

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
) Civil Action No. 1:10-cv-11263-NG
v.)
)
BIM INVESTMENT CORPORATION,)
SHAFFER REALTY NOMINEE TRUST,)
TYCO HEALTHCARE GROUP LP, and)
W.R. GRACE & CO.-CONN.,)
)
Defendants.)
_____)

**MEMORANDUM IN SUPPORT OF UNITED STATES’
MOTION TO ENTER CONSENT DECREE**

Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), submits this memorandum in support of its Motion to Enter Consent Decree (“Memorandum in Support”). The United States respectfully requests that the Court enter the proposed Consent Decree (“Decree,” or “CD”) between the United States and the four Defendants in this action – BIM Investment Corporation (“BIM”), Shaffer Realty Nominee Trust (“Shaffer Trust”), Tyco Healthcare Group LP (“Tyco Healthcare”), and W.R. Grace & Co.-Conn. (“Grace”) (collectively, “Settling Defendants”) – as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

On July 28, 2010, the United States lodged with the Court a proposed Decree to resolve the United States’ claims against the Settling Defendants under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* (“CERCLA”), with respect to the Blackburn & Union Privileges Superfund Site in Walpole,

Massachusetts (the “Site”). In accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2); 28 C.F.R. § 50.7; and Paragraph 113 of the Decree, the United States published notice of lodging of the Decree in the Federal Register and invited the public to comment on the Decree for a period of 30 days from August 3, 2010. *See* 75 Fed. Reg. 45,666 (Aug. 3, 2010). Two comments were submitted concerning the Decree.

As described below, after careful consideration of the comments received, the United States maintains that the Decree is fair, reasonable, and faithful to the objectives of CERCLA.¹

BACKGROUND

A. The CERCLA Enforcement Program

CERCLA was enacted to address the growing problem of inactive hazardous waste sites and hazardous waste releases across the United States. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1080 (1st Cir. 1986); *Eagle-Picher Indus. Inc. v. U.S. Env'tl. Protection Agency*, 759 F.2d 922, 925 (D.C. Cir. 1985). CERCLA empowers the federal government and the states with broad authority to clean up hazardous waste sites.

B. The Blackburn & Union Privileges Site

The Site comprises approximately 22 acres in Walpole, Massachusetts, encompassing the areal extent of contamination resulting from the operations of industrial facilities formerly located on both the east and west side of South Street. Complaint ¶ 8. The Neponset River runs through the Site. EPA Region 1, Record of Decision, Blackburn and Union Privileges Superfund

¹ Because Grace has filed for protection under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (“Bankruptcy Court”), Grace has sought, and obtained, the Bankruptcy Court’s authorization to enter into this Decree. Order Authorizing Entry Into a Consent Decree With the United States Regarding the Blackburn and Union Privileges Superfund Site – Walpole, MA., *In re W.R. Grace & Co., et al.*, No. 01-01139 (JKF) (Bankr. D. Del. July 3, 2010) (attached as Exhibit A).

Site (Sept. 30, 2008) (“ROD”), at 13.²

Industrial and commercial processes have occurred at the Site for at least one hundred years, and may date back as far as the late 1600s. ROD at 28. From approximately 1915 to 1935, the Multibestos Company, a predecessor of Grace, used a portion of the Site for the manufacture of asbestos clutch and brake linings, and disposed of raw asbestos waste, asbestos dust, and off-specification or otherwise unsold finished products containing asbestos at the Site. Complaint ¶ 10. From approximately 1946 to 1983, The Kendall Company, a predecessor of Tyco Healthcare, used a portion of the Site for a cotton bleaching and mercerizing operation, piping caustic solution to an unlined settling lagoon and then discharging it into a municipal sewer line that ran through the Site. *Id.* ¶ 12.

In 1985, a private contractor identified volatile organic compounds (“VOCs”) in soil and groundwater sampled at the Site. *Id.* ¶ 13. Tests also revealed surface water with an alkaline condition and elevated levels of conductivity. *Id.* Further study has indicated that soils, sediment, and groundwater at the Site are contaminated with inorganic chemicals (including asbestos and metals), VOCs, polycyclic aromatic hydrocarbons, and highly alkaline compounds. ROD at 28-35.

C. History of Response Actions

In December 1988, EPA issued an Administrative Order for Removal Action to BIM Investment Trust and Shaffer Trust to assess the extent of contamination and to prepare a report of assessment and proposed response plan. Exhibit B, Declaration of David Lederer (“Lederer Decl.”) ¶ 3.

² EPA’s Record of Decision for the Site is Appendix A to the Consent Decree, and appears as Attachments 2-13 to the Notice of Lodging (Docket No. 2). Subsequent citations to the Record of Decision in this Memorandum in Support are referenced as “ROD at ___.”

In January 1992, EPA issued a second Administrative Order for Removal Action to BIM Investment Trust, Shaffer Trust, and Grace. *Id.* ¶ 4. Pursuant to this administrative order, the three parties performed a removal action that involved the following activities: (1) temporary diversion of the Neponset River and relocation of a sanitary sewer; (2) construction of a 400-foot-long arch plate culvert along the original alignment of the Neponset River to prevent erosion of asbestos-contaminated soils from the river's banks; (3) excavation of asbestos-contaminated soils; (4) consolidation of asbestos-contaminated soils in an Area of Containment ("AOC") covered with 2½ feet of clean soil; (5) excavation, stabilization, and consolidation of contaminated sediments from a former mill tailrace in a high-density polyethylene-lined and capped containment cell covered with 2½ feet of clean soil; and (6) recording of a land use restriction for the Area of Containment. ROD at 19.

In May 1994, EPA placed the Site on the National Priorities List. 59 Fed. Reg. 27,989, 27,993 (May 31, 1994).

In September 1999, EPA entered into an Administrative Order by Consent with Grace and The Kendall Company for the performance of a Remedial Investigation and Feasibility Study ("RI/FS") at the Site. ROD at 19. Tyco Healthcare, as the successor to The Kendall Company, completed the Remedial Investigation in March 2007, and EPA completed the Feasibility Study in June 2008.³ Lederer Decl. ¶ 5.

Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of EPA's proposed plan for remedial action in the Walpole Times on May 29 and June 5, 2008, and held a public information session about the proposed plan at Walpole Town Hall on June 9, 2008.

³ In 2001, after filing for reorganization under Chapter 11 of the United States Bankruptcy Code, Grace notified EPA that it would stop performing the RI/FS. Lederer Decl. ¶ 5.

ROD at 21-22. EPA also provided an opportunity for written and oral comments from the public on the proposed plan for remedial action, including at a public hearing at Walpole Town Hall on July 14, 2008. *Id.* at 22.

On September 30, 2008, with the concurrence of the Massachusetts Department of Environmental Protection, EPA issued a Record of Decision setting forth the remedial action to be implemented at the Site. Complaint ¶ 15. The major components of the remedy are: (1) excavation and dredging of contaminated soil and sediment; (2) extraction and treatment of contaminated groundwater posing a risk to surface waters; (3) institutional controls to limit exposure to contamination; and (4) long-term monitoring of soil, sediment, and groundwater. ROD at 9. The ROD included a responsiveness summary with EPA's responses to the public comments it received on the proposed plan for remedial action. *Id.* at 129-51.

Finally, in 2009, EPA performed a short-term removal action at the Site to (1) remove asbestos, asbestos-containing material, and abandoned drums and containers of hazardous substances from a former mill building; and (2) sample a vacant lot for the presence of asbestos-containing material or asbestos-contaminated soil. Lederer Decl. ¶ 6.

D. Nature of the CERCLA Liability

On July 28, 2010, the United States filed its complaint against the Settling Defendants concurrently with the lodging of the Decree. As alleged in the complaint, there has been a release, or a threatened release, of hazardous substances within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), into the environment at or from the Site. Complaint ¶ 19. EPA has incurred, and will continue to incur, costs of removal and/or remedial actions within the meaning of Section 101(23), (24), and (25) of CERCLA, 42 U.S.C. § 9601(23), (24), and (25), not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan

(“NCP”), to respond to such release or threatened release. Complaint ¶¶ 21, 22.

The Settling Defendants are each “covered persons” under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). BIM and Shaffer Trust are owners of the Site within the meaning of Sections 101(20) and 107(a)(1) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(1). Complaint ¶¶ 6, 7. The Multibestos Company and The Kendall Company each owned and operated part of the Site at the time of disposal of hazardous substances within the meaning of Sections 101(20) and 107(a)(2) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(2). Complaint ¶¶ 4, 5. Grace is a successor to the liabilities of the Multibestos Company; Tyco Healthcare is a successor to the liabilities of The Kendall Company. *Id.*

Accordingly, the Settling Defendants are liable to the United States for injunctive relief at the Site, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and for all response costs incurred by the United States in connection with the Site, pursuant to Section 107(a)(1) and (2) of CERCLA, 42 U.S.C. § 9607(a)(1) and (2).

E. The Proposed Consent Decree

The total value of the settlement reached under this Decree is estimated to be \$16,431,860. This total consists of the Settling Defendants’ implementation of an estimated \$13 million remedial action at the Site, CD ¶¶ 10-17;⁴ payment of \$1,431,860 in reimbursement of the United States’ past response costs, *id.* ¶ 54; agreement to reimburse the United States for its future oversight costs up to \$2 million (or up to 15% of the costs incurred by the Settling Defendants in performing the remedial action, if that amount is greater), *id.* ¶ 55(b); and agreement to reimburse the United States for any future response costs that are not future oversight costs, *id.* ¶ 55(a).

⁴ The Consent Decree appears as Attachments 1-14 to the Notice of Lodging (Docket No. 2). Subsequent citations to the Consent Decree in this Memorandum in Support are referenced as “CD ¶ ___.”

The proposed Decree follows model provisions for EPA Remedial Design/Remedial Action consent decrees. In exchange for the work to be performed and the payments to be made, the Decree provides the Settling Defendants with a standard covenant not to sue by the United States for performance of the remedial action and for recovery of past response costs, future oversight costs, and future response costs. *Id.* ¶ 84.⁵ Under the Decree, the Settling Defendants will also receive standard protection from contribution claims under Section 113(f)(2) of CERCLA for “matters addressed” in the Decree – i.e., past response costs, future response costs, future oversight costs, and the work. *Id.* ¶ 92. In return, the Settling Defendants agree to standard covenants not to sue and waiver of affirmative claims against the United States relating to this remedial action, past response actions, past response costs, future response costs, and future oversight costs. *Id.* ¶ 88.

