

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, <i>et al.</i> ,)	CIVIL ACTION NO. 83-3882-Y
Defendants.)	
)	
COMMONWEALTH OF MASSACHUSETTS,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, <i>et al.</i> ,)	
Defendants.)	

EXHIBIT 1

**RESPONSES TO PUBLIC COMMENTS ON THE PROPOSED SUPPLEMENTAL
CONSENT DECREE WITH DEFENDANT AVX CORPORATION**

Responses to Public Comments
Supplemental Consent Decree with Defendant AVX Corporation
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INTRODUCTION

On October 10, 2012, the United States of America, on behalf of the United States Environmental Protection Agency, and the Commonwealth of Massachusetts (the “Commonwealth”), lodged a Supplemental Consent Decree (“Supplemental Decree”) in this matter. The Supplemental Decree resolves claims by the United States and the Commonwealth against Defendant AVX Corporation (“AVX”) for response costs and response actions in connection with the New Bedford Harbor Superfund Site (the “Site”) under two distinct reopener provisions contained in a Consent Decree entered by the Court in 1992 (“1992 Consent Decree”).¹

On October 17, 2012, the Department of Justice published a notice of lodging of the proposed Supplemental Decree in the Federal Register and invited the public to submit comments on the settlement for a period of thirty days. 77 Fed. Reg. 63871 (Oct. 17, 2012).² On November 8, 2012, the Department of Justice published a notice that extended the comment period for an additional thirty (30) days until December 17, 2012. 77 Fed. Reg. 67025 (Nov. 8, 2012).³

¹ The 1992 Consent Decree is attached as Appendix A to the Supplemental Decree, which is attached to the Notice of Lodging, Docket No. 2617, as Exhibit 1. Citations to the 1992 Consent Decree in these Responses to Comments are referenced as “1992 CD at ¶ [paragraph number].” Citations to the Supplemental Decree are referenced as “SCD at [page number]” or “SCD at ¶ [paragraph number].”

² Notice of Lodging of Proposed Supplemental Consent Decree Under the Comprehensive Environmental Response Compensation and Liability Act, 77 Fed. Reg. 63871 (Oct. 17, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-10-17/pdf/2012-25488.pdf> (accessed on April 17, 2013).

³ Notice of Extension to Public Comment Period for Supplemental Consent Decree Lodged Under the Comprehensive Environmental Response, Compensation, and Liability Act, 77 Fed. Reg. 67025 (November 8, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-11-08/pdf/2012-27287.pdf> (accessed on April 17, 2013).

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The United States received approximately 21 sets of comments pursuant to these Federal Register notices.⁴ These 21 sets of comments can be separated into three categories:⁵

1. comments in support (total of 6);
2. comments in opposition (total of 13); and
3. form letter comments in opposition, and a petition drive in opposition, with multiple on-line and handwritten signatures (counted as 2).

All of the comments on the proposed Supplemental Decree that have been submitted during the comment period are being filed with the Court as Exhibit 4 to the Memorandum in Support of Motion to Enter the Supplemental Consent Decree (the “Memorandum”).⁶ The United States and the Commonwealth (collectively, the “Governments”) carefully considered all of these comments. To facilitate the Court’s review of the major comments and the Governments’ responses, and in order to present these comments faithfully and efficiently to the Court, in these Responses to Public Comments on the Proposed Supplemental Consent Decree with Defendant AVX Corporation (“Responses to Public Comments”), the major comments have been divided between those in opposition and those in support of the proposed Supplemental Decree, and then placed into outline form, organized according to subject. The Governments’

⁴ Comments submitted during the public comment period are available on the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/sites/production/files/documents/521888.pdf>. Comments submitted by the Buzzards Bay Coalition are available separately. See Footnote 7 below for more information about the comments submitted by the Buzzards Bay Coalition.

⁵ Comments neither in support nor in opposition (total of 2), include comments from U.S. Department of the Interior’s National Park Service (New Bedford Whaling National Historic Park) and OPFLEX Solutions. The Bates number references in footnotes correspond to the Bates numbers in Exhibit 4. With respect to this citation, for comments from the New Bedford Whaling National Historic Park, see Bates numbers 307-308, and for comments from OPFLEX Solutions, see Bates numbers 026-027.

⁶ Unless otherwise stated, references to Exhibits refer to those Exhibits to the Memorandum.

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responses to the major comments are presented in these Responses to Public Comments directly following each comment.

One category of comments in opposition to the proposed settlement consists of thirteen comments, including those from the Buzzards Bay Coalition (“BBC”)⁷ and Hands Across the River Coalition (“HARC”).⁸ The other category of comments in opposition to the proposed settlement consists of form letter comments and petition drive comments, which were initiated by BBC and circulated by BBC and HARC.⁹ The petition/form letter category of comments has four subcategories:

1. BBC asked members of the public to submit form letter comments using suggested language requesting that the New Bedford Harbor be “cleaned to the highest, safest standard” and that the settlement “include a reopener clause to ensure a full cleanup of the harbor.” Seventeen form letter comments of this nature, or very similar, were timely received.¹⁰

⁷ BBC’s comments are represented by Bates numbers 386-432, 599-638, 641-680, and 682-765, and are included in Exhibit 4 and are also available on the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/sites/production/files/documents/521885.pdf>. Citations to BBC’s comments are referenced as “BBC Comments at [page number]” or “BBC Comments at Attachment [attachment number].”

⁸ Other comments in this category were received from the following entities: Aghai, R. (Bates number 052); State Representative Cabral (Bates number 305); Dade, C. (associated with HARC) (Bates numbers 316-337); Finneran, J. (Bates number 286); Mattapoissett Land Trust, Inc. (Bates number 287); State Senator Montigny (Bates numbers 278-280); Myerson, J. (Bates number 156-157); Phinney, M. (Bates number 020); Ross, B. (Bates number 234); State Representative Straus (Bates numbers 297-299); and Tatelbaum, D. (Bates numbers 023-024).

⁹ The form letter comments and the petition drive comments, respectively, are responded to collectively, and therefore are counted as one comment each because the language adopted in the overwhelming majority of such comments is identical.

¹⁰ See comments from: Barboza, J. (Bates number 871); Bourne, M. (Bates number 175); Calusine, M. (Bates number 203); Costas S. (Bates number 174); Dempsey, S. (Bates number 182); Durkee, M. (Bates number 178); Farrell, J. (Bates number 254); Garfield, B. (Bates number 208); Hammond, S. (Bates number 185); Kelley, R. (Bates number 226); Legault, R. (Bates number 218); Marcus, D. (Bates number 176); Nardi, E. (Bates number

(cont’d...)

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2. BBC also asked members of the public to submit comments through an on-line petition hosted by <http://www.change.org/>. As of the close of the public comment period, it appears that approximately 800 signatures were timely received via this on-line petition drive.¹¹
3. BBC's on-line petition drive hosted by <http://www.change.org/> permitted members of the public to write personal statements describing their motivations for signing the on-line petition. Of the approximately 800 on-line signatures, roughly 67 commenters chose to write supplemental personal statements relating to why they chose to sign the petition.¹²
4. In addition, a hand-written petition effort circulated by BBC and HARC asked members of the public to sign paper copies of the <http://www.change.org/> on-line petition drive. Approximately 1,150 signatures appear on those paper petitions.

The United States received six comments, including from the Mayor of New Bedford, the New Bedford Harbor Development Commission, and several local employers, in support of the proposed Supplemental Decree.¹³

(...cont'd)

253); Payne, D. (Bates number 235); Savino, A. (Bates numbers 213-214); Sweeney, L. (Bates number 022); and Sylvia, J. (Bates number 021).

¹¹ Comments submitted as signatures on BBC's on-line petition are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/sites/production/files/documents/521887.pdf>.

¹² In the summary of comments, below, in some instances, excerpts from some of the supplemental personal statements have been provided as elaboration.

¹³ Comments from: Mayor Jon Mitchell of the City of New Bedford (Bates numbers 313-314); the New Bedford Harbor Development Commission (Bates numbers 284-285); joint comments from five New Bedford employers (Precix; Joseph Abboud; MarLees Seafood; Darn It; and the Acushnet Company) (Bates numbers 282-283); Anthes-
(cont'd...)

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Following a careful review of all of the public comments submitted during the public comment period, for all of the reasons set out below in these Responses to Public Comments, consistent with Section 122(d)(2)(B) of CERCLA, 42 U.S.C. § 9622(d)(2)(B), the United States and the Commonwealth find that the Supplemental Decree is not inappropriate, improper or inadequate.

(...cont'd)

Washburn, E. (Bates number 300); Maritime Terminal, Inc. (Bates numbers 302-303); and Kennedy, T. (Bates numbers 001-007).

OVERVIEW OF SITE HISTORY, ENFORCEMENT AND CLEANUP

The New Bedford Harbor Superfund Site is located in Bristol County, Massachusetts. EPA identified sediment and seafood contaminated with polychlorinated biphenyls (“PCBs”) in and around New Bedford Harbor in the mid 1970s, and EPA began site-specific investigations in 1983 and 1984. The Commonwealth of Massachusetts designated the New Bedford Site as its highest priority site, and EPA placed the New Bedford Site on the National Priorities List (“NPL”) on September 8, 1983.¹⁴

The 18,000-acre Site extends from the shallow northern reaches of the Acushnet River estuary, south through the commercial harbor of the City of New Bedford (“City”), and into 17,000 adjacent acres of Buzzards Bay. The Site is contaminated with high concentrations of many hazardous substances, notably very high levels of PCBs and heavy metals, with contaminant gradients generally decreasing from north to south.¹⁵

The Site includes three geographic areas of the Acushnet River estuary and Buzzards Bay—the Upper, Lower and Outer Harbors—consistent with geographical features of the area and gradients of contamination.¹⁶ EPA divided the Site into three operable units (“OUs”), as defined in 40 C.F.R. § 300.5. OU1 covers the Upper and Lower Harbors, and also includes an

¹⁴ Record of Decision, Upper and Lower Harbor Operable Unit, September 25, 1998 (“OU1 ROD”) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/38206.pdf>), at 2.

¹⁵ OU1 ROD at 1. For a visual depiction of PCB concentration levels at the Site, see EPA’s public presentation from 2010 (part of the Administrative Record for OU1 ESD4 available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/299745.pdf>) at 5.

¹⁶ For a map of the Site and its three operable units, see EPA’s Second Five-Year Review Report for the New Bedford Harbor Superfund Site (September 2010) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/470549.pdf>) at Figure 1 (page 63 of the 144-page PDF).

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interim action for two locations in the Outer Harbor. OU2 addressed the hot spot sediment, defined as sediment containing PCBs at levels above 4,000 parts per million (“ppm”), generally located in a five-acre area in the Upper Harbor near the Aerovox Facility, the primary source of PCB contamination to the Harbor.¹⁷ OU3 encompasses the Outer Harbor area.¹⁸

On December 9, 1983, the United States filed a complaint on behalf of the National Oceanic and Atmospheric Administration (“NOAA”) under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980,¹⁹ seeking damages for injury to natural resources at and near the Site caused by the releases of PCBs, against six defendants, including AVX, that at various times, owned and/or operated either the Aerovox Facility or the Cornell-Dubilier Facility. On December 10, 1983, the Commonwealth filed a complaint under CERCLA § 107 against the same defendants. The cases were subsequently consolidated. On March 9, 1984, the United States amended its 1983 complaint against the six defendants to include claims on behalf of EPA for recovery of response costs incurred, or to be incurred, at the Site under CERCLA § 107, 42 U.S.C. § 9607, and for injunctive relief under CERCLA § 106, 42 U.S.C. § 9606, and other environmental statutes. The Commonwealth subsequently filed an amended complaint which included claims for recovery of response costs

¹⁷ The term “Aerovox Facility” is defined in Paragraph 6(A) of the proposed Supplemental Decree.

¹⁸ OU1 ROD at 1 and 6. For more information about OU3, see the response to “Comments Asserting that EPA Failed to Account for Costs for the Outer Harbor Portion of the Site (“Operable Unit 3” or “OU3”)” (Section I(A)(3)(b)(v) below).

¹⁹ The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, commonly known as “Superfund,” will hereinafter be referred to as “CERCLA.”

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under Section 107 of CERCLA and Sections 5(a) and 13 of Mass. General Laws Chapter 21E.²⁰

At that time, EPA had not yet issued a record of decision (“ROD”) for any operable unit at the Site.²¹

On April 6, 1990, EPA issued a ROD for the Hot Spot Operable Unit of the Site (“OU2”), which was later modified. The OU2 ROD, as modified, called for dredging of sediment contaminated with over 4,000 ppm PCBs in a roughly 5-acre area in the Upper Harbor, followed by dewatering and off-site disposal in an appropriately licensed disposal facility. This work was completed by EPA in May 2000.²²

In 1991 and 1992, the United States and the Commonwealth entered into three separate consent decrees with five settling defendants, including AVX, which resulted in payment of approximately \$100 million, plus interest, which included payment for natural resource damages.²³ Pursuant to the 1992 Consent Decree, AVX paid \$66 million plus interest—out of which \$59 million plus interest was for Response Costs and \$7 million plus interest was for

²⁰ While the 1992 Consent Decree explained that the United States and the Commonwealth filed amended complaints on February 27 and 28, 1984, the case docket lists the filing of the first amended complaint on March 9, 1984.

²¹ OU1 ROD at 3; and Unilateral Administrative Order for Remedial Design, Remedial Action, and Operation and Maintenance, U.S. EPA Docket No. CERCLA-01-2012-0045, New Bedford Harbor Superfund Site, Upper and Lower Harbor Operable Unit, April 18, 2012 (“UAO”) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/507998.pdf>), at ¶ 16.

²² Record of Decision, Hot Spot Operable Unit, April 6, 1990 (“OU2 ROD”) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/218788.pdf>); and UAO at ¶ 17.

²³ OU1 ROD at 3-4. On March 27, 1986, the Court dismissed the claims of the United States and the Commonwealth against one of the named defendants due to lack of personal jurisdiction. *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22 (D. Mass. 1987).

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Natural Resource Damages, as these terms are defined in the 1992 Consent Decree.²⁴ The 1992 Consent Decree included a reopener provision, Paragraph 16 (“Unknown Conditions Reopener”), which reserved the Governments’ rights to institute proceedings against AVX if EPA finds that the Remedial Action is not protective of human health or the environment based on unknown conditions or new information discovered after the issuance of the RODs.²⁵ The 1992 Consent Decree also included a cost reopener provision, Paragraph 18 (“Cost Reopener”), which reserved the Governments’ rights to institute proceedings against AVX to the extent that Remedial Costs, as defined in the 1992 Consent Decree, exceed \$130.5 million.²⁶

On September 25, 1998, EPA issued a ROD for the Upper and Lower Harbor Operable Unit of the Site (“OU1”), which was subsequently modified by four Explanations of Significant Differences (“ESDs”) (collectively referred to as the “OU1 Remedy”).²⁷ Since EPA’s issuance of the OU1 ROD, EPA has been performing the remedial design and remedial action for OU1. From 1999 through 2004, EPA performed remedial design and remedial action activities using

²⁴ 1992 CD at ¶¶ 6-12.

²⁵ 1992 CD at ¶ 16; see also UAO at ¶ 21.

²⁶ 1992 CD at ¶ 18; see also UAO at ¶ 21.

²⁷ ESD issued on September 27, 2001 (“OU1 ESD1”), available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/25344.pdf>; ESD issued on August 15, 2002 (“OU1 ESD2”), available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/33633.pdf>; ESD issued on March 4, 2010 (“OU1 ESD3”), available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/462542.pdf>; and ESD issued on March 14, 2011 (“OU1 ESD4”), available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/479471.pdf>.

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settlement funds received from AVX and the other settling defendants to finance this work.

These funds were depleted in 2004.²⁸

EPA is continuing to perform the remedial design and remedial action for OU1. The major components of the OU1 Remedy include, but are not limited to:²⁹

- Hydraulic dredging of sediment in the Upper Harbor, dewatering, and off-site disposal;
- Dredging of additional sediment from areas of the Upper Harbor and disposal of that sediment into three confined disposal facilities (“CDFs”) to be built along the New Bedford shoreline of the Upper Harbor;
- Mechanical dredging for sediment from the Lower Harbor and the southern end of the Upper Harbor and disposal of that sediment in a confined aquatic disposal (“CAD”) cell, which will be constructed in the Lower Harbor;
- Disposal of contaminated sediment currently located in a temporary storage cell at the end of Sawyer Street; and
- Long-term operation and maintenance of components of the harbor remedy, including a capped area of sediment in the Outer Harbor, the CAD cell, and CDFs.³⁰

The OU1 Remedy also includes long-term site-wide monitoring and institutional controls (e.g., seafood monitoring, seafood advisories and land use restrictions).³¹

²⁸ UAO at ¶¶ 25 and 92.

²⁹ For a visual depiction of the major components of the OU1 Remedy’s hydraulic dredging process (prior to issuance of OU1 ESD4), see Second Five-Year Review at Figure 3 (page 65 of the 144-page PDF).

³⁰ UAO at ¶ 63.

³¹ UAO at ¶ 63.

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Since settlement funds were depleted in 2004, and since EPA began full-scale dredging (hydraulic dredging, desanding, dewatering, wastewater treatment, and off-site disposal of PCB-contaminated sediment) in 2004 until the present, EPA has been implementing the above-listed activities with funding from EPA's trust fund known as the "Hazardous Substance Superfund" (commonly known as "Superfund") and the statutory State 10% cost share of remedial action costs paid by the Commonwealth, as required by CERCLA § 104(c)(3).³² With the typical annual funding rate from Superfund of approximately \$15 million,³³ EPA has been able to perform full-scale dredging for only approximately two and a half to three months per year (or an average of about 40-45 days of dredging).³⁴ Under this typical \$15 million annual funding level from Superfund,³⁵ EPA has estimated that it would take approximately 40 years to complete the OU1 Remedy. However, EPA has estimated that if the Site's dredging and treatment facility can be operated at full capacity, the OU1 Remedy can be completed in five to seven years.³⁶

EPA's and the Commonwealth's past and expected future costs at the Site are as follows. Remedial Costs, as defined in the 1992 Consent Decree, incurred from April 6, 1990, as of

³² UAO at ¶¶ 25 and 28; and see also SCD at 2-3.

³³ It should be noted that throughout these Responses to Comments, whenever there is a mention of funding for remedial action activities from Superfund, the Commonwealth customarily reimburses EPA a companion State statutory 10% cost share (typically, 10% of the annual federal expenditure or \$1.5 million) in accordance with contractual agreements between EPA and the Commonwealth.

³⁴ UAO at ¶ 28. In 2009, \$30 million in supplemental funds from the American Recovery and Reinvestment Act allowed for 120 days of EPA dredging in 2009 and 59 days in 2010. Id.

³⁵ It should be noted that for the \$15 million annual funding level estimate, over the approximately 40 years, the annual \$15 million in funding has been adjusted every year to account for inflation.

³⁶ UAO at ¶ 31 (Footnote 7); and Declaration of Elaine T. Stanley in Support of Motion to Enter Supplemental Consent Decree (filed with the Court as Exhibit 2 to the Memorandum) ("Stanley Decl.") at ¶ 24.

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December 31, 2011, total approximately \$430 million.³⁷ Accordingly, Remedial Costs that are “reimbursable” under the 1992 Consent Decree’s Cost Reopener, as of December 31, 2011, total approximately \$299.5 million (\$430 million minus \$130.5 million). EPA estimates that the costs to complete the OU1 Remedy to be \$393 million in net present value if the Site’s dredging and treatment facility is operated at full capacity.³⁸

Since 2008, the Governments engaged AVX in discussions concerning the company’s remaining exposure to liability at the Site, including exposure under the 1992 Consent Decree’s reopeners. After these negotiations stalled, on April 18, 2012, EPA issued a CERCLA § 106(a) Unilateral Administrative Order (“UAO”), requiring AVX to perform the OU1 Remedy as set forth in the OU1 ROD and four ESDs. EPA issued the UAO pursuant to the rights reserved by the United States against AVX in the 1992 Consent Decree’s Cost Reopener and Unknown Conditions Reopener.³⁹ The Governments engaged in a facilitated mediation process with AVX in order to determine if a settlement in principle was possible prior to the UAO’s effective date.⁴⁰ The Governments and AVX hired a JAMS mediator with significant experience in resolving environmental matters, including complex Superfund cases.⁴¹ Through the mediation process, consisting of numerous telephone and in-person conferences with the mediator and several extended mediation sessions, the Governments and AVX reached a settlement. The settlement is

³⁷ UAO at ¶ 69.

³⁸ OU1 ESD4 at 12; and UAO at ¶ 92.

³⁹ UAO at ¶ 1.

⁴⁰ Stanley Decl. at ¶ 21.

⁴¹ See <http://www.jamsadr.com/> (accessed on May 1, 2013).

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memorialized in the proposed Supplemental Decree which supplements and modifies the 1992 Consent Decree. Under the Supplemental Decree, AVX will pay \$366.25 million with interest (which is in addition to the \$59 million plus interest that AVX paid for response costs under the 1992 Consent Decree) in three payments spanning two years.⁴² These payments will be retained and used for future response actions to complete the cleanup at the Site (funds would be distributed to pay the Governments' respective past costs at the Site only if there were an excess after the completion of the cleanup.)⁴³ The Governments will release their claims for reimbursement of response costs and injunctive relief to perform response actions, without new "reopener" provisions.⁴⁴

⁴² SCD at ¶ 7.

⁴³ SCD at ¶ 10.

⁴⁴ SCD at ¶¶ 15 and 16. Under the Supplemental Decree, the Governments retain their rights to additional relief for natural resource damages pursuant to a reservation of rights contained in the 1992 Consent Decree. Id.

SUMMARY OF PUBLIC COMMENTS AND GOVERNMENTS' RESPONSES

I. COMMENTS IN OPPOSITION TO PROPOSED SUPPLEMENTAL CONSENT DECREE

A. Comments on Key Provisions of the Proposed Settlement

1. Comments Asserting that the Cost Recovery Settlement Is Not Supported by the Governments' Exaggeration of Litigation Risks

Comment: BBC expresses disagreement with the Governments' evaluation of litigation risk:

AVX's legal defenses to liability have no merit and EPA's decision to settle without a cost-related reopener cannot reasonably rest on the spurious merits of those defenses...[EPA] significantly overstates the litigation risks posed in this instance...AVX is clearly a 'liable' party under CERCLA section 107(a) and its liability would not be difficult or time-consuming to prove as a matter of law...AVX's defense that there were also other sources of the Harbor's PCB contamination is irrelevant as a matter of law to its liability for the entire clean-up...[T]his case is no longer burdened by issues about the liabilities of other parties or the division of clean-up costs among various entities...[A]lthough AVX may have concerns about the EPA's remedy selection and the costs of those remedies, CERCLA section 113(h) bars judicial review of those issues until remedial work has been completed...[I]t would not take a great deal of EPA's time or effort to prove to the court's satisfaction that the prerequisites for reopening its case against AVX had been satisfied...[The settlement] reflects the determination of AVX's management and its able attorneys that AVX has no viable defenses to avoid liability for all costs of the PCB clean-up at this Site. EPA and Commonwealth officials knew 10 years ago that clean-up costs had exceeded the reopener cost trigger and that they had insufficient resources to implement an expeditious clean-up of the Harbor. If the Governments were truly worried that reopened litigation against AVX would be prolonged, they could and should have initiated that legal action at that time.⁴⁵

Response: The settlement of any dispute inherently involves some level of compromise, and the consideration of the risks of adverse rulings by the Court must be factored into the amount of such a compromise. In this case, as in almost every case resolved through settlement, the Governments would face risks in further litigation, discussed in more detail below. In reaching

⁴⁵ BBC Comments at 4 and 35-38.

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the settlement contained in the Supplemental Decree, the Governments fully evaluated the risks of litigation that this case presents. The Governments cannot ignore these litigation risks in determining whether a settlement is appropriate or not, since adverse rulings in litigation could significantly reduce the monetary value of the Governments' claims or eliminate certain claims altogether, resulting in the payment by AVX of substantially fewer dollars towards the further cleanup of this Site.

Some commenters assert that the Governments have exaggerated the litigation risks that are present. The Governments disagree. While the comments regarding the Governments' litigation risks were general in nature, the litigation risks arise from specific legal and factual issues that exist in the case. The Governments have weighed these risks individually, and considered the likelihood that, taken together, these risks could reduce or eliminate the Governments' claims against AVX, which in turn would lengthen the time to complete the cleanup of the Site. This analysis underlies the Governments' evaluation of compromise. In the 1980s and early 1990s, the Governments were involved in nine years of litigation with AVX, which concluded with entry of the 1992 Consent Decree.⁴⁶ Many of the litigation risks that existed back in the 1980s still exist, notwithstanding the settlement of the Governments' claims in the 1992 Consent Decree. However, significant additional litigation risks now exist due to the fact that the Court's analysis of language of the 1992 Consent Decree would govern the extent of the Governments' claims against AVX. The Governments settled with AVX in 1992, and only

⁴⁶ See 1992 CD; and UAO at ¶¶ 15, 16, and 21.

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have further claims against AVX to the extent that they can successfully exercise the reopener provisions of the 1992 Consent Decree.

