UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC COMPANY, Defendant.	:	Civil Action No. 05-01270 (DNH - RFT)

PLAINTIFF'S MEMORANDUM IN SUPPORT OF
SUBMISSION REQUESTING ENTRY OF CONSENT DECREE

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PLAINTIFF'S MEMORANDUM IN SUPPORT OF
SUBMISSION REQUESTING ENTRY OF CONSENT DECREE

Plaintiff, the United States of America, respectfully provides this Memorandum in Support of Submission Requesting Entry of Consent Decree. The Consent Decree, lodged with this Court on October 6, 2005, simultaneously with the United States' filing of its Complaint in this matter, will resolve certain liabilities of the Defendant General Electric Company ("GE" or "Settling Defendant") to the United States with respect to the Hudson River PCBs Superfund Site ("Site"). The Site extends from the Fenimore Bridge in Hudson Falls to the Battery in New York City, a distance of nearly 200 miles. GE has agreed not to oppose entry of or to challenge any provision of the Decree. Consent Decree, ¶ 137.[1/]

This Consent Decree represents the culmination of more than 25 years of research, study, and action by the United States devoted to the cleanup of one of America's scenic and historic treasures, the Hudson River. For a period of 30 years, the River became heavily contaminated by polychlorinated biphenyls ("PCBs") emanating from GE capacitor plants in Hudson Falls and Fort Edward, New York. The progress toward the goal of the cleanup over this period has not always been swift and the issues surrounding the nature and extent of the remediation have

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[1/] Notice of the Consent Decree was published in the Federal Register on October 13, 2005. 70 Fed. Reg. 59771. The public comment period has ended, and the United States has received approximately 20,000 comments regarding the settlement. The United States received comments from the following: U.S. Rep. Sue W. Kelly; U.S. Reps. Nita Lowey and Maurice D. Hinchey; Eliot Spitzer, Attorney General of the State of New York; Denise M. Sheehan, Commissioner, State of New York Department of Environmental Conservation; Town of Fort Edward (and associated entities); Friends of a Clean Hudson ("FOCH"); and Scenic Hudson, Inc. Copies of these comments are attached as Exhibits ("Ex.") 1 - 7 to this Memorandum. Almost all of the additional comments were in the form of, one page letters, most identical or virtually so, from individual members of the public. We have also attached representative samples of the letters as Ex. 8.

sparked controversy. EPA's own approach to the River has changed over the years, reflecting changes in technology, science and its understanding of the river system and its habitat. In 2002, EPA issued the most significant step forward in the march toward ridding the River of its contamination with PCBs when it determined that the dredging of the River was a necessary step. While GE, and many others, for many years had strongly resisted this approach, it is now in place and EPA remains firmly committed to it.

Now, the parties have succeeded in negotiating the next hugely significant step. The proposed Consent Decree represents *GE's* commitment to the dredging remedy and to the cleanup of the Hudson River. This dedication to the remediation, as memorialized in the body of this Decree, and in the hundreds of pages of technical attachments that will help guide GE's performance of the work and the United States' careful oversight of it, is nothing short of historic. Perhaps above all, the Consent Decree succeeds in assuring that the actual remediation of the River *will* begin. This is a settlement that will provide highly important environmental benefits, will well serve the public interest, and will significantly advance the purposes of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 ("CERCLA"), pursuant to which the Decree was lodged.

After full and fair consideration of the comments, and for the reasons discussed below, the United States has determined that the Consent Decree is reasonable, fair, and consistent with the goals of CERCLA. Accordingly, the United States respectfully requests that this Court enter the Consent Decree so that the long-awaited remediation of the Hudson River may begin.

I. BACKGROUND

A. The Statute

Congress enacted CERCLA in 1980, in response to serious environmental problems posed by improper handling, treatment, and disposal of hazardous substances. See e.g., United States v. Bestfoods, 524 U.S. 51, 55 (1998) ("enacted in response to the serious environmental and health risks posed by industrial pollution"); New York v. Shore Realty Corp., 759 F.2d 1032, 1039-40 (2d Cir.1985). CERCLA provides the United States with a powerful array of tools to promptly clean up sites where hazardous substances have come to be located, including Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), which authorizes the government to respond to releases or threatened releases of hazardous substances into the environment.

The courts have recognized two primary purposes of CERCLA: to provide for efficient responses to releases of hazardous substances and to place the costs for remedying the same on responsible parties. Consolidated Edison Co. of New York v. UGI Utilities, Inc., 423 F.3d 90, 94 (2d Cir. 2005); B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996); see United States v. Charles George Trucking, Inc., 34 F.3d 1081, 1086 (1st Cir.1994) (overarching goals of CERCLA include accountability, desirability of unsullied environment, and prompt response activities). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994). It "provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." Pennsylvania v. Union Gas Co., 491 U.S.

1,7 (1989), overruled on other grounds by, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

CERCLA also created a Hazardous Substance Superfund, known simply as the Superfund, to finance federal response actions undertaken pursuant to Section 104(a) of CERCLA. 26 U.S.C. § 9507. Although CERCLA authorizes cleanup of hazardous waste sites using money provided by the Superfund, the Fund is a limited source and cannot finance cleanup of all of the many hazardous waste sites nationwide. See S. Rep. No. 96-848, 96th Cong., 2d Sess. at 17-18 (1980), reprinted in 1 Sen. Comm. on Env't & Pub. Works, Legislative History of CERCLA 305, 324-25 (1983). Thus, the United States is tasked with seeking to ensure that the limited Superfund monies expended by the federal government in response to a release or threatened release of hazardous substances are recovered through the liability scheme set forth in Section 107 of CERCLA wherever possible. See B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992) (a statutory purpose to hold responsible parties liable for the costs of the cleanup).

Finally, it is well recognized that settlement of CERCLA cases is the approach favored by Congress:

> Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

42 U.S.C. § 9622(a); see Betkoski, 99 F.3d at 514 (statutory purpose of "encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation"); In re Cuyahoga Equip. Corp., 980 F.2d 110, 119 (2d Cir. 1992) (one purpose of CERCLA is to encourage settlements); New York v. Moulds Holding Corp., 196 F. Supp. 2d 210, 214 (N.D.N.Y. 2002)

(same).[2]/

B. The Site and the Settling Defendant

The Hudson River PCBs Site includes a nearly 200 river-mile stretch of the Hudson River in eastern New York State. The Site has traditionally been divided into Upper Hudson River and Lower Hudson River segments based on physical and chemical characteristics such as river hydrology and PCB inventory. The Upper Hudson River portion of the Site extends from the Fenimore Bridge in Hudson Falls to the Federal Dam at Troy, a distance of just over 43 river miles. The Lower Hudson River extends from the Federal Dam to the southern tip of Manhattan at the Battery in New York City.

During an approximate 30-year period ending in 1977, GE used PCBs in its capacitor manufacturing operations at its Hudson Falls and Fort Edward, New York plants, both located along the Upper Hudson. PCB oils were discharged both directly and indirectly from these

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[2]/ To establish liability in a cost recovery action filed under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), the government need only establish that the site at issue is a "facility" (see 42 U.S.C. § 9601(9) ("any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located"); that there was a "release" or "threatened release" of a "hazardous substance" there; that such release or threatened release caused the United States to incur response costs; and that a defendant falls into one of four categories of responsible parties set out in Section 107(a)(1)-(4). Betkoski, 99 F.3d at 514; see Dedham Water Co. v. Cumberland Farms Dairy, Inc., 889 F.2d 1146, 1150 (1st Cir. 1989). These four categories of responsible parties are: (1) the current owner and operator of a facility; (2) the owner or operator at the time a hazardous substance was disposed of at the facility; (3) a person who "arranged for disposal or treatment" of a hazardous substance or who "arranged with a transporter for transport for disposal or treatment" of hazardous substances; and (4) a person who accepted a hazardous substance for transport to a disposal or treatment facility selected by such person. 42 U.S.C. § 9607(a). The standard of liability under Section 107(a) of CERCLA is joint and several among liable parties and strict in that liability is imposed without fault. See e.g., Betkoski, 99 F.3d at 514; United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (strict, joint and several liability); Shore Realty, 759 F.2d at 1042; Moulds Holding Corp., 196 F. Supp. 2d at 214. Liability is also retroactive. United States. v. Alcan Aluminum Corp., 315 F.3d 179, 188-90 (2d Cir. 2003).

plants into the Hudson River.[3]/ Estimates of the total quantity of PCBs discharged directly from the two plants into the river from the 1940s to 1977 are as high as 1,330,000 pounds.

Many of the PCBs discharged to the river adhered to sediments and accumulated with the sediments as they settled in an impounded pool behind the Fort Edward Dam, as well as other depositional areas farther downstream. The removal of the dam in 1973 resulted in a remobilization and downstream distribution of PCBs that had accumulated behind the dam. Historically, the highest PCB sediment concentrations have been detected in the cohesive sediments (fine grained sands, silts and clays) within the Upper Hudson River. River scouring/erosion and other mechanisms have mobilized PCB-contaminated sediments from the extensive cohesive deposits, redepositing them farther downstream all the way to New York Harbor. The preponderance of data indicate that burial of contaminated sediment by cleaner materials is not universally or uniformly occurring. Data also indicate that contaminated sediments continue to serve as the major source of PCBs to the water column and fish within the Upper Hudson River.

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[3]/ EPA has classified PCBs as probable human carcinogens. PCBs are also linked to serious non-cancer adverse health effects based on studies among workers exposed to higher levels of PCBs who developed severe skin rashes, in animals including rhesus monkeys, and in ongoing epidemiological studies of human populations. In 1977, the manufacture and sale of PCBs within the United States were generally prohibited under the Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692. Although commercial uses of PCBs then ceased, PCBs from GE's Fort Edward and Hudson Falls plants continued to contaminate the Hudson River, due partly to releases of PCBs via bedrock fractures from the GE Hudson Falls plant.

C. Environmental History[4]/

Once introduced into a river, PCBs adhere to sediments, with some fraction being carried in the water column. Physical, chemical and biological release mechanisms allow PCBs in the sediment to be available for redistribution and be a source of PCB contamination to the water column and, ultimately, to fish. High levels of PCBs in fish, in turn, pose a risk to human health.[5]/ The sediments of the Upper Hudson River were surveyed by the New York State Department of Environmental Conservation ("NYSDEC") in 1976-1978 and 1984. Areas with average total PCB concentrations of 50 parts per million ("ppm") or greater were identified and are known as the NYSDEC-defined PCB "hot spots." There were 40 such hot spots located in the Upper Hudson. Legal action brought by NYSDEC against GE in 1975 resulted in a $7 million program for the investigation of PCBs and the development of methods to reduce or remove the threat of PCB contamination. In 1976, NYSDEC issued a ban on all fishing in the Upper Hudson River due to the potential risks from consuming PCB-contaminated fish. ROD at 4. A ban on most commercial fishing, including commercial fishing of striped bass, was issued for the Lower Hudson River. Id. Various such restrictions continue to this day. Id.

