

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA,  
INDIANAPOLIS DIVISION

<u>UNITED STATES OF AMERICA, <i>et al.</i>,</u>	)	
Plaintiffs,	)	
	)	
v.	)	
	)	<b>CAUSE NO. 1:81-cv-448-RLY-KPF</b>
<b>CBS CORPORATION,</b>	)	<b>Consolidated</b>
Defendant.	)	
<u>THE CITY OF BLOOMINGTON,</u>	)	
<b>INDIANA, <i>et al.</i>,</b>	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
<b>CBS CORPORATION,</b>	)	[Cause No. 1:83-cv-009-RLY-KPF]
Defendant.	)	
<u>SARAH ELIZABETH FREY, <i>et al.</i>,</u>	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
<b>UNITED STATES ENVIRONMENTAL</b>	)	[Cause No. 1:00-cv-660-RLY-KPF]
<b>PROTECTION AGENCY and</b>	)	
<b>CBS CORPORATION,</b>	)	
Defendants.	)	

UNITES STATES' MEMORANDUM IN SUPPORT OF MOTION TO ENTER  
THE AGREED AMENDMENT TO THE CONSENT DECREE  
PROVIDING FOR REMEDIAL ACTIONS AT  
NEAL'S LANDFILL, LEMON LANE LANDFILL AND BENNETT'S DUMP

This memorandum applies to Cause No. 1:81-cv-448-RLY-KPF

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## EXHIBITS

### EXHIBIT 1: PUBLIC COMMENTS

- 1-A. Michael Baker, COPA
- 1-B. Kelly Boatman, City of Bloomington Environmental Commission
- 1-C. Amy Eklund
- 1-D. Mick Harrison, on behalf of Frey, Enright, and Protect Our Woods
  - D.a – Letter of March 26, 2008
  - D.b – Letter of March 27, 2008
- 1-E. League of Women Voters
- 1-F. Tim Maloney, on behalf of Hoosier Environmental Council, Indiana Wildlife Federation, and Hoosier Chapter Sierra Club
- 1-G. Joan Middendorf
- 1-H. Roland Smith
- 1-I. Dennis Williamson, Monroe County Health Department
- 1-J. John Wirthwein, Izaak Walton League of America, Evansville Chapter
- 1-K. Jennifer Boyle, Indiana Association of Soil and Water Conservation Districts
- 1-L. David Hudak

### EXHIBIT 2: UNITED STATES RESPONSE TO PUBLIC COMMENTS

- Attachment A, Declaration of Thomas Alcamo
- Attachment B, Public Notice of Lodging of Proposed Amendment
- Attachment C, Public Notice of Extension of Comment Period
- Attachment D, Declaration of Joseph W.C. Warren
- Attachment E, Declaration of John Bassett
- Attachment F, Declaration of Harry V. Ellis III
- Attachment G, Summaries of Sampling Data
  - G.1 – Lemon Lane Landfill
  - G.2 – Neal’s Landfill
  - G.3 – Bennett’s Dump
- Attachment H, Declaration of Dr. James Chapman
- Attachment I, 1989 Air Monitoring Study for Bloomington
- Attachment J, 1994 Air Monitoring Study for Bloomington

## INTRODUCTION

The United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), submits this memorandum in support of its motion to enter the Amendment to the Consent Decree lodged with the Court on February 19, 2008 (“proposed Amendment”). This is the fourth and, if all goes as expected, final amendment to a 1985 Consent Decree, which originally required defendant CBS to excavate and incinerate PCB-contaminated material at six sites in and near Bloomington, Indiana (“Bloomington Sites”). After the parties abandoned implementation of these remedial measures in 1994, the parties agreed to a series of Consent Decree modifications that changed the remedies to be implemented by CBS at three of the six sites. The proposed Amendment now before the Court for approval would modify the remedies with respect to the three remaining sites – Neal’s Landfill, Lemon Lane Landfill and Bennett’s Dump (“Remaining Sites”).

Pursuant to an order issued by the Court in 1999, CBS has already implemented various agreed-upon “source control” measures at the Remaining Sites. Specifically, CBS excavated contaminated materials at all three Sites and, with respect to Neal’s Landfill and Lemon Lane Landfill, consolidated other contaminated materials under “caps” designed to prevent precipitation and surface runoff from coming into contact with contaminated materials while eliminating the potential for direct contact with remaining waste materials. The proposed Amendment will conform the 1985 Consent Decree to reflect these source control measures. More importantly, the proposed Amendment would require CBS to implement new remedial measures to control the last remaining pathway by which humans and wildlife can be exposed to

PCBs from the Sites, which is through seeps and springs that continue to release PCB-contaminated groundwater into nearby streams.

The remedial actions that CBS will perform under the proposed Amendment were selected by EPA in three Record of Decision Amendments issued after completing public notice and comment procedures. The selected remedial measures include (1) expanding the water treatment plants that were built as interim remedies at Neal's Landfill and Lemon Lane Landfill; (2) expanding the systems for capturing contaminated seeps and spring water at these sites; (3) operating and maintaining the water collection and treatment systems for as long as necessary to meet performance standards specified in the proposed Amendment; and (4) building a passive drain system at Bennett's Dump and, if that system falls short of specific performance standards, building a collection system and treatment plant and operating it for as long as necessary to attain specific standards. The total value of these remedial measures is estimated by EPA to be at least \$14,256,316. In addition, the proposed Amendment requires CBS to reimburse EPA for \$6,669,000 in past response costs, and to pay \$1,881,000 to the Department of the Interior ("DOI") for natural resource damages, including assessment and restoration costs.

In accordance with Section 122(d)(2)(B) of CERCLA, 42 U.S.C. § 9622(d)(2)(B), the United States Department of Justice published notice of the proposed Amendment on February 26, 2008, and provided an opportunity for public comment that was later extended to a period of 45 days, ending on April 8, 2008. The comments received during that period are attached at Exhibit 1. The United States has considered all of these comments and, with EPA's assistance, prepared a detailed response, which is attached to this memorandum at Exhibit 2. As discussed further below, none of the public comments do not disclose facts or considerations which

indicate that the proposed settlement is inappropriate, improper or inadequate. To the contrary, the United States continues to believe that the proposed Amendment is fair, reasonable, and consistent with the goals of CERCLA and, accordingly, requests that the Court approve, sign and enter the proposed Amendment as a final judgment.

### **FACTUAL BACKGROUND<sup>1</sup>**

#### **A. The Bloomington PCB Sites and 1985 Consent Decree**

From 1958 to 1972, CBS (formerly Westinghouse) operated a plant in Bloomington, Indiana where it manufactured electrical capacitors containing an insulating fluid composed of polychlorinated biphenyls (“PCBs”), which are hazardous substances within the meaning of CERCLA. CBS disposed of defective capacitors at local dumps, resulting in the release of PCBs into the environment. In addition, CBS discharged PCBs from its plant through the sewer system to the Winston Thomas Sewage Treatment Plant (“Winston Thomas”).

In 1985, after extensive litigation, CBS entered into a Consent Decree (“Original Consent Decree”) with the United States and its co-plaintiffs – the State of Indiana, City of Bloomington and Monroe County – that required CBS to clean up six sites in and around Bloomington, Indiana. These six sites included Winston Thomas and five local dumps, including the three Remaining Sites that are the subject of the current proposed settlement. A central feature of the remedial action required by the Original Consent Decree was for CBS to dig up all soil within the confines of each site, down to bedrock, and burn the excavated material in a high-temperature incinerator to be constructed and operated by CBS.