Given the size of the Governments' claim, and number of legal issues in contention, any litigation of this matter would likely be complex, resource-intensive, and time consuming. Following litigation, an appeal might be filed. BBC's assumptions about the absence of litigation risk are unfounded, and fail to take into account that any litigation would require a Court to review both the Governments' liability claims and AVX's defenses under CERCLA as well as the Governments' claims and AVX's defenses under the terms of the 1992 Consent Decree.

In response to comments received regarding the litigation risks that the Governments face if this case were to proceed through litigation and any appeal, the Governments respond below with a description of the risks, and the possible effect of the risks. Virtually all of the litigation risks detailed below are among the claims that AVX has raised to the Governments in its defense to liability at various times. By presenting these litigation risks, neither the United States nor the Commonwealth agrees with the merits of any arguments that AVX would likely raise in this case, and the Governments would contest these issues if the case were to proceed to litigation.

- Litigation Risks Relating to AVX's Liability

There was no finding by the Court of AVX's liability in the 1980s litigation, nor did the 1992 Consent Decree contain an admission by AVX that it is liable under CERCLA.⁴⁷ Accordingly, in any litigation, AVX is expected to contest the underlying liability issues. AVX

⁴⁷ 1992 CD at ¶ 3.

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would vigorously defend each allegation in new litigation as it did during the 1980s litigation when AVX marshalled arguments and expert testimony in an effort to avoid or limit its liability.⁴⁸ For example, AVX has argued that certain of its corporate predecessor's PCB releases were federally permitted and exempt from CERCLA liability under Section 107(j) of CERCLA, 42 U.S.C. § 9607(j).⁴⁹ Furthermore, the Governments' evidence against AVX may be more difficult to present where, for example, witness' recollections may be less clear now than they were over 20 years ago. Given the issues and response costs in this case, AVX would be expected to mount a vigorous defense.

- Litigation Risks Relating to AVX's Divisibility Arguments

Even if the Governments obtained a ruling that AVX is liable, AVX would likely argue that the harm from the hazardous substances its corporate predecessor released is divisible, following Burlington N. & Santa Fe Ry. Co. v. United States, 556 U.S. 599 (2009), based on temporal and geographic divisibility.⁵⁰

AVX would argue that temporal divisibility of the harm reduces the amount of costs for which it is liable. AVX is the successor to Aerovox Corporation, which owned and operated the Aerovox Facility from 1938 to January 2, 1973.⁵¹ After AVX's predecessor, Aerovox Corporation, transferred the Facility, another separate entity, Belleville Industries, Inc.

⁴⁸ See 1992 Memorandum in Support of Plaintiff's Motion to Enter Consent Decree with AVX Corporation (which is attached to BBC Comments at Attachment 3) ("1992 Memo in Support of Motion to Enter") at 8-9.

⁴⁹ See BBC Comments at Attachment 3 (1992 Memo in Support of Motion to Enter at 8-9).

⁵⁰ See, e.g., In re Bell Petroleum Servs., Inc., 3 F.3d 889 (5th Cir. 1993) (on temporal divisibility) and United States v. Township of Brighton, 153 F.3d 307 (6th Cir. 1998) (on geographic divisibility).

⁵¹ 1992 CD at ¶ 2; and UAO at ¶¶ 33 and 34.

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(“Belleville”), owned and operated the Facility from 1973 to 1978.⁵² A third entity, Aerovox Incorporated, owned and operated the Aerovox Facility from 1978 until April 2, 2001.⁵³ AVX would argue that during the time period of ownership and operation of the Facility by Belleville and Aerovox Inc., some hazardous substances were released into the Harbor and therefore the costs associated with remediation are divisible based on the time and duration of the separate entities that operated the Aerovox Facility.⁵⁴ AVX’s temporal divisibility claim would likely involve significant factual and expert discovery.

With regard to geographic divisibility, AVX would argue that some portion of the PCBs within the Harbor is attributable to another facility that operated at another location in the Harbor, the Cornell-Dubilier Facility. Since the 1940s, Cornell-Dubilier Electronics, Inc. (“CDE”) owned and operated an electrical manufacturing facility at the Cornell-Dubilier Facility, from which it discharged PCBs to the Site.⁵⁵ While the Cornell-Dubilier Facility is currently located outside the Hurricane Barrier, the construction of the Hurricane Barrier occurred in the mid-1960s.⁵⁶ AVX would argue that wastes from the Cornell-Dubilier Facility flowed into the Upper and Lower Harbors before the construction of the Hurricane Barrier and

⁵² Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action In the Matter of Aerovox, CERCLA Docket No. 01-2010-0017 (March 25, 2010) (available at the EPA-maintained website for the Aerovox Facility Site at: <http://www.epa.gov/region1/superfund/sites/aerovox/462586.pdf>), at ¶ 13.

⁵³ Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action In the Matter of Aerovox at ¶¶ 14, 26, and 27.

⁵⁴ See BBC Comments at Attachment 3 (1992 Memo in Support of Motion to Enter at 9). (“For example, AVX has attempted to demonstrate that the harm to the Harbor, and therefore the response costs incurred, are divisible, thereby avoiding the imposition of joint and several liability for the cleanup costs.”).

⁵⁵ OU1 ROD at 2; and UAO at ¶ 4.

⁵⁶ OU1 ROD at 2; and UAO at ¶ 4.

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from outside the Hurricane Barrier after the barrier's construction due to tidal flows or other means of transport. AVX's geographic divisibility claim, similar to its temporal divisibility claim, would likely involve significant factual and expert discovery.

If AVX were successful in proving divisibility, AVX's share of the costs would be less than 100% of all remedial costs attributable to the Site.

- Litigation Risks Relating to EPA's Selection and Implementation of the Site's Cleanup Remedy

As it did prior to the 1992 Consent Decree, AVX would challenge EPA's selection and implementation of the Site's cleanup remedy.⁵⁷ Following the entry of the 1992 Consent Decree, AVX submitted numerous comments on EPA's proposed cleanup plans, in which it argued that EPA's conduct was arbitrary and capricious, including selecting cleanup levels that are too stringent and insisting on extensive dredging despite dredging's "deleterious environmental impacts[, including] wetlands destruction."⁵⁸ If AVX were successful in arguing that EPA's

⁵⁷ See BBC Comments at Attachment 3 (1992 Memo in Support of Motion to Enter at 9). ("Finally, AVX was mounting a detailed and well-funded challenge to EPA's selection of cleanup alternatives, potentially slowing down the actual implementation of the remedy and restoration work.")

⁵⁸ See, e.g., (a) Comments of AVX Corporation for Inclusion in the Administrative Record for the New Bedford Harbor Superfund Site (July 13, 1992) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/46649.pdf>) at 3; <http://www.epa.gov/region1/superfund/sites/newbedford/46654.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46656.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46659.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46659.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46663.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46664.pdf>; <http://www.epa.gov/region1/superfund/sites/newbedford/46665.pdf>; and <http://www.epa.gov/region1/superfund/sites/newbedford/46666.pdf>; (b) AVX Comments on Draft OU1 ESD2 (April 10, 2002) (part of the Administrative Record for OU1 ESD2 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/ar/30975.pdf>); and (c) AVX Comments on Draft OU1 ESD4 (September 24, 2010) (part of the Administrative Record for OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/472667.pdf>).

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actions and decisions were arbitrary and capricious, there is a risk of a reduction of the Governments' recovery, since AVX would then have met its burden of demonstrating that these costs are not recoverable because they were incurred in a manner inconsistent with the NCP, as set forth in the statute's liability provision, Section 107(a)(4)(A) of CERCLA ("...all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan"). 42 U.S.C. § 9607(a)(4)(A) (emphasis added).

- Litigation Risks Relating to the 1992 Consent Decree's Cost Reopener

Under the terms of the Cost Reopener, the Governments can only seek to recover certain additional costs that fall under the definition of "Remedial Costs." "Remedial Costs" are defined in Paragraph 5(K) of the 1992 Consent Decree as:

all Response Costs incurred in connection with the Remedial Action...from the dates of signature of the respective records of decision for the first and second operable units at the New Bedford Harbor Site, but excluding any increase in costs resulting from any amendments to the RODs (as hereafter defined) within the meaning of 40 C.F.R. § 300.435(c)(2)(ii).⁵⁹

AVX would argue that the bulk of the Governments' costs that were incurred after and resulting from the issuance of "Explanations of Significant Difference" ("ESDs") cannot be recovered pursuant to the Cost Reopener because these remedy modifications should have been amendments to the RODs and they increased costs. AVX would also argue that EPA improperly issued ESDs instead of ROD amendments in order to avoid the exclusion from the definition of "Remedial Costs" of costs increased as a result of ROD amendments.

⁵⁹ 1992 CD at ¶ 5(K) (emphasis added).

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EPA has issued a total of four ESDs modifying the OU1 Remedy, in 2001, 2002, 2010, and 2011, as well as two ESDs modifying the OU2 Remedy, in 1992 and 1995.⁶⁰ Under EPA regulations, EPA issues an ESD when the change to a remedy previously selected in a ROD “do[es] not fundamentally alter the remedy selected in the ROD with respect to scope, performance, or cost.” 40 C.F.R. § 300.435(c)(i). On the other hand, EPA issues an amendment to a ROD when the change “fundamentally alter[s] the basic features of the selected remedy with respect to scope, performance, or cost.” 40 C.F.R. § 300.435(c)(ii). In general, under its regulations, EPA is required to follow a more expanded administrative process in order to amend a ROD in comparison to the requirements for issuance of an ESD. *See, e.g.*, 40 C.F.R. § 300.435(c)(2).

A number of reported decisions analyze whether in very fact-specific situations the changes to the scope, performance, or cost of a remedy are fundamental, requiring EPA to undertake amendments to a ROD. In *U.S. v. BASF-INMONT Corp.*, 819 F. Supp. 601 (D. Mich. 1993), the court declined to find that a change in treatment location, without any other changes, caused a fundamental alteration with respect to scope, performance or cost. In contrast to *BASF*, the Court of Appeals in *U.S. v. Burlington Northern R.R. Co.*, 200 F.3d 679 (10th Cir. 1999) took a more comprehensive view of whether several changes to a selected remedy can

⁶⁰ *See* Footnote 27 above for weblinks to the four OU1 ESDs. For ESDs modifying OU2, the ESD issued on April 27, 1992 (“OU2 ESD1”) is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/284094.pdf>; and the ESD issued on October 30, 1995 (“OU2 ESD2”) is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/269683.pdf>. With respect to the Governments’ costs incurred after and resulting from the 1999 amendment to the 1990 OU2 ROD, AVX would still have to show that costs were increased, but one of the factors for the exclusion of such costs—“any amendment to the RODs”—would have been met.

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cause a “fundamental alteration.” The district court disagreed with EPA’s view that the discovery of higher rock concentrations in sludge was not fundamental. The Burlington district court reasoned that the large increase in costs—61 percent—taken as a whole, altered the remedy fundamentally with respect to scope and cost. On appeal, the Tenth Circuit reversed, in part, but upheld most of the district court’s “fundamental alteration” ruling. See also United States v. NCR Corp. and Appleton Papers, Inc., et al., 2012 U.S. Dist. LEXIS 166347 (E.D. Wis. Nov. 21, 2012) (where the court did not find that an amended ROD was required).

AVX has already argued and would likely again argue that the ESDs modifying the OU1 ROD were improper, and should have been issued as amendments to the ROD. AVX would also argue that the four ESDs as a group should have been issued as an amendment to the OU1 ROD because collectively they “fundamentally” altered the remedy with respect to “scope, performance, or cost.” As an example, the first ESD for the OU1 Remedy, in 2001, identified an increase in the estimated quantity of PCB-contaminated sediment that must be addressed, specifically increasing this amount from 576,000 cubic yards (“cy”) identified in the 1998 OU1 ROD to 800,000 cy⁶¹ (and this number was subsequently raised to 900,000 cy as explained in the 2011 OU1 ESD4).⁶² In addition, AVX would argue that the ESDs increased costs by such a magnitude that a ROD amendment was required.

⁶¹ OU1 ESD1 at 9.

⁶² OU1 ESD4 at 2.

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In sum, a ruling that EPA's ESDs were, in effect, ROD amendment(s) that resulted in increased costs could weaken or jeopardize EPA's finding that the Cost Reopener was triggered or could reduce the amount of the Governments' "reimbursable" Remedial Costs.

- Litigation Risks Relating to the 1992 Consent Decree's Unknown Conditions Reopener

The 1992 Consent Decree contains a reopener that permits the Governments to seek additional relief if unknown conditions or new information discovered after the selection of the remedial action indicate that the selected remedy is not protective of human health or the environment. The Unknown Conditions Reopener states:

Pre-certification reservations. Notwithstanding any other provision of this Decree, the United States and the Commonwealth reserve the right, jointly or separately, to institute proceedings in this action or in a new action, including issuance by EPA of an administrative order, seeking to compel AVX (1) to perform response actions at the New Bedford Harbor Site, and (2) to reimburse the United States and the Commonwealth for response costs, if prior to EPA's certification of completion of the Remedial Action:

- A. conditions at the New Bedford Harbor Site, previously unknown to the United States and the Commonwealth, are discovered after the issuance of the RODs, or
 - B. information is received, in whole or in part, after the issuance of the RODs,
- and the EPA Administrator or his delegate finds, in consultation with the Commonwealth, based on these previously unknown conditions or this information, together with any other relevant information, that the Remedial Action is not protective of human health or the environment.⁶³

On April 18, 2012, EPA issued a Unilateral Administrative Order ("UAO") to AVX under Section 106 of CERCLA, exercising the Governments' rights under both the Cost Reopener and the Unknown Conditions Reopener.⁶⁴ As relevant here, EPA's UAO specifically found that

⁶³ 1992 CD at ¶ 16.

⁶⁴ UAO at ¶ 1

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conditions unknown to EPA were discovered and information was received after the issuance of the RODs in 1990 and 1998, and that these previously unknown conditions and new information, which if left unaddressed would make the OU1 Remedy not be protective of human health or the environment.⁶⁵ Because EPA found that these conditions and information exist, the Governments would argue that they can exercise the Unknown Conditions Reopener contained in the 1992 Consent Decree to compel AVX to perform response actions or reimburse the Governments for response costs. AVX would argue in litigation that the unknown conditions and new information cited by the EPA in its UAO were known, or at least knowable, at the time the RODs were issued in 1990 and 1998. If AVX were successful in arguing that EPA improperly invoked the Unknown Conditions Reopener, the Governments' claims against AVX for liability for the costs of the remedy, and any claims related to the enforcement of the UAO, could be adversely affected.

- Litigation Risks Relating to AVX's Counterclaims

Under the terms of the 1992 Consent Decree, AVX retained its ability to pursue a counter-claim against the United States Army Corps of Engineers.⁶⁶ This counterclaim is based on AVX's allegation that the Corps "repeatedly conducted substantial dredging and dredge and fill operations in and around the Acushnet River, New Bedford Harbor, and Buzzards Bay" including the "repeated and widespread disturbance of the sediments...and widespread

⁶⁵ UAO at ¶¶ 64-68.

⁶⁶ 1992 CD at ¶ 21.

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transportation and disposal of such sediments as dredge spoils...”⁶⁷ If AVX were successful in pursuing this counterclaim, its exposure for the remedial costs attributable to the Site could be reduced.

2. Comments on Supplemental Consent Decree’s Covenant Not to Sue and the Release of AVX from Reopeners

a. Comments Asserting that the Governments Lack Authority to Release AVX from the Unknown Conditions Reopeners

Comment: Commenter BBC asserts that EPA is not authorized to grant AVX a release from the unknown conditions/new information reopener set forth in Paragraph 15.D. of the Supplemental Decree. This commenter contends that,

*EPA is not authorized to provide a settling party with a covenant not to sue as to future liabilities unless, inter alia, it has met all of the public interest conditions set forth in subsection 122(f)(1)(A), based on the factors listed in subsection 122(f)(4), as well as the other factors set forth in subsection 122(f)(1)(B)-(D); and unless any such covenant is crafted such that it will not take effect until after EPA’s certification of completion of the remedial action.*⁶⁸

*In other words, “EPA lacks the authority to enter into the proposed settlement with AVX because the statutory prerequisites authorizing EPA to grant an unconditional covenant not to sue have not been met.”*⁶⁹

Response: EPA is authorized by CERCLA to enter into the proposed Supplemental Decree, which grants a covenant not to sue without an unknown conditions/new information reopener,

⁶⁷ Answer of Defendant AVX Corporation to the First Amended Complaint, *United States of America v. AVX Corporation, et al.*, Civil Action No. 83-3882-Mc, at 19.

⁶⁸ BBC Comments at 39.

⁶⁹ BBC Comments at 41-42.

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because the requirements of Section 122(f) of CERCLA do not apply to the proposed settlement.

Moreover, even if these requirements did apply, they have been met.

As a general matter, a consent decree with a responsible party under Section 122 of CERCLA that resolves that settling party's CERCLA liability, including past and future liability, falls into one of two categories: (1) a consent decree that secures performance of the remedial design and remedial action (which in some instances may also recover response costs) and (2) a consent decree that secures only the recovery of response costs. The inclusion of unknown conditions/new information reopeners is not statutorily mandated in all circumstances; in particular, the reopeners are not required for cash-out settlements. See United States v. Hercules, 961 F.2d 796, 799 (8th Cir. 1992); United States v. Atlas Lederer, 494 F. Supp. 2d 629, 639 (S.D. Ohio 2005).

In this action, the 1992 Consent Decree contains the Unknown Conditions Reopener. The proposed Supplemental Decree retains the Governments' rights under a reopener relating to natural resource damages; however, the compromise memorialized in the Supplemental Decree does not include a second unknown conditions/new information reopener. The Governments have considered this comment and, for the reasons set forth below, do not believe that the comment raises a question concerning the fairness or reasonableness of this second settlement. In addition, the comment does not support a finding that the proposed settlement is not faithful to the objectives of CERCLA and in the public interest.

Section 122(f) of CERCLA states, in pertinent part:

(f) Covenant not to sue

(1) Discretionary covenants

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The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether that action is onsite or offsite, if each of the following conditions is met:

- (A) The covenant not to sue is in the public interest.
- (B) The covenant not to sue would expedite response action consistent with the National Contingency Plan under section 9605 of this title.
- (C) The person is in full compliance with a consent decree under section 9606 of this title (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.
- (D) The response action has been approved by the President.

...

(4) Factors

In assessing the appropriateness of a covenant not to sue under paragraph (1) and any condition to be included in a covenant not to sue under paragraph (1) or (2), the President shall consider whether the covenant or condition is in the public interest on the basis of such factors as the following:

- (A) The effectiveness and reliability of the remedy, in light of the other alternative remedies considered for the facility concerned.
- (B) The nature of the risks remaining at the facility.
- (C) The extent to which performance standards are included in the order or decree.
- (D) The extent to which the response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.
- (E) The extent to which the technology used in the response action is demonstrated to be effective.
- (F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.
- (G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

...

(6) Additional condition for future liability

(A) Except for the portion of the remedial action which is subject to a covenant not to sue under paragraph (2) or under subsection (g) of this section (relating to de minimis settlements), a covenant not to sue a person concerning future liability to the United States shall include an exception to the covenant that allows the President to sue such person concerning future liability resulting from the release or threatened release that is the subject of the covenant where such liability arises out of conditions which are unknown at the time the President certifies under paragraph (3) that remedial action has been completed at the facility concerned.

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(B) In extraordinary circumstances, the President may determine, after assessment of relevant factors such as those referred to in paragraph (4) and volume, toxicity, mobility, strength of evidence, ability to pay, litigative risks, public interest considerations, precedential value, and inequities and aggravating factors, not to include the exception referred to in subparagraph (A) if other terms, conditions, or requirements of the agreement containing the covenant not to sue are sufficient to provide all reasonable assurances that public health and the environment will be protected from any future releases at or from the facility.

...

42 U.S.C. § 9622(f)(1), (f)(4) & (f)(6).

As noted above and in the Memorandum in Support of Motion to Enter Supplemental Consent Decree, Section 122(f) of CERCLA applies to settlements involving the performance of remedial actions by settling defendants. However, these requirements are not mandated by CERCLA in the context of cost recovery settlements, such as the proposed Supplemental Decree, because Section 122(f) does not apply to such cost recovery settlements. See Hercules, 961 F.2d at 799; Atlas Lederer, 494 F. Supp. 2d at 639. In addition, Section 122(f) does not limit the Attorney General's discretion in entering into cost-recovery settlements.

Consideration of CERCLA § 122(f)(4) Factors:

Even though the CERCLA § 122(f)(4) factors are not applicable to the proposed Supplemental Decree, these factors were considered by the Governments in determining whether the proposed settlement is consistent with the goals of CERCLA. Based on these factors, the Governments have determined that the proposed settlement and its covenant not to sue are in the public interest.

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- (A) Effectiveness and reliability of the remedy, in light of other alternative remedies considered for the facility.

As described in greater detail in the response to “Comments on the Protectiveness of the Selected Remedy” (Section I(C) below) as well as the discussion below regarding CERCLA § 122(f)(4)(E) factor (extent to which the technology used in the response action is demonstrated to be effective), EPA has previously determined that the selected OU1 Remedy is both effective and reliable⁷⁰, and therefore this CERCLA § 122(f)(4)(A) factor is fully satisfied. In addition, the Governments note that the proposed Supplemental Decree does not alter the OU1 Remedy selected for the Site in the OU1 ROD and the four OU1 ESDs, and so the Supplemental Decree will have no effect on the fact that the OU1 Remedy satisfies this factor. Moreover, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

The basic features of the OU1 Remedy include: the dredging and disposal of PCB-contaminated sediment; construction of containment facilities, including three Confined Disposal Facilities (“CDFs”) and a Confined Aquatic Disposal cell (“CAD”) cell in the Lower Harbor for on-site disposal; off-site disposal of PCB contaminated sediment; long-term monitoring; and institutional controls.⁷¹

Dredging and on-site disposal have remained basic features of the OU1 Remedy since EPA’s issuance of the OU1 ROD in 1998.⁷² EPA issued the 1998 OU1 ROD after initiating a

⁷⁰ See Second Five-Year Review at 42; and OU1 ESD4 at 16.

⁷¹ UAO at ¶ 63; and OU1 ESD4 at 1-2 and 6.

⁷² See OU1 ROD; OU1 ESD1; OU1 ESD2; OU1 ESD3; and OU1 ESD4.

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Community Forum process (*i.e.*, a professionally mediated process to consider cleanup plans for OU1 and OU2) in 1993.⁷³ EPA provided the public with opportunities to comment on three proposed plans for the OU1 cleanup: the January 1992 proposed plan; the May 1992 proposed plan addendum; and the November 1996 revised proposed plan.⁷⁴ In July 1996, as a result of a comprehensive focus on the OU1 ROD, all members of the Community Forum, including the Hands Across the River Coalition, documented their consensus on a proposed cleanup approach for the Upper and Lower Harbor, including the dredging remedy and the on-site disposal of dredged sediment into CDFs.⁷⁵ Significantly, BBC also provided comments, prior to the issuance of the 1998 OU1 ROD, in support of the CDF-based cleanup plan.⁷⁶

Since the OU1 ROD was issued in 1998, EPA has been performing the OU1 Remedy and therefore has gained a substantial amount of additional data and experience about conditions at the Site.⁷⁷ In addition, EPA completed the OU2 Hot Spot ROD cleanup in 2000.⁷⁸ Furthermore, under the Superfund law, EPA is required to conduct reviews of Superfund sites where hazardous substances remain at a site every five years to determine if the remedy remains

⁷³ OU1 ROD at 5, 22, 33, 41, and 44.

⁷⁴ OU1 ROD at 4-6.

⁷⁵ OU1 ROD at 5; and New Bedford Harbor Superfund Site Community Forum Phase 2 Agreement (July 1996) (part of the Administrative Record for the OU1 ROD and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/63639.pdf>).

⁷⁶ Comments of The Coalition for Buzzards Bay (later renamed BBC) in support of OU1 ROD remedy are included as part of the OU1 ROD Administrative Record and are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/54624.pdf>.

⁷⁷ OU1 ESD4 at 17; and UAO at ¶ 92.

⁷⁸ Second Five-Year Review at ix; OU1 ESD4 at 4; and UAO at ¶ 18.

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protective of human health and the environment.⁷⁹ EPA has conducted two five-year reviews of the New Bedford Harbor Site so far, in 2005 and 2010.⁸⁰ In the most recent Five-Year Review in 2010, after a thorough evaluation, EPA determined that the remedy for OU1 is expected to be protective of human health and the environment upon completion.⁸¹ EPA also determined that the exposure assumptions, toxicity data, cleanup levels, and remedial action objectives used at the time of remedy selection are still valid.⁸²

Other remedies considered by EPA for the Site included dredging and on-site incineration of contaminated sediment, which was selected in the 1990 OU2 Hot Spot ROD. However, due to a reversal of public support for incineration, EPA initiated the professionally mediated Community Forum process in 1993 to identify alternatives to on-site incineration. As part of this process, treatability studies were performed to evaluate various PCB-treatment methods to be used for both an amendment of 1990 OU2 ROD and to be incorporated into the planning process for the Proposed Plan for the Upper and Lower Harbor Operable Unit ROD, which had not yet been issued.⁸³ The PCB-treatment methods analyzed included: solidification/stabilization;

⁷⁹ See CERCLA § 121(c), 42 U.S.C. 9621(c); Section 300.400(f)(4)(ii) of NCP, 40 C.F.R. § 300.400(f)(4)(ii); and OSWER Directive 9355.7-03B-P (June 2001) (available at the EPA-maintained website at <http://www.epa.gov/superfund/accomp/5year/guidance.pdf>).

