discussions do not constitute EPA comments, modifications or direction for change that must be addressed by the LWG under Section IX of the AOC.[8]

Under the FS Process Agreement, EPA drafted the main text for each section and provided it to the LWG for review and comment. EPA committed to "provide a written response to LWG comments as to whether they are incorporated or rejected for each section," and then EPA and the LWG would attempt to informally resolve the LWG's comments. EPA would then "share a copy of the proposed final version with the LWG after considering the LWG's comments, but <u>the EPA is not planning to direct the LWG to incorporate these modifications at this point in the process</u>" (emphasis added).[9]

The original June 11, 2014 FS Process Agreement provided the LWG a dispute resolution opportunity as EPA finished each section.[10] The LWG preferred this approach, because it allowed issues that carried forward through the FS analysis to be resolved sequentially as the FS was developed. By the fall of 2014, however, EPA was concerned enough about meeting the schedule it had set for completion

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[6] The FS Process Agreement grew out of a similar agreement for finalization of the RI negotiated between EPA and LWG senior managers developed in the wake of the LWG's dispute over EPA's 2012 notice of noncompliance concerning the Baseline Human Health Risk Assessment. *See*, Cohen letter to Kirkpatrick dated September 24, 2013, attached at Tab 4. In his partial resolution of the dispute concerning the BHHRA, Director Opalski wrote, "It is … reasonable and appropriate for EPA and the Lower Willamette Group to seek to clarify expectations and/or protocols for communications between them going forward." Opalski October 25, 2012 Partial Resolution of Dispute, attached at Tab 5. In 2013, Director Albright noted the success of the RI Process Agreement in moving the RI/FS toward completion: "I find it interesting that the language relating to 'good faith' is specifically called out in this AOC. Such a provision in an AOC is highly unusual, and as such must have been put in for a specific purpose. Since the EPA sent its notice of stipulated penalties, a number of actions have been taken to demonstrate 'good faith' and improve working relationships. Among the steps taken were development and establishment of a new process for the remaining sections of the RI report. Early implementation of this new process appears to be successful in moving work forward …. I find that the LWG's efforts to engage in this new process … are a demonstration of 'good faith.' I understand that the staff representing the LWG and the EPA have made significant progress on several fronts." Albright September 30, 2013 Resolution of Dispute, attached at Tab 6.

[7] The June 11, 2014 FS Process Agreement is attached at Tab 7. The December 14, 2014 modification is attached at Tab 8. EPA subsequently further modified the process and schedule by delivering Sections 3 and 4 for review at approximately the same time. Cohen e-mail to Kirkpatrick and Hamilton dated April 7, 2015, attached at Tab 9. Other than this schedule modification, however, the parties continued to follow the FS Process Agreement. *See, e.g.,* Koch e-mail to Wyatt and McKenna dated August 18, 2015, attached at Tab 10 ("per the agreed process, any issues raised during the 30 day review period are to be resolved within the subsequent 14-day period"). Similarly, Administrator McLerran referred to the LWG's right to dispute resolution during a November 13, 2015 executives meeting.

[8] December 14, 2014 FS Process Agreement at p. 1.

[9] *Id.*

[10] *See also*, June 5, 2014 Cora email to Pearman, attached at Tab 11.

of the FS that it proposed to modify the FS Process Agreement to eliminate the section-by-section dispute resolution process in favor of a single opportunity to dispute all FS issues when EPA finished the FS.[11] Reluctantly, the LWG agreed to this approach in order to support EPA's desired schedule. Therefore, the December 14, 2014 modified FS Process Agreement provides a clear opportunity for the LWG to dispute the final FS once EPA completed its review of and directed changes to all sections of EPA's revised FS report:

> At the conclusion of the technical discussion process for all sections and within 120 days following NRRB review, EPA will send a formal letter with its final text modifications, and additional work requirements for revision to supporting tables, maps, and figures for all sections and direct the LWG to incorporate the text and perform the requested revision work for the draft Final FS. Per the AOC, the LWG shall proceed on the direction, unless within fourteen (14) days of receipt of the EPA letter, the LWG invokes dispute resolution by identifying their objections as set forth in the AOC.[12]

