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October 24, 2017

VIA ELECTRONIC AND REGULAR U.S. MAIL

Mr. Eric J. Wilson
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Re: Lower Passaic River OU-2 Allocation Proceedings

Dear Mr. Wilson:

On behalf of certain members of the Cooperating Parties Group (the "CPG")[1], we are responding to: (a) your September 18, 2017 letter concerning the proposed settlement framework for the anticipated at least $1.4 billion remedy for the lower eight miles of the Passaic River; and (b) EPA's representatives' statements at the meeting it convened on October 13, 2017 among certain private potentially responsible parties ("PRPs") and David Batson. In the letter and at the meeting, EPA stated that it anticipates settling with the Passaic Valley Sewerage Commission ("PVSC") and other municipal entities[2] (the "Municipalities") separately from the allocation process that will encompass certain other PRPs (including certain members of the CPG who were notified in the letter). For the below reasons, EPA should revise its current position and include PVSC and the Municipalities in the allocation process overseen by Mr. Batson. We respectfully submit that failure to do so would be fundamentally unfair, at odds with EPA's recognition in its September 18 letter that "transparency" and "fairness" are "of importance to the Agency in this matter" (Sept. 18 letter at 1), and, at bottom, arbitrary and capricious.

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[1] This is submitted on behalf of those CPG members who were notified and requested to participate in the allocation based on EPA's September 18, 2017 letter, and does not include CPG members identified by EPA in its March 30, 2017 letter as eligible for "early" cash out settlement and who are accepting the settlement offer.

[2] EPA's letter stated that negotiations are proceeding with the municipalities to which EPA issued notices of potential liability: the City of Newark, Borough of East Newark, Town of Harrison, and Town of Kearny. There are numerous additional municipalities that are part of the PVSC system, but for purposes of this letter, we are focusing on the four municipalities that EPA identified in its September 18, 2017 letter.

A fair settlement process should embrace all PRPs, including PVSC and the Municipalities (whose liability is already presumed by EPA and not in question). It is not fair to have one process applicable to PRPs other than PVSC and Municipalities, and a separate (and non-transparent) process used to allocate PVSC's and the Municipalities' relative liability shares. This is especially true for an equitable allocation of liability at this site, where, as discussed below, abundant evidence already exists demonstrating that PVSC and the Municipalities:

- Knowingly and willfully discharged an enormous amount of PCBs and other risk-driving COCs to the Passaic River, contrary to any legitimate "government function" and even though PVSC could have appropriately treated these wastes at its treatment plant;

- Knowingly and willfully failed in designing, implementing, operating, and maintaining their sewerage infrastructure, thus discharging additional enormous amounts of PCBs and other risk-driving COCs into the Passaic River (again independent of any "government function" and even though they could have appropriately treated these wastes); and

- Are uniquely liable for discharges attributable to entities that are defunct and thus unable to bear their share of liability (absent PVSC's and the Municipalities' liability for these discharges, they would comprise an orphan share).

The allocation process overseen by Mr. Batson will necessarily consider in detail the discharges by PVSC and the Municipalities, in light of, among other things, certain PRPs having discharged through their sewerage systems. Simply put, the PVSC's and Municipalities' discharges *will be* at issue in the allocation process overseen by Mr. Batson, and given this reality, EPA's purported justifications for excluding PVSC and the Municipalities from the allocation process, as stated at the October 13 meeting, do not have merit.

In short, and for all of the reasons explained in detail below, EPA should include PVSC and the Municipalities in the allocation process overseen by Mr. Batson (a process that may apply to at least 80 other PRPs) and give meaning to its statement that "Transparency and fairness are concepts that EPA has consistently stated are of importance to the Agency in this matter" (Sept. 18 letter at 1).

1. Procedural and substantive fairness require that PVSC and the Municipalities be included in the allocation process encompassing other PRPs.

Apart from early cashout settlements, EPA itself has long recognized a preference for a single settlement and allocation process where municipalities and private parties are PRPs at the same site, as stated in EPA's *Interim Policy On CERCLA Settlements Involving Municipalities' Wastes*:

> [T]he general goal and overall process for reaching settlement at sites involving municipalities or municipal wastes is the same as for other sites. . . to negotiate

> with PRPs to reach one settlement agreement that provides complete resolution of all pending CERCLA claims. . . .