⁸⁰ First Five-Year Review Report for the New Bedford Harbor Superfund Site (September 2005) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/237034.pdf>); and Second Five-Year Review Report.

⁸¹ Second Five-Year Review at 42; and see also OU1 ESD4 at 16.

⁸² Second Five-Year Review at 33.

⁸³ See, e.g., Amended ROD, Hot Spot Operable Unit, April 27, 1999 (“OU2 Amended ROD”) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/9721.pdf>), at 4-8.

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contaminant destruction; and contaminant separation and destruction. As explained in the OU2 Amended ROD,

After extensive discussion of the treatability studies and the evaluations, the Community Forum developed an initial recommendation which narrowed the range of alternatives to two cleanup options. One option was for the on-site dewatering of the sediment and transportation of the dewatered sediment to an off-site permitted hazardous waste landfill. The other option was for the on-site separation of the PCBs from the sediment by one of two innovative technologies demonstrated during the treatability studies: thermal desorption or solvent extraction. The resulting reduced volume of material containing the concentrated PCBs would be transported off-site to a permitted hazardous waste incinerator. The remaining treated sediment, which would contain small concentrations of heavy metals (but not at sufficient levels to be regulated as hazardous waste would be placed in one of the confined disposal facilities to be constructed as part of the Upper and Lower Harbor ROD remedy to contain the less PCB-contaminated sediments to be dredged from the upper and lower harbor.⁸⁴

EPA ultimately selected off-site disposal for Hot Spot sediment in the 1999 OU2 ROD Amendment and on-site disposal in CDFs for the OU1 ROD in 1998. EPA modified the OU1 ROD to incorporate additional approaches analyzed during the Community Forum process.⁸⁵ In 2001, in the First Explanation of Significant Differences modifying the OU1 ROD (“OU1 ESD1”), EPA selected on-site dewatering to reduce the volume of processed sediment requiring disposal.⁸⁶ In 2002, in the Second Explanation of Significant Differences modifying the OU1 ROD (“OU1 ESD2”), EPA modified the OU1 ROD remedy to eliminate the largest of the CDFs, CDF D, in favor of off-site disposal of 725,000 cubic yards of sediment that otherwise would have been disposed in it.⁸⁷ However, the OU1 Remedy still includes the use of CDFs A, B, and

⁸⁴ OU2 Amended ROD at 6.

⁸⁵ OU1 ROD at 5.

⁸⁶ OU1 ESD1 at 6-7.

⁸⁷ OU1 ESD2 at 1; and see also OU1 ESD4 at 2.

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C for the disposal of dredged contaminated sediment. In March 2011, EPA issued an Explanation of Significant Differences (“OU1 ESD4”) which selected the disposal of 300,000 cubic yards of contaminated sediment (of the 725,000 cy originally slated for disposal in CDF D) in a CAD cell to be built in the Lower Harbor. EPA notes that CAD cells have been used as a successful method of containing contaminated sediment in New Bedford Harbor and in several other ports throughout the country.⁸⁸

- (B) Nature of the risks remaining at the facility.

EPA has previously determined that the selected OU1 Remedy will be protective upon completion⁸⁹, and therefore this CERCLA § 122(f)(4)(B) factor is fully satisfied. The Governments note that the proposed Supplemental Decree does not alter the OU1 Remedy selected for the Site in the OU1 ROD and the four ESDs, and so the Supplemental Decree will have no effect on the fact that the OU1 Remedy satisfies this factor. In addition, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

Based on modeling, after the cleanup is complete, the Harbor and surrounding areas are expected in the long term to become open for safe seafood consumption in regard to the reduction of PCBs in seafood tissue.⁹⁰ (Note, however, that although PCB contamination will be reduced, shellfish consumption may not necessarily be safe due to bacterial contamination from combined sewer overflows (“CSOs”) which have been contaminating local shellfish since at

⁸⁸ OU1 ESD4 at 7.

⁸⁹ Second Five-Year Review at 42; and OU1 ESD4 at 16.

⁹⁰ See OU1 ROD at 34-35, A-10, and A-12.

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least the early 1900s.)⁹¹ The national recommended water quality criterion (formerly known as ambient water quality criterion) for PCBs in salt water of 0.03 parts per billion (ppb)⁹² is expected, based on modeling, to be attained throughout the Harbor ten years after the cleanup is complete.⁹³

Pursuant to Section 121(c) of CERCLA, EPA has performed two five-year reviews, in 2005 and 2010, and will continue to perform the five-year reviews of conditions at the Site to ensure the OU1 Remedy remains protective. As described in the Second Five-Year Review for the Site, issued in 2010, EPA performs long-term monitoring programs for the Site, including an annual seafood monitoring program (which is conducted by the Massachusetts Department of Environmental Protection (“MassDEP”)) and a long-term benthic community monitoring program.⁹⁴ Monitoring data thus far indicate progress towards achieving the 1998 OU1 ROD’s cleanup goals. Overall, the levels of PCBs in seafood in the Harbor area continue to be above the site-specific goals, but are consistent with levels expected during ongoing, long-term, active sediment remediation. In comparison to historic PCB monitoring of Harbor area lobster dating

⁹¹ See *Imprint of the Past: Ecological History of New Bedford Harbor*, EPA Office of Research and Development (February 2011) (part of the Administrative Record for the UAO and available on the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/505063.pdf>), at 15. (“The sewage was also contaminating shellfish in the harbor. From 1900 through 1903, 575 people in New Bedford contracted typhoid fever (93 died) from eating contaminated shellfish. By 1904, the State Board of Health closed the Acushnet River to shell fishing.”).

⁹² While national recommended water quality criterion for PCBs in freshwater is 0.014 ppb, the criterion in saltwater is 0.03 ppb.

⁹³ OU1 ROD at 34-35.

⁹⁴ Second Five-Year Review at 17.

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to the mid 1980s, current data show a significant decrease in levels over time.⁹⁵ Moreover, the long-term benthic community monitoring—to assess the overall effectiveness of the remedy in terms of marine bottom (benthic) species abundance and richness—confirms that the cleanup activities to date have resulted in significant improvement in benthic quality in 2009 compared to the 1993 baseline data for the Lower and Outer Harbor areas.⁹⁶

The OU1 Remedy will provide protection against human health risks from dermal contact with and incidental ingestion of contaminated sediment immediately upon completion of shoreline intertidal sediment dredging.⁹⁷ The worst of the PCB-contaminated shoreline areas for dermal contact were remediated in 2000 and 2002.⁹⁸

In addition, on March 25, 2010, EPA entered into an Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action (“Settlement Agreement”) with AVX for the Aerovox Facility Site⁹⁹, which is the primary source of PCB contamination to New Bedford Harbor, to demolish the vacant buildings and cap the site.¹⁰⁰ Under the Settlement Agreement, AVX agreed to achieve, among other things, a controlled demolition of the vacant, deteriorated, and contaminated building at the Aerovox Facility Site. The Settlement Agreement was effective June 3, 2010. The demolition activities pursuant to the

⁹⁵ Second Five-Year Review at 32.

⁹⁶ Second Five-Year Review at 26.

⁹⁷ OU1 ROD at 34, 40, and 42-44.

⁹⁸ Second Five-Year Review at 39.

⁹⁹ See definitions in the 1992 CD at ¶ 5(B) and SCD at ¶ 6(A).

¹⁰⁰ See Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action In the Matter of Aerovox. For more information, see Footnote 52 above.

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Settlement Agreement were performed by AVX in 2011.¹⁰¹ Also in 2010, AVX entered into an Administrative Consent Order and Notice of Responsibility in the Matter of AVX Corporation, File No. ACO-SE-09-3P-016, Release Tracking Number 4-0601 (“ACO”), with MassDEP to investigate and address the nature and extent of the remaining contamination at the Aerovox Facility, and to remediate the Aerovox Facility Site in accordance with the requirements of Mass. General Laws Chapter 21E and the Massachusetts Contingency Plan, 310 Code of Massachusetts Regulations 40.0000 (“MCP”). The ACO was effective June 3, 2010. In order to satisfy its obligations under the ACO, Chapter 21E and the MCP, AVX must achieve control of all sources of contamination at the Aerovox Facility.¹⁰²

- (C) Extent to which performance standards are included in the decree.

Because the proposed Supplemental Decree is a cost recovery settlement, it does not include any performance standards and therefore this factor is not applicable.

- (D) Extent to which response action provides a complete remedy for the facility, including a reduction in the hazardous nature of the substances at the facility.

As EPA determined in its Second Five-Year Review of the Site, “The remedy for OU1 is expected to be protective of human health and the environment upon completion, and in the interim, exposure pathways that could result in unacceptable risks have been, or are in the process of, being controlled to the maximum extent practicable.”¹⁰³ Therefore, this CERCLA

¹⁰¹ Stanley Decl. at ¶ 16.

¹⁰² Stanley Decl. at ¶ 17.

¹⁰³ Second Five-Year Review at 42; and see also OU1 ESD4 at 16 (“The remedy as modified herein remains protective of human health and the environment, complies with all Federal and State requirements that are applicable or relevant and appropriate to the remedy as modified herein (and which were not waived in the 1998

(cont’d...)

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§ 122(f)(4)(D) factor is fully satisfied. The Governments note that the proposed Supplemental Decree does not alter the OU1 Remedy selected for the Site in the OU1 ROD and the four OU1 ESDs, and so the Supplemental Decree will have no effect on the fact that the OU1 Remedy satisfies this factor. In addition, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

Removal and permanent isolation of contaminated sediment above the OU1 cleanup levels will reduce human health risks from dermal contact with, and incidental ingestion of, contaminated sediment to PCB levels within EPA's acceptable risk range. After the cleanup is complete, the Harbor and surrounding areas are expected in the long term to become open for safe seafood consumption in regard to the reduction of PCB contamination, but bacterial contamination from CSOs may remain.¹⁰⁴

Because some contamination will remain on-site after completion of the OU1 cleanup, pursuant to Section 121(c) of CERCLA, EPA will continue to perform five-year reviews of conditions at the Site to ensure that the OU1 Remedy remains protective.¹⁰⁵

(...cont'd)

ROD), and is cost-effective. In addition, the revised remedy utilizes permanent solutions and alternative treatment technologies to the maximum extent practicable for this site.”).

¹⁰⁴ OU1 ROD at 34-35; and *Imprint of the Past: Ecological History of New Bedford Harbor* at 15.

¹⁰⁵ See First Five-Year Review; Second Five-Year Review; 42 U.S.C. § 9621; National Contingency Plan Section 300.400(f)(4)(ii), 40 C.F.R. § 300.400(f)(f)(ii); and OSWER Directive 9355.7-03B-P (June 2001).

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- (E) Extent to which the technology used in the response action is demonstrated to be effective.

EPA has previously determined that the technology used in the selected OU1 Remedy is demonstrated to be effective, and therefore this CERCLA § 122(f)(4)(E) factor is fully satisfied. The Governments note that the proposed Supplemental Decree does not alter the OU1 Remedy selected for the Site in the OU1 ROD and the four OU1 ESDs, and so the Supplemental Decree will have no effect on the fact that the OU1 Remedy satisfies this factor. In addition, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

Dredging: The Governments note that the OU1 Remedy is primarily a dredging remedy. EPA's 2005 contaminated sediment remediation guidance discusses how dredging is a common feature of Superfund remedies for sediment sites. "Dredging and excavation are the two most common means of removing contaminated sediment from a water body, either while it is submerged (dredging) or after water has been diverted or drained (excavation). Both methods typically necessitate transporting the sediment to a location for treatment and/or disposal."¹⁰⁶ "Sediment removal by dredging or excavation has been the most frequent cleanup method used by the Superfund program at sediment sites. Dredging or excavation has been selected as a cleanup method for contaminated sediment at more than 100 Superfund sites."¹⁰⁷

¹⁰⁶ *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* (December 2005) (available at the EPA-maintained website regarding contaminated sediments in Superfund at <http://www.epa.gov/superfund/health/conmedia/sediment/pdfs/guidance.pdf>) at 6-1.

¹⁰⁷ *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* at 6-2.

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Confined Disposal Facilities (“CDFs”): Similarly, EPA’s 2005 contaminated sediment remediation guidance describes the use of CDFs at sediment sites:

“CDFs are engineered structures enclosed by dikes and specifically designed to contain sediment. CDFs have been widely used for navigational dredging projects and some combined navigational/environmental dredging projects but are less common for environmental dredging sites, due in part to siting considerations. However, they have been used to meet the needs of specific sites, as have other innovative in-water fill disposal options, for example, the filling of a previously used navigational waterway or slip to create new container terminal space (e.g., Hylebos Waterway cleanup and Sitcum Waterway cleanup in Tacoma, Washington).”¹⁰⁸

Confined Aquatic Disposal (“CAD”) Cell: CAD cells have been used successfully for containing PCB contaminated sediment dredged for navigational purposes in New Bedford Harbor.¹⁰⁹ Since 2004, the New Bedford Harbor Development Commission (“HDC”)¹¹⁰ has been successfully constructing and using CAD cells to contain PCB-contaminated sediment with weighted average concentration levels ranging from 8 ppm to 22 ppm PCBs¹¹¹ resulting from navigational dredging in the Lower Harbor as part of the State Enhanced Remedy, which was

¹⁰⁸ *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* at 6-34 to 6-35.

¹⁰⁹ OU1 ESD4 at 7.

¹¹⁰ See *New Bedford Harbor USEPA Lower Harbor CAD Cell Work Plan*, New Bedford Harbor Development Commission (December 2011) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/507201.pdf>), at 1. (“The NBHDC has extensive experience with the design and construction of CAD Cells in New Bedford Harbor, and has agreed to design and construct the body of the USEPA Lower Harbor CAD Cell (LHCC), which the USEPA would then utilize for its cleanup operations in keeping with the new ESD [OU1 ESD4].”).

¹¹¹ TSCA Determination and PCB Concentrations Greater than 50 ppm in the Navigational CAD Cells, New Bedford Harbor Superfund Site, Massachusetts Department of Environmental Protection (May 25, 2012) (part of the Administrative Record for the Final Determination for the South Terminal Project and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/70004648.pdf>), at 2-3.

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incorporated into the OU1 ROD pursuant to 40 C.F.R. § 300.515 of the Superfund regulations, the National Contingency Plan (“NCP”).¹¹²

EPA notes that CAD cells have also been installed in many other ports and waterways in the nation and elsewhere world-wide.¹¹³ As EPA explained in OU1 ESD4, “CAD cell technology is a recognized, protective contaminated sediment disposal approach that is being used more and more frequently, especially for navigational dredged material that is unsuitable

¹¹² Pursuant to 40 C.F.R. § 300.515(f)(1), a state may ask EPA to make changes in or expansions of a selected remedial action:

If EPA finds that the proposed change or expansion is not necessary to the selected remedial action, but would not conflict or be inconsistent with the EPA-selected remedy, EPA may agree to integrate the proposed change or expansion into the planned CERCLA remedial work if: (A) The state agrees to fund the entire additional cost associated with the change or expansion; and (B) The state agrees to assume the lead for supervising the state-funded component of the remedy...

40 C.F.R. § 300.515(f)(1)(ii). The OU1 Remedy includes a State-Enhanced Remedy (“SER”) consistent with 40 C.F.R. § 300.515(f). In the 1998 OU1 ROD, EPA integrated the Commonwealth’s enhancement request for navigational dredging and on-site disposal into EPA’s OU1 Remedy because this State Enhanced Remedy would remove sediment containing PCBs up to 50 ppm and heavy metals that EPA’s OU1 cleanup would not be addressing in the Lower Harbor. See OU1 ROD at 33-34. These SER activities are integrated into the OU1 Remedy and are completely funded by the Commonwealth.

The New Bedford Harbor Development Commission has, with MassDEP oversight, constructed and filled three navigational CAD cells created through the State Enhanced Remedy. These CAD cells were constructed in the Lower Harbor within an area set aside for CAD cell construction in the October 2003 Final Environmental Impact Report for the New Bedford/Fairhaven Harbor Dredge Material Management Plan.

On November 19, 2012, EPA issued the Final Determination for the South Terminal Project, which modified the SER so that it includes the South Terminal Project. As part of the South Terminal Project, the Commonwealth will construct a 28.45-acre marine terminal, consisting of a CDF and upland area in the South Terminal location of the New Bedford Harbor, as well as the dredging and filling associated with the construction of CAD cells. See EPA’s Final Determination for the South Terminal Project, New Bedford Harbor Superfund Site (November 2012) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/525556.pdf>), at 5. The Final Determination for the South Terminal Project was issued based on an Administrative Record which was developed in accordance with Section 113(k) of CERCLA, 42 U.S.C. § 9613(k). The Administrative Record for the Final Determination for the South Terminal Project is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/532080.pdf>. See also Stanley Decl. at ¶ 22.

¹¹³ See, e.g., OU1 ESD4 at 7; and *Why Confined Aquatic Disposal Cells Often Make Sense* (Fredette 2005) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/506004-16.pdf>).

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for open water disposal. CAD cells have been used in recent years for navigational dredging in major New England ports such as Boston, New Bedford and Providence, and have also been used (or selected for use) at contaminated sediment Superfund sites in Washington, Minnesota and Maine.”¹¹⁴ CAD cells are being selected in a growing number of navigation dredging and sediment remediation projects such as harbors including: Boston, Massachusetts; Providence, Rhode Island; and Los Angeles, California; the Puget Sound Naval Shipyard, Bremerton, Washington; and the St. Louis River–Duluth Tar Site, Duluth, Minnesota. CAD cells have also been used successfully at Newark, New Jersey; and Hyannis, Massachusetts.¹¹⁵

In the 2011 OU1 ESD4, EPA selected the construction and use of a CAD cell in the Lower Harbor for disposal of approximately 300,000 cy of PCB contaminated sediment, which pursuant to the 1998 OU1 ROD would have been disposed in CDF D, but as modified by the 2002 OU1 ESD2 would have been disposed off-site. EPA explained that the use of a Lower Harbor CAD cell (“LHCC”) would be significantly faster and less costly because the contaminated sediment going to the LHCC would be mechanically dredged and then placed into it, thereby avoiding the desanding, dewatering and off-site transportation and disposal costs that would otherwise be associated with the hydraulic dredging of this sediment.¹¹⁶ Based on modeling, EPA determined that a capped CAD cell for Harbor sediment would be highly effective in isolating contaminated dredged material regardless of the Harbor PCB concentration

¹¹⁴ OU1 ESD4 at 7.

¹¹⁵ *Why Confined Aquatic Disposal Cells Often Make Sense* (Fredette 2005) at 35 and 37.

¹¹⁶ OU1 ESD4 at 12.

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levels.¹¹⁷ Based on EPA's water and air quality monitoring of data from navigational CAD cell construction in New Bedford Harbor, computer modeling, and the successful use of CAD cells in many ports throughout the United States, EPA determined that a Lower Harbor CAD cell will be a protective remedial component.¹¹⁸

- (F) Whether the Fund or other sources of funding would be available for any additional remedial actions that might eventually be necessary at the facility.

If the settlement funds are insufficient to complete the cleanup, EPA will seek additional funding from the Superfund, as well as the statutorily mandated share of such funding from the Commonwealth, for the remainder of the cleanup.¹¹⁹

EPA's Superfund appropriation is, generally, insufficient to fund every action necessary to address sites on the National Priorities List. For example, the Superfund Remedial Program budget for Fiscal Year 2013 budget is about \$504 million, of which EPA anticipates using approximately \$195 million on remedial action and post-construction activities. As a result, EPA must make policy decisions regarding the use of these funds. One such decision, reflected in the President's Budget, places a priority on completing ongoing site work over starting new work.

Another EPA policy places a strong emphasis on using available non-appropriated resources, like

¹¹⁷ See *Assessment for Contaminant Loss and Sizing for Proposed Lower Harbor Confined Aquatic Disposal (CAD) Cell*, New Bedford Harbor Superfund Site, U.S. Army Corps of Engineers, Engineer Research and Development Center, (May 2010) (part of the Administrative Record for OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/506004-11.pdf>), at 32; and *Assessment for Contaminant Loss and Sizing for Proposed Upper Harbor Confined Aquatic Disposal (CAD) Cell*, New Bedford Harbor Superfund Site, U.S. Army Corps of Engineers, Engineer Research and Development Center (December 2011) (available at the EPA-maintained website for the New Bedford Harbor Site at <http://www.epa.gov/region1/superfund/sites/newbedford/518092.pdf>), at 11.

¹¹⁸ OU1 ESD4 at 8-11 and 16.

¹¹⁹ Stanley Decl. at ¶ 27; and see also Declaration of James E. Woolford in Support of Motion to Enter Supplemental Consent Decree (filed with the Court as Exhibit 3 to the Memorandum) ("Woolford Decl.") at ¶ 18.

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Special Accounts,¹²⁰ prior to using appropriated resources at a site. To allocate appropriated resources, EPA, generally, follows an established policy that uses a process whereby potential risks to human health and the environment are evaluated to guide funding decisions (other factors, including the readiness of the site for remediation, are also considered). A panel of regional and headquarters managers and experts, the National Risk-Based Priority Panel, convenes at least once a year to review projects ready for construction with appropriated resources. The panel makes recommendations to EPA senior managers on the relative risk considerations posed by those NPL sites. Risk considerations include the toxicity of the release and the likelihood of exposure. Actual funding decisions are made by the Assistant Administrator for EPA's Office of Solid Waste and Emergency Response, based on recommendations from EPA's Office Superfund Remediation and Technology Innovation.¹²¹

In 1991, the risks posed by the New Bedford Harbor Site were deemed sufficient to warrant receiving appropriated funds for cleanup. Since 1991, Superfund has obligated nearly \$215 million of appropriated funds for remedial action at the New Bedford Harbor Superfund Site. In Fiscal Year 2013, an additional \$15.5 million of appropriated funds is going toward remedial action at the Site. The total funding amount includes funding from the American Recovery and Reinvestment Act of 2009 and excludes resources used at the Site for other

¹²⁰ Costs recovered or settlement funds are, generally, retained by EPA in special sub-accounts of the Superfund to fund future response work for that particular site and are commonly known as "Special Accounts."

¹²¹ Woolford Decl. at ¶¶ 7 and 8.

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response activities and enforcement, payroll, work funded from State cost share payments or private party settlements, and EPA's indirect costs.¹²²

Future funding decisions for the New Bedford Harbor site are expected to be made in a manner consistent with the practices described above. Furthermore, EPA is committed to assuring that sites reach completion, even sites where cleanup has been substantially performed or funded by responsible parties, and subject to appropriations, EPA is committed to completing cleanup of the New Bedford Harbor Superfund Site.¹²³

- (G) Whether the remedial action will be carried out, in whole or in significant part, by the responsible parties themselves.

Because the proposed Supplemental Decree is a cost recovery settlement, AVX will not be performing the OU1 Remedy. Therefore, this factor is not relevant in this case.

Consideration of CERCLA § 122(f)(6) Factors:

Although the CERCLA § 122(f)(6) factors are not applicable to this settlement, the settlement memorialized in the Supplemental Decree is supported by these factors and is in the public interest.

- Volume, Toxicity, Mobility, Ability to Pay, Inequities, and Aggravating Factors

These factors are not relevant to the proposed cost-recovery settlement because the proposed Supplemental Decree is a cash-out settlement and will have no effect on the previously selected remedy for the Site. In issuing the cleanup plan for OU1 in the 1998 OU1 ROD and the four ESDs, EPA documented the volume, mobility, and toxicity of hazardous substances,

¹²² Woolford Decl. at ¶ 17.

¹²³ Woolford Decl. at ¶ 18.

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particularly PCBs, at the Site. EPA has been performing the cleanup of the Site and will continue to do so with the proposed Supplemental Decree's \$366.25 million settlement funds, and the OU1 Remedy is expected to be protective of human health and the environment upon completion.¹²⁴

- Strength of Evidence and Litigation Risks

In the response to the "Comments Asserting that the Cost Recovery Settlement is Not Supported by the Governments' Exaggeration of Litigation Risks" (Section I(A)(1) above), the Governments describe some of the litigation risks that were considered in accepting the proposed settlement's compromise. The litigation risks in this case support the proposed settlement, which grants a covenant not to sue without an unknown conditions/new information reopener.

- Public Interest Considerations

As further described in the response to "Comments on the Sufficiency of the Proposed Settlement's \$366.25 Million Cost Recovery" (Section I(A)(3) below), the proposed settlement is in the public interest because it will provide sufficient funding for over 90% of estimated future cleanup costs, which will greatly accelerate the pace of the OU1 cleanup.¹²⁵ Without these settlement funds, it would take about 40 years to complete the remedy.¹²⁶ With the \$366.25 million plus interest in settlement funds, EPA estimates that it would have over 90% of

¹²⁴ Second Five-Year Review at 42; and OU1 ESD4 at 16.

¹²⁵ Stanley Decl. at ¶ 25.

¹²⁶ See OU1 ESD4 at 2 and 12. As discussed above, the 40 year estimate assumes funding from Superfund and the Commonwealth in the future that would be similar to the "typical" annual funding from 2004 to the present.