On July 8, 2014, consistent with the FS Process Agreement, EPA provided its first detailed comments on the 2012 draft FS to the LWG by providing a new FS Section 1. EPA's cover letter notes, "[w]e appreciate your willingness to work with us to complete this report and move forward to cleanup of the Portland Harbor Superfund site."[13] The LWG provided its comments on Section 1, and, on December 18, 2014, EPA provided a revised Section 1, stating, "we look forward to completing the remaining sections of the FS with you."[14] EPA provided drafts of Section 2 of the FS on February 23, 2015, Section 3 on July 29, 2015, and Section 4 on August 18, 2015. The LWG provided its comments on each section within the timeframes set out in the FS Process Agreement. Although EPA responded to the LWG's comments on Section 2 and provided several revised drafts of Section 2 and associated tables, figures and appendices, EPA has never responded to the LWG's comments on Sections 3 and 4 of its 2015 draft FS, has never provided revised drafts of Sections 3 or 4, and has never provided the LWG with its comments and directions for changes to the FS.

The LWG has consistently complied in good faith with the FS Process Agreement, has provided technical information requested by EPA during EPA's revision of the FS quickly and without objection, and has in good faith accepted deferred dispute resolution under the Consent Order and the FS Process Agreement to support EPA in its desired schedule for completing the FS. The LWG stands ready and willing to perform its obligation to incorporate EPA's final text modifications and additional requested revisions to the FS. EPA has never suggested that the LWG has in any way deviated from its commitments under the FS Process Agreement. As recently as November 13, 2015, Administrator McLerran met with elected officials and executives from the City of Portland, the Port of Portland, and NW Natural without mentioning that EPA intended to take over the FS.

EPA's January 4, 2016 letter requiring the LWG to relinquish the FS and its negotiated dispute resolution rights for the first time makes the allegation that the LWG failed to comply with the Consent Order with respect to the FS submitted in 2012.[15] The January 4 letter is an extraordinarily unfair and

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[11] *See* Cohen e-mail to Kirkpatrick et al dated November 26, 2014, attached at Tab 12.
[12] FS Process Agreement, pp. 1-2.
[13] Koch letter to Wyatt dated July 8, 2014, attached at Tab 13.
[14] Koch e-mail to Wyatt and McKenna dated December 18, 2014, attached at Tab 14.
[15] During the afternoon of Monday, December 28, 2015, EPA requested a January 4, 2016 conference call with the AOC signatories (including attorneys, who are typically not permitted to participate in EPA meetings and conference calls) "to discuss the process to complete the Portland Harbor Feasibility Study." *See,* Robinson e-mail

punitive act against the small subset of potentially responsible parties who have worked hardest to assist EPA in its efforts toward a cleanup of the Portland Harbor Superfund Site. This action is unsupported by any authority in the Consent Order, EPA's attempt to revoke important contract rights at the last moment stands to make it that much more difficult for potentially responsible parties to see value in cooperating with EPA on the far larger remedy implementation effort ahead.

Request for Dispute Resolution

For these reasons, and as discussed more fully below, the LWG respectfully objects to EPA's January 4, 2016 decision to take over the Portland Harbor Feasibility Study and requests formal dispute resolution on the following bases:

1. EPA lacks the grounds under Section IX, Paragraph 1 or Section XIX, Paragraph 9 of the Consent Order to require the LWG to relinquish performance of work as stated in the January 4, 2016 letter.

2. The January 4, 2016 letter amounts to a requirement that the LWG waive its rights under the Consent Order and the FS Process Agreement to dispute the final FS.

3. To the extent that it is relevant to EPA's final FS, the findings and conclusions of EPA's 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.

4. To the extent that it is relevant to EPA's final FS, the comments provided in EPA's December 2012 letter concerning the LWG draft FS report are incomplete, technically incorrect and, in at least some cases, reflect positions that EPA itself has abandoned in its 2015 FS drafts. The December 2012 letter was not a disapproval, and nothing in the December 2012 letter supports EPA's determination more than three years later that the LWG has failed to comply with the Consent Order.

5. EPA's unilateral work takeover without cause and denial of the LWG's right to initiate dispute resolution on the final FS under Section XVIII constitute a material breach of the Consent Order.

The LWG requests that EPA withdraw the January 4, 2016 letter. The LWG continues to be willing to work with EPA to assist EPA in meeting its desired schedule for the FS, Proposed Plan and ROD. However, we are unable to accept a determination by EPA that the LWG is not in compliance with the Consent Order, and we are unable to accept the abrogation of our dispute resolution rights.

