UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CRH PLC,

CRH AMERICAS MATERIALS, INC.,

and

POUNDING MILL QUARRY CORPORATION,

Defendants.

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Defendants CRH plc ("CRH"), CRH Americas Materials, Inc. ("CRH Americas"), and Pounding Mill Quarry Corporation ("Pounding Mill") entered into a purchase agreement, dated March 26, 2018, pursuant to which CRH Americas would acquire the assets of Pounding Mill, including four of Pounding Mill's aggregate quarries located in West Virginia and Virginia. The United States filed a civil antitrust Complaint on June 22, 2018, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the markets for aggregate and asphalt concrete that are used in West

Virginia Department of Transportation ("WVDOT") road projects in southern West Virginia. This loss of competition likely would result in increased prices and decreased service in these markets. Therefore, the Complaint alleges that the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

CRH Americas' acquisition of Pounding Mill's aggregate quarries would secure CRH Americas' control over the materials necessary to build and maintain roads and bridges in southern West Virginia. CRH Americas supplies aggregate and asphalt concrete in this area and holds significant shares in each market. The proposed acquisition would result in CRH Americas owning nearly all of the aggregate quarries that supply southern West Virginia and would eliminate the head to head competition between CRH Americas and Pounding Mill for the supply of aggregate. As a result, prices for aggregate likely would increase significantly if the acquisition was consummated. The acquisition also would strengthen the virtual monopoly CRH Americas holds over the supply of asphalt concrete in southern West Virginia. In that market, CRH Americas competes with only one small new entrant that procures aggregate from Pounding Mill. There are no alternative aggregate suppliers to which that competitor can economically turn. The merger would give CRH Americas the means and incentive to disadvantage or exclude its competitor by denying it access to aggregate, reliable delivery, and competitive prices.

Along with the Complaint, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, explained more fully below, CRH Americas is required to divest Pounding Mill's Rocky Gap quarry located in

Rocky Gap, Virginia (hereinafter, "Rocky Gap" or the "Rocky Gap Quarry") and related assets to Salem Stone Corporation ("Salem"). Under the terms of the Hold Separate, CRH Americas will take certain steps to ensure that Rocky Gap is operated as a competitively independent, economically viable, and ongoing business concern that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. Defendants and the Proposed Transaction

Defendant CRH is headquartered in Ireland and is a global supplier of building materials. In the United States, CRH is a leader in the supply of aggregate, asphalt concrete, and ready mix concrete, among many other things. In 2015, CRH had global sales of approximately $26 billion and sales in the United States of approximately $14 billion. Defendant CRH Americas (through its parent CRH Americas, Inc.) is a subsidiary of CRH plc. CRH Americas is incorporated in Delaware and has a principal place of business in Atlanta, Georgia. CRH Americas is one of the largest suppliers of aggregate, asphalt concrete, ready mix concrete, and construction and paving services in the United States.

Defendant Pounding Mill is incorporated in Delaware and has its headquarters in Virginia. Pounding Mill owns and operates four aggregate quarries—three in Virginia and one

in West Virginia. In 2015, Pounding Mill had sales of approximately $44 million.

On March 26, 2018, CRH Americas and Pounding Mill entered into an Asset Purchase Agreement. Pursuant to this agreement, CRH Americas will acquire all the assets of Pounding Mill, including four quarries located in West Virginia and Virginia and the equipment and other property used to operate such quarries and run the Pounding Mill business. The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially as a result of CRH Americas' acquisition of Pounding Mill's assets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on June 22, 2018.

B. The Competitive Effects of the Transaction for Aggregate and Asphalt Concrete Used for WVDOT Projects

1. Relevant Markets Affected by the Proposed Acquisition

a. Product Markets

i. WVDOT Aggregate

Aggregate is particulate material that primarily includes crushed stone, sand, and gravel. It is produced at mines, quarries, and gravel pits and is used for a variety of construction projects. Aggregate generally can be categorized based on size into fine aggregate and coarse aggregate. Within the categories of fine and coarse aggregate, aggregate is further identified based on the size of the aggregate and the type of rock. Aggregate also can differ based on hardness, durability, and polish value, among other characteristics. Further, various sizes and types of aggregate are distinct and often used for different purposes.

Aggregate is an essential component of road construction, such as building or repairing roads. Aggregate is used in road projects as a base that is laid and compacted under the asphalt concrete. Aggregate also is an essential ingredient in asphalt concrete, which is used for paving

roads and other areas. There are no substitutes for aggregate in these types of road construction projects because no other materials can be used for the same purpose.