In 1984, EPA issued a Record of Decision ("1984 ROD") for the Site. 2002 ROD at 5. EPA recognized that PCB contamination in the Upper Hudson River sediments was a problem,

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[4]/ Many of the facts set forth in this section of, and elsewhere in, this Memorandum are taken from the Record of Decision for the Site issued by EPA in 2002 (hereinafter, "2002 ROD" or simply "ROD"). The 2002 ROD is attached to the Consent Decree as Appendix A and, therefore, is not attached as an exhibit to this Memorandum.

[5]/ EPA performed an assessment of risks posed by the PCB-contaminated sediments in the Hudson and determined that exposure by fish, and through fish, to humans, was the primary health concern posed by the PCBs. Direct contact by humans to such sediments, however, was not found to be a concern.

but selected an interim "No Action" remedy for the contaminated sediments there because, in EPA's view at that time, the reliability and effectiveness of remedial technologies available to address the contamination were uncertain, particularly in a fast-moving river system like the Hudson. Moreover, there appeared to be downward trends of PCBs in fish, sediment, and water. (More recent data show that this downward trend has not continued.) The 1984 ROD required only limited work, including evaluation of certain areas of the river and in-place capping, containment and monitoring of exposed sediments ("remnant deposits") in a former impoundment behind the Fort Edward Dam.

In December 1989, EPA announced its decision to initiate a detailed Reassessment Remedial Investigation/Feasibility Study ("RI/FS") of the Site, reconsidering the 1984 ROD's interim no action decision for the sediments. This was prompted by CERCLA's requirement for a five-year review at sites which have undergone remedial activity but where hazardous substances remain, 42 U.S.C. § 9621(c), as well as technical advances in sediment dredging and treatment/destruction technologies and a request by NYSDEC for a re-examination of the 1984 interim no-action decision for the sediments.[6]/ EPA considered a number of remedial alternatives during its investigation (as required by CERCLA and its regulations), including

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[6]/ After the announcement, actions to reduce contamination in the Hudson continued. In 1990, EPA entered into a Consent Decree with GE with respect to the 1984 ROD, pursuant to which GE conducted the in-place capping of certain remnant deposits (i.e., PCB-contaminated sediments exposed after removal of the Fort Edward Dam in 1973). From 1993 to 1995, under NYSDEC jurisdiction, GE removed approximately 45 tons of PCBs from a tunnel near its Hudson Falls Plant. GE also instituted a number of mitigation efforts that have resulted in a decline, but not cessation, of PCBs entering the river through seeps adjacent to the same plant. Also, based on human health concerns, between June and December of 1999, a total of 4,440 tons of contaminated soil were excavated from nine Rogers Island properties and disposed of off-site. Lastly, in January 2000, NYSDEC signed a Record of Decision that called for removal of PCB-contaminated soils and sediments at an old wastewater outfall near Fort Edward. GE currently is conducting remedial activities near the GE Hudson Falls plant and at the Fort Edward plant pursuant to Orders on Consent with NYSDEC to address these PCB sources.

capping, dredging and no-action.

EPA's Proposed Plan for sediment cleanup in the Upper Hudson was released in December 2000 and was made subject to public comment. Thousands of comments were received. Certain groups argued that the proposed dredging remedy would leave too many PCBs in the river. Other parties argued that the dredging remedy was not necessary and would be highly intrusive. GE was particularly vociferous in its opposition to a dredging remedy to remove the PCBs. In addition to launching a well-financed public relations campaign against that solution, it filed voluminous and highly sophisticated comments in opposition to the Proposed Plan. EPA, pursuant to CERCLA regulations, prepared an extensive Responsiveness Summary comprehensively addressing the issues raised by GE and the public.

D. The 2002 Record of Decision

In February 2002, after consideration of the filed comments, EPA issued a second ROD. In the 2002 ROD, EPA identified five general remedial action objectives. These are: (1) reduce the cancer risks and non-cancer health hazards for people eating fish from the Hudson River by reducing the concentration of PCBs in fish; (2) reduce the risks to ecological receptors by reducing the concentration of PCBs in fish; (3) reduce PCB levels in sediments in order to reduce PCB concentrations in river (surface) water; (4) reduce the inventory (mass) of PCBs in sediments that are or may be bioavailable; and (5) minimize the long-term downstream transport of PCBs in the river. ROD at 50-51.

The selected remedy calls for the removal of PCBs to varying levels of cleanup in each of

three Upper Hudson river sections. See Appendix A, Ex. 2.[7]/ The remedy includes the targeted environmental dredging and off-site disposal of PCB-contaminated sediment from the Upper Hudson River and backfilling of dredged areas. In the ROD, EPA estimated that the remedial action will remove approximately 2.65 million cubic yards of PCB-contaminated sediment from the river, containing about 150,000 pounds of total PCBs (approximately 65 per cent of the total PCB mass present in the Upper Hudson River). The ROD also calls for the dredged sediments to be transported to a sediment processing/transfer facility for dewatering and, as needed, stabilization, before being taken to an appropriate licensed off-site landfill for disposal. At the time of the ROD, the total present-worth cost of the selected remedy was estimated to be $460 million. It is now expected to cost more. The size and scope of this project is generally considered to be virtually unprecedented under CERCLA.

Several of the features of the 2002 ROD were added by EPA in response to comments received during the public comment period prior to the issuance of the ROD. Some, such as the decision to develop "engineering performance standards" and "quality of life performance standards" were adopted primarily to address concerns of the public, including local residents.[8]/ Others, however, at least to an extent, reflected an appreciation of the complexity of the remedy.

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[7]/ Specifically, the ROD calls for removal of sediments based primarily on a mass per unit area ("MPA") of 3 g/m^2 Tri+ PCBs or greater from River Section 1, an MPA of 10 g/m^2 Tri+ PCBs or greater from River Section 2, and removal of selected sediments with high concentrations of PCBs and high erosional potential from River Section 3. The ROD addresses active remediation of the sediments only in the Upper Hudson River.

[8]/ The quality of life standards address light, noise, odor, traffic and navigational concerns. The engineering performance standards were developed to ensure that the dredging of the Hudson River is done safely and on schedule. They regulate three aspects of the dredging: dredging-related resuspension of sediments from the river bottom, residual levels of PCBs after dredging occurs, and the productivity of the dredging work. These three engineering performance standards will be used to ensure that the cleanup meets the human health and environmental protection objectives of the ROD. ROD at iii, 95.

Of particular relevance here, EPA determined in the 2002 ROD that the remedy should be divided into two phases: Phase 1 would constitute only a portion of the total dredging (about 10%) and would be followed by an independent, external peer review of a written report that will evaluate the Phase 1 dredging with respect to the Engineering Performance Standards. ROD at iii, 95.[9]/ Performance of Phase 2 would follow, pursuant to the performance standards, as modified (if at all) by EPA for Phase 2. As will be seen below, the phased approach to remedy performance established in the ROD is highly relevant to the structure of many of the provisions of the proposed Consent Decree.

E. Post-ROD, Pre-Consent Decree Agreements

The parties entered into two agreements prior to the proposed Consent Decree. First, in July, 2002, GE and EPA entered into an Administrative Order on Consent ("AOC") concerning sediment sampling work in the Upper Hudson. Pursuant to this agreement (and the 2003 AOC discussed below), GE collected approximately 50,000 samples from the Upper Hudson, and sections of the river have been mapped by GE using side-scan sonar and other approaches. Data from the sampling and mapping program have been and will be used to target and refine the location of dredging of PCB-contaminated sediment. GE also agreed to pay $5 million in partial reimbursement of the United States' past costs in connection with the Site, and to reimburse up to $2.625 million of future costs incurred by EPA in overseeing GE's sampling work.

Second, in August, 2003, GE and EPA entered into an AOC regarding the Remedial Design ("RD") for the ROD remedy. Under the agreement, GE is developing detailed

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[9]/ Significantly, the peer reviewers will *not* consider whether Phase 2 should be carried out. See Consent Decree, ¶ 14.d. ("nor will the Peer Review panel evaluate whether Phase 2 should be implemented"). All decisions regarding recommendations made by the panel will be made by EPA.

approaches to removing sediment from the river bottom, transporting and disposing of the material, and replacing the habitat in dredged areas. The RD AOC includes work plans for the design of the dredging work, baseline monitoring, cultural and archeological resources assessment, and habitat delineation and assessment. The agreement also requires development of a Community Health and Safety Plan to help ensure that the project design work is performed in a manner that is safe for local communities. The design work that has been and will be performed by GE includes evaluating sediment sampling data from the Upper Hudson; providing design-related information to EPA to help ensure that the selected site(s) for the sediment processing/transport facility are suitable for the project; determining locations for the disposal of the dredged and dewatered sediments; developing engineering and other information needed to select which areas of sediment will be removed during Phase 1 and Phase 2 of the dredging project; developing all remedial design documents; and designing an effective monitoring program that meets the objectives of the engineering performance standards developed by EPA. Work under the RD AOC is currently ongoing.

Under the RD AOC, GE paid EPA an additional $15 million in partial reimbursement of the government's past costs for the Site. In addition, the company agreed to reimburse the Agency up to $13 million in costs associated with EPA's performance of work for which the Agency has lead responsibility - such as community relations activities and determining the location(s) of the dewatering facilities - as well as costs that will be incurred in the oversight of GE's design work. All told, GE has paid to EPA under the two AOCs a total of $35.625 million, $20 million of which is attributable to reimbursement of the United States' past costs.

II. TERMS OF THE CONSENT DECREE

Under the proposed Consent Decree, GE will, in summary: (a) implement Phase 1 of the remedy selected in the ROD, and may elect to implement Phase 2, in which case Phase 2 will be performed pursuant to the terms of the Consent Decree; (b) pay up to $43,000,000 of EPA's past response costs and expected future costs in connection with, inter alia, Phase 1 and the subsequent evaluation period; (c) if it elects to perform Phase 2, pay up to an additional $32,500,000 of EPA's response costs in connection with the rest of the remedy, and also pay up to $2.5 million in connection with EPA's performance of the first two CERCLA five-year reviews following the date of certification of completion of the remedial action and EPA's oversight of operation, maintenance and monitoring ("OM&M") activities.[10]/ Thus, GE's commitment under this Consent Decree represents a major recovery by the United States in the form of both reimbursement of costs and work.

This section of this Memorandum describes for the Court's convenience some of the major provisions of the proposed Decree. In Section III of this Memorandum, some of these terms are discussed again in the context of responding to public comments concerning the Decree.