1. EPA lacks grounds under the Consent Order for a work takeover.

EPA's January 4, 2016 letter states

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to Woronets dated December 29, 2015, attached at Tab 15. Later that day, EPA notified the LWG that it needed further internal meetings before it could confirm the January 4 meeting it had requested. On Tuesday, December 29, EPA confirmed the conference call with the AOC signatories for 3 p.m. on January 4. The January 4 conference call was the first notice the LWG had that EPA intended the work takeover; its letter was delivered by email at 4:59 p.m. the same day, shortly after completion of the 3 p.m. conference call.

> EPA can complete the work otherwise required of the LWG under the [Consent Order] because the 2012 draft FS was disapproved as deficient. See Section IX, Paragraph 1 and Section XIX, Paragraph 9.[16]

EPA's requirement that the LWG relinquish completion of the FS is not supported by either cited provision of the Consent Order.[17]

Section IX, Paragraph 1 does not address a work take over at all. Instead, it requires the Respondents to incorporate EPA's comments in revised deliverables.

> At EPA's discretion, Respondents must fully correct all deficiencies and incorporate all information and comments supplied by EPA either in subsequent or resubmitted deliverables within a time frame specified by EPA.

As discussed above, EPA has never provided its comments and directions for change for the final FS to the LWG. The FS Process Agreement clearly states that "any materials provided to the LWG in connection with" technical discussions prior to EPA's final direction to the LWG to produce the FS "do not constitute EPA comments, modifications or direction for change that must be addressed by the LWG under Section IX of the AOC."[18]

Section IX, Paragraph 4 does address takeover of a deliverable:

> If Respondents amend or revise a report, plan or other submittal in response to EPA comments, and EPA subsequently disapproves of the revised submittal, or if such subsequent submittals do not fully reflect EPA's directions for changes, EPA retains the right to seek penalties, perform its own studies, complete the RI/FS (or any portion of the RI/FS)….

Those facts don't exist here, and EPA doesn't claim that they do. The LWG has not submitted an amended or revised FS Report that fails to "fully reflect EPA's directions for changes" – because EPA has not provided its directions for changes to the LWG.

Section XIX, Paragraph 9 also describes a situation in which EPA can take over all or part of the work:

> The stipulated penalties provisions do not preclude EPA from pursuing any other remedies or sanctions which are available to EPA because of Respondents' failure to comply with this Consent Order, including, but not limited to conduct all or part of the RI/FS by EPA.

EPA's statement that it is taking over the work "because the 2012 draft FS was disapproved as deficient" apparently is intended as a finding that the LWG has in 2016 failed to comply with the Consent Order because in 2012 EPA did not approve its first draft of the FS. The Consent Order itself is, however, quite clear that if EPA declines to approve the first draft of the FS, the

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[16] Grandinetti January 4, 2016 letter to Wyatt, attached at Tab 16.
[17] We have not located any other provision in the Consent Order that would allow EPA to take over this work; we assume EPA's letter provides all of the grounds on which it intends to rely for its decision.
[18] FS Process Agreement (December 15, 2014), Tab 8, at p. 1.

LWG's obligation is to "amend and submit a revised FS report to EPA which is responsive to the directions in all EPA comments, within thirty (30) days of receiving EPA's comments." It is a generally accepted principle of contract interpretation that terms of a contract that directly address a particular matter, control over more general language. *See, e.g., Feibusch v. Integrated Device Tech., Inc. Employee Benefit Plan*, 463 F.3d 880, 885-86 (9th Cir. 2006). The LWG stands ready and willing to submit a revised FS report that is responsive to the directions in all EPA comments within thirty days of receiving those comments. EPA's decision not to approve the 2012 draft FS cannot serve as a basis for EPA finding that the LWG has failed to comply with the Consent Order, when EPA has never provided the LWG with its comments for incorporation into a revised report.

