

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

TOWN OF LEE, MASSACHUSETTS,

Plaintiff,

v.

MONSANTO CO., et al.

Defendants.

No. 3:24-CV-30050-MGM

**PHARMACIA’S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS**

This is a case of apparent buyer’s remorse. After years of hard-fought administrative rulemaking and litigation, Plaintiff Town of Lee (“the Town”) committed to an agreement with EPA and others establishing a corrective action plan for the remediation of PCBs discharged by General Electric (“GE”) from its Pittsfield facility. Under that plan, the Town was paid \$25 million for, among other things, its agreement that the PCB waste disposal facility contemplated by the plan would be located in Lee. In connection with that agreement, the Town joined other towns in asking the First Circuit to confirm EPA’s plan, which expressly included Lee as the location of the waste disposal facility. *Housatonic River Initiative v. EPA*, 75 F.4th 248 (1st Cir. 2023).

The Town apparently no longer likes the deal it made: it now seeks compensatory damages from GE and Defendants Monsanto Company, Solutia Inc., and Pharmacia LLC (collectively “Pharmacia”) for GE’s use of the disposal facility in compliance with the plan.¹ But the Town is

¹ Am. Compl. ¶ 183 (“The Town and its resident [sic] will suffer damages after GE complies with the 2020 CERCLA Order.”); ¶ 184 (“The Town and its residents will suffer damages as [PCBS are dredged] and deposited within the . . . Town of Lee in a dump”); ¶ 185 (“The presence of this massive PCB dump in Lee will cause severe damages to the Town and its residents for years

precluded from reneging on its commitment to EPA. Likewise it cannot, as a workaround, seek to impose civil liability on Pharmacia for the acts of GE and others made under the agreed-upon corrective action plan. The Court should dismiss the Town's case against Pharmacia.

* * *

The operative Complaint² “is confusing and fails to satisfactorily articulate what” Pharmacia “is alleged to have done that would expose it to liability.” *Pankey v. Berryhill*, 2019 WL 7562375, at *2 (D. Mass. Feb. 19, 2019), *report and recommendation adopted by* 2019 WL 7562366 (D. Mass. Mar. 21, 2019). Its foundation is a fictional tort—“intentional infliction of harm”—which the Town says supports claims for civil and criminal conspiracy. Neither is adequately pleaded under Rule 8. A civil conspiracy requires an underlying tort, but Massachusetts law does not recognize a tort for “intentional infliction of harm.” And the Town lacks authority to bring criminal charges in the context of this civil action.

But even if the Town were to plead a cause of action recognized by Massachusetts law, its case against Pharmacia still would fail as a matter of law, on several grounds. ***First***, any claim against Pharmacia is ***time barred***. The only Pharmacia conduct that is alleged in the Complaint is sales of PCBs to GE and others before 1977. The Town asserts the discovery rule but fails to allege any basis to toll the applicable three-year statute of limitations. Indeed, the Town has acknowledged, in a brief to the First Circuit filed jointly with other towns (“the Municipal Committee”) that it “has for almost ten years participated in discussion and litigation” regarding

to come.”).

² The Town served Monsanto on June 12, 2024, with a “First Amended Complaint” that was previously filed on the docket as Doc. 11-2, attached as an exhibit to a document styled as a “Notification to the Court” that was filed on the docket as a “Motion for Summary Judgment.” This “Amended Complaint” (Doc. 11-2) is the only complaint that has been served on Pharmacia, so Pharmacia deems it the operative complaint and accordingly will refer to it as “the Complaint.”

PCBs. Br. of Housatonic Rest of River Municipal Committee, 2023 WL 2473563, at *6 (Feb. 24, 2023) (hereafter “Towns’ Brief”). The Town knew of its potential claims against Pharmacia for at least a decade before filing this suit. **Second**, the Town’s claims are *preempted* by CERCLA and RCRA. The Town concedes that “CERCLA preempts any action that the Town of Lee might wish to take to impede in any way construction of the dump or the partial cleanup.” Doc. 11-1, at 3. There is no daylight between that concession and the Town’s claims against Pharmacia—the Complaint is predicated on action taken by GE and others, all in connection with the EPA-administered corrective action plan. **Third**, the Town is *estopped* from challenging the terms of the Settlement Agreement that it freely entered into with GE and EPA. Notably, Pharmacia had no involvement in that Settlement Agreement, but the Town blames Pharmacia for its terms. The Town participated in the administrative processes and agreed to the plan, including the location of the waste disposal facility, so it cannot now challenge the plan through different legal means.

FACTUAL BACKGROUND

On a Rule 12(b)(6) motion, the Court takes as true any well-pleaded allegations that conform to Rule 8(a). The Court may also consider “documents pertinent to the action and/or referenced in the complaint,” *In re Polaroid Corp. Sec. Litig.*, 134 F. Supp. 2d 176, 182 (D. Mass. 2001), and “matters fairly incorporated within [the pleadings] and matters susceptible to judicial notice,” *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003).