A. Reimbursement of Response Costs

The Consent Decree requires GE to pay up to a total of $78 million for the government's

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[10]/ The Consent Decree, at Paragraph 64, also obligates GE to reimburse EPA for certain other costs, referred to as "Non-Capped Phase 1 Costs," and, if GE elects to perform Phase 2 under the Consent Decree, "Non-Capped Phase 2 Costs," as those terms are defined in Paragraph 4 of the Consent Decree.

past and future costs at the Site.[11]/ The $78 million in payments are broken down as follows:

Within thirty days of the effective date of the Consent Decree, GE will pay $26 million toward EPA's unreimbursed past response costs for the Site (which at the time of the negotiations, totaled approximately $30 million), plus interest from the date of lodging of the Consent Decree through the date of payment. ¶ 61. GE will also reimburse up to $17 million of EPA's Phase 1 response costs. ¶ 62. If GE opts in for Phase 2, it will also pay for EPA's Phase 2 response costs (which consist primarily of the costs to be incurred by EPA in overseeing GE's implementation of Phase 2) up to a maximum of $32.5 million. ¶ 63.[12]/

Finally, if GE opts in for Phase 2 it will also pay EPA up to $2.5 million for costs incurred by EPA in conducting the first two five-year reviews (required by CERCLA) following the date of certification of completion of the remedial action and in overseeing GE's performance of OM&M up to the date of completion of the second five-year review. The Consent Decree reserves EPA's rights to bring a separate action against GE seeking recovery of, inter alia, the Agency's costs in performing later five-year reviews and in overseeing GE's performance of OM&M during that time.[13]/

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[11]/ This is *in addition to* the $37 million GE has already paid pursuant to the 2002 and 2003 AOCs and earlier settlements and it also does not include the "non-capped costs" referenced in footnote 10, supra.

[12]/ GE would pay 100% of such costs up to $25 million and then 75% of any additional costs up to $35 million. ¶¶ 63.a., b.

[13]/ Although the State of New York is not a party to the Consent Decree, the settlement will also require GE to pay the State $3 million to support the State's implementation of fish advisories and fishing restrictions on the Hudson, as well as a further payment of $1 million for such efforts if GE opts in for Phase 2.

B. Performance of Work

As discussed above, EPA's ROD calls for the remedial action to be divided into two "phases." Phase 1 is the first construction season of dredging and will initially be implemented at less than full scale operation. Areas to be dredged during Phase 1 have been recommended by GE pursuant to the RD AOC, and after some changes, have been accepted by EPA. Extensive monitoring will be conducted during this phase. Phase 2 is the remainder of the dredging project. (The precise areas to be dredged in Phase 2 are not yet determined, but will be based upon sampling results and design considerations.) The ROD provides that results from Phase 1 will be compared to the engineering performance standards, and adjustments may be made to the dredging operation or the performance standards for Phase 2. The ROD also provides that data generated during the project will be used to evaluate "whether [the remedy] is achieving its human health and environmental protection objectives." See, e.g., ROD at iii. The experience and information gained during Phase 1 of the dredging will be made available to the public and will also be considered during the peer review. This peer review will evaluate how well the project met the engineering performance standards during Phase 1, to assist EPA in deciding if adjustments need to be made prior to the second phase of dredging.[14]/

Under the Consent Decree GE commits to construct a sediment processing facility and

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[14]/ As noted, the State is currently working with GE on a project at the GE capacitor plant in Hudson Falls to stop and collect the final PCB seeps or leaks coming out of the bedrock there. Next year GE will install large tunnels under the Hudson River to capture PCBs slowly seeping up into the river from the bedrock. The State has also nearly completed a cleanup of highly contaminated soil near an old wastewater outfall below GE's still-operating Fort Edward plant. The Consent Decree acknowledges that the State is addressing source control at GE's Hudson Falls and Fort Edward plants. ¶ 9. EPA, however, retains its rights to take action regarding those plants should it deem it necessary. The Consent Decree does not give GE a covenant not to sue with respect to those plants since the Decree, and the ROD, concern only the River and its sediments.

perform Phase 1 of the dredging, pursuant to design documents prepared under the 2003 RD AOC, and consistent with the Statement of Work ("SOW") and other technical attachments to the Decree. The Decree also allows GE the option of "opting in" to perform Phase 2, after the performance of Phase 1, the completion of the peer review, and EPA's notification to GE of changes, if any, to the engineering performance standards, Phase 1 Quality of Life Standards, the SOW, and/or the scope of Phase 2. ¶ 15.c.

To help ensure that there is no delay in the transition between Phase 1 and Phase 2, the Consent Decree requires GE to spend up to $5,000,000 prior to its Phase 2 opt-in deadline "to undertake those activities necessary to efficiently prepare for the remobilization of contractors and equipment that will be needed to undertake Phase 2." ¶ 16.[15]/ If GE opts in for Phase 2, it will perform Phase 2 under the Consent Decree.[16]/ If GE opts out of Phase 2, EPA's rights are reserved to issue a unilateral administrative order to, and/or seek judicial injunctive relief against, GE requiring it to implement Phase 2.

C. Covenants and Reservations of Rights

The breadth of the covenant not to sue that GE will receive under the Consent Decree will depend on whether it opts in to perform Phase 2 of the remedy. If GE only performs the Phase 1 remedy under the Consent Decree, it will receive a covenant for Past Response Costs, Phase 1 RA Response Costs, and Non-Capped Phase 1 Costs (as those terms are defined in Paragraph 4 of the Consent Decree) (¶ 98.b), and "for the performance of, or payment for, additional response

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[15]/ This provision is important in order for the dredging operations to continue with as little delay as possible after the post-Phase 1 evaluation process has been completed.

[16]/ Indeed, the United States insisted on entering into a Consent Decree which would cover both Phase 1 and potential Phase 2 activities in order to avoid delay in negotiating a separate Phase 2 decree.

actions in connection with the specific locations in the Upper Hudson River *that are dredged* in Phase 1 of the Remedial Action." ¶ 98.c. (emphasis added). If GE opts in for Phase 2, it will also receive a covenant not to sue for Phase 2 RA Response Costs, Non-Capped Phase 2 Costs and Post-Phase 2 Costs (¶ 99.b., as defined in ¶ 4), and "administrative or judicial injunctive-type relief with respect to PCB contamination in the Upper Hudson River, or for reimbursement of response costs in connection with the Upper Hudson River." ¶ 98.f. Thus, GE will only receive the more complete covenant if it agrees to perform Phase 2.

The covenant not to sue is subject to several rights reserved by the United States. ¶ 104. For example, the United States reserves its rights with respect to any GE criminal liability and for any GE failure to meet a requirement of the Consent Decree. In addition, the United States reserves its rights as to GE's liability for: (a) Phase 2, if GE does not opt in under the Consent Decree; (b) the Lower Hudson River; and (c) response actions to address contamination in the Hudson River flood plain (except to the extent that such response actions are part of the work under the Consent Decree). *Id.* The Consent Decree also fully reserves the United States' rights with respect to GE's "liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments." ¶ 104.f.[17]/ Finally, the

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[17]/ One commenter urges that the Decree should "allow for additional habitat restoration efforts to be part of the Natural Resource Damages Claim." Scenic Hudson at 11. Under Section 107 of CERCLA, the trustees for natural resources may bring an action to recover "damages for injury to, destruction of, or loss of natural resources" (42 U.S.C. § 9607(a)(4)(c)). Both federal and state Trustees are involved in discussions concerning claims for natural resource damages at the Site. Paragraph 104(f) of the Consent Decree specifically reserves "liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments." Thus, claims for habitat restoration, as well as all other aspects of the Trustees' natural resource damage claims remain unaffected by the terms of the Consent Decree.

Consent Decree includes "reopeners,"which preserve EPA's rights against GE in the event that new information comes to light and EPA determines that the work performed or to be performed is not protective of human health or the environment. Consent Decree ¶¶ 100-102.

D. Peer Review

The ROD mandates that EPA conduct an independent peer review after the performance of Phase 1 of the remedy, primarily in order to examine the engineering performance standards. Under the Decree, following completion of Phase 1 dredging, EPA and GE will each prepare a Phase 1 Evaluation Report that will, inter alia, evaluate the Phase 1 dredging relative to the engineering performance standards and propose changes to those standards, if appropriate. ¶ 13. The reports will be submitted to an independent peer review panel. The Consent Decree specifies various aspects of the peer review process, including topics to be considered by the peer review panel (¶ 14.b.); the method of selection of panel members (¶ 14.c.); the opportunity for GE to have input in the drafting of the final charge questions for peer review (¶ 14.e.); the fact that EPA is the final preparer of the charge questions (¶ 14.e.); and an opportunity for GE to make presentations to the peer review panel. ¶ 14.h. The Consent Decree explicitly states that the "Peer Review panel will *not* evaluate whether the Remedial Action will, or may, achieve the human health and/or environmental objectives of the ROD, nor will the Peer Review panel evaluate whether Phase 2 should be implemented." ¶ 14.d. (Emphasis added). Rather, the panel will consider such questions as whether the experience in Phase 1 shows that the engineering performance standards can consistently be met or need to be changed for Phase 2. ¶ 14.b.[18]/

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[18]/ If GE opts in for Phase 2, the proposed Consent Decree contains a provision which will allow GE, after it has completed at least two construction seasons of Phase 2 dredging, to request that EPA perform an evaluation of, "whether, in light of the experience gained from Settling Defendant's undertaking of the

E. Stipulated Penalties

The Decree provides for severe stipulated penalties for violations of the Consent Decree. The penalties are tied to types of violations and the length of the violation. Amounts for the more significant violations range from $2,500 to $10,000 per day of violation, depending on duration. ¶ 88.a. Amounts for the less severe violations range from $1,250 to $5,000 per day. ¶ 89.a. The Decree also provides significant work takeover penalties. Thus, if EPA assumes performance of all or a portion of Phase 1, GE is required to pay a $1 million penalty. ¶ 90.a. If GE opts in to perform Phase 2, and then EPA assumes performance of Phase 2, GE shall be liable for a penalty of $1 million per year for each remaining year of Phase 2, up to a maximum of $6 million. ¶ 90.b.

III. ARGUMENT

A court should enter a CERCLA consent decree if the decree "is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990) (quoting House Report on the Superfund Amendments and Reauthorization Act of 1986, H.R. Rep. No. 253, Part 3, 99th Cong. 1st Sess. 19 (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042); see In re Cuyahoga Equipment Corp., 980 F.2d at 118; United States v. DiBiase, 45 F.3d 541, 543 (1st Cir. 1995); Charles George Trucking, 34 F.3d at 1084-85; 55 Motor Avenue Co. v. Liberty Industrial Finishing Corp., 332 F.

Work and any data gathered in connection with the Work and associated analysis of such data, the project is making reasonable progress toward achieving its human health and environmental protection objectives, as set forth in the ROD." ¶ 21.a. GE may make more than one such request, but EPA is only obliged to conduct an evaluation in response to the first one. ¶ 21.d. Neither EPA's substantive conclusions nor its decision as to whether to conduct additional evaluations are subject to dispute resolution or judicial review. ¶¶ 21.a.; 21.d.

Supp. 2d 525, 529-530 (E.D.N.Y. 2004).