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the estimated future cleanup funds needed to complete the cleanup in five to seven years.¹²⁷ This accelerated cleanup will have a positive impact on reducing risks posed by PCB contamination in the Harbor since PCB contaminated sediment above cleanup levels will be removed over a 5-7 year period rather than a 40 year period, as well as ameliorate the threat to public welfare due to the Site's contamination.¹²⁸ In addition, in the event of litigation, even if the Governments were to win or eventually to reach another settlement, the cost of delay would significantly raise the overall cost of the cleanup.¹²⁹

- Precedential Value

The proposed Supplemental Decree may be the first instance in which parties have settled claims based upon an unknown conditions/new information reopener or a cost reopener contained in an earlier CERCLA settlement, and therefore has a beneficial precedential value. If the Governments were to engage in litigation with AVX in this matter at this Site, the Court and the parties would have to grapple with novel legal issues, including the applicability, interpretation, and enforceability of the Unknown Conditions Reopener and Cost Reopener.

¹²⁷ Stanley Decl. at ¶ 25.

¹²⁸ Stanley Decl. at ¶ 26; and see also UAO at ¶ 54 for the following description of the Site's current threat to public welfare: "Hazardous substances, including PCBs, at the Site have affected the economic vitality of New Bedford and surrounding communities, including fishing and harbor development. The economic impact has been severe, due to long-term fishing closures, lost beach use, diminished property values, and reduced opportunities for coastal development."

¹²⁹ As discussed in the response to "Comments on the History of EPA's Cost Estimates and Performance of the Remedy" (Section I(A)(3)(b)(i) below), in contrast to the current pace of the cleanup, the \$366.25 million settlement funds will greatly increase the efficiency of EPA's cleanup, thereby reducing the time and money necessary to complete the OU1 Remedy.

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- Reasonable Assurances that Public Health and the Environment Will be Protected

Finally, because of EPA's performance of the cleanup at the Site, as explained in the discussion above regarding CERCLA § 122(f)(4) factors, in the response to "Comments on the Sufficiency of the Proposed Settlement's \$366.25 Million Cost Recovery" (Section I(A)(3) below), and in the response to "Comments on the Protectiveness of the Selected Remedy" (Section I(C) below), there are "reasonable assurances that public health and the environment will be protected from any future releases at or from the facility." 42 U.S.C. § 9622(f)(6)(B).

- b. Comments Asserting that Because AVX Should Be Held Fully Accountable for the Damage It Caused, the Supplemental Consent Decree Should Include a Reopener**

Comment: The petition by BBC (and HARC), signed by numerous individuals, states that "the failure of the Consent Decree to include a reopener would release AVX from responsibility and robs this community of a clean harbor."¹³⁰ Similarly, a number of commenters note that "the settlement between the EPA and AVX should include a reopener clause to ensure a full cleanup of the harbor."¹³¹ It is also suggested that a balance be struck between AVX's interest in

¹³⁰ Bates numbers 054, 055, 056, 057, 058, 059, 060, 062, 063, 064, 65, 066, 067, 068, 069, 070, 071, 072, 073, 074, 075, 076, 077, 078, 079, 080, 081, 082, 083, 084, 085, 086, 087, 088, 089, 090, 091, 092, 093, 094, 095, 096, 097, 098, 099, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 177, 179, 181, 183, 184, 186, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 204, 205, 207, 209, 210, 211, 212, 213, 215, 216, 217, 219, 220, 221, 223, 225, 227, 228, 230, 231, 232, 236, 237, 238, 239, 240, 242, 243, 244, 245, 246, 247, 249, 250, 251, 252, 255, 256, 258, 259, 261, 262, 263, 264, 266, 267, 268, 269, 271, 273, 274, 275, 277, 310, 599-638, 641-680, 682-738, and 740-765.

¹³¹ Bates numbers 021, 022, 106, 156, 174, 175, 176, 178, 182, 185, 203, 206, 208, 218, 226, 234, 235, 253, 254, 272, 286, 304-305, and 315-337. The set of comments Bates numbered 315-337 was submitted to the Department of Justice on three separate occasions. Since they appear nearly identical, only one set of those comments is referenced in this Response. Duplicate copies are included in Exhibit 4 and are Bates numbered 338-360 and 361-383.

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achieving finality and the public's interest in a successful cleanup: "The company can be given a timetable for notification of the success or failure of this phase of cleanup, but the Buzzards Bay area deserves the right to further evaluation and protection down the road."¹³² Other comments are more specific in expressing the opinion that the settlement should include another cost reopener. State Senator Mark C. Montigny expresses appreciation of the Governments' efforts to secure additional funding from AVX by exercising the 1992 Consent Decree reopeners, but seeks modification of the proposed settlement to include a second cost reopener, in the event that cleanup costs exceed current estimates.¹³³ Consistent with these comments, BBC seeks withdrawal and modification of the proposed settlement with AVX on the ground that "the settlement is not in the public interest unless it is modified to include cost reopeners."¹³⁴

State Representative William M. Straus, representing the 10th Bristol District, suggests a hybrid approach recommending "that the Court consider approval of the settlement monies now before it, but with a further set contingency amount to be considered for payment by AVX; disbursement of which would depend upon further petition to the Court by the Plaintiffs. In this way, the unknowns of an open-ended 'reopener' clause are avoided, but the public is protected by allowing a quicker paced cleanup to begin promptly for the remaining polluted sediments.

¹³² Bates number 023.

¹³³ Bates number 278; and see also Bates numbers 287 and 290-296.

¹³⁴ BBC Comments at 1 and 22-23.

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This would also provide the public with some assurance that a calculated amount of monies will still be available should the final remedy costs escalate.”¹³⁵

Many commenters ask that the Governments ensure that justice is served, that those responsible for environmental harm or those who increase risks to human health for private gain are held fully accountable. While some of these comments are directed to polluters generally, others address their concern towards Aerovox or towards the remaining defendant in this action, AVX Corporation. These comments are summarized by the following statement: “It is unacceptable to allow any entity to shirk their responsibility for pollution caused as a result of their activities. This case is no different. This company is no different and must be held accountable.”¹³⁶ Several commenters state that companies who contributed to the contamination of New Bedford Harbor should contribute to the cleanup effort and they should be held fully accountable for the damage they have caused.¹³⁷ Other comments express similar thoughts, using stronger language, “[p]olluters need to pay 100% of the damages they cause. Taxpayers have no responsibility to pick-up the slack . . . It’s time that there is zero tolerance for irresponsible companies like this,”¹³⁸ “[i]t’s time the companies responsible were held entirely accountable,”¹³⁹ “[o]ur waters and nature need to be guarded from hap-hazard, greed based,

¹³⁵ Bates numbers 297-299. While Rep. Straus recommends “that the Court consider approval of the settlement monies now before it,” he also states: “I do not believe that it is appropriate to eliminate a “re-opener” clause from the pending Decree before the Court.” Accordingly, the Governments have categorized Rep. Straus’ comment as being in opposition to the proposed Supplemental Decree.

¹³⁶ Bates number 125.

¹³⁷ Bates numbers 087 and 108.

¹³⁸ Bates numbers 198, 231, 236, 243, and 249; and see also Bates number 020.

¹³⁹ Bates numbers 184, 195, 237, 239, 252, 263, 271, and 315-337.

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*irresponsible behavior,*¹⁴⁰ and “[p]olluters should not be allowed to walk away without cleaning up the mess they created.”¹⁴¹

Several commenters, in signing on to the BBC/HARC petitions opposing the proposed Supplemental Decree claiming that it would not fully clean up the Harbor and would let AVX off the hook, note that “New Bedford Harbor is one of the most active fishing ports on the East Coast[, and] its fish and fishermen and women deserve the cleanest harbor possible,”¹⁴² that “restoring this harbor would bring economic vitality to tens of thousands in a region that is full of eager underemployed workers,”¹⁴³ that clean waters are critical for economic well being,¹⁴⁴ and that “New Bedford is depressed enough. It needs all the help it can get!”¹⁴⁵ Articulated more generally, one commenter draws a relationship between environmental and human conditions, noting that “[p]ollution anywhere hurts everyone, there’s no such thing as a closed environment.”¹⁴⁶

Response: A second settlement that secures \$366.25 million, plus interest, in additional funding for the Site, as memorialized in the proposed Supplemental Decree with AVX, would not have been achieved if the settlement included terms providing an additional cost reopener or unknown

¹⁴⁰ Bates number 258.

¹⁴¹ Bates numbers 185 and 226.

¹⁴² Bates number 138.

¹⁴³ Bates numbers 173 and 212.

¹⁴⁴ Bates number 194.

¹⁴⁵ Bates number 249.

¹⁴⁶ Bates number 170.

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conditions/new information reopener. The expectation of achieving finality with regard to the exercised reopeners in exchange for the payment of \$366.25 million, plus interest, is entirely reasonable, where, under the 1992 Consent Decree, AVX paid EPA \$59 million plus interest (totaling \$66 million plus interest if the payment for natural resource damages is included) and received covenants not to sue from the Governments.¹⁴⁷ Through the recent mediated negotiations, culminating in the proposed settlement, the Governments and AVX settled the Government's claims against AVX under certain reservations in the 1992 settlement. The proposed Supplemental Decree is the result of arms-length negotiations achieved through assistance from an experienced third-party mediator following the issuance of the UAO.¹⁴⁸ The Governments have resolved the case with AVX for a larger lump sum payment than if the Governments had insisted upon additional cost and unknown conditions/new information reopeners. Moreover, if the Governments held out for a settlement with such additional reopeners, reaching a settlement would have been unlikely, if not impossible, and there would not likely have been a way to achieve settlement of this size or avoid protracted litigation and litigation risks.

The Governments recognize that the factual strengths and weaknesses of a particular case are relevant in evaluating settlement proposals and that expeditious cleanup reached through negotiated settlements is preferable to protracted litigation. When assessing proposals for settlement and identifying targets for litigation, the Governments consider aggravating and

¹⁴⁷ 1992 CD at ¶¶ 6-12 and 14-20.

¹⁴⁸ Stanley Decl. at ¶ 21.

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mitigating factors and appropriate equitable factors.¹⁴⁹ In light of these factors, the Governments note that the proposed settlement will provide over 90% of the estimated funds necessary for EPA to complete the OU1 cleanup in five to seven years, shortening the amount of time necessary to complete the cleanup from 40 years.¹⁵⁰

Two of the goals of CERCLA are to ensure that the polluter pays for the damage it causes and to address environmental problems in a timely, reasonable manner. A settlement may serve the goals of CERCLA without netting full recovery, especially when such a settlement is necessary to ensure that the cleanup is implemented quickly and efficiently. United States v. Cannons Eng'g Corp., 899 F.2d 79, 90 (1st Cir. 1990). As one might expect, all settlements represent a compromise between two sides. Public policy favors the resolution of such disputes, and parties generally should be left free to compromise. As addressed in the response to “Comments Asserting that the Cost Recovery Settlement Is Not Supported by the Governments’ Exaggeration of Litigation Risks” (Section I(A)(1) above), there would be significant litigation risks for the Governments if this case were litigated. Because “the reasonableness of a proposed settlement must take into account foreseeable risks of loss,” Id., this settlement, which would provide a cost recovery of \$366.25 million plus interest to allow EPA to accelerate the cleanup of New Bedford Harbor, is sufficient for holding AVX responsible and accountable for its actions, and is fair, reasonable, and consistent with CERCLA.

¹⁴⁹ See EPA’s “Interim CERCLA Settlement Policy” (December 5, 1984), which was published in the Federal Register on February 5, 1985 (50 Fed. Reg. 5034) and is available at the EPA-maintained website at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc-settlmnt-mem.pdf>.

¹⁵⁰ Stanley Decl. at ¶¶ 24-25; and OU1 ESD4 at 2, 12 and Footnote 126.

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In assessing the current proposed settlement, it is useful to examine the implications of the earlier 1992 settlement with AVX. Under the 1992 Consent Decree, the Governments agreed to, and the Court approved, a settlement whereby AVX agreed to pay \$59 million plus interest for response costs and whereby AVX would be subject to the Cost Reopener after Remedial Costs exceed \$130.5 million.¹⁵¹ The amount of the Cost Reopener and the cost recovery in the 1992 settlement represented a significant cost compromise. The terms of 1992 settlement meant that the Governments and the Court accepted a scenario in which the Governments would not recover the difference between \$130.5 million and \$59 million plus interest from AVX.¹⁵² In short, in 1992, the Governments accepted and the Court approved a Superfund settlement between these very same parties that did not provide full recovery for the Governments from AVX.¹⁵³

All of the factors supporting the cost compromise in the 1992 Consent Decree remain applicable to the proposed Supplemental Decree. Now, there are arguably additional litigation risks due to challenges AVX could make over EPA's remedy selection and implementation since the 1992 settlement, due to additional arguments that AVX would make to limit or exclude the

¹⁵¹ 1992 CD at ¶¶ 8-10 and 18.

¹⁵² The Governments also compromised "past" response costs at the time of the 1992 Consent Decree. The Cost Reopener's trigger is \$130.5 million in "Remedial Costs," which is defined as "all Response Costs incurred...from the dates of signatures of the [two RODs]." The OU2 ROD, which was the first one issued, was signed on April 6, 1990. Accordingly, the costs incurred prior to April 6, 1990 do not fall within the definition of "Remedial Costs" under the 1992 Consent Decree.

¹⁵³ In the early 1990s, in addition to the settlement with AVX, EPA entered into two other separate cash-out settlements for the Site: (1) with Belleville Industries, Inc. and its legal successor, Aerovox Inc. (which is a different entity than AVX's predecessor, Aerovox Corp.); and (2) with Cornell-Dubilier Electronics, Inc. ("CDE") and its parent company, Federal Pacific Electric Company ("FPE"). EPA received approximately \$16 million plus interest for response costs from these two additional settlements.

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Governments' claims under the reopeners in the 1992 Consent Decree, and due to a lack of precedent for exercising reopeners. Accordingly, the Governments are prepared again to accept a settlement with AVX that does not result in a "full" recovery. In assessing the acceptability of compromising significant "reimbursable"¹⁵⁴ past Remedial Costs, totaling approximately \$300 million as of December 31, 2011, and providing finality to AVX in exchange for payment of over 90% of EPA's estimated future costs for OUI (i.e., no further response cost reopeners), the Governments weighed the benefits of an accelerated cleanup with the settlement funds against the detriments of and uncertainty associated with protracted litigation.¹⁵⁵ The Governments concluded that the benefits of an accelerated cleanup as a result of settlement funds providing over 90% of future estimated costs far outweigh the uncertainties of litigation and accompanying delays and cost increases.

c. Comments Asserting that the Effective Date of the Covenant Not to Sue Must Be Delayed Until Certification of Completion of the Remedial Action

Comment: Commenter BBC asserts that Section 122(f)(3) prohibits

EPA from providing a covenant not to sue that becomes effective before the remedy is certified as complete. Even if the absence of a reopener were appropriate, any covenant not to sue is statutorily required to include language

¹⁵⁴ Under the 1992 Consent Decree's Cost Reopener, Remedial Costs are "reimbursable" once they exceed \$130.5 million. 1992 CD at ¶¶ 5(K) and 18.

¹⁵⁵ If the Supplemental Decree is approved by the Court, AVX will have paid \$425.25 million plus interest (including the \$59 million plus interest that AVX under the 1992 Consent Decree) for response costs and response actions at the Site. In addition, AVX has paid \$7 million plus interest for natural resource damages under the 1992 Consent Decree. With respect to the Aerovox Facility Site (the primary source of PCB contamination to the Harbor), in 2010, AVX entered into two settlements with EPA and MassDEP, respectively. Under the settlement with EPA, AVX demolished the vacant buildings and capped the site in 2011. Under the Administrative Consent Order with MassDEP, AVX agreed to investigate and address the nature and extent of the remaining contamination at the Aerovox Facility, including containing all sources of contamination at the Aerovox Facility, pursuant to Mass. General Laws Chapter 21E.

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*delaying the effectiveness of that covenant until EPA certifies the completion of the remedial action.*¹⁵⁶

Response: As discussed above, the inclusion of reopener language is not statutorily mandated in all circumstances. This comment addresses the effective date of a covenant not to sue in this case, specifically, the statutory provision found in Section 122(f)(3) of CERCLA. The Governments have considered this comment and do not believe that it raises a question concerning the fairness or reasonableness of the proposed Supplemental Decree. In addition, this comment does not support a finding that the proposed settlement is not in the public interest.

Section 122(f) of CERCLA states:

(3) Requirement that remedial action be completed

A covenant not to sue concerning future liability to the United States shall not take effect until the President certifies that remedial action has been completed in accordance with the requirements of this chapter at the facility that is the subject of such covenant.

42 U.S.C. § 9622(f). The terms described in Section 122(f)(3), however, only apply to settlements involving the performance of remedial action by a settling defendant. The requirement is not mandated by the statute for a cost recovery settlement, such as the proposed Supplemental Decree with AVX. See Hercules, 961 F.2d at 799; Atlas Lederer, 494 F. Supp. 2d at 639.

As the Eighth Circuit held in Hercules, Section 122(f)—including Section 122(f)(3)—applies only to remedial actions where the responsible party is completing the remedial action; this section does not apply to covenants in cost recovery actions where EPA is performing the

¹⁵⁶ BBC Comments at 39 and 42.

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cleanup. See Hercules, 961 F.2d at 799. Accordingly, a Court may approve a settlement in a cost recovery action where the covenant not to sue becomes effective before the site remediation is complete. See, e.g., United States v. Vertac Chemical Corp., 756 F. Supp. 1215, 1218-19 (E.D. Ark. 1991), aff'd sub nom. United States v. Hercules, 961 F.2d 796 (8th Cir. 1992). In Hercules, the court affirmed the lower court's approval of a covenant not to sue in a cost recovery action despite the fact that the covenant became effective upon receipt of the final payment rather than upon a certificate of completion. Hercules, 961 F.2d at 800; see Vertac, 756 F. Supp. at 1218-19. In approving the settlement, the lower court noted that the covenant not to sue did not become effective until all payments had been made and that it represented a good faith negotiation to expedite effective remedial action and avoid wasteful litigation. Vertac, 756 F. Supp. at 1219.

Applied to the proposed settlement in this case, in which the date the covenant not to sue becomes effective is the date of AVX's final payment to the Governments, the logic of permitting a covenant not to sue to become effective on receipt of the final payment is fully consistent with above-cited case law. Where a settling defendant is obligated to perform the remedial action, delaying the effective date of a covenant not to sue protects the government from a defendant whose performance of the remedial action is inadequate, incomplete, or unsatisfactory. However, where a settling defendant's final obligation is the payment of money, it is appropriate for the covenant to take effect on the date the final payment is received rather than the date when EPA's remedial action is completed. Accordingly, this comment concerning the effective date of the covenant not to sue memorialized in the proposed Supplemental Decree is not supported by law and does not warrant modification of the settlement.

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3. Comments on the Sufficiency of the Proposed Settlement's \$366.25 Million Cost Recovery

a. Comments Asserting that the Settlement Amount Is Insufficient in General

Comment: BBC, HARC, and several additional commenters, who signed BBC's petition and generally agreed with BBC and HARC, assert that the proposed settlement's \$366.25 million cost recovery is not sufficient for various reasons, including: (1) Assertion that EPA's cost estimates are flawed; (2) Assertion that \$366.25 million cost recovery is insufficient to perform the commenters' preferred remedy for the Site, which differs from the selected remedy; and (3) Assertion that AVX is the only viable source of funds and that AVX can afford to pay more.

Response: The Governments disagree with comments that the \$366.25 million settlement is insufficient. As discussed in the response to "Comments Asserting that Because AVX Should Be Held Fully Accountable for the Damage It Caused, the Supplemental Consent Decree Should Include a Reopener" (Section I(A)(2)(b) above), the proposed \$366.25 million cost recovery settlement is in the public interest, even if the settlement would not recover 100% of the Governments' "reimbursable"¹⁵⁷ past Remedial Costs and current estimate of future Remedial Costs.¹⁵⁸

The Governments weighed several important factors in determining that this settlement is in the public interest, including the following:

¹⁵⁷ Refer to Footnote 154 above for a note on remedial costs that are "reimbursable."

¹⁵⁸ The National Park Service (New Bedford Whaling National Historic Park) submitted a letter as noted in Footnote 5 above, concerning "the need to factor archeological surveys into both the proposed settlement amount as well as into the new project schedule that will be developed as a result of the settlement." EPA will continue to coordinate its activities with the National Park Service regarding archaeological surveys at the Site.

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- This settlement will greatly accelerate the pace of the cleanup. Assuming that the current funding by the Superfund continued at the current rate of \$15 million per year,¹⁵⁹ it would take about 40 years to complete the cleanup.¹⁶⁰ The settlement funds will provide over 90% of the estimated funding necessary to complete the OU1 cleanup in five to seven years.¹⁶¹ The vastly increased level of immediate funding made available by this settlement will result in a reduction of the risks to human health and the environment far sooner than with the current annual funding levels of \$15 million from the Superfund.¹⁶²
- The longer it takes to perform the cleanup, the more the actual cost of the cleanup increases due to inflation and annual fixed costs (which includes the expense of mobilization and demobilization each year) incurred over a longer duration, as well as the likely additional dredging that would be required to reach the cleanup levels based on natural sediment transport in the Upper Harbor over this longer duration.¹⁶³ Assuming the current funding level of \$15 million from Superfund, and a 40-year cleanup, the

¹⁵⁹ The Commonwealth (MassDEP) has made contributions to funding for the remediation of the Site at its statutory State 10% cost share of remedial action costs for Superfund financed remedial action activities consistent with the Superfund law and customary contractual agreements with EPA.

¹⁶⁰ OU1 ESD4 at 2 and 12; and Stanley Decl. at ¶ 24.

¹⁶¹ Stanley Decl. at ¶ 25.

¹⁶² See OU1 ESD4 at 2 and 12 for how increased funding will decrease the amount of time necessary to complete the OU1 Remedy cleanup.

¹⁶³ *Assumptions for ESD (OU1 ESD4) Cost Estimates* (part of the Administrative Record for OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/466839.pdf>) at 1 and 80-94 of 136-page PDF; see UAO at ¶ 10; and see also *Final North of Wood Street Post-Remediation Monitoring* (April 2012) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/535504.pdf>) at 3-4, 17, 19, and 21-22.

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actual cost of performing the remedy would be over one billion dollars.¹⁶⁴ In short, there is a significant public interest in ensuring a large influx of money through this settlement, to ensure that the cleanup is performed as rapidly as possible in a cost-effective and protective manner.

- Failure to reach a settlement would likely mean years of complex litigation, including litigation over novel legal¹⁶⁵ and significant technical issues,¹⁶⁶ with an uncertain outcome. If this matter proceeded to litigation, it is expected that AVX would vigorously pursue its legal defenses. Some of these legal defenses are discussed in the response to “Comments Asserting that the Cost Recovery Settlement Is Not Supported by the Governments’ Exaggeration of Litigation Risks” (Section I(A)(1) above). The settlement is in the public interest because it avoids the cost, time and uncertain results from protracted litigation against AVX.
- Although there are risks inherent to settlement, such as the potential for additional unexpected costs that result in EPA spending more money than anticipated, the Governments weighed this consideration when evaluating the settlement and determining that the settlement is in the public interest. Based on the experiences of the United States and the Commonwealth in settling the liability of parties at numerous hazardous waste cleanup sites across the nation and in Massachusetts, under circumstances such as these

¹⁶⁴ OU1 ESD4 at 2 and 12.

¹⁶⁵ For example, the Governments are unaware of any cases that construe the Governments’ ability to reopen a CERCLA settlement based on reopener provisions contained in the 1992 Consent Decree.

¹⁶⁶ For example, the facts in support of the Governments’ claims under the Unknown Conditions Reopener require proof of complex technical issues.

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where litigation risks are present, the Governments consider a compromise where one party pays over 90% of the estimated remaining costs to clean up a site to be reasonable.

b. Comments Asserting that EPA's Cost Estimates Are Flawed

i. Comments on the History of EPA's Cost Estimates and Performance of the Remedy

Comment: In its comments, BBC suggests that EPA's cost estimates from the early 1990s were inaccurate and that EPA's current cost estimates cannot be trusted because of this history. BBC also criticizes EPA for what it characterizes as frequent modifications of the remedy for the Site, which BBC suggests makes EPA's cost estimates inaccurate because of the potential for future changes to the remedy. At the same time, BBC suggests that EPA should modify the remedy now.

In a similar comment, BBC and the Mattapoissett Land Trust, Inc. seek to compare EPA's past costs for all aspects of the Site, including OUI and OU2, to EPA's estimate of future remedial costs. The commenters further compare the volume of contaminated sediment addressed by EPA to date to the volume that remains to be addressed. Based on these comparisons, these commenters assume that EPA's current cost estimates must be unreliable. Specifically, the Mattapoissett Land Trust, Inc. stated, "To date, EPA has spent approximately \$425 million to remove about 225,000 cubic yards (cy) of the total 900,000 cy of sediment. The fact that EPA now states that it can remove the remaining 675,000 cy for less than what they spent to remove 225,000 cy does not appear reasonable."¹⁶⁷ BBC states: "As of the end of 2011, EPA had spent approximately \$456 million for Site study and remediation. Those remediation efforts resulted in the dredging of approximately 265,000 cy of contaminated

¹⁶⁷ Bates number 287.

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sediments, constituting about 30% of the total volume of 900,000 cy that will require dredging according to EPA's most recent estimates."

