The following summary was submitted to EPA and DOJ on March 22, 2023 and contains an overview of the arguments presented in OxyChem's comment letter regarding EPA's proposed settlement.

I. Executive Summary

In its Notice, DOJ reported that EPA "sponsored an allocation process, which involved hiring a third-party neutral to perform an allocation" which "concluded in December 2020 with a Final Allocation Recommendation Report that recommends relative shares of responsibility for each allocation party's facility or facilities evaluated in the allocation,"[6] and:

> After review of the Final Allocation Recommendation Report, EPA identified the parties who were eligible to participate in the proposed Consent Decree. Based on the results of the allocation, the United States concluded that the Settling Defendants, individually and collectively, are responsible for a minor share of the response costs incurred and to be incurred at or in connection with the cleanup of Operable Unit 2 and Operable Unit 4, for releases from the facilities identified in the proposed Consent Decree.[7]

DOJ's statements are not accurate in key respects.

The allocation violated CERCLA, which requires that a *court*, not EPA, allocate response costs through an open judicial process that tests and determines the sufficiency of evidence.

Instead, the report was prepared by an unqualified, former EPA employee, David Batson ("Batson"), a lawyer and mediator with no scientific training or qualifications. Unlike a court, Batson used self-reported, unverified, secret submissions to do his work. Lacking scientific or technical expertise, Batson made stunning mathematical errors, misapplied scientific concepts, and disregarded EPA's own scientific findings. All of this led him to reach the seriously inaccurate—and scientifically unsupportable—conclusion that OxyChem should bear nearly 100% of the cleanup costs, including the costs to clean up chemicals it never produced.

The report pertains solely to OU2, the Lower 8.3 miles of the river (the "Lower 8"). It makes no credible, scientific, peer-reviewed, or even competent finding of parties' responsibility for response costs in the Lower 8.

The report makes no finding at all regarding responsibility for costs in OU4, the Upper Nine miles of the river (the "Upper 9"), where the final remedy has not been determined and its costs are not known.

EPA's actions exceed its authority and are arbitrary and capricious in many respects. The proposed settlement should be rejected.

A. Background Relevant to Comments

EPA has repeatedly acknowledged that "the Lower Passaic River has been a highly industrialized waterway, receiving direct and indirect discharges from numerous industrial facilities" since at least "the late 1800s."[8] So much discharge had occurred before 1900 that the

[6] Notice at 2133.

[7] *Id.* The December 28, 2020 Diamond Alkali Superfund Site OU2 Allocation Recommendation Report by David Batson, Esq. of AlterEcho is referred to herein as the "Batson Report."

[8] Unilateral Administrative Order for Remedial Design for Operable Unit 4, USEPA Region 2 CERCLA Docket No. 02-2023-2011 (Mar. 2, 2023) ("OU4 UAO"), at ¶ 7; Administrative Settlement Agreement and Order on Consent for Removal Action, in re: Lower Passaic River Study Area of the Diamond Alkali Superfund Site, Occidental

Passaic was delisted as a commercial fish source. By 1926, the United States declared the river's "fish life destroyed."

EPA issued its Record of Decision for Operable Unit 2 (OU2) in 2016.[9] In March 2016, EPA sent letters to over 100 parties it identified as potentially responsible ("PRPs") for polluting the lower 8.3 miles (the Lower 8) of the Lower Passaic River Study Area ("LPRSA"),[10] the "17-mile, tidal portion of the Passaic River," from River Mile ("RM") 0 "to Dundee Dam (RM 17.4), and its watershed, including the Saddle River (RM 15.6), Third River (RM 11.3) and Second River (RM 8.1)."[11] *See* **Ex. 1** (Mar. 31, 2016 EPA letter to General Notice Letter recipients) at 3 ("By this letter, we notify all the parties on the attached list of potential liability for the lower 8.3 miles.").

In May 2017, EPA notified certain private parties that it intended "to use the services of a third-party allocator" to assign shares of responsibility for OU2. *Id*. at 3; *see also* Dkt. 84-1 (Declaration of Alice Yeh, "Yeh Declaration") at 5, ¶ 13 ("EPA informed all the PRPs that had been noticed in 2016 that the Agency intended to use the services of a third-party allocator with the expectation of offering cash-out settlements to additional parties.").

On September 18, 2017, EPA notified the private party PRPs that, "the Agency has concluded that the allocation process should include *all* of the potentially responsible parties for OU2 apart from the PVSC [and four municipal parties.]"[12] To conduct that allocation on behalf of the agency, "EPA retained AlterEcho to perform an allocation for OU2 that would assign non-binding shares of responsibility to the OU2 PRPs (excluding the public entities), and determine relative groupings, or tiers, corresponding to the nature of the PRPs' impact on OU2 and the remedial action for OU2."[13]

David Batson ("Batson")—a former EPA employee retained at AlterEcho to perform the "allocation"— has no scientific or judicial expertise. Before his retirement from EPA, he served as an "ADR" specialist and mediator for PRP groups. Batson's lack of qualifications or expertise led him to make stunning scientific and mathematical errors. His report is not merely inaccurate and unreasonable, it is so seriously flawed that it would be arbitrary and capricious for the United States to rely on it in deciding to accept the settlement.

B. EPA's Actions in Convening the Allocation Process Exceeded EPA's Authority

---

Chemical Corporation and Tierra Solutions, Inc., Respondents (June 23, 2008) (Region 2, CERCLA Docket No. 02-2008-2020) § 10(a).

[9] On March 4, 2016, EPA issued its Record of Decision for the lower 8.3 miles of the Lower Passaic River. *See* U.S. EPA, Record of Decision for the Lower 8.3 Miles of the Lower Passaic River Part of the Diamond Alkali Superfund Site; Essex and Hudson Counties (Mar. 3, 2016), *available at* https://semspub.epa.gov/work/02/396055.pdf (last visited Mar. 3, 2023) (the "OU2 ROD").

[10] *See* List of Parties That Received the March 31, 2016 Notice of Potential Responsibility for the Lower 8.3 Miles of the Lower Passaic River, OU2 of the Diamond Alkali Site, https://semspub.epa.gov/work/02/457510.pdf (last visited March 3, 2023); OU2 ROD § 2 (Site History and Enforcement Activities) ("over 100 industrial facilities have been identified as potentially responsible for discharging contaminants into the river").