ARGUMENT

A. Standard of Review

A district court reviews a consent decree to ensure that it is “fair, reasonable, and faithful to the objectives of the governing statute.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *accord Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1993); *Durrett v. Housing Auth. of Providence*, 896 F.2d 600, 604 (1st Cir. 1990). The approval of settlements is a judicial act that is committed to the informed discretion of the trial court. *See Donovan v. Robbins*, 752 F.2d 1170, 1176-77 (7th Cir. 1985); *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 351 (6th Cir. 1986). In reviewing a settlement, the inquiry is directed not to whether the Court itself would have reached the

⁵ The United States expressly reserves its rights against the Settling Defendants with respect to all other matters, including the Settling Defendants’ liability for natural resource damages and for any additional response actions at the Site that EPA determines are necessary. *Id.* ¶ 85.

particular settlement, but rather to whether the proposed settlement is a fair and reasonable compromise. *See Cannons*, 899 F.2d at 84. The Court is not “empowered to rewrite the settlement agreed upon by the parties,” or to “delete, modify, or substitute certain provisions of the consent decree.” *Officers for Justice v. Civil Serv. Comm’n of City & County of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982).

In ruling on a consent decree, the Court should make its ruling “in light of the strong policy in favor of voluntary settlement of litigation.” *United States v. Cannons Eng’g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff’d* 899 F.2d 79. 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 policy of encouraging settlement “is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal administrative agency ‘specially equipped, trained or oriented in the field’” *Cannons*, 720 F. Supp. at 1035 (quoting *United States v. Nat’l Broad. Co.*, 449 F. Supp. 1127, 1144 (C.D. Cal. 1978)). The First Circuit has recognized “a strong and ‘clear policy in favor of encouraging settlements,’ especially in complicated regulatory settlements. *Conservation Law Found.*, 989 F.2d at 59 (quoting *Durrett*, 896 F.2d at 604). Where a governmental agency has negotiated a consent decree, “the district court must exercise some deference to the agency’s determination that settlement is appropriate.” *Conservation Law Found.*, 989 F.2d at 58.

B. The Consent Decree Is Fair, Reasonable, and Faithful to the Objectives of CERCLA

The proposed settlement has been negotiated by the Department of Justice on behalf of EPA, a federal administrative agency “specially equipped, trained or oriented in the field” of

environmental protection. *See Cannons*, 720 F. Supp. 1035. For the reasons set forth below, the proposed Decree meets the three-part test for district court approval of a settlement: the Decree is fair, reasonable, and faithful to the objectives of CERCLA. Accordingly, we respectfully request that the Court sign and enter the Decree.

First, the Decree is fair. It has been negotiated by the parties at arm's length, with all parties represented by experienced counsel and technical staff, and has been signed by the United States and each Settling Defendant. The Settling Defendants, collectively, are the parties responsible for the environmental contamination at the Site, or the successors to those parties. Complaint ¶¶ 4-7. Under the proposed Decree, these Settling Defendants have agreed to implement the remedial action selected by EPA, and to reimburse the United States for the majority of its past response costs, all future response costs, and all anticipated future oversight costs in conjunction with the remedial action. CD ¶¶ 10-17, 54, 55. Because the Settling Defendants are responsible for the harm at the Site, and the Settling Defendants are performing all the work described in the ROD and reimbursing the United States for the majority of its past response costs and all anticipated future costs, the settlement is substantively fair.

Second, the settlement embodied in the Decree is reasonable. "A CERCLA consent decree is reasonable when it provides for an efficacious cleanup, and at the same time adequately compensates the public for the cost of that cleanup." *United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994). Here, the work to be performed by the Settling Defendants will address the environmental contamination at the Site, as discussed in EPA's ROD attached as Appendix A to the Decree. Moreover, the Decree requires the reimbursement of the majority of the United States' response costs, which adequately compensates the public while freeing up Superfund monies to be used to perform cleanups at sites where the potentially

responsible parties are unable, or unwilling, to implement EPA's remedy.

Finally, the Decree is faithful to the objectives of CERCLA. By securing the Settling Defendants' agreement to perform a remedial action at the Site and to reimburse the United States for its response costs, the settlement advances the two major policy concerns underlying CERCLA: "that the federal government be immediately given the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal," and "that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." *Cannons*, 899 F.2d at 79 (quoting *Dedham Water Co.*, 805 F.3d at 1081). Settlement of the United States' claims against the Settling Defendants will also provide for a prompt cleanup without the need for prolonged and complicated litigation that would waste the resources of this Court and the parties to this action.

C. The Comments Do Not Demonstrate Any Basis to Deny Entry of the Consent Decree

Pursuant to Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2); 28 C.F.R. § 50.7; and Paragraph 113 of the Decree, the Decree was available for public comment for 30 days from the August 3, 2010 notice of lodging published in the Federal Register. *See* 75 Fed. Reg. 45,666 (Aug. 3, 2010). The Department of Justice received two sets of comments on the Decree during the 30-day comment period: an e-mail from "Jean Public," and a letter from the Town of Walpole, Massachusetts (the "Town").

EPA has provided detailed responses to both sets of comments, and those responses are attached as part of Exhibit B to this Memorandum in Support. *See* Lederer Decl., Attachment 1. The following summarizes the comments received and the United States' responses.

1. Response to Comments from Jean Public

The text of the August 11, 2010 e-mail from “Jean Public” is as follows:

is this from woburn. because if they are settling with the us for contamination from polluted water, then the people who died and who got cancer should be getting a lot more from these polluters. i do not favor this settlement and believe polluters get a slap on the wrist from the us govt and the us dept of justice. i find this intolerable. polluters need to have everything they have taken from them and they need to be in jail for the rest of their lives. we need to make decisions to pollute very very costly. this settlement does not do that.

it is time to make pollution stop. our world is too crowded to allow this to continue to go on in america.

jean public 15 elmst florham park nj07932

(capitalization and spelling as in original). A copy of the printed e-mail is attached as Exhibit C to this Memorandum in Support.

United States’ Response: The Site is in Walpole, Massachusetts, and is not one of the Superfund sites located in Woburn, Massachusetts. Further, CERCLA does not provide for jail terms or other criminal penalties, and the Decree does not resolve any potential criminal claims. *See CD* ¶ 85(f). After due consideration, the United States does not believe that this comment discloses facts or considerations that indicate that the proposed Decree is “inappropriate, improper, or inadequate.” 42 U.S.C. § 9622(d)(2)(B).

2. Response to Comments from Town of Walpole

By letter dated September 1, 2010, the Town submitted its comments on the proposed Decree. A copy of the Town’s letter is attached as Exhibit D to this Memorandum in Support. The comments contained in that letter are set forth and addressed below.

Comment 1: The Town expressed concern that the remedy is not sufficiently protective of human health and the environment, because it does not require the Settling Defendants to abate all contamination at the Site.

United States' Response: The Town's comment is a critique of the remedy selected in the ROD, which was issued in 2008. Prior to the issuance of the ROD, EPA published notice of its proposed plan for remedial action, invited public comments on the proposed remedy, and considered and responded in detail to each comment received – including comments, such as this one, that the Town submitted to EPA. *See* ROD at 21-22, 129-51. The public comment period just concluded, pursuant to Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), provided an opportunity for public comment on the proposed settlement, not another opportunity for comment on the remedy previously selected by EPA.⁶

As EPA explained in its response to comments contained in the ROD, CERCLA does not require that all contamination be removed from a Site. The NCP, which governs Superfund cleanups, provides that institutional controls may be used in remedies to manage exposure to contamination in combination with other actions. *See* 40 C.F.R. 300.430(a)(1)(iii)(C) and (D).

The remedy selected in the ROD provides for a combination of soil and sediment excavation, groundwater extraction and treatment, institutional controls, and long-term monitoring. ROD at 9. This remedy selected was based on an extensive study of the contamination at the Site, human health and ecological risk assessments, and an RI/FS of site contamination and potential remedial alternatives. *See id.* at 7 & App. E. Using CERCLA's

⁶ Pursuant to the NCP, which governs Superfund response actions, after an RI/FS has been completed, and a preferred alternative for remedial action has been identified, EPA publishes a proposed plan that includes the remedial alternatives analyzed and a summary of information relied upon in selecting the preferred alternative. 40 C.F.R. § 300.430(f)(2). After making the proposed plan available for public comment, EPA considers all comments received and issues a ROD. *Id.* § 300.430(f)(3), (4). The ROD selects a final remedy for the site, explains the reasons for selecting the remedy, includes the data supporting the decision, and provides EPA's responses to public comments. *Id.* § 300.430(f)(5).

Under Section 113(j)(1) of CERCLA, 42 U.S.C. § 9613(j)(1), judicial review of any issues concerning the adequacy of a response action is limited to the administrative record. *See also United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1425 (6th Cir. 1991) (when reviewing a consent decree under CERCLA that provides for the performance of a remedial action, "the court's role is limited to approval or rejection of the decree, and it remains EPA's responsibility to select the remedy and to take the steps necessary to bring the decree to the court for approval").

nine remedy selection criteria, EPA made a determination in the ROD that this remedy is protective of human health and the environment, complies with applicable or relevant and appropriate requirements relating to environmental protection, is cost-effective, and utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable. *Id.* at 9-10.

Comment 2: The Town expressed concern that the on-site asbestos encapsulation component of the remedy is not sufficiently protective, because the remedy does not protect against a catastrophic failure of the arch plate culvert in place at the Site.