To evaluate the proposed acquisition's effects on the market for aggregate, it is appropriate to include all sizes and kinds of aggregate because, with limited exceptions, each size and type of aggregate is offered under similar competitive conditions in the relevant geographic market. Thus, the grouping of the various sizes and types of aggregate makes evaluating competitive effects more efficient without undermining the reliability of the analysis.[1]

Because different types, sizes, and qualities of aggregate are needed depending on the intended use, the end-use customer establishes the exact specifications that the aggregate must meet for each application. These specifications are designed by the project engineers to ensure the safety and longevity of road construction projects. WVDOT purchases significant quantities of aggregate for its road construction projects, which include building, repairing and maintaining roads and bridges in West Virginia. WVDOT also purchases significant quantities of aggregate for its maintenance yards. These maintenance yards are used to store the aggregate purchased directly by WVDOT for use on the projects WVDOT completes itself, instead of through a contractor, such as fixing a pothole or repaving a small area of a road.

For each road project, WVDOT provides the precise specifications for the aggregate used for asphalt concrete and road base, among other things. WVDOT specifications are designed to ensure that the roads and bridges are built safely and withstand heavy usage over time. The use

[1] However, the market for aggregate does not include friction-coarse aggregate that is used to create the anti-skid surface layer of roads. Pounding Mill does not have the ability to manufacture friction-coarse aggregate and the competitive conditions for that product are not similar to the remaining aggregate market.

of aggregate that does not meet WVDOT specifications could compromise the safety of the road or bridge, or cause the need for repairs sooner than would otherwise be required. Therefore, aggregate that does not meet WVDOT specifications cannot be used.

A small but significant increase in the price of aggregate that meets WVDOT specifications (hereinafter "WVDOT aggregate") would not cause WVDOT to substitute other types of materials in sufficient quantities, or to utilize aggregate that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT aggregate is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

ii. WVDOT Asphalt Concrete

Asphalt concrete is a composite material that is used to surface roads, parking lots, and airport tarmacs, among other things. Asphalt concrete consists of aggregate combined with liquid asphalt and other materials. Asphalt concrete has unique performance characteristics compared to other building materials, such as ready mix concrete. For example, asphalt concrete is the desired material used to build roadways because it has optimal surface durability and friction, resulting in low tire wear, high breaking efficiency, and low roadway noise. Other products generally cannot be used as economically to build and maintain roadways and therefore are not adequate substitutes.

WVDOT purchases significant quantities of asphalt concrete for road construction and maintenance projects in West Virginia. For each road project, WVDOT provides the precise specifications for the asphalt concrete. WVDOT specifications are designed to ensure that the roads are built safely and withstand heavy usage over time. Using asphalt concrete that does not

meet WVDOT specifications could compromise the safety of the road or cause the need for repairs sooner than would otherwise be required. Therefore, asphalt concrete that does not meet WVDOT specifications cannot be used.

A small but significant increase in the price of asphalt concrete that meets WVDOT specifications (hereinafter "WVDOT asphalt concrete") would not cause WVDOT to substitute other materials in sufficient quantities, or to utilize asphalt concrete that does not meet its specifications, with sufficient frequency so as to make such a price increase unprofitable. Accordingly, WVDOT asphalt concrete is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

b. Geographic Markets

The relevant geographic markets for both WVDOT aggregate and WVDOT asphalt concrete are the following four counties in West Virginia: Wyoming, Raleigh, Mercer, and Summers (these four counties are hereinafter referred to as "Southern West Virginia").

i. WVDOT Aggregate

Aggregate is a relatively low-cost product that is bulky and heavy, with high transportation costs. The geographic area an aggregate supplier can profitably serve is primarily determined by: (1) the distance from the quarry to the job site where the aggregate is used; and (2) the relative distance between the supplier's competitor's quarry and the job site compared to its own. Suppliers know the importance of transportation costs to a customer's selection of an aggregate supplier and also know the locations of all their competitors. An aggregate supplier

can often charge a lower/more competitive price than its competitor if its quarry is closer to the customer's location than its competitor's quarry.

CRH Americas owns and operates aggregate quarries located in Beckley and Lewisburg, West Virginia and those quarries sell WVDOT aggregate to customers with plant locations or job sites in Southern West Virginia. Customers with plant locations or job sites in Southern West Virginia may also economically procure WVDOT aggregate from Pounding Mill's quarries located in Princeton, West Virginia and Rocky Gap, Virginia, and from another smaller third-party quarry located in Lewisburg, West Virginia. For many customer locations in Southern West Virginia, quarries owned by CRH Americas and Pounding Mill are the two closest options and can quote different prices based on the location of a customer in relation to each supplier's quarries.