In sum, EPA does not have grounds to take over the FS from the LWG because it has never provided the LWG with its comments on and directions for changes to the FS, and the LWG cannot therefore be in default of its obligation to incorporate those comments and directions for change into a revised report.[19]

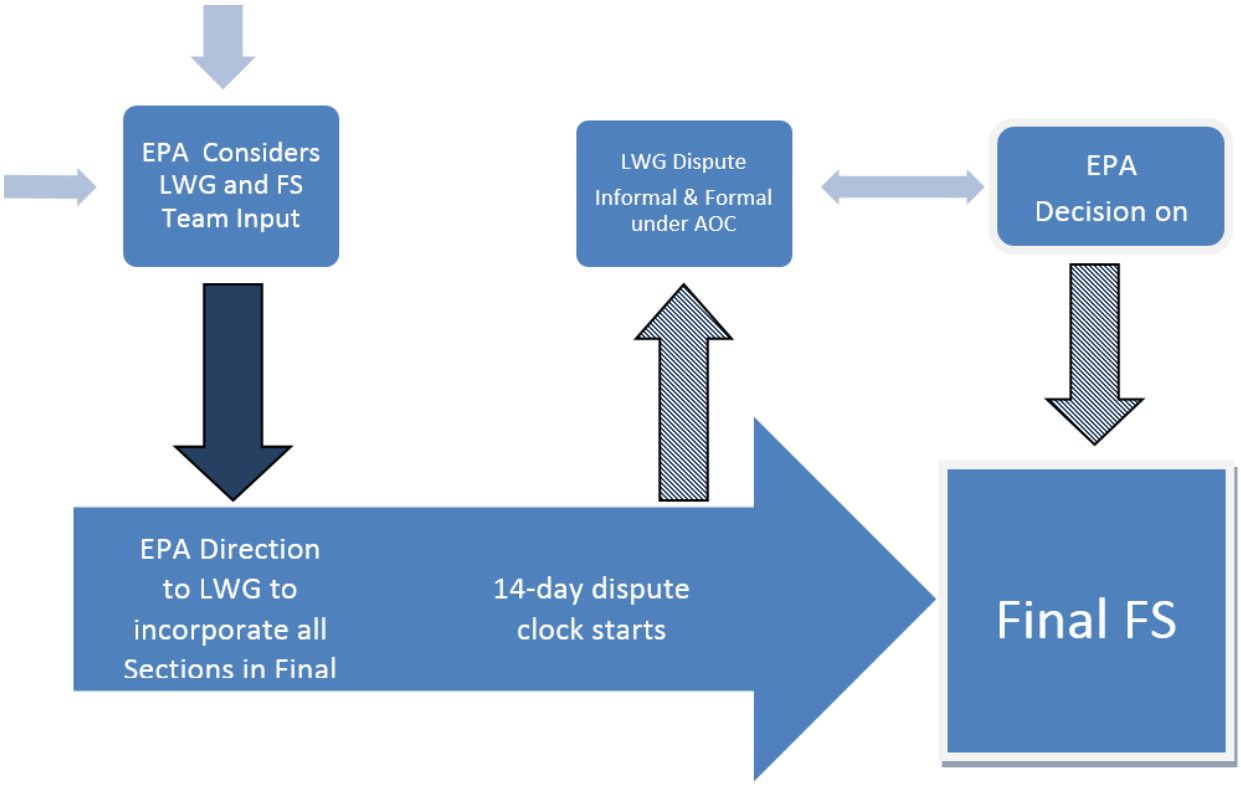
2. <u>The January 4, 2016 letter amounts to a requirement that the LWG waive its rights under the Consent Order and the FS Process Agreement to dispute the final FS</u>.

The FS Process Agreement was developed and agreed upon by EPA and LWG Senior Managers as a part of a process "consistent with the [Consent Order]" that explained in the specific context of the FS revision process "when EPA modifications, comments and directions for changes to the LWG will occur . . . and when the RI/FS [Consent Order] dispute process may be invoked."[20] The December 2014 revision to the FS Process Agreement described the way in which the LWG's right under the Consent Order to dispute the FS could be exercised:

> At the conclusion of the technical discussion process for all sections and within 120 days following NRRB review, EPA will send a formal letter with its final text modifications, and additional work requirements for revision . . . and direct the LWG to incorporate the text and perform the requested revision work for the draft Final FS. Per the [Consent Order], the LWG shall proceed on the direction, unless within fourteen (14) days of receipt of the EPA letter, the LWG invokes dispute resolution by identifying their objections as set forth in the [Consent Order].[21]

The accompanying FS Revision Process diagram clearly set forth the agreed-upon process by which the LWG could dispute the final FS:

[19] We observe that work takeover is such an extraordinarily punitive remedy that it is not even mentioned in the EPA guidance *Options for Responding to Deficient Deliverables from PRPs* (OECA, June 30, 2011) (attached at Tab 17).
[20] FS Process Agreement (December 15, 2014), Tab 8, at p. 1.
[21] *Id*., pp. 1-2.