United States' Response: As discussed in the response to Comment 1, this comment concerns the remedy selected in the ROD; EPA considered, and responded to, public comments on the proposed remedy prior to issuing the ROD in 2008. As explained in the ROD, the encapsulation remedy (AOC-3) was selected over an alternative that would have removed contaminated material from the AOC area (AOC-4) because the encapsulation remedy presented fewer short-term risks, at a substantially lower cost. ROD at 92-99. EPA determined that the culvert has a high degree of permanence when combined with active inspection and operation and maintenance activities. *See id.* at 95; ROD App. F at 1-2 (“Response to Comments on the AOC Culvert Received During the Proposed Plan Comment Period”). The Statement of Work (“SOW”) contained in the CD requires the Settling Defendants to perform extensive studies regarding the long-term viability of the AOC and the culvert. CD App. B (Statement of Work), § V.B.g.⁷

Comment 3: The Town commented that the CD does not require the Settling Defendants

⁷ The Statement of Work is Appendix B to the Consent Decree, and appears in Attachment 1 to the Notice of Lodging (Docket No. 2). Subsequent citations to the Statement of Work in this Memorandum in Support are referenced as “SOW § ___.”

to maintain, repair, and/or replace the culvert, or to provide financial assurance for post-closure care of the culvert.

United States' Response: The CD does require the Settling Defendants to maintain and, as necessary, repair the culvert. Under Section VI.E.1 of the SOW, the Settling Defendants must develop an EPA-approved Operation and Maintenance Plan, including a plan for post-closure monitoring of the AOC, to ensure the long-term continued effectiveness of each component of the remedy. SOW § VI.E.1. In addition, if EPA determines that modification to the work specified in the SOW or in work plans developed pursuant to the SOW is necessary to maintain the effectiveness of the remedy, EPA can require such modification, provided it is consistent with the scope of the remedy selected in the ROD. CD ¶ 15(a). The Settling Defendants must implement any work required by such modification. *Id.* ¶ 15(d).

With respect to financial assurance, the Performance Guarantee required under Section XIV of the CD ensures completion of the Work, and the amount of the Performance Guarantee to be maintained is based on the estimated cost of the Work, which is currently \$13,000,000. As defined in Paragraph 4 of the CD, "Work" covers all obligations of the Settling Defendants under the CD, including long-term operation and maintenance at the Site. If repair or replacement of the culvert becomes necessary, and EPA determines that the Performance Guarantee "is inadequate . . . whether due to an increase in the estimated cost of completing the Work or for any other reason," the CD authorizes EPA to require an increase in the amount of the Performance Guarantee. CD ¶ 48; *see also* 40 C.F.R. § 264.145(c)(7).

Comment 4: The Town expressed concern about the remedy's use of long-term institutional controls to protect the public from environmental risks associated with the buildings that remain on the Site west of South Street, and requests that the remedy include the removal of

such buildings.

United States' Response: This comment concerns the remedy selected in the ROD; EPA considered, and responded to, this specific comment prior to issuing the ROD in 2008. *See* ROD at 135. EPA determined at that time that the buildings west of South Street did not pose a threat of release of hazardous substances to the environment, but reserved its authority to conduct future investigations and take action as necessary. In 2009, following a preliminary assessment and site investigation, EPA conducted a removal action in which it removed asbestos, asbestos-containing material, and abandoned drums and containers of hazardous substances from a former mill building west of South Street. EPA believes that these actions have abated the imminent risks presented by the former mill building.

Comment 5: The Town expressed concern that the CD's Performance Guarantee of \$13,000,000 is inadequate to cover all remediation required under the CD, including inspection, maintenance, repair, and/or replacement of the culvert. The Town also commented that the CD should not permit the Settling Defendants to petition for reduction of the Performance Guarantee.

United States' Response: As stated in response to Comment 3, above, the Performance Guarantee at present is adequate to cover all remediation required by the CD. If EPA determines at a later date that the amount of the Performance Guarantee is inadequate to cover the Work, EPA can require the Settling Defendants to increase its amount.

The CD provision permitting the Settling Defendants to petition for a reduction of the Performance Guarantee under certain circumstances, CD ¶ 50(a), is included in EPA's standard RD/RA consent decree, and is provided for by EPA's regulations under the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* *See* 40 C.F.R. § 264.145(c)(8). Because the purpose of the Performance Guarantee is to ensure the completion of the Work, if

the Settling Defendants demonstrate that the estimated cost of the remaining Work has diminished below \$13,000,000, the Performance Guarantee may be reduced – with EPA approval – to the amount of the estimated cost of the remaining Work to be performed.

Comment 6: The Town requested that the United States’ covenant not to sue exclude any actions that EPA takes in order to enforce the post-closure requirements of the CD, including remediation required due to noncompliance with the CD or due to releases from any portion of the Site where hazardous substances remain in place.

United States’ Response: The United States’ covenant not to sue does not preclude any action by the United States either to enforce the post-closure requirements of the CD or to compel the Settling Defendants to address future releases of hazardous substances at the Site. Pursuant to the CD, the United States covenants not to sue Settling Defendants for performance of the Work and for recovery of Past Response Costs, Future Response Costs, and Future Oversight Costs. CD ¶ 84. These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under the CD. *Id.* Further, the United States expressly reserves certain rights, including its rights with respect to Settling Defendants’ failure to meet any requirement of the CD, *id.* ¶ 85(a), and liability for additional response actions at the Site, *id.* ¶ 85(h), (k).

Comment 7: The Town requested that the CD provide a covenant not to sue and contribution protection for the Town, in the event the Town forecloses on tax liens it holds on certain Site parcels and assumes ownership of a portion of the Site.

United States’ Response: The provisions that the Town requests are beyond the scope of the CD, which resolves certain of the United States’ claims against the Settling Defendants and outlines the Settling Defendants’ obligations to perform a remedial action at the Site. However,

certain provisions of CERCLA can provide municipalities with statutory protection when they acquire property through tax foreclosures, provided that they have not caused or contributed to the release of hazardous substances. Section 101(20)(D), 42 U.S.C. § 9601(20)(D), provides that municipalities that acquire property involuntarily, such as through tax delinquency, are not “owners” or “operators” under CERCLA. Sections 107(b)(3) and 101(35)(A)(ii), 42 U.S.C. §§ 9607(b)(3) and 9601(35)(A)(ii), provide that municipalities that acquired property by “involuntary transfer or acquisition” may not be liable for contamination caused by third parties. And Section 107(r), 42 U.S.C. § 9607(r), provides certain bona fide prospective purchasers, including municipalities, with protection from liability.

Comment 8: The Town expressed concerns about a potential lack of communication in the future among the Town, the Settling Defendants, and EPA, and specifically requested that (a) the Settling Defendants prepare a Community Relations Support Plan that is acceptable to the Town, (b) EPA continue to invite the Town’s Health Director to monthly Site work status meetings with the Settling Defendants, and (c) EPA conduct regular public meetings regarding work at the Site at least quarterly.

United States’ Response: EPA’s Regional Superfund program has been, and continues to be, committed to vigorous public outreach. Since the lodging of the CD, the Town’s Health Director has been invited to progress meetings with EPA and the Settling Defendants. The Statement of Work attached to the CD requires EPA to develop a Community Relations Plan (“CRP”) and requires the Settling Defendants to prepare a Community Relations Support Plan (“CRSP”); both plans will contain provisions for public meetings regarding the work at the Site. *See* SOW § V.B.3 and Attachment A, § D. EPA will give the Town the opportunity to comment on the CRP and the CRSP.

After review and consideration of the Town's comments on the proposed Decree, the United States has determined that the comments do not disclose facts or considerations indicating that the proposed Decree is "inappropriate, improper, or inadequate." 42 U.S.C. § 9622(d)(2)(B). Accordingly, the United States has concluded that entry of the Decree is warranted as proposed in the notice of lodging.

CONCLUSION

For the reasons set forth above, the proposed Consent Decree is fair, reasonable and faithful to the objectives of CERCLA. Therefore, the United States respectfully requests that this Court sign and enter the Consent Decree as a final judgment.

Respectfully submitted,

/s/ Mark Sabath
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PETER DECAMBRE
Senior Enforcement Counsel
U.S. Environmental Protection Agency
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Mail Code OES04-4
Boston MA 02109

DATE: December 3, 2010

Certificate of Service

I hereby certify that on December 3, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

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/s/ Mark Sabath
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Exhibit A

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:) Chapter 11
)
W. R. GRACE & CO., et al.¹) Case No. 01-01139 (JKF)
) (Jointly Administered)
Debtors.)
) Re Docket No. 24901 and 25028
) 7/14/10 Hearing Agenda item no. 4

ORDER AUTHORIZING ENTRY INTO A CONSENT DECREE WITH THE UNITED STATES REGARDING THE BLACKBURN AND UNION PRIVILEGES SUPERFUND SITE - WALPOLE, MA.

Upon consideration of the *Motion of Debtors for Entry of an Order Authorizing Entry Into a Consent Decree with the United States Regarding the Blackburn and Union Privileges Superfund Site - Walpole, MA.* (the "Motion"); and due and proper notice of the Motion having been given; and it appearing that the relief requested in the Motion is

¹ The Debtors consist of the following 62 entities: W. R. Grace & Co. (f/k/a Grace Specialty Chemicals, Inc.), W. R. Grace & Co.-Conn., A-1 Bit & Tool Co., Inc., Alewife Boston Ltd., Alewife Land Corporation, Amicon, Inc., CB Biomedical, Inc. (f/k/a Circe Biomedical, Inc.), CCHP, Inc., Coalgrace, Inc., Coalgrace II, Inc., Creative Food N Fun Company, Darex Puerto Rico, Inc., Del Taco Restaurants, Inc., Dewey and Almy, LLC (f/k/a Dewey and Almy Company), Ecarg, Inc., Five Alewife Boston Ltd., G C Limited Partners I, Inc. (f/k/a Grace Cocoa Limited Partners I, Inc.), G C Management, Inc. (f/k/a Grace Cocoa Management, Inc.), GEC Management Corporation, GN Holdings, Inc., GPC Thomasville Corp., Gloucester New Communities Company, Inc., Grace A-B Inc., Grace A-B II Inc., Grace Chemical Company of Cuba, Grace Culinary Systems, Inc., Grace Drilling Company, Grace Energy Corporation, Grace Environmental, Inc., Grace Europe, Inc., Grace H-G Inc., Grace H-G II Inc., Grace Hotel Services Corporation, Grace International Holdings, Inc. (f/k/a Dearborn International Holdings, Inc.), Grace Offshore Company, Grace PAR Corporation, Grace Petroleum Libya Incorporated, Grace Tarpon Investors, Inc., Grace Ventures Corp., Grace Washington, Inc., W. R. Grace Capital Corporation, W. R. Grace Land Corporation, Gracoal, Inc., Gracoal II, Inc., Guanica-Caribe Land Development Corporation, Hanover Square Corporation, Homco International, Inc., Kootenai Development Company, L B Realty, Inc., Litigation Management, Inc. (f/k/a GHSC Holding, Inc., Grace JVH, Inc., Asbestos Management, Inc.), Monolith Enterprises, Incorporated, Monroe Street, Inc., MRA Holdings Corp. (f/k/a Nestor-BNA Holdings Corporation), MRA Intermedco, Inc. (f/k/a Nestor-BNA, Inc.), MRA Staffing Systems, Inc. (f/k/a British Nursing Association, Inc.), Remedium Group, Inc. (f/k/a Environmental Liability Management, Inc., E&C Liquidating Corp., Emerson & Cuming, Inc.), Southern Oil, Resin & Fiberglass, Inc., Water Street Corporation, Axial Basin Ranch Company, CC Partners (f/k/a Cross Country Staffing), Hayden-Gulch West Coal Company, H-G Coal Company.