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<sup>1</sup>/ This summary is based upon the pleadings, evidence developed during discovery prior to entry of the Original Consent Decree, and documents in the administrative records for the Remaining Sites.

Following the entry of the Original Consent Decree in August of 1985, CBS completed interim remedial measures required under the Original Consent Decree, including the removal of exposed capacitors and the stabilization of sites by grading and covering. During this period, however, community opposition to the incinerator mounted and ultimately boiled over to the state legislature. In the early 1990s, the Indiana legislature passed various laws that prevented the pertinent state agency from considering CBS' applications for permits needed to construct and operate the PCB incinerator contemplated by the Original Consent Decree. In light of this legislation and community opposition, the parties "met together to discuss how to proceed with [CBS'] expression of interest in exploring alternative remedies for the six Consent Decree sites." Operating Principles at 1.<sup>2</sup>

**B. Efforts to Develop Revised Remedies and Amend the Original Consent Decree**

In February 1994, the parties filed with the Court a set of principles "to guide the process of exploring alternative remedies" to replace those set forth in the Original Consent Decree. These principles, known as the Operating Principles, provided that the parties would assess the risks posed by the sites "based on the current condition of the sites," and that the "alternative remedies must adequately address [these] site risks." *Id.* at 3. In selecting remedial alternatives, the parties agreed that EPA would follow its Record of Decision ("ROD") amendment process to revise the Enforcement Decision Document in which EPA selected the remedial measures memorialized in the Original Consent Decree.<sup>3</sup> *Id.* at 3-4. Finally, the parties agreed that "if an

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<sup>2</sup>/ The Operating Principles are attached to a joint status report filed with this Court on Feb. 8, 1994.

<sup>3</sup>/ EPA's approval of the remedy memorialized in the Original Consent Decree was set forth in an Enforcement Decision Document, which was executed on December 4, 1984.

alternative remedy is approved by the Parties, it will be presented to the Court in the form of a modified Consent Decree or other legal instrument.” *Id.* at 4.

From 1994 to 1999, with the assistance of the Special Master, the parties agreed upon alternative remedies for three of these six sites covered by the Original Consent Decree – Winston Thomas, Neal’s Dump and Anderson Road Landfill. Three consent decree amendments memorializing these agreements were approved by the Court in 1997, 1998 and 1999.<sup>4</sup> The parties also made progress towards cleanup of the three Remaining Sites, but were unable to reach agreement on final alternative remedies for those sites until they negotiated the proposed Amendment now before this Court.

### **C. The Cleanup of the Three Remaining Sites**

The cleanup of the Remaining Sites has been broken into three stages or “operable units.” The first operable unit, known as the “source control operable unit,” addressed PCB contamination within the “fill” areas of the former landfills. The purpose of this operable unit was to prevent people and wildlife from coming into direct contact with PCB-contaminated waste material and to minimize the migration of PCB-contaminated groundwater from these sites. After soliciting and responding to public comments, EPA selected the alternative source control operable units for the Remaining Sites in three separate ROD amendments issued on October 16, 1998 (Bennett’s Dump), March 29, 1999 (Neal’s Landfill) and May 12, 2000 (Lemon Lane Landfill). CBS completed all three source control operable units by the end of 2000, as required by an order issued by the Court on February 1, 1999.

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<sup>4</sup>/ Although the parties have never amended the 1985 Decree with respect to Anderson Road Landfill, CBS excavated and removed all wastes from the Anderson Road Landfill and stored the wastes at an Interim Storage Facility (“ISF”) at Winston-Thomas. CBS closed the ISF in accordance with the Court order issued on November 25, 1997.

The second and third operable units, which CBS will implement under the proposed Amendment, will address PCB contamination in groundwater, surface water and sediment at or related to the Remaining Sites. The purpose of these operable units is to prevent people and wildlife from coming into contact with PCB contamination in streams located near the Remaining Sites. The PCBs have migrated to these streams through conduits in the bedrock beneath the former landfills. Each of the Remaining Sites is located over water-soluble limestone bedrock, which is known as “karst.” The movement of groundwater through cracks and fissures in the bedrock has caused the karst bedrock to dissolve and, over time, resulted in a network of underground streams, caves and sinkholes. The drainage in such topography is largely subterranean. Hence, after PCBs were dumped at the sites over 30 years ago, some of the PCBs quickly migrated into the fractured bedrock, which contains PCBs to this day. Groundwater flowing through the bedrock transports the PCBs to nearby springs.

From 2006 to 2007, EPA published for public comment three proposed plans to address PCB contamination in groundwater, surface water and sediment. Risk assessments completed by EPA showed unacceptably high risk of noncarcinogenic health effects in humans who might consume fish contaminated with PCBs, as well as an unacceptably high risk of reproductive impairment in mink and kingfishers that live along stream corridors. Consequently, EPA proposed additional remedial measures to reduce the mass of PCBs released into nearby springs and decrease the concentration of PCBs in fish. After receiving public comments, EPA selected the second and third operable units in three separate ROD amendments issued on Sept. 26, 2006 (Bennett’s Dump), Sept. 29, 2006 (Lemon Lane Landfill) and Sept. 25, 2007 (Neal’s Landfill). As discussed more fully below, EPA believes that the remedial measures required by these ROD

amendments, together with the completed source control operable units, are protective of human health and the environment, and EPA does not anticipate that any additional response actions will be necessary at the Remaining Sites after these remedies are implemented.

### **THE PROPOSED SETTLEMENT**

On February 19, 2008, the parties lodged with the Court the proposed Amendment that requires CBS to implement the remedies selected by EPA to address groundwater, surface water and sediment contamination at the Remaining Sites. Consistent with prior amendments, the proposed Amendment does not fully supersede the Original Consent Decree. Rather, it rescinds portions of the Original Consent Decree that are no longer applicable while it adds new provisions that reflect the parties' current agreement. These changes are summarized below.

#### **A. Modification of Geographical Boundaries of the Remaining Sites**

Section III of the proposed Amendment expands the geographical boundaries of the Remaining Sites to include springs and seeps where CBS will perform remedial measures under the proposed settlement. The new geographical boundaries of the Remaining Sites are shown in maps attached to the proposed Amendment at Appendix A (Bennett's Dump), Appendix B (Lemon Lane Landfill), and Appendix C (Neal's Landfill). Section III of the proposed Amendment also provides that CBS may petition EPA to expand the boundaries of the Remaining Sites to include additional areas investigated or remediated by CBS.

#### **B. Injunctive Relief**

##### **1. Lemon Lane Landfill**

Lemon Lane Landfill is a former sanitary landfill to the northwest of Bloomington. In accordance with the source control ROD Amendment issued by EPA in May of 2000, CBS has

already excavated and removed “hot spots” from the former landfill where PCB concentrations in the soil exceeded 50 ppm on average. This work involved the excavation of 80,087 tons of PCB-contaminated waste and the removal of 4,402 capacitors, which CBS transported to hazardous waste disposal facilities in Michigan and Texas. CBS consolidated the remaining 40,000 cubic yards of landfill material under a landfill “cap,” which consists of, among other things, six inches of topsoil, eighteen inches of granular fill, and a geomembrane that is impervious to water. The former landfill now spans nine acres and is surrounded by a fence.

