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BY HAND DELIVERY

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**Re: Confirmation Of Potential Liability; Demand And Notice Of Decision
Not To Use Special Notice Procedures
Aerovox Facility, 740 Belleville Avenue, New Bedford, Massachusetts**

Dear Ms. Catri:

This letter provides the response of AVX Corporation ("AVX") to a letter bearing the above caption from the United States Environmental Protection Agency ("EPA") dated May 31, 2006 and received by AVX on June 2, 2006 (the "notice and demand letter").¹ This letter is the first notice AVX has received from EPA concerning response actions at the former capacitor manufacturing plant located at 740 Belleville Avenue, New Bedford, Massachusetts (the "Site").

In the notice and demand letter, EPA demanded payment of past response costs in connection with the cleanup of the Site in the amount of \$1,610,208.88.² On August 9, 2006, AVX received from EPA a revised cost summary (dated August 2, 2006) referencing past

¹ Please note that AVX has had the specialized technical assistance of URS Corporation ("URS"), including the expertise of a Massachusetts Licensed Site Professional ("LSP"), in the preparation of this response. Please refer to the *curricula vitae* attached to the comment letter on the Supplemental Engineering Evaluation and Cost Analysis (the "SEE/CA") submitted by AVX on August 15, 2006 for information on the qualifications of members of the technical team.

² The notice and demand letter indicated that EPA was seeking \$1,610,208.80 in past response costs, but the back-up documentation provided totals \$1,610,208.88.



costs of \$737,558.84, which amount AVX assumes for purposes of this response constitutes EPA's past costs demand.³ EPA's demand likewise seeks payment for "all future Site-related costs," plus any recoverable interest. EPA cites the presence of PCBs, mercury and asbestos at the Site, and represents that response costs have been and will be incurred to "investigate and control such releases and threatened releases at the Site."

The notice and demand letter was completely unexpected. AVX, as it now exists, never conducted operations in New Bedford. AVX's corporate predecessor, Aerovox Corporation, departed New Bedford over 33 years ago after having sold its assets and liabilities to Belleville Industries, Inc.⁴ Chief among those assets was the manufacturing building, fully functioning then, and until 2001. The manufacturing building continued to be used in manufacturing operations without any express concern by any regulator from 1973 until an EPA-conducted inspection under the Toxic Substances Control Act ("TSCA") in May 1997, described at length in the administrative record file (the "AR file") and briefly below.

It has also been over 14 years since AVX settled its liability to EPA and the Commonwealth of Massachusetts (the "Commonwealth") in the NBH litigation, in one of the largest settlements with a single potentially responsible party ("PRP") in the history of Superfund. Likewise, it has been many years since AVX participated in settlement negotiations concerning the Re-Solve Superfund Site and the Sullivan's Ledge Superfund Site. At both Re-Solve and Sullivan's Ledge, two sites at which waste from Aerovox Corporation's operations at 740 Belleville Avenue was allegedly disposed, AVX was a participant in the settling defendant groups which took responsibility to perform the remedies. At Sullivan's Ledge, AVX has been the lead settling defendant responsible for implementing the remedy for the Middle Marsh Operable Unit. AVX was the recipient of a special notice letter at both of those sites.⁵ AVX responded in a timely fashion to special notice in those instances, even when asked to bear more than its *pro rata* or volumetric share of liability. Thus, EPA's assumption in the present instance that AVX would not negotiate in good faith in response to a

³ The revised cost summary reduced EPA's initial demand by \$695,180.72 in costs attributed to the Department of Justice ("DOJ"), and \$177,469.32 in EPA indirect costs. The past costs demand of \$737,558.84 includes: \$531,842.36 for payroll and non-payroll costs (including \$16,871.03 for DOJ direct labor and other direct costs); \$169,909.41 for EPA indirect costs; and \$35,807.07 for DOJ indirect costs.

⁴ The corporate history of the companies that have operated at 740 Belleville Avenue, New Bedford, Massachusetts, is well known to EPA as a result of the New Bedford Harbor Superfund Site litigation (the "NBH litigation") and subsequent events. It is recited briefly below.