Thus, it is clear that EPA and the LWG agreed that the LWG did not waive its right under the Consent Order to dispute the final FS by conceding to EPA's proposed expedited FS revision process.

EPA's January 4, 2016 letter, however, purports to unilaterally change the FS revision process in a way that deprives the LWG of the dispute rights it holds under Consent Order, rights that were carefully preserved and defined in the FS Process Agreement. First, as described above, without any authority under the Consent Order, EPA purports to take over completion of the FS. Then, it directs the LWG that it can only exercise its right to dispute the FS with respect to the 2012 draft FS and the "August 2015 modified FS," not with respect to the Final FS. Together these amount to a requirement that the LWG waive its rights to dispute the Final FS. The LWG did not in the past and does not now consent to waive that right.

3. <u>To the extent that it is relevant to EPA's final FS, the findings and conclusions of EPA's 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.</u>

EPA's January 4, 2016 letter purports to limit the LWG's right to initiate dispute resolution to EPA's disapproval of the 2012 LWG draft FS and to EPA's August 2015[22] draft FS. We have been advised

[22] EPA's January 4, 2016 letter refers to "EPA's August 2015 modified FS." In fact, only a draft of Section 4 was delivered to the LWG in August 2015. In this letter, the terms "August 2015 draft FS" and "2015 draft FS" refer to all of EPA's draft sections of an FS for Portland Harbor. The LWG has never received a compiled "modified" or final FS report from EPA.

by EPA that it is significantly modifying the 2015 draft FS, and so EPA's offer to allow us an almost certainly futile dispute over a stale document that was never understood by either party to be a final draft seems pointless. Nonetheless, because EPA has never responded to our comments on key sections of the FS, and to avoid any later claim by EPA or others that we have failed to exhaust an administrative remedy, we are initiating dispute resolution on the findings and conclusions of the August 2015 draft FS, without waiving our right to dispute any final FS produced by EPA. As more fully explained in the LWG's previously submitted comments on the 2015 draft FS and to the National Remedy Review Board (NRRB), which we hereby incorporate by reference, the findings and conclusions of the August 2015 draft FS are technically incorrect, unsupported by facts in the administrative record, and insufficient to support remedy selection by EPA.[23]

Our major technical disagreements with the FS are summarized in Attachment A to this Request for Formal Dispute.

As this summary demonstrates, and as explained at length in its comments on EPA's draft FS and its comments submitted NRRB, the LWG has identified many significant concerns with EPA's draft FS. The concerns are not trivial and relate directly to the viability of EPA's alternatives as legitimate cleanup options under CERCLA and the National Contingency Plan (NCP). The LWG intends to pursue all appropriate means to seek an informed and objective adjudication of its concerns.

Thus, the LWG will not waive or accept the unilateral dismantling of its rights under the Consent Order to object to EPA's use of cleanup levels that are not attainable within a reasonable time frame by a sediment remedy. Similarly, the LWG will not acquiesce to a decision-making process that fails to employ risk management to identify and prioritize the most significant and pervasive risks at the site and emphasizes mass removal over risk reduction. The LWG will not accept an evaluation of cleanup alternatives that offers no credible comparison of the tradeoffs in cost, time, and effectiveness between the alternatives. Because of EPA's failure to comply with previous agreements on finalization of the FS, the LWG has no choice but to invoke dispute resolution at this time regarding the lengthy list of concerns it has previously identified on EPA's FS.

EPA should understand the seriousness of the LWG's discontent. EPA has broad authority under CERCLA to select and require performance of remedies that protect human health and the environment. But EPA's authority is not limitless and is bounded by clear and direct requirements under CERCLA and the NCP. EPA's failure at Portland Harbor to comply with these requirements undermines its ability and authority to work with PRPs to perform a technically sound and effective cleanup.

4. <u>To the extent that it remains relevant, the comments provided in EPA's December 2012 letter concerning the LWG draft FS report are incomplete and technically incorrect</u>.

EPA's December 2012 letter identified several general areas of disagreement with the LWG's 2012 draft FS. To the extent that EPA's comments present sufficient detail for us to respond to them,[24]

[23] The LWG's comments on the August 2015 draft FS are attached at Tab 18. The LWG's September 8, 2015 list of significant issues on Sections 3 and 4 of the August 2015 draft FS are attached at Tab 19. The LWG's October 19, 2015 comments to the National Remedy Review Board are attached at Tab 20.