Members of the public have submitted comments opposing entry of the Consent Decree. The primary arguments put forth against the Consent Decree are that it does not, in and of itself, require GE to complete the entire remedy; that in some respects it is inconsistent with the remedy chosen by EPA in the Record of Decision; and that it does not assure that the River will be fully cleansed of PCBs.

As discussed more fully below, these arguments, and others raised by the commenters in an effort to derail the settlement, are without merit. Although, like any settlement, it is a compromise, the Consent Decree is the result of a vigorous negotiation, provides massive benefit, and is without question consistent with the statutory purposes of CERCLA. Pursuant to its terms, GE will commence performance of the remedy, and will have significant incentives to agree to perform the entire remedy. Indeed, EPA anticipates that GE will perform Phase 2 of the remedy; but if GE does not do so, the United States retains the authority to undertake the work itself and seek cost recovery from GE, or to order the company to complete the work. In either case, EPA intends that the River will be remediated as directed in the Record of Decision. Perhaps most important, the Decree insures that the dredging will commence in a timely fashion and avoids the hugely complex and time-consuming litigation which this massive project might otherwise engender. The Decree is a triumph for the environment and for the public. As this Consent Decree meets the standard governing this Court's review, it should be entered by the Court.

A. <u>This Court's Standard of Review is Deferential</u>

The standard to be applied by this Court in reviewing this Consent Decree is laden with

judicial deference generally accorded to CERCLA consent decrees. Charles George, 34 F.3d at 1085; Cannons, 899 F.2d at 84. This approach, employed, for example, by the Second Circuit in Cuyahoga, is founded upon the general public policy, and the particular CERCLA policy, favoring settlements, and the expertise of the government agencies that negotiate such decrees.

Courts accord substantial deference to settlement agreements in general because public policy strongly favors settlements of disputes without litigation. Gambale v. Deutsche Bank AG, 377 F.3d 133, 143 (2d Cir. 2004); United States v. Hooker Chemicals & Plastics Corp., 776 F.2d 410, 411 (2d Cir. 1985); Patterson v. Newspaper and Mail Deliverer' Union, 514 F.2d 767, 771 (2d Cir. 1975); Agway, Inc. Employees' 401(k) Thrift Investment Plan v. Magnuson, 409 F. Supp. 2d 136, 140-42 (N.D.N.Y. 2005); see In Re: Tamoxifen Citrate Antitrust Litigation, 429 F.3d 370, 386 (2d Cir. 2005); United States v. Glens Falls Newspapers, Inc., 160 F.3d 853, 856-57 (2d Cir. 1998). 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).

The Second Circuit stressed this point in Cuyahoga: "Appellate courts ordinarily defer to the agency's expertise and the voluntary agreement of the parties in proposing the settlement." 980 F.2d at 118 (citations omitted). This view in Cuyahoga echoes the Second Circuit's earlier statement, in Hooker Chemicals, 776 F.2d at 411, with respect to an environmental consent decree:

> Bearing in mind the well-established policy of encouraging settlements, and the fact that the instant settlement has the approval of the government agencies charged with the enforcement of the environmental protections statutes, we have no hesitation in affirming.

(Citations omitted). Moreover, the law favoring settlements "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." Cannons, 899 F.2d at 84 (citation omitted). And, the policy favoring settlement "is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of [EPA]." United States v. Cannons Engineering Corp., 720 F. Supp. 1027, 1035 (D.Mass. 1989), aff'd, 899 F.2d 79 (1st Cir. 1990); see United States v. City of New York, 30 F. Supp. 2d. 325, 331 (E.D.N.Y. 1998).

The Second Circuit emphasized this point very recently:

> [T]he Act specifically asks that the government enter into CERCLA settlements 'in order to expedite effective remedial actions and minimize litigation.' § 9622(a). Courts considering CERCLA cases have recognized that the usual federal policy favoring settlements is even stronger in the CERCLA context.

Betkoski, 99 F.3d at 527 (citations omitted). See United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1436 (6th Cir. 1991); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (the balancing of interests "must be left, in the first instance, to the discretion of the Attorney General"); United States v. Rohm & Haas Co., 721 F. Supp. 666, 685 (D. N.J. 1989) ("Respect for the litigants, especially the United States, requires the court to play a much more constrained role"); City of New York v. Exxon Corp., 697 F. Supp. 677, 692-93 (S.D.N.Y. 1988).

Thus, the function of a reviewing court is not to substitute its judgment for that of the parties to the decree, but to assure itself that the terms of the decree are fair and adequate and are not unlawful, unreasonable, or against public policy. Cannons, 899 F.2d at 84 (the standard "is not whether the settlement is one which the court itself might have fashioned, or considers as

ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute"); Liberty Industrial, 332 F. Supp. 2d at 530-31; United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982), aff'd, 749 F.2d 968 (2d Cir. 1984). Also, a court does not have the power to modify a settlement; it may only accept or reject the terms to which the parties have agreed. Akzo Coatings, 949 F.2d at 1435; Officers for Justice v. Civil Service Commission, 688 F.2d 615, 630 (9th Cir. 1982); Patterson, 514 F.2d at 772.

The instant Consent Decree presents no reason for this Court to diverge from this well established standard of review.

B. The Consent Decree Is Reasonable

As noted earlier, a court should enter a CERCLA consent decree if the decree "is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." Cannons, 899 F.2d at 85; Cuyahoga Equipment, 980 F.2d at 118; Liberty Industrial, 332 F. Supp. 2d at 529-530.[19]/ Consideration of three primary factors is appropriate in determining whether a CERCLA settlement is "reasonable": the technical adequacy of the work to be performed; whether the decree satisfactorily compensates the public for response costs; and the risks and delays inherent in litigation. Cannons, 899 F.2d at 89-90. The Decree is certainly reasonable under these necessarily intertwined considerations.

1. The Work to be Performed is Technically Adequate

Commenters make numerous arguments which properly fall under the rubric of

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[19]/ In the remainder of this Memorandum, these criteria shall be employed to form the organizational structure for the United States' responses to the filed public comments. These responses shall serve to demonstrate that the Consent Decree satisfies the judicial standards for entry.

challenges to the "technical adequacy" of the work to be performed pursuant to the Consent Decree. Those technical comments involve, inter alia, issues attendant to dredging near shorelines, restoring habitats, and peer review provisions. Each of these comment areas, and others, is addressed in a highly detailed and comprehensive fashion in the Declaration and Responses of EPA To Technical Comments, prepared by EPA, which is attached as Appendix A to this Memorandum.

By way of only brief summary, the first primary objection voiced by commenters is that EPA has made certain decisions with respect to the design of the remedy (which become part of the settlement) that will result in more PCB inventory left in the River sediments than was contemplated in the ROD. The areas most affected by this alleged result are the "near shore" areas, that is, along the banks of the River. EPA strongly believes that its approach will not leave a significant additional amount of PCB inventory in the sediments. It notes that the amount of PCB mass now expected to be removed from River Section 1 is almost twice as much as the ROD estimate, and it emphasizes that it is free to later change its approach if the Phase 1 experience shows that changes are needed. See App. A, Part B.

Commenters also voice concern that subaquatic vegetation ("SAV") and associated habitats affected by the dredging will not be adequately restored. As EPA's responses to the comments demonstrate, however, the remedy is designed such that GE will place more backfill in the dredged areas than was discussed in the ROD, to help in the restoration of SAV. Moreover, the remedy requirements should assure that there is a similar acreage of dredged river within the "photic zone" as existed in these areas prior to the project. See App. A, Part D.

Finally, several commenters raise questions about the process for peer review of the

engineering performance standards which is to occur subsequent to Phase 1 of the dredging. In particular, the comments focus on the extent of the participation of GE in that process. EPA's responses demonstrate no deviation from the ROD in this participation and set forth the agency's view that GE, as the party performing Phase 1 of the remedy, will likely contribute to the usefulness of the peer review. See App. A, Part C.

EPA's responses make clear that the Consent Decree comports with the remedy described in the ROD and that EPA remains entirely committed to the remedial goals set forth in the ROD. Moreover, and very significantly, if remedial issues come to light that have not been anticipated by EPA or that threaten the remedial goals, the Consent Decree includes several provisions under which EPA can require modifications to the Statement of Work (Att. B to the Consent Decree) or to the approved design documents in order to fully ensure the effectiveness of the remedy.[20]/

It is also clear that the Agency now has the benefit of post-ROD data which will permit it

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[20]/ One such provision is Paragraph 15.b., under which, after the peer review of the Phase 1 dredging and before GE is required to notify EPA as to whether it will implement Phase 2, EPA can unilaterally require changes to the Statement of Work ("SOW"). The Decree does not restrict the kinds of changes that EPA can require under this Paragraph. For example, EPA could require changes to the approach to dredging in near-shore areas if EPA determines that such changes are needed for Phase 2. In addition, under Paragraph 20 of the Consent Decree, EPA can require changes to the SOW, or to the work plans developed pursuant to the SOW, if EPA determines that such changes are needed in order to achieve and maintain, among other things, the engineering performance standards or to carry out and maintain the effectiveness of the remedial action, subject to certain limitations. Paragraph 20 is in addition to, and does not limit, the changes that EPA can require to the SOW under Paragraph 15.b., nor does it limit any rights EPA has under the terms of the SOW itself to require changes to be made to the SOW, or to the work plans developed under the SOW. Moreover, if GE agrees to perform Phase 2 under the Consent Decree, the SOW requires GE to submit, on an annual basis during Phase 2, changes that are needed to the approved Phase 2 design documents in order to ensure compliance with the Phase 2 performance standards in the upcoming dredge season (subject to the applicable limitations on such changes as set forth in Paragraph 20). Finally, the Consent Decree includes standard reopener provisions that would allow the United States to institute new proceedings against GE seeking to compel it to perform further response actions if EPA obtains new information indicating that the remedial action is not protective of human health or the environment. ¶¶ 100, 101.

to direct GE's performance of the remedy such that the remedy is performed effectively and efficiently while respecting the riverine habitat. In short, the approach now memorialized in the Consent Decree (and the accompanying technical documents) is cognizant of the governing engineering and quality of life standards, and EPA believes that nothing in the approach will serve to compromise the remedy's ability to meet the remedial action objectives of the ROD.[21]/ EPA's responses to the technical comments demonstrate that the remedial work to be performed pursuant to the Consent Decree comports with the ROD and will effectively address the PCB-contaminated sediments of the Upper Hudson River.