[11] *See* OU2 ROD § 1 (Site Name, Location and Brief Description).

[12] Batson Report at 38 (Sept. 18, 2017 letter from EPA to General Notice Letter recipients).

[13] *See* Dkt. 84-1 (Yeh Decl. at 5, ¶ 14).

No provision of the CERCLA, the APA, or the ADR Act authorizes EPA to open an administrative proceeding to determine how much responsibility private parties bear for response costs at OU2 and OU4.

Congress specifically denied EPA authority to allocate responsibility for response costs in CERCLA, 42 U.S.C. § 9613(f)(2), authorizing only a court to allocate liability for response costs. In fact, Congress twice rejected requests by EPA to amend the statute to expand its authority to allocate costs through out-of-court proceedings using so-called neutrals. *See* Recycle America's Land Act of 1999, H.R. 1300, 106th Cong. (1999); Superfund Reform Act of 1994, S. 1834, 103d Cong. (1994).

By conducting an unauthorized allocation of costs and seeking to make it binding through a consent decree, EPA exceeded its statutory authority. Congress did not authorize EPA to determine which parties were liable for cleanup costs or, as EPA has determined here, "[]that the Settling Defendants, individually and collectively, *are responsible for* a minor share of the response costs incurred and to be incurred in the cleanup of Operable Unit 2 and Operable Unit 4."[14] *See* Parts II & III(A), *infra*.

C. EPA's Proposed Settlement Is Arbitrary and Capricious Because It Relies Solely on an Allocation Process That Exceeded EPA's Authority

CERCLA imposes stringent limits on EPA's use of allocations of responsibility. CERCLA authorizes EPA to engage *only* in a non-binding allocation of responsibility, the results of which are not admissible in evidence for any purpose. 42 U.S.C. § 9622(e)(3). These limitations on EPA's use of allocations of responsibility are not only emphatic, *see id.* at 42 U.S.C. § 9622(e)(3)(C) (providing that "no court shall have jurisdiction to review the nonbinding allocation of responsibility"), but have been reiterated by Congress—which has twice *refused* to amend CERCLA to permit EPA to employ an allocation process nearly *identical* to the one EPA retained Batson to conduct. *See* Superfund Reform Act of 1994, S. 1834, 103d Cong. (1994); Recycle America's Land Act of 1999, H.R. 1300, 106th Cong. (1999). *See also* Parts II(A)-(B) & III(A), *infra*.

The ADR Act does not expand this authority. EPA recognized this. In 1999—after the ADR Act was enacted—it went back to Congress and again sought an amendment to grant EPA the authority it desired to mandate agency (rather than in-court) allocations of responsibility for cleanup costs. Congress again refused. *See* Part II(B)-(C), *infra.*

OxyChem and several others chose—as was their right—not to participate in EPA's unauthorized, unlawful Batson process. Batson punished OxyChem severely for this. In a capricious, arbitrary way, Batson increased OxyChem's alleged liability for response costs by an enormous amount, not based on any scientific finding, but rather because OxyChem exercised its constitutional right to insist on the judicial allocation of costs CERCLA mandates. EPA's actions in permitting Batson to retaliate against OxyChem for a constitutionally protected act, and in then ratifying that punishment by adopting the resulting, punitive allocation as the basis for this proposed settlement, are arbitrary, capricious, and violate due process. *See* Part III(A)(3), *infra.*

[14] Notice at 2133 (emphasis added).

EPA pushed forward anyway, pursuing what EPA claimed was a "***non-binding allocation process***." EPA's actions in seeking to make this "non-binding process" binding through a consent decree exceed its authority and are arbitrary and capricious.

Equally arbitrary and capricious is EPA's claim that the process it announced as a non-binding allocation of responsibility of CERCLA response costs was not conducted under CERCLA, but rather was conducted under the ADR Act. EPA's attempt to provide authorization for this process under the ADR Act after the fact fails because no part of that statute authorizes this process, either. Contradicting the ADR Act, the process made OxyChem a nonconsensual participant, authorizing the so-called neutral—Batson—to "represent" OxyChem's interests[15] without its consent or knowledge. By definition, a *non-binding* process cannot thereafter be invoked to bind the parties—particularly those whom EPA had no power to *compel* to participate in it, such as OxyChem.

All of this violated the allocation protocol, again exceeded EPA's authority, deprived OxyChem of due process, and violated Article I and Article III of the Constitution. *See* Parts II(C) & III(A), *infra*.

D. The Batson Report Cannot Support EPA's Exercise of Settlement Discretion and No Consent Decree Can Be Entered Based on It

EPA's actions exceed its authority and violate Due Process, Article I and Article III of the Constitution. The same would be true of any effort by the United States to support entry of the proposed consent decree based on the Batson Report because:

- The report is inadmissible in evidence under CERCLA Section 122(e)(3)(c);
- To the extent EPA insists the Batson process was an ADR proceeding, Section 574 of the ADR Act does not permit any offer of an ADR Act report into evidence against a party (like OxyChem) whose alleged responsibility is the subject of that report; and
- Federal Rule of Evidence 408, which governs in any proceeding to seek entry of the proposed consent decree, prohibits the report's admission.

OxyChem notified EPA in writing at the outset that the proposed allocation process could not offer "the 'transparency and fairness' that EPA has 'consistently stated are of importance to the Agency.'"[16] In the same letter, OxyChem raised concerns that:

- "Allocation of costs is a judicial, not an administrative, function under CERCLA"[17];
- "Basic fairness requires that the equitable responsibility for these staggeringly large costs be ascertained carefully and with due process. As a matter of economics, single percentage inaccuracies in the allocation could shift millions of dollars in cost to parties who should not be required to bear them."[18];

[15] *See* Batson Report, Attachment E (Revised Work Plan for the Allocation) at 120 ("Occidental (OCC) not being a participating party as had been anticipated and OCC filing a lawsuit against [Participating Allocation Parties] have substantially increased the level of effort required of the Allocation Team, which will spend additional resources to ensure that ***OCC is fairly represented in the allocation process***…" (emphasis added)).