⁵ There are three types of notices for removal actions: (a) notice of potential liability for an action EPA has already taken or is about to take; (b) notice of potential liability and opportunity to enter "informal" negotiations; and (c) notice of potential liability and opportunity to enter "formal" negotiations, pursuant to the Section 122(e) special notice procedures. See *Interim Guidance on Notice Letters, Negotiations, and Information Exchange* (OSWER Directive No. 9834.10, October 19, 1987) (hereinafter the "Notice Letter Guidance") at 25. EPA has chosen to proceed with type (b), the informal approach, with respect to the non-time-critical removal action ("NTCRA") proposed by the SEE/CA.



special notice letter engenders questions as to whether EPA was looking for a means to move forward without allowing time for the special notice procedure to unfold.⁶

During the NBH litigation, there was extensive factual investigation and discovery into manufacturing operations and plant conditions during the period of Aerovox Corporation's ownership.⁷ At no point until 1997, however, did EPA concern itself with the possibility that releases of hazardous substances inside the plant might create an imminent and substantial endangerment to public health and the environment. Following the 1997 inspection, EPA issued an approval memorandum for the performance of an engineering evaluation and cost analysis ("EE/CA") at the Site, reviewed the EE/CA prepared by Aerovox, Inc.'s consultant, in October 1998 issued a proposed plan seeking public comment on the EE/CA, and in 1999 entered into an administrative order on consent with Aerovox, Inc. (the "1999 AOC"). While AVX was ultimately made aware of the entry of the 1999 AOC, it received no notice from EPA concerning that settlement or any of the preceding response actions. Nor was AVX given any notice by EPA, the Commonwealth or the City of New Bedford (the "City") of any of the response actions taken or intended to be taken at the Site between 1997 and May 31, 2006.

EPA's notice and demand letter takes the position that, on February 24, 1982 and on February 17, 1984, AVX received formal written notice of its status as a PRP with respect to the Site. The 1984 letter, however, exclusively concerned alleged releases into New Bedford Harbor; the 1982 letter was an information request made under the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act, which closed with a request for the parties to meet concerning abatement actions with respect to contamination of New Bedford Harbor. There is no question that EPA took the position during settlement negotiations in the NBH litigation that the Site was not part of the New Bedford Harbor Superfund Site. If EPA contends these letters satisfy its constitutional, statutory and regulatory obligations to notify AVX of its response and enforcement actions concerning the Site, its position rests on a slim reed. In fact, once a removal action at the Site became likely, in the 1997-98 period, EPA was

⁶ Given the enormity of AVX's financial payment in the NBH litigation, as well as its performance in connection with both the Re-Solve and Sullivan's Ledge Superfund Sites, AVX strongly objects to the comment in EPA's May 31, 2006 letter that "EPA's past experience with AVX indicates that AVX is unlikely to negotiate a rapid settlement that would allow the response action at Aerovox to occur as quickly as possible." As will be described below, EPA's failure to provide reasonable notice to AVX at each and every juncture of its response actions and enforcement activities concerning the Site has guaranteed that it will be impossible for AVX to respond meaningfully on the basis of a scant three months' notice and a dearth of much of the information necessary in the decision-making process. In addition, EPA's decision to deny AVX access to the Site to inspect and evaluate current conditions has further hampered AVX's ability to respond to EPA's demand. In any given case, AVX's decision whether to settle, and on what terms to settle, will be made in good faith, based on the facts and circumstances of each case. This is not the situation of a PRP who has refused countless demands. The notice and demand letter was EPA's first notice to AVX of response actions and enforcement demands concerning the Site.

⁷ We note that nothing in the AR file for this Site produced to date by EPA documents sampling inside the plant while Aerovox Corporation operated it between 1938 and 1973.



required to, but did not, notify AVX of the planned action and give AVX an opportunity to undertake the action itself.⁸ Even if EPA were to take the position, however, that it fulfilled its obligations pursuant to the NCP when it arranged for Aerovox, Inc. to undertake the cleanup efforts under the 1999 AOC, as soon as Aerovox, Inc. became financially unable to undertake the removal action, EPA's obligation to notify AVX was clear. EPA's failure in this regard greatly prejudiced AVX. Not only did EPA prevent AVX from undertaking the cleanup efforts at the Site in its condition at the time, but it also was prevented AVX from participating in the bankruptcy and seeking its own recovery from Aerovox, Inc. See Section I below.

