

TO: City of Somerville City Council
CC: Francis X. Wright, Jr., Esq.
FROM: Gareth I. Orsmond
DATE: September 21, 2020
RE: Conway Park – Administrative Settlement Agreement and Order on Consent for Removal Action, CERCLA Docket No. 01-2020-0054 (the “AOC”)

Legal Background

Following negotiations, the City of Somerville (the “City”) and the U.S. Environmental Protection Agency (“EPA”) entered into the above-captioned AOC. The U.S. Department of Justice reviewed and approved the AOC. The AOC is effective as of August 26, 2020.

The AOC governs aspects of the Conway Park cleanup. Ordinarily, Conway Park would be regulated under state hazardous waste law¹ and, due to the presence of polychlorinated biphenyls (PCBs), a federal act known as TSCA.² Because the City has entered into the AOC, however, certain activities will be regulated under CERCLA as well.³ CERCLA authorizes EPA to use federal funds for time-critical cleanup actions where conditions present an imminent and substantial endangerment. EPA can only access these funds if it enters into an AOC. The AOC settles some claims that EPA has against the City, but it is not a comprehensive settlement of all possible claims. For claims not settled by the AOC, the City has a liability defense because it owns Conway Park as a result of a tax taking completed in 1943.⁴ It may have other defenses as well. The AOC acknowledges that the City does not admit liability or waive its defenses. ¶4.⁵

The AOC is a prerequisite for EPA performing work with an estimated value of \$3 million without recovering these costs from the City (the “EPA Lead Work”).⁶ If the EPA were to do all of the work contemplated by the AOC on its own, EPA’s estimated cost would be \$7.8 million, which it could then seek to recover from the City. The EPA Lead Work includes excavating, transporting, disposing of, and backfilling certain areas where PCB contamination is high. The EPA Lead work is complete when the site is considered clean at 18” below the surface, which would allow the City to fill the site and install artificial turf or take other action to complete the cleanup. The AOC does not prohibit the City from excavating another 18” to a level of 36” below the surface if it chooses to install grass instead.

¹ Massachusetts General Laws Chapter 21E and the Massachusetts Contingency Plan, 310 CMR 40.0000.

² The Toxic Substances Control Act, 15 U.S.C. §2601, *et seq.*

³ The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601, *et seq.*

⁴ CERCLA §§ 101(20)(D) and 101(35)(A) exempt a municipality from liability arising from the involuntarily acquisition of property, which includes takings for failure to pay taxes. However, a municipality may compromise its defense if it contributes to or exacerbates the contamination after taking title.

⁵ Citations such as “¶4” refer to the numbered paragraph of the AOC.

⁶ To perform work valued at over \$2 million, EPA must determine that there is an immediate risk to public health. EPA made this determination.

Major Terms and Conditions

The AOC adheres to an EPA-published form. Much of the language is not negotiable. We were able to negotiate some key areas, such as stipulated penalties, indemnification obligations, and insurance requirements. The AOC's material terms include the following:

- The City is responsible for certain lead work (the "City Work"). The City Work includes site preparation and control (*e.g.*, creating access roads, site security). It also includes excavating, transporting, and disposing of contaminated soils and backfilling areas where these activities are not completed by EPA as EPA Lead Work. ¶29. The City must retain contractors to perform the City Work, and EPA may disapprove a contractor. ¶25.
- The City must prepare various plans – which the AOC calls "Deliverables" – for EPA approval. ¶¶31-37. The Deliverables include a removal work plan describing and setting a schedule for the City Work. October 5, 2020 is the due date for the work plan and some other Deliverables.
- The City must provide access for EPA and its contractors and must not use the site in a manner that poses a risk to the public.
- The City must provide EPA and the Commonwealth with reports and other information relating to site activities upon request, excluding privileged or protected information.
- The City must pay EPA's "future response costs." These are largely oversight costs relating to the City Work or subsequent site closure activities. EPA states that its oversight costs will be modest. If the City disputes a cost, it can submit the matter for dispute resolution by a higher branch of EPA.
- In certain instances, the City is excused from performance by force majeure events beyond its control. EPA retains some discretion to determine what constitutes force majeure.
- If the City fails to pay future response action costs or submit a Deliverable on time, the City must pay EPA a stipulated penalty of \$250/day for the first 14 days of delinquency, \$500/day for days 15 through 30, and \$800/day from day 31 on.
- If the City fails to complete the City Work and EPA takes over the cleanup, the City must pay EPA a stipulated penalty of \$750,000. A work takeover only occurs if the City stops doing the City Work, is seriously or repeatedly deficient or late in performing the City Work, or is implementing the City Work in a manner that endangers human health or the environment. The City has a 30-day cure period before EPA can take over the City Work and claim the penalty.
- The City may submit EPA's stipulated penalty assessments for dispute resolution by a higher branch of EPA.
- EPA covenants not to sue the City for the City Work, for future response action costs, and for the EPA Lead Work up to \$3 million. Aside from these matters, EPA reserves its rights against the City, but the City reserves its defenses.
- The City covenants not to sue EPA or its contractors with respect to the City Work, the EPA Lead Work, future response costs, and the AOC, subject to limited exceptions.

- The City must indemnify and hold harmless EPA and its contractors and representatives for claims caused by negligent or wrongful acts or omissions by the City or persons acting on its behalf, but this obligation is subject to the protections granted municipalities by the Massachusetts Tort Claims Act and other state laws.
- The City must require that its contractors and subcontractors meet minimum insurance requirements, but the City itself can remain self-insured and does not need to meet these same requirements.