I. Pharmacia manufactured and sold PCBs until 1977.

The Town alleges that Pharmacia manufactured and distributed PCBs from the 1930s until the 1970s. Am. Compl. (Doc. 11-2) ¶ 2. GE purchased PCBs from Pharmacia to use as insulators in the manufacture of electrical transformers that GE serviced in Pittsfield, Massachusetts. *Id.* ¶¶ 2, 87. When the PCBs lost insulation, GE buried them or dumped them in the Housatonic River, which runs through Lee and other towns near Pittsfield. *Id.* ¶ 89.

The Complaint acknowledges that as Pharmacia learned of the presence of PCBs in the environment, it acted. In 1970, Pharmacia suspended production of PCBs for certain uses. *Id.* ¶ 112. According to the Complaint, Pharmacia notified GE of the “care [that] is required in handling, possession, use and disposition” of PCBs, and GE agreed to indemnify Pharmacia in exchange for the right to continue to purchase PCBs. *Id.* ¶ 178; Pl.’s Exh. 20. Pharmacia voluntarily ceased the manufacture and sale of PCBs for all uses in 1977, before the U.S. Government banned the manufacture and sale of PCBs in 1979. Am. Compl. ¶¶ 12, 57, 94.

II. EPA has been heavily involved in remedial action at GE’s Pittsfield facility, and other affected areas, from 2000-present.

In 1999, Massachusetts and Connecticut (later joined by the federal government) filed CERCLA complaints against GE for damages and cleanup associated with the release of PCBs from the Pittsfield facility. *Id.* ¶ 64. GE ultimately entered into a consent decree with EPA, Massachusetts, Connecticut, and others affected by PCBs in the environment. *Id.* ¶ 64; *Housatonic River Initiative v. EPA*, 75 F.4th 248, 257 (1st Cir. 2023). In that Consent Decree, approved in 2000, “GE committed to clean-up the Rest of River based upon the remedy selected by EPA through the process outlined in the Decree.” Am. Compl. ¶ 66.³

The Consent Decree required GE to conduct remediation of the river and created a process for selecting a cleanup plan that best met several criteria. *Housatonic River Initiative*, 75 F.4th at 257–58. “[Sixteen] years of study and litigation” followed, “regarding whether and to what extent PCBs could be removed from the Housatonic River.” Am. Compl. ¶¶ 65–68; *Housatonic River Initiative*, 75 F.4th at 258. EPA issued a RCRA permit in 2016, which was appealed by both GE and various community groups, such as the Municipal Committee, which included the Town. *Id.*

³ “Rest of River” is a term the First Circuit used to mean “[t]he portion of the river downstream” from where separate branches met north of Pittsfield. *Housatonic River Initiative*, 75 F.4th at 257.

¶ 69; *Housatonic River Initiative*, 75 F.4th at 260. The Environmental Appeal Board (EAB) remanded the permit to EPA on the grounds GE challenged—namely, that the waste disposal facility that EPA required should not be required to be built off-site. *Id.*; *In re Gen. Elec. Co.*, 17 E.A.D. 434 (EAB 2018). On remand, EPA issued a new permit that called for the waste disposal facility to be built onsite, in the Town of Lee. *Id.* ¶ 71.

More litigation followed, until GE, EPA, and various towns (including the Town of Lee) reached a settlement. The towns agreed that the waste disposal facility would be built in Lee, and GE would pay for the construction of the facility and compensate the towns. Of the \$62 million total payout under the Settlement Agreement, the Town of Lee received \$25 million, more than several other communities. *Id.* ¶¶ 73, 80; Pl.’s Exh. 16; Pl.’s Exh. 17. The Town acknowledges that it received money in exchange for not appealing the Settlement Agreement. Am. Compl. ¶ 73. The Town signed the Settlement Agreement in February 2020, Pl.’s Exh. 16, and EPA incorporated “all major terms of the Settlement” in its December 2020 final order. *Housatonic River Initiative*, 75 F.4th at 263; Pl.’s Exh. 3.

When a group petitioned the First Circuit to review the final EPA permit, the towns that were parties to the Settlement Agreement, including the Town of Lee, intervened to “strongly support[]” EPA’s final permit.⁴ This “Municipal Committee” asked the First Circuit to confirm the plan, including the decision to locate the “onsite” waste disposal facility in Lee. In other words, the Town joined a group of communities in formally defending EPA’s plan to construct the waste disposal facility for which the Town now seeks damages from Pharmacia. Towns’ Br. at *4. The First Circuit confirmed the EPA permit. *Housatonic River Initiative*, 75 F.4th at 285.

⁴ “The Housatonic Rest of River Municipal Committee, which acts for the five towns in western Massachusetts most directly affected by the cleanup, strongly supports this cleanup. These five towns are Great Barrington, Lee, Lenox, Sheffield, and Stockbridge.” Towns’ Br. at *1.