Under Paragraph IV.B.1 of the proposed Amendment, CBS will be obligated to continue and complete performance of operations and maintenance (“O&M”) and other requirements set forth in the EPA-approved plans under the source control ROD Amendment. These plans, which are incorporated by reference into the proposed Amendment, require CBS to conduct inspections of the cap, mow grass, apply herbicide and conduct long-term groundwater monitoring.

In addition to requiring CBS to perform continuing O&M of the source control measures already implemented, Paragraph IV.B.2 of the proposed Amendment requires CBS to implement the remedial measures selected by EPA in the Lemon Lane Landfill ROD Amendment for Operable Units Two and Three. Most importantly, CBS will take over ownership and operation of, and will expand, the water treatment plant that EPA built in 1996 at Illinois Central Spring (“ICS”), which is located approximately a half mile to the southeast of the site. Amendment, App. G, at 5. In its current configuration, the treatment plant can treat up to 1,000 gallons per minute of spring water and store up to 1.2 million gallons when spring flow exceeds the plant’s treatment capacity. During very large storms, however, the plant is still not large enough to capture all of the groundwater from ICS. Consequently, the proposed Amendment requires CBS

to construct a second carbon-filtration system for treating water that overflows the storage tanks. *Id.* at 5-6. EPA anticipates that this overflow treatment system, in combination with the existing primary treatment system, will remove more than 99% of the mass of PCBs released into Clear Creek, whereas the plant currently removes 70% of the mass of PCBs. CBS will be required to operate the plant until the groundwater emerging from ICS for a 12-month period has a PCB concentration equal to or less than the PCB effluent limit of 0.3 ppb, which was set by the Indiana Department of Environment Management in accordance with its National Pollutant Discharge Elimination System (“NPDES”) program under the Clean Water Act. *Id.* at 20.

In accordance with the Lemon Lane Landfill ROD Amendment for Operable Units Two and Three, the proposed Amendment also requires CBS to extend the effluent line for the treatment plant by approximately 1,000 feet so that the treated water discharges beyond a sinkhole that presently causes some of the discharge to re-enter the contaminated bedrock. *Id.* at 6-7. CBS will also extend the capture system to include three additional small springs and convey this water to the Illinois Central Spring treatment plant for treatment; remove contaminated soil and sediment from certain areas within the site, achieving a PCB cleanup standard of 1 ppm on average in drainage ways and 5 ppm on average in non-drainage ways; and conduct periodic sampling of domestic wells within a 5,000-foot radius of the site and within the hydrogeological zone of influence of the site. *Id.* at 7. In the event that PCBs are detected in any domestic wells within this 5,000-foot radius, CBS will provide an alternative potable water supply to remedy threats arising from the domestic use of such water.<sup>5</sup> *Id.* at 7.

## 2. Neal's Landfill

Neal's Landfill is a former landfill that is located approximately five miles west of Bloomington. In accordance with the source control ROD Amendment issued by EPA on March 29, 1999, CBS has already excavated and removed "hot spots" from the former landfill where PCB concentrations exceeded 500 parts per million. This work involved the excavation and removal of 41,747 tons of PCB-contaminated material and 4,119 capacitors, which CBS transported to hazardous waste disposal facilities in Texas and Michigan. CBS consolidated the remaining waste under a landfill "cap," shrinking the former landfill from 18 acres to 10 acres.

Under Paragraph IV.C.1 of the proposed Amendment, CBS will continue and complete performance of O&M and other requirements set forth in the EPA-approved plans under the source control ROD Amendment. These plans, which are incorporated by reference into the proposed settlement, require CBS to conduct periodic inspections of the cap, prevent the growth of plants with deep roots that might penetrate the cap, and conduct groundwater monitoring.

In addition, Paragraph IV.C.2 of the proposed Amendment requires CBS to implement the remedial action selected by EPA in the Neal's Landfill ROD Amendment for Operable Units Two and Three. CBS will modify and operate a groundwater collection and treatment system that will capture and treat a large part of the total mass of continuing discharges of PCBs to surface waters from springs and seeps near Neal's Landfill. Amendment, App. I, at 5. An existing groundwater collection and treatment system, which CBS constructed in 1989 as part of the interim remedial measures required under the Original Consent Decree, captures PCB-contaminated groundwater released from previously identified springs and seeps and conveys the

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<sup>5</sup> A similar requirement exists for the other Remaining Sites. Amendment, App. I (pp. 8-9) and App. E (p. 12)

captured groundwater to a treatment plant that is able to treat up to 500 gallons per minute, which is enough capacity to treat all PCB-contaminated water released from spring and seeps during periods of low-flow. *Id.* Under the proposed Amendment, CBS will be required to modify and expand the collection system, moving the collection point several hundred feet downstream so that the collection system will also capture and treat discharges of PCB-contaminated groundwater from some additional seeps that had not been identified at the time of the Original Consent Decree. Amendment, App. I, at 5. CBS will be obligated to continue operating the treatment plant until groundwater emerging from these springs and seeps has a PCB concentration equal to or less than the PCB effluent limit of 0.3 ppb for a 12-month period. *Id.* at 15-16.

The expanded collection system will be able to capture all flow rates up to 450 gallons per minute. *Id.* at 3. Based upon a CBS-developed computer model, EPA determined that capacity should be sufficient to reduce PCB concentrations in fish below the target concentrations determined by EPA to be protective of human health and the environment. However, because the predictive accuracy of CBS' model is uncertain, the proposed Amendment includes a Remedy Confirmation Clause ("RCC"), under which CBS may be required to implement additional remedial measures selected by EPA in the event that PCB concentrations in fish do not decline as predicted by the computer model.

Under the RCC, the success (or failure) of the remedy will be determined by comparing the concentration of PCBs in fish to target concentrations set forth in the RCC at Paragraph IX.A.1. EPA will evaluate the remedy every five years after the completion of construction in accordance with Section IX.D. At the first and second five-year reviews, EPA can declare the

remedy to be a failure, but only if fish sampling data shows that the PCB concentrations in fish have not achieved and will not achieve the target concentrations.<sup>6</sup> Starting at the third five-year review, EPA can declare the remedy a failure if it can show that the PCB concentrations in fish continue to exceed the target concentrations by a statistically significant margin.<sup>7</sup>

The proposed Amendment also requires CBS to conduct a removal of PCB-contaminated sediment and soil along Conard's Branch, which has been contaminated by releases of PCBs. Amendment, App. I at 5. The removal must achieve a PCB cleanup standard of 1 ppm on average for PCBs in stream sediment and 5 ppm on average for PCBs in flood plains. *Id.* In the event that the soil or sediment becomes recontaminated with PCBs at a concentration greater than these cleanup criteria, CBS must conduct another removal, unless CBS can demonstrate that the recontamination is not contributing to PCB concentrations in fish greater than the target value set by EPA to protect human health and the environment. *Id.* at 15.