in the best interests of the Debtors,² their estates and creditors, it is hereby ORDERED that:

1. The Motion is granted in its entirety.
2. The Debtors are authorized to enter into the Consent Decree, which is attached to this Order as Exhibit I.
3. The Debtors are authorized to consummate the transactions contemplated in the Consent Decree, including the use of the Debtors' estate property and resources necessary to undertake the performance of the work set forth in the Consent Decree.
4. Claim No. 9634 of the U.S. EPA with respect to Past Response Costs and Future Oversight Costs and Future Response Costs at the Site is resolved by the Consent Decree as follows:

(i) The U.S. E.P.A. shall have an allowed general unsecured claim against the Debtors in the amount of \$715,930 (the "Allowed Past Response Cost Claim"). The Allowed Past Response Cost Claim will be paid in the same manner as all other allowed general unsecured claims on the effective date of a confirmed chapter 11 plan of reorganization for the Debtors. Notwithstanding what the Debtors' plan may provide, however, Interest will not accrue on the Allowed Past Response Cost Claim until 30 days after the Effective Date of the Consent Decree, at which point, Interest will accrue on the Allowed Past Response Cost Claim at the rate established by 26 U.S.C. § 9507;

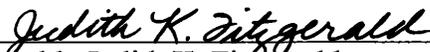
² Capitalized terms not defined in this Order shall have the meaning ascribed to them in, as the case may be, the Consent Decree or the *First Amended Joint Plan of Reorganization in these Chapter 11 Cases*, dated February 27, 2009, as amended.).

(ii) The Debtors are authorized to pay 50% of Future Oversight Costs and Future Response Costs. These costs shall be payable within 30 days of Settling Defendants' receipt of each bill requiring payment or within 30 days of the effective date of the Debtors' plan of reorganization, whichever is later. Payment of Future Oversight Costs incurred by U.S. EPA shall be capped at the greater of \$2,000,000 or 15% of the total costs incurred by the Settling Defendants to complete the ROD remedy; and

(iii) To the extent it applies, the automatic stay under section 362(a) of the Bankruptcy Code is modified for the limited purpose of permitting the United States to file a complaint (the "Complaint") against the Debtors concurrently with the lodging of the Consent Decree to resolve all claims alleged in the Complaint, lodge the Consent Decree and take other actions consistent with the Consent Decree in the United States District Court for the District of Massachusetts as outlined in paragraph 113 of the Consent Decree. In the event that the Consent Decree is voided by any of its Parties pursuant to paragraph 114 of the Consent Decree, the Debtors preserve all arguments regarding applicability of the automatic stay to the Complaint, and the limited modification of the automatic stay described in this paragraph shall be void.

5. The Court shall retain jurisdiction to hear and determine all matters arising from or relating to the implementation of this Order.
6. This Order is effective immediately upon its entry, notwithstanding Fed. R. Bankr. P. 6004(h).

Dated: July 3, 2010



Honorable Judith K. Fitzgerald
United States Bankruptcy Judge

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BIM INVESTMENT CORPORATION,)
SHAFFER REALTY NOMINEE TRUST,)
TYCO HEALTHCARE GROUP LP, and)
W.R. GRACE & CO.-CONN.,)
)
Defendants.)
_____)

Civil Action No. 1:10-cv-11263-NG

**DECLARATION OF DAVID LEDERER IN SUPPORT
OF UNITED STATES' MOTION TO ENTER CONSENT DECREE**

David Lederer states as follows:

1. I am employed by the United States Environmental Protection Agency ("EPA") Region 1 as a Remedial Project Manager ("RPM") in the Office of Site Remediation and Restoration. I have worked as an RPM since 1987. One of the sites that I am assigned to is the Blackburn & Union Privileges Superfund Site in Walpole, Massachusetts (the "Site"). I have worked as an RPM at this Site since 2004, and during that time I have become familiar with response actions at the Site, and the proposed Consent Decree regarding the Site that the United States lodged with this Court on July 28, 2010 ("Consent Decree"). In connection with my duties as the RPM at this Site, I am responsible for maintaining the Site file, and I have reviewed records in the Site file. I am submitting this declaration in support of the United States' motion requesting that the Court enter the proposed Consent Decree.
2. I have reviewed EPA's responses to the public comments submitted concerning

the Consent Decree. EPA's responses to the public comments are attached as Attachment 1 to this Declaration. To the best of my knowledge, the responses to the public comments are true and accurate.

3. In December 1988, EPA issued an Administrative Order for Removal Action to BIM Investment Trust and Shaffer Realty Nominee Trust to assess the extent of contamination and to prepare a report of assessment and proposed response plan.

4. In January 1992, EPA issued an Administrative Order for Removal Action to potentially responsible parties BIM Investment Trust, Shaffer Realty Nominee Trust, and W.R. Grace & Co.-Conn ("Grace"). The three parties subsequently performed a removal action at the Site.

5. In September 1999, EPA entered into an Administrative Order by Consent with Grace and The Kendall Company for the performance of a Remedial Investigation and Feasibility Study ("RI/FS") at the Site. In 2001, after filing for reorganization under Chapter 11 of the United States Bankruptcy Code, Grace notified EPA that it would stop performing the RI/FS. Tyco Healthcare Group LP, as the successor to The Kendall Company, completed the Remedial Investigation in March 2007, and EPA completed the Feasibility Study in June 2008.

6. In 2009, EPA performed a short-term removal action at the Site to (1) remove asbestos, asbestos-containing material, and abandoned drums and containers of hazardous substances from a former mill building; and (2) sample a vacant lot for the presence of asbestos-containing material or asbestos-contaminated soil.

I declare under penalty of perjury that, based on my personal knowledge and review of records related to the Site, the foregoing is true and accurate to the best of my information and belief.

Dated: DECEMBER 3, 2010



David Lederer
Remedial Project Manager
U.S. Environmental Protection Agency, Region 1
Office of Site Remediation and Restoration
5 Post Office Square, Suite 100
Boston, MA 02109

Attachment 1

RESPONSE TO COMMENTS RECEIVED BY EPA DURING THE PUBLIC COMMENT PERIOD UNDER CERCLA SECTION 122(D)(2)

On July 28, 2010, the Consent Decree (“CD”) for the Blackburn and Union Privileges Superfund Site (“Site”), located in Walpole, Massachusetts, was lodged with the United States District Court for the District of Massachusetts. On August 3, 2010, notice of the proposed CD was published in the Federal Register, starting the 30-day comment period. During the comment period, Jean Public and the Town of Walpole, Massachusetts submitted comments. A summary of the comments and EPA’s responses to those comments are below.

A. August 11, 2010 Comments by Jean Public:

On August 11, 2010, Jean Public supplied comments regarding the CD for the Site by electronic mail.

Comment #1: Jean Public wants to know if this is the Superfund site located in Woburn, Massachusetts. If it is, the people who died and got cancer as a result of contaminated ground water should be justly compensated by the polluters. Polluters should have everything taken from them and should be placed in jail for the rest of their lives.

EPA Response: The commenter makes reference to one of the Superfund sites located in Woburn, Massachusetts. The Blackburn and Union Privileges Superfund Site is a different Superfund site and is located Walpole, Massachusetts.

The commenter requests that those who cause contamination should have everything taken away from them and placed in jail. However, CERCLA does not authorize jail terms or provide for criminal penalties. The CD does not resolve any potential criminal claims. See CD ¶ 85(f).

B. September 1, 2010 Comments by the Town of Walpole, Massachusetts (the “Town”):

On September 1, 2010, the Town submitted comments regarding the Consent Decree for the Site by letter. These comments consist of a number of concerns, questions and requested additions to the Consent Decree.

Comment #1: The Town expresses concerns that the design and implementation of response actions at the Site by Settling Defendants are inadequate to address the hazards presented by the Site and therefore the remedy does not protect human health or welfare and the environment. The Town is concerned that the CD does not require the Settling Defendants to abate all contamination and to adequately address the important sources and potential sources of contamination. Although the Town submitted comments on the June 2008 Proposed Plan, and EPA responded to those comments in the September 30, 2008 Record of Decision (“ROD”), the Town asserts that many of its concerns remain unaddressed in the CD.

EPA Response: The proposed response action to be carried out under the terms of the CD is based on the 2008 ROD. The remedy selected in the ROD was based on an extensive study of the contamination found at the Site, a human health and ecological risk assessment, and a Remedial Investigation and Feasibility Study of site contamination and potential remedial

alternatives. The selected remedy was chosen using CERCLA's nine remedy selection criteria, including the two threshold criteria of protection of human health and the environment, and the requirement that the remedy meet all applicable or relevant and appropriate requirements ("ARARs") relating to environmental protection.