LEGAL STANDARD

A plaintiff must allege facts sufficient “to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Under Rule 8, the complaint “must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action.” *Id.* (quoting 5 Wright & Miller, *Fed. Prac. & Proc.* § 1216, at 235–36 (3d ed. 2004) (internal quotation marks omitted)). Bare allegations, legal conclusions, or a “formulaic recitation of a cause of action’s elements will not do,” *id.* at 556, and a court is “not bound to accept as true a legal conclusion couched as a factual allegation,” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Although a complaint “does not need detailed factual allegations, a plaintiff’s obligations to provide the grounds of [their] entitlement to relief requires more than labels and conclusions.” *Twombly*, 550 U.S. at 556 (internal quotation marks omitted).

ARGUMENT

I. The Town’s Complaint fails to state a claim under Rule 8.

The Town pleads two claims—criminal and civil conspiracy—on the basis of alleged “intentional infliction of harm.” Neither claim is adequately pleaded, and “intentional infliction of harm” is not a cognizable claim under Massachusetts law.

Criminal conspiracy. It is well-established that a plaintiff may not assert a criminal cause of action in a civil suit because it would “abolish the historic difference between civil and criminal causes relating to the burden of proof” and other necessary criminal procedures. *Kotteakos v. United States*, 328 U.S. 750, 763 (1946); *United States v. Spock*, 416 F.2d 165, 180 (1st Cir. 1969). This is not a criminal proceeding: There’s been no finding of probable cause, no warrant, no grand jury. *See, e.g.*, Mass. R. Crim. P. 3(b) (requiring indictment for criminal charge). The criminal conspiracy claim cannot be maintained on these grounds; further, the additional grounds that doom the civil conspiracy claim, discussed below, are also fatal to the criminal conspiracy claim.

Civil conspiracy. The Town’s claim for civil conspiracy likewise fails because the Town has not pleaded an underlying tort. “Under Massachusetts law, two types of civil conspiracies exist.” *Grant v. John Hancock Mut. Life Ins. Co.*, 183 F. Supp. 2d 344, 362 (D. Mass. 2002). The theory here is “akin to a theory of common law joint liability in tort,” *Grant*, 183 F. Supp. 2d at 362 (internal quotation omitted), and “requires an underlying tort,” *Taylor v. Am. Chemistry Council*, 576 F.3d 16, 35 (1st Cir. 2009).

The Town’s civil-conspiracy claim fails on its face because it is based on an alleged “intentional infliction of harm” (Am. Compl. ¶¶ 1, 9, 42, 57, 170), which is not a cognizable tort under Massachusetts law. No decision from any Massachusetts federal or state court recognizes “intentional infliction of harm” as an independent tort, and there is no such cause of action listed in the Massachusetts Superior Court’s model jury instructions for civil torts.⁵ The Town cites no precedent for such a tort’s existence, much less its elements. So, the Court should dismiss the civil-conspiracy claim. *Beck v. Prupis*, 529 U.S. 494, 502 (2000) (“Conspiracy fails as the basis for the imposition of civil liability absent the actual commission of some independently recognized tort.” (cleaned up)); *Snyder v. Collura*, 812 F.3d 46, 53 (1st Cir. 2016); *Sundaramurthy v. Abbott Vascular, Inc.*, 594 F. Supp. 3d 117, 124 (D. Mass. 2022).

Separately, the Complaint fails to state a claim under Rule 8 because it lacks specifics regarding the alleged “intentional infliction of harm” or its elements. *Twombly*, 550 U.S. at 555–56. A “complaint must state identifiable causes of action and allege facts that satisfy the elements of those causes of action, alleging specific acts engaged in by the defendant what would support plaintiff’s claim.” *Sreedhar v. Google LLC*, 2022 WL 2532967, at *2 (D. Mass. July 7, 2022). The Town’s Complaint fails on every score. *Zaragoza v. Ocean Spray Cranberries, Inc.*, 2020

⁵ Available at <https://www.mass.gov/guides/superior-court-model-jury-instructions>.

WL 13824756, at *7 (D. Mass. Mar. 11, 2020) (holding that complaint does not meet standard when “facts, to the extent they are alleged, are spread throughout numerous documents,” and there “is no effort to plead the elements of different causes of action, or even to identify which causes of action are being pursued.”); *U.S. ex rel. Deering v. Physiotherapy Assocs., Inc.*, 601 F. Supp. 2d 368, 378 (D. Mass. 2009). The Complaint is anything but specific or element-based. Across its 195 numbered paragraphs, which reference numerous other documents, the Complaint offers only a scattershot of conclusory statements that lack any connection to an identifiable cause of action. That is inconsistent with the requirements of Rule 8.

II. The Town’s claim against Pharmacia is time-barred in any event.

Even if the Town had adequately pleaded a cognizable cause of action, this case still would be time-barred. The Town alleges that Pharmacia produced PCBs and sold them to GE *decades ago*—its alleged conduct ceased by 1977. The Town argues that the statute of limitations was tolled. Am. Compl. ¶ 170; Doc. 11-1, at 11–12. But the Town cannot credibly argue that it did not know, or could not have known, the subject of its complaint—*i.e.*, the presence and release of PCBs by GE in its community, and the resulting alleged harm—for many years before it filed suit.

