UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ENVIRONMENTAL
CLEANUP

SEP 30 2013

Mr. Bob Wyatt
Chairman
Lower Willamette Group
c/o Northwest Natural
220 Northwest Second Avenue
Portland, Oregon 97209

RE: Combined Notice of Objection to and Request for Dispute Resolution of EPA's Notice of Demand for Payment of Stipulated Penalties Regarding Baseline Human Health Risk Assessment and Request for Determination; Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240

Dear Mr. Wyatt:

This letter sets forth my decision with respect to the Lower Willamette Group's objection to and invocation of dispute regarding the EPA's notice of demand for payment of stipulated penalties relating to the Baseline Human Health Risk Assessment. In summary based on the LWG's "good faith" efforts, I hereby suspend the assessment and demand for payment of the stipulated penalty as further explained on page 6.

Background

The penalty that is the subject of this dispute arises from years of effort by the Lower Willamette Group and the EPA Project Team to complete an approvable BHHRA. The challenges and complexity of this process are well documented in the record, the Partial Dispute Resolution Decision by Dan Opalski dated October 25, 2012, and the Final Dispute Resolution Decision by Director Opalski dated December 6, 2012 (Final BHHRA Decision). Today's decision accepts and incorporates the record and findings related to the Final BHHRA Decision.

Today's decision is focused solely on whether the assessed penalty is legally supported by the record and whether there are any "good faith" equities that should be considered in assessing this penalty. You have asked me to reconsider this decision and have asked me to withdraw the assessed penalty. You have provided your rationale for this request and the EPA Project Team has provided me with a rebuttal to your rationale.

To make my decision, I have considered the following information:

- Administrative Order on Consent For Remedial Investigation/Feasibility Study (Docket No. 10-2001-0240)
- Partial Dispute Resolution Decision By Dan Opalski Dated October 25, 2012 and Final Dispute Resolution Decision By Dan Opalski Dated December 6, 2012 (Final BHHRA Decision)
- EPA BHHRA Approval Letter dated April 3, 2013
- EPA Penalty Assessment Letter dated April 10, 2013

- LWG letter dated April 29, 2013 requesting withdrawal of stipulated penalties

- LWG letter dated July 12, 2013 titled "Combined Notice of Objection to and Request for Dispute Resolution of EPA's Notice of Demand for Payment of Stipulated Penalties Regarding Baseline Human Health Risk Assessment and Request for Determination; Lower Willamette River, Portland Harbor Superfund Site, USEPA Docket No: CERCLA-10-2001-0240"
- EPA's Response dated August 1, 2013
- LWG Reply Letter dated August 9, 2013
- EPA Letter dated May 17, 2013 proposing a process for revisions to and finalization of the remedial investigation report
- EPA Letter dated September 24, 2013 establishing process for revisions to and finalization of the remedial investigation report

This Decision fully incorporates and accepts the record, factual findings and conclusions set forth in the Final BHHRA Decision. This includes the finding that the BHHRA submitted by the LWG "failed to address EPA comments, and that this failure was sufficient to justify a finding of noncompliance with the Order on Consent." Therefore, today's decision is focused solely on the validity of the assessed stipulated penalty in light of the surrounding facts and circumstances.

In order to fully analyze the LWG's arguments, I have summarized the timeline of events leading to the initial demand for payment of a stipulated penalty to guide me in my understanding of the communications that have taken place regarding the BHHRA.