OSWER Directive # 9834.13 (Dec. 6, 1989), at 14. A single process only enhances the credibility of the allocation and participation among PRPs; conversely, "for cases in which PRPs perceive that EPA treats municipalities differently than the other parties at the site, the allocation process may deteriorate."[3] Excluding PVSC and the Municipalities from the other PRPs here will result in significant inefficiencies and will yield inconsistent and unfair results. In addition, it is unlikely that any eventual settlement with PVSC and the Municipalities stemming from a separate process would satisfy the requirements for court approval, which include that the settlement be both procedurally and substantively fair.

"To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its *candor, openness, and bargaining balance*." *United States v. Cannons Engr. Corp.*, 899 F.2d 79, 86 (1st Cir. 1990) (emphasis added) (compiling citations). Candor and openness are not served by excluding several of the most significantly liable parties from the allocation process and, among other things, preventing private parties from commenting on the allocation factors and evidence to be used by EPA to determine PVSC's and the Municipalities' fair shares. Treating PVSC and the Municipalities differently and separately also is inconsistent with the plain language of CERCLA, which includes municipalities, commissions, and political subdivisions of a State as "persons" that may be subject to the same liability as corporations. 42 U.S.C. § 9601(21). At bottom, there appears to be no rational basis for EPA's disparate and secretive treatment of PVSC and the Municipalities; instead, EPA's decision to engage in a separate allocation process with PVSC and the Municipalities is arbitrary and capricious.

To ensure substantive fairness in any settlement, a rational determination of comparative fault is required. *See Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014); *see also Cannons*, 899 F.2d at 87 ("Substantive fairness introduces into the equation concepts of corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible"). Exclusion of PVSC and the Municipalities, as EPA proposes here, necessarily prevents evaluation of their contribution to the LPRSA relative to other parties' contributions, undermining the rationality of any allocation. The required comparative analysis to reach a rational determination of PVSC's and the Municipalities' fair shares is particularly implausible at this stage, given that EPA currently lacks a sufficient record of ***all*** parties' contributions to the LPRSA, including the substantial orphan share and the shares of non-participating parties. Any settlement with PVSC and the Municipalities could only be substantively fair and reasonable – and not arbitrary and capricious – if it assigns to them an allocation share that is, based on consideration of all the available evidence, appropriate relative to those of other parties as established in the allocation process. The need for PVSC's and the Municipalities' shares to be assigned as part of an allocation process encompassing all PRPs is

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[3] U.S. EPA, *Developing Allocations Among Potentially Responsible Parties for the Costs of Superfund Site Cleanups* (October 1994), at p. 9 (summarizing interviews with expert CERCLA allocators).

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especially pronounced because many other PRPs were connected to the PVSC system, such that considerations of their and PVSC's relative allocations will be essential.

All relative shares will most fairly be assigned in a transparent and open process that promotes consistency in application of allocation factors and evidence-based determinations. Excluding PVSC and the Municipalities from this process increases the potential for inconsistent and potentially unfair use of different allocation factors, determinations based on an incomplete understanding of the evidence, and differing evaluation of evidence, which also leads to differences in accounting for other, non-participating parties' contributions and shares, including the substantial orphan shares that will be part of this case. Finally, only a single allocation process will promote complete development of the record with respect to PVSC's and the Municipalities' liability. Because many PRPs at this Site were tied to sewer systems (including the Municipalities' systems) that were linked to the PVSC, these PRPs' potential shares will necessarily depend on information and evidence inextricably related to PVSC and the Municipalities, among other things. Where a group of PRPs are so factually linked together, it would be patently prejudicial to "wall off" the group of PRPs who possess the very information that would establish the presence and extent of a link to the site for each of the other PRPs.

Development of all of the relevant evidence in a transparent and fair process that involves all participating PRPs will yield a more efficient and expedient development of the factual basis for allocation, will avoid the risk of inconsistent results and unfairness to the participating parties, and will increase the chances of a settlement that can obtain court approval and allow implementation of the OU-2 remedy.

2. EPA's noted justifications for excluding PVSC and the Municipalities from the allocation, as stated at the October 13 meeting, do not have merit.