A. The three-year statute of limitations bars the Town’s claim.

Municipalities are subject to statutes of limitation. *City of New Bedford v. Lloyd Inv. Assocs., Inc.*, 292 N.E.2d 688, 691 (Mass. 1973). Massachusetts sets a three-year limitations period for both personal injury and property damage, the types of injuries alleged in the Complaint. *See* Mass. Gen. Laws ch. 260 §§ 2A, 4.

The Town filed this case on March 14, 2024. Pharmacia’s alleged conduct stopped *more than 40 years before* then. The Town alleges that the manufacture and sale of PCBs were banned in 1979 (Am. Compl. ¶ 57), and Pharmacia had already stopped selling PCBs two years earlier (*id.* ¶ 94). The Town does not allege that Pharmacia did *anything* later than 1979, nor could it.

B. The discovery rule does not toll the statute of limitations in this case.

The Town argues that its claims against Pharmacia are timely because it did not *discover* its alleged injuries until recently. Both Massachusetts law and CERCLA provide a discovery rule that turns on a plaintiff's actual or constructive knowledge of harm and the cause of that harm. *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014); *Lareau v. Page*, 39 F.3d 384, 388 (1st Cir. 1994). To obtain its benefit, a plaintiff must prove both lack of actual knowledge of the basis for a claim and that the lack of knowledge was objectively reasonable. *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 7 (1st Cir. 2010).

Here, the Town seeks recovery for damage caused by the disposal of PCBs in the waste disposal facility constructed within its town limits. Notably, that activity occurred decades after Pharmacia ceased manufacturing PCBs and Pharmacia had no role in the planning related to the waste disposal facility. But decades before filing this suit, the Town had actual knowledge of the presence of PCBs in its community and of the potential impact—which is evident from the public record and the allegations in the Complaint—and the Town *for years* actively litigated the proposed location of the disposal facility.

1. As an initial matter, the Town asserts in its Complaint that “[t]he toxicity of [PCBs] to humans and the environment became known world-wide by the 1960s.” Am. Compl. ¶ 5. For more than a decade, the Town has known of PCBs in its community—indeed, it has *actively litigated* the issue during that time. Towns’ Br. at *6.

2. Just looking at the Complaint, the Town has long known—for more than three years before it filed suit—that GE used PCBs in its Pittsfield plant; that GE released PCBs from the plant into the Housatonic River; and that PCBs in the environment were a concern for human health and the environment. *E.g.*, Am. Compl. ¶¶ 5, 14, 33, 61–67, 73, 100, 117, 161.

3. Then there's the Consent Decree, which GE entered with Massachusetts, EPA, and others in 2000 to address PCB effects in the Housatonic River. *Housatonic River Initiative*, 75 F.4th at 257; Am. Compl. ¶ 64; Pl.'s Exh. 26. The Consent Decree capped off a highly visible 30-year remedial process that included extensive public participation, including by and in the Town. E.g., Exh. 8 to Mem. in Support of Mot. to Enter Consent Decree, *United States v. Gen. Elec. Co.*, No. 3:99-cv-30225 (D. Mass.).⁶ The Consent Decree "created a process for selecting a remedy for the Rest of River," *i.e.*, in areas south of Pittsfield. *Housatonic River Initiative*, 75 F.4th at 257.

4. Further remedial action came in October 2016, when EPA issued the RCRA Corrective Action Permit Modification following another period of public notice and comment. *Housatonic River Initiative*, 75 F.4th at 258–60; Pl.'s Exh. 38; Am. Compl. ¶ 68. There was "intense public debate in Berkshire County" regarding "onsite disposal," *i.e.*, the thing that the Town now challenges. Towns' Br. at *12. The Town actively participated in the RCRA Permit administrative process, including in the EAB appeal as a member of the Municipal Committee, *see Housatonic River Initiative*, 75 F.4th at 260, and the Permit specifically references the Town multiple times in its study summaries. *See, e.g.*, Pl.'s Exh. 1, Fig. 2 & Tbl. 2.