[24] For example, EPA's comment on "text, figures and presentation" notes, "Please note that our lack of detailed comments on the text and figures in this initial comment set should not be construed to imply that we are in

we continue to disagree with EPA's approach to most of the topics discussed in the letter. Our detailed objections to EPA's approach to fate and transport modeling and MNR, principal threat waste, relevant exposure areas, the long and short term effectiveness and impact of dredging, and methodology for the comparative analysis of alternatives are contained within our discussion of EPA's 2015 draft FS,[25] and we will not repeat them here.[26]

We do note that EPA itself no longer holds some of the views expressed in the December 18, 2012 letter. For example, in its 2015 draft FS, EPA itself was unable to successfully resolve issues surrounding fate and transport modeling and MNR that it raised in December 2012; rather than relying on the model referenced in the December 2012 letter or any other approach to predictive modeling of natural recovery, EPA ultimately abandoned all efforts to quantitatively evaluate long-term effectiveness or natural recovery.[27]

Similarly, despite criticizing the 2012 LWG FS for its approach to identifying "Hot Spots" under Oregon law,[28] EPA did not identify any such "Hot Spots" in its 2015 draft FS, nor did it classify Oregon regulatory provisions pertaining to Hot Spots as ARARs.[29] Materials presented by Oregon Department of Environmental Quality confirm that "Hot Spots are not an ARAR."[30]

Finally, EPA's December 18, 2012 letter was not a "disapproval." As stated in the letter, EPA believed the FS required revisions and was simply not approving the FS "at this time."[31] As noted above, EPA's project manager advised the LWG that the notice was specifically drafted to avoid triggering the LWG's obligation to initiate dispute resolution.[32] EPA's project manager stated that these were EPA's initial concerns and expressed its expectation that EPA would at some point direct the LWG to make specific changes to the FS.[33]

5. <u>EPA's unilateral work takeover without cause and denial of the LWG's right to initiate dispute resolution on the final FS under Section XVIII constitutes a material breach of the Consent Order.</u>

Because EPA plainly lacks any basis under the Consent Order for taking over the FS, EPA's January 4, 2016 letter essentially repudiates material terms of its administrative settlement agreement

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agreement with the text. EPA expects to work with LWG to revise figures and text in the document to correct these problems."

[25] See Section 3, supra, and Tabs 18, 19 and 20.

[26] The LWG also objects to the statement in EPA's January 4, 2016 letter that "the opportunity to dispute EPA's disapproval of the 2012 draft has technically passed." As discussed above, neither EPA nor the LWG ever contemplated that the LWG's *first draft* of the FS report would be approved without comment. The letter itself simply states that the report needs revision and "at this time … is not approved by EPA." The letter not only did not require the LWG to do anything beyond meet with EPA, it was intentionally drafted by EPA to avoid the need for the LWG to initiate dispute resolution, and EPA assured the LWG that its comments did not trigger a deadline for initiating a dispute. McKenna Declaration, Tab 3.

[27] August 2015 Draft FS, p. 4-3 to 4-5.

[28] (ORS 465.315(2)(b)(A) and OAR 340-122-0115(32)(b))

[29] OAR 340-122-0115(32)(b) is not mentioned in Draft Final Tables 2.1-1 to 2.3-1 of the August 2015 draft FS.

[30] Parrett Presentation, 2014 Oregon Environmental Cleanup Conference, September 12, 2014, Slide 17, attached at Tab 21.

[31] December 18, 2012 letter, Tab2.

[32] McKenna declaration, Tab 3.

[33] *Id*.

and order on consent with the LWG, including the LWG's rights under the Consent Order to invoke dispute resolution on the final FS. The LWG's contract rights are separate and apart from the LWG's rights under CERCLA, and the LWG expects the United States to honor its obligations under the Consent Order as it should any other contract.