Response: The Governments disagree with the comments submitted by BBC and the Mattapoisett Land Trust. EPA's current estimate of future remedial costs is based on years of experience and actual past cost data. Since the OU2 ROD was issued in 1990 and the OUI ROD was issued in 1998, EPA has been performing the cleanup of the Upper and Lower Harbor Operable Unit and has gained additional knowledge of the extent of sediment contamination and actual ongoing cleanup costs at the Site.¹⁶⁸ EPA has extensive experience with or information about both hydraulic and mechanical dredging, offsite disposal, and CAD cell disposal and capping—much of the experience gained since entry of the 1992 Consent Decree. Moreover, EPA's current cost estimate takes advantage of actual costs experienced to date for various elements of the Harbor cleanup, which are applicable to similar tasks to be performed in the future. As such, they represent as accurate an estimate as possible of future costs.¹⁶⁹ Because actual costs are inclusive of all aspects of an activity, including overhead and support costs, they are generally more accurate than cost estimates that do not include such actual costs.¹⁷⁰ For these reasons, EPA's current cost estimate of \$393 million in net present value to complete the cleanup of the Upper and Lower Harbor in five to seven years is significantly more accurate than earlier estimates.¹⁷¹

¹⁶⁸ OUI ESD4 at 17.

¹⁶⁹ OUI ESD4 at 17; *Assumptions for ESD (OUI ESD4) Cost Estimates* at 1; and Stanley Decl. at ¶ 24.

¹⁷⁰ *Assumptions for ESD (OUI ESD4) Cost Estimates* at 1.

¹⁷¹ OUI ESD4 at 17; *Assumptions for (OUI ESD4) Cost Estimates* at 1; and Stanley Decl. at ¶ 24.

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The Governments entered the prior cash-out settlement with AVX in 1992 before issuance of the OU1 ROD in 1998. From 1999 to 2004, EPA obtained considerably more information about the Site during the performance of additional investigations as part of the remedial design and early remedial action activities. As part of this process, EPA identified a substantial increase in the estimated volume of contaminated sediment to be remediated in 2003; however, throughout EPA's performance of the OU1 Remedy over the last ten years, this estimated volume has not changed significantly.

With respect to remedy changes, EPA has modified the 1998 OU1 ROD through four Explanations of Significant Differences ("ESDs") in accordance with CERCLA and the NCP (the Superfund regulations), 40 C.F.R. Part 300. However, the basic features of the OU1 Remedy have remained consistent: dredging has been a major component, and on-site disposal has been a significant part of the selected remedy. Examples of on-site disposal include confined disposal facilities ("CDFs"), a confined aquatic disposal ("CAD") cell in the Lower Harbor, and a pilot cap built in the Outer Harbor.¹⁷² Although aspects of the OU1 Remedy have been modified, these modifications were the result of reasonable considerations and responses to a complex Site, public comments, and EPA's performance of the remedy. In addition, see the response to "Comments Asserting that the Proposed Settlement's \$366.25 Million Cost Recovery Is Insufficient for the Commenters' Preferred Remedy, Which Is Assumed to Be More Expensive Than EPA's Selected Remedy" (Section I(A)(3)(c) below) regarding EPA's

¹⁷² CDFs A, B and C are part of the OU1 Remedy, but have not been constructed yet because of annual funding limitations for the Site; the Lower Harbor CAD cell's design has been finalized and its construction is anticipated to occur in 2013 or 2014; and the Outer Harbor's pilot underwater cap is completed. For more information about the pilot cap, see the response to "Comments Asserting that EPA Failed to Account for Costs for the Outer Harbor Portion of the Site ("Operable Unit 3" or "OU3")" (Section I(A)(3)(b)(v) below).

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anticipated accelerated initiation of a Focused Feasibility Study to consider other protective, more cost-effective alternatives for the disposal of contaminated sediment other than the selected CDFs.

With respect to the relevancy of past costs, the Governments disagree with the commenters' assertion that EPA's total past costs for the Site have a direct relationship to the volume of contaminated sediment addressed by EPA to date, and the Governments disagree with the suggestion that EPA's current estimate of future remedial costs is unreasonable. Several significant types of costs have already been incurred and will not be incurred again as future remedial costs, including: (1) all costs of the performance of the OU2 Hot Spot Remedy, which was completed in 2000; (2) costs associated with the preparation for full-scale dredging, including relocation of combined sewer outfalls, relocation of businesses, construction of EPA's desanding facility, and construction of EPA's dewatering facility; (3) all costs associated with the development of the Remedial Investigation and Feasibility Study for OU1 and OU2 at the Site; (4) costs of the previous litigation that lasted from 1983 until 1992; and (5) costs of addressing approximately 250,000 cy of the estimated 900,000 cy of contaminated sediment at the Site through 2012, including early action dredging and restoration of the area north of Wood Street.¹⁷³

Furthermore, approval of the proposed settlement will greatly increase the efficiency of EPA's cleanup, thereby reducing the time and money necessary to complete the OU1 Remedy.

¹⁷³ Stanley Decl. at ¶ 29; and see also Second Five-Year Review at 15.

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Due to annual funding limitations at this Site,¹⁷⁴ EPA's hydraulic dredging, desanding, and dewatering operations at the Site are typically only active for two and a half to three months per year (or an average of about 40 days of dredging), but EPA's operations were designed for and are capable of handling greater quantities of contaminated sediment per year more efficiently if funded at higher levels.¹⁷⁵ Without settlement funds, under EPA's current \$15 million annual funding level, it would take approximately 40 years to complete the OU1 Remedy, with the "actual" cost estimated to be \$1.2 billion.¹⁷⁶ In contrast, the proposed settlement's \$366.25 million payment would provide sufficient funds for over 90% of the estimate of future remedial costs to complete the cleanup of the Upper and Lower Harbor in five to seven years.¹⁷⁷

ii. Comments on the Relationship Between "Contingency Factors" and Cost Estimates

Comment: In its comments, BBC states: "...it is remarkable that EPA's current cleanup cost estimate of \$393 million includes [no] [sic] 'contingency' factor whatsoever. The absence of such a factor is inconsistent with standard industry practice and with EPA's own guidance for Superfund cleanup projects. Under that guidance, a cleanup cost estimate 'always' should include an upside factor of up to 50% for projects where the final remedial design has not yet been completed."¹⁷⁸ BBC continues that "application of a contingency factor increases EPA's

¹⁷⁴ Since 2004, annual funding from Superfund has been \$15 million, but \$30 million in supplemental funds from the American Recovery and Reinvestment Act allowed for 120 days of EPA dredging in 2009 and 59 days in 2010. See UAO at ¶ 28.

¹⁷⁵ UAO at ¶ 28.

¹⁷⁶ OU1 ESD4 at 2 and 12.

¹⁷⁷ Stanley Decl. at ¶ 25.

¹⁷⁸ BBC Comments at 33.

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current cost estimate by \$60 to \$400 million.”¹⁷⁹ “EPA guidance regarding remediation at Superfund sites states that cost estimates made prior to the remedy’s final design should ‘always’ be qualified as having an uncertainty range of -30% to +50%, meaning that actual costs may be as much as 30% lower or 50% higher than the estimates.”¹⁸⁰

Response: The Governments disagree with these comments submitted by BBC. Although EPA guidances recommend the use of cost “contingency factors” when EPA develops remedy alternatives, these guidances do not apply to cost estimates prepared for other purposes or for CERCLA settlement negotiations. EPA’s cost estimate of \$393 million in net present value to complete the OU1 Remedy is presented and explained in the 2011 OU1 ESD4. In ESD4, EPA used a 15% contingency factor, instead of the typical 50% contingency factor used when EPA is comparing remedial alternatives at an earlier stage in the cleanup process, during remedial investigation and feasibility study. Given EPA’s extensive experience at the Site and the OU1 cleanup being in the remedial action stage, EPA determined that a 15% contingency was appropriate.

In its comments, BBC cites and quotes from EPA’s guidance document, *A Guide to Developing and Documenting Cost Estimates during the Feasibility Study*, EPA 540-R-00-002, OSWER 9355.0-75, (July 2000) (“Feasibility Study Cost Guidance” or “FS Cost Guidance”).¹⁸¹

¹⁷⁹ BBC Comments at 35.

¹⁸⁰ BBC Comments at 14.

¹⁸¹ *A Guide to Developing and Documenting Cost Estimates during the Feasibility Study*, EPA 540-R-00-002, OSWER 9355.0-75, (July 2000) (available at the EPA-maintained website at: [http://yosemite1.epa.gov/ee/epa/ria.nsf/vwAN/S200010.pdf/\\$file/S200010.pdf](http://yosemite1.epa.gov/ee/epa/ria.nsf/vwAN/S200010.pdf/$file/S200010.pdf)). In its comments, BBC attributes a quote to the Feasibility Study Cost Guidance in the following language: “a cleanup cost estimate ‘always’ should include an upside factor of up to 50% for projects where the final remedial design has not yet been completed.”
(cont’d...)

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In arguing that the FS Cost Guidance would require EPA to add some type of “contingency factor” to the proposed settlement, BBC misunderstands both the purpose of the FS Cost Guidance and the type of cost estimate being discussed. The FS Cost Guidance notes, “Cost estimates are developed during the FS [feasibility study] primarily for the purpose of comparing remedial alternatives during the remedy selection process, not for establishing project budgets or negotiating Superfund enforcement settlements” (emphasis added).¹⁸² The FS Cost Guidance notes that, “The FS remedial alternative cost estimate can be used as [a] starting point for budgeting purposes, but adjustments may be needed based on individual agency requirements. For example, estimates may need to be revised based on project scope requirements, escalation factors may need to be added, or discount factors may need to be removed.”¹⁸³

The FS Cost Guidance describes the role of the feasibility study at the beginning of the Superfund process, during “(1) development and screening of remedial action alternatives; and (2) comparison of each alternative that passes screening in a detailed analysis.”¹⁸⁴ However, EPA’s most recent cost estimate was developed to support OU1 ESD4, which was issued in 2011 at a much later stage in the Superfund process for the New Bedford Harbor Superfund Site. In short, the FS Cost Guidance does not require EPA to use the same contingency factor that would

(...cont’d)

BBC Comments at 14. EPA notes that the Feasibility Study Cost Guidance does not use the term “always” in this context. See Feasibility Study Cost Guidance, at 2-4, Footnote 4 (“If the number of viable alternatives developed during the FS process is limited, the ‘screening of alternatives’ step is not always performed, nor is it required. However, the ‘detailed analysis of alternatives’ is performed regardless to evaluate each alternative against the NCP evaluation criteria.”).

¹⁸² Feasibility Study Cost Guidance at 1-2.

¹⁸³ Feasibility Study Cost Guidance at 1-2 and Footnote 3.

¹⁸⁴ Feasibility Study Cost Guidance at 2-1.

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be used for purposes of the development of remedial alternatives prior to selection of a remedy. This is especially so when EPA uses actual prior costs at a site in developing future cost estimates.

The Governments acknowledge that EPA's Explanations of Significant Differences decision documents ("ESDs") modifying the OU1 ROD have referred to the FS Cost Guidance and the expected accuracy range of +50% to -30% of cost estimates. The Governments note that these references to the FS Cost Guidance were part of EPA's considerations when modifying aspects of the OU1 ROD, in accordance with the requirements of CERCLA, the NCP, and EPA guidance on remedy modifications, *A Guide to Preparing Superfund Proposed Plans, Records of Decisions, and Other Remedy Selection Decision Documents*, EPA Office of Solid Waste and Emergency Response, EPA 540-R-98-031, OSWER 9200.1-23P, PB98-963241, July 1999 (commonly referred to as the "ROD Guidance").¹⁸⁵

As EPA's ROD Guidance explains, EPA's categorization of a post-ROD change to the selected remedy is a site-specific determination and must consider the factors set forth in the NCP at 40 C.F.R. § 300.435(c)(2). Pursuant to 40 C.F.R. § 300.435(c)(2), EPA may issue an ESD to document a change to a selected remedy if the differences in the remedial action significantly change but do not fundamentally alter the scope, performance, or cost of the

¹⁸⁵ *A Guide to Preparing Superfund Proposed Plans, Records of Decisions, and Other Remedy Selection Decision Documents*, EPA Office of Solid Waste and Emergency Response, EPA 540-R-98-031, OSWER 9200.1-23P, PB98-963241, July 1999 ("ROD Guidance") (available at the EPA-maintained website at: http://www.epa.gov/superfund/policy/remedy/rods/pdfs/guide_decision_documents_071999.pdf).

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remedy selected in the ROD. The ROD Guidance also notes that the performance of a feasibility study and the evaluation of alternatives are not applicable to ESDs.¹⁸⁶

When considering whether a change in remedial costs is significant or fundamental, the ROD Guidance suggests that EPA should take into account the fact that Feasibility Study cost estimates are expected to provide an accuracy of +50 percent to -30 percent.¹⁸⁷ The Governments also note that the ROD Guidance specifies that a large increase in remedial costs is an example of a significant change, requiring an ESD.¹⁸⁸

When deciding to issue ESDs for OU1 of the New Bedford Harbor Site, EPA took the ROD Guidance into account when making changes to the selected remedy for OU1, and EPA took the FS Cost Guidance accuracy ranges into account for the purposes of compliance with the ROD Guidance. Responding to BBC's specific assertion that the 15% contingency factor applied in OU1 ESD4 was inappropriate, as EPA indicated in its response to comments on ESD4: "EPA believes that the draft ESD #4's cost estimates are much more accurate than this - 30% to +50% range recommended in agency guidance. This is due to the fact that they are based on five years or more of actual Site dredging and disposal experience, and since they take advantage of actual navigational CAD cell implementation costs in NBH [New Bedford Harbor],

¹⁸⁶ ROD Guidance at 7-7.

¹⁸⁷ ROD Guidance at 7-1.

¹⁸⁸ See also the recent Lower Fox River and Green Bay Superfund Site decision, *United States v. NCR Corp. and Appleton Papers, Inc., et al.*, supra, at 9-10.

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among other factors. As a result the final ESD #4 clarifies that EPA believes a contingency factor of 15%, rather than 50%, is appropriate.”¹⁸⁹

iii. Comments on Whether EPA’s Cost Estimates Assume that AVX Would Perform the Remedy

Comment: In its comments, BBC suggests that EPA’s current cost estimates, which estimate future remedial costs as ranging between \$393 million and \$401 million (if the remedy is funded at full capacity), are understated because EPA made certain incorrect underlying assumptions about which party would perform the remedy. Specifically, BBC suggests that EPA’s cost estimates originate from the Unilateral Administrative Order that EPA issued to AVX on April 18, 2012. BBC suggests that EPA’s cost estimates assume that AVX, and not EPA, will perform the remedy.¹⁹⁰ BBC then suggests that EPA’s performance of any remedy is inherently more expensive than when a potentially responsible party, such as AVX, performs a remedy. Based on these assumptions, BBC concludes that EPA’s remediation costs will exceed the \$393-401 million estimate by an additional \$80 million.

Response: BBC’s comments are incorrect. EPA’s cost estimates in the UAO were not predicated on AVX performing the remedy; rather EPA used its current cost estimates for EPA’s performance of the remedy. EPA’s current cost estimates were developed for OU1 ESD4. OU1 ESD4 was issued on March 14, 2011, and therefore predates the April 18, 2012 UAO by over one year. Although BBC’s footnotes regarding EPA’s current cost estimates refer to EPA’s

¹⁸⁹ OU1 ESD4 Attachment A—Response to Comments at 31 (Response #18 to AVX comment about -30% to +50% range).

¹⁹⁰ BBC Comments at 29.

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April 18, 2012 UAO, the specific paragraph of the UAO referenced is EPA's discussion of the OU1 ESD4 cost estimates.¹⁹¹ OU1 ESD4 and its cost estimates assume that EPA is performing the remedy for the Site. EPA has been performing the OU2 and OU1 remedies at the Site as fund-lead remedies since the early 1990s. EPA's current cost estimates use EPA's actual past cost data and are therefore as accurate an estimate of EPA's future costs as is possible.¹⁹²

iv. Comments on Land Use Changes

Comment: BBC, joined by the Mattapoissett Land Trust, Inc., points out that the OUI Remedy's site-specific cleanup levels are dependent on potential exposure pathways, such as abutting shoreline uses. BBC asserts that the uses of various properties around the shoreline of the Site have changed since the issuance of the 1998 OUI ROD from industrial uses to residential or recreational uses, which therefore increase people's potential rates of exposure to site-related contamination. BBC asserts that EPA should apply more stringent cleanup levels when remediating such shoreline areas in order to match the current land use. BBC states that the site-specific cleanup levels for shoreline areas bordering recreational and residential areas is 1 ppm PCBs. BBC extrapolates from these assertions that if EPA's cleanup levels at portions of the Site are more stringent, then necessarily this will require a "significant escalation of the volume of sediment that must be dredged and necessarily an increase in the costs to complete the cleanup."¹⁹³ BBC explains that it has acquired property at Marsh Island, a saltmarsh property

¹⁹¹ See UAO at ¶ 31 and ¶ 31, Footnote 7. BBC cites to the UAO at ¶ 31, Footnote 7. Paragraph 31 has a discussion of the OU1 ESD4, and Footnote 7 to ¶ 31 explains the cost estimates contained within OU1 ESD4.

¹⁹² OU1 ESD4 at 17; and Stanley Decl. at ¶ 24.

¹⁹³ BBC Comments at 27.

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abutting the Site. BBC desires to increase public access to the shoreline of the Site by building walking trails to the shoreline in areas where there currently is limited or no public access. BBC concludes that because of changed shoreline land uses, including BBC's own plans to increase access to the Site, EPA's costs will be \$90 million greater than EPA's current cost estimates.

Response: Overall, the proposed \$366.25 million settlement will have a positive impact on shoreline development and use of the Site in that the settlement funds will enable EPA to address PCB contamination in significantly less time than would be possible with the yearly \$15 million funding EPA has been receiving from the Superfund.¹⁹⁴ As EPA completes the cleanup, the Agency will continue to coordinate and cooperate with the City of New Bedford, the Town of Fairhaven, the Town of Acushnet, private developers, and other stakeholders in their efforts to promote economic and recreational growth in and abutting the Site.¹⁹⁵ The proposed settlement will therefore help BBC achieve its goal of increasing the safe recreational use of the Site much sooner. Moreover, contrary to the commenters' assertions, EPA does not expect land use changes along the shoreline to significantly alter the scope or cost of the remedy.

The OU1 Remedy includes separate PCB cleanup levels for different areas of the Harbor:

- For subtidal areas, the cleanup levels, to attain applicable water quality and seafood consumption standards, are the following:¹⁹⁶
 - 10 ppm PCBs for subtidal and mudflat sediment in the Upper Harbor (north of the Coggeshall Street bridge), which has most of the PCB contamination; and

¹⁹⁴ Stanley Decl. at ¶¶ 24-26.

¹⁹⁵ See Second Five-Year at 22 and 37; and OU1 ROD at 32.

¹⁹⁶ UAO at ¶ 61.

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- 50 ppm PCBs for subtidal and mudflat sediment in the Lower Harbor (between the Coggeshall Street bridge and the New Bedford Hurricane Barrier); and
- For the shoreline intertidal areas, the cleanup levels, to reduce risk from human contact with contaminated sediment, are the following:
 - 1 ppm PCBs for areas bordering residential areas;
 - 25 ppm PCBs for shoreline areas bordering recreational areas; and,
 - 50 ppm PCBs for other shoreline areas with little or no public access.

Thus, BBC's statement that the site-specific cleanup level for shoreline areas bordering recreational areas is 1 ppm PCBs was incorrect, as the cleanup level for shoreline areas bordering recreational areas is 25 ppm PCBs.

As discussed above, EPA is required to perform a review of the New Bedford Harbor Site every five years pursuant to Section 121(c) of CERCLA. In the 2010 Five-Year Review performed for the Site, EPA noted a potential long-term trend in the Upper Harbor towards changes in shoreline land use from commercial/industrial to residential and recreational.¹⁹⁷ EPA noted that, "If land use changes occur prior to remediation, or if they are expected to occur in the near future, EPA will evaluate whether site use will need to be restricted through institutional controls or if the ROD's more stringent shoreline cleanup standards will need to be used to permit less restricted uses."¹⁹⁸

¹⁹⁷ Second Five-Year Review at xiii and 37.

¹⁹⁸ Second Five-Year Review at xiii; and see also Second Five-Year Review at 22 and 37.

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To date, EPA's cleanup has focused on subtidal dredging, primarily addressing the worst (more contaminated) areas first.¹⁹⁹ EPA's OU1 ESD4 stated: "At NBH, since the OU1 ROD includes separate clean-up standards for various shoreline land uses (e.g., residential, recreational/beach combing, industrial), should shoreline land use change over time it is not the scope of the remedy that is changed, but rather only the geographic area within which these respective cleanup levels get implemented. Obviously the issue of land use changes over time is completely moot for the vast majority of the site—its subtidal sediments—and this issue only could come into play at its margins."²⁰⁰

For the volume of contaminated sediment required to be addressed under the OU1 Remedy, subtidal sediment comprises approximately 95%, while shoreline intertidal sediment comprises the remaining 5%.²⁰¹ In addition, any change in the shoreline land uses would not increase the total shoreline intertidal areas needing remediation by any considerable extent. Specifically, for shoreline intertidal areas in the Upper Harbor, volume estimates and associated costs were conservatively based on a 10 ppm PCBs cleanup level for vertical and lateral extent even though the OU1 Remedy cleanup levels for these areas are 50 ppm PCBs for shoreline

¹⁹⁹ See Second Five-Year Review at 13.

²⁰⁰ OU1 ESD4 Attachment A—Response to Comments at 43.

²⁰¹ See *Volumes, Areas and Properties of Sediment by Management Units, New Bedford Harbor Superfund Site*, September 2003 (part of the Administrative Record for OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/509200.pdf>), at Table 2.

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areas with little or no public access and 25 ppm PCBs for shoreline areas bordering recreational areas.²⁰²

Moreover, it is estimated that two-thirds of the costs for remediating the shoreline intertidal sediment are associated with excavation-support costs, including, accessing these areas, mobilizing and demobilizing specialized equipment, constructing and removing temporary access roads, planting appropriate vegetation, ensuring shoreline slope stability, removing debris, and installing silt curtains and sheet piles, where necessary.²⁰³ These excavation-support costs would be incurred irrespective of the shoreline land uses.

With respect to BBC's Marsh Island property, EPA selected a 50 ppm PCBs cleanup level for shoreline areas with little or no public access.²⁰⁴ If BBC increases public access to Marsh Island to encourage recreational uses, then EPA may apply the more stringent 25 ppm recreational use cleanup level to the Marsh Island shoreline intertidal area. At the present time, based upon EPA's understanding of the New Bedford Harbor Trustee Council's²⁰⁵ proposed

²⁰² See *Volumes, Areas and Properties of Sediment by Management Units, New Bedford Harbor Superfund Site* at Table 2 (for volume); *Assumptions for ESD (OUI ESD4) Cost Estimates*, at pages 11-13 and 125-136 of the 136-page PDF; 2008 Wetland Sediment Core Locations Update (September 29, 2008) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/289897.pdf>); and Figures 2 through 10 (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/new-bedford-harbor/new-bedford-harbor-cleanup-plans-technical-documents-and-environmental-data#EarlierCleanupActions>).

²⁰³ See *Final Excavation Basis of Design/Design Analysis Report, New Bedford Harbor Superfund Site* (October 2002) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/447661.pdf>) at 4-3 to 4-4; and see also *Assumptions for ESD (OUI ESD4) Cost Estimates* at pages 11-15 and 125-136 of the 136-page PDF.

²⁰⁴ OUI ROD at 44.

²⁰⁵ "Trustees" are defined in the 1992 CD at ¶¶ 5(E) and 5(O). Pursuant to the 1992 CD at ¶ 11, AVX paid the Federal Trustees (the Secretary of Commerce, acting through the National Oceanic and Atmospheric Administration, and the Secretary of Interior) and the State Trustee (the Secretary of the Executive Office of

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recreational uses for Marsh Island, EPA's cleanup volumes and current cost estimate already assume that the cleanup level for the Marsh Island shoreline intertidal area will be 25 ppm.²⁰⁶ Accordingly, the potential change in land use at Marsh Island is unlikely to cause any increase in the volume of existing intertidal sediment to be removed or any increase in remedial costs. As such, it does not present a material reason not to approve the settlement.

With respect to BBC's claim that shoreline land use changes would result in an estimated \$90 million in increased costs, it appears that two of the fundamental assumptions BBC made in its calculations are inaccurate. First, BBC's calculations were based on the volume of subtidal sediment that might need to be addressed if EPA changed the Upper Harbor's subtidal sediment cleanup level from 10 ppm PCBs to 1 ppm PCBs.²⁰⁷ Any change in shoreline land uses from commercial/industrial to residential or recreational may change the bordering shoreline intertidal sediment PCB cleanup levels from 50 ppm to 1 ppm or 25 ppm, respectively.²⁰⁸ However, these land use changes would have no effect on the subtidal sediment cleanup levels, which were developed to address human health risks associated with seafood consumption while balancing

(...cont'd)

Environmental Affairs, Commonwealth of Massachusetts) for Natural Resource Damages to be used "by the trustees to plan, implement, and oversee actions to restore, replace, or acquire the equivalent of natural resources that have been injured, destroyed, or lost as a result of the release of hazardous substances at the New Bedford Harbor Site, in accordance with Section 107(f)(1) of CERCLA, 42 U.S.C. § 9607(f)(1)." The New Bedford Harbor Trustee Council is comprised of the Federal Trustees and the State Trustee. *Final Restoration Plan/Environmental Impact Statement for the New Bedford Harbor Environment* (May 1998) (part of the Administrative Record for the OU1 ROD and available at the EPA-maintained website for the New Bedford Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/446853.pdf>) at i.