- On September 23, 2009, the LWG submitted the first draft baseline human health risk assessment.
- On July 16, 2010, the EPA provided extensive comments on the first draft baseline human health risk assessment.
- On May 2, 2011, the LWG provided a revised draft baseline human health risk assessment.
- On July 22, 2011, EPA notified the LWG that the revised draft baseline human health risk assessment was inadequate and requested Word files for the baseline human health risk assessment.
- On June 22, 2012, EPA provided the LWG a modified version of the baseline human health risk assessment and notified the LWG that it was out of compliance with the AOC.
- On June 29, 2012, the LWG sent a letter requesting a 30-day extension for dispute and a 90-day extension of time to produce the document, and seeking clarification on intent of EPA regarding the AOC.
- On June 29, 2012, the EPA responded to LWG authorizing 14-day extension for dispute, a 90-day extension of time to produce the document and EPA clarified that the June 22 letter was EPA's notification to LWG that they provided an unacceptable document.
- On July 24, 2012, the LWG invoked dispute resolution on EPA's notice of non-compliance and directed revisions to the BHHRA.
- On December 6, 2012, EPA Director Dan Opalski issued Final BHHRA Decision (Final BHHRA Decision).
- On April 3, 2013, EPA approved the final BHHRA.
- On April 10, 2013, EPA issued notice of demand for payment of a stipulated penalty in the amount of $125,500.

I have also set forth the relevant provisions in the AOC that relate to the assessment of this stipulated penalty:

Section IX of the AOC describes the process for EPA review, approval and modification of deliverables and mentions EPA's retention of its right to seek penalties as follows:

"If Respondents amend or revise a report, plan, or other submittal in response to EPA comments, and EPA subsequently disapproves of the revised submittal, or if such subsequent submittals do not fully reflect EPA's directions for changes, EPA retains the right to seek penalties."

Section XIX of the AOC states the following:

"[F]or each day that Respondents ...fail to produce a deliverable of acceptable quality...Respondents shall be liable for stipulated penalties..... Penalties begin to accrue on the day that performance is due or a violation occurs, and extend through the period of correction. Where a revised submission by Respondents is required, stipulated penalties shall continue to accrue until a satisfactory deliverable is produced. EPA will provide written notice for violations that are not based on timeliness; nevertheless, penalties shall accrue from the day a violation commences. EPA may, at its discretion, waive imposition of stipulated penalties if it determines that Respondents have attempted in good faith to comply with this Order, or have timely cured defects in initial submissions."

Based on the terms of the AOC and this timeline, I find that the plain language of the AOC provides that stipulated penalties automatically begin to accrue when a revised submittal does not fully reflect EPA's directions for change or fails to produce a deliverable of acceptable quality. I now consider whether EPA appropriately exercised this authority in this instance.

Discussion of LWG's Dispute Resolution Challenges To EPA's Legal Authority To Assess Stipulated Penalties In This Matter

The LWG presents a number of arguments in support of its request for withdrawal of the stipulated penalty. The LWG's primary arguments focus on whether the decision to assess a stipulated penalty in the amount of $125,500 was arbitrary and capricious or otherwise inconsistent with the law, the AOC or EPA guidance. The specific arguments presented by LWG are reviewed and considered below:

(1) The LWG asserts that the assessment of stipulated penalties is arbitrary and capricious because it punishes the LWG for invoking dispute and it has no rational connection to the factual record.

The LWG asserts EPA did not timely articulate a basis for the Notice of Noncompliance and that EPA did not provide sufficient explanation of the calculated penalty amount. The LWG asserts that the stipulated penalties are arbitrary and capricious because they did not understand the basis until July 27, 2012 and that the LWG could have addressed these issues and cured the alleged noncompliance.

Based on the findings of fact and terms of the AOC set forth above, I find that the AOC provides sufficient notice to the LWG that stipulated penalties may begin to accrue if a revised deliverable does not fully address EPA's directions. In this instance, it has already been found that the revised BHHRA

failed to address EPA's comments and that this failure was sufficient to justify a finding of noncompliance with the AOC.

The EPA directed changes to the first draft BHHRA dated September 23, 2009 that were not fully addressed in the revised draft BHHRA submitted on May 2, 2011. These directions for change and the terms of the AOC provided the LWG with sufficient notice and opportunity to cure. In focusing on this early date, I recognize that the AOC states that EPA will provide written notice for violations not based on timeliness and that such notice was not formally provided until June 22, 2012. However, according to the terms of the AOC, this written notice does not create an additional opportunity to cure nor does it automatically toll or otherwise affect the accrual of penalties.