Settlement agreements, consent decrees, and other negotiated administrative orders between private parties and the government are treated by federal courts as enforceable contracts.[34] Such documents are compromises in which parties "give up something they might have won in litigation."[35] As such, "enforceability of these compromise agreements is favored in the law."[36] Judicial approval of a settlement agreement or consent order is not a prerequisite to enforceability.[37] By its express terms, the Agreement is legally binding on EPA:

> This Consent Order shall apply to and be binding on EPA, and shall be binding upon Respondents, their agents, successors, assigns, officers, directors, and principals . . . . The signatories to this Consent Order certify that they are authorized to execute and legally bind the parties they represent to this Consent Order.[38]

Agreements to settle legal disputes "should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation."[39] A settlement agreement or consent order must be interpreted "as it is written."[40] When interpreting and enforcing such agreements, federal courts apply state contract law from the situs of the agreement.[41] Courts construe such agreements according to their four corners, "and not by reference to any purposes of the parties or of the underlying statutes."[42]

The interpretation and enforceability of EPA's agreements has often been addressed in the context of CERCLA.[43] In *US v. Knote*,[44] the court applied this principle to require EPA to comply with dispute resolution provisions of a consent decree:

> The EPA's toxic waste clean-up efforts are commendable, however, its vigorous protection of the environment does not make it an administrative deity. Congress intended CERCLA to provide the EPA with the means to respond quickly to any release or threatened release of hazardous waste products. It did not intend to give the EPA unfettered authority to deceive and bully people into submission. It is with guarded

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[34] *E.g., United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236-37 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971); *United States v. Asarco, Inc.*, 430 F.3d 972, 980-81 (9th Cir. 2005).
[35] *ITT Cont'l*, 420 U.S. at 235.
[36] *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989)
[37] *Collins v. Thompson*, 679 F.2d 168, 172-73 (9th Cir. 1982).
[38] Consent Order, §III.1.
[39] *ITT Cont'l*, 420 U.S. at 236-37.
[40] *Id.* at 236, quoting *Armour*, 402 U.S. at 682.
[41] *Jones v. McDaniel*, 717 F.3d 1062, 1067 (9th Cir. 2013); *see also Collins*, 679 F.2d at 170-71.
[42] *ITT Cont'l*, 420 U.S. at 233 (internal quotation marks omitted).
[43] *See, e.g., Asarco*, 430 F.3d 972, 980-81 ("Without question courts treat consent decrees as contracts for enforcement purposes"); *see also U.S. v. Charter Int'l Oil Co.*, 83 F.3d 510, 516-17 (1st Cir. 1996); *Akzo Coatings, Inc. v. Aigner Corp.*, 30 F.3d 761, 769 (7th Cir. 1994) (Dispute regarding scope of consent decree "is first and foremost one of contractual interpretation"); *NJ Dep't of Envtl. Prot. v. Gloucester Envtl. Mgmt. Servs., Inc.*, 264 F. Supp. 2d 165, 175 (D. N.J. 2003); *U.S. v. Atlas Minerals and Chems., Inc.*, 851 F. Supp. 639, 651 (E.D. Pa. 1994).
[44] 818 F. Supp. 1280 (E.D. Mo. 1993), affirmed, 29 F.3d. 1297 (8th Cir. 1994)

> hope that this is not the situation that is presently unfolding before the Court. The Court would rather believe that the EPA negotiated the Consent Decree in good faith; that it did not deliberately deceive the defendants into signing the Consent Decree with assurances that the formulation building would be decontaminated and not demolished; that it fully intended to abide by Section XIII's dispute resolution procedures, and that it accepted and concurred with the Court's continuing jurisdiction over this matter as provided for in Section XX of the Consent Decree.

"As a general rule, EPA prefers to achieve Enforcement First through settlement agreements (Administrative Orders on Consent (AOCs) or Consent Decrees (CDs)) rather than through UAOs."[45] The right to dispute resolution under an administrative order is a key consideration for most potentially responsible parties in deciding to cooperate with the government by signing a consent order:

> AOCs also may offer benefits to the PRPs and EPA that are not available under a UAO. The Region should ensure that PRPs are aware of these potential benefits, including:
>
> ***
>
> *Beneficial Terms.* The model AOC for RI/FS offers certain provisions that may be more beneficial to PRPs than the requirements typically included in a UAO for RI/FS. Most significantly, the model AOC for RI/FS includes a covenant by EPA not to sue and dispute resolution provisions that establish procedures for narrowing and resolving disputes.[46]

During the negotiation of the Portland Harbor Consent Order, the terms of dispute resolution were so important that some parties ended up declining to sign the order after EPA refused to agree to dispute resolution terms it had accepted at other sites.[47] The history of negotiation of the FS process agreement further demonstrates the importance the LWG places on its dispute resolution rights under the AOC. By repudiating its contractual obligations to the LWG, EPA's actions will substantially discourage future settlements and voluntary cleanups.[48] Such an outcome would frustrate CERCLA's legislative purpose and betray the very interests that EPA is supposed to protect in administering the statute.