[16] **Ex. 2** (Oct. 12, 2017 OxyChem letter to Eric Wilson, EPA) at 1.

[17] *Id*.

[18] *Id*. at 4.

- EPA lacked "adequate information from which to derive an equitable allocation of costs"[19];
- By focusing on only *two* of the eight chemicals of concern identified in the OU2 ROD, EPA had "inexplicably abandoned its own finding concerning the drivers" of the OU2 remedy[20]; and
- "[T]he process, as outlined thus far, will not (and cannot) arrive at a cost allocation which ensures that *all liable PRPs pay their fair share*."[21]

Even the companies that now support the settlement because it is so wildly and unfairly favorable to them expressed similar concerns about relying on the Batson process at the outset. The Small Parties Group ("SPG")—a misnamed group of 50, mostly large and multinational companies—and Benjamin Moore & Co. each wrote to EPA saying that EPA did not have statutory authority to conduct this process, could not ensure a full and fair assessment of liability, and was wrongly excluding the PVSC and municipal entities whose interests could be affected dramatically by it.

Specifically, though they now impermissibly offer AlterEcho and Batson's allocation as evidence of OxyChem's share of liability,[22] the SPG recognized then that "to be credible, . . . the allocation must be complete and comprehensive," writing that EPA's proposed process "leaves the relevancy of [] documents to be added/produced to be determined by each individual party producing said documents"; that "to insure that a level playing field is established, all key, relevant information must be collected before the allocation process commences so that no advantage is gained by a party due to the lack of sufficient information in EPA's database or the failure of a PRP to undertake a diligent inquiry and produce relevant documents"; and that "EPA has not identified all viable parties in this matter for the allocation of OU2"—including the Passaic Valley Sewerage Commission.[23]

Benjamin Moore & Co. ("Benjamin Moore")—now one of the settling defendants—warned EPA that it lacked statutory authority to conduct the process EPA proposed:

> There appears to be no statutory basis for the Batson allocation—which can be summed up as an EPA-improvised process for organizing certain information and allocating measures of OU2 responsibility in anticipation of a court-approved endorsement of settlement. But Congress has already mandated the process for an allocation in aid of settlement—a nonbinding preliminary allocation of responsibility ("NBAR")—in section 122(e)(3) of [CERCLA]. EPA issued guidelines for NBARs at 52 Fed. Reg. 19,919

[19] *Id*.

[20] *Id*. at 2; *see also id*. ("EPA has no scientific or administrative basis on which it can now abandon the findings of the ROD—after selecting the remedy—in favor of an allocation process that will apportion costs based on only three chemicals of concern, ignoring all other contaminants and PRPs in the process.").

[21] *Id*. at 5.

[22] *See* Jan. 23, 2023 SPG letter to Special Master Thomas P. Scrivo, Esq., Dkt. 2266 in Case 2:18-cv-11273-MCA-LDW in the United States District Court for the District of New Jersey (hereinafter the "Contribution Action") at 2 (contending that the Batson Report "confirms . . . that OxyChem should be responsible for the overwhelming share of the cleanup costs").

[23] *See* **Ex. 3** (Jan. 30, 2018 SPG letter to Eric Wilson, USEPA) at 1, 3 & 4.

> (May 28, 1987). Per the EPA's guidelines, an NBAR is intended only as an aid to settlement among those parties who participate and EPA, and not as a justification for a contested settlement. The very nature of an NBAR confirms its more limited purpose; an NBAR is a voluntary allocation process, the results of which (i) may be adjusted by the PRPs after preparation, and (ii) cannot be introduced in any court proceeding (including one for the entry of a consent decree).[24]

When the Batson Report is excluded from consideration, as it must be because Congress deprived any reviewing court of the power to consider it, 42 U.S.C. § 9622(e)(3), there is no factual basis to support the reasonableness of EPA's proposed settlement, which seeks to release 85 parties from joint and several liability for $1.82 billion for what EPA admits is a "minor" cash payment. *See* Part III(B), *infra*. And, even if the reviewing court could consider the Batson Report (it cannot) the report is so plagued with errors that it affords no basis at all on which to evaluate the reasonableness of the proposed settlement.

E. EPA's Settlement Is Arbitrary and Capricious Because It Discloses No Relationship Between the Amount Each Party Is Paying and the Respective Costs To Perform the Remedies in OU2 and OU4

EPA has never disclosed to the United States or the public how much each party to the settlement is paying or how each party's payment reflects its alleged "share of responsibility" for OU4 as distinct from OU2.

EPA cannot disclose that information because EPA has no way to know whether any such relationship exists. The settlement is a bulk settlement. The amount each party is paying (and what they are paying for) have been concealed from the United States and from the public.

CERCLA requires the United States and, eventually, the reviewing court to assess whether a settling party's payment bears a reasonable relationship to the costs being resolved in the settlement. There is no basis on which the United States (or a court) can do that here. No party's individual payment is disclosed, nor is there any disclosure of what portion of any payment reflects responsibility for OU2 versus OU4, much less any disclosure of how each party's settlement payment purportedly bears a reasonable relationship to the $1.82 *billion* of liability for costs being released. *See* Part III(B)(2), *infra*.

The settlement does not require any settling party to perform any actual cleanup work at all and no part of its proceeds are dedicated to actual cleanup work. Instead, the only disclosed use for the settlement monies is to reimburse EPA for its administrative and oversight costs. Not a penny is dedicated to actual cleanup work.

This too is arbitrary and capricious. It contradicts 40 years of consistent EPA guidance—and CERCLA's intentional design—to secure voluntary settlements for large-scale cleanup work, leaving private parties free to litigate among themselves who is responsible for the costs. *See* Parts II(B)(3) & VI(A), *infra*.

[24] **Ex. 4** (Feb. 13, 2018 Benjamin Moore letter to Juan M. Fajardo, Esq., USEPA).

The following summary was submitted to EPA and DOJ on March 22, 2023 and contains an overview of the arguments presented in OxyChem's comment letter regarding EPA's proposed settlement.