6. In February 2020, the Town signed the Settlement Agreement with GE and others, which called for specific measures to remediate PCB contamination and to provide for an "onsite" waste disposal facility in the Town of Lee. Am. Compl. ¶ 73; Pl.'s Exh. 16. In the Settlement Agreement, GE committed "to repair damage to roads caused by GE's cleanup-related truck

⁶ A court may take judicial notice of its own records, *Lopes v. Riendeau*, 177 F. Supp. 3d 634, 666–67 (D. Mass. 2016), and of "official public records" of public agencies, *O'Hara v. Diageo-Guinness, USA, Inc.*, 306 F. Supp. 3d 441, 457 (D. Mass. 2018). Because of the Consent Decree's age, it appears that Exhibit 8 is not accessible on PACER. The document is available on EPA's website at <https://semspub.epa.gov/src/document/01/10672>.

traffic” (Towns’ Br. at *17), an issue that takes centerstage in the Town’s Complaint (Am. Compl. ¶¶ 27, 91, 142, 155, 184). And GE agreed to pay the Municipal Committee millions of dollars—including \$25 million to the Town—“to resolve disputes regarding EPA’s October 2016 RCRA Corrective Action Permit Modification.” Pl.’s Exh. 16; Am. Compl. ¶ 21. The Municipal Committee has described the Settlement as a settlement of “the Towns’ claims for socioeconomic impacts associated with the Housatonic site,” which “the Towns have pursued for almost a decade” (as of 2023), and “to account for disruption to the towns from a cleanup process that will take over a decade to complete.” Towns’ Br. at *2, 17. In July 2020, EPA issued a draft revised permit that incorporated the terms of the Settlement Agreement, which also had a period of public notice and comment. *Housatonic River Initiative*, 75 F.4th at 262. EPA issued its final permit in December 2020 incorporating “all major terms of the Settlement,” including the Town of Lee as the location of the waste disposal facility. *Id.* at 263; Am. Compl. ¶¶ 73–78.

* * *

All of these events—any of which would have given the Town notice of the harms alleged in this lawsuit—occurred more than three years before the suit commenced. They were public events that provided the Town notice of the basis (and the potential defendants) for any claims regarding the location and details surrounding GE’s waste disposal facility, which form the basis of the Complaint. The Town was even a party to some of these actions. Towns’ Br. at *6. From the face of the Complaint, the Town knew (or objectively should have known) of the alleged harms more than three years before filing this action.

C. Any indemnity agreement between Pharmacia and GE is irrelevant to the discovery rule.

The Town argues that an indemnity agreement between GE and Pharmacia from the 1970s tolls the statute of limitations (Am. Compl. ¶¶ 36, 136, 170, 178), but it never explains how or

why. The Town contends that it learned of the agreement in December 2023 (*id.* ¶ 169) and that it “made the Town of Lee aware for the first time that [Pharmacia] was jointly liable with GE for PCB related damages” (*id.* ¶ 36).

That argument is not credible. The Town previously filed a similar lawsuit against Pharmacia on March 30, 2023—*before* it says it learned of the indemnity agreement. *See* Compl., *Town of Lee v. Monsanto Co., et al.*, No. 3:23-cv-30035-KAR (D. Mass. Mar. 30, 2023). That lawsuit (later dismissed) was, like this one, based entirely on PCB contamination stemming from GE’s Pittsfield facility. So, even before learning of the indemnity agreement, the Town (represented by the same counsel) had enough information to assert the same conduct underlying its tort theory. Adding a “conspiracy” gloss, as already explained, cannot stand alone to provide a cause of action. *Beck*, 529 U.S. at 502. Further, the Town pleads no facts that tie the “discovery” of the indemnity agreement to tolling the statute of limitations. The discovery rule requires the Town to show that it reasonably could not have known that Pharmacia and GE had a business relationship that eventually led to the administrative cleanup plan of the PCB contamination, but those missing allegations doom the discovery rule. *Shea v. Ditech Fin. LLC*, 255 F. Supp. 3d 273, 278–79 (D. Mass. 2017). The Complaint offers no explanation, nor could it, as to how the indemnity agreement did *anything* to keep the Town from knowing that it had a potential claim against Pharmacia. The entire substance of the Complaint evidences the Town’s knowledge that Pharmacia manufactured PCBs that GE used. How Pharmacia and GE chose to allocate liability between themselves (in a manner similar to business agreements that govern multitudes of transactions) has no logical connection to any of the alleged harm in the Complaint or the Town’s alleged discovery of that harm.

III. Any claim based on the Consent Decree—and the resulting RCRA Permit, Settlement Agreement, and administrative actions—is preempted by federal law.

The Complaint recounts certain conduct related to EPA’s Consent Decree, the 2016 RCRA Permit, the Settlement Agreement, and resulting administrative actions. Am. Compl. ¶¶ 19–30, 71–83, 142–44, 154–57, 163, 176, 182–85.⁷ Although it’s unclear how these recent actions are related to a conspiracy or “intentional infliction of harm,” the allegations irreconcilably conflict with federal law, preempting any claims based on them.