EPA stated at the beginning of the October 13 meeting (before leaving the room and allowing Mr. Batson to speak with PRP representatives) that including PVSC and the Municipalities in the allocation would add complexity to the allocation and would risk delaying the remedial action for the Lower Passaic River. However, any allocation process can be structured, on the same two-year schedule as presently is applicable to other PRPs, to include PVSC and the Municipalities. There is no reason to believe that Mr. Batson and his team would be unable to fairly include PVSC and the Municipalities in an allocation within a timeframe of this duration. Moreover, as set forth below, there is abundant evidence readily available for consideration as part of the allocation process anticipated to conclude in 2019. If anything is likely to add complexity and delay, it would be EPA's failure to include PVSC and the Municipalities in the allocation. Any separate settlement with PVSC and Municipalities that results from a non-transparent settlement dialogue and information exchange conducted by EPA, without input from the allocator overseeing an allocation of other parties' liability and without input from other PRPs, almost unquestionably would be the subject of protracted legal challenges (including extensive discovery) and appeals.

At the October 13 meeting, EPA also alluded to PVSC and the Municipalities being different from other PRPs because they provided government functions and their liability is tied to such functions. The same could be said of the City of New York, which is currently engaged

in the EPA-prompted allocation at the Gowanus Canal Superfund Site; the City of New Haven and other municipalities who participated in a combined allocation for the Beacon Heights and Laurel Park Landfill Superfund Sites, *see Goodrich Corp. v. Town of Middlesbury*, 311 F.3d 154 (2d Cir. 2002); the City of Philadelphia and other municipalities who participated in the combined allocation for the Helen Kramer Landfill Superfund Site, *U.S. v. Kramer*, 19 F.Supp.2d 273 (D.N.J. 1998); the City of Appleton, which negotiated a settlement along with other private parties for its contributions to the Fox River Superfund Site, *see United States v. NCR Corporation*, 2014 WL 12660390 (E.D. Wisc. Dec. 12, 2014); the City of Bangor, which negotiated a settlement along with other private parties for its contributions to the Penobscot River/Dunnett's Cove Superfund Site, *City of Bangor v. Citizen Communications Co.* 2007 WL 1557426 (D. Me. May 25, 2007); and countless other governmental entities that routinely engage in CERCLA allocation processes with private parties.[4] To the extent that PVSC and Municipalities feel that they have unique equitable arguments relating to their governmental functions, they are free to present those claims in the allocation process. Their inclusion would also allow the other allocation participants to establish that the PVSC's substantial discharges of PCBs and other COCs are not attributable to its governmental function, but rather to conscious decisions made by PVSC in abdication of the responsibility it assumed to its customers and the public at large to safely and responsibly treat waste.

At the October 13 meeting, EPA additionally stated that it is evaluating the possibility of entering into a settlement with PVSC and the Municipalities (and presumably additional municipal entities), in exchange for "in kind" services. While EPA did not describe at all the nature of the services potentially at issue, it is not apparent from the Record of Decision for the Remedial Action for the Lower Passaic River what "in kind" services PVSC and/or the Municipalities might provide that would be fairly coextensive with their collective substantial liability share (and that would necessarily reduce the cost of the remedy for other PRPs). EPA's reference to "in kind" services might have been intended to convey that EPA may attempt to settle with PVSC and/or the Municipalities in exchange for them undertaking actions in the Passaic River that they are required to perform under laws other than CERCLA (for example, PVSC's and/or the Municipalities' obligations under the Clean Water Act to eliminate or substantially reduce either discharges of stormwater to the river or discharges through combined sewer overflows). However, any such settlement that attempts to absolve PVSC and/or the Municipalities of their fair allocation of liability under CERCLA for the remedial action, in exchange for them undertaking actions that are required by other laws, would be unfair, objectionable, and arbitrary and capricious.[5] *See Cannons*, 899 F.2d at 87 ("[A] party should bear the cost of the harm for which it is legally responsible.").

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[4] This comparison is not intended to analogize PVSC and the Municipalities' relative responsibility to that of governmental entities referenced above, but rather to emphasize that public entities serving governmental functions are regularly included in CERCLA allocations and settlement negotiations alongside private parties.

[5] EPA has generally recognized that "in-kind services" are actual "services" that a municipality is often "uniquely situated to perform at a site (e.g., mowing, road maintenance, structural maintenance)". *Interim Municipal Settlement Policy*, 54 Fed. Reg. 51,071 (Dec. 12, 1989).