I find that the LWG was provided appropriate notice and opportunity to cure its initial draft BHHRA and that the decision to limit the assessed penalties to dates following the notice of noncompliance provided the LWG with additional notice and opportunities to reduce the ongoing accrual of penalties. The assessed penalty also generously waived all of the penalties that could have accrued during the formal dispute process.

Accordingly, I find that the assessment of these stipulated penalties was neither arbitrary nor capricious and that the record demonstrates that the stipulated penalty was rationally calculated in accordance with the terms of the AOC and allowed for the formal dispute process.

(2) <u>The LWG asserts that the assessment of stipulated penalties is arbitrary and capricious because it is inconsistent with EPA guidance and the amount is excessive.</u>

The LWG asserts that the assessment of stipulated penalties is arbitrary and capricious because it is inconsistent with EPA guidance and the amount is excessive. As discussed above, this stipulated penalty relates back to the revised BHHRA that necessitated extensive EPA modifications.

The LWG downplays the significance of the deficiencies in that document and the findings in the Final BHHRA Decision, including the following finding:

"...taken as a whole, nearly all of the deficiencies pointed to a tendency in the original draft towards language that downplays risk or overemphasizes the conservativeness of the risk assessment, a subject about which EPA has provided feedback at both the staff and management levels for several years. This is an area of substantial importance in the assessment, characterization and communication of risks posed by the site. On these bases, I do not find compelling the Lower Willamette Group's argument that EPA's comments lack significance or substance."

The Final BHHRA Decision and the associated record clearly document that the revised BHHRA was not acceptable and did not fully respond to all of EPA's directions. The EPA does not lightly take on the task of modifying a deliverable and only does so when significant modifications are needed. This modification diverted significant time and resources. Contrary to LWG's assertion, this assessed penalty was clearly based on more than "a single comment" standard.

LWG also asserts that the assessed stipulated penalty is "grossly disproportionate" based on other penalty cases under other statutes. I do not find the references to other cases persuasive and instead find

that the appropriateness of the amount must be considered in the context of the terms of the AOC and the significance of the risk assessment work being performed.

Finally, LWG asserts EPA failed to consider the history of cooperation during the last 12 years of this project. The record clearly shows that there have been other challenges during the work on this project. Accordingly, I find that the assessment of these stipulated penalties was neither arbitrary nor capricious and that it is fully consistent with guidance and EPA procedures to assess a penalty when the second version of a deliverable necessitates significant EPA modifications.

(3) The LWG asserts that the assessment of stipulated penalties violates the AOC, the Constitution and are otherwise unlawful

The LWG asserts that the assessment of stipulated penalties violates the AOC and the Constitution. To support this assertion, the LWG re-asserts that there is a meaningful distinction between directed and non-directed comments for the purpose of assessing a stipulated penalty under the AOC and based on principles of fair notice and due process.

The Final BHHRA Decision found that "both directed and non-directed comments can provide the basis for an EPA determination of Respondents' noncompliance with the Order on Consent." In accordance with this determination, I find that the EPA has the requisite legal authority to assess a stipulated penalty for failure to address all directions for change.

The LWG further asserts that the LWG lacked fair notice of EPA's directions for change and the impending assessment of stipulated penalties. This position fails to acknowledge the clear terms of the AOC that were negotiated between the EPA and Respondents and the timeline set forth above.

The AOC provided clear and sufficient notice to the Respondents that stipulated penalties begin to accrue upon the date that Respondents fail to submit a deliverable that fully reflects EPA's directions for change and that fails to be of acceptable quality.

Accordingly, I find that the assessment of these stipulated penalties does not violate the AOC and is within the legal authority granted to EPA under the terms of this AOC.