A small but significant post-acquisition increase in the price of WVDOT aggregate to customers with plants or job sites in Southern West Virginia would not cause those customers to substitute another product or procure aggregate from suppliers other than CRH Americas, Pounding Mill, and the third competitor in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia is a relevant geographic market for WVDOT aggregate within the meaning of Section 7 of the Clayton Act.

ii. WVDOT Asphalt Concrete

As with aggregate, the geographic area an asphalt-concrete plant can profitably serve is primarily determined by the location of its plant in relation to the job site and the relative location of competing suppliers. Asphalt-concrete suppliers typically deliver asphalt concrete to a job site. Distance from the plant to the job site is important for two reasons—temperature and

transportation costs. First, asphalt concrete must be maintained at a certain temperature range before it is poured. If the temperature drops below that required by the asphalt-concrete specifications, it cannot be used. The temperature of asphalt concrete drops as it travels from the plant and drops faster in colder weather than in warmer weather. As a result, the distance between an asphalt-concrete plant and the project site determines whether a plant can service a particular geographic area. Second, asphalt concrete is heavy and transporting it is expensive. Therefore, the distance between the site where the asphalt concrete is poured and the asphalt-concrete plant drives transportation costs and has a considerable impact on the area a supplier can profitably serve.

A further factor that determines the area a supplier can profitably serve is the location of its plant in relation to competing plants. Suppliers know the importance of transportation costs to a customer's selection of a supplier and also generally know how far each competing supplier can deliver asphalt concrete. An asphalt-concrete supplier often will charge a lower/more competitive price than its competitor if its plant is closer to the customer's location than its competitor's plant.

CRH Americas has an advantage with respect to transportation costs because it owns and operates three of the four asphalt-concrete plants that supply WVDOT asphalt concrete and serve customers in Southern West Virginia. Customers with job sites in Southern West Virginia may also economically procure WVDOT asphalt concrete from CRH's sole asphalt-concrete competitor, which operates one asphalt-concrete plant in Mercer County, West Virginia. Pounding Mill does not own any asphalt-concrete plants, though it is currently supplying CRH Americas' competitor in the asphalt concrete market with the aggregate it needs to compete.

Thus, the four asphalt-concrete plants that serve Southern West Virginia procure aggregate from CRH Americas and Pounding Mill.

A small but significant post-acquisition increase in the price of WVDOT asphalt concrete to customers with job sites in Southern West Virginia would not cause those customers to substitute another product or procure WVDOT asphalt concrete from suppliers other than CRH Americas or its rival in sufficient quantities so as to make such a price increase unprofitable. Accordingly, Southern West Virginia constitutes a relevant geographic market for WVDOT asphalt concrete within the meaning of Section 7 of the Clayton Act.

2. Anticompetitive Effects in the Market for WVDOT Aggregate

If CRH Americas acquired Pounding Mill, competition would be substantially lessened for the supply of WVDOT aggregate in Southern West Virginia. This market is already highly concentrated and would become significantly more concentrated as a result of the acquisition. For all WVDOT aggregate supplied in Southern West Virginia, including aggregate supplied to WVDOT through contractors for road projects and aggregate purchased directly by WVDOT for its maintenance yards, CRH Americas and Pounding Mill's combined market share is well over 80 percent. Moreover, the companies' combined share is even higher—over 90 percent—for the aggregate supplied by contractors for use in road projects.

Acquisitions that reduce the number of competitors in already concentrated markets are more likely to substantially lessen competition. Concentration can be measured in various ways, including by market shares and by the widely-used Herfindahl-Hirschman Index ("HHI"). Under the *Horizontal Merger Guidelines*, post-acquisition HHIs above 2,500 and changes in HHI above 200 trigger a presumption that a proposed acquisition is likely to enhance market

power and substantially lessen competition in a defined market. Premerger, the HHI for aggregate supplied for WVDOT road projects is approximately 4,350. The post-acquisition HHI is approximately 8,500, with an increase of over 4,000. For WVDOT aggregate purchased by WVDOT for its maintenance yards, the premerger HHI is approximately 3,800. Post-acquisition, the HHI is approximately 6,700, with an increase of nearly 3,000.