²⁰⁶ *Sediment Sampling, Summary Report – 2004 – 2005, Marsh Island* (August 2006) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/282753.pdf>) at 2 and Figure 13.

²⁰⁷ BBC Comments at Attachment 7 (Rasmussen Declaration at ¶¶ 34-37).

²⁰⁸ See Second Five-Year Review at xiii, 22, and 37.

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protection of public health and the environment (see the response to “Comments Asserting that the Cleanup Standards Should Be More Stringent” (Section I(C)(1) below). Therefore, because BBC used the volume of subtidal sediment in its calculations, rather than the volume of shoreline intertidal sediment, BBC’s calculations do not accurately reflect how a change in shoreline land use might affect the volume of intertidal sediment that might need to be addressed. Second, it appears that BBC used an incorrect assumption to calculate the costs per cubic yard of contaminated sediment for dredging and disposal. BBC assumed that EPA’s total remedial costs are all associated with dredging-related costs, which is not accurate.²⁰⁹

v. Comments Asserting that EPA Failed to Account for Costs for the Outer Harbor Portion of the Site (“Operable Unit 3” or “OU3”)

Comment: BBC, joined by the Mattapoissett Land Trust, Inc., asserts that EPA’s cost estimates for OUI are flawed because they do not take into account any costs for the Outer Harbor Operable Unit (“OU3”) of the Site. BBC asserts that EPA’s cost estimate “completely ignores future cleanup costs for the 17,000 acres of PCB contamination in Outer New Bedford Harbor where commercial fishing and lobstering have been banned for over 30 years...Other factors are also likely to escalate the costs of EPA’s current remedial plan such as the fact that there is no ROD for OU3, the 17,000 acres of the Outer Harbor (BBC, at 28-29; 287).²¹⁰

Response: The Governments agree that EPA’s cost estimate for the OUI Remedy does not include costs for OU3. As BBC noted, EPA has not yet issued a record of decision for OU3. In 2009, EPA initiated a Remedial Investigation and Feasibility Study (‘RI/FS’) of the Outer

²⁰⁹ BBC Comments at Attachment 7 (Rasmussen Declaration at ¶¶ 34-37).

²¹⁰ BBC Comments at 28-29; and Bates number 287.

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Harbor. The RI/FS includes field sampling activities to determine the nature and extent of contamination, a risk assessment, a review of technologies and range of response actions to address any risk found.²¹¹

Through the recent mediated negotiations, culminating in the proposed settlement, the Governments and AVX settled the Government's claims against AVX under certain reservations in the 1992 Consent Decree—the Cost Reopener and the Unknown Conditions Reopener. EPA invoked these reopeners in the April 18, 2012 Unilateral Administrative Order. The 1992 Consent Decree provided a covenant not to sue to AVX for the entire New Bedford Harbor Site, but its Cost Reopener only applies to Remedial Actions and Remedial Costs associated with the “records of decision for the first and second operable units at the New Bedford Harbor Site.”²¹² If instead of settling this matter the Governments were engaged in litigation with AVX over the 1992 Consent Decree reopeners, AVX would likely argue that EPA has no claim against AVX for OU3.

The Governments also agree with the commenters that PCBs from the Upper and Lower Harbors are migrating to the Outer Harbor. Specifically, monitoring in 2010 at the New Bedford Hurricane Barrier indicated that 95 pounds of PCBs move from the Lower Harbor to the Outer Harbor each year.²¹³ Therefore, the quicker the OU1 Remedy is implemented, the sooner the source of contamination to the Outer Harbor will be contained. The funds from the proposed

²¹¹ See the EPA-maintained website on the Outer Harbor, which is available at: <http://www2.epa.gov/new-bedford-harbor/new-bedford-harbor-cleanup-plans-technical-documents-and-environmental-data#OuterHarborStudy>.

²¹² 1992 CD ¶ 5(K); and see also 1992 CD ¶ 5(J).

²¹³ UAO at ¶ 10.

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settlement will make it possible for EPA to implement the OU1 Remedy at a faster remediation schedule, which in turn will have a positive impact on reducing risks posed by PCB contamination in the Outer Harbor.²¹⁴ The likely alternative to accepting this settlement—years of litigation—will delay the cleanup.

More significantly, PCB contamination in the Outer Harbor is generally much lower than in the Upper Harbor and Lower Harbor.²¹⁵ Generally, PCB concentrations in the Outer Harbor are below 1 ppm except for a few localized areas.²¹⁶ As described in greater detail in the response to “Comments on the Community’s Use and Enjoyment of and the Aesthetic Value of the Harbor” (Section I(D) below), swimming events have been held in the Outer Harbor for the last twenty years.

In addition, the 1998 OU1 ROD included the cleanup of an area just south of the hurricane barrier near the Cornell-Dubilier facility because it was the only known area within the Outer Harbor that contained PCB levels above the Lower Harbor’s 50 ppm cleanup standard.²¹⁷ Due to the general north to south (worst first) dredging strategy, this area was slated for dredging towards the end of the OU1 cleanup. However, in 2005, an opportunity for an alternative accelerated cleanup approach for this localized Outer Harbor area presented itself at no cost to EPA: clean sand generated by the port of New Bedford’s navigational dredging

²¹⁴ Stanley Decl. at ¶ 26.

²¹⁵ OU1 ROD at 2.

²¹⁶ See *Final Summary Report, New Bedford Harbor Long Term Monitoring V* (November 2010) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/454688.pdf>) at 16.

²¹⁷ OU1 ROD at 6.

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(implemented pursuant to the State Enhanced Remedy) became available for use as an underwater cap. From April through July 2005, EPA worked in close collaboration with the New Bedford Harbor Development Commission and a multi-agency steering committee to design and implement an effective underwater cap. Approximately 20 acres of contaminated sediment was capped under this pilot project (“Pilot Cap”). Bathymetric and sediment PCB monitoring of the pilot cap area has been performed annually, with the conclusion to date that the Pilot Cap is performing well.²¹⁸

vi. Comments Asserting that EPA’s Model for Predicting Dredging Depth Is Flawed

Comment: In its comments, BBC points to EPA documents in which EPA describes how EPA’s predictive model may be underestimating the required depth of dredging at localized portions of the Site.²¹⁹ BBC extrapolates from these EPA documents that because the predictive model is not always accurate, then EPA’s cost estimates must be flawed.

Response: As EPA explained in the Second Five-Year Review issued for the Site in 2010:

The depth to which sediments have to be removed in a particular dredge area are based on core sampling data, a z-star (z^*) predictive model for dredging depth, and bathymetric survey data. In order to determine progress in meeting the target dredge elevation and to confirm the removal of contaminated sediments to concentrations at or below the remediation criteria, sediment conditions are assessed during and following dredging operations. The results indicate that the overall thickness of the highly contaminated sediment layers in the northern reaches of the upper harbor have been significantly reduced across all dredged regions, as presented in the sediment monitoring data since the first Five-Year Review (issued in 2005)...The post-dredge monitoring also suggests that, at least

²¹⁸ Second Five Year Review at 13-24.

²¹⁹ BBC Comments at 29.

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in the highly contaminated northern reaches of the Upper Harbor, the z^* predictive model may be underestimating the required depth of dredging.²²⁰

The Governments acknowledge that it is difficult to account for every potential variable at highly contaminated sediment sites, such as New Bedford Harbor. However, EPA's current cleanup plans and cost estimates already addressed the potential increased volume that might need to be dredged in order to reach site-specific cleanup levels, even at the specific locations in the Upper Harbor where the z^* predictive model alone might underestimate the required depth of dredging. Specifically, in EPA's *Cost Estimates for 2010 Confined Aquatic Disposal (CAD) Cell Explanation of Significant Differences (ESD)*, EPA explained how its current cost estimates take into account the cost of dredging an additional 10% of sediment during additional cleanup passes, which is estimated to add 53,351 cubic yards of volume of contaminated sediment to be dredged.

Therefore, EPA's current cost estimates already take into account the cost of dredging additional volume to address sediment that might otherwise be underestimated by EPA's predictive model for dredging depth. Indeed EPA's practical experience performing the OUI Remedy has informed EPA's cost estimates and increased the accuracy of these estimates.

c. Comments Asserting that the Proposed Settlement's \$366.25 Million Cost Recovery Is Insufficient for the Commenters' Preferred Remedy, Which Is Assumed to Be More Expensive Than EPA's Selected Remedy

Comment: BBC, HARC, and joining commenters suggest that EPA should change the selected remedy for OUI. BBC and HARC now argue that a "full cleanup of the Harbor" would require several changes to the selected remedy for the Site, including off-site disposal of all

²²⁰ Second Five-Year Review at 30-31.

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contaminated sediment, as well as changes to the site-specific cleanup levels.²²¹ BBC and HARC also assert that various specific remedial technologies, such as Confined Disposal Facilities (“CDFs”) and Confined Aquatic Disposal (“CAD”) cells, are flawed and/or are inherently worse than off-site disposal options.²²² These commenters assume that their preferred remedy will be more expensive than the cost of the selected OUI Remedy, and therefore they assert that the \$366.25 million cost recovery settlement provides insufficient funds for what they view as a “full cleanup.”

Response: The remedy for the Upper and Lower Harbor Operable Unit (“Operable Unit 1” or “OU1”) was selected in the OU1 Record of Decision in 1998, which was later modified in four Explanations of Significant Differences. All components of the selected OU1 Remedy—including dredging, dewatering, off-site disposal, future disposal in Confined Disposal Facilities A, B, and C, and disposal in a Lower Harbor Confined Aquatic Disposal (CAD) cell—have been previously determined by EPA to be protective of human health and the environment.²²³ The Governments note that the proposed Supplemental Decree does not alter the OU1 Remedy selected for the Site in the OU1 ROD and the four OU1 ESDs. In addition, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here.

EPA issued these remedy decisions in accordance with the Superfund law and regulations, and provided the community with extensive input and the opportunity to submit

²²¹ BBC Comments at 29-34.

²²² BBC Comments at 31-32.

²²³ OU1 ESD4 at 16.

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public comments. Prior to finalizing these decisions, EPA considered and responded to the public comments. BBC, HARC, and all members of the communities surrounding the Site had the opportunity to comment on the remedial alternatives considered by EPA. In fact, in its comments on the 1996 Revised Proposed Plan for OU1, BBC wrote that it was in favor of the remedy that EPA eventually selected in the 1998 OU1 ROD.²²⁴

Because of the limited annual funding at the Site after the funds from the early 1990s settlements were depleted in 2004, CDFs A, B, and C have not yet been built for the disposal of contaminated sediment.

Under the current OU1 Remedy, approximately 900,000 cubic yards (“cy”) of contaminated sediment at the Site are estimated to be above the OU1 ROD cleanup standards and have been or will be addressed in the following manner:

- 175,000 cy will be placed in Confined Disposal Facilities (“CDFs”) along the New Bedford shoreline in the Upper Harbor, as selected in the 1998 OU1 ROD;
- 425,000 cy have been or will be transported off-site for disposal, as selected in the 2002 OU1 ESD2;²²⁵ and
- 300,000 cy will be placed in a Lower Harbor CAD cell (“LHCC”), as selected in the 2011 OU1 ESD4.

²²⁴ See Comments of The Coalition for Buzzards Bay (later renamed BBC) in support of OU1 ROD remedy, which are included as part of the OU1 ROD Administrative Record and are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/54624.pdf>.

²²⁵ Included in the 425,000 cy estimate is 10,000 cy of contaminated sediment in the Outer Harbor just south of the New Bedford Hurricane Barrier near the New Bedford shore that has been addressed by a pilot underwater cap.

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Through 2012, EPA has addressed approximately 250,000 cy of the 425,000 cy of sediment slated for off-site disposal.²²⁶ In addition, in 2013 or 2014, EPA expects to construct the Lower Harbor CAD cell for the disposal of approximately 300,000 cy of sediment. With the accelerated pace of the cleanup expected with the \$366.25 million of proposed settlement funds, EPA may complete the dredging of the volumes slated for the off-site and CAD cell disposal within two to three years.²²⁷ Under the current OU1 Remedy, EPA would dispose of the sediment volumes not slated for off-site and CAD cell disposal by constructing CDFs along the shoreline. However, in part due to the passage of time since the Agency selected the CDFs in 1998, if the cleanup is indeed accelerated due to the availability of the settlement funds, EPA anticipates accelerating the initiation of a Focused Feasibility Study, within the 2-3 year period described above, in order to consider other protective, more cost-effective measures which may be appropriate, including alternatives for the disposal of contaminated sediment other than the selected CDFs. EPA expects to consider a range of possible practicable alternatives for sediment disposal in the Focused Feasibility Study, and EPA will seek public comment at that time, in accordance with Superfund law.²²⁸ BBC's and HARC's additional comments regarding the protectiveness of the selected OU1 Remedy are addressed in the response to "Comments on the Protectiveness of the Selected Remedy" (Section I(C) below).

To the extent BBC, HARC and other commenters are urging EPA to select a different cleanup approach, the proposed cash-out settlement will have no effect on the selected remedy

²²⁶ Stanley Decl. at ¶ 29; and see also Second Five-Year Review at 15.

²²⁷ Stanley Decl. at ¶ 29.

²²⁸ Stanley Decl. at ¶ 30.

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for the Site. One of the purposes of the Focused Feasibility Study would be to identify protective disposal alternatives that are less costly than the selected shoreline CDFs.²²⁹ In the 2002 OUI ESD2, EPA explained that “while the current cost-estimate...indicates that it would be cost-effective to dispose all site sediments at an offsite facility, thus eliminating construction of CDFs A, B and C as well as D, EPA stresses that this cost estimate will need to be reevaluated....”²³⁰ Consistent with Section 300.430(f)(1)(ii)(B)(2) of the NCP, 40 C.F.R. § 300.430(f)(1)(ii)(B)(2), as is required for a Feasibility Study, EPA is required to conduct a new nine-criteria analysis, including an evaluation of the cost of all alternatives evaluated in a Focused Feasibility Study as compared to the current selected remedy.

d. Comments Asserting that AVX Is the Only Viable Source of Funds and AVX Can Afford to Pay More

Comment: BBC raises a concern about a lack of an alternative source of adequate funding to support the remedial action at the Site. BBC asserts: “Other than AVX, no responsible company or government agency has sufficient funds to finance the expeditious completion of this project. In fact, EPA has conceded that its funding limitations would delay the project's completion for 40 years. Thus, funding from AVX, a successful enterprise having \$1 billion/year in revenues and now controlled by a much larger Japanese multinational, is the only viable source for the timely completion of the cleanup...Nor is EPA a viable source of funds for the project's expeditious completion. In 1995 Congress repealed the taxes once used to replenish

²²⁹ Stanley Decl. at ¶ 30.

²³⁰ OUI ESD2 at 2.

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the ‘Superfund’ trust fund to finance EPA’s remedial actions, so that today EPA’s only source of cleanup funds is annual Congressionally-appropriated general revenues.”²³¹

Response: The Governments disagree that AVX is the only source of funding to finance the OU1 cleanup and note that EPA has been using annual appropriations from the Superfund and funds contributed by the Commonwealth to perform the OU1 cleanup since 2004. The proposed settlement will provide over 90% of the estimated funds needed to allow EPA’s dredging, desanding, and dewatering operations to operate at full-capacity at a rate that will allow EPA to complete the OU1 cleanup within five to seven years.²³² If the settlement funds are insufficient to complete the cleanup, EPA Region 1 will seek additional Superfund funding from EPA Headquarters’ Office of Solid Waste and Emergency Response (“OSWER”), as well as the statutorily mandated share of such funding from the Commonwealth, for the remainder of the cleanup.²³³ EPA is committed to assuring that Superfund sites reach completion, even sites where cleanup has been substantially performed or funded by responsible parties, and subject to appropriations, EPA is committed to completing cleanup of the New Bedford Harbor Superfund Site.²³⁴ See the discussion of the CERCLA § 122(f)(4)(F) factor in the response to “Comments Asserting that the Governments Lack Authority to Release AVX from the Unknown Conditions Reopeners” (Section I(A)(2)(a) above). Finally, the Governments note that the proposed settlement is the result of several years of arms-length negotiations. The commenters’ assertion

²³¹ BBC Comments at 3 and 25.

²³² Stanley Decl. at ¶ 25.

²³³ Stanley Decl. at ¶ 27; and see also Woolford Decl. at ¶¶ 8 and 18.

²³⁴ Woolford Decl. at ¶ 18.

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that AVX could afford to pay more has no bearing on whether a higher cost recovery could be obtained through further litigation or whether the proposed settlement is reasonable.

B. Comments on Procedural Matters

1. Comments on Environmental Justice Concerns

*Comment: HARC and a commenter associated with HARC raise environmental justice concerns, seeking both greater access to information and a larger role in advocating and participating in decisions relating to the Site.*²³⁵

*HARC submitted four sets of comments related to this subject. HARC asserts that it is an environmental justice (“EJ”) organization with 25 years of experience related to the Site. HARC submitted a comment in which HARC seeks more notice of meetings and other information and generally questions EPA’s commitment to addressing environmental justice concerns²³⁶. HARC submitted an additional comment listing a number of concerns regarding CAD cells and EPA monitoring techniques, and reiterating HARC’s previous comments that it represents a large environmental justice community and the community has felt excluded from meaningful participation in EPA’s plans and negotiations.*²³⁷

Another commenter associated with HARC expresses EJ concerns about EPA’s activities at the Site, including the following statement: “Recent policies by the EPA with regard to new initiatives have acted in contradiction toward that end and have turned a deaf ear to local

²³⁵ Bates numbers 008-012, 290-296, and 315-337.

²³⁶ Bates numbers 014-019.

²³⁷ Bates numbers 290-296.

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*government bodies, grassroots community groups, [non-governmental organizations] and citizen's [sic] that have tried to speak for the people.*²³⁸

Response: Environmental Justice is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. Meaningful involvement means that: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the public's concerns will be considered in the decision making process; and (4) the decision makers seek out and facilitate the involvement of those potentially affected.²³⁹

The Governments agree with both commenters that the community located near New Bedford Harbor is a community with environmental justice concerns, and as such, EPA and the Commonwealth have attempted and continue to attempt to provide fair treatment for and allow meaningful involvement from that community. With respect to fair treatment, one of the primary purposes of the remedial action at the Site is to ensure that the community located near New Bedford Harbor is not disproportionately impacted by negative environmental consequences. As with any Superfund cleanup site, the remedial process takes time, and is governed by the relevant

²³⁸ Bates numbers 315-337.

²³⁹ See the EPA-maintained website on Environmental Justice—Basic Information, which is available at: <http://www.epa.gov/environmentaljustice/basics/ejbackground.html>.

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provisions of CERCLA, 42 U.S.C. § 9601 *et seq.*, and the National Contingency Plan, 40 C.F.R. Part 300. In accordance with applicable law and regulations, the remedial work at the Site is governed by the OU1 ROD, as amended by four ESDs. After the cleanup is complete, however, the Harbor and surrounding areas are expected in the long term to become open for safe seafood consumption in regard to the reduction of PCBs in seafood tissue.²⁴⁰

HARC and the associated commenter both refer to environmental justice requirements. Presumably, both commenters are referring to Executive Order 12898, which focuses federal attention on the environmental and human health conditions of minority and low-income populations with the goal of achieving environmental protection for all communities. Two sections of that Executive Order are particularly relevant to the comments received from both commenters: Section 4-4 (Subsistence Consumption Of [sic] Fish and Wildlife) and Section 5-5 (Public Participation and Access to Information).²⁴¹

With respect to meaningful involvement and public participation, both commenters expressed a belief that the Governments have fallen short of allowing for the meaningful involvement of the community concerning the Site generally, and concerning the settlement with AVX specifically. The Governments disagree. With respect to the issuance of cleanup decisions and public notification of this proposed settlement, EPA complied with all CERCLA and other requirements for public comment and public involvement. EPA has also issued a press release, a

²⁴⁰ Note that although PCB contamination will be reduced, shellfish consumption may not be safe due to bacterial contamination from CSOs.

²⁴¹ Executive Order—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (February 11, 1994) (available at an EPA-maintained website at: www.epa.gov/compliance/ej/resources/policy/exec_order_12898.pdf).

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community update, and two documents addressing “frequently asked questions” in order to provide the public with information about the public notice and comment period for the proposed settlement and the process before the Court.²⁴² Moreover, for almost 20 years, EPA has made public outreach for New Bedford Harbor a high priority. Some of the activities that EPA has undertaken to enhance public outreach concerning the Harbor include:²⁴³

- Sponsoring a professionally mediated Community Forum process, which began in 1993 and culminated in the issuance of the 1998 OU1 ROD;²⁴⁴
- Holding several public meetings each year for Superfund sites in the greater New Bedford community, including the New Bedford Harbor Superfund Site, the Aerovox Facility removal site, and the Parker Street Waste Site (an EPA-lead CERCLA removal action site in New Bedford);
- Attending monthly meetings, open to the public, regarding the State Enhanced Remedy;
- Holding periodic neighborhood meetings at the Bullard Street Association and Brooklawn Association;
- Providing technical assistance funds and services to local groups to help educate the public about EPA’s cleanup activities, including to BBC for the New Bedford Harbor

²⁴² The press release is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://yosemite.epa.gov/opa/admpress.nsf/0/F2E569434F4428B685257A930063AC45>. The community update is available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/sites/production/files/documents/521884.pdf>. The two documents addressing “frequently asked questions” are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/sites/production/files/documents/507281.pdf> and <http://www2.epa.gov/sites/production/files/documents/507282.pdf>.

²⁴³ Stanley Decl. at ¶ 31.

²⁴⁴ Refer to Footnote 292 below for more information about the Community Forum process.

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Superfund Site and to the Citizens Leading Environmental Action Network

(“C.L.E.A.N.”) for the Parker Street Waste Site;

- Holding public Technical Workgroup meetings focused on the Lower Harbor CAD cell;
- Funding professional facilitators to lead public meetings;
- Holding office hours at EPA’s Sawyer Street facility during the 2011 and 2012 dredging seasons and during the Aerovox Facility removal action;
- Promoting the Fish Smart Campaign regarding local seafood consumption recommendations;
- Providing educational training, in collaboration with University of Massachusetts Dartmouth’s Center for University, School & Community Partnerships; the Lloyd Center for the Environment; and New Bedford School Department’s Sea Lab, about the Harbor for local teachers, including lesson plan ideas to bring back to the classroom, and for students;²⁴⁵
- Setting up an educational kiosk about the Site at the New Bedford Ocean Explorium, a center for ocean science public education, located in downtown New Bedford;
- Maintaining informational kiosks and warning signs about the Site along the Harbor;
- Sponsoring numerous small business open houses and outreach efforts;
- Providing two Brownfields grants to the City of New Bedford, Bristol Community College and New Directions to develop and implement a Brownfields Environmental Job

²⁴⁵ EPA’s resources for teachers are available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www2.epa.gov/new-bedford-harbor/environmental-education-resources-teachers-and-students>.

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Training Pilot Program (a 17-week Environmental Tech Aid Program that provided a comprehensive education in both technical expertise as well as professional and life skill development to residents living in communities impacted by brownfields);²⁴⁶

- Meeting with New Bedford Community Rowing and the New Bedford Harbor Development Commission to educate rowers about the Site and to assist in the planning of safe races at the Site, and providing staff at the Site during races to oversee and answer questions about the Site, as well as removing sheet piles in the Harbor for the sole purpose of facilitating rowing races;
- Maintaining a detailed website for the Site, including links that provide the public with access to hundreds of documents about the cleanup;
- Issuing fact sheets, press releases, and e-mail updates about the Site;
- Arranging for Lisa Jackson, then Administrator of EPA, to visit the New Bedford Harbor Superfund Site in 2009 and meet with local community groups; and
- Arranging for Lisa Garcia, EPA's Senior Advisor to the Administrator for Environmental Justice, and Curt Spalding, EPA's Region 1 Administrator, to visit New Bedford to attend public meetings for both the New Bedford Harbor Superfund Site and the Parker Street Waste Site.

With respect to the concern regarding subsistence fishermen at the Site, in 1979, the Massachusetts Department of Public Health ("MA DPH") promulgated regulations prohibiting seafood consumption in three closure areas in and around the Site, due to the identification of

²⁴⁶ See the EPA-maintained website on EPA's Brownfields grants in New Bedford, available at: <http://www.epa.gov/region1/brownfields/success/newbedford.html>.

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high concentrations of PCB levels in local seafood from the Site.²⁴⁷ These restrictions are still in effect. In 2010, based on seafood monitoring data results, EPA, MA DPH, the Massachusetts Department of Marine Fisheries, and MassDEP jointly provided augmented fish and shellfish consumption information to targeted populations such as pregnant woman, nursing mothers, women of child-bearing age, the medical community, sport fishermen, and recreational shell fishermen. Medical “grand rounds” presentations were given in 2004 to ensure that the medical community is aware of the risks from local seafood and is able to communicate these risks to its clients and patients. Also in 2004, EPA distributed medical pamphlets about the risks of consuming contaminated local seafood to hospital waiting rooms. EPA is working to include information guides augmenting the 1979 fishing bans in the saltwater fishing licenses and applications that are now required in Massachusetts. Similar guides have also been provided to the recreational shellfishing community, whose licenses are issued at the local level, as well as posted on EPA’s New Bedford Harbor Superfund Site website, community bulletin boards, and made available at public meetings.²⁴⁸

In sum, the Governments take their responsibilities to address environmental justice concerns seriously and have taken the necessary steps to ensure compliance with applicable policies and guidance with respect to the Site and the community living near the Harbor.²⁴⁹ Moving forward, the Governments will strive to continue to provide fair treatment and allow for

²⁴⁷ OUI ROD at 2; and UAO at ¶ 11.