### **3. Bennett's Dump**

Located in an abandoned limestone quarry one mile to the northwest of Bloomington, Bennett's Dump occupies three acres adjoining a small stream known as "Stout's Creek." In accordance with the source control ROD Amendment issued by EPA in October of 1998, CBS fully excavated the site, achieving an average residual PCB concentration of 25 ppm or less, which is EPA's standard cleanup criterion for low-use/industrial property. In total, CBS

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<sup>6</sup>/ This determination is made pursuant to a statistical testing methodology. Amendment, ¶ IX.D.

<sup>7</sup> In the event that EPA declares the remedy to be a failure, the RCC provides CBS with a limited-time opportunity to challenge this determination under Paragraph IX.F. Unless CBS successfully challenges EPA's determination under the RCC, CBS must undertake a remedial investigation subject to approval by EPA and must thereafter perform the remedial alternative selected by EPA in accordance with Paragraph IX.G, subject to CBS's right to invoke the Dispute Clause in the Original Consent Decree to challenge EPA's selected remedy on the ground that it is arbitrary or capricious or otherwise not in accordance with the law.

removed 36,172 tons of material and 1,756 capacitors and covered the site with a 12-inch soil cover. CBS also excavated 10 cubic yards of sediment from Stout's Creek.

Under Paragraph IV.A.1 of the proposed Amendment, CBS will continue performing O&M relating to the source control ROD Amendment for Bennett's Dump, and will continue to monitor surface water, flow and groundwater in accordance with the Long-Term Groundwater Monitoring Plan approved by EPA in March of 2002. Amendment, App. E at 11. In addition, Paragraph IV.A.2 of the proposed Amendment requires CBS to implement the remedial action selected by EPA in the Bennett's Dump ROD Amendment for Operable Units Two and Three, which is attached at Appendix E of the proposed Amendment. This remedial action will take place in two stages. The first stage centers on the installation of a passive drain system to lower the water elevation in several rain-filled quarry pits around the site. Amendment, App. E, at 4-5. Because these pits currently recharge the groundwater that feeds nearby springs and seeps, lowering the water elevation in the pits will reduce, if not eliminate, on-going releases of PCB-contaminated groundwater from springs and seeps. The second stage of the remedial action includes the design, construction and operation of a new treatment plant and collection trench. The latter would cut deep enough into the bedrock to intercept any remaining discharges of PCB-contaminated groundwater into Stout's Creek and convey such water to the treatment plant. *Id.* at 5-6. CBS would be required to operate the treatment plant until the groundwater emerging from these springs and seep at the site has a concentration equal to or less than the effluent limit of 0.3 ppb for a 12-month period. Amendment, App. E at 19.

If the passive drain system installed during the first stage of the work succeeds in eliminating spring and seep discharges to Stout's Creek, the proposed Amendment will allow CBS to petition EPA to suspend requirements relating to the construction and operation of the collection trench and water treatment plant. *Id.* at 6-7. If the suspension is granted, and if EPA does not subsequently lift the suspension in accordance with the criteria described in the Amendment, CBS may petition EPA to make the suspension permanent after EPA has completed the initial five-year review of the remedy pursuant to Section 121(c) of CERCLA, 42 U.S.C. § 9621(c). *Id.* at 8.

**C. Payments for Response Costs and Natural Resource Damages**

Under Paragraph VI, CBS will pay \$6,669,000 to the United States within 30 days of entry of the settlement in reimbursement of a portion of the response costs previously incurred by the United States in connection with the Bloomington sites. The total amount will be deposited into a special account within the Superfund to be retained and used by EPA to conduct work in connection with the site, or to be transferred by EPA to the general Superfund account where it will be available for use in responding to any releases or threatened releases of hazardous substances. In addition, under Paragraph VII, CBS shall pay \$1,881,000 to the United States for natural resource damages within 30 days of the entry of the settlement. Of this amount, the proposed Amendment provides that \$1.5 million shall be deposited into a special account within the DOI's Natural Resources Damages Assessment and Restoration (NRDAR) Fund to be used by DOI to conduct or finance projects to restore and/or permanently protect riparian and forested wetland in the White River/Patoka River Watershed. The remaining \$381,000 shall be used to reimburse DOI for natural resource damage assessment costs.

**D. Covenant Not to Sue by Government Plaintiffs**

In exchange for CBS' performance of its obligations under the proposed Amendment, the United States (and the other plaintiffs) promise not to assert claims against CBS for specified matters described in the "Covenant Not to Sue" with respect to the Remaining Sites.

Amendment, ¶¶ VIII.B and C. This covenant, which is based upon the Covenant Not to Sue in the Original Consent Decree, is effective upon entry of the proposed Amendment, but is subject to a significant reservation of rights that would allow the United States to seek further response actions, or to recover additional costs, from CBS under specified conditions. *Id.* Under this "reservation of rights" provision, the United States may assert future claims for injunctive relief and cost recovery with respect to releases (or threatened releases) resulting from "previously unknown or unforeseen conditions that arise or are discovered after the entry of this Amendment." *Id.* at ¶ VIII.B.4.a. After EPA certifies completion of the remedial action with respect to a particular site, the United States may only exercise this clause with respect to conditions that arise or are discovered after EPA issued the certification.

**E. CBS' Covenant Not to Sue and Waiver of Claims**

The proposed Amendment retains the language from the Original Consent Decree with respect to CBS's waiver of claims against United States, except that CBS has agreed to broaden the waiver to include claims under Sections 106(b)(2) and 113 of CERCLA, which Congress added to CERCLA after the Original Consent Decree was entered by the Court. Amendment, ¶ VIII.E. CBS also covenants not to sue the United States or other government plaintiffs for breach of contract or any other violation of the Original Consent Decree arising prior to the entry of the proposed Amendment. *Id.* at ¶ VIII.D.1. CBS, however, reserves the right to sue the State

of Indiana for breach of the Original Consent Decree in the event that the United States takes any civil or administrative action to seek additional relief under the “reservation of rights” provision or the “Remedy Confirmation Clause” discussed above. *Id.* at ¶ VIII.D.2.

### ARGUMENT

The proposed Amendment is the culmination of a twenty-five year effort to clean up PCB-contaminated waste from the Bloomington sites. While this effort was delayed by controversy over the original incineration remedy, the proposed Amendment sets forth alternative remedial actions that are ultimately more comprehensive and robust than those required under the Original Consent Decree. In particular, the alternative remedies for the Remaining Sites required under the proposed Amendment, taking into account significant advances in EPA’s understanding of the Sites’ hydrology since 1985, will achieve effective control of the migration of PCBs from the former landfills into nearby streams. The proposed Amendment also reserves EPA’s authority to require further actions in the event that PCBs in fish at Neal’s Landfill do not decrease to specific target levels or if other unknown or unforeseen conditions come to light that may affect the protectiveness of the remedies at the sites.

Notwithstanding the robustness of the remedial actions selected by EPA, certain commenters (most notably, the plaintiffs in the *Frey* litigation) argue that EPA has not gone far enough. They speculate that residual contamination at the landfills may escape into the environment, either by volatilizing into the atmosphere or bypassing the water treatment plants that CBS is required to build and operate under the proposed Amendment. As a result, in addition to the remedial actions selected by EPA, these commenters contend that the Remaining Sites should be excavated to the maximum extent feasible. Specifically, they argue that CBS

should not merely excavate “all material” from the Remaining Sites as required by the Original Consent Decree – a requirement that contemplated the removal of at least 650,000 cubic yards of material – but that CBS should also dig into the bedrock below the Remaining Sites in order to remove PCBs that have migrated into the groundwater system.