CRH Americas and Pounding Mill compete vigorously in the market for WVDOT aggregate in Southern West Virginia. For many customers and job sites in that area, they are the first- and second-best sources of supply for aggregate in terms of price, quality, and reliability of delivery. Only one other company, located in Lewisburg, West Virginia, is able to supply WVDOT aggregate in Southern West Virginia in any meaningful quantity. But while this competitor supplies WVDOT aggregate to maintenance yards, it has not bid on many road projects, leaving only CRH Americas and Pounding Mill to compete for most of those large projects. While a few other small suppliers provide limited quantities of WVDOT aggregate for maintenance yards in Southern West Virginia, they are unable to provide the large quantity of aggregate needed on road projects and do not supply the types or quality of aggregate needed for the asphalt concrete and road base.

The proposed acquisition would substantially increase the likelihood that CRH Americas would unilaterally increase the price of WVDOT aggregate to customers in Southern West Virginia. Without the constraint of competition between CRH Americas and Pounding Mill, the combined firm would have a greater ability to exercise market power by raising prices to customers for whom CRH Americas and Pounding Mill were the two best sources of WVDOT aggregate.

Therefore, the proposed acquisition would substantially lessen competition in the market for WVDOT aggregate in Southern West Virginia. This is likely to lead to higher prices for the ultimate consumers of such aggregate, in violation of Section 7 of the Clayton Act.

3. Anticompetitive Effects in the Market for WVDOT Asphalt Concrete

CRH Americas' acquisition of Pounding Mill would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia. CRH Americas has historically dominated this market. Pounding Mill does not compete directly with CRH Americas in the asphalt-concrete market, but it is a supplier of aggregate to CRH Americas' only competitor. That competitor, a recent entrant, has recently begun making inroads in the WVDOT asphalt-concrete market, and eroding CRH Americas' dominant position. By building its asphalt-concrete plant close to Pounding Mill's quarry in Mercer County, this entrant attempted to ensure that it would have a reliable, nearby source of aggregate, which allowed it to charge competitive prices. Pounding Mill is uniquely positioned to provide asphalt-concrete producers such as this entrant with competitively priced aggregate because it is not itself vertically integrated, and so has no incentive to raise the costs or otherwise disadvantage other asphalt-concrete producers.

If the proposed acquisition were consummated, this entrant could no longer be assured an economical source of WVDOT aggregate. Post-merger, CRH Americas would have the ability and incentive to use its ownership of Pounding Mill's quarries to disadvantage its rival by either

withholding WVDOT aggregate or supplying it at less favorable terms than Pounding Mill currently provides.

Any post-merger conduct by CRH Americas that cuts off the supply of WVDOT aggregate or raises the cost of that input would weaken its asphalt-concrete rival's ability to compete on price. If CRH Americas' rival cannot win WVDOT contracts, it may find it impossible to stay in business, thereby ensuring CRH Americas' control over the entire market for WVDOT asphalt concrete in Southern West Virginia.

CRH Americas would have the incentive and ability to raise the price or sacrifice sales of WVDOT aggregate in order to maintain its dominance in the asphalt-concrete market. Such a strategy would be attractive in part because the sale of asphalt concrete is significantly more profitable than the sale of aggregate. Therefore, if CRH Americas were able to gain additional asphalt-concrete sales by raising the price of aggregate to its rival, foreclosing supply, or delaying deliveries, the additional asphalt-concrete sales would be considerably more profitable to CRH Americas than any lost aggregate sales. By raising the costs of its sole competitor in the provision of WVDOT asphalt concrete, CRH Americas likely would gain the ability to unilaterally raise the price of WVDOT asphalt concrete in Southern West Virginia.

Therefore, CRH Americas' acquisition of Pounding Mill's quarries would give CRH Americas both the incentive and ability to either eliminate or raise the costs of its sole asphalt-

concrete competitor. As a result, the acquisition would substantially lessen competition in the market for WVDOT asphalt concrete in Southern West Virginia.

4. Entry Will Not Constrain CRH Americas' Market Power.

Entry into the market for WVDOT aggregate in Southern West Virginia is unlikely to be timely, likely, and sufficient to constrain CRH Americas' market power post-merger given the substantial time and cost required to open a quarry.

First, securing the proper site for an aggregate quarry is difficult and time-consuming. There are few sites on which to locate coarse aggregate operations in or near Southern West Virginia. Finding land with the correct rock composition requires extensive investigation and testing of candidate sites, as well as the negotiation of necessary land transfers, leases, and/or easements. Further, the location of a quarry close to likely job sites is extremely important due to the high cost of transporting aggregate.