Putting aside that Pharmacia did not participate in the EPA Consent Decree, its negotiation, or its implementation, the conduct about which Town complains—*i.e.*, GE’s establishment of a waste disposal facility in the Town—is required by federal administrative law by virtue of the negotiated Consent Decree to which Town is a part. Therefore, it cannot be the basis for state-law liability.⁸ *Mut. Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472, 490 (2013) (“Where state law imposes a duty to take such remedial measures, it actually conflicts with federal law by making it impossible for a private party to comply with both state and federal requirements.” (cleaned up)). The current corrective action plan was determined by EPA to be the best course of action after more than a decade of study, input from stakeholders and the public (including the Town), and careful consideration. Indeed, Congress requires EPA to undertake that thorough process through RCRA and CERCLA. 42 U.S.C. § 6901 *et seq.* By filing this suit, the Town is attempting to

⁷ For example, the Town complains that it has “suffered and will continue to suffer damages from their inability to use the Housatonic Rive [sic] *as specified by EPA.*” *Id.* ¶ 182; *see also id.* ¶ 27 (“In the forthcoming 13 years, two billion pounds of PCB contaminated muds and soil will be dredged from the River by GE—*as ordered by EPA.*”); *id.* ¶ 183 (“The Town and its resident [sic] will suffer damages *after GE complies with the 2020 CERCLA Order.*”). (Emphases added.)

⁸ Pharmacia’s lack of participation under CERCLA indicates that EPA never considered Pharmacia a potentially responsible party under Section 107(a) of CERCLA for GE’s release of PCBs into the Housatonic River. 42 U.S.C. § 9607(a).

impose civil liability for the very acts that EPA authorized in its best judgment. That directly conflicts with the procedures that Congress enacted into law.

It is true that CERCLA, on its own, does not expressly preempt state hazardous waste regulation. *Town of Acton v. W.R. Grace & Co. Conn., Techs., Inc.*, 2014 WL 7721850, at *9 (D. Mass. Sept. 22, 2014); 42 U.S.C. § 9614(a). But state-law claims, like this suit, can still be conflict-preempted by CERCLA because conflict preemption “reflects the idea that congressional intent also can be deduced from circumstances such as inconsistency or impossibility.” *Mass. Ass’n of Health Maintenance Orgs. v. Ruthardt*, 194 F.3d 176, 179 (1st Cir. 1999); *Town of Halfmoon v. Gen. Elec. Co.*, 105 F. Supp. 3d 202, 217–18 (N.D.N.Y. 2015). The Town’s claims against Pharmacia here conflict with CERCLA in several ways.

1. CERCLA prohibits the double recovery the Town seeks. “Any person who receives compensation for removal costs or damages or claims pursuant to this chapter *shall be precluded* from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law.” 42 U.S.C. § 9614(b) (emphasis added). The Town already received \$25 million in connection with its agreement to accept an onsite waste disposal facility in the Town. It cannot now argue that the compensatory damages it seeks here are not “the same removal costs or damages.” By pursuing civil damages for the same “socioeconomic impacts” for which it already has been compensated, the Town seeks double recovery that CERCLA forbids.

2. CERCLA also prohibits responsible parties from taking “any remedial action” not included in a Consent Decree. 42 U.S.C. § 9622(e)(6). The Town, as a party to the Settlement Agreement, falls “within the broad definitions of” potentially responsible parties under CERCLA. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352 (2020); 42 U.S.C. § 107(a)(3). CERCLA thus preempts the Town from seeking compensation for action that EPA requires. *Town of Acton*, 2014 WL 7721850, at *9 (“[L]ocal laws which impose more stringent restrictions than those

imposed by EPA under a selected CERCLA remedial plan are preempted because they pose an obstacle to accomplishment of CERCLA's objectives.” (collecting cases)).

3. The Town's second-guessing of the location and operation of the waste disposal site—remedial action mandated by the RCRA permit—is further preempted because RCRA provides a single means to challenge violations of RCRA permits. 42 U.S.C. § 6972(a)(1). The Town's suit and preferred remedy would essentially alter the terms of the Settlement Agreement that were incorporated into EPA's 2020 RCRA Permit, which underwent public notice-and-comment and approval by EPA. So, this suit “conflicts with federal law, and the provisions of the RCRA govern.” *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1270 (11th Cir. 2000).

The Town argues that its suit is not preempted because it is seeking money damages, not modification of the remediation plan (*see* Doc. 11-1, at 3), but the Tenth Circuit expressly rejected that argument in *New Mexico v. General Electric Co.*, 467 F.3d 1223 (10th Cir. 2006). There, New Mexico sought compensatory damages against GE before it had completed compliance with EPA's remedial plan. “Because the State's lawsuit calls into question the EPA's remedial response plan, it is related to the goals of the cleanup and thus constitutes a ‘challenge’ to the cleanup under § 9613(h).” *Id.* at 1249. The Tenth Circuit reasoned that “[a]ccepting the State's argument might place GE . . . in the unenviable position of being held liable for monetary damages because they are complying with an EPA-ordered remedy which [they] have no power to alter without prior EPA approval.” *Id.* at 1250; *Town of Halfmoon*, 105 F. Supp. 3d at 217–18 (“It is impossible for GE to comply with the requirements of the Consent Decree without subjecting itself to liability under state statutory and common law.”). Just so here. The Town wants compensatory relief for the construction and operation of the waste disposal facility that the Town agreed in the Settlement Agreement to host. Courts routinely hold that similar claims, based on virtually identical arguments, are preempted. *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1454–55