The commenter’s arguments fall well short of the high standard that must be met before this Court may reject the proposed Amendment. It is important to note that these comments are not attacking the merits of the bargain struck between CBS and the governmental plaintiffs. They do not criticize the compromise of EPA’s past costs, the amount of NRD recovery, or the terms and conditions of the settlement – all of which are issues that are commonly the focus of whether an environmental consent decree is in the public interest. Rather, the thrust of the commenters’ attack is focused upon the underlying remedial decisions made by EPA in its ROD Amendments. The public was previously afforded the opportunity to comment on the underlying remedies, and EPA considered these comments in issuing the ROD Amendments. Consequently, the Court should weigh the commenters’ arguments against the deference that it must give to EPA’s technical expertise, as well as EPA’s statutory authority under Section 104 of CERCLA, 42 U.S.C. § 9604, to select remedial measures.

As discussed in more detail below (and in even greater detail in the response to public comments at Exhibit 2), EPA has considered the commenter’s concerns about the technical adequacy of the selected remedies and determined them to be wholly without merit. Further, the excavation remedy favored by the commenters makes little practical sense: it offers no significant advantages in term of the long-term protection of human health and the environment; it increases short-term risks to local residents; it would cost at least twenty times more than the

selected remedial actions, and it presents significant technical problems in terms of its implementation. As a result, when weighed against the approach selected by EPA, the scale tips sharply in favor of deference to EPA's remedial decisions.

**A. Standard of Review**

Approval of a consent decree is a judicial act that is committed to the informed discretion of the trial court. *Madison County Jail Inmates v. Thompson*, 773 F.2d 834, 845 (7th Cir. 1985); *see also United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). Courts, however, should exercise this discretion in a limited and deferential manner, as the process of negotiations is normally not subject to judicial review. *Mars Steel v. Cont'l Ill. Nat'l Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987).

In general, public policy strongly favors settlements of disputes without litigation. *Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1984). “[T]he limitations of judicial competence and the desirability of encouraging out-of-court settlements in order to lighten the judicial caseload create a presumption in favor of approving the settlement.” *Id.* The public policy favoring settlements “is particularly strong where a consent decree has been negotiated by the Department of Justice on behalf of a federal agency, like the Environmental Protection Agency, which enjoys substantial expertise in the environmental field.” *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (presumption of validity for settlement negotiated by agency whose mission furthers public interest).

In reviewing CERCLA consent decrees, in particular, courts determine “not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether

the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." *Id.*; see also *Akzo Coatings of America*, 949 F.2d at 1435; *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982); H.R. Rep. No. 99-253, pt. 3, at 19 (1985), reprinted in 1986 U.S.C.C.A.N 3038, 3042. Thus, courts have fashioned a three-part test under which a court should evaluate a proposed CERCLA settlement. This three-part test consists of a review for: (1) fairness, (2) reasonableness and (3) consistency with applicable law and the public interests. *B.P. Exploration*, 167 F. Supp. 2d at 1051-54. As demonstrated below, the proposed Amendment meets this three-part test.

#### **B. The Proposed Amendment is Fair**

"A consent decree must be both procedurally and substantively fair." *B.P. Exploration*, 167 F. Supp. 2d at 1051. "Procedural fairness concerns the negotiations process, *i.e.*, whether it was open and at arms-length." *Id.* "Substantive fairness concerns concepts of corrective justice and accountability." *Id.*

The proposed Amendment is procedurally fair because it was negotiated at arms-length by competent counsel under the supervision of a court-appointed special master. None of the comments presents any facts or other considerations suggesting procedural unfairness in connection with negotiation of the proposed Amendment. One commenter did assert that the negotiation of the Original Consent Decree was tainted by an alleged conflict of interest because an attorney who had represented EPA in the negotiation of the Original Consent Decree allegedly left EPA after the entry of that settlement to work for the law firm that had represented the City of Bloomington in the same negotiations. As explained in the attached response to comments, however, these facts fall short of showing a past conflict of interest, and there is no

suggestion that the former EPA employee had any role whatsoever in the discussions that led to the proposed Amendment. Exhibit 2, Response to Comments (hereinafter “RTC”), at 72-73. Thus, there is no basis to conclude that the proposed Amendment is the product of any procedural unfairness.

The proposed settlement is substantively fair because CBS will bear the sole cost of conducting an alternative cleanup that EPA has determined will provide adequate protection of human health and the environment. The proposed cleanup is focused upon PCB contamination that was released into the environment by CBS’ corporate predecessor, and therefore, it is appropriate for CBS to “bear the cost of the harm for which it is legally responsible.” *Cannons Eng’g*, 899 F.2d at 87. To that end, the proposed Amendment will require CBS to incur the cost of implementing remedial measures to address PCB contamination in groundwater, surface water, and sediments. The cost of these remedial measures, which EPA has valued at approximately \$14,256,000 over a 30-year period, will be in addition to the source control work that CBS has already implemented, which EPA valued at approximately \$50 million. Moreover, the proposed Amendment includes a Remedy Confirmation Clause for Neal’s Landfill, which assures that CBS will perform additional response actions at that site if currently defined remedial measures do not achieve projected reductions in containment levels. Amendment, § IX. Additionally, the proposed Amendment reserves the right of the United States to seek additional relief if an unknown or unforeseen condition results in the release, or threatened release, of hazardous substances, and such release or threatened release presents an imminent and substantial endangerment to human health or the environment. *Id.* at ¶ VIII.B.4. Finally, CBS

will pay \$6,669,000 to reimburse EPA for past response costs and pay \$1,881,000 to compensate the public for natural resource damages.

**C. The Proposed Amendment is Reasonable**

In evaluating the reasonableness of the proposed Amendment, Courts have identified a number of factors that may be considered, including (1) the nature and extent of potential hazards, (2) the technical adequacy of the cleanup, (3) the availability of viable alternatives, and (4) the extent to which the consent decree reflects the relative strengths or weakness of the Government's case against the Defendants. *B.P. Exploration*, 167 F. Supp. 2d at 1053; *Seymour*, 554 F. Supp. at 1339. As discussed below, all these factors argue in favor of the Court finding the settlement to be reasonable.

**1. Nature and Extent of Potential Hazards**

As a result of the re-investigation of the Remaining Sites, EPA's knowledge today is considerably greater than it was in 1985 with respect to the nature and extent of potential hazards at the Remaining Sites. As an initial matter, EPA now knows that the complete excavation of the sites is not necessary to protect human health in the environment. Ex. 2, RTC at 40-41.

In selecting its original remedy in 1984, EPA concluded that the sites must be fully excavated because it believed that any PCB-contaminated waste left on site would be mobilized through "backflooding" – a phenomenon that occurs during large storms when runoff floods conduits in the bedrock, causing groundwater to reverse its ordinary flow. EPA feared that such backflooding would saturate the underside of any contaminated material left on site and cause PCBs to migrate into the groundwater system. Based upon hydrogeologic information that was generated after entry of the 1985 Consent Decree, however, EPA now knows that waste material

can be safely left on site. As explained in the attached response to comments, piezometric (water elevation) monitoring shows that the consolidated waste under the landfill caps is not coming into contact with groundwater. Ex. 2, RTC at 40-41. At Lemon Lane Landfill, the piezometers indicate that water levels have always been below the base of the waste materials. Similarly, at Neal's Landfill only one of five piezometers has shown significant groundwater, but the water in this piezometer has been consistently below the consolidated waste since September of 2003. *Id.* Further, the groundwater in this well has been slowly dropping since the completion of the source control remedy. Based upon these facts, EPA has concluded that backflooding is not a concern at the Remaining Sites.