2. The Consent Decree Satisfactorily Compensates the Public for Response Costs

The comments are largely silent with respect to the amount of the response costs recovered by the United States in this Consent Decree. This is understandable. As set forth above (see Part II.A of this Memorandum), based on cash payments alone, the Consent Decree results in a recovery of the large majority of the United States' past and expected future costs. In addition, if GE opts in to perform Phase 2 of the remedy, and together with EPA's previous settlements with GE regarding the Site, GE will have agreed to make payments and finance work with a combined value estimated at over $600 million. This is a massive and extraordinary

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[21]/ It is simply and unequivocally wrong to suggest, as have some commenters, that insufficient amounts of hazardous materials will be removed from the River. See Appendix A, passim. But, at the same time, it is well to keep in mind that the ROD does not (and could not) contemplate the removal of *all* PCBs from the Upper Hudson River, but instead focused on removing sediments from the most contaminated areas. The Consent Decree provides rules of operation for the design team and balances the governing standards, while achieving the objectives of the ROD. EPA will continue to assess this approach as the design proceeds during Phase 1, and will ensure that its approach continues to meet the remedial objectives during Phase 2.

recovery, bringing about highly significant environmental and human health benefits.[22]/

3. The Consent Decree Properly Accounts for the Risks and Delays Inherent in Litigation

Several commenters (NYSAG at 2; Scenic Hudson at 2; FOCH at 3) make one argument which relates at least tangentially to the third element of the reasonableness inquiry, "the risks and delays inherent in litigation." They argue that the United States and GE should withdraw the Consent Decree and engage in a one month renegotiation to address certain alleged deficiencies in the Decree. The commenters' proposal is untenable. First, it is not clear what would happen during this negotiation period. The parties already engaged in intense negotiations for approximately one year. Negotiations necessarily involve compromises. The proposed Consent Decree is the settlement that resulted from that negotiation. The flawed premises of the proposal are that the United States did not attempt during the negotiations to maximize its negotiating leverage and that GE would now simply agree to proposed changes that it earlier rejected. That is, the comment apparently assumes that an ideal (or at least allegedly improved) Consent Decree was available, that the United States did not seek to obtain it, and could do so now. It also possibly assumes that something which would alter the negotiating landscape has occurred since the conclusion of the negotiations. None of this is true.

Second, in assessing this comment, particularly in the context of the Hudson River

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[22]/ One commenter focuses on a very narrow subset of this general issue – arguing that the United States fails to account for interest to which it is "entitled." (FOCH at 8). The United States agrees that CERCLA provides for the recovery of interest. 42 U.S.C. § 9607(a). Accordingly, its demands upon GE for reimbursement included a claim for accrued interest. The amount which EPA will recover under the Decree, as set forth above, reflects a compromise attributable to the normal, honest arms-length give and take of negotiations, not to any decision to forego a claim for interest. The comment provides no basis for rejecting the Decree.

remediation, it is important to keep in mind a point that has been recognized time and again by the courts, namely that it is proper *and desirable*, when negotiating settlements, for the United States to consider that "it may take time and money to collect damages or to implement private remedial measures through litigatory success." Cannons, 899 F.2d at 90; see Betkoski, 99 F.3d at 527 ("the Act specifically asks that the government enter into CERCLA settlements 'in order to expedite effective remedial actions and minimize litigation.'"); Cuyahoga, 980 F.2d at 119; Dedham Water Co. v. Cumberland Farm Dairy, Inc., 805 F.2d 1074, 1082 (1st Cir. 1986) ("early resolution of [CERCLA] disputes is a desirable objective"); Arizona v. Motorola, Inc., 139 F.R.D. 141, 149-50 & n.10 (D. Ariz. 1991); United States v. McGraw-Edison Co., 718 F. Supp. 154, 159 (W.D.N.Y. 1989); City of New York, 697 F. Supp. at 693 (benefit of immediate payment to environmental cleanup effort); Hooker Chemicals, 540 F. Supp. at 1080. Possibly the single most important benefit of this Consent Decree is that GE will be *in the River dredging in a timely fashion*. For reasons relating to public benefit, it is important that the remedial work begin soon.[23]/ *No other viable method exists in EPA's arsenal to assure that result within the*

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[23]/ For this reason of potential delay, among others, the comment (FOCH at 2) that the Decree must not be finalized until key components of the Intermediate Design Report ("IDR") are revised, is flawed. The comment is also off the mark because the IDR pertains to the *design* of the remedy, and it was submitted by GE pursuant to the 2003 RD AOC. GE also will submit the Phase 1 Final Design Report pursuant to the RD AOC. The comment is thus concerned with perceived deficiencies in GE's proposed design of the remedy rather than with the content of the Consent Decree itself. Such comments on the IDR, along with EPA's own comments on it (which in turn included comments submitted by the State, federal natural resource trustees, and the public), are being addressed pursuant to the separate process established in the RD AOC, not the Consent Decree. Awaiting revision of the IDR would not only delay entry of the Consent Decree but is also beyond the scope and purpose of this Consent Decree public comment period. Finalization of the Decree does not need to await the revision of the IDR or finalization of the Phase 1 Final Design Report. As a final note, and as a substantive matter, there is no reason to believe that the Phase 1 design will be violative of the ROD or "arbitrary and capricious" in any event. On November 1, 2005, EPA provided GE with over 200 separate comments on the IDR. As a result of EPA's comments, many items in the IDR were modified, as reflected in the Phase 1 Final Design Report that was submitted by GE on March 21, 2006 and that is now undergoing EPA review.

same time frame.[24]/

This timing issue is of no small consequence. A renegotiation period, even if somehow limited to one month and (as the commenters assume) ultimately "successful," would add not one month, but many, to the pre-entry phase of this matter. For example, after this hypothetical "new" Consent Decree were lodged, another public comment period would be required, and another period for analysis and response to comments. 42 U.S.C. § 9622(d)(2). Thus, the proposed renegotiation would be inconsistent with the recognized statutory goals of reaching prompt settlements and expeditiously obtaining either funds to finance, or the performance of, cleanups. 42 U.S.C. § 9622(a); Betkoski, 99 F.3d at 514 ("encouraging settlements that reduce the inefficient expenditure of public funds on lengthy litigation" (citation omitted)). And, of course, there is no guarantee that such renegotiation would be "successful."

Accordingly, by avoiding a lengthy trial and a protracted collection effort the United States' actions here plainly promote CERCLA's remedial purposes. EPA's primary goal was to begin the dredging process in a timely manner so as to maximize the benefits of the remedy. Litigation of the remedy would have directly undercut that goal. Settlement brings it to fruition. A renegotiation period is not appropriate.

C. The Consent Decree is "Fair"

Fairness of a CERCLA settlement involves both procedural fairness and substantive

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[24]/ While EPA could issue GE an order requiring it to perform the remedy, GE could, admittedly at the risk of penalty, refuse to comply with the order. Litigation to enforce the order would almost certainly be lengthy and cause delay.

fairness. Cannons, 899 F.2d at 86-89. This Consent Decree satisfies both prongs of the test.

1. The Settlement is Procedurally Fair

Courts evaluate procedural fairness by considering the openness, candor, and balance of the negotiating process. Cannons, 899 F.2d at 86-88. The court in Liberty Industrial enumerated as the relevant factors that should guide a court's analysis of this issue, "whether negotiation was adversarial and conducted at arms length; whether the counsel was skilled; [and] whether extensive formal discovery or other information-sharing procedures provided the parties with adequate information." 332 F. Supp. 2d at 530. See In re Tutu Water Wells, 326 F.3d 201, 208-09 (3d Cir.), cert. denied, Gal v. Plaskett, 540 U.S. 984 (2003) (quoting Cannons, supra) ("Respect for the agency's role is heightened in a situation where the cards have been dealt face up and a crew of sophisticated players, with sharply conflicting interests, sit at the table."); City of New York, 697 F. Supp. at 692-93 (consider whether settlement entered into in good faith, product of arms-length negotiations, and whether the parties had sufficient factual record).[25]/

Few of the comments received relate to the procedural fairness of this Decree. Nevertheless, two of the comments could be construed as addressing this subject. Specifically, Friends of a Clean Hudson "urge[s] the Attorney General to take a hard look at the negotiation process to gauge its candor, openness, and bargaining balance" (FOCH at 2), and also comments that the Consent Decree was not "negotiated in good faith" (FOCH at 9). We address these comments below.

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[25]/ See Rohm & Haas, 721 F. Supp. at 681 ("where a settlement is the product of informed, arms-length bargaining by the EPA, an agency with the technical expertise and the statutory mandate to enforce the nation's environmental protection laws, in conjunction with the Department of Justice . . . a presumption of validity attaches to that agreement.") (emphasis added)); Hooker Chemicals, 540 F. Supp. at 1080.

a. There is No Need for the Attorney General to Review the Negotiation Process

FOCH does not make explicit its reasons for proposing that the Attorney General conduct an assessment of the candor, openness and balance factors that courts have considered in the procedural fairness context.[26]/ It is clear, however, that there is no need for such a review.

First, it is difficult to imagine parties having more "adequate information" entering into a negotiation -- the administrative record in this case stretches to 111 volumes and the parties have been investigating, researching, studying, modeling, and considering the Hudson River cleanup for more than two decades. Second, EPA and the Department of Justice, on the one hand, and GE, on the other, conducted an intense negotiation of the Consent Decree over the course of roughly one year. As this was a matter of great public interest, senior government officials were kept informed of the progress of negotiations and, at times, directly participated in them. At GE, as the negotiations involved literally hundreds of millions of dollars, decisions were cleared at the highest levels of the corporation. Both parties brought sophisticated and highly experienced attorneys and technical experts into the negotiations. The product of these efforts were civil, but undeniably highly adversarial negotiations.

This Consent Decree, therefore, easily meets all of the standards of procedural fairness set forth by the courts. In any event, it is neither appropriate, necessary, nor sensible for the Attorney General to review the negotiation process. The Attorney General's authority with respect to the approval has been delegated to the Associate Attorney General in this particular

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[26]/ The case cited by FOCH (Comment at 2, fn. 4), Plaskett v. Esso Standard Oil S.A. (In re Tutu Water Wells CERCLA Litig.), 326 F.3d 201, 206-210 (3d Cir. 2003), nowhere hints that a court should require reevaluation of the negotiation process by the Attorney General. It is evidently cited by FOCH simply in support of the general approach to the procedural fairness inquiry described in the text.

case. 28 C.F.R. §§ 0.160, 0.161. The Associate Attorney General, other Department of Justice officials, as well as management at EPA Region 2 and EPA Headquarters, approved the Consent Decree, and by implication, evaluated its procedural fairness, *prior to* its lodging with this Court. Therefore, no purpose would be served by Attorney General review of the negotiation process.

b. The Consent Decree Was Negotiated in Good Faith

These same factors also render FOCH's second comment in this field, that the Decree was not negotiated in good faith, unsupportable.[27]/ The description above of the participants in the negotiation, their experience, their access to relevant information, the adversary setting, and the high stakes of this matter, all serve to demonstrate that the negotiation of this Consent Decree was carried out in good faith.

FOCH's comment regarding the good faith of the parties has another aspect as well. It suggests that the Consent Decree "demonstrates a complete lack of good faith" (FOCH at 7) because the United States did not insist that GE dismiss a pending lawsuit and because GE did not voluntarily dismiss that case. See also Comment of Lowey and Hinchey. The comment is without merit.[28]/

In 2000, GE brought a case challenging the constitutionality of the unilateral administrative order provisions of CERCLA Section 106 as a violation of due process of law.