EPA's disavowal of the commitments it has made to the LWG in the Consent Order and the FS Process Agreement communicates to the larger Portland Harbor PRP community, as well as the LWG, that there is a significant risk that EPA will not stand behind its agreements. The LWG's long-held hope to implement a Portland Harbor remedy through settlement appears now a remote possibility. We urge EPA in the strongest possible terms to turn back from a course that seems destined to lead us all into years of litigation instead of cleanup.

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[45] *Enforcement First at Superfund Sites: Negotiation and Enforcement Strategies for Remedial Investigation/Feasibility Studies (RI/FS)*, OSWER 9355.2-21 (August 9, 2005), p. 2. *See also Charter Int'l*, 83 F.3d at 520 (Congress sought in the SARA amendments "to encourage earlier resolutions by agreement.").
[46] *Id.* at p. 6.
[47] Ordine e-mail to Newlands dated July 27, 2001, attached at Tab 22.
[48] Cf. *Charter Int'l*, 83 F.3d at 518 n.11 (noting that because EPA is a "repeat player in the world of CERCLA clean-ups," developing "a reputation for cheating early settlors . . . would deter settlements in later clean-ups" and, "in the long run, hurt the government's interests."); *Akzo Coatings*, 30 F.3d at 774 (Easterbrook, J., concurring in part and dissenting in part) ("Having persuaded us to depart from the language of its settlement with *Aigner*, because formal agreements are just 'circumstances' to be weighed on some conceptual scale . . ., the EPA will have a hard time persuading other PRPs that its promises are credible – and a correspondingly hard time obtaining the maximum value in settlement").

Requested Relief

The LWG requests that EPA withdraw the January 4, 2016 letter.

As we have said, the LWG has no interest in delaying work at Portland Harbor. We continue to be open to considering adjustments to the process and schedule, so long as those adjustments neither presume that the LWG is in default under the Consent Order nor require the LWG to waive important contract rights, such as dispute resolution. As EPA moves toward remedy implementation, it is critical for EPA to demonstrate publicly that there are real benefits to PRPs in settling quickly with EPA, rather than forcing EPA to take enforcement action.

We have already spoken with Region 10 leadership about our intent to continue discussing ways we might resolve this matter during the 14 day informal dispute resolution period.

Based upon the discussions the LWG has had with EPA Region 10 to date, it appears that the Region has a settled view about how this dispute should be decided. In particular, the Region appears to be committed, at the highest level, to the view that EPA is justified in taking over the FS and that therefore the Consent Order does not allow for dispute of the final FS content. We note that EPA's website promotes EPA's Conflict Prevention and Resolution Center's (CPRC) Alternative Dispute Resolution (ADR) process as useful both in Superfund matters and in matters with broad implications for the community. EPA's Policy on Alternative Dispute Resolution states that EPA "strongly supports the use of alternative dispute resolution (ADR) to deal with disputes and potential conflicts."[49] The LWG suggests that if this dispute is not resolved during the informal dispute resolution period, the dispute should be referred to a neutral third party for resolution. Given the nature of the dispute and the importance of a successful resolution of these issues to both the selection of a remedy and the future implementation of that remedy, resolution through the CPRC ADR process by a third party not involved in the underlying decisions would have a greater potential to influence stakeholder acceptance of the outcome.

Sincerely,

The Lower Willamette Group

cc:

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Sean Sheldrake, U.S. Environmental Protection Agency, Region 10
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Confederated Tribes and Bands of the Yakama Nation
Confederated Tribes of the Grand Ronde Community of Oregon
Confederated Tribes of Siletz Indians of Oregon

[49] 65 Fed. Reg. 81858, 81859 (December 27, 2000).

Confederated Tribes of the Umatilla Indian Reservation
Confederated Tribes of the Warm Springs Reservation of Oregon
Nez Perce Tribe
Oregon Department of Fish & Wildlife
United States Fish & Wildlife
Oregon Department of Environmental Quality
LWG Legal
LWG Repository