The selected remedy is a comprehensive remedy that utilizes source control and management of migration components to address the principal risks and wastes at the Site by preventing human exposure through excavation and off-site disposal of contaminated soils and sediments; maintenance of the previously installed soil and asphalt covers on the Area of Containment ("AOC"); excavation and off-site disposal of characteristic hazardous waste, if present, in Settling Basin #2 west of South Street; utilization of institutional controls for groundwater and soils left in place at the Site; treatment and discharge of shallow groundwater affecting surface water quality; and periodic five-year reviews of the remedy. EPA has addressed the sources of the contamination by requiring excavation and off-site disposal of soils exceeding certain health-based cleanup criteria in the area east of South Street, excavation and off-site disposal of certain soils in Settling Basin #2, and maintaining covers on the AOC. Pursuant to the 1992-1993 removal action, cleanup of contaminated sediments near the Site and the Orlando property near Main Street was addressed.

EPA made a determination in the ROD that this remedy is protective of human health and the environment, complies with ARARs, is cost-effective, and utilizes permanent solutions and alternative treatment (or resource recovery) technologies to the maximum extent practicable.

Although the Town objects to the CD because the remedy does not require abatement of all contamination at the Site, CERCLA does not require that all contamination be removed. In fact, the National Contingency Plan (the "NCP"), which regulates Superfund cleanups, assumes that institutional controls will be used in remedies to manage exposure in combination with other actions. See 40 C.F.R. 300.430(a)(1)(iii)(C) and (D).¹ The institutional controls for the Site are focused on addressing risks posed by contaminated groundwater site-wide, soils within the AOC, and soils within the east of South Street area under the footprint of existing building foundations.

Comment #2: The Town expresses concerns that the on-site asbestos encapsulation component of the remedy is not sufficiently protective of human health and the environment. The Town is also concerned that the aluminum plate arch culvert, which runs beneath the AOC and allows the Neponset River to flow through the Site, will not last for the long-term or be maintained post-closure.

EPA Response: As set forth in the ROD, EPA determined that the on-site encapsulation of the asbestos within the AOC is protective of human health and the environment because the AOC provides a protective barrier to exposure from the hazardous materials that were placed within it during the removal action conducted in 1992-1993. This barrier consists of 24 inches of clean

¹Often, institutional controls are a critical component of the cleanup process and are used to ensure both the short- and long-term protection of human health and the environment. See *Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund and RCRA Corrective Action Cleanups*, September 29, 2000, OSWER 9355.0-7-4FS-P, EPA 540-F-00-005.

sand and 6 inches of topsoil necessary to support a vegetative cover. Thus, the hazardous materials present in the AOC will not impact the property or the Neponset River.

As explained in EPA's ROD and the responsiveness summary, the encapsulation remedy (AOC-3) was selected over the alternative that would have removed the material from the AOC area (AOC-4) because the encapsulation presented fewer short-term risks, at a substantially lower cost. Additionally, EPA indicated that the culvert has a high degree of permanence when combined with active inspection, as well as operation and maintenance activities. The NCP expects that remedies will use engineering controls, such as containment, for waste that poses a relatively low long-term threat. *See* 40 C.F.R. 300.430(a)(1)(iii)(B).

EPA's consultant, Metcalf and Eddy, evaluated the long-term life and potential failure mechanisms of the culvert in a report dated September 25, 2008, entitled "*Response to Comments on the AOC Culvert Received During the Proposed Plan Comment Period*," which is attached to the ROD as Appendix F. The report describes the aluminum corrugated plate arch culvert used at the Site as "highly resistant to corrosion." The soil in contact with the culvert is sand borrow, which is not corrosive. Even if corrosion were to occur, it would likely happen on the inside of the culvert, which could be repaired.

The Metcalf and Eddy report indicated that the culvert should last at least 50 years without requiring major repairs. Also, the contaminants in the asbestos-containing soil and groundwater should have no effect on the life of the culvert. While highly organic soils and borrow soils with pH less than 4.5 or more than 8.5 are considered corrosive to aluminum, none of these, including high pH groundwater, are in contact with the culvert.

Under the Statement of Work ("SOW") attached to the CD, the Settling Defendants are required to perform extensive studies regarding the long-term viability of the AOC and culvert, and to take corrective measures in the event deficiencies are identified. Section V.B.g of the SOW requires the Settling Defendants to perform pre-design studies with regard to the AOC and the culvert as follows:

To supplement the analysis outlined in Appendix F to the ROD, pre-design studies shall include a re-evaluation of flood modeling to confirm the previous finding that the AOC/culvert can withstand a 100 flood event. The stability of the culvert shall be re-evaluated with regard to other modes of potential failure. In the event that any inadequacies are identified as determined by EPA, the Settling Defendants shall propose corrective measures to be performed as part of the Remedial Action portion of this SOW. In addition, the September 1992 "Long-Term Inspection and Maintenance Plan, South Street Site, Walpole, Massachusetts" shall be re-evaluated as to its adequacy and the findings incorporated into the [operation and maintenance] activities at the Site.

If there is a need to increase the frequency of inspection and/or maintenance activities at the Site, the Settling Defendants can be required to do so under the provisions in the SOW described above.

Finally, the ROD requires institutional controls to be established where waste will be managed in place. For all parcels within the areas east and west of South Street and the AOC that contain existing buildings, excavation or exposure of soils beneath such buildings will be prohibited, unless performed in accordance with a soil management plan approved by EPA. Long-term monitoring of institutional controls will be required to ensure compliance with Site restrictions. Finally, because wastes are being left in place as part of the remedy, CERCLA requires EPA to complete reviews every five years of the protectiveness of the remedy.

Comment #3: The Town expresses concerns that the CD does not adequately address the long-term obligations of the Settling Defendants to maintain, repair and/or replace the culvert. In addition, the Town comments that the CD does not specifically require the Settling Defendants to provide any financial assurance for post-closure care of the culvert beyond that which is statutorily required for the entire Site.

EPA Response: The Settling Defendants have long-term obligations under the CD and the SOW to maintain the Remedial Action, including maintenance and repair of the culvert. Pursuant to the Section VI of the CD (Performance of the Work by Settling Defendants), the Settling Defendants are required to maintain the long-term effectiveness of the Remedial Action. Under Section VI.E of the SOW, the Settling Defendants are required to develop an EPA-approved Operation and Maintenance Plan to ensure the long-term continued effectiveness of each component of the Remedial Action, including a cost estimate for post-closure care, a plan for establishment of a financial assurance mechanism for post-closure care, and a post-closure inspection schedule and plans for implementing such activities.

In order to ensure the full and final completion of the Work by the Settling Defendants, Section XIV of the CD requires that a Performance Guarantee be established and maintained in the amount of the estimated cost of the Work. Under the CD, "Work" is described as all the activities the Settling Defendants are obligated to perform in the CD, in the ROD, in the SOW and any modifications thereto. The Performance Guarantee will ensure the completion of the construction of the remedy, as well as its long-term operation and maintenance. The estimated cost of the Work is \$13,000,000, of which \$6,000,000 is estimated for all operation and maintenance. Of the \$6,000,000, \$330,000 is estimated for operation and maintenance of the AOC. Under the terms of the CD, the Settling Defendants have already posted a surety performance bond for \$13,000,000. This performance bond ensures the completion of the Work and covers the estimated cost of all operation and maintenance at the Site.

If EPA determines that the Performance Guarantee provided by the Settling Defendants is inadequate due to an increase in estimated cost of completing the remedy or if the Guarantee no longer satisfies the requirements of CD, EPA may require an increase in the amount of the required Performance Guarantee, including for the purpose of providing sufficient funds in the case of the failure of the remedy.

Comment #4: The Town expresses concerns that relying on long-term institutional controls where waste is left in place is not protective of the environment. Placing institutional controls west of South Street will not protect the public from the environmental risks associated with the Former Mill Building. Instead, the Town wants the CD to require

demolition and removal of the buildings west of South Street, soil sampling under the footprint of the buildings, and response actions based on actionable findings. The Town also expresses concerns that the remedy does not include the demolition of the Former Mill Building.

EPA Response: As discussed above, long-term institutional controls are an effective remedy for waste left in place at Superfund sites. The ROD requires institutional controls be established to prevent residential exposure and use in the areas east and west of South Street where waste will be managed in place. As part of the institutional controls, the ROD, CD and SOW all require the Settling Defendants to draft a Soil Management Plan, to be approved by EPA, which would govern the performance of any approved activities at the Site that would disturb soils beneath existing buildings or any contaminated soils to be managed in place. Long-term monitoring and reporting of these institutional controls will also be required to ensure compliance with the Site restrictions. These institutional controls will be maintained for the life of the remedy. Accordingly, institutional controls are a protective component of the remedy.

As for the Former Mill Building, the CD does not require its demolition because this activity was not included in the ROD. As part of the Responsiveness Summary to the ROD, EPA in Comment #17 addressed the Town's concerns regarding the Former Mill Building as follows:

Under Section 104(a)(3)(B) of CERCLA, 42 U.S.C. § 9604(a)(3)(B), EPA is precluded from taking a response action for a release or threat of release of products solely within a building. During investigations of the Site, there was no evidence observed that any contaminants were being released from the buildings to the outside environment. Building roofs appeared intact, walls were stable and windows and doorways were secured. Therefore, EPA determined it did not have jurisdiction under CERCLA to address any of the buildings or their contents as part of this remedy for the Site. However there is potential that the condition of the unoccupied buildings may deteriorate over time, so EPA continues to reserve its authority to conduct future investigations to determine if the buildings and their contents may pose a threat of release of CERCLA-regulated contaminants to the outside environment. The results of such investigation could lead the Agency to take a further response action under CERCLA, but this would be established under a separate decision document.

In response to concerns raised during the comment period leading up to the ROD, EPA performed a Preliminary Assessment and Site Investigation in 2009 of potential risks to human health and the environment under the Superfund statute in two areas: the abandoned Former Mill Building west of South Street, and soil in an area close to the site adjacent to the Neponset River. In the spring of 2009, EPA signed an action memo authorizing the removal of drums and asbestos from the Former Mill Building, as well as discarded brake pads and soil from a vacant lot near the Neponset River. From June through October 2009, EPA conducted a removal action which included the disposal of nearly 30 tons of asbestos and asbestos containing debris, as well as over 2,700 pounds of hazardous materials and waste oils. While EPA reserves its right to conduct further investigations, EPA believes that these actions have abated the imminent risks caused by the Former Mill Building.