F. EPA's Settlement Is Arbitrary and Capricious Because It Seeks Without Authority To Bar OxyChem's Claims for Contribution for Costs It Has Incurred and Will Incur

CERCLA Section 113(f)(2) provides that a person who has "resolved its liability ***to the United States*** . . . shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). CERCLA Section 113(f)(1), in contrast, provides that any person who incurs response costs itself "may seek contribution from any other person who is liable or potentially liable" for those costs. 42 U.S.C. § 9613(f)(1). In 2018, OxyChem invoked its statutory rights under CERCLA to seek a judicial allocation of response costs by the United States District Court.[25]

OxyChem—and *not* the United States—has incurred significant response costs under a September 2016 Administrative Settlement Agreement and Order on Consent (the "2016 ASAOC").[26] Pursuant to the 2016 ASAOC, OxyChem agreed to undertake the design of the EPA-selected remedy in OU2 on its own, but subject to the right to seek contribution from others responsible for the Passaic's pollution. EPA estimates the cost of this work to be $165 million. OxyChem has also incurred and continues to incur significant response costs (that the United States has not incurred) pertaining to the siting and design of an Upland Processing Facility (UPF) that must be built before the remedy can be implemented in OU2. OxyChem has also incurred, and is continuing to incur, costs pertaining to a recently-issued Unilateral Administrative Order requiring OxyChem to design the interim remedy for the upper nine miles of the Passaic River in OU4. EPA estimates the cost of this work to be $71 million. In the Contribution Action, OxyChem also sought—and the District Court sustained its right to pursue—a declaratory judgment for all response costs OxyChem might incur in the future.

In the first half of 2022, OxyChem made two more offers of response work that would have meant additional progress on *both* OU4 and OU2 before the end of that year:

- On January 13, 2022, OxyChem offered both to perform the remedial design and implement the interim remedy set out in the OU4 ROD,[27] at an EPA estimated cost of $441 million. In return, OxyChem asked that EPA not enter any cash-out settlement for OU4, but instead to allow *OxyChem* to pursue recoveries of costs. EPA did not accept, or even respond, to OxyChem's January 13, 2022 offer.
- In March and May 2022, EPA sent a letter to OxyChem and a few other companies, requesting "good faith offers" to implement the remedial actions for OU2 and OU4. OxyChem responded on June 27, 2022, *once again* offering to design and implement the interim remedy in OU4.[28] OxyChem also offered to implement the OU2 remedy through a series of agreements that would allow work to move forward as it was planned and designed.[29] EPA acknowledged receipt of OxyChem's offer, but never substantively responded.

[25] The Contribution Action is Case 2:18-cv-11273-MCA-LDW in the United States District Court for the District of New Jersey.

[26] *See generally* **Ex. 5** (Nov. 7, 2018 OxyChem letter to EPA Region 2).

[27] *See* **Ex. 6** (Jan. 13, 2022 OxyChem letter to EPA Region 2).

[28] *See* **Ex. 7** (Jun. 27, 2022 OxyChem letter to EPA Region 2) at 2.

[29] *Id*. at 2-3.

None of the costs OxyChem has incurred (or will incur) to respond to hazardous substances in the Site have been incurred by the United States. Every penny of costs for work OxyChem has performed has been incurred (and will be incurred) by OxyChem *alone*. The settling defendants therefore do *not* have "liability to the United States," 42 U.S.C. § 9613(f)(2), for response costs incurred by OxyChem; instead, the settling defendants are liable only *to OxyChem* for those costs.

By purporting to allocate liability for response costs incurred by OxyChem in its settlement, EPA exceeded the statutory limits of its authority under CERCLA.[30] The settlement term that purports to bar OxyChem's right to seek contribution for costs OxyChem has incurred and will incur, and that the United States has not incurred and will not incur because of work OxyChem itself has performed, exceeds the limits of CERCLA Section 113(f)(2) and—if approved—would be an unconstitutional taking of OxyChem's property.[31] *See* Part IV below.

G. EPA's Reliance on the Batson Report Is Arbitrary and Capricious Because It Reveals a Collusive Settlement Dominated by the Settling Parties

Lacking relevant expertise or independence, Batson allowed the participating parties to co-opt his "allocation" process to serve their own ends. The participating PRPs—who have now been rewarded with a proposed release of $1.82 billion in joint and several liabilities—were allowed to decide what information Batson would be allowed to consider. They determined what they would (and would not) disclose to him about their own operations and pollution of the Passaic River. They were allowed to "correct" his data sheets. He even allowed them to participate in the drafting of his so-called report, anonymizing their comments so there would be no way to trace where his reasoning stopped and theirs began. *See* Part V, *infra.*

The Batson Report was in no way an independent or accurate allocation of costs or a process that complied with the limits of EPA's authority under CERCLA. Quite the contrary: it is nothing more than a mediated agreement among some PRPs that another party—OxyChem—should bear the lion's share of the costs to clean up the river. To achieve that collusive end, the process that EPA permitted and that Batson implemented was contrived to overstate OxyChem's alleged responsibility for cleanup costs, while understating the liability of settling parties. *See* Part VI(B), *infra*. The report is nothing more than the settling parties' *ipse dixit*, rendered through the deeply-flawed, wildly-inaccurate report issued by Batson. The United States cannot rely on a

---

[30] *See e.g.*, *Akzo Coating of Am., Inc. v. Am. Renovating*, 842 F. Supp. 267, 271 (E.D. Mich. 1993) ("If defendants were permitted to settle with the government for part of the cleanup costs of a site, and then become immune from suit for contribution by private entities who paid for other cleanup costs, it would defeat the policy of CERCLA."); *United States v. Hardage*, 750 F. Supp. 1460, 1493 (W.D. Okla. 1990) ("CERCLA provides the United States with no authority to settle private party response cost claims.").