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[27]/ It is therefore not surprising, but nevertheless worth noting, that FOCH supplies absolutely no factual support for its assertion regarding the absence of good faith negotiations.

[28]/ Even the premise of the comment is flawed. It is simply not true that if GE is successful in the lawsuit and also decides not to perform Phase 2 under the Consent Decree, EPA would be "without the means" to complete the remedy. FOCH at 8. The comment overlooks the provisions of section 106(a) of CERCLA, which grants to the United States the authority to seek injunctive relief, here in the form of performance of Phase 2, to abate an endangerment to "the public health or welfare or the environment."

General Electric Co. v. Johnson, Civ. A. No. 00-2855 (JDB) (D.D.C.). The district court originally dismissed the claims for lack of subject matter jurisdiction, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded. 360 F.3d 188 (D.C. Cir. 2004). On remand, the district court ruled in favor of EPA as to GE's facial challenge to CERCLA Section 106, but GE's additional claim, alleging a "pattern and practice" challenge to EPA's use of the CERCLA Section 106 unilateral administrative order provision, remains to be resolved. See General Electric Co. v. Johnson, 362 F. Supp. 2d 327 (D.D.C. 2005).

Thus, GE's lawsuit is a challenge to EPA's nationwide administration of only one part of the CERCLA program, i.e., the issuance of unilateral administrative orders under CERCLA Section 106. It is *not* a lawsuit about the Hudson River PCBs Superfund Site or any other specific site. Indeed, EPA has not issued a unilateral administrative order with respect to the ROD remedy here. Further, in its overall administration of CERCLA, the United States does not usually require, as part of the settlement of one lawsuit involving one or more sites, that a settling defendant make concessions in other, ongoing lawsuits; and certainly not where, as here, the other lawsuit involves a constitutional claim related to the administration of a part of the CERCLA program not at issue in the instant matter.

So, too, is the commenter misguided in arguing that the United States has diverged from its prior practice here by *not* requiring such a waiver. First, FOCH states that "nearly every other CERCLA settlement has contained a waiver of constitutional objections." FOCH at 8. FOCH is correct that EPA's settlements usually contain such a waiver, but so does this Decree. In Paragraph 107.c. of the Decree, GE covenants not to assert "any claims arising out of response actions *at or in connection with the Site*, including any claim under the United States

Constitution. . . ." (Emphasis added). This is language taken directly from the Model Consent Decree utilized by the United States for settlements of this nature. See http://www.epa.gov/compliance/resources/policies/cleanup/superfund/mod-rdra-cd.pdf, at 43. The language of the Decree is in no manner at odds with the guidance cited in footnote 33 of the FOCH comment. The quoted language directs that decrees resolve claims "related to the site." This Decree accomplishes precisely that because, as noted, GE's constitutional challenge is directed at the pattern and practice of EPA's use of its administrative order authority at sites across the country. Thus, the Decree is consistent with prior practice.

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In sum, the Consent Decree plainly satisfies the courts' established criteria for procedural fairness.

2. The Settlement is Substantively Fair

The Consent Decree also is substantively fair. The "substantive fairness" inquiry that guides a court's approach to CERCLA consent decrees is based on consideration of the equity of the settlement in relation to the risks of litigation and in some measure in relation to comparative fault and other pertinent factors. Thus, as stated by the court in Cannons, 899 F.2d at 87:

> Whatever formula or scheme EPA advances for measuring comparative fault and allocating liability should be upheld so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs. Put in slightly different terms, the chosen measure of comparative fault should be upheld unless it is arbitrary, capricious, and devoid of a rational basis.

(Citations omitted). See DiBiase, 45 F.3d at 544-46; Charles George Trucking, 34 F.3d at 1087-

89.[29]/

It is by now well established that the court's inquiry into the *substantive* fairness of a consent decree should be highly influenced by a conclusion that the negotiation of the decree satisfied the *procedural* fairness factors outlined in the text. Cannons, 899 F.2d at 87, n. 4 ("[t]o the extent that the process was fair and full of 'adversarial rigor,' the results come before the court with a much greater assurance of substantive fairness.") (citations omitted); Liberty Industrial, 332 F. Supp. 2d at 530. (same).

As no commenter has challenged the substantive fairness of the Decree, and as the Decree clearly satisfies this hurdle, this Court need not be long detained in its consideration.

D. The Consent Decree Is Consistent With CERCLA's Goals and in the Public Interest

The fairness and reasonableness inquiries discussed above are largely congruent with the consideration of whether a settlement is faithful to the statutory scheme. Cannons, 899 F.2d at 90-91. Here, commenters have alleged that the Consent Decree is "arbitrary and capricious" (FOCH at 9), that it will not achieve the goals of the remedy (Scenic Hudson at 1), and other similar broadsides. These comments widely miss the mark. The United States believes that this Consent Decree is the most efficacious vehicle to assure that the remedy is implemented

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[29]/ As this quotation from Cannons makes clear, the approach, as narrowly defined, is not wholly suited to the inquiry here, where there is only one settling party, rather than a group of parties, each of which is apportioned a part of the total liability at a site. Although there are perhaps other parties that have, over the course of the last 50 years, released PCBs into the Hudson River, it is essentially not disputed that GE is responsible for the vast majority of the PCB contamination in the Upper Hudson River. Thus, it is not sensible to argue, and no commenter does so, that the Consent Decree does not satisfy the requirements of substantive fairness, at least as that term is used in the "comparative fault" context. To the extent that it is used more broadly, see e.g. Akzo Coatings, 949 F.2d at 1435 ("[p]rotection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate") (emphasis added), we address such concerns elsewhere in this Memorandum.

promptly and properly. It is consonant with the goals of a vigorous environmental stewardship and with the public interest.

1. GE's Commitment Only to Performance of Phase 1 Does Not Undercut EPA's Chosen Remedy

As noted above, many commenters expressed the position that the Consent Decree should require GE to perform both Phase 1 and Phase 2, that is, that there should be no "opt-in" provision providing GE the opportunity not to perform Phase 2 of the remedy under the Decree. The commenters variously argue that this provision is inconsistent with the ROD, will not protect the public interest, and will leave PCBs in the River.

It is initially important to emphasize that EPA has clear authority to divide the remedy into two (or more) phases. For example, the National Contingency Plan ("NCP"), at 40 C.F.R. § 300.5, contemplates that a remedial action may be approached as separable operable units.[30]/ Second, it is important to emphasize that the decision to carry out the remedy in phases (with the attendant post-Phase 1 peer review regarding the performance standards to govern Phase 2) was set forth in the 2002 Record of Decision for the Site (see ROD at 95) and is *not* a new concept that was introduced in this Consent Decree. To the contrary, because of the terms of the ROD, it was necessary that the Consent Decree incorporate the phased structure into its terms. That structure profoundly influenced the course of the negotiations.

It is, nevertheless, fair to say that the phased approach in the ROD, with the chance that

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[30]/ On many occasions, EPA has reached settlements with responsible parties which only require the performance of less than all of the operable units at a site. See e.g., Model RD/RA Consent Decree (May, 2001) at 42 (recommending use "where appropriate" of reservation of "liability for additional operable units at the Site"). And, in other cases, EPA has used various of its tools, for example, both settlements and unilateral administrative orders at one site to obtain full performance of the remedy.

the performance standards governing the remedy can change at some point during performance, is unusual. This feature of the ROD created an unusual negotiation dynamic. A party that agrees to perform a remedy usually knows, at least generally, the cost and extent of the work that it will be required to perform. Here, however, the areas to be dredged in Phase 2 have not yet been precisely defined (EPA is reviewing GE's Dredge Area Delineation Report for Phase 2; once that report is revised, to the extent needed, and approved by EPA, it will define the extent of Phase 2 dredging). Thus the volume of sediment to be dredged in Phase 2, which is the bulk of the remedy, is not yet known, and thus the cost of the Phase 2 work is also not yet known. In addition, following the Phase 1 peer review, EPA may determine that changes are needed to the performance standards, the SOW, and/or the scope of Phase 2, and those changes may have a significant impact on the cost of Phase 2. Thus, at the time of the Consent Decree negotiations with GE (and indeed, to this day), there were and are uncertainties about the details of the dredging project, and those details could have a sizable impact on the project costs. Consequently, GE was not willing to commit up front in the Consent Decree to the performance of Phase 2 of the remedy. At the same time, the United States' goal has been to have one Consent Decree control the entire remediation, primarily to avoid the necessity of negotiating a second time for the performance of Phase 2, with the likelihood of attendant delays.[31]/

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[31]/ As stated supra, to help ensure that there is no delay in transition between Phase 1 and Phase 2, the Consent Decree requires GE to spend up to $5,000,000 prior to its Phase 2 opt-in deadline "to undertake those activities necessary to efficiently prepare for the remobilization of contractors and equipment that will be needed to undertake Phase 2." ¶ 16. In addition, it is important to note that the sediment processing/transfer facility that GE will build as part of the Phase 1 activities, will continue to be available during the performance of Phase 2. The same concern about delay undercuts the usefulness of one of the other comments (NYSDEC at 1-2), namely that the Consent Decree should include clear criteria for GE to follow in making the determination of whether it would perform Phase 2 – criteria subject to what would be tantamount to a second peer review. This suggestion is problematic for two

Thus, the opt-in provision represented a compromise in the negotiations. That compromise, however, is neither inconsistent with the ROD nor does it threaten the public interest. The inconsistency point is easily disposed of. The ROD sets forth the proposed remedy for the Site. While it is true that GE has not agreed in the Decree to perform that entire remedy, there is no reason to think, based on the Consent Decree, that the remedy as set forth in the ROD will not be performed. Thus, there is no "inconsistency." As has been often stated, EPA is committed to both phases of the remedy.

The argument that the Consent Decree is not consistent with the public interest is equally flawed, for reasons that flow from the same point. Specifically, if GE does not "opt-in," EPA remains free to issue GE a unilateral administrative order ("UAO") or seek injunctive relief to require performance of Phase 2.[32]/ The United States' authority to do so is found in Section 106 of CERCLA, 42 U.S.C. § 9606(a), which provides in pertinent part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect

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major reasons. First, it would be exceedingly difficult for the parties, at this time, to negotiate the criteria which would govern this determination. Recall that the ROD called for the peer review to occur *after* Phase 1 precisely because the adjustment of the performance standards would at that time be informed by the Phase 1 experience. So, too, presumably, would the criteria that GE would apply to its decision as to whether to perform Phase 2. Second, the convening, educating, and decision-making by the commenter's proposed "impartial technical review board" would take a great deal of time and could delay the start of Phase 2.

[32]/ EPA could also use funds available in the Superfund to perform the remedy itself.

public health and welfare and the environment.