Rather than attempting to justify excluding PVSC and the Municipalities from the allocation process applicable to other PRPs, EPA should fulfill its stated commitment to transparency and fairness by including them in the allocation. Doing so also is consistent with the spirit of Administrator Pruitt's recent memorandum addressing EPA's now-ended practice of "sue and settle" arrangements. *Adhering to the Fundamental Principles of Due Process, Rule of Law, and Cooperative Federalism in Consent Decrees and Settlement Agreements* (Oct. 16, 2017). Any decision by EPA to reach a separate, secret settlement with PVSC and the Municipalities would undermine the same fundamental principles of government that the Administrator seeks to uphold: "EPA must faithfully administer the laws of the land and take actions that are tethered to the governing statutes" (*id.* at 3), and must avoid a settlement process that "empowers special interests at the expense of the public and parties that could have used their powers of persuasion to convince the agency to take an alternative action" (*id.* at 2).

3. A fair and reasonable allocation would assign very substantial shares to PVSC and the Municipalities.

PVSC and the Municipalities' contributions to the harm at this Site are substantial, and these parties should not be afforded special settlement considerations due to their governmental status. PVSC and the Municipalities were not merely performing a government function — *i.e.*, providing sewerage and treatment services. Rather, abundant evidence demonstrates that PVSC both knowingly chose to discharge wastes containing risk-driving COCs to the Passaic River, and willfully failed in designing, implementing, operating, and maintaining their sewerage infrastructure. No "government function" preference can apply in these circumstances.

In an equitable allocation, PVSC and the Municipalities should be ascribed among the highest shares of all PRPs, with PVSC's demonstrated responsibility for the contamination and remediation of the Lower Passaic River, potentially second only to that of the single largest contributor of primary remedy-driver dioxin, OCC.[6]

a. PVSC's lack of care in carrying out its government function warrants a significant share of liability.

PVSC's statutory mandate from the New Jersey Legislature in 1902 was to build and operate a sewer system serving the Lower Passaic River Valley, so as to prevent any discharges of sewage into the Passaic River. The legislature also prohibited further discharges to the Passaic River by any public or private entity. PVSC was required to design and operate an interceptor sewer system to carry out this mandate, and to provide a means for municipalities and many industries along the Passaic River to eliminate their discharges and send their waste to PVSC's

[6] *See* 42 U.S.C. § 9613(f)(1) (courts may apportion response costs among liable parties liable under CERCLA using "such equitable factors as the court determines are appropriate"); *see also* Brief for United States of America and State of California in Support of Motion to Enter Amended Consent Decree with the Settling Local Governmental Entities at pp. 6-9, *United States v. Montrose Chem. Corp. of Cal.*, No. CV 90-3122-AAH (JRx) (Apr. 8, 1999) (EPA justified a settlement with the municipal sewer operator PRPs on the basis that it represented 19% of the amount sought in all settlements collectively); Order, *United States v. Montrose Chem. Corp. of Cal.*, No. CV 90-3122-AAH (Aug. 24, 1999) (granting motion for entry of consent decree).

treatment plant for treatment and discharge into New York Bay.

Since 1924, PVSC has operated an interceptor sewer trunk line intended to keep wastewater from discharging into the Passaic River by connecting into the individual municipal sewerage systems along the Lower Passaic River and conveying that wastewater to a central, PVSC-operated treatment plant for treatment and discharge into New York Harbor.[7] The Municipalities each operated existing sewer systems that were "combined" systems, containing both storm water and wastewater in the same sewer pipes, which caused overflows from the sewers during wet weather events, with such overflows being discharged via the municipality's outfalls along the Passaic River.

PVSC constructed and operated combined sewer overflow ("CSO") regulator chambers at over 70 locations along the interceptor line. These chambers mechanically and automatically redirected untreated wastewater directly to the Passaic River, prior to entry into the interceptor, when the interceptor lacked capacity. PVSC also constructed and manually operated numerous major bypass points along the length of its interceptor sewer. From these bypass points, PVSC could manually redirect flow from a sewer system prior to entry into the main interceptor, or, at certain points, directly out of the main interceptor sewer, into the Passaic River.