Another area where EPA's knowledge of conditions has improved since the 1985 Consent Decree concerns the impact of PCBs upon nearby streams. For instance, EPA now knows that PCBs from Lemon Lane Landfill are being released from Illinois Central Spring – a fact that was not established until dye trace studies were conducted in 1998. Ex. 2, RTC at 45. More importantly, EPA now knows the mere removal of PCBs from the “fill” area of the former landfills, as required under the Original Consent Decree, will not stop releases of PCBs into surface streams. Investigations have shown that these releases are fueled by PCBs that have migrated deep into the bedrock below the sites, and, therefore, PCBs would continue to be released into nearby streams even if CBS were to remove all the soil down to the bedrock surface. Ex. 2, RTC at 9-10, 43, 65-66.

Unlike in 1985, EPA has conducted site-specific risk assessments for each of the Remaining Sites to determine threats to human health and the environment resulting from on-going releases of PCBs to surface water. Ex. 2, RTC at 34-35, 37. These studies have shown

that releases pose unacceptably high risks to people who might wade or play in the contaminated streams or consume PCB-contaminated fish. Likewise, the releases pose an unacceptably high risk to wildlife that feed in and along the contaminated streams. Thus, the purpose of the settlement is to abate ongoing releases of PCBs to surface water, remove PCB-contaminated soils and sediments in and near the affected streams, and restore and replace natural resources that have been injured as a result of the releases. None of these measures (other than some sediment removal at Neal's Landfill) were included in the Original Consent Decree.<sup>8</sup>

Despite the fact that the alternative remedial measures are more protective than those contemplated under the Original Consent Decree, several commenters are troubled by the fact that CBS will not be removing "all material" from the Remaining Sites, as required under the Original Consent Decree. They argue that regional, as well as global, populations are already overexposed to PCBs and other hazardous substances from numerous sources, and that CBS should therefore be required to remove all PCBs from the Remaining Sites. Ex. 1-D.b, Comments of Mick Harrison at 3. These sweeping arguments, however, misapprehend the purpose of a remedial action under CERCLA. The National Contingency Plan ("NCP") does not mandate removal of all hazardous substances from the environment regardless of risk, nor does it impose on EPA the nearly impossible burden of adding into its risk assessments the effects of pollutants released from other sources in the region, or from elsewhere in the world. Rather, the NCP provides that remedial action should "adequately protect human health and the environment

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<sup>8</sup> While the Original Consent Decree required CBS to build and operate an interim water treatment plant at Neal's Landfill, it gave CBS the right to shut down the plant within five years of excavating the site. See Original Consent Decree at ¶ 59(a)(1)(H).

. . . from unacceptable risks posed by hazardous substances, pollutants, or contaminants *present at the site.*” 40 C.F.R. § 300.430(e)(9)(iii)(A) (emphasis added).<sup>2</sup>

Here, there is no evidence that PCBs at the Remaining Sites pose risks to persons or wildlife at any location other than along the stream corridors where PCBs continue to be released. The Agency for Toxic Substances and Disease Registry (“ATSDR”), in fact, conducted a public health assessment in connection with the Bloomington PCB sites in the 1990s and concluded that “the general populations of Bloomington and surrounding areas are either not being exposed to PCBs and other site-related contaminants or are not being exposed at levels that would be expected to produce human body burden sufficient to cause adverse health effects.”

Ex. 2, RTC at 36-37.

The commenters who raise this issue also argue that PCBs are not the only contaminant of concern at the Remaining Sites, and that dioxin and furan contamination also threatens human health and the environment. As discussed in response to Comment 8 in Exhibit 2, however, sampling data collected from the Remaining Sites over the past 20 years show that dioxin and furan contamination is not driving the risk to human health and the environment. In the early 1980s, the ATSDR evaluated dioxin/furan samples from all three sites and determined that the low levels of contamination were not a significant health risk. Ex. 2, RTC at 14. Similarly, Dr. Milton Clark, Health and Science Advisor for EPA, evaluated dioxin contamination in fish samples in the 1990s and concluded that they presented a cancer risk that was 75,000 times less

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<sup>2</sup> This is not to deny that hazardous substances from other sources can contribute to cumulative impacts on a local population. EPA surely has discretion to consider the cumulative impacts from other sources in particular instances. To insist that EPA is invariably or generally obligated to study and account for non-site-related sources of risk in its CERCLA risk assessments, however, would cripple this vital cleanup program, resulting in “paralysis by analysis.”

than the cancer risk from PCBs in fish. *Id.* at 15. Finally, after PCBs were removed from the Remaining Sites (but before the landfill caps were installed as part of the source control operable units), EPA's contractor collected verification samples to determine whether residual dioxin and furan contamination posed any problems. *Id.* at 16-19. This sampling confirmed that dioxin-furan contamination was at least an order of magnitude lower than the cleanup level set by EPA to protect human health and the environment from dioxin and furans.<sup>10</sup> Thus, the remedial actions performed by CBS not only abated risks posed by PCB contamination at the sites, they were also adequate to abate risks posed by the less-threatening dioxin and furan contamination, which was commingled with the PCB waste.

Finally, the plaintiffs in the Frey litigation assert in their public comments that EPA's procedures for evaluating site risks were defective. They argue, as they do in Frey, that EPA failed to conduct a remedial investigation and feasibility study ("RI/FS"), or the functional equivalent thereof, in contravention of the National Contingency Plan ("NCP"). The Court in Frey, however, has already determined that EPA was not literally required to comply with the RI/FS requirements set forth in the NCP at 40 C.F.R. §§ 300.430(d), (e). (*Frey*, Order of March 11, 2008, at 14). The Court explained that EPA must demonstrate only that the primary purpose of the RI/FS was accomplished at some point prior to, or as part of, the ROD Amendment process. *Id.* at 16. This demonstration is easily made. As discussed in the attached Response to Comments, the administrative records for the Remaining Sites contain a number of documents

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<sup>10</sup> The maximum concentration of dioxin and furan contamination detected through verification sampling was 130 parts per trillion ("ppt") when converted to the toxic equivalency ("TEQ") of the most harmful dioxin isomer, 2,3,7,8 tetrachlorodibenzo-p-dioxin. Ex. 2, RTC at 16. In contrast, EPA has a policy setting a TEQ concentration of 1,000 ppt as the starting point for residential cleanup standards for sites contaminated with dioxin. *Id.*

that, when considered together, are the functional equivalent of an RI/FS. Ex. 2, RTC at 3-5. Specifically, EPA completed the functional equivalent of an RI for each site by: (1) characterizing the nature and extent of the contamination, (2) identifying applicable and relevant and appropriate requirements (“ARARs”) and (3) preparing a risk assessment. Further, EPA completed the functional equivalent of an FS by explaining how it identified various remedial alternatives, and then selecting a remedy based upon an analysis of the nine evaluation criteria set forth in the National Contingency Plan.