Once a location is chosen, obtaining the necessary permits is also difficult and time-consuming. Attempts to open a new quarry often face fierce public opposition, which can prevent a quarry from opening or make opening it much more time-consuming and costly. Finally, even after a site is acquired and permitted, the owner must spend significant time and resources to prepare the land and purchase and install the necessary equipment. Moreover, once a quarry is operating, a supplier must demonstrate that its aggregate meets WVDOT specifications. WVDOT qualification requires testing. Until the aggregate can meet these specifications, it cannot be used to supply WVDOT road construction projects.

Entry into the market for WVDOT asphalt concrete in Southern West Virginia also is unlikely to be timely, likely, or sufficient to constrain CRH Americas' post-merger market

power. Potential entrants in WVDOT asphalt concrete must have access to WVDOT aggregate. Only CRH Americas and one other competitor would be available to supply WVDOT aggregate in Southern West Virginia and, for many locations in Southern West Virginia, the remaining competitor will not be an economical alternative. Post-merger, CRH Americas would have the incentive and opportunity to foreclose its competitors' access to WVDOT aggregate or disadvantage its rivals by either withholding WVDOT aggregate or supplying it on less favorable terms. Lack of access to a reliable, independent supply of aggregate will deter or prevent timely or sufficient entry into the asphalt-concrete market in Southern West Virginia.

In addition, an entrant into the asphalt-concrete market would have to purchase appropriate land close to an aggregate quarry, build a plant, procure the necessary permits, and obtain WVDOT approval of each asphalt-concrete mix made, among other things. These actions are required before production of asphalt concrete can begin and involve significant costs and often lengthy time periods.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the markets for WVDOT aggregate and WVDOT asphalt concrete by establishing a new, independent, and economically viable WVDOT aggregate supplier in Southern West Virginia. The divestiture will preserve the current state of competition in both the markets for WVDOT aggregate and WVDOT asphalt concrete.

A. The Divestiture Assets

The proposed Final Judgment requires CRH and CRH Americas to divest all assets that are primarily used for or in connection with Pounding Mill's Rocky Gap quarry. CRH and CRH

Americas must divest all real property identified in Paragraph II(G)(1) of the proposed Final Judgment upon which the Rocky Gap quarry currently operates, and the property adjacent to that quarry.

In addition, CRH and CRH Americas must divest all tangible assets listed in Paragraph II(G)(2) of the proposed Final Judgment that have been primarily used to operate the Rocky Gap quarry at any time since July 31, 2016. This includes all production equipment that has been used at the Rocky Gap quarry since that date. This provision ensures that, among other things, any mobile tangible assets, such as vehicles or production equipment, used at the Rocky Gap quarry since July 31, 2016, are divested. Further, CRH and CRH Americas must divest all ongoing customer contracts that have been fulfilled by aggregate produced at the Rocky Gap quarry, even if the contract does not require that the aggregate be produced at the Rocky Gap quarry. This provision will ensure that the acquirer of the Divestiture Assets receives all ongoing work of the Rocky Gap quarry and prevent CRH Americas from fulfilling such work from one of its other quarries post-acquisition, including the nearby quarry that it is acquiring from Pounding Mill. Defendants also are required to divest all intangible assets that have been primarily used by the Rocky Gap quarry at any time since July 31, 2016. The proposed Final Judgment provides that Pounding Mill cannot interfere with the permitting, operation, or divestiture of the Divestiture Assets and shall not undertake any challenges to the permits relating to the Divestiture Assets.

B. The Acquirer of the Divestiture Assets

Paragraph IV(I) of the proposed Final Judgment provides that final approval of the divestiture, including the identity of the acquirer, is left to the sole discretion of the United States

to ensure the continued independence and viability of the Divestiture Assets in the relevant markets. In this matter, Salem has been identified as the expected purchaser of the Divestiture Assets. Due to the narrow local market at issue and the small number of companies with sufficient expertise that operate in or near Southern West Virginia, there are only a small number of potential purchasers that could quickly begin operating the Rocky Gap quarry. After a thorough examination of Salem, its plans for the Divestiture Assets, the proposed sale agreement, and consideration of feedback from customers, the United States approved Salem as the buyer. Salem is a large, regional producer of construction aggregates and owns 15 quarries in Virginia and North Carolina. Salem is a strong aggregate competitor in markets near Southern West Virginia, and WVDOT has qualified various types of the aggregate that Salem produces for use on its road projects. Salem's vast experience producing and selling aggregate, its familiarity with WVDOT's approval process, and its familiarity with nearby geographic markets should ensure that in its hands the Divestiture Assets will provide meaningful competition.