[31] The U.S. Chamber of Commerce has also expressed concerns about EPA granting settling defendants contribution protection from private parties—like OxyChem—who have themselves incurred response costs:

> By absolving select [potentially responsible parties ("PRPs")] of liability for contribution to other PRPs through settlement, the Agency disposes of the claims of absent parties. Depending on how it is employed, such a practice raises the potential for due process and takings issues, particularly in cases where absent parties may have strong claims against settling PRPs who bear considerable responsibility for contributing to the cleanup costs at issue. This practice amounts, in effect, to a protection racket, as the government may lack the legal authority to extinguish another person's claims for response costs under CERCLA.

Mar. 21, 2023 letter from U.S. Chamber of Commerce to Administrator Regan and Assistant Attorney General Kim, *available at* https://www.uschamber.com/assets/documents/230321_Comments_CERCLA_EPA_DOJ.pdf (last visited Mar. 21, 2023) (footnotes and quotation marks omitted).

captive, mediated report of a purported (but not actual or authorized) allocation of costs to accept a settlement that wrongly places nearly 100% of the responsibility on OxyChem. The United States should reject the settlement. *See* Parts III & VI, *infra*.

The process was separately arbitrary and capricious because it imposed no consequences on the participants for lack of candor or for outright misrepresentations. EPA permitted Batson to rely on sham "certifications" that provide no assurance that any settling party disclosed the full extent of its responsibility, a system so toothless that several parties gamed it to obtain settlements based on misrepresented or overtly concealed facts. Incredibly, the settlement also contains no provision permitting it to be reopened even if—as shown herein—a party has seriously misrepresented facts to the allocator or concealed material facts from him. *See* Part VII, *infra.*

H. EPA's Reliance on the Batson Report To Justify Its Settlement Decision Is Arbitrary and Capricious Because Batson Is Unqualified To Conduct an "Allocation" of Costs and His Report Is Plagued With Serious Errors

Given its fatal procedural flaws, it is hardly surprising that the Batson Report is plagued with fundamental errors, grave misstatements, and overreach. The report lacks scientific or analytic substance because David Batson is not a scientist, and his process was not a disinterested, independent, scientific process. Quite the contrary: it was a process designed and manipulated to reach the outcome the participating PRPs sought: an outsized, unsupportable assignment of nearly 100% of the responsibility to OxyChem.

By training and experience, Batson is unqualified to allocate the costs of environmental remedies. His lack of qualifications affords EPA no basis to rely on his work to draw any conclusions about the responsibility of individual parties to pay response costs—even assuming EPA had that authority, which it does not. *See* Part VI(B)(3)(f), *infra.*

The two courts that have considered Batson's purported allocations of costs and methodology in other cases have rejected his work, describing it as a result-driven process designed to increase the responsibility of one disfavored party over those Batson preferred or represented. *See* Part VI(B)(3)(e), *infra.*

The same is true here. Though directed by EPA to apply inferences consistently to all parties (including OxyChem) Batson does the opposite, picking and choosing the inferences he will apply to OxyChem and—in each case—choosing the one that will *increase* OxyChem's alleged share of responsibility. *See* Part VI(B), *infra.*

- **Where an inference would reduce OxyChem's liability, Batson ignores it**. In evaluating factors such as cooperation" and "culpability" Batson disregards EPA's finding that OxyChem itself never polluted the river and never mentions the extensive and consistent history of OxyChem's cooperation with EPA in OU2—the area of costs he is purporting to allocate. Conversely, he rewards the settling parties with cooperation points despite the fact they uniformly, and in writing, *refused* to perform any work on OU2.
- **Where an inference reduces the settling parties' responsibility, Batson does not apply the same inference to OxyChem**. In the case of contaminated historic fill, Batson *removes* consideration of historic fill when he assesses the settling parties' responsibility but does *not* remove it from OxyChem. This has the effect of assigning to OxyChem the responsibility to clean up chemicals in historic fill that there is no evidence the Diamond Alkali plant ever produced or used, such as mercury, lead, and copper.

The following summary was submitted to EPA and DOJ on March 22, 2023 and contains an overview of the arguments presented in OxyChem's comment letter regarding EPA's proposed settlement.

- **Where Batson is unable to eliminate the settling parties' liability for contaminants they produced, he removes it**. Batson misapplies a settled scientific concept—attenuation—in a manner contrary to EPA's own scientific findings and guidance. Batson's made up "attenuation" reductions allow him to make 99% of the chemicals the settling defendants put in the Passaic River *vanish*. This unscientific attenuation alchemy whisks away the settling parties' responsibility for chemicals they produced, converting them to an "orphan" share—even though the "parents" responsible for those chemicals are, in fact, known and identified by Batson.
- **Batson uses his fictitious "orphan" share to make OxyChem pay to clean up chemicals it never produced.** Rather than making the parties who produced these chemicals pay to clean them up, Batson distributes this alleged (but not actual) "orphan share" ratably, shifting arbitrarily to OxyChem the costs to cleanup chemicals it never produced.
- **Batson contradicts EPA's scientific determinations in the OU2 ROD by assuming that a single chemical (dioxin) is responsible for 84% of cleanup costs**. This single assumption is the biggest factor that explains how Batson reached such an erroneous assignment of liability to OxyChem. It is flatly wrong. To make this assumption, Batson must ignore, minimize, or disregard EPA's findings that there are eight contaminants of concern, four with specific remedial goals, and two—dioxins and PCBs—whose producers would be expected to perform the remedy. Batson achieves his unscientific and unsupportable assignment of liability to OxyChem by assuming (contrary to EPA's findings and consistent position) that only dioxin matters to the cleanup. His report amounts to a tautology: only dioxin matters so dioxin bears all the costs. But Batson's tautology is not true, either on the science or EPA's own Records of Decision.
- **Batson's "assessment" of OxyChem's share of dioxin responsibility is wrong because it relies on improper inferences from the absence of evidence.** Batson assumed that because the settling parties and EPA didn't *tell* him about other dioxin sources, there were none. Batson was wrong. OxyChem has made EPA aware of at least two significant, additional dioxin sources: Clean Earth of New Jersey, Inc. ("Clean Earth") and Ashland LLC's Drew Chemical facility. Neither was considered by Batson; both have significant responsibility for dioxins. Batson made a different evidence error about Givaudan Fragrances Corporation: He assumed Givaudan had presented to him all available information about its operations and discharges of dioxins. Givaudan did not.
- **Batson finds that OxyChem—a company with an extensive record of *voluntary* cooperation—has cooperated *less* than any of the settling defendants.** This ignores OxyChem's cooperation and minimizes the settling parties' refusal to cooperate, in any way, with the remedy in OU2. In fact, the *sole* basis for Batson's refusal to credit OxyChem with cooperation is that it refused to participate in his unauthorized, unlawful allocation process. Punishing a party for exercising its constitutional and statutory rights in this way is fundamentally unfair and deprived OxyChem of due process.
- **Batson assigns extreme culpability to OxyChem, ignoring EPA's finding that OxyChem itself never polluted the river and is liable as a bare successor to the Diamond Alkali Company.** Batson attempts to justify an extreme culpability finding against OxyChem by treating as OxyChem's *own* the acts of employees of the