In addition, all parcels east and west of South Street that contain existing buildings will have institutional controls prohibiting excavation or exposure of soils beneath such buildings. Any excavation will be prohibited, unless performed in accordance with a soil management plan approved by EPA.

Comment #5: The Town expresses concerns that the Performance Guarantee of \$13 million is inadequate. The Town wants confirmation that \$13 million is adequate to cover all the remediation required under the CD and SOW. The Town requests that the Performance Guarantee be increased to cover inspection, maintenance, repair, and/or replacement of the culvert or removal of asbestos in the AOC for at least 30 years, and preferably 100 years. Finally, the CD should not allow the Settling Defendants to petition for reduction of Performance Guarantee.

EPA Response: Under Section XIV of the CD, the Settling Defendants have already posted a surety performance bond for \$13,000,000 pursuant to 40 C.F.R. 264.145(c) as the Performance Guarantee. As previously stated in EPA's response to Comment #3 above, the Performance Guarantee ensures the full and final completion of the Work, and the amount of the Performance Guarantee to be established and maintained is based on the estimated cost of the Work. As defined in Paragraph 4 of the CD, "Work" covers all obligations of the Settling Defendants under the CD, including long-term operation and maintenance at the Site. If repair or replacement of the culvert becomes necessary, the CD authorizes EPA to require an increase in the amount of the Performance Guarantee.

While the CD does allow the Settling Defendants to petition EPA for a reduction of the Performance Guarantee, this can only occur if the Settling Defendants demonstrate that the estimated cost of the remaining Work has diminished below \$13 million. Under Paragraph 50 of the CD, the Settling Defendants are allowed to request a reduction in the amount of the Performance Guarantee only to the amount of the estimated cost of the remaining Work to be completed. Such a petition for a reduction of a Performance Guarantee is allowed under RCRA and under EPA's national model Consent Decree for Remedial Design and Remedial Action. See 40 C.F.R. 264.145(c)(8). EPA approval is required for any reduction of the Performance Guarantee.

However, if EPA determines that the Performance Guarantee provided by the Settling Defendants is inadequate due to an increase in estimated cost of completing the remedy or if the Guarantee no longer satisfies the requirements of CD, under Paragraph No. 48 of the CD EPA may require an increase in the amount of the required Performance Guarantee, including for the purpose of providing sufficient funds in case of the failure of the remedy. See 40 C.F.R. 264.145(c)(7).

Comment #6: The Town wants the United States' "Covenant Not to Sue" to exclude any actions that may need to be taken by the EPA in order to enforce the post-closure requirements of the CD, including, but not limited to, remediation of any releases or threatened releases as a result of (i) remediation work later found to have been improperly performed, (ii) non-compliance with any long-term institutional controls, (iii) non-compliance with any post-closure obligations, and (iv) damage or compromise of the

culvert and any other portions of the Site where hazardous materials were allowed to be left in place.

EPA Response: In consideration of the Settling Defendants performing the Work and making certain payments to the United States, the United States covenants not to sue or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA for performance of the Work and for recovery of Past Response Costs, Future Response Costs, and Future Oversight Costs, all as defined under the CD.

These covenants not to sue are conditioned on the Settling Defendants successfully performing all of their obligations under the CD, which include the satisfactory completion of the Work and long-term operation and maintenance at the Site. Moreover, to ensure performance of the remedy, EPA has specifically reserved certain rights against the Settling Defendants. Among some of the rights EPA has specifically reserved are those with respect to:

- a. claims based on a failure by Settling Defendants to meet a requirement of the Consent Decree;
- h. liability, prior to Certification of Completion of the Work, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to [CD] Paragraph 15 (Modification of the SOW or Related Work Plans); and,
- k. liability for additional response actions at the Site, including but not limited to any response action arising from the disposal, release, or threat of release of hazardous substances in the Neponset River and floodplain downstream of the West Street Dam.

Therefore, EPA has rights under the CD to enforce the CD if the Settling Defendants fail to perform any of their obligations, including the CD's post-closure requirements.

In addition to its reservation, EPA also has rights under the CD in the event that Settling Defendants (1) have ceased implementation of any portion of the Work, (2) are seriously or repeatedly deficient or late in their performance of the Work, or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment. Under such circumstances, EPA may either require the Settling Defendants to remedy the circumstances giving rise to EPA's issuance of such notice or assume the performance of any portion of the Work as EPA deems necessary.

Comment #7: The Town requests that the CD be modified to provide liability and contribution protection to the Town if it forecloses on its tax liens on Site properties owned by BIM Investment Corporation and Shaffer Realty Nominee Trust and assumes full ownership of all or any portion of the Site.

EPA Response: The liability relief and contribution protection that the Town requests if it forecloses on its tax liens are outside the subject matter of the CD. The CD concerns the obligations of the Settling Defendants to perform cleanup work at the Site and does not address

the Town's foreclosure options. The Town's request, therefore, is not relevant to the approval of the CD.

Although the CD does not provide the liability relief that the Town requests, certain provisions of CERCLA provide municipalities statutory protection related to tax foreclosures. Section 101(20)(D) of CERCLA provides that municipalities that acquire property involuntarily, such as through tax delinquency, are not included as liable owners or operators. *See* 42 U.S.C. § 9601(20)(D). In addition to this statutory exclusion, there is a statutory defense contained in Sections 107(b)(3) and 101(35)(A)(ii). This third-party defense, in relevant part, applies to contamination caused by third parties unrelated to a municipality where the municipality acquired property by "involuntary transfer or acquisition." *See* 42 U.S.C. §§ 9607(b)(3), 9601(35)(A)(ii). The municipality need not be completely passive for the acquisition to be considered involuntary. *See The Effect of Superfund on Involuntary Acquisitions of Contaminated Property by Government Entities*, December 1995, EPA, OECA, Office of Site Remediation Enforcement. These protections do not apply if the municipality has caused or contributed to the release of hazardous substances.

In addition to the above, CERCLA provides a defense for certain "bona fide prospective purchasers" or "BFPPs" that satisfy certain conditions. *See* 42 U.S.C. § 9607(r). This provision allows parties, including municipalities, that are not affiliated with a liable party to purchase contaminated property as long as they perform "all appropriate inquiry" prior to purchase and comply with a number of ongoing obligations after purchase.

Although protections for the Town's protective tax taking are outside the scope of the CD, CERCLA provides safe harbors from liability for municipal tax takings. More information about CERCLA's liability protections for municipal acquisitions is found at <http://www.epa.gov/compliance/cleanup/revitalization/local-acquis.html>. Note that these liability protections are complicated and contain a number of conditions. The Town should review the statutory provisions and related guidance carefully. The Town may want to obtain legal advice on these issues before proceeding with any tax takings at the Site. EPA would be glad to further discuss these protections with the Town.

Comment #8: The Town expressed concerns that there may in the future be a lack of communication and sharing of information by the Settling Defendants in addressing issues and concerns which the Town has with respect to the remediation work being performed on the Site. The Town requests the CD be modified to require Settling Defendants to prepare and institute a Community Relations Support Plan that is acceptable to the Town. Also, EPA should continue to invite the Town's Health Director to the monthly Site work status meetings with the Settling Defendants, and to publicize and conduct regular public meetings (at least quarterly) to provide information and receive public input regarding the Settling Defendants' remediation work until such work has been completed.

EPA Response: The Regional Superfund program is committed to vigorous outreach both with the general public and the Town of Walpole. Since lodging of the CD, the Town and the Town's Health Director have been invited to progress meetings with the Settling Defendants.

The development of a Community Relations Plan (“CRP”) is required of EPA under the terms of the SOW attached to the CD, and the Settling Defendants are required to prepare a Community Relations Support Plan (“CRSP”) designed to support EPA’s efforts. The CRP and the CRSP will both contain provisions for public meetings on both a regular and ad hoc basis as needed. EPA will in the future give the Town the ability to comment on the CRP and the CRSP.

END OF RESPONSE

Exhibit C

From: bk1492@aol.com
Sent: Wednesday, August 11, 2010 10:38 AM
To: Katz, Maureen (ENRD); Fleetwood, Tonia (ENRD);
pubcomment.ees.enrd@usdoj.gov; americanvoices@mail.house.gov;
comments@whitehouse.gov; sf.nancy@mail.house.gov;
info@emagazine.com; today@nbc.com; info@starmagazine.com;
info@taxpayer.net; media@cagw.org
Cc: info@nypost.com
Subject: public comment on federal register Fwd: causing cancer in ma - settlement is far too quiet comment is this from cancer cluster in ma where people died?

is this from woburn. because if they are settling with the us for contamination from polluted water, then the people who died and who got cancer should be getting alot more from these polluters. i do not favor this settlement and believe polluters get a slap on the wrist from the us govt and the us dept of justice. i find this intolerable. polluter need to have everything they have taken from them and they need to be in jail for the rest of their lives. we need to make decisions to pollute very very costly. this settlement does not do that. it is time to make pollution stop. our world is too crowded to allow this to continue to go on in america. jean public l5 elmst florham park nj07932

[Federal Register: August 3, 2010 (Volume 75, Number 148)]
[Notices]
[Page 45666]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr03aul0-106]

DEPARTMENT OF JUSTICE

Notice of Lodging of Consent Decree Under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ('`CERCLA'')

Notice is hereby given that on July 28, 2010, a proposed Consent Decree in United States v. BIM Investment Corp. et al., Civil Action No. 1:10-cv-11263, was lodged with the United States District Court for the District of Massachusetts.

The Consent Decree resolves claims brought by the United States, on behalf of the United States Environmental Protection Agency ('`EPA''), against four parties ('`Settling Defendants'') under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9606 and 9607. In its Complaint, filed concurrently with the Consent Decree, the United States sought injunctive relief in order to address the release or threatened release of hazardous substances at or from the Blackburn and Union Privileges Superfund Site in Walpole, Massachusetts (the ``Site''), along with the recovery of costs the United States incurred for response activities undertaken at the Site.