The Consent Decree explicitly reserves to EPA this authority. ¶ 104.j.[33]/

Moreover, because of these retained powers, the very existence of the Consent Decree provides an incentive for GE to perform Phase 2 of the remedy pursuant to the terms of the Decree. This is because GE would obtain the benefit of various negotiated Consent Decree provisions, such as covenants not to sue, dispute resolution, and cost caps, for its performance of Phase 2. If, in contrast, it received a unilateral administrative order from EPA requiring GE to perform Phase 2, such provisions would not be included in the terms of the order which, by its nature, would be "unilaterally" drafted and issued by EPA. And failure to comply with the order would subject the company to significant penalties.

Therefore, the "opt-in" provision has no real bearing on whether Phase 2 of the remedy will be performed. This is the critical point. Accordingly, contrary to the argument of the commenters, the provisions of the Consent Decree which permit GE to opt not to perform Phase 2 do *not* threaten the completion of the remedy. In short, EPA is committed to the timely completion of the *complete* remedy. The Consent Decree in no way undermines that commitment; it is wholly consistent with the ROD. Indeed, it is the most efficient way of getting the remedy begun.

2. The Opt-in Provisions Violate No Policy Regarding Covenants

One commenter urges that the Consent Decree violates EPA and DOJ policy by virtue of "resolving [ ] liability" without obtaining the performance of the "entire remedial project."

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[33]/ As discussed at greater length in Part II.C., supra, unless it performs Phase 2 under the Consent Decree, GE will not receive a covenant not to sue for the ROD remedy.

NYSAG Memorandum at 1-2. As an initial matter, the EPA Guidance cited by NYSAG, "Negotiation and Enforcement Strategies to Achieve Timely Settlement and Implementation of Remedial Design/Remedial Action at Superfund Sites," does not actually enunciate the firm principle attributed to it.[34]/ Rather, it states that obtaining performance of the "entire remedy" is something that "should" be required in "the vast majority of settlements." Id. at 10. But even if the Guidance were categorical, it is important to reemphasize that, as discussed above, the Consent Decree will not serve to "resolve" GE's "liability" unless GE does, in fact, perform the entire remedy. If GE does not opt in, it receives no covenant for Phase 2 and EPA is free to issue GE a UAO or do the work itself and file a CERCLA Section 107 action to recover its response costs.

3. It is Appropriate to Exclude Certain Costs From the Phase 1 Non-Capped Costs Definition

One commenter (FOCH at 8), by means of a question, seems to suggest that the Consent Decree definition of the term "Non-Capped Phase 1 Costs" (¶ 4) should include costs that EPA may incur for enforcement of the Decree, dispute resolution, emergency response, and the acquisition of real property interests.[35]/

The answer to the comment is fairly straightforward. First, the commenter is mistaken in suggesting that the Consent Decree's definition of "Non-Capped Phase 1 Costs" excludes costs

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[34]/ The use of the Guidance is, in any event, discretionary. Id. at 11.

[35]/ The definition is: "'Non-Capped Phase 1 Costs' shall mean all direct and indirect costs, not inconsistent with the NCP, that EPA, or the U.S. Department of Justice on behalf of EPA, incurs (1) to enforce this Consent Decree prior to the Phase 2 Election Date; and (2) to enforce any surviving obligations Settling Defendant has under the Consent Decree in the event that Settling Defendant notifies EPA pursuant to subparagraph 15.c. below, that Settling Defendant will not implement Phase 2 of the Remedial Action pursuant to this Consent Decree."

that EPA incurs to enforce the Decree. See footnote 35, supra. Second, while it is true that costs that EPA incurs in engaging in any dispute resolution process during Phase 1, or in taking actions during Phase 1 pursuant to the Decree's Emergency Response section (Section XV), or in acquiring property interests prior to or during Phase 1, are not included within the definition of "Non-Capped Phase 1 Costs," while those types of costs are included in the Consent Decree's definition of "Non-Capped Phase 2 Costs," that was simply a modest compromise that was part of the ordinary give-and-take during the Consent Decree negotiations. It in no way affects the reasonableness of the Consent Decree.

Third, these dispute resolution, emergency response, and property acquisition costs are purely theoretical; such costs may never be incurred. Fourth, and on the other hand, if they *are* incurred, the Consent Decree does not foreclose their recovery by EPA; whether they are recovered only depends on whether these costs, in combination with other Phase 1 RA Response Costs, reach the amount of the cap. Finally, if such costs are incurred, they would pale in comparison with the tens of millions of dollars that GE is already committed to reimburse EPA under the Consent Decree, as discussed in Section II.A. above, not to mention the even greater sum that GE will incur in performing the remedy.

4. The Stipulated Penalties are Adequate

Several commenters (see Scenic Hudson at 9; FOCH at 9) objected to the Consent Decree because no stipulated penalty is imposed upon GE if the company decides not to perform Phase 2 of the remedy. The simple answer to this comment is that the Decree does not require GE to perform Phase 2 if it does not opt to do so and, therefore, not performing Phase 2 is not a violation of the Decree. Accordingly, there is no stipulated penalty provision for GE's decision

not to perform Phase 2. It follows that the absence of a stipulated penalty is in no manner violative of the cited "Guidance on the Use of Stipulated Penalties in EPA Settlement Agreements." (1987).[36]/ While it is correct that the Guidance seeks to impose "economic incentives" through the use of stipulated penalties, as the commenter recognizes, those incentives are to "ensure compliance." As stated, failure to opt to perform Phase 2 is not, under this Decree, *non*-compliance.

The comment, however, may be directed at a slightly different point, that is, that in the view of the commenters, GE should be penalized for making the decision not to perform Phase 2, that is, it should be incentivized to choose to perform. The United States agrees that there should be incentives for GE to perform Phase 2, but believes that the Consent Decree provides such incentives in its current form. Although the Decree does not require a cash payment if GE does not opt in for Phase 2, it does contain other equally important incentives. Perhaps the strongest is that GE is aware that EPA would likely issue to it a unilateral administrative order to perform the work if it does not opt in. See 42 U.S.C. § 9606(a) (EPA may issue "such orders as may be necessary to protect public health and welfare and the environment"). Under such an order, GE would not obtain the benefits of several negotiated provisions of the Consent Decree that are highly significant. Primary among these are the dispute resolution provisions, which give GE an opportunity to challenge decisions by EPA (Section XIX), and the caps imposed on various EPA response costs that will have to be reimbursed by GE (Section XVI). Also, if GE refused to comply with the order, it would be subject to penalties, and punitive damages based on the amount expended by EPA to perform Phase 2, if it chose to do so. 42 U.S.C. §§ 9606(b),

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[36]/ Again, the use of the Guidance is in any event discretionary. Id. at 12.

9607(c)(3). In addition, GE is no doubt aware that if it chose not to perform Phase 2 and, if EPA then itself undertook Phase 2 and (through a section 107 cost recovery action) EPA sought to impose those costs upon GE, the costs would most likely be higher. Thus, while it cannot be denied that the imposition of an additional stipulated penalty based on a decision not to perform Phase 2 would perhaps serve as an additional incentive to perform for GE, in no way can the Consent Decree be viewed as deficient by virtue of not containing such a penalty.

An additional variation on the stipulated penalty comments is that the stipulated penalties in the Consent Decree are too low. The United States believes that the Decree provides for rather severe stipulated penalties for violations of the Consent Decree. The penalties are tied to types of violations and the length of the violation. Amounts for the more significant violations range from $2,500 to $10,000 per day of violation, depending on duration. ¶ 88.a. Amounts for the less severe violations range from $1,250 to $5,000 per day. ¶ 89.a. Clearly, lengthy violations of the Decree could lead to perhaps millions of dollars in stipulated penalties. The Decree also provides significant work takeover penalties. If EPA assumes performance of all or a portion of Phase 1, GE is required to pay a $1 million penalty. ¶ 90.a. If GE opts in to perform Phase 2, and then EPA needs to assume performance of Phase 2, GE shall be liable for a penalty of $1 million per year for each remaining year of Phase 2, up to a maximum of $6 million. ¶ 90.b.[37]/

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[37]/ FOCH also complains that the Consent Decree does not follow the Model Department of Justice provisions regarding stipulated penalties used in CERCLA settlements. FOCH, however, fails to explain the manner in which it claims the Decree departs from the Model provisions in that regard. It is true that the phased approach to the remedy necessitated some change to Model stipulated penalty provisions, but the proposed Decree does not undercut any Department of Justice or EPA policies. In any event, as the commenter points out, the Model Consent Decree may be changed to suit site-specific circumstances. See Model RD/RA Consent Decree (May, 2001) at 1 ("This model and any internal procedures adopted for its implementation and use are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to

5. The Decree Properly Waives Local Permitting Requirements

One comment relates to the consistency of the Consent Decree with the local permit waiver provisions of CERCLA and, thus, should be addressed here, in the context of the Decree's consistency with CERCLA. The Town of Fort Edward ("Town")[38]/ argues that the sediment processing/transfer facility ("Facility") that is to be constructed as part of the remedy will not be located sufficiently close to the Site to justify the provision in the Consent Decree which purports to waive permit requirements. The Town argues that this Consent Decree provision will have the effect of depriving it of the right to exercise its police power and local zoning jurisdiction over the Facility. The Town's argument is not persuasive.

By way of background, the Record of Decision calls for materials dredged from the Hudson River to be taken to a processing facility where the materials will be dewatered and then loaded onto rail cars for transport to the ultimate disposal site. The decision regarding where to locate the Facility was made after a lengthy and careful administrative process which involved the initial comparison of a number of possible locations and several opportunities for public comment. The process began shortly after the ROD was signed.[39]/ The purpose of the process was to identify locations that met the requirements of a sediment processing/transfer facility, that

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create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this model or its internal implementing procedures"). The phased nature of the remedy here, as set forth in the ROD, is rare, justifying the United States' approach.

[38]/ The Town's comments are filed on behalf of the Town, the Village of Fort Edward, the Washington/Saratoga/Warren/Hamilton/Essex Board of Cooperative Educational Services, the Fort Edward Union Free School District, the Hudson Falls Central School District, and the County of Washington.

[39]/ The process and the substantive issues considered by EPA are described in detail in EPA's 441 page Facility Siting Report (December, 2004). The Executive Summary of the document, from which the text herein draws heavily, is attached hereto as Ex. 9.

is, that could be used to transfer sediment from the river to a processing area, dewater the sediment, treat the water, and transfer the sediment to rail or barge for off-site disposal.

In December, 2002, EPA issued the "Hudson River PCBs Superfund Site Facility Siting Concept Document," which identified the critical future milestones in the decision-making process. Among these were developing the Engineering Criteria and the Siting Criteria,[40]/ implementing community involvement activities, identifying and evaluating preliminary candidate sites ("PCSs"), and conducting site-specific field investigations. By June, 2003, EPA had identified 24 PCSs. These were then evaluated through a process that included site visits, evaluation of data concerning such factors of proximity of residences, and consideration of rail facility issues. The number of possible sites was thereby reduced to seven Final Candidate Sites. Further evaluation brought the number of possible sites to five, and finally, based on detailed analysis of the suitability of the sites, with particular reference to the amount of useable acreage, rail yard suitability, waterfront suitability, environmental conditions, road access, and proximity to dredge areas, to only three. Thereafter, in April, 2004, EPA released for a 90 day public comment period the "Draft Facility Siting Report." After this administrative process, including evaluation of the comments received, the decision was made to locate the Facility near Fort Edward, located along the Champlain Canal, approximately 1.4 miles from the River.[41]/ See Ex. 9 at 17.