> Diamond Alkali that were committed decades *before* OxyChem bought the company's stock. Equally outrageous is that neither Batson nor EPA assigns similar, extreme culpability findings to parties whom the evidence shows destroyed documents, concealed material facts, and refused to cooperate with EPA.

These result-driven and inconsistently applied inferences violate the allocation protocol Batson was supposed to follow. They deprived OxyChem of due process and the rights it has to a judicial allocation of costs under CERCLA. It is arbitrary and capricious and fundamentally unfair for EPA to rely on Batson's analysis as the sole basis for its settlement decision, particularly given that the report makes assumptions and uses processes that are directly contrary to EPA's protocol and its own scientific findings. *See* Part VI(B), *infra.*

Apart from applying inferences inconsistently to similarly situated parties, Batson fails to apply accurately basic scientific standards, EPA's own scientific findings and guidance, or even simple arithmetic. The report is plagued with fundamental conceptual errors and math mistakes. For example, Batson mistakes parts per million for parts per billion, resulting in ***a thousand-fold overstatement of OxyChem's alleged responsibility***. This, alone, requires rejecting the settlement.[32] And there are many others, some described below but in total too numerous to catalogue. *See* Part VI(B), *infra.*

The captive and collusive nature of the Batson process created other serious errors that individually and in combination caused Batson to seriously understate the responsibility of more than twenty parties for polluting the Passaic River. These errors vary, but all of them render unreliable Batson's "allocation" of costs to at least: BASF Corporation; Bath Iron Works; Benjamin Moore & Co.; Conopco, Inc.; EnPro Holdings, Inc.; General Electric Company; Givaudan Fragrances Corporation; ISP Chemicals LLC; Kearny Smelting & Refining; the parties at the 600 Doremus Avenue Site (Legacy Vulcan, LLC, McKesson Corporation, and Safety-Kleen Envirosystems Company); L3Harris Technologies, Inc.; Montrose Chemical; Noveon-Hilton Davis; Pitt-Consol Chemicals Company; PPG Industries, Inc.; Sequa Corporation/Sun Chemical Corporation; The Sherwin-Williams Company; and STWB Inc. *See* Parts V, VI(B), VII, & Appendix A *infra.*

OxyChem also uncovered significant evidence of responsibility on the part of parties EPA excluded from the process, including Ashland LLC ("Ashland") (for a Drew Chemical facility highly contaminated with dioxins) and Clean Earth of North Jersey, Inc. ("Clean Earth") (a company with a long history of environmental violations whose property is, likewise, highly contaminated with dioxins and PCBs). Batson's erroneous assumptions that he had all relevant information, and that he had all relevant parties before him, again render his report wholly unreliable. He did not know what he was measuring, all parties that contributed, or what their responsible actions had been. The *absence* of this relevant information does not provide any *substantial evidence* to support EPA's settlement decision. *See* Parts VI(B)(2)(a) & VII(C), *infra.*

Taken individually, or together, Batson's errors are stunning, and EPA would have discovered them had they taken the time to subject it to an independent peer-review, like all other credible science reports. Batson's report is wholly unreliable. It is fundamentally flawed. And it fails to demonstrate any rational relationship between the settling parties' alleged share of

[32] The Third Circuit reversed a district court allocation that made a similar error. *See Trinity Industries, Inc. v. Greenlease Holding Co.*, 903 F.3d 333, 358 (3d Cir. 2018) (vacating district court's allocation in CERCLA contribution action because "the District Court treated conceptually distinct units of measurement as equal").

responsibility and the (unknown and concealed) amount each of them is paying to settle their joint and several liability for $1.82 billion in cleanup costs. *See* Parts III(B) & VI(B), *infra*.

EPA's reliance on a report this fundamentally flawed as the sole basis to release 85 parties of joint and several liability for the $1.82 billion of joint and several liability for the cleanup of the Passaic River is arbitrary and capricious.

The United States cannot rely reasonably on a report with fundamental measurement and scientific errors like these. It would be arbitrary and capricious to do so. And the United States should not do so, when what is at stake is so serious. The settlement proposes to release 85 large, corporate parties from all liability to perform an essential, $1.82 billion cleanup of the Passaic River in historically overburdened communities. Furthermore, none of the settlement funds are dedicated to the actual cleanup of the river. Settlements are supposed to achieve results. No one from EPA or the settling parties has argued that this one does. Defending the non-peer reviewed, junk science in the Batson Report is wrong. Supporting the settlement is wrong. The United States should reject both.

I. EPA Acted Arbitrarily in Refusing To Reevaluate the Proposed Settlement Based on Highly Relevant Evidence Certain Parties Withheld From or Misrepresented to Batson

It is essential to note that Batson (an EPA consultant) had no power to compel the parties to turn over documents and evidence. He relied on the participating companies to provide him information and then took that information at face value. And his process (like the proposed settlement) imposed no penalties for parties that concealed information, destroyed documents, or misrepresented facts.

OxyChem did not believe that kind of informal process meets judicial standards. Accordingly, as Congress permitted, EPA initiated a CERCLA contribution action that would determine parties' responsibility for cost in court—as Congress mandated—with the benefits of due process and the ability to compel the production of evidence.

Through that court-supervised process, OxyChem has discovered substantial, highly-relevant evidence pertaining to the responsibility of certain companies included in EPA's proposed settlement.