(1) PVSC has never implemented its original design standard of elimination of combined sewer systems, resulting in an undersized and insufficiently maintained sewer system.

PVSC based its design and capacity of the conveyance and treatment system on an approximately 15-year estimate of the future population growth within the PVSC service area.[8] PVSC did not design the interceptor system to accept the full, future anticipated flow from the communities with combined sewers. In communities with combined sewers, including the Municipalities, PVSC made provisions in the original design to discharge excess storm-related peak flows to the Passaic River via CSOs, until the separation of sewers could be accomplished.[9] These provisions were to be temporary, due to future growth requiring greater capacity for raw sewage. The presumption in this design is that some storm water-related flows could be accommodated in the PVSC system for a limited time, but that the combined sewers would ultimately be separated (*i.e.*, a system that uses separate storm sewers and sanitary sewers) and that the storm water-caused, combined sewer overflows could be eliminated.

This presumption was part of PVSC's design as early as 1908, but elimination of combined systems for urban areas ultimately became a standard and expected practice in the industry, due to known pollution impacts on receiving waters. By 1965, it was widely recognized

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[7] All factual statements in this letter are based upon extensive review and analysis conducted by experts retained by the CPG. Should EPA question the basis for any of these statements, the CPG can provide further support and elaboration.

[8] Passaic Valley Sewerage Commissioners Report (1908); p. 9-11.

[9] *Id.*, p. 18.

and recommended by federal, state and local pollution control agencies that in all area urban sewer systems "existing combined sewers shall be eliminated wherever feasible", and that sewer systems "convey the maximum practicable amount of combined flow to and through treatment plants."[10]

Despite the growth of population and industrial activity in the area, and resulting increase in sewage flow, PVSC never implemented its critical design concept nor met the national standard for bypass and CSO elimination. Flow from the combined sewer systems (including Newark, Kearney, Harrison, and East Newark) grew to overwhelm the capacity of the PVSC main interceptor during even routine rainfall. In 1973, PVSC's own engineers declared that "*the present system usage far exceeds the concepts developed by the original design engineers*." As described further below, this lack of capacity in the system resulting from PVSC's and the Municipalities' failure to remove combined sewers led to PVSC routinely relying on bypasses and combined sewer overflows to control and limit flow in the its system.

(2) PVSC manually bypassed wastewater as a standard method of operation to manage flow in its system.

Good sewerage system operation practices and standards (and Clean Water Act (NPDES) wastewater discharge permits) have long discouraged and prohibited bypassing – the direct discharge of wastewater without treatment – except under only emergency conditions. But PVSC relied on bypassing as a standard mode of operation, to compensate for its failure to reduce the combined sewer flows in its system. PVSC's former Chief Engineer admitted that since at least 1950, "PVSC would bypass waste directly to the River in varying quantities in order to control the flow of waste in the trunk line and at the treatment plant."[11]

PVSC's operational records from 1950 to 1974 document frequent and intentional bypassing, including during dry weather, with nearly 1,000 documented bypass events during this period (an average of 40-50 per year). In 1975, the one year that PVSC actually monitored bypass amounts, PVSC discharged approximately 7.6 billion gallons of sewage and storm water into the Passaic River.[12]

PVSC's bypassing in the 1950s was particularly extreme, was caused in substantial part by the undersized system, and was exacerbated by PVSC's failure to maintain and upgrade its Newark Bay Pumping Station and treatment plant. PVSC relied on bypassing to overcome design limitations and to delay necessary upgrades at the Newark Bay Pumping Station. PVSC's engineers concluded in 1954 that bypasses related to the failing Newark Bay Pump Station were

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[10] Summary of Conference (First Session), Pollution of the Interstate Waters of the Hudson River and Its Tributaries (New York-New Jersey) (September 28, 1965), p. 11.

[11] Affidavit of Seymour Lubetkin, Chief Engineer, PVSC (1994), para. 19.

[12] Elson T. Killam Associates, Inc., *Report on Overflow Analysis to Passaic Valley Sewerage Commissioners, 1976* (1976), p. xii. (measuring discharges from October 1974-October 1975).