If the sale to Salem does not occur, CRH and CRH Americas may sell the divestiture assets to another acquirer, subject to the approval of the United States. If CRH Americas does not secure an acceptable acquirer and divest the assets during the time period allowed for the divestiture, an acquirer will be located by a trustee, subject to the approval of the United States.

C. Provisions of the Proposed Final Judgment

Paragraph IV(A) of the proposed Final Judgment requires that the Divestiture Assets be sold to Salem or an approved acquirer within ten days after the Court signs the Hold Separate. The entry of the Hold Separate was chosen as the date upon which the divestiture period begins to run because CRH and CRH Americas cannot consummate the acquisition of Pounding Mill's

assets until the Court enters the Hold Separate, and that acquisition must be consummated before the Divestiture Assets are sold. If the Divestiture Assets are not sold within ten days of the Court's entry of the Hold Separate, a Divestiture Trustee is to be appointed to sell the Divestiture Assets to an entity acceptable to the United States.

Defendants also are required to provide various information regarding and access to the Divestiture Assets to potential acquirers of those assets. For example, Defendants are required to provide the Acquirer information relating to employees to enable the acquirer to make offers of employment. The proposed Final Judgment requires Defendants to provide information about employees at the Rocky Gap quarry, as well as the other three Pounding Mill quarries and several CRH Americas aggregate and asphalt-concrete facilities. The scope of this area includes the counties within and closest to the relevant geographic market alleged in the Complaint. This will ensure that the acquirer has a broad pool of potential candidates to choose from. In addition, Defendants must provide information regarding employees at CRH Americas' asphalt-concrete operations. Asphalt-concrete suppliers work closely with aggregate producers and are often knowledgeable about some aspects of the others' business. Therefore, asphalt-concrete suppliers may also be a source of qualified employees for an aggregate producer.

Further, Paragraph IV(J) of the proposed Final Judgment requires CRH and CRH Americas to notify all customers that have purchased aggregate from the CRH Americas quarries located in Southern West Virginia, and all four Pounding Mill quarries, that the Rocky Gap quarry has been sold and is not affiliated with CRH Americas or Pounding Mill. The proposed Final Judgment requires such notification be provided for customers that historically made aggregate purchases of a dollar value typical of WVDOT road construction projects. The more

recent the customer, the smaller the dollar volume of purchases needed to meet the notification cut-off. This notification will ensure that customers are informed about the existence of the Rocky Gap quarry as an independent source of aggregate.

Section XI of the proposed Final Judgment requires CRH and CRH Americas to notify the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott Rodino Act, 15 U.S.C. 18a (the "HSR Act"). The requirement applies to acquisitions of entities engaged in the production of asphalt concrete and/or aggregate in and around the alleged relevant market, as defined in Paragraph IV(C) of the proposed Final Judgment.

The proposed Final Judgment also contains provisions designed to promote compliance and make the enforcement of Division consent decrees as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its rights to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore all competition that would otherwise be harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for

failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation and enforcement of violations of the proposed Final Judgment, Paragraph XIV(C) provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for attorneys' fees, experts' fees, or costs incurred in connection with any enforcement effort, including the investigation of the potential violation.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment shall expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

The divestiture will remedy the likely anticompetitive effects of the acquisition in the markets for WVDOT aggregate and WVDOT asphalt concrete by preserving the current state of competition in both markets.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition,

comments will be posted on the United States Department of Justice, Antitrust Division's website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Maribeth Petrizzi
Chief, Defense, Industrials, and Aerospace Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against CRH Americas' acquisition of Pounding Mill's quarries. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the markets for WVDOT asphalt concrete and WVDOT aggregate in Southern West Virginia. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into

whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA]

proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F.

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is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that

"[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 75(indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 75.

[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

VIII. DETERMINATIVE DOCUMENT

In formulating the proposed Final Judgment, the United States considered a report on the geology of the Rocky Gap Quarry site entitled "Rocky Gap Quarry, Rocky Gap, Virginia" dated March 13, 2017, authored by John Chermak, PhD, PG, to be a determinative document within the meaning of the APPA.

Dated: June 22, 2018

Respectfully submitted,

FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I, Christine Hill, hereby certify that on June 22, 2018, I caused a copy of the foregoing Competitive Impact Statement to be served on Defendants CRH plc, CRH Americas Materials, Inc., and Pounding Mill Quarry Corporation by mailing the documents electronically to their duly authorized legal representatives as follows:

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