Though OxyChem turned over this newly-discovered evidence to EPA, it was not considered in the Batson Report. The documents OxyChem uncovered show that several companies (whom the allocation report rewards for their alleged "cooperation" with EPA) have either willfully or negligently withheld from EPA critical information about their operations, their releases of hazardous substances, or their liability for response costs. Some examples:

- Givaudan Fragrances Corporation ("Givaudan") was once the *largest* U.S. producer of hexachlorophene—a product known to create 2,3,7,8-TCDD dioxin when manufactured in alkaline and high-temperature processes. It did not provide to EPA or Batson information about its Clifton-based, hexachlorophene manufacturing process that used *alkaline conditions* and *high temperatures*, a process Givaudan admits would generate 2,3,7,8-TCDD. Givaudan also misrepresented to EPA the existence of surface swales on its property that carried stormwater runoff over soils highly contaminated with dioxin to an outflow in the Passaic River. *See* Parts VI(B)(2)(a), VII(D)(2), & Appendix A, below.

- The Sherwin-Williams Company ("Sherwin-Williams"), a company with a $55+ billion market capitalization, cannot explain the disappearance of key documents EPA ordered it to retain and withheld over 33,000 pages of other documents —some going back as far as 1901—showing that its plant used enormous amounts of mercury, PCBs, DDT, and other chemicals it has for decades told EPA were never used. In just four years of its operations, Sherwin-Williams consumed thousands of pounds of the PCB mixture Aroclor-1254 and also regularly used and received DDT at its site (producing within one year's time over 200,000 pounds or gallons of "Pestroy," a pesticide with DDT as an active ingredient). *See* Part VII(D)(2) & Appendix A, below.
- Though obligated to do so, the Kearny Smelting & Refining Corporation ("Kearny Smelting") failed to forward to Batson recent and troubling sampling results that show PCB contamination at its site that is thousands of times higher than reflected in any of the sampling data it initially provided to Batson, and that would have made Kearny Smelting the largest PCB contributor under Batson's protocol. *See* Part VII(C)(2) & Appendix A, below.

OxyChem informed EPA of these serious errors on several occasions. Despite clear evidence that these parties had misrepresented facts, or have been unable to explain missing documents, or concealed relevant information about their pollution, an EPA lawyer shrugged it off, asserting this evidence "did not move the needle." OxyChem believes this evidence should be considered by the Court, as Congress intended, not swept under the rug by EPA because Batson never considered it.

A settlement decision that is not affected or altered by clear evidence of wrongful actions by a party that is about to obtain a $1.82 billion release of liability is arbitrary and capricious and obviously unfair. EPA's indifference to the actual *evidence* of parties' liability and responsibility can give the United States no confidence that EPA has exercised its settlement discretion honorably, fairly, or based on the evidence. What EPA has done is to find parties who will agree to pay it cash for EPA's administrative and oversight costs—and it has sold them a release for cash, in exchange.

This is wholly unsupportable. It violates EPA's environmental justice mandates, and it requires that the settlement be rejected because it raises a fundamental question: if EPA is prepared to ignore evidence of serious misconduct like this, what *else* has it ignored behind the veil of secrecy it lowered (and still maintains) to conceal how this settlement was negotiated?

J. EPA's Actions Are Arbitrary and Capricious in Relying on the Batson Report To Release Claims for Response Costs in OU4

It is separately arbitrary and capricious for EPA to propose releasing parties from liability to perform remedial work in OU4 because no record evidence exists—or can exist—based on the Batson Report to support this decision.

EPA retained Batson specifically and expressly to prepare an allocation report on shares of responsibility for OU2. EPA never notified OxyChem or the public that the Batson Report would evaluate responsibility for the costs to implement the interim remedy in OU4. When issued in December 2020, Batson's Report confirmed its stated objective was "to establish the relative equitable responsibility of certain parties for a portion of the costs of remediating Operable Unit 2 (OU2) of the Lower Passaic Diamond Alkali Superfund Site." Batson Report at 6.

In fact, Batson did *not* evaluate OU4 or purport to allocate costs for any remedy in that Operable Unit. His report was issued nine months *before* EPA issued its record of decision for an

interim remedy for the Upper Nine Miles of Operable Unit 4 (the Upper Nine).[33] That Record of Decision prescribes a fundamentally different interim remedy for the Upper Nine than for the Lower Eight in OU2, finding that the full costs to implement the remedy in OU4 are not yet known or even knowable.

Ignoring the limitations of the Batson Report, and the absence of *any* findings by him allocating costs for either the interim remedy in OU4 or the eventual final remedy, EPA's published notice in the Federal Register confirms the Batson Report is the sole basis on which it has included OU4 in the settlement proposed by the consent decree:

> After review of the Final Allocation Recommendation Report, EPA identified the parties who were eligible to participate in the proposed Consent Decree. Based on the results of the allocation, the United States concluded that the Settling Defendants, individually and collectively, are responsible for a minor share of the response costs incurred and to be incurred at or in connection with the cleanup of Operable Unit 2 and Operable Unit 4, for releases from the facilities identified in the proposed Consent Decree.[34]

Even if the Batson Report were authorized by Congress and reliable (it is neither), it is arbitrary and capricious and unlawful on both statutory and constitutional grounds for EPA to rely on it as the sole (or even as part of) the basis for EPA's decision to settle and release parties from responsibility for costs to implement remedies in OU4.

EPA's scientific findings confirm that the conditions, contamination, and hydrodynamics in the Upper Nine are markedly different from those in the Lower Eight, requiring a different—and interim—remedial approach rather than the permanent remedy contemplated for OU2. The Batson Report does not address or consider any of this, nor could it: Batson issued it before the *interim* remedy for the Upper Nine was selected, and the final remedy is not yet known.