"operating 60 percent of the time."[13] Worse, PVSC would "start bypassing at some overflows before it is actually necessary to do so…", leading to "large quantities of raw sewage… being bypassed a large part of the time to the Passaic River, *a contravention of the primary function of the sewer system.*"[14]

Major sewer line repairs also resulted in significant but avoidable bypasses to the Passaic River. During these repairs, it was standard operating procedure for PVSC to keep the interceptor empty by bypassing all flow above the repair point directly into the Passaic River. PVSC could have made the repairs without bypassing untreated sewage to the river, by diverting (rerouting) the sewage around the repair point and back into the system instead, consistent with accepted operating practice employed by other area city sewer systems. But PVSC repeatedly rejected diversion as an option, despite the fact that in 1969, the State Department of Health ruled that PVSC's bypassing during repairs was unacceptable due to the resulting "imminent danger to public safety".[15]

In one of many examples where PVSC ignored this directive, PVSC used the Yantacaw bypass to discharge untreated sewage to the Passaic River for the entire month of March, 1974, during a month-long repair of a section of the main interceptor in Newark. (The Yantacaw bypass discharged all of the untreated wastewater flow collected from Clifton, Passaic, Paterson, East Rutherford, Wallington, Garfield, Lyndhurst and Rutherford, at a rate of over 100 million gallons per day.) PVSC discharged the entire flow from the system to the Passaic river without treatment for the full month, resulting in over **7.5 billion gallons** of sewage discharged to the river—approximately the same amount as PVSC discharged into the river in an entire year.[16] PVSC discharged millions more gallons during numerous similar repair events over the years.

(3) PVSC failed to maintain its CSO regulators and other equipment.

Inadequate maintenance of CSO chambers and bypass outfall mechanisms can cause overflows of undiluted sewage during dry weather. Dry weather overflows have always been strictly prohibited by the Clean Water Act, in addition to state law. Yet PVSC disregarded minimum maintenance of overflow structures and its interceptor, further contributing to overflows and bypasses of untreated wastewater. Noted maintenance problems in the CSO regulators and bypass points caused dry weather bypasses in the earliest days of operation. By the early 1950's, the mechanical control features of the overflows and bypass structures were almost totally inoperable, leading to numerous discharges of raw, untreated wastewater to the Passaic River, often during dry weather.

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[13] Bogert-Childs Engineering Associates, *Report on Repairs, Replacements and Improvements at Newark Bay Pumping Station* (May 1954), Bogert-Childs Engineering Report for PVSC (May 1954), p. 17.

[14] *Id.* (emphasis added).

[15] Federal Water Pollution Control Administration (November 1969), p. 23.

[16] Passaic Valley Sewerage Commissioners, *Annual Report for the Year 1974* (1975), p. 21-27.

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In 1969, the U.S. Federal Water Pollution Control Administration cited PVSC's ongoing maintenance failures, finding that PVSC's continuing bypasses were impairing water quality in the Passaic River. The agency recommended that PVSC "improve the present method of controlling combined sewer overflows in its intercepting sewer system. Existing manually operated by-pass valves [should] be replaced by an automatic regulating system."[17] The agency also singled out PVSC among its peer sewerage utilities, noting that "most of the municipalities and industries in the… area are moving to meet the conference recommendations", but that PVSC had "not initiated adequate action" to implement necessary upgrades and maintenance programs to reduce pollution to the river.[18] Despite these warnings, PVSC did not take action to automate the bypass locations until the early 1980s.

In the meantime, PVSC's CSO and bypass equipment malfunctions continued unabated. In 1976, 49 of 73 flow regulators inspected were either inoperable or had been removed, one grit chamber was completely filled with debris, 25 locations had inoperable or missing flap valves, 26 locations had broken or missing tide gates, and 11 had outfalls that were plugged or could not even be located.[19] Accepted municipal sewerage practice during this period included preventative maintenance and inspection programs that would limit equipment malfunctions. The frequency and duration of mechanical failures resulting in untreated direct discharges demonstrate that PVSC had a substandard and deficient maintenance and replacement program that contributed to greater numbers and volumes of discharges, including COCs, to the Passaic River.

(4) PVSC and the Municipalities benefitted economically from their lack of care and continuing discharges to the River.