Under the Consent Decree, the Settling Defendants--BIM Investment Corporation, Shaffer Realty Nominee Trust, Tyco Healthcare Group LP, and W.R. Grace & Co.-Conn.--will implement the remedy selected by EPA for the Site, including the excavation of soil and sediment and the extraction and treatment of groundwater. The Consent Decree also

requires the Settling Defendants to reimburse the United States for \$1,431,860 in past response costs incurred at the Site, and to reimburse the United States for its future oversight costs at the Site, up to \$2,000,000.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and either e-mailed to pubcomment-ees.enrd@usdoj.gov or mailed to P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to United States v. BIM Investment Corp. et al., D.J. Ref. No. 90-11-3-09667.

The Consent Decree may be examined at the Office of the United States Attorney, District of Massachusetts, United States Courthouse, 1 Courthouse Way, Suite 9200, Boston, Massachusetts, 02210, and at U.S. EPA Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109. During the public comment period, the Consent Decree may also be examined on the following Department of Justice website: http://www.justice.gov/enrd/Consent_Decrees.html. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$136.50 for a copy of the complete Consent Decree (25 cents per page reproduction cost), or \$30.25 for a copy without Appendix A (the 425-page Record of Decision, which is available at <http://www.epa.gov/region1/superfund/sites/blackburn/293498.pdf>), payable to the U.S. Treasury or, if by email or fax, forward a check in that amount to the Consent Decree Library at the stated address.

Maureen Katz,
Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2010-18975 Filed 8-2-10; 8:45 am]

BILLING CODE 4410-15-P

Exhibit D



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September 1, 2010

John W. Giorgio
jgiorgio@k-plaw.com

**BY EXPRESS MAIL AND
ELECTRONIC MAIL**

Ignacia S. Moreno
Assistant Attorney General
Environmental and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611

Re: United States v. BIM Investment Corp. et al., D.J. Ref No. 90-11-3-09667
Blackburn & Union Privileges Superfund Site -
Comments of the Town of Walpole - Proposed Consent Decree

Dear Ms. Moreno:

Please be advised that this firm serves as Town Counsel to the Town of Walpole (“Town”). The following is submitted on behalf of the Town with respect to the Consent Decree lodged in the above-referenced matter.

While the Town appreciates the time and effort which the United States has expended in preparing the Consent Decree, the Town continues to have significant concerns regarding the Blackburn & Union Privileges Superfund Site in Walpole, Massachusetts (the “Site”) and the remediation of the contamination thereof. Despite the fact that the Town submitted detailed comments to the U. S. Environmental Protection Agency (the “EPA”) on the Record of Decision (“ROD”) dated September 30, 2008, most of the Town’s concerns remain unaddressed in the Consent Decree. As you know, the Town pursuant to G.L. c. 60, Section 53 has taken the Site for nonpayment of real estate taxes by the record owners, B.I.M. Investment Corporation and Shaffer Realty Nominee Trust subject to the right of redemption of such Owners to redeem their interest in the Site through the payment in full of all outstanding taxes. Accordingly, the Town has a compelling interest in ensuring that the Consent Decree meets the requirements of applicable federal laws.

Applicable Standard

In reviewing Consent Decrees issued under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9601 *et seq.*, as amended by Superfund Amendment and Reauthorization Act of 1986, Pub. L. No. 99-499 (collectively “CERCLA”), “[t]he relevant standard is whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute [i.e. CERCLA]. U.S. v. Cannons Engineering, et al., 720 F.Supp. 1027 (D. Mass.

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1989), affirmed 899 F.2d 79, 84 (1st Cir. 1990) see also United States v. SEPTA, 235 F.3d 817, 823 (3d Cir.2000).

In determining whether a consent decree is reasonable under CERCLA, the District Court for the District of Massachusetts has applied the following criteria:

- (1) the nature and extent of the hazards at the site;
- (2) the degree to which the remedy provided for by the consent decree will adequately address the hazards present at the site;
- (3) the possible alternative approaches for remedying the hazards at the site;
- (4) the extent to which a consent decree furthers the goals of the statutes that form the basis of the litigation; and
- (5) the extent to which the court's approval of a consent decree is in the public interest.

Id. at 1038 [emphasis supplied](citing, U.S. v. Conservation Chemical Co., 628 F.Supp. at 401, relying on Seymour Recycling Corp., 554 F.Supp. 1334, 1339 (D.C. Ind.1982)). Another relevant factor in evaluating whether the consent decree is "reasonable" is "whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures." U.S. v. Charles George Trucking, Inc., et al., 34 F.3d 1081, 1085 (1st Cir. 1994). A CERCLA consent decree is considered reasonable when it provides an "efficacious cleanup" and also adequately compensates the public for the cost of the cleanup. Id. The decree's effectiveness in cleaning the environment is of "cardinal importance." Cannons, 899 F.2d. at 89. A consent decree is faithful to the objectives of CERCLA if it addresses "accountability, the desirability of an unsullied environment, and promptness of responsive activities." Id.

As set forth in Article V, Section 5 of the Consent Decree entitled "Objectives of the Parties," one of the enumerated objectives of the Consent Decree is to protect public health or welfare or the environment by the design and implementation of response actions at the Site by the Settling Defendants. Pursuant to this standard, the Town objects to the entry of the proposed Consent Decree in its present form because the design and implementation of response actions at the Site by Settling Defendants are inadequate to address the hazards presented by the Site and, therefore, do not protect public health or welfare or the environment. Further, as the Consent Decree does not require abatement of all contamination which exists at levels acknowledged by the EPA to be harmful, the Consent Decree puts the Town, its citizens and the environment at risk of continuing harm from exposure to hazardous materials in contravention of the legal requirements of CERCLA. As such, this Consent Decree is not faithful to the objectives of CERCLA and is not in the public interest.

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For your consideration and review, the Town objects to the proposed Consent Decree on the following specific grounds:

**The Asbestos Encapsulation On-Site Is Not Protective
of Human Health and the Environment**

The Town is greatly concerned that the Selected Remedies (as such term is defined in the Consent Decree) will not adequately address the hazards present at the Site. Specifically, the Consent Decree ratifies the Settling Defendants' election pursuant to the Second Administrative Order for Removal Action issued by the EPA in 1992, to allow hazardous materials in the sediment and ground beneath the Neponset River, which flows through the Site, to remain in place and to install a culvert to allow the River to flow through the Site without allegedly coming into direct contact with the hazardous materials. It is manifestly clear, however, that the Consent Decree does not adequately address the long-term obligations on the part of the Settling Defendants (as such term is defined in the Consent Decree) to maintain, repair and replace the culvert in good condition and repair other than periodic inspections on an annual basis. More importantly, the Consent Decree does not specifically require the Settling Defendants to provide any financial assurance for post-closure care of the culvert beyond that which is statutorily required for the entire Site. The Settling Defendants, with the approval of EPA, selected and implemented the remedy consisting of construction of a new culvert and encapsulation of the known asbestos on site. The Town has said throughout the process, however, that the remedy is inadequate to protect the environment. While Town recognizes the impracticability of requiring at this time the removal of the encapsulated asbestos, the United States at the very least should require, as part of the Consent Decree, an enhanced Performance Security to protect the Town and the environment from a catastrophe failure of the culvert.

Under the proposed Consent Decree there is no guarantee in place to protect against a catastrophic failure of the culvert (i.e. failure due to, among other things, severe weather conditions, including, but not limited to, hurricanes, extreme or flash flooding, ice and snow storms). In order to adequately ensure that the culvert will not fail, or in the event of a failure that the Neponset River does not come into contact with the hazardous materials, the Consent Decree should be modified to obligate the Settling Defendants to provide financial assurance for the post-closure care of the culvert. This obligation should be in the form of a trust fund or a performance bond in amounts sufficient to ensure that (i) the culvert continues to be maintained in good condition and repair, and (ii) if the existing culvert is no longer viable, sufficient funds are available for the immediate replacement thereof, or in the alternative, the immediate excavation and removal of hazardous materials in the Area of Contamination and Settling Basin 2 Containment Cell. Moreover, the Consent Decree should require that such funds be fully available as of the commencement of the post-closure period. This modification is in accordance with the Selected Remedies set forth by the EPA in its ROD (Part 2.L.2 Pages 111 and 116).

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The Town also requests that the Consent Decree be modified to provide for a physical on-site inspection of the culvert at least 4 times a year and after every major weather or seismic event (at least within 5 days thereafter). Regular inspections will ensure that the culvert has not been damaged or compromised and that there is no danger of release or threatened release of the encapsulated hazardous materials surrounding the culvert. Recent events in Massachusetts further demonstrate the need for frequent inspections. As you know, last spring the Massachusetts Water Resource Authority's water main coupling, which was less than 10 years old and was expected to have a useful life similar to that of the proposed culvert in Town, failed for no apparent reason. As was the case with the water main coupling in Weston, there is no apparent expectation of the culvert failing. Nevertheless, providing sufficient financial assurance for the post-closure care of the culvert ensures the prompt repair and/or replacement of the culvert and the clean-up of any released hazardous materials into the Neponset River and surrounding areas as needed.

Significantly, the issue here is not whether the culvert can withstand a 100-year flood event, but how many 100-year flood events, rises in the water levels, increased flooding, and other unforeseen events can the culvert withstand. Accordingly, the Consent Decree must be modified to be proactive with respect to the maintenance, repair and replacement of the culvert.

Reliance on Grant of Environmental Restriction and Easement for Institutional Controls Does Not Adequately Protect the Environment

One of the Selected Remedies provided in the Consent Decree allows the Settling Defendants by means of "long-term institutional controls" to leave in place a large amount of hazardous materials on the Site. This selected remedy presents a real and constant threat of releases of hazardous materials into the environment for an indefinite period of time. Specifically, the proposed "long-term institutional controls" in the form of a Grant of Environmental Restriction and Easement (the "GERE") prohibit any portion of the Site, where the hazardous materials are allowed to remain in place, to be used or activities conducted thereon, if such use would interfere with the Selected Remedies. Under the form of the GERE, attached as Exhibit F to the proposed Consent Decree, prohibited acts include, but are not limited to, excavation, removal and disposal of soil and ground cover; extraction or utilization of ground water; and any agricultural, residential (permanent and transient), daycare, education uses or activities (for students ages 18 and younger), recreation, commercial and industrial uses. In light of the Town's legal interest in the Site by virtue of its tax liens, the GERE requires the consent of the Town.