In 2000, the EPA Ombudsman Office investigated allegations that EPA had failed to comply with the NCP and found these allegations to be without merit. On the contrary, the principal investigator concluded that EPA and its site manager were “doing a commendable job consistent with the [NCP]” and found that RI/FS equivalent analyses had been performed prior to the source control operable units. Ex. 2, RTC at 6.

## **2. Technical Adequacy of the Proposed Amendment and the Availability of Remedial Alternatives**

In selecting the original remedy for the site in 1984, EPA determined that the unique geology of the sites prevented consideration of traditional methods of remediating groundwater contamination, such as pumping contaminated groundwater from the ground and cleaning the water at a water treatment plant. As a result, in selecting alternative remedial measures, EPA decided to concentrate on preventing groundwater contamination from reaching human or other biological receptors by capturing it when it emerges to the surface and routing it to water treatment plants. The primary goal of this approach is to reduce PCB concentrations in fish, since EPA determined in its human health risk assessments that the consumption of

contaminated fish is the principal threat to human health, as well as determined in its ecological risk assessments the PCB levels in fish are excellent indicators of other impacts on the environment. Amendment, App. D (Bennett's Dump) at 8-14; App. F (Lemon Lane Landfill) at 12-18; App. H (Neal's Landfill) at 11-20.

In attacking the adequacy of EPA's approach, some commenters speculate that dangerous levels of PCBs will continue to escape into the environment, either by volatilizing into the air or by bypassing the water treatment plants that CBS is required to build and operate under the proposed Amendment. These commenters argue that the best remedial option for the Remaining Sites is to combine water treatment with the complete excavation of the sites, including excavation of the bedrock below the sites. EPA has considered these arguments and rejected them, as discussed further below.

a. EPA has found no merit to commenter's concerns about the technical adequacy of the proposed remedy

In response to concerns about air emissions of PCBs from the sites, EPA evaluated potential risks from such emissions and concluded that the risks are well within acceptable bounds. Air sampling at the water treatment plant at Illinois Central Spring showed an average PCB concentration ranging from 0.011 to 0.185 micrograms per cubic meter of air ( $\mu\text{g}/\text{m}^3$ ). As discussed in the attached response to comments, EPA reviewed these data and concluded that nearby residents or persons visiting the facility would have no significant cancer or non-cancer risk as result of exposure to these observed concentrations. Ex. 2, RTC at 27-28. Similarly, air samples collected from Lemon Lane Landfill and Neal's Landfill after completion of the source control operable units showed concentration ranging from below the detection limit to 30.1

nanograms per cubic meter of air (equivalent to .03 micrograms per cubic meter of air) – concentrations that were even lower than those detected at water treatment plant at Illinois Central Spring. Ex. 2, RTC at 26-28. Finally, there is no risk of PCB air emissions from Bennett’s Dump because CBS did not consolidate waste material at that site, and the springs at the Site contain much smaller quantities and lower concentrations of PCBs than at the other Remaining Sites. Ex. 2, RTC at 28.

EPA also evaluated the commenters’ concern that PCB air emissions pose a risk because airborne PCBs may be absorbed by plants that are later consumed. As discussed in response to Comment 16 in the attached Exhibit 2, Dr. James Chapman, who is an ecologist at EPA, used data collected from air monitors around the perimeter of Illinois Central Spring from April 7 to 19, 2002 to calculate the accumulation of airborne PCBs by leafy vegetables and legumes under worst-case scenarios where the plants are assumed to grow immediately adjacent to the treatment plant. Ex. 2, RTC at 29-30. Even with these worst case assumptions, Dr. Chapman determined that the cancer risk from eating vegetables from a garden adjacent to the ICS property was 2 individuals in 100,000. *Id.* Dr. Chapman concluded that these cancer risk estimates are well within EPA’s acceptable risk management range of 1 individual in 10,000 to 1 individual in a million. *Id.* Dr. Chapman also calculated the non-cancer risks to people, including children, from eating vegetables from a garden adjacent to the ICS property and concluded that non-cancer risks were not significant. *Id.*

With respect to the commenters’ argument that contamination in the groundwater might be released from springs or seeps that are presently unknown or undiscovered, the years of re-investigation that have occurred since the Original Consent Decree make this argument

implausible. As discussed in response to Comment 13, EPA has essentially ruled out the possibility that contamination in the groundwater is migrating to springs and seeps other than those subject to the proposed Amendment. Ex. 2, RTC at 22-24. Further, there is no evidence to support the commenter's theory that the groundwater system is changing and that new springs or seeps might appear in the future. *Id.* at 46-48, 75. While it is possible that there have been local changes in the discharge point of the groundwater system at Neal's Landfill, the proposed Amendment requires CBS to build a new collection system several hundred feet downstream from the springs and seeps, thereby expanding the collection zone to accommodate any minor changes in the discharge point of the groundwater system.<sup>11</sup>

b. The remedy favored by certain commenters is a poor remedial option

Excavation of the bedrock is preferred by some commenters because it would remove a portion of the mass of PCBs that will otherwise remain in the bedrock for an indeterminate time. EPA has concluded, however, that the PCBs in the bedrock do not pose a threat to human health or the environment unless and until they migrate into nearby streams. Thus, from a protectiveness standpoint, the excavation of the bedrock does not offer any significant advantages over the containment remedies selected by EPA, which will ensure that human and biological receptors are not threatened by releases of PCBs to nearby streams or wells. Further, excavation alone would not fully protect human health or the environment. Despite years of

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<sup>11</sup> Although EPA does not foresee the emergence of springs or seeps that would bypass any of the water treatment plants, EPA would be able to pursue additional relief against CBS in the event that such springs should appear or are discovered in the future. This is because the "Covenant Not to Sue" gives EPA the right to bring an action for injunctive relief, or cost recovery, where an unknown or unforeseen condition results in a release of threatened release of PCBs that may present an imminent and substantial endangerment to health, welfare, or the environment. Amendment, ¶ VIII.B.4.

investigation, the main conduits in the bedrock through which PCBs migrate have not been discovered. Even if they had been discovered, it is highly doubtful that PCBs could be effectively cleaned from every crack and fissure where they may have come to reside over the past fifty years since they were dumped at the Remaining Sites. Thus, excavation of the bedrock would not obviate the need for water treatment plants – a point that the commenters readily concede. Ex. 1-D.b, Comments of Mick Harrison at 2.

Excavation of the bedrock also poses significant short-term risks and technical challenges. Ex. 2, RTC at 57. For example, CBS's conduit investigation established that high concentrations of PCBs are located beneath a railroad track and a cemetery. *Id.* at 68. Needless to say, excavation beneath such obstacles would be difficult and would almost certainly arouse objections from some members of the public. Further, even if these obstacles could be overcome, CBS would need to jackhammer through more than sixty feet of bedrock to reach the area where PCBs are known to reside. *Id.* Such work would generate significant amounts of dust and could create a new risk to local residents from volatilizing PCBs. During the "hot spot" removal at the same site, CBS was required to suspend work as a result of elevated concentrations of airborne PCBs. Given that the proposed excavation would involve a much larger area of removal than the "hot spot" removal, it is reasonable to expect that the public health threat would be comparatively greater in terms of the concentration of airborne PCBs, the areal extent of their dispersion, and the duration of time that the public would be exposed to PCBs.<sup>12</sup>

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<sup>12</sup> The commenters who favor excavation recognize this short-term risk and propose that the area of excavation be enclosed under a dome with an air filtration system. Ex. 1-D.b, Comments of Mick Harrison at 2.