Division Director Decision Regarding The Assessment of Stipulated Penalties in This Matter

Based on my review of the record, I find that the assessment of stipulated penalties in this matter is neither arbitrary nor capricious and is consistent with applicable laws, regulations, guidance and the terms of the AOC.

Although I find that the assessment of stipulated penalties in this matter is legally sufficient, I am taking this opportunity to further consider the element of "good faith" in the assessment of this stipulated penalty. The element of "good faith" is expressly recognized in Section XIX of the AOC as an appropriate factor to consider in assessing stipulated penalties.

"EPA, may, at its discretion, waive imposition of stipulated penalties if it determines that Respondents have attempted in good faith to comply with this Order."

As the new Division Director, I have not been privy to the previous working relationships of past years, but gather from discussions with both the LWG and Region 10 staff that the relationship has been very difficult at times. I find it interesting that the language relating to "good faith" is specifically called out in this AOC. Such a provision in an AOC is highly unusual, and as such must have been put in for a specific purpose. Since the EPA sent its notice of stipulated penalties, a number of actions have been taken to demonstrate "good faith" and improve working relationships. Among the steps taken were development and establishment of a new process for the remaining sections of the RI report. Early implementation of this new process appears to be successful in moving work forward. In addition, the LWG and EPA have committed to hold periodic executive level meetings to improve communication and identify and resolve key policy issues in order to expedite completion of investigation work, the evaluation of alternative cleanup actions, and selection of a preferred cleanup alternative. The first such executive level meeting is currently scheduled for October 2, 2013.

I also wish to acknowledge a point made repeatedly by the LWG, and that is the fact that while there are a number of potentially responsible parties in the lower Willamette River who have refused to participate in remedial investigation actions, the LWG consists of a group of key stakeholders who have stepped forward to take responsibility for past actions and take a leadership role in the investigation.

I find that the LWG's efforts to engage in this new process and the executive level meetings are a demonstration of "good faith" that is worthy of consideration during my evaluation of the assessed stipulated penalty. I understand that the staff representing the LWG and the EPA have worked hard to implement and respect the new process and, in doing so, have made significant progress on several fronts. As of this writing, the EPA has approved the Baseline Human Health Risk Assessment, the Ecological Risk Assessment is near final and a significant portion of the RI is also completed. I have also observed that the commitment of the LWG to more directly engage the Associate Director of the Office of Environmental Cleanup, Lori Cohen, has improved communications and progress on this project.

Based on the LWG's "good faith" efforts, I hereby suspend the assessment and demand for payment of the stipulated penalty in this matter as follows:

The assessment and demand for payment is suspended unless a written demand for this stipulated penalty is sent from the Division Director to the LWG before EPA's final approval of the Remedial Investigation. This suspension is granted to allow the LWG to continue demonstrating their "good faith" by cooperatively implementing the new process for the Remedial Investigation as set forth in a letter from Lori Cohen to Margaret Kirkpatrick on May 17, 2013, and amended on September 24, 2013 per agreements made by the LWG and EPA.

In the event of a written demand for this assessed stipulated penalty, LWG shall remit payment of this penalty (plus interest) within 30 days of receipt of the demand letter from EPA as set forth in Section XIX of the AOC.

Nothing in this decision shall be construed as altering any requirements or provisions of the existing AOC, including, but not limited to, the accrual of new stipulated penalties for new violations of the AOC.

While a suspension of stipulated penalties is extremely unusual, I find the unique language in the AOC provides me, as the dispute resolution official, significant latitude to interpret what constitutes "good

faith" and how to apply it in mitigating the stipulated penalties. In making my decision, I am choosing to place high value on the LWG's expressions of good faith. It is my expectation that this approach will foster improved communication and coordination, and will expedite the process for selecting a cleanup plan for the Portland Harbor Superfund Site.

Sincerely,

Richard Albright, Director
Office of Environmental Cleanup

cc: Mr. Jim McKenna, LWG
Ms. Patricia Dost, Pearl Legal Group
Ms. Jennifer Woronets, Anchor QEA