²⁴⁸ Second-Five Year Review at 17.

²⁴⁹ See Second Five-Year Review at 17; and Stanley Decl. at ¶ 31.

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meaningful involvement of the community by providing information to the public, providing opportunities for the public to participate, and considering public comments regarding the Site.

2. Comments Asserting that the Public Should Have Been Given an Opportunity to Participate in Settlement Negotiations and in Mediation With AVX

Comment: HARC notes in a few comments a concern that it was not directly involved in settlement negotiations with AVX.²⁵⁰

Response: There is no requirement under CERCLA, or by EPA or the United States or the Commonwealth, in general, to conduct settlement negotiations in public. See 40 C.F.R. § 300.430(c)(4) of the NCP and 55 Fed. Reg. 8768 of the NCP preamble (contrasting technical discussions involving the public with “settlement negotiation discussions in which information on liability of a party and other enforcement sensitive issues are discussed”). “[T]he government is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes....So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses.” Cannons, 899 F.2d at 93 (1st Cir. 1990). See also United States v. Comunidades Unidas Contra La Contamination, 204 F.3d 275, 277 (1st Cir. 2000) (court rejected objections to a settlement based upon lack of participation by intervener in negotiations); United States v. Town of Moreau, New York, 979 F. Supp. 129, 135-36 (N.D. N.Y. 1997) (“it is doubtful that a public settlement conference would ever permit the type of give and take that would lead to an agreed resolution of the dispute.”). This is also true of cases with environmental justice concerns; while increased public participation is encouraged and sought

²⁵⁰ Bates number 290.

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out by federal agencies, there is no requirement within Executive Order 12898, “Federal Action to Address Environmental Justice in Minority Populations and Low-Income Populations,” or within EPA or Department of Justice policy or guidance that requires direct public participation in settlement negotiations. Furthermore, the negotiations in this case were complex, technical, sensitive, and took several years. Like virtually all negotiations, they were not held in the public arena. Had the negotiations taken place in public, the process would almost certainly have taken substantially longer, and reaching an agreement may well have been impossible.

3. Comments on the Availability of EPA’s Cost Estimates to the Public

Comment: One commenter²⁵¹ signed BBC’s petition, echoing language on BBC’s website which suggested that EPA is withholding a detailed cost analysis of the cleanup, which thereby makes it impossible for the public to understand if the proposed settlement is in the public interest.²⁵² Specifically, the comment is: “We need more accountability and detailed cost analysis of the cleanup. A settlement is only acceptable if it covers the total costs of cleaning up the harbor, and we need to see the hard numbers.”

Response: The Governments disagree with these characterizations of the availability of EPA’s cost estimates and decision documents. EPA has provided the public with extensive information about estimated future cleanup costs in the Administrative Records for the Site, which are available on EPA’s New Bedford Harbor website (www.epa.gov/nbh), at the New Bedford

²⁵¹ Bates number 118.

²⁵² BBC’s website (<http://www.savebuzzardsbay.org/NewBedfordHarbor>, last viewed on April 30, 2013) stated that \$366.25 million “seems like a lot of money, but is it *really* enough to fully clean up the harbor? It’s impossible to tell without the details of the cleanup plan, and the EPA refuses to share those details with the community.” (emphasis in original).

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Public Library, and at EPA Region 1's office. Indeed, the Administrative Record for the Fourth Explanation of Significant Differences for Operable Unit 1 of the Site ("OU1 ESD4"), issued on March 14, 2011, included a 136-page document that explained EPA's estimated future costs.²⁵³ This document, *Cost Estimates for 2010 Confined Aquatic Disposal (CAD) Cell Explanation of Significant Differences (ESD)*, explains EPA's current estimated future cleanup costs for the Site in great detail.

4. Comments Asserting that EPA's Characterization of the Complexity and Protractedness of Avoided Litigation With AVX Is Exaggerated

Comment: BBC asserts that EPA's concerns in avoiding complex and protracted litigation with AVX's well-funded attorneys are self-interestedly exaggerated.²⁵⁴

Response: The Governments disagree with this comment. As discussed above, there are significant litigation risks in this case. Litigation of this matter would be costly, resource-intensive and time consuming.

C. Comments on the Protectiveness of the Selected Remedy

1. Comments Asserting that the Cleanup Standards Should Be More Stringent

Comment: In its comments, BBC asserts that the site-specific PCB cleanup levels selected by EPA in the 1998 OUI ROD "for dredging most of the Site are much less protective than those used by EPA at other PCB sites. Except in areas of human exposure, those standards range from 10 to 50 ppm."²⁵⁵ BBC continues that, "EPA has indicated that it does not plan to change

²⁵³ See *Assumptions for ESD (OU1 ESD4) Cost Estimates*.

²⁵⁴ BBC Comments at 4.

²⁵⁵ Bates number 419.

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*its 1998 cleanup standards for the New Bedford Harbor even though for some areas of the Harbor they are up to 50 times less protective than the criteria in use at similar sites.*²⁵⁶ BBC asserts that the 1998 OUI ROD suggested that a target level of 0.02 ppm PCBs in fish tissue was mandated, and that EPA acknowledged that the cleanup levels selected in the OUI ROD would “fail to achieve this goal.”²⁵⁷

Response: The appropriateness of EPA’s selected remedy is not at issue here.²⁵⁸ Section 113(h) of CERCLA, 42 U.S.C. § 9613(h) (no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here). Nevertheless, for the purpose of providing an explanation of the Site’s cleanup remedy and cleanup levels, EPA is providing the following discussion to: (a) explain the selection of site-specific cleanup levels (different cleanup levels for different areas of the Site); (b) describe how the site-specific cleanup levels were developed to balance both protection of human health and protection of the Harbor ecosystem; (c) explain how the OUI Remedy is enhanced by additional navigational dredging being performed as part of a State Enhanced Remedy that was incorporated into the 1998 OUI ROD; (d) explain the site-specific nature of this Site’s and other Superfund sites’ cleanup levels; and (e) explain how EPA continues to evaluate the protectiveness of the OUI Remedy in accordance with Superfund law during Five-Year Reviews. As explained further below, the

²⁵⁶ Bates number 419.

²⁵⁷ Bates number 419. But see 1998 OUI ROD at 35.

²⁵⁸ BBC acknowledges that the public comment period is not the appropriate forum to challenge the OUI Remedy. See BBC Comments at 31 and 37.

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Governments note that the site-specific selection of Superfund cleanup levels takes many factors into account.

- Site-Specific Cleanup Levels (Different Cleanup Levels for Different Areas of the Harbor) Were Selected in the 1998 OU1 ROD

The Governments note that there are separate PCB cleanup levels for different areas within OU1.²⁵⁹ EPA determined that the site-specific cleanup levels adopted in the 1998 OU1 ROD are protective and balance the protection of public health with the protection of the environment.²⁶⁰ EPA selected the cleanup levels in the OU1 ROD based on a careful consideration of multiple factors including: how to best balance the protection of public health with the protection of sensitive ecosystems, such as the Site's valuable saltmarsh habitat; the large geographic area covered by the Site (the Upper Harbor is approximately 187 acres and the Lower Harbor is approximately 750 acres); the wide range of potential direct contact exposure rates at the Site, varying with shoreline land uses; and the fact that portions of OU1's Lower Harbor are within the Designated Port Area ("DPA"), as classified by the Massachusetts Office of Coastal Zone Management, with concentrated maritime industrial uses.²⁶¹

As discussed in the response to "Comments on Land Use Changes" (Section I(A)(3)(b)(iv) above), EPA selected different cleanup levels for different areas of the Harbor. The site-specific rationale for these varying cleanup levels is provided below. For subtidal areas,

²⁵⁹ For a visual depiction of the areas of the OU1 to be dredged, see EPA's public presentation on OU1 from 2010 (part of the Administrative Record for OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at: <http://www.epa.gov/region1/superfund/sites/newbedford/299745.pdf>) at 7.

²⁶⁰ OU1 ROD at 34-35; and Second Five-Year Review at 42.

²⁶¹ OU1 ROD at 16-17, 29-34, 42-44, A-5 to A-6, and A-119.

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the cleanup levels, to attain applicable water quality and seafood consumption standards, are the following:

- **10 parts per million (ppm) PCBs for subtidal and mudflat sediment in the Upper Harbor** (north of the Coggeshall Street bridge),²⁶² which has the highest concentrations of PCB contamination since the Aerovox Facility was located adjacent to the Upper Harbor shoreline.²⁶³ The 10 ppm PCBs cleanup level was applied to the Upper Harbor portion of the Site in order to balance protection of public health with ecological health (i.e., avoiding the adverse ecosystem impacts that would result from larger scale sediment and saltmarsh removal).
- **50 ppm PCBs for subtidal and mudflat sediment in the Lower Harbor** (between the Coggeshall Street bridge and the New Bedford Hurricane Barrier).²⁶⁴ In contrast to the Upper Harbor, the Lower Harbor portion of the Site is a Designated Port Area,²⁶⁵ with a working waterfront, and it is lined with industrial and commercial facilities along the New Bedford shoreline.²⁶⁶ Among other factors, EPA considered the current and future use of an area, such as an urban port, in selecting appropriate cleanup levels.²⁶⁷ In addition, most if not all of the remaining Lower Harbor will be dredged for navigational

²⁶² OU1 ROD at -i-, i, and 30.

²⁶³ OU1 ROD at 1-2.

²⁶⁴ OU1 ROD at -i-, i, and 30.

²⁶⁵ OU1 ROD at 36-37, A-20, and A-119.

²⁶⁶ OU1 ROD at 1, 44, and A-20.

²⁶⁷ See OU1 ROD at -ii-, 11, 15, 37, 38, and 43.

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purposes over time, as provided in the 1998 OU1 ROD's State-Enhanced Remedy (see discussion below, "OU1 Remedy is Enhanced by Additional Dredging Being Performed Under the State Enhanced Remedy").²⁶⁸ Therefore, the 50 ppm PCBs cleanup level for the Lower Harbor was determined to be appropriate given the Lower Harbor's current and future anticipated use and the enhancement of the cleanup due to the State-Enhanced Remedy.²⁶⁹

For the shoreline intertidal areas, the cleanup levels, to reduce risk from human contact with contaminated sediment, are the following:²⁷⁰

- **1 ppm PCBs for areas bordering residential areas;**
- **25 ppm PCBs for shoreline areas bordering recreational areas; and**
- **50 ppm PCBs for other shoreline areas with little or no public access, including saltmarshes.** The Upper Harbor contains large fragile saltmarsh habitats which include ecologically important breeding, nursery, and feeding areas for aquatic life. EPA selected a 50 ppm PCBs cleanup level for saltmarshes with limited expected access to minimize adverse impacts to these marshes while still protecting against dermal contact risks to the occasional beachcomber.²⁷¹

²⁶⁸ OU1 ROD at 33; and *New Bedford/Fairhaven Municipal Harbor Plan 2010*, May 26, 2010 (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/504398.pdf>), at 6-37.

²⁶⁹ See OU1 ROD generally and at 30 and 44.

²⁷⁰ OU1 ROD at 42-44.

²⁷¹ OU1 ROD at 16 and 44.

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- Site-Specific Cleanup Levels Were Developed to Balance Protection of Public Health and the Environment

In selecting the cleanup levels for the various areas in the Harbor in the 1998 OU1 ROD, as described above, EPA balanced protection of public health and the environment. Prior to issuing the 1998 OU1 ROD, EPA performed a human health risk assessment at the Site.²⁷² With respect to seafood consumption, EPA first considered the U.S. Food and Drug Administration's ("FDA") tolerance level of 2 ppm PCBs in seafood tissue:

FDA levels are based on nationwide seafood consumption patterns of the general public and are balanced by economic considerations. Public health agencies typically use FDA levels in regulating seafood consumption. At Superfund sites, EPA assesses risk and derives target levels in seafood which are protective of public health by utilizing a site-specific risk assessment process. This process relies on reasonable assumptions about exposure and up-to-date scientific information about toxicity.²⁷³

Accordingly, EPA developed a target site-specific risk-based level of 0.02 ppm for PCBs in fish tissue (i.e., to achieve an incremental cancer risk of one in one hundred thousand, or 10^{-5}). Based on this target site-specific risk-based level in fish tissue, EPA determined the target cleanup level for PCB-contaminated sediment at the Site. In so doing, EPA explained, "For seafood to meet both the FDA and site specific levels at the end of 10 years, EPA believes that a TCL [target cleanup level] for sediment dredging of 1 ppm would be necessary."²⁷⁴

However, EPA determined that "dredging to that level [1 ppm PCBs for subtidal sediment] would cause severe adverse environmental impacts to the Harbor" and "would cause

²⁷² OU1 ROD at 11.

²⁷³ OU1 ROD at 35.

²⁷⁴ OU1 ROD at 35-36.

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more harm than good.”²⁷⁵ Of particular concern are the wetland areas located primarily along the eastern shoreline of the Site. Remediation of these sensitive habitats would likely cause profound effects on the whole harbor ecosystem. Among the numerous functional services provided by wetland areas, the tremendous productivity is perhaps the most important; destruction of these areas would eliminate a significant contributor to the primary productivity that supports the harbor ecosystem. In addition, these areas play an essential role as refuge areas for juvenile fish, which spend many of the daylight hours hidden in the submergent vegetation, and then migrate into the open water at night to feed (juvenile fish suffer much greater predation risks when forced to remain in the open water during the day). Many of these same submergent plants also serve as substrate for egg deposition by ovipositing females of many species. Finally, the vegetation in estuarine wetlands (particularly cordgrass (*Spartina*)) acts to trap sediments and to buffer the harbor from storm-related effects.²⁷⁶

Moreover, in order to achieve a 1 ppm PCB target cleanup level for OU1, immediately upon completion of remedial activities, almost the entire Upper and Lower Harbors would have had to be either dredged or capped. If all the sediment above 1 ppm PCBs were dredged, the OU1 cleanup would require the dredging and disposal of approximately 2.1 million cubic yards of sediment,²⁷⁷ compared to the approximately 576,000 cubic yards identified in the OU1 ROD

²⁷⁵ OU1 ROD at 34-36.

²⁷⁶ Draft Final Feasibility Study of Remedial Alternatives for the Estuary and Lower Harbor/Bay, New Bedford Harbor, Massachusetts, Volume I (August 1990) (part of the Administrative Record for the OU1 ROD and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/63937.pdf>), at 4-25.

²⁷⁷ OU1 ROD at 16 and 34.

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to meet the its cleanup levels. EPA noted that a capping-based remedy of the magnitude required to achieve a 1 ppm PCB target cleanup level for OU1 would have created concerns about long-term reliability and protectiveness, and would have completely changed the hydrodynamics and habitat structure of the Harbor (*i.e.*, certain subtidal areas would become intertidal areas, and certain intertidal areas would become upland areas).²⁷⁸ In order to balance both protection of human health and the environment, EPA “determined that using a slightly higher TCL together with institutional controls on seafood consumption allows the remedy to remain protective of human health yet does not impose as severe adverse impacts to the Harbor ecosystem.”²⁷⁹

Accordingly, EPA selected the cleanup levels for subtidal sediment of 10 ppm PCBs in the Upper Harbor and 50 ppm PCBs in the Lower Harbor, as discussed above.²⁸⁰ EPA noted that “naturally occurring sedimentation within the upper and lower harbor, estimated to average 3 mm per year for the upper harbor..., should assist in lowering residual PCB levels further over time,”²⁸¹ which will approach if not achieve the 1 ppm ecologically protective level for marine

²⁷⁸ OU1 ROD at A-24.

²⁷⁹ OU1 ROD at 35-36.

²⁸⁰ In its comments on the OU1 ROD, the New Bedford Harbor Trustee Council (the “Council”; see Footnote 205 above regarding more information about the Council) commented that it supported the OU1 Remedy cleanup levels. The Council noted that, “post-remediation PCB levels will approach, but are still likely to exceed, FDA acceptance levels for edible tissues in fish and shellfish,” but recognized that, “increased costs, time and disruption make further reduction in TCLs infeasible.” Comments of the Council (part of the Administrative Record for OU1 ROD and available on the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/54638.pdf>) at 1. Responding to the Council’s comments in the 1998 OU1 ROD, EPA noted that the radical alterations of the Harbor required to achieve the target site-specific risk-based level of 0.02 ppm PCBs in fish tissue in the near future would do more harm than good. OU1 ROD at A-23 to A-24.

²⁸¹ OU1 ROD at 34.

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organisms in the Upper Harbor.²⁸² Based on modeling, after the cleanup is complete, the Harbor and surrounding areas are expected in the long term to become open for safe seafood consumption in regard to the reduction of PCBs in seafood tissue. (Note that although PCB contamination will be reduced, shellfish consumption may not be safe due to bacterial contamination from CSOs). It should also be noted that the national recommended water quality criterion (formerly known as ambient water quality criterion) for PCBs in salt water of 0.03 parts per billion (ppb) is expected based on modeling to be attained throughout the Harbor ten years after the cleanup is complete.²⁸³

- OU1 Remedy Is Enhanced by Additional Dredging Being Performed Under the State Enhanced Remedy

As discussed in Footnote 112 above, in the 1998 OU1 ROD, EPA integrated the State Enhanced Remedy of navigational dredging and on-site disposal into EPA's OU1 Remedy. The State Enhanced Remedy would remove sediment containing PCBs up to 50 ppm and heavy metals that EPA's OU1 cleanup would not be addressing in the Lower Harbor.²⁸⁴ Under the State Enhanced Remedy, navigational dredging will address an estimated 1.7 million cubic yards of sediment contaminated with heavy metals and lower levels of PCBs (below 50 ppm PCBs).²⁸⁵ Since 2005, navigational dredging under the State Enhanced Remedy of approximately 231,000 cubic yards of sediment contaminated with PCBs mostly below 50 ppm from the Lower Harbor

²⁸² OU1 ROD at A-10.

²⁸³ OU1 ROD at 34-35.

²⁸⁴ OU1 ROD at 33.

²⁸⁵ OU1 ROD at 33.

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has occurred.²⁸⁶ In the areas addressed by the SER's navigational dredging, the average PCB concentration levels in the pre-dredge sediment were found to have been approximately 12-14 ppm. In general, by removing PCB-contaminated sediment below 50 ppm PCBs, navigational dredging in the Lower Harbor to date has resulted in post-dredging PCB levels approaching 1 ppm or less at these locations.²⁸⁷ Moreover, EPA's long-term monitoring program, which assesses remedial effectiveness every five years, has found that in 2009 the average concentration levels of surficial sediment (2 cm) in the Lower Harbor to be approximately 5 ppm PCBs.²⁸⁸

- Cleanup Levels for This Site and Other Superfund Sites Are Site-Specific

In the Second Five-Year Review for the Site, EPA determined that, "Based on a review of the most current state and federal regulations, as well as other PCB-contaminated sediment sites nationally, the target sediment cleanup levels remain valid."²⁸⁹ As described above, cleanup levels are site-specific determinations that take into account the specific facts and circumstances

²⁸⁶ Second Five-Year Review at 16.

²⁸⁷ See Post-Dredge/Existing Conditions Report, New Bedford Harbor Dredge Project Phase II, January 2007, Apex Companies, LLC (part of the Administrative Record for the Final Determination for the South Terminal Project and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/517959.pdf>), at 14; and see also Post-Dredge/Existing Conditions Report, New Bedford Harbor Dredge Project Phase III, March 2010, Apex Companies, LLC (part of the Administrative Record for the OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/466823.pdf>), at 11 (note that because the New Bedford Rowing Facility is located in the Upper Harbor, pre-dredge samples from this location have not been included in determining the pre-dredge average in the Lower Harbor). Under the next phase of the State Enhanced Remedy (the South Terminal portion, whose final determination was issued by EPA in 2012), approximately 225,000 cy of sediment contaminated with PCBs less than 50 ppm will be dredged.

²⁸⁸ See Long Term Monitoring Report Powerpoint Presentation, April 29, 2010 Public Meeting (part of the Administrative Record for the OU1 ESD4 and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/299752.pdf>), at 10.

²⁸⁹ Second Five-Year Review at 33.

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of individual sites. Moreover, “EPA’s policy has been and continues to be that there is no presumptive remedy for any contaminated sediment site, regardless of the contaminant or level of risk.”²⁹⁰ Principle 7 of EPA’s 2002 *Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites* is to “Select Site-specific, Project-specific, and Sediment-specific Risk Management Approaches that will Achieve Risk-based Goals.”²⁹¹ This is the approach taken for the Site’s OU1 Remedy, and caution must be used when comparing it to other sites’ remedies because of the significant site- and sediment-specific issues that influence remedial actions and attainment of risk-based goals.

The OU1 Remedy, including the Site’s range of cleanup levels, was broadly endorsed by community stakeholders at the time it was proposed, including support from the Sea Change, Inc. public review panel, the New Bedford Harbor Community Forum, and EPA’s National Remedy Review Board.²⁹² In fact, BBC’s written comments on the proposed OU1 Remedy in 1996 supported the cleanup plan since it would remove “more than 90% of the PCBs from the

²⁹⁰ *Contaminated Sediment Remediation Guidance for Hazardous Waste Sites* at v.

²⁹¹ EPA’s 2002 *Principles for Managing Contaminated Sediment Risks at Hazardous Waste Sites* is available at the EPA-maintained website for key EPA Remedy Selection Guidance Documents and Directives for Superfund at: <http://www.epa.gov/superfund/policy/remedy/pdfs/92-85608-s.pdf>.

²⁹² See OU1 ROD at 5, 22, 33, 41, 44, A-13, and A-50. Sea Change, Inc., a local non-profit organization, held a public panel session in 1995, in which six experienced panelists from academia and the private sector discussed the Site and OU1 remedial alternatives. The Community Forum was a professionally mediated process, initiated in 1993, to consider cleanup plans for OU1 and OU2. The Community Forum was made up of a wide variety of site stakeholders, including citizen group leaders, local and state elected officials, business representatives, EPA, MassDEP, and other relevant state and federal agencies. EPA’s National Remedy Review Board, a cross-regional, management-level body, was formed in 1995 to help control remedy costs and promote consistent and cost-effective decisions by in general making “advisory recommendations” to the EPA Regions on proposed cleanup actions that *inter alia* are estimated to cost more than \$30 million.

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Site.”²⁹³ In its recent comments, however, BBC reverses its former support of the OU1 Remedy by citing a 1 ppm PCBs cleanup standard used at certain other Superfund sites across the nation. EPA’s approach at the Site is consistent with that taken by EPA at other similar sites, or reflects site-specific factors unique to New Bedford Harbor.²⁹⁴

From a practical standpoint, it is important to note that a) in the Upper Harbor, with a subtidal sediment cleanup level of 10 ppm, naturally occurring sedimentation will result in residual PCB levels that will approach 1 ppm over time²⁹⁵ and b) in the Lower Harbor, in general, navigational dredging is expected over the long term to leave residual PCB levels of 1 ppm or less over most if not all of the area, based on post-navigational dredging sampling performed to date.²⁹⁶ See also Figure 6.2 from the *New Bedford/Fairhaven Municipal Harbor Plan 2010*, which shows the long term dredging areas for local, state and federal navigational dredging (note that EPA’s OU1 Remedy dredging in the Lower Harbor is not shown on this Figure 6.2).²⁹⁷

²⁹³ Comments of The Coalition for Buzzards Bay (later renamed BBC) in support of OU1 ROD remedy (included as part of the Administrative Record for the OU1 ROD and available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www.epa.gov/region1/superfund/sites/newbedford/54624.pdf>); and see also OU1 ROD at A-22.

²⁹⁴ See Second Five-Year Review at 33.

²⁹⁵ See OU1 ROD at 34 and A-10.

²⁹⁶ See Post-Dredge/Existing Conditions Report, New Bedford Harbor Dredge Project Phase II, at 14; and Post-Dredge/Existing Conditions Report, New Bedford Harbor Dredge Project Phase III, at 11.

²⁹⁷ *New Bedford/Fairhaven Municipal Harbor Plan 2010* at 6-37.

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- Five-Year Reviews Demonstrate that the Cleanup Levels for the Site Remain Protective

As discussed above, under the Superfund law, EPA is required to conduct reviews of Superfund sites where hazardous substances remain at the site every five years to determine if the remedy remains protective of human health and the environment.²⁹⁸ EPA has conducted two five-year reviews of the New Bedford Harbor Site so far, in 2005 and 2010, in accordance with EPA guidance, “Comprehensive Five-Year Review Guidance,” OSWER No. 9355.7-03B-P (2001), which is intended to promote consistent implementation of the five-year review process throughout the ten EPA Regions.²⁹⁹ In the most recent Five-Year Review in 2010, after a thorough evaluation, EPA determined that the remedy for OU1 is expected to be protective of human health and the environment upon completion.³⁰⁰ EPA determined that the exposure assumptions, toxicity data, cleanup levels, and remedial action objectives used at the time of remedy selection are still valid.³⁰¹ “Based on a review of the most current state and federal regulations, as well as other PCB-contaminated sediment sites nationally, the target sediment cleanup levels remain valid.”³⁰² The overall long term goals of the remedy also remain appropriate (e.g., eventual lifting of the state fishing bans in regard to the reduction of PCB

²⁹⁸ See CERCLA § 121(c), 42 U.S.C. 9621(c); Section 300.400(f)(4)(ii) of NCP, 40 C.F.R. § 300.400(f)(4)(ii); and “Comprehensive Five-Year Review Guidance,” OSWER Directive 9355.7-03B-P (June 2001), which is available at the EPA-maintained website at: <http://www.epa.gov/superfund/accomp/5year/guidance.pdf>.