Reduction of combined sewer systems could have been accomplished on a gradual basis over many decades. Had PVSC insisted on sewer separation as an ongoing, gradual program of improvements starting in 1908, PVSC could have required those communities with combined sewers-- through regulation, rate design and general enforcement-- to begin the process of sewer separation at the outset. Later, as the original combined sewers needed to be upgraded or replaced to accommodate new development, or simply as a result of older lines wearing out, many of these sewers could have been gradually replaced, mitigating the economic stress of undertaking a complete sewer separation program all at once. It would have also addressed the fundamental operational problem that still causes PVSC to discharge untreated sewage to the Passaic River today.

Instead of taking these steps to implement its original design standard, PVSC incentivized inaction through its billing practices. Common industry practice is to implement billing systems that encourage good performance and discourage poor performance, such as

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[17] *Report on Quality of the Interstate Waters of the Lower Passaic River and Upper and Lower Bays of New York Harbor*; Federal Water Pollution Control Administration; U.S. Dept. of Interior (November 1969), p. viii-xi.

[18] *Id.*

[19] Elson T. Killam Associates (1976); p. 16-19.

through charging higher rates to those who contribute storm water through combined sewer systems. But rather than impose charges to encourage elimination of combined sewer flows, PVSC provided billing credit adjustments to the municipal members based on the portion of wastewater discharged to the Passaic River, removing any economic incentive to make necessary improvements.

In choosing to rely on bypassing and CSOs to regulate flow, PVSC delayed and avoided capital costs for necessary improvements and addressing combined sewers, which created an economic benefit to PVSC and the District municipalities. Over 30 years ago, in 1976, PVSC conducted an evaluation of various available alternatives for elimination of overflows and bypasses. Cost estimates ranged from $650 million to $2.5 billion.[20] PVSC took no action to implement any of these options (while most other major U.S. urban combined sewer systems long ago began major sewer separation projects). To date, PVSC has never implemented any capital program for CSO and bypass elimination, and PVSC continues to bypass on a regular basis with little reduction in discharge volume or frequency.

PVSC's egregious failures over decades warrant assessment of a significant share. Given its intentional and knowing bypasses, design failures, and maintenance failures, PVSC should be assigned one of the largest shares, perhaps second only to the share of the primary discharger of dioxin to the Passaic River, OCC. *See, e.g., Gould, Inc. v. A&M Battery & Tire Serv.*, 987 F. Supp. 353 (M.D. Pa. 1997) (operator of battery recycling facility site allocated 75% due to "lack of care" and continuous failure to implement routine practices to minimize discharges, as compared to 25% allocation to generator defendants who sent batteries to site expecting them to be recycled).

b. PVSC actively and intentionally discharged risk-enhancing and remedy-driving COCs through its intentional use of system bypasses and combined sewer overflows.

PVSC's deliberate actions and inaction are directly responsible for the contamination in the River, including but not limited to PCBs. Based on data from PVSC's own engineering studies, PVSC personnel intentionally bypassed approximately 615.6 billion gallons of untreated sewage from 1924 through 2016. It is further estimated that wet weather overflows through PVSC's and the Municipalities' CSO outfalls similarly discharged nearly 570 billion gallons during this same period, based on rainfall data and flow measurements. That is, PVSC has released, through intentional bypasses and a negligently designed and maintained, and undersized system, approximately **1.2 trillion** gallons of untreated sewage containing COCs to the River.

[20] *Id.*, p. xxx; *see also* Elson T. Killam Associates, *Combined Sewer Overflow Facility Plan, Phase* I, Vol.1; (1983), p. 4-1.

This sewage contained significant amounts of PCBs. Various data points from different locations and later times provide likely conservative estimates of PVSC's contribution of PCBs that, but for PVSC's actions and inactions, would have otherwise been conveyed to the PVSC treatment plant and kept out of the Passaic River.

Using PCB concentrations from a 1978 EPA study of PCBs in the City of Baltimore municipal sewer system – which is similar in size, treatment capacity, flow rate, drainage area, and industrial user profile – provides an instructive basis for estimating concentrations of PCBs in the PVSC system at and before 1978. Assuming similar concentrations in the PVSC system during the period 1930-1976 only (from the start of commercial PCB use until the national ban on PCB sales[21]), and based on calculated discharge amounts from PVSC discharge records, PCB discharges from PVSC's overflows and bypasses would be estimated to be:

PVSC CSO Overflow PCB Mass:	34,781 lbs.
PVSC Bypass PCB Mass:	56,832 lbs.
Total PVSC PCB Mass:	**91,613 lbs.**

This estimate, while conservative, is nearly *double* the amount of PCBs estimated by EPA to be in the sediment of the Lower 8 miles of the Passaic River – 51,809 lbs. – according to the OU-2 RI/FS.