The settlement must be rejected as to OU4. There is no basis on which the United States (or a court) could conclude that whatever amount the settling parties are paying that is attributed to the Upper Nine—an amount that EPA also fails to disclose—bears any reasonable relationship to the unknown amount of costs that will be incurred to build the interim and, eventually, the final remedy for the Upper Nine. *See* Part VIII, *infra.*

K. EPA's Actions in Making the Allocation Report Public Were Arbitrary, Capricious, and Violate Due Process

Two years after AlterEcho issued the Batson Report, the United States filed its complaint in December 2022 in *Alden Leeds*, seeking court approval of its $150 million proposed settlement with the 85 settling defendants. In and related to that filing, the United States made the Batson Report available for the first time to OxyChem and the public.

---

[33] EPA issued its Record of Decision for an Interim Remedy in the Upper 9 Miles of the [LPRSA] (the "OU4 ROD") in September of 2021. EPA estimated the cost to design and implement this interim remedy as $441 million but noted that the full costs to remedy contamination in the Upper Nine would not be known until after the interim remedy was constructed, operational, and could be evaluated for its effectiveness, at which point a final remedy—of unknown and currently unknowable cost—will be selected.

[34] Notice at 2133.

The following summary was submitted to EPA and DOJ on March 22, 2023 and contains an overview of the arguments presented in OxyChem's comment letter regarding EPA's proposed settlement.

EPA's actions intentionally and wrongfully tarred OxyChem with an inaccurate and scientifically unsupported (and unsupportable) allocation of nearly 100% responsibility for the costs of the cleanup.

The United States' public dissemination of an *ex parte*, inadmissible, and wholly unreliable report to damage OxyChem in the public eye (and in the eyes of the reviewing court) was *exactly* what Congress prohibited in CERCLA Section 122(e)(3)(C).

EPA's actions in making the Batson Report public were arbitrary and capricious. They smack of a malicious attempt to deprive OxyChem of due process. OxyChem has a right under CERCLA to have the Court decide the fairness of the proposed settlement *without* considering the inadmissible report of a "non-binding allocation of responsibility" that Congress deprived the Court of jurisdiction to consider.

EPA's wrongful actions sought to foreclose OxyChem's unfettered exercise of its constitutional and statutory rights to a fair, transparent, evidence-based *judicial* allocation of responsibility that conforms to the requirements of due process. EPA's arbitrary and capricious actions in making the Batson Report public and in presenting it to the Court in support of the proposed settlement are an egregious violation of OxyChem's rights and a gross excess of EPA's authority. The United States should reject the settlement because EPA's actions have fundamentally tainted the process by which EPA seeks the settlement's approval. *See* Parts II, III, IV & V, *infra*.

EPA's actions in persisting with this settlement have also prompted significant public concern. The settlement creates enormous financial risks for the Passaic Valley Sewerage Commission, on which will fall every bit of the settling parties' responsibility if their payment proves insufficient. *See* Part VI(A), *infra*. The proposed settlement is also contrary to EPA's environmental justice mandates. Rather than making polluters pay, it will make the public pay, because OxyChem is *not* liable to pay for the costs to clean up hazardous substances that the settling parties disposed of through the PVSC sewer system. *See* Part VI(A)(2), *infra*.

The settlement is understandably opposed by many in the over-burdened communities around the Passaic River, all of whom have been left to wonder why EPA breached its promise to make polluters pay and is instead allowing them to write a check and walk away from their responsibility for a $1.82 billion cleanup. *See* Part VI(A)(2)-(3), *infra*.

EPA's actions to exceed its authority are of independent concern because an agency that fails to abide the limits of its authority acts lawlessly. And here, EPA's actions to reward with releases those who have refused to cooperate while punishing with excessive and unsupported liability the one party that *has* cooperated—OxyChem—will send a strong message to other parties, at other sites, that EPA cannot be trusted to respect contribution rights, a message that will deter the voluntary cleanups those rights were meant to incentivize. *See* Part VI(A)(3), *infra*.

L. The United States Should Reject the Settlement Because the Administrative Record Contains No Basis on Which the Court Could Lawfully Enter the Proposed Decree

The United States is required to seek court approval for a settlement in which it seeks to bar the claims of other parties to pursue contribution. 42 U.S.C. § 9622(e).

In evaluating a proposed settlement, the Court is prohibited by law from considering any report from a non-binding allocation of responsibility. *See* CERCLA Section 122(e) and ADR

Act Section 573. Once stripped of that inadmissible matter, there is no basis on which the Court could conclude the settlement meets the standards required to enter the proposed consent decree.

Even if the Court could consider the Batson Report, and it cannot, the Batson Report is the sole basis EPA presents for its approval of the settlement. It is not sufficient to meet the standards required to allow the Court to conclude the settlement is reasonable, fair, or conforms to due process.

There is no possibility the settlement could or would be approved by the Court on this record. *See* Part IX, *infra.*

For all these reasons, and those stated in detail below, OxyChem respectfully submits that EPA's actions in respect to the settlement are and have been arbitrary, capricious, and exceed EPA's authority. They have deprived OxyChem of due process and violated Articles I and III of the Constitution.

The United States should decline to accept this settlement. It would be a waste of taxpayer resources—over and above the $4.5 million in taxpayer funding that EPA has already spent on this unauthorized process and deeply flawed result—to pursue it further.

II. The Proposed Settlement Improperly Attempts To Invade and Eviscerate the Judicial Allocation That CERCLA Requires

The proposed consent decree improperly seeks to evade and undermine the judicial allocation of liability that CERCLA mandates, replacing it with EPA's *sui generis,* seriously flawed, and *ultra vires* allocation process.

By its terms, the proposed decree effectively strips OxyChem of its statutory right to have a federal district court determine the proper allocation of CERCLA liability. EPA first acts arbitrarily and capriciously by relying on the Batson Report to assign shares of responsibility to all the potentially liable parties (whether or not they consented to that process). On that unlawful and unauthorized foundation, EPA then constructed a settlement with 85 liable parties to generate funding for EPA's own oversight costs—requiring no cleanup work in the process—all for what EPA admits is a "minor" fraction of the total cleanup costs. Not content to stop there, EPA again exceeds its authority by urging the Court to extinguish the right of any other party to seek contribution from those settling defendants, including for costs that private parties alone have incurred and that the United States has not (and never will) incur.

All of this is profoundly unfair and unreasonable. It is squarely contrary to CERCLA's text and its goals. And it is—without question—arbitrary and capricious.