(6th Cir. 1991) (“[T]he language of CERCLA and the legislative history of that act indicate that once the consent decree is entered by a federal court—giving the decree the force of law—alternative state remedies may not be pursued.”); *Bartlett v. Honeywell Int’l Inc.*, 737 F. App’x 543, 549 (2d Cir. 2018) (rejecting state-law claims that effectively ask a defendant to depart from a consent decree’s terms by “conducting additional or different remedial action than that mandated by CERCLA and the consent decree”).⁹

4. Finally, the Town’s pursuit of damages for alleged future harm is preempted. The Town seeks compensation for injuries that it has not even experienced. Am. Compl. ¶¶ 183–84 (“The Town and its resident [sic] *will* suffer damages *after* GE complies with the 2020 CERCLA Order.” (emphasis added)). The Town has a standing issue, *cf. TransUnion LLC v. Ramirez*, 594 U.S. 413, 435 (2021), but CERCLA preempts claims for future damages. CERCLA allows private parties to recover costs incurred in response to contamination, 42 U.S.C. § 9607(a)(4), and only within the framework of the statutory scheme “provides for a declaratory judgment action to establish liability for *future* response costs.” *Stanton Road Assocs. v. Lohrey Enters.*, 984 F.2d 1015, 1021 (9th Cir. 1993) (citing 42 U.S.C. § 9613(g)(2)). Thus, in *Stanton Road*, the Ninth Circuit reversed the district court’s award of monetary damages for future clean-up costs that the plaintiffs had not yet incurred. *Id.* That is this case. The Town’s claims demanding compensatory damages for alleged future harm are preempted by CERCLA.

⁹ See also MANAGING ENV’T RISK § 7:34 (March 2024 Update) (“The issuance of a final decree under CERCLA concerning cleanup of a site constitutes the final determination of the remediation of that site, precluding alternative remedies.”). Relatedly, the First Circuit “places a heavy burden on those who purpose to upset a trial judge’s approval of a consent decree.” *United States v. Cannons Eng’g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990).

IV. The Town is estopped from challenging the Settlement Agreement it agreed to and the administrative proceedings it participated in.

As already explained, the Town was involved in negotiating and litigating the administrative process that culminated in a Settlement Agreement, EPA permit, and the construction of the “onsite” waste disposal facility. The Municipal Committee, which included the Town, told the First Circuit that it “*strongly support[ed]*” EPA’s plan (Towns’ Br. at *1); that “EPA was *fully justified* in embracing onsite disposal” in the Town of Lee (*id.* at *4), and that the negotiated outcome was “*the best outcome* for human health and the environment” (*id.* at *31–32). The Town has long known the “disruption” that the GE remediation would cause and that it would take “over a decade to complete.” *Id.* at *2. The Town wants *additional* compensation, above the compensation it has already received—but basic estoppel principles foreclose that effort.

A. Collateral estoppel bars the Town’s claims.

Defensive collateral estoppel is “when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff previously litigated and lost against another defendant.” *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.4 (1979). The doctrine “prevents re-litigation of an issue” when “(1) the issue sought to be precluded [is] the same as that involved in the prior action; (2) the issue [was] actually litigated; (3) the issue [was] determined by a valid and binding final judgment; and (4) the determination of the issue [was] essential to the judgment.” *O’Connell v. Fed. Ins. Co.*, 484 F. Supp. 2d 223, 225–26 (D. Mass. 2007) (quoting *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994)). EPA administrative actions (*e.g.*, the Consent Decree, the Settlement Agreement) can serve as a “final judgment” for purposes of collateral estoppel. *United States v. Metro. Water Reclamation Dist. of Greater Chi.*, 792 F.3d 821, 828 (7th Cir. 2015); *United States v. Gurley*, 43 F.3d 1188, 1197 (8th Cir. 1994); *St. Bernard Citizens for Env’t Quality, Inc. v. Chalmette Refin., L.L.C.*, 500 F. Supp. 2d 592, 608 (E.D. La. 2007).

The Town is estopped from bringing claims based on conduct that it already raised in a full and fair hearing on the merits. After EPA issued its 2016 Permit, the Town, as part of the Municipal Committee, petitioned the EAB for review, arguing “that the cleanup was not extensive enough.” *Housatonic River Initiative*, 75 F.4th at 260. The EAB granted the requested relief in part and denied review in part. *Id.* (citing *In re Gen. Elec. Co.*, 17 E.A.D. 434 (EAB 2018)). But the EAB remanded based on “finding legal error in part of EPA’s selection of the disposal remedy,” *id.*, an issue that the Town seeks to relitigate throughout the Complaint. This adjudication was fully litigated in the EAB appeal, and the Town is thus estopped from pressing its claims here. There has been no showing to cast doubt on the quality, extensiveness, or fairness of the prior adjudication by either EPA or the EAB—the EAB’s decision should have preclusive effect. So too should the EPA Settlement which, importantly, the Town was a party to and signed in exchange for significant compensation. Am. Compl. ¶ 14; Pl.’s Exh. 16; Pl.’s Exh. 17. Again, the Town knew that the Settlement Agreement included a provision that would locate the “onsite” waste disposal facility within its borders. Towns’ Br. at *1–2.