As noted, this estimate is based upon contemporaneous data from a comparable municipal sewage system. Of course, EPA routinely applies data from other locations in evaluating conditions at sites that are the subject of remedial decisions. Indeed, EPA has considered data from other sites in connection with the remedy for the Lower Passaic River. Furthermore, this estimate is supported by site-specific data collected from sampling in the PVSC system in 1995, nearly twenty years after the national ban on PCBs. Even at that late date, significant levels of PCBs were measured in the PVSC system. While the 1995 levels undoubtedly were much lower than existed in earlier years, even if one assumed (incorrectly) that the levels measured in 1995 existed throughout 1930 to 2016, that would equate to approximately 2,500 pounds of PCBs discharged from PVSC's CSO outfalls and bypasses to the Passaic River. Even that artificially low amount would make PVSC one of the greatest PCB dischargers to the river. To be clear, PVSC's actual PCB discharge levels prior to 1995 unquestionably were much higher than those measured in that year, some two decades after the 1977 ban on PCB sales.

4. PVSC and the Municipalities are uniquely liable for discharges of risk-driving COCs into their systems by a large number of insolvent and defunct entities.

PVSC and the Municipalities are uniquely liable for discharges of risk-driving COCs into their systems by insolvent or defunct entities. PVSC and the Municipalities are unquestionably liable for these discharges and are themselves neither insolvent nor defunct.

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[21] Commercial production of PCBs began in the United States in 1929. The PCB ban was implemented in 1977. *See* United Nations Environment Programme - Chemicals, *Regionally Based Assessment of Persistent Toxic Substances, North America Regional Report* (December 2002), p. 32.

There are thousands of entities who discharged COCs into the PVSC system who have not been identified by EPA as PRPs. Some of these entities are now defunct or insolvent, but their share of liability would be borne by PVSC and, depending on the location of these entities, the Municipalities. PVSC (and the associated Municipality) represent the only solvent PRPs with any nexus to these insolvent or defunct entity waste streams, and would be solely liable for these shares. "[I]t would be inequitable to shift the burden of the costs associated with the quantities of hazardous waste in question, from the transporters and owner/operators who disposed of it and the absent generators who produced it to . . . generator defendants who have no connection to it." *United States v. Davis*, 31 F. Supp. 2d 45, 68 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001) (refusing to impose orphan liability on generators who had no connection to defunct entities' waste). *See also City of Bangor v. Citizens Communications Co.*, No. 02-183, Findings of Fact and Conclusions of Law (June 27, 2006), at 83 (allocating 40% share to city government sewer owner, which included entire shares of other non-party PRPs with whom city had nexus); *United States v. Consolidation Coal Co.*, 184 F. Supp. 2d 723, 732 (S.D. Ohio 2002), *vacated in part on other grounds,* 345 F.3d 409 (6th Cir. 2003) (landfill owners and operators, and not viable generator defendants, should bear defunct generator shares alone because the owners were "fully aware of [the site's] intended use as a solid waste disposal facility" and the operators "received, handled, and disposed of the [waste] on a day-to-day basis"); *United States v. Atlas Minerals & Chems., Inc.*, Civ. A. No. 91-5118, 1995 WL 510304 (E.D. Pa. 1995) (allocating defunct entity share to the sole party with nexus to that entity, not as an "orphan" share allocated to all parties).

The addition of defunct entity shares, to be identified in the allocation process, further increases the already significant liability of PVSC and the Municipalities, and further underscores the need to have PVSC and the Municipalities participate in the same allocation process encompassing all other PRPs so that their shares can be determined relative to the shares of all other participating PRPs, not in a vacuum.

CONCLUSION

For the foregoing reasons, we request that EPA reconsider its intentions with regard to PVSC and the Municipalities, and include them in the allocation process with other participating PRPs.

We request that this letter be included in the administrative record for OU-2.

Sincerely,

David R. Erickson
SHOOK, HARDY & BACON, LLP

cc: David Batson