²⁹⁹ Comprehensive Five-Year Review Guidance at i.

³⁰⁰ Second Five-Year Review at 42; and see also OU1 ESD4 at 16.

³⁰¹ Second Five-Year Review at 33.

³⁰² Second Five-Year Review at 33.

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contamination³⁰³ (although PCB contamination will be reduced, seafood consumption may not be safe for other reasons, such as due to wastes from CSOs),³⁰⁴ reduction of human health risks associated with dermal contact with and incidental ingestion of shoreline sediment, and compliance with the PCB national recommended water quality criterion).

2. Comments Asserting that a Different Disposal Method Should Be Used for the Site Cleanup

***Comment:** In their comments, BBC, HARC, and several commenters who signed BBC's petition suggest that they prefer a different remedy than the selected OUI Remedy.³⁰⁵ These commenters specifically find fault in the use of on-site disposal of contaminated sediment, such as the use of a CAD cell in the Lower Harbor. Rather, these commenters express the preference for off-site disposal of all contaminated sediment from the Site.*

Response: As discussed above, pursuant to Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), no federal court has jurisdiction to review challenges to selected remedial actions, except under limited exceptions not at issue here. Nonetheless, the EPA is providing the following discussion for informational purposes.

As discussed in the response to “Comments Asserting that the Cleanup Standards Should Be More Stringent” (Section I(C)(1) above), after considerable assessments and investigations, as well as public participation and peer review, in 1998, EPA issued the OUI ROD for the Site, which selected four on-site CDFs along the New Bedford shoreline for the disposal of dredged

³⁰³ Second Five-Year Review at 33.

³⁰⁴ See *Imprint of the Past: Ecological History of New Bedford Harbor* at 15.

³⁰⁵ See BBC comments at 29-35 and Bates number 316.

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contaminated sediment.³⁰⁶ Off-site disposal first became a remedial component of the remedy for OU1 as part of OU1 ESD2, which was issued in 2002 pursuant to Section 117(c) of CERCLA, 42 U.S.C. § 9617(c), and 40 C.F.R. § 300.435(c)(2)(i).³⁰⁷ EPA issued OU1 ESD2 to select the off-site disposal of contaminated sediment formerly slated for on-site disposal in one of the CDFs because sampling data indicated that the sediment underlying the proposed location for the CDF was too soft and fine grained to support the weight of construction of CDF D.³⁰⁸ CDFs A, B, and C remained part of the OU1 Remedy.

The reliability and protectiveness of CAD cells as a remedial technology is discussed above in the response to “Comments Asserting that the Governments Lack Authority to Release AVX from the Unknown Conditions Reopeners” with respect to the CERCLA § 122(f)(4)(E) factor (extent to which the technology used in the response action is demonstrated to be effective) (Section I(A)(2)(a) above) and to “Comments Asserting that the Proposed Settlement’s \$366.25 Million Cost Recovery Is Insufficient for the Commenters’ Preferred Remedy, Which Is Assumed to Be More Expensive than EPA’s Selected Remedy” (Section I(A)(3)(c) above). In March 2011, after receiving and responding to extensive public comment, EPA issued OU1 ESD4, pursuant to Section 117(c) of CERCLA, 42 U.S.C. § 9617(c), and 40 C.F.R. § 300.435(c)(2)(i), which selected the disposal of 300,000 cubic yards of contaminated sediment into an on-site CAD cell to be built in the Lower Harbor portion of the Site.³⁰⁹ EPA notes that a

³⁰⁶ OU1 ROD at 29.

³⁰⁷ See OU1 ESD2.

³⁰⁸ OU1 ESD2 at 6.

³⁰⁹ See OU1 ESD4.

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majority of the public comments supported the construction of a Lower Harbor CAD cell.³¹⁰ EPA selected the construction of an on-site CAD cell in an effort to adopt a protective remedy that would also reduce the time and cost necessary to complete the OU1 cleanup.³¹¹ EPA also provided BBC with funding via a Technical Assistance Grant (“TAG”) to review technical information about the Lower Harbor CAD cell project.³¹² “As part of the EPA decision to design, construct, and fill a CAD cell, a technical workgroup (TWG) open to individuals and organizations interested in the project was formed to review and discuss design and construction documents.”³¹³ During the Technical Working Group meeting process, BBC and other members of the public have had extensive opportunities to discuss the technical design for the Lower Harbor CAD cell with EPA.³¹⁴

³¹⁰ OU1 ESD4 Attachment A—Response to Comments at 1.

³¹¹ OU1 ESD4 at 2.

³¹² New Bedford Harbor Superfund Site—Site Update (February 2012) (part of the Administrative Record for the UAO and available at the EPA-maintained website for the New Bedford Harbor Superfund Site available at <http://www.epa.gov/region1/superfund/sites/newbedford/507202.pdf>) at 2 (“In addition to ongoing community outreach, EPA has funded a ‘Technical Assistance Grant’ or ‘TAG’ to the Buzzard’s Bay Coalition. Dr. Frank Bohlen of the Department of Marine Sciences at the University of Connecticut has been hired with TAG funds to review technical information about the project.”).

³¹³ New Bedford Harbor Superfund Site—Site Update (February 2012) at 2.

³¹⁴ See, e.g., Correspondence between EPA and BBC regarding the Lower Harbor CAD Cell Technical Working Group, including EPA Response to Buzzard’s Bay Coalition Comments on the Invitation for Bid: New Bedford Harbor Development Commission, New Bedford Harbor Lower Harbor CAD Cell (March 25, 2013), (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/507290.pdf>); EPA Responses to Questions Raised by the Buzzard’s Bay Coalition from 4/25/2012 Meeting of the Technical Working Group Regarding Air Issues (May 22, 2012) (available at the EPA-maintained website for the New Bedford Harbor Superfund Site at <http://www2.epa.gov/sites/production/files/documents/507271.pdf>).

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D. Comments on the Community's Use and Enjoyment of and the Aesthetic Value of the Harbor

Comment: Many commenters who signed BBC's petition also provide brief additional comments reflecting on the public's loss of use and enjoyment of the marine and other natural resources in and around New Bedford Harbor, including the loss of aesthetic value of the Harbor.³¹⁵ For instance, one commenter writes, "I have spent my whole life living very closely to the Acushnet river, seeing the mass death of wildlife and the effect it has had on the surrounding areas and beaches. The fact that this has been going on for so long with PCBs being so dangerous and toxic, is quite disturbing. Something should have been done a very long time ago."³¹⁶ Others write about enjoying "swimming, sailing, fishing, crabbing, and loving the waters of Buzzards Bay."³¹⁷ "It has a beautiful harbor, but unfortunately that was polluted with PCBs years ago."³¹⁸

Response: The Governments agree with these comments and note that approval of the proposed Supplemental Decree will provide over 90% of the estimated funds needed to complete the cleanup of PCBs in the Upper and Lower Harbor in five to seven years, in contrast to an

³¹⁵ Bates numbers 054, 055, 056, 057, 058, 059, 060, 062, 063, 064, 065, 066, 067, 068, 069, 070, 071, 072, 073, 074, 075, 076, 077, 078, 079, 080, 081, 082, 083, 084, 085, 086, 087, 088, 089, 090, 091, 092, 093, 094, 095, 096, 097, 098, 099, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 177, 179, 181, 183, 184, 186, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 204, 205, 207, 209, 210, 211, 212, 213, 215, 216, 217, 219, 220, 221, 223, 225, 227, 228, 230, 231, 232, 236, 237, 238, 239, 240, 242, 243, 244, 245, 246, 247, 249, 250, 251, 252, 255, 256, 258, 259, 261, 262, 263, 264, 266, 267, 268, 269, 271, 273, 274, 275, 277, 310, 599-638, 641-680, 682-738, and 740-765.

³¹⁶ Bates number 166; and see also Bates numbers 020, 156, and 239.

³¹⁷ Bates numbers 108, 118, 164, and 191.

³¹⁸ Bates number 218.

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estimated 40 years under the “typical” annual funding from Superfund.³¹⁹ EPA has worked with the City of New Bedford to provide for the safe recreational use of the Site, including rowing activities in the Upper Harbor portion of the Site and the proposed construction of a river walk pathway around much of New Bedford Harbor.³²⁰ For more information about EPA’s work to facilitate rowing at the Site, see the response to “Comments on Environmental Justice Concerns” (Section I(B)(1) above). Regarding swimming, in the OU1 ROD, EPA explained that, “Exposure to PCBs and metals while swimming was not found to result in significant human health risk.”³²¹ In fact, hundreds of people swim safely in the Outer Harbor every year and have been participating in swimming events across the Outer Harbor for the last 20 years without being negatively impacted by contamination at the Site or EPA’s remediation activities.³²²

E. Miscellaneous Comments

Comment: Several commenters state more general concerns that are not easily categorized with other comments, although they bear on the public interests relating to the proposed settlement. Some commenters remark that “[p]ollution is bad”³²³ or exclaim “[s]top polluting my blasted

³¹⁹ Stanley Decl. at ¶¶ 24-25.

³²⁰ Stanley Decl. at ¶ 31.

³²¹ OU1 ROD at 11. But note that any adverse health effects from exposure to discharges from CSOs were beyond the scope of EPA’s risk assessment.

³²² See BBC’s website at: <http://www.savebuzzardsbay.org/GetConnected/LatestNews#LN20130319> (accessed on April 26, 2013) (“The Buzzards Bay Swim is a 1.2-mile open water course across outer New Bedford Harbor, starting at Davy’s Locker in New Bedford’s South End and ending at Fort Phoenix State Reservation in Fairhaven. The Swim draws participants of all ages and abilities, including families, swim teams, serious competitors, and individuals seeking a new fitness challenge. Three hundred swimmers are expected to participate in this year’s Buzzards Bay Swim. Now in its 20th year, the Buzzards Bay Swim has become a signature outdoor event for the SouthCoast. Swimmers from as far away as Colorado, Florida, Los Angeles and Washington, D.C. have participated in recent Swims...The Buzzards Bay Swim is the Bay Coalition’s longest-running fundraising event.”).

³²³ Bates number 107.

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food!”³²⁴ Others urge that we address or take care of the Harbor contamination³²⁵ by “do[ing] the right thing” and urging, “[l]et’s do it right!”³²⁶ Others comment about a sense of interconnectedness among humans and the marine environment, also noting “[w]e all live from the environment.”³²⁷ Another theme that is consistently raised by commenters revealed they are motivated to secure a good result for the harbor because of historical or reputational values. These commenters note “[t]his affects...how this area is seen by the rest of the world,” contamination in the harbor establishes a regional historical legacy, the problem of contamination is an insult to the Harbor’s legacy,³²⁸ or because the harbor and shoreline establish or are central to the regional history.³²⁹

Other commenters note that “[t]his project needs to be done right...[f]or the health and safety of New Bedford Harbor and everyone, human and wildlife, that surround it,”³³⁰ “EPA needs to do its job and restore these water ways to health,”³³¹ “a clean aquatic ecosystem is vital to our future,”³³² “we need to ensure that this site is cleaned up responsibly and completely,”³³³

³²⁴ Bates numbers 130 and 191.

³²⁵ Bates numbers 272 and 277.

³²⁶ Bates numbers 200, 227, 267, 289, and 309.

³²⁷ Bates numbers 209, 227, and 237.

³²⁸ Bates numbers 191, 268, 278, and 301-303.

³²⁹ Bates number 282.

³³⁰ Bates number 055.

³³¹ Bates number 087.

³³² Bates number 103.

³³³ Bates number 111.

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*“New Bedford Harbor is one of the most active fishing ports on the East Coast. Its fish and fishermen and women deserve the cleanest harbor possible,”*³³⁴ *“There is a film of ‘ick’ floating on the surface. Families swim at Fort Phoenix; which is dangerously close!”*³³⁵ *“I suspect that the water that I played in and watched become extremely polluted” is related to various types of cancer.*³³⁶ *“The fact that this has been going on for so long with PCBs being so dangerous and toxic, is quite disturbing.”*³³⁷ *“This one saddens me. If this is the company I am thinking of it used to be known as Aerovox. I worked at the agency that did the insurance for this company. I got a bonus as a result of us obtaining this account. Very sad.”*³³⁸

Response: The Governments agree with the commenters that it is important to perform the cleanup of the New Bedford Harbor in a way that protects human health and the environment. The proposed settlement will provide an excellent result for the Harbor because settlement funds will provide over 90% of the estimated funds necessary to complete the OU1 cleanup of PCBs in five to seven years.³³⁹ The Governments acknowledge the depth of concern expressed by the commenters. The Governments note, however, that the Superfund cleanup will only address PCB contamination in the Harbor.³⁴⁰

³³⁴ Bates number 138.

³³⁵ Bates number 153.

³³⁶ Bates number 239.

³³⁷ Bates number 166.

³³⁸ Bates number 230.

³³⁹ Stanley Decl. at ¶ 25.

³⁴⁰ See OU1 ROD at i, 8, and 15-16.

II. COMMENTS IN SUPPORT OF THE PROPOSED SUPPLEMENTAL CONSENT DECREE

Six commenters—(1) Jonathan F. Mitchell, Mayor, City of New Bedford, (2) the New Bedford Harbor Development Commission, (3) five area businesses (Precix, Joseph Abboud, Darn It, MarLess Seafood, and Acushnet Company) in a joint letter, (4) Maritime Terminal Inc. (a local business), (5) Thomas A. Kennedy (a local resident and a former New Bedford City Councilor), and (6) Edward C. Anthes-Washburn (a local resident)—submitted comments during the public comment period in support of the proposed Supplemental Decree. In this section below are summaries of the comments in support of the settlement and the Governments’ responses.

A. Comments Asserting that the Proposed Settlement, Which Would Provide Funds for an Accelerated Cleanup, Is Preferred Over Risks and Costs of Protracted Litigation

Comment: The Mayor of New Bedford, writing in support of the proposed settlement, explains: “In short, my assessment is that it is time to get to work cleaning up our harbor. This judgment is also informed by personal experience as an Assistant United States Attorney. Having served as lead prosecutor on some of the nation’s major environmental contamination cases in recent years, I well appreciate the risks of protracted litigation in cases like the AVX case and its implications for resources expended and a diminished likelihood of future recovery. The possibility that a settlement of this size and scope might not present itself again argues strongly for [its] adoption.”³⁴¹

³⁴¹ Bates numbers 312-314.

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Response: As discussed above in the Governments' response to "Comments Asserting that the Cost Recovery Settlement Is Not Supported by the Governments' Exaggeration of Litigation Risks" (Section I(A)(1) above), although the enforcement case against AVX is compelling, there are nonetheless litigation risks in either enforcing EPA's April 18, 2012 Unilateral Administrative Order or in proceeding to trial to reopen the 1992 Consent Decree. The Governments agree with the Mayor and note that the 1992 Consent Decree was entered before trial, resolving nine years of litigation. The size and scope of the proposed settlement is sufficient and is in the public interest. For these reasons, the Governments agree with the Mayor that the value of the certainty of \$366.25 million in settlement funds now outweighs the prospect of a greater recovery in the future, especially considering the potential risk of lengthy litigation that might result in significantly lower recovery.

B. Comments Asserting that an Accelerated Cleanup as a Result of the Settlement Funds Would Lessen Risks to Human Health and the Environment

Comment: The New Bedford Harbor Development Commission expresses support for the proposed Supplemental Decree, noting that "the accelerated clean up is clearly in the interest of the port - particularly removing potential exposures to humans and halting the migration of pcbs downstream into the outer harbor and Buzzards Bay."³⁴²

Response: The New Bedford Harbor Development Commission, established by the Commonwealth through legislation enacted in 1957, states on its website that its primary charge is to support the Port of New Bedford through the implementation of best management practices

³⁴² Bates numbers 284-285; and see also Bates numbers 300, 301-303, and 312-314.

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over port resources and the development of economic growth strategies.³⁴³ As stated above, the more rapid reduction of human health and environmental risks due to the availability of the proposed settlement funds to accelerate the cleanup of PCB-contaminated sediment in the Harbor provides support to the Governments' view that the proposed settlement is fair, reasonable, and consistent with CERCLA.³⁴⁴

C. Comments Asserting that an Accelerated Cleanup as a Result of the Settlement Funds Would Improve the Community's Economic Environment and Quality of Life

Comment: In a joint submission, several local employers (Precix, Joseph Abboud, Darn It, MarLess Seafood, and Acushnet Company) state that it "is crucial that we now move forward and define an integrated remedy to the PCB problem, and compress the time frame for reaching the chosen result." In describing the local maritime industry, these commenters observe that the highly competitive industry "demands immediate cohesive solutions" to keep New Bedford at the forefront of the maritime industry. As further noted, an efficient and environmentally sound clean up of the Harbor would have significant impacts on local redevelopment efforts, including associated construction jobs and supporting use of the waterfront by local citizens.³⁴⁵ Maritime Terminal Inc., a local business, expresses support for the proposed Supplemental Decree, noting that: "Besides being a hazard to the environment and human health, the presence of contamination in our community and in our Harbor has cast a shadow over all activities related

³⁴³ The New Bedford Harbor Development Commission's website at <http://www.portofnewbedford.org/hdc/about-the-hdc/> (accessed on May 1, 2013).

³⁴⁴ Stanley Decl. at ¶ 26.

³⁴⁵ Bates numbers 282-283.

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to the Harbor, including the business sector I work in, as well as all local businesses with ties of any kind to the Harbor (which represents a large swath of the citizenry of the region).

Accelerating the pace of the harbor cleanup using these settlement funds will have a positive benefit on all aspects of life in this region....”³⁴⁶

Response: A remediated New Bedford Harbor will undoubtedly have a positive impact on the economic vitality of the community. EPA recognized that contamination at the Site poses a threat to public welfare, noting that:

Hazardous substances, including PCBs, at the Site have affected the economic vitality of New Bedford and surrounding communities, including fishing and harbor development. The economic impact has been severe, due to long-term fishing closures, lost beach use, diminished property values, and reduced opportunities for coastal development.³⁴⁷

The acceleration of the PCB cleanup of the Harbor as a result of the \$366.25 million in settlement funds will have a positive impact on the use of the Harbor by the community and local businesses as well as promote shoreline development.³⁴⁸

D. Comments Requesting EPA to Retain Flexibility so that Settlement Funds Can Be Used to Best Service the Citizens of New Bedford and Fairhaven Who Have Suffered Severe Economic Harm and Lost Opportunities or to Use Settlement Funds for Shellfish Restoration

Comment: *The Mayor of New Bedford, writing in support of the proposed settlement, requests that the settlement should contain no elements that might constrain the ability of EPA in*

³⁴⁶ Bates numbers 301-303; and see also Bates numbers 312-314.

³⁴⁷ UAO at ¶ 54.

³⁴⁸ Stanley Decl. at ¶ 26.

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developing a creative, thoughtful cleanup and restoration plan.³⁴⁹ Likewise, the New Bedford Harbor Development Commission, writing in support of the proposed settlement, requests that “[t]he governments...retain flexibility so that settlement funds can be used to best serve the citizens of New Bedford and Fairhaven who have suffered severe economic harm and lost opportunities due to their proximity to the contaminated areas.”³⁵⁰

Thomas A. Kennedy, a local resident and a former New Bedford City Councilor, writing in support of the proposed settlement, raises a concern relating to the quohogs (shellfish) that have become nonharvestable or have been otherwise destroyed by dredging activities to date, requesting that the Court consider the injury to these shellfish while considering the proposed settlement. Mr. Kennedy specifically asks the Court to “set aside as per the original consent decree, a certain amount of funds to be placed in an escrow account specifically for shellfish restoration in clean waters in the city...to make whole that which was destroyed by the PCB contamination.”³⁵¹

Response: In response to comments requesting that the Governments set aside certain funds or spend funds in certain ways, the Governments note that EPA is only authorized to retain and use settlement funds to address the CERCLA response actions addressed in the settlement agreement, pursuant to CERCLA § 122(b)(3), 42 U.S.C. § 9622(b)(3). The statutory provision provides that:

³⁴⁹ Bates numbers 312-314.

³⁵⁰ Bates numbers 284-285; and see also Bates numbers 301-303.

³⁵¹ Bates numbers 001-007 and 038-051.

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If, as part of any agreement, the President will be carrying out any action and the parties will be paying amounts to the President, the President may, notwithstanding any other provision of law, retain and use such amounts for purposes of carrying out the agreement.

EPA retains these settlement funds in site-specific accounts, called “special accounts,” which are subaccounts within the EPA Hazardous Substance Superfund (Trust Fund). Pursuant to Paragraph 10 of the proposed Supplemental Decree, the “payments received by EPA, on behalf of Plaintiffs,...shall be deposited by EPA in the New Bedford Harbor Reopener Special Account to be retained and used to conduct or finance future response actions at or in connection with the Site.” Therefore, the “cash-out” settlement funds from the proposed settlement would be paid to the United States and the Commonwealth jointly, and retained by EPA for use at the New Bedford Harbor Superfund Site to perform CERCLA response actions, including the OU1 Remedy, as selected in the 1998 OU1 ROD, as modified by four ESDs and any subsequent remedy decisions selected in accordance with CERCLA and the NCP.³⁵²

In enabling EPA to address the contamination in significantly less time than would be possible with the yearly \$15 million funding EPA has been receiving from the Superfund, the proposed settlement would have a positive impact on future development and positive use of the Site, as a result of EPA’s performance of the cleanup, as the commenters suggest.³⁵³ Since the 1998 OU1 ROD, EPA’s selected remedy includes coordination and cooperation, as appropriate,

³⁵² SCD at ¶ 10.

³⁵³ Stanley Decl. at ¶¶ 24-26.

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with the City of New Bedford, Town of Acushnet, Town of Fairhaven, and private developers in their efforts to promote economic and recreational growth in and abutting the Harbor.³⁵⁴

With respect to the comment specifically concerning shellfish restoration, in the 1998 OUI ROD, EPA recognized that the cleanup would have an impact on shellfish and is committed to coordinate with U.S. Fish and Wildlife Service, NOAA, and the Commonwealth's Division of Marine Fisheries to accommodate dredging schedule impacts on shellfish habitat.³⁵⁵

E. Comments Requesting EPA to Continue to Fund the Cleanup with Appropriations While Settlement Funds Are Being Used

Comment: The Mayor of the City of New Bedford, writing in support of the proposed settlement, requests the continuation of federal Superfund funding for the New Bedford Harbor Site even while the settlements funds are being used: “[B]y its nature[,] a cleanup of this magnitude and complexity will confound to a certain degree the ability of today’s project managers to predict precisely how much and when funding is needed to keep the effort on track. By any measure, the \$366 million being contemplated represents a monumental leap forward from the modest \$15 million cleanup now implemented annually with federal funds....maintain annual federal

³⁵⁴ See OUI ROD at 32: “EPA will continue to work with the local communities to develop appropriate plans for beneficial reuse of each CDF. As one example, the City of New Bedford has expressed an interest in the reuse of CDF D as a commercial marine facility. As a result, the conceptual design of this CDF includes a sheet pile wall (rather than an earthen dike) on the seaward face of the CDF to promote docking and facilitate boat hauling. Similar design accommodations can be made to the other CDFs provided that the ultimate land use is developed in advance in conjunction with the surrounding communities and abutters and provided that the design is cost-effective, does not interfere with the integrity of the remedy or delay the remedy.”

In addition, as discussed in Footnote 112 above, EPA integrated the State Enhanced Remedy for navigational dredging and disposal into the OUI Remedy as documented in the 1998 OUI ROD, and, on November 19, 2012, issued the final determination for the South Terminal Project modification of the SER. Navigation dredging and disposal under the SER has been performed in concert with plans for developing the public and economic uses of the Harbor. See EPA's Final Determination for the South Terminal Project at 18-19; and Stanley Decl. at ¶ 22.

³⁵⁵ OUI ROD at 36-37.

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*appropriations and spending at the current level (or greater as necessary) simultaneous with the spending of settlement monies.*³⁵⁶

Response: The Governments note that EPA has provided \$15 million from the Superfund for 2013 to fund the cleanup of the Site, even as the Governments await a determination by the Court on the Government's motion to approve the proposed settlement. In the event that the settlement is entered and the settlement funds are paid, consistent with EPA practice, however, there will be no additional funding provided by the Superfund unless the settlement funds are eventually depleted. At that time, EPA Region 1 will seek additional Superfund funding from EPA Headquarters' Office of Solid Waste and Emergency Response as well as the statutorily mandated share of such funding from the Commonwealth for the remainder of the cleanup.³⁵⁷

³⁵⁶ Bates numbers 312-314.

³⁵⁷ Stanley Decl. at ¶ 27; and see also Woolford Decl. at ¶¶ 6, 8 and 18.