Finally, excavation of the bedrock would be enormously expensive, especially when compared to the relatively low-cost containment remedies selected by EPA. In selecting the source control operable units, EPA estimated that the cost of fully excavating the former landfill (but not excavating into the bedrock) would be \$54.35 million at Lemon Lane Landfill and \$80.24 million at Neal's Landfill. Ex. 2, RTC at 62-63. Obviously, the cost would be considerably greater if EPA were to select a remedy that required removing the landfill cap, digging seventy feet into the bedrock and excavating under a railroad track and within a cemetery. Indeed, EPA estimates that it would cost nearly \$270 million to excavate the bedrock below the Remaining Sites. *Id.* at 62-64 (estimating \$108 million to excavate the bedrock at Lemon Lane Landfill and \$160 million to do the same at Neal's Landfill). While even such extremely high costs do not automatically disqualify a remedial option, cost is certainly an appropriate balancing factor (40 C.F.R. § 300.430(e)(7)(iii)) and can weigh heavily where, as here, the high cost alternative's comparative benefits and feasibility are doubtful at best.

In summary, the excavation remedy is a poor option light of its uncertain benefits, short-term risks, high costs and technical difficulties. Thus, EPA's appropriately selected a containment remedy as the far superior remedial alternative.

### **3. The Proposed Amendment Reflects the Strengths and Weakness of the Government Plaintiffs' Case against CBS**

The proposed Amendment appropriately reflects the relative strengths of the parties' positions in light of the terms of the Original Consent Decree and the circumstances which prevented implementation of that agreement. The Original Consent Decree provided CBS with a "Covenant Not to Sue" protecting it from environmental claims relating to the Bloomington

Sites, subject to certain specific reservations of rights. This protection extended to all of the types of claims that are now the subject of this settlement – namely, claims for additional response actions, the reimbursement of response costs, and natural resource damages. Thus, absent a settlement, Plaintiffs’ ability to pursue these claims would depend on showing the applicability of reservations to the “Covenant Not to Sue” or other provisions of the Original Consent Decree defining circumstances in which “Covenant Not to Sue” may be declared void.

Under its reservations to the “Covenant Not to Sue,” the United States has the right to assert claims against CBS for injunctive relief or response costs (but not for Natural Resource Damages) where such claims arise from an unknown or unforeseen condition at the Site. Original Consent Decree at ¶ 111(e). To rely on this reservation, the United States would need to demonstrate that the on-going releases from seeps and springs at the Remaining Sites, or their hydrogeologic connections to the contaminated groundwater at these sites, were unknown or unforeseen condition in 1985. In response to such arguments, CBS would point to certain documents and information in the public record at that time, which CBS would argue demonstrate that these conditions were foreseen or even actually known at the time the “Covenant Not to Sue” was given to CBS in the Original Consent Decree.

Alternatively, the United States could assert all of its claims against CBS, including its claim for natural resource damages, if it could successfully satisfy the requirements for voiding the “Covenant Not to Sue” with respect to the Remaining Sites. To do so, however, the United States would need to show that CBS failed to perform its obligations under the Original Consent Decree. CBS would counter that it did not “fail” to perform its obligations, but rather was prevented from doing so by the State’s refusal to consider its permit applications with respect to

the incinerator, and that the source control operable units that it did implement should be deemed substantial performance in these circumstances. In its ROD Amendments, EPA valued the source control operable units at \$50.27 million, and CBS maintains that its actual costs were far greater than EPA's estimated amount.<sup>13</sup>

Although the United States believes that it would ultimately prevail on its arguments, litigation of these questions would raise complex issues that are not free from litigation risk. Moreover, assuming the Court concludes that Plaintiffs' claims for additional relief are not barred by the "Covenant Not to Sue," CBS would likely argue that certain of the response actions taken and selected by EPA are inconsistent with the NCP, that many of EPA's past costs are inadequately documented, and the injuries to natural resources resulted mainly from other sources of contamination.

Rather than testing the uncertainty of litigation, the plaintiffs (and the public) are far better served by the proposed Amendment. By requiring CBS to perform the amended remedies selected by EPA for the Remaining Sites, the proposed Amendment fully satisfies Plaintiffs' remedial objectives, while compromising a portion of Plaintiffs' claims for recovery of response costs, as well as compromising various counterclaims that could have been asserted by the Defendant. In light of the complexities and risks associated with litigation, not to mention the substantial delay in the cleanup of the sites if litigation were to ensue, the proposed compromise of response costs and natural resource damages is reasonable.<sup>14</sup>

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<sup>13</sup> CBS estimates that it has spent \$216 million to date at the Bloomington sites.

<sup>14</sup> Under the proposed settlement, the United States will not recover approximately \$17.09 million in past response costs. In contrast, the value of the work to be performed under the Amendment, combined with the source control work that CBS has already implemented, is approximately \$64.54 million, according to cost estimates prepared by EPA in its ROD Amendments.

**D. The Proposed Amendment is Consistent with Applicable Law and the Public Interests**

The purpose of CERCLA is twofold – it is intended to “abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites,” as well as “shift the costs of cleanup to the parties responsible for the contamination.” *Metro. Water Reclamation Dist. v. North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 827 (7th Cir. 2007). The proposed Amendment will advance both goals. It provides for CBS to assume responsibility for the Remaining Sites, and for CBS to reimburse the United States for a significant portion of EPA’s past response costs. Additionally, the proposed Amendment will generate funding for restoring and replacing natural resources damages by PCBs, as well as providing for CBS to reimburse the United States for a significant portion of DOI’s assessment costs.

The proposed Amendment serves the public interest by protecting human health and the environment from released hazardous substances without further expenditure of limited Superfund resources, while at the same time reimbursing a portion of past Superfund expenditures which can be used to fund cleanups at other sites. The settlement will also allow implementation of the final remedial actions to begin immediately whereas litigation would result in delay for an unknown, but undoubtedly lengthy, period of time and would impose significant burdens on the resources of all parties and the Court.

**CONCLUSION**

The proposed Amendment is the culmination of a fourteen-year effort to select remedial alternatives to replace the original agreed-upon remedy in the Original Consent Decree. This settlement is the product of arms-length negotiations conducted under court supervision and will

ensure the implementation of remedial measures selected by EPA in ROD Amendments issued in accordance with the NCP. The public comments received by the United States after a 45-day comment period disclosed no facts or considerations which indicate that the proposed settlement is inappropriate, improper or inadequate. The remedial measures, which CBS will be required to implement in accordance with SOWs attached to the Amendment, will abate risks to human health and the environment posed by on-going releases of PCB to surface water. CBS would also reimburse the United States for a substantial portion of its past costs, and would make an additional payment for measures to restore or replace natural resources that have been lost or injured as result of PCBs. Lastly, the settlement will enable the parties and the Court to avoid the time and expense of protracted litigation. Because the settlement is fair, reasonable, and consistent with CERCLA, the Court should grant the United States' motion and approve, sign and enter the proposed Amendment as a final judgment.

Respectfully submitted,

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