While the Town understands that "long-term institutional controls" are an effective Selected Remedy at some sites, here, the Town has grave concerns about the adequacy of relying on such controls at this Site. Indeed, the effectiveness is particularly dubious in light of the remedies' failure to remove or remediate hazardous materials from certain portions of the Site and only requiring annual inspection of such areas. The Town feels strongly that placing the Restrictions upon the buildings which are located on the west side of South Street will not adequately protect the public

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from the potential environmental risks associated with these buildings, and that the proper remediation of this Site should include (i) the demolition and removal of these buildings, (ii) findings confirming the types of hazardous materials located under the buildings, and (iii) removal and remedial actions based upon such findings. The risks to the public and the environment in leaving these buildings in place are simply unacceptable to the Town, which holds recorded tax liens on the Site, and should not be accepted by the EPA.

Although the EPA and the Settling Defendants may believe that these buildings are presently secure and present no immediate threat of release and that the “long-term institutional controls” is an adequate remedy, absent re-use, these buildings will continue to remain unoccupied and their physical condition will continue to deteriorate. This is detrimental to the environment and the Town. As in the case of the culvert, the Consent Decree does not place any additional and timely inspection or maintenance obligations upon the Settling Defendants to ensure that these buildings are maintained in such a manner as to avoid any potential release. Moreover, the Consent Decree does not provide any post-closure funding mechanism to ensure that there would be sufficient funds to address any deterioration of the buildings which pose an environmental risk to the public. Further, by not requiring any remediation of this portion of the Site, the EPA has condoned the continued abandonment of these buildings by the Settling Defendants. This abandonment contributes to a blighted area for the foreseeable future due to the stigma attached to this Site as a result of the long-term institutional controls. As such, the Town requests that the Consent Decree be modified to require the complete removal of all buildings, confirm the types of hazardous materials located under the building, and ensure appropriate removal and remediation of the hazardous materials found under the buildings.

The Performance Guaranty is Inadequate

It is the Town’s understanding that the \$13 million amount provided in the Consent Decree for the Performance Guaranty is based on the July 2008 estimated cost of work for the EPA preferred clean-up plan. This \$13 million amount does not include the cost for the installation of the culvert or the excavation and removal of hazardous materials in the Area of Contamination on the west side of the Site. As years have passed since this estimate was provided, the Town requests that the EPA confirm that such amount is currently sufficient to complete all of the remediation required under the Consent Decree, and if such funds are insufficient, to require the amount of the Performance Bond to be increase to cover such costs. The Town also requests that the amount of the Performance Guaranty be further increased to include the costs associated with the repair or replacement of the culvert. As stated above, the proposed Consent Decree does not provide for any protection against a catastrophic failure of the culvert. In order to adequately ensure that there are sufficient funds available during the remediation period in such an event, the EPA must require that the amount of the Performance Guaranty be increased to also include the costs associated with the repair or replacement of the culvert, or in the alternative, the costs associated with the removal of the encapsulated hazardous materials surrounding the culvert.

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Moreover, given that the need for remediation is immediate, the Consent Decree should not allow the Settling Defendants to provide a Performance Guaranty by means of a demonstration of financial ability or written corporate guarantee pursuant to Paragraph 46 (e) or 46(f) of the Consent Decree. Further, the Town requests that the Consent Decree be modified to not allow for the release of any portion of the Performance Guaranty until all remediation work is completed and a post-closure fund has been established and funded. This post-closure fund should include sufficient funding to allow for on-going inspection, maintenance and as necessary, the repair/replacement of the remediation facilities installed on the Site, including, but not limited to, the culvert. Such financial assurances for post-closure care should pursuant to 40 CFR 264.117(a)(2)(ii), be extended to cover the 100 year period for which the EPA states in the ROD the hazardous materials would still be present at the Site and if released would be harmful to human health and environment. In no event, however, should the financial assurances for post-closure care be less than the full 30 year period required under 40 CFR 264.117(a)(1).

Additional Exclusions to Limited Liability of Settling Defendants

The Consent Decree limits the Settling Defendants' contribution to amounts expended to complete the remediation work set forth in the Consent Decree. The Town requests that this limitation be modified to specifically exclude any future remediation required as a result of non-compliance with any post-closure activities required to be performed or undertaken by the Settling Defendants, including, but not limited to, any actions required as a result of the culvert failing and release of potentially hazardous materials from the buildings. Further, the Consent Decree should be modified to specifically exempt from the "Covenant Not to Sue" any actions that may need to be taken by the EPA in order to enforce the post-closure requirements of the Consent Decree, including, but not limited to, remediation of any releases or threatened releases as a result of (i) remediation work later found to have been improperly performed, (ii) non-compliance with any long-term institutional controls, (iii) non-compliance with any post-closure obligations; and (iv) damage or compromise of the culvert and any other portions of the Site where hazardous materials were allowed to be left in place.

Covenant Not to Sue Lienholders

To the extent that the Consent Decree contemplates that all holders of liens upon those portions of the Site which shall be subject to long term institutional controls, including, but not limited to, the Town, the Consent Decree should be modified. Specifically, the Town requests that the modification provides that in the event that the Town forecloses on its tax liens and assumes full ownership of all or any portion of the Site, the United States and the Commonwealth of Massachusetts (the "Commonwealth"), and the Town will agree to appropriate liability and contribution protection for the Town.

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Lack of Communication and Information Sharing

The Town is greatly concerned that there may in the future be a lack of communication and sharing of information by the Settling Defendants in addressing issues and concerns which the Town has with respect to the remediation work being performed on the Site. Although the Settling Defendants are currently making efforts to communicate and share information regarding the Site with the Town by inviting the Town's Health Director to monthly Site work status meetings with the EPA, however, as evidenced by the Emergency Response provisions of the Consent Decree (Article XVI, Paragraph 52) and the Project Operations Plan, among other provisions, there is no affirmative requirement for the Settling Defendants to coordinate their remediation activities with the Town. In fact, while many of the proposed remediation activities to be undertaken by the Settling Defendants will directly affect the Town and its residents, such as the dust contaminates from excavations, truck traffic, and fire or other acts of vandalism on the site, there is no requirement in the Consent Decree requiring that the Settling Defendants consultation or coordination with the Town to put plans or protocols in place. Such coordination is necessary to protect the surrounding properties and the citizens and employees of the Town (including, but not limited to, the Town's emergency personnel such as police officers, firefighters and EMT's who must answer any calls originating from the Site due to an accident, casualty or other such incidents) from exposure to the hazardous materials located upon the Site.

This lack of continuing communication and information sharing requirement in the Consent Decree will impede the Town's ability to effectively respond and address any emergencies that may arise at the Site and to fully protect its residents and employees. Accordingly, the Consent Decree should be modified to require Settling Defendants to prepare and institute a Community Relations Support Plan that is acceptable to the Town and which, among other things, provides the Town with contact information for all responsible parties, and with timely updates of remediation activities occurring at the Site. The EPA should also continue to invite the Town's Health Director to the monthly Site work status meetings with the Settling Defendants, and to publicize and conduct regular public meetings (at least quarterly) to provide information and receive public input regarding the Settling Defendants' remediation work until such work has been completed.

Conclusion

Most of the aforesaid concerns are a reiteration of the Town's concerns which were previously presented to the EPA during the public comment period for the ROD. As set forth above, the Town remains concerned that the Consent Decree does not require abatement of all contamination which exists at levels acknowledged by EPA to be harmful and fails to adequately address the important sources and potential sources of contamination. Consequently, the Consent Decree accepts and preserves unacceptable risks of exposure and continued contamination and recontamination. The proposed remediation outlined in the Consent Decree, therefore, is inadequate, unreasonable and not in the best interest of the residents of the Town or the environment. The

Ignacia S. Moreno
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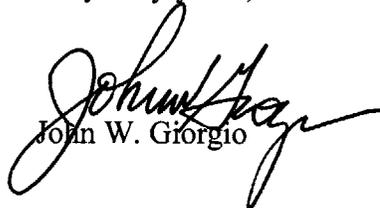
Town, however, also believes that there is now a unique opportunity to modify the Consent Decree to remove and reduce the risks of exposure, contamination and recontamination to occur, instead of leaving it for a future generation to inherit.

The Town, as lien holder, has an obvious and immediate interest in the remediation of the Site. To that end, the open ended liability and uncertainty regarding the Site's contamination and incomplete cleanup efforts set forth in the proposed Consent Decree unjustifiably limit the Site's future potential use by the Town. Indeed, under the proposed Consent Decree, the contaminated Site's use will not only be indefinitely restricted, but indefinitely contaminated.

The Town is, therefore, very reluctant to agree to subordinate its tax title lien (which is now approximately \$2 million) against these properties or to consent to any institutional controls, including a GERE without (i) a Consent Decree that is fair, reasonable, and faithful to the objectives of the CERCLA by adequately addressing the hazards presented by the Site and protecting the public and the environment, and (ii) the Town receives appropriate protection against liability from the United States, the Commonwealth, and the Settling Defendants in the event that the Town forecloses on its tax liens in the future. Specifically, the Town requests that, as a condition of its consenting to a GERE in the form contained in Appendix F to the Consent Decree, the United States revises the Consent Decree to (1) increase the amount of Performance Security to ensure replacement of the culvert and removal of the encapsulated asbestos, if necessary, and (2) an amendment to the Scope of Work requiring the Settling Defendants to remove the buildings on the west side of South Street and to conduct further remedial measures that may be necessary once the building is removed.

The Town looks forward to your response regarding the comments herein, pursuant to Section 122(i) of CERCLA and 28 CFR §50.7. Unless the Consent Decree is modified in accordance with the Town's comments, the Town respectfully requests that the Department withdraw its consent to the proposed judgment, as permitted by 28 CFR §50.7, since the proposed Consent Decree is inappropriate, improper and inadequate to remedy the hazardous contamination at the Site under CERCLA.

Very truly yours,


John W. Giorgio

JWG/bp
cc: Board of Selectmen
Town Administrator
407303v2/30707/0001