St. Bernard presents similar facts. There, the court held that an EPA settlement stemming from a consent decree was a “final judgment on the merits” that had preclusive effect on a party to the settlement. 500 F. Supp. 2d at 606–08. That same logic applies here. The Town agreed to the Settlement’s terms in exchange for certain considerations, including a \$25 million payment. The Town knows that asking the Court to change the *substance* of the Settlement would be futile (*see, e.g.*, Doc. 11-1, at 3), so it instead is trying to obtain additional compensation for the approved cleanup plan. That is a distinction without a difference; it shows that this is just the “same claim” that was resolved in the Settlement, and the Town is precluded from altering the terms it agreed to. *United States v. Sherwin-Williams Co.*, 165 F. Supp. 2d 797, 809–11 (C.D. Ill. 2001) (applying estoppel because CERCLA consent decree precluded additional costs from settling defendants).

B. Judicial estoppel bars the Town’s claims.

Similarly, judicial estoppel—which “generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase,” *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted)—forecloses the Town’s claims. Judicial estoppel can apply in either an earlier phase of the same legal proceeding or a separate proceeding. *Guay v. Burack*, 677 F.3d 10, 16 (1st Cir. 2012).

In the First Circuit appeal, where citizens challenged EPA’s 2020 Permit that incorporated the terms of the Settlement, the Town (as part of the Municipal Committee) intervened and took a position contrary to the one it takes in this suit. It urged the First Circuit to *reject* challenges to EPA’s ultimate waste disposal determination and to *follow* the Consent Decree.¹⁰ Indeed, the Municipal Committee gave its full-throated support for the Settlement Agreement:

[T]he Settlement Agreement has provisions that . . . require GE to provide substantial compensation and services to the Five Towns comprising the Committee, including a \$55 million payment, consultation with local officials throughout the cleanup, and a commitment to repair damage to roads . . . The payment and services to be provided by GE to the Towns settled the Towns’ claims for socioeconomic impacts associated with the Housatonic site—claims that the Towns have pursued for almost a decade.

Towns’ Br. at *17. The Municipal Committee also agreed with the outcome of the Settlement as it related to the damages the Town now seeks: “As the Committee has publicly stated many times, this remedy is . . . the best outcome *for human health and the environment.*” *Id.* at *31–32 (emphasis added). And the Municipal Committee deferred to EPA’s expertise: “EPA’s 2020

¹⁰ The Court should take judicial notice of the Towns’ Brief in the First Circuit, not for the truth of the facts as stated in the brief, but for the Town’s prior litigation position. *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15–16 (1st Cir. 2003). When considering a preclusion defense, courts often *must* take judicial notice of matters of public record. *See id.* at 16.

permit was also substantively the right call—and certainly one well within EPA’s broad discretion to make technical judgments about how to protect human health and the environment.” *Id.* at *33.

These litigation positions are irreconcilable with the Complaint. The Town alleges intentional infliction of harm to humans and the environment, yet *just last year* called the Settlement and incorporating EPA Permit “the *best* outcome for human health and the environment.” It contends that it was harmed by the location and operation of the onsite waste disposal facility in the Town limits, yet *just last year* urged the First Circuit to approve the EPA plan to locate it there. The Town should be judicially estopped because “its current position is plainly inconsistent with its earlier position such that the two positions are ‘mutually exclusive.’” *Sexual Minorities Uganda v. Lively*, 899 F.3d 24, 32 (1st Cir. 2018) (internal citation omitted). It would be unfair for the Town to make those supportive statements to finalize a Settlement that paid it millions of dollars only to take the opposite position the following year to secure even more compensation.

CONCLUSION

For the reasons above, the Court should dismiss the Town’s claims against Pharmacia with prejudice. No amendment can cure the numerous and fatal deficiencies in the Complaint.

Dated: July 3, 2024

Respectfully submitted,

/s/ Stephen I. Hansen

Stephen I. Hansen (BBO 679134)

Shook Hardy & Bacon LLP

One Federal Street, Suite 2540

Boston, MA 02110

Tel: 617.531.1411

Fax: 617.531.1602

sihansen@shb.com

DEFENDANTS, PHARMACIA LLC, SOLUTIA INC., and MONSANTO CO.

CERTIFICATE OF SERVICE

I, Stephen I. Hansen, hereby certify that on this 3rd day of July, 2024, the foregoing was presented to the Clerk of Court for filing and uploading to the CM/ECF System, which will send notification of such filing to the parties by electronically serving counsel of record.

/s/ Stephen I. Hansen

Stephen I. Hansen