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[40]/ These included such criteria as the presence of sensitive or cultural resources, land uses, presence of rare ecological communities or endangered species, ease of property acquisition, wetlands, and geology.

[41]/ In light of the existence of this record, the Town's statement that "neither the Decree nor the administrative record contain any explanation of why the [Facility] must of necessity be located along an uncontaminated section of the Champlain Canal," Comment at 7, is misleading. The Report has long been available to the public.

The paragraph of the Consent Decree to which the Town objects is Paragraph 8(a), which provides, in pertinent part:

> As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP [National Contingency Plan], no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). The Sediment Processing/Transfer Facility(ies) shall be considered on-site for purposes of the CERCLA Section 121(e) permit exemption.

The legal provisions relevant to the Town's comment, therefore, are Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and Section 300.400(e) of the NCP. The former provides that

> "[n]o Federal, State or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section."

The relevant phrase "onsite" is not defined in CERCLA itself, but has been defined in the governing regulations, the NCP, as follows:

> The term 'on-site' means the areal extent of contamination and all suitable areas in very close proximity to the contamination necessary for implementation of the response action."

40 C.F.R. § 300.400(e). These statutory and regulatory provisions, then, serve to narrowly define the issue here, that is, whether the Facility is located "on-site" within the intent of the regulations.

This issue was the subject of consideration when EPA promulgated the revised NCP containing the present definition. At that time, one public commenter on the proposed language argued that the term "on-site" be limited to the geographic area of the "contiguous area having the same legal ownership as the actual site of the release." That commenter feared that the more expansive definition would enable EPA to "unjustifiably usurp state permit laws." EPA rejected this approach:

> EPA disagrees with those commenters who assert that the definition of 'on-site' in the rule is unnecessarily broad. For practical reasons . . . on-site remedial actions may, of necessity, involve limited areas of noncontaminated land; for instance, an on-site treatment plant may need to be located above the plume or simply outside the waste area itself. EPA does not believe that including in the definition of on-site those areas 'in very close proximity to the contamination' and 'necessary for implementation of the response,' is beyond the intent of Congress, or that it would allow the permit exemption in section 121(e)(1) to be used for activities that are that fundamentally different in nature from conventional on-site actions.

55 Fed. Reg. 8666, 8689 (March 8, 1990).[42]/

This policy was accurately stated, and endorsed, by the court in State of Ohio v. EPA, 997 F.2d 1520 (D.C. Cir. 1993), the very case cited by the commenter:

> CERCLA provides for an overarching framework within which the federal Government, states, and PRPs can respond to hazardous waste releases. The statutory scheme is meant to transcend artificial geographical and legal distinctions in order to facilitate remedial action. [citations omitted] The petitioning States ignore this fundamental statutory premise, and rest their definition of "onsite" on precisely the artificial constraints that the statute meant to reject. . . . The NCP definition allows EPA to respond to releases expeditiously and, one would hope, efficaciously. It is a definition that reflects the practical aspects of responding to hazardous waste releases under various conditions.

Id. at 1549. Thus, the D.C. Circuit got it just right by saying that *in this context*, the phrase "on-site" needs to be defined by EPA with the needs and the practicalities of the remedy as determinative.[43]/

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[42]/ Although groundwater contamination is not at issue here, the following additional EPA comment demonstrates the regulatory understanding that "on-site" should be broadly construed: "Defining on-site as the area having the same legal ownership as the primary contaminated area may not be useful when a ground-water plume has traveled *a considerable distance* away from the source of contamination. As the preamble to the proposed rule noted, such a definition may artificially constrain a remedy because the exemption would be defined in terms of a property line rather than the contamination." 55 Fed. Reg. at 8690 (emphasis added).

[43]/ The New York State cases cited by the commenter in its footnote 5 shed no light whatsoever on the issue. Each was a case involving whether an allegedly injured party had standing to challenge a zoning enactment, an inquiry requiring a determination of whether the complaining party would "suffer direct harm different from that of the public at large. . ." as a result of the disputed enactment. McGrath v.

With respect to the Hudson River, as the long and extraordinarily thorough administrative process demonstrates, it was precisely EPA's attempt to maximize remedial efficiency and efficacy, that resulted in the choice of the location. As stated by the Agency,

> The RD Team evaluations considered the relative benefits of the Selected Sites compared with the eliminated sites and the relative ease or difficulty of meeting the engineering and quality of life performance standards. . . . The relative impact of each of the many interdependent factors (such as rail access, topography, local traffic issues, and sensitive and cultural resources) on the safe and efficient design, construction, and operation of a sediment processing/transfer facility has been considered. The RD Team has also incorporated information regarding the logistics of the transportation methods and routes for moving material reliably and cost-effectively to disposal locations.

Facility Siting Report, Executive Summary (December, 2004), at 3. After its exhaustive study, including detailed consideration of all the enumerated factors, EPA chose the Fort Edward site, which is located along the Champlain Canal, which flows into the Hudson. Under these circumstances, 1.4 miles is within the close proximity to the Site required for permit waiver under the regulatory framework, especially when one considers that the Upper Hudson River portion of the 200 mile site is itself 43 miles long. To hold otherwise would be to undercut precisely the rationale employed by EPA in choosing the terminology that it did in the governing

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Town Board of Town of North Greenbush, 254 A.D. 2d 614, 615, 678 N.Y.S.2d 834, 836 (3d Dept. 1998). In each of the cited cases, ruling on dismissals below, the court found that, accepting the allegations of the challengers' adverse impact to be true, the noted distances were in sufficiently close proximity to allow the case to go forward. The cases do not stand for the proposition that "close proximity" could never be *more than* "500 - 1700 feet," even in the narrow context of assessing standing in zoning controversies. They certainly do not begin to purport to define the term "close proximity" for any and all contexts. Indeed, if anything, the cited cases all stand for the highly sensible proposition that a phrase such as "close proximity" cannot be defined, certainly for legal purposes at least, *apart from* its context. (Thus, for example, an astronomer might say that Earth is in "very close proximity" to Mars.) The cases reflect an understanding of this contextual approach. Cf. Doubleday Broadcasting Co. v. F.C.C., 655 F.2d 417 (D.C. Cir. 1981) (reversing FCC's denial of request for conformance of local radio stations (requiring that served communities be "adjoining") in light of prior agency decisions allowing conformance for stations in communities 2.5 miles apart and more than 10 miles apart).

regulations.

6. There is No Requirement that the Consent Decree Provide Compensation for Local Communities

Two commenters suggest generally that the Consent Decree should somehow compensate local communities. FOCH at 9; Town at 3. The rationale for this desire is variously stated as compensation for "the cost of economic impacts . . . of such an incomplete clean-up" or for "its environmental and social suffering." Neither commenter makes any pretense of stating that such compensation is required by law or regulation, and indeed the Town correctly notes both that "EPA may lack direct authority to address these disturbances with economic compensation programs, as part of its CERCLA responsibility" and that "EPA is attempting to work with us to secure whatever public funding is available in efforts to ameliorate some of the effects of the dredging project." Town at 4.

EPA in fact does not have authority under CERCLA to provide funding of the type sought by the Town to local communities in connection with site remediations. Nor does CERCLA itself provide any basis for EPA to bargain away potential benefits to the Superfund in order to devote funds (or to direct a settling defendant to devote funds that would otherwise go to EPA) obtained in settlement negotiations to local communities. The short answer to the comments, therefore, is that the absence of the desired community benefits is no reason for this Court to withhold approval of the Consent Decree.[44]/

Having said that, however, it is worth pointing out that the local communities are

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[44]/ In analyzing the fairness of the Consent Decree, the interests of non-settlers are not preeminent. See Akzo Coatings, 949 F.2d at 1435 ("The effect on non-settlers should be considered, but is not determinative in the court's evaluation.")(quoting Cannons).

obtaining significant benefits as a direct result of the Consent Decree. The performance of the remedy should itself comprise a huge benefit to the local communities in the Hudson region, in the form of a cleaner River, with all the recreational opportunities as well as symbolic value that entails, particularly in the long run. EPA also expects the remedy to generate significant economic benefits for local communities. Indeed, an economic analysis performed by EPA and included in the Responsiveness Summary (Part 3 of the ROD) projected that the remedy would generate approximately $576 million in additional economic output for the region, $126 million in additional earnings, and more than 500 jobs per year over the years of the dredging operation. Ex. 10 at 1. ROD White Paper – Socioeconomics. In the short run, EPA devoted huge resources, at the remedy selection stage, in the development of the Quality of Life Performance Standards after the ROD, and now in the oversight of GE's design efforts to assure that the "quality of life" standards are part of the remedial action. These performance standards, which govern such local concerns as noise, odor, and lighting, have been incorporated into the Consent Decree in order to address the concerns of the local communities and because of EPA's responsiveness to their articulated concerns. Compliance with those standards will, of course, impose monetary burdens on both EPA and GE which, admittedly, do not flow directly to the communities, but are nevertheless very much to their benefit.

The Court should also not lose sight of the fact that GE, in order to further benefit local communities, has recently publicized, through its web-site and the press, an effort to solicit services and materials for the project from local businesses. See e.g. The Times Union (Albany, NY) (February 15, 2006) (Exhibit 11).

* * * *

This settlement satisfies the "consistent with CERCLA" prong of the inquiry here because it requires a responsible party to contribute huge sums to the reimbursement of the United States' response costs at the Site and because it puts in place the structure for the prompt performance of a remedy of unprecedented scope. The proposed Consent Decree is, therefore, utterly faithful to the statutory scheme.

CONCLUSION

For the reasons stated, the settlement is reasonable, fair, consistent with CERCLA, and in the public interest. Accordingly, this Court should grant the request of the United States and enter the Consent Decree.

Respectfully submitted,

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EXHIBIT LIST

Exhibit 1	Comment of U.S. Rep. Sue W. Kelly
Exhibit 2	Comment of U.S. Reps. Nita Lowey and Maurice D. Hinchey
Exhibit 3	Comment of Eliot Spitzer, Attorney General of the State of New York
Exhibit 4	Comment of Denise M. Sheehan, Commissioner, State of NewYork Department of Environmental Conservation
Exhibit 5	Comment of Town of Fort Edward (and associated entities)
Exhibit 6	Comment of Friends of a Clean Hudson
Exhibit 7	Comment of Scenic Hudson, Inc.
Exhibit 8	Representative samples of letter Comments
Exhibit 9	Executive Summary, Facility Siting Report (December, 2004)
Exhibit 10	ROD White Paper – Socioeconomics, Page 1.
Exhibit 11	The Times Union (Albany, NY) (February 15, 2006)