To reiterate, the notice and demand letter found AVX surprised by EPA's demand, and ill-prepared to respond within the very limited time period EPA sought to impose. Nonetheless, AVX has worked diligently since its receipt of the letter to bring itself up to speed. While EPA has been cooperative in providing additional information,⁹ AVX – a company with no connection to New Bedford in the ordinary course of its business since 1973 – has had less than three months to acquire information, analyze the information it has obtained in that short time, and strategize about a situation portrayed as an imminent and substantial endangerment, while every other player at the table has been dealing with the situation in a collaborative and cooperative fashion amongst themselves for almost ten years. AVX's ability to defend itself has been substantially prejudiced by EPA's unwillingness to extend the deadline for comments on the SEE/CA past August 15, 2006 and by the short timeframe accorded AVX to respond to the notice and demand letter.

⁸ Pursuant to the National Contingency Plan ("NCP"), "as soon as" EPA determines that a removal action is necessary, EPA is required to conduct a PRP search: "Where the responsible parties are known, an effort initially *shall* be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly." 40 CFR 300.415(a)(2) (emphasis added). See also *Quick Reference Fact Sheet: Conducting Non-Time-Critical Removal Actions Under CERCLA*, December 1993 (Publication No. 9360.0-32FS) at 2 ("A PRP search should begin as soon as a removal action appears likely."), and Notice Letter Guidance at 26 ("A removal notice that does not invoke the special notice procedures should be provided to PRPs as soon as practicable. For removal notices that invoke the special notice procedures, the notice should be issued as early as possible but no later than 120 days before the scheduled date for initiating the removal action.").

The NCP, 40 CFR 300.415(k), states that removal actions pursuant to Sections 106 and 122 of CERCLA are not subject to the: "(1) Section 300.415(a)(2) requirement to locate responsible parties and have them undertake the response." AVX notes that the NTCRA proposed in the SEE/CA is to be implemented pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604 (and 40 CFR 300.415). See SEE/CA at 3. In addition, the notice and demand letter explains that the past costs sought from AVX were also incurred pursuant to Section 104 of CERCLA.

⁹ AVX has refrained from filing a formal request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, at EPA's request. While AVX appreciates the disclosures that have been made in response to informal requests, it previously has noted and reiterates in this response that it may be necessary to file a formal FOIA request to protect its rights to challenge EPA's failure to produce documents that were requested. There is also considerable additional information AVX has requested and awaits receipt of, as well as information not yet requested.



New information which may be critical to AVX has been requested not only from EPA but also from the City pursuant to the Massachusetts Public Records Act. The City Solicitor has advised AVX that the City will not respond until on or about the due date of this letter, August 31, 2006. More time is clearly needed to respond meaningfully to the notice and demand letter and AVX reserves the right to supplement its response as necessary based on information learned after the date of submittal of this response letter and of AVX's comments on the SEE/CA (the "SEE/CA comment letter").

In the limited time AVX has had to consider this matter, however, several points have become clear:

1. As of the time Aerovox, Inc. vacated the Site, whatever the conditions that may have existed inside the Site, the manufacturing building itself had been properly maintained and did not pose a threat of fire or explosion. Now AVX is informed that the building is considered such a firetrap that it must be torn down virtually immediately, with little and apparently inadequate thought to long-term ramifications. AVX has no responsibility for the allegedly dangerous deterioration of the building in the approximate six-year period from 2001 to 2006, and certainly had none for the prior 28 years. As it was never notified of the situation, and since it clearly could not have taken any positive steps to avert the dangerous conditions now said to exist, that responsibility clearly must lie elsewhere, with those who knew and had responsibility for the situation, whether it be Aerovox, Inc., EPA, the Commonwealth, the City or the present property owner.

2. Although the 1999 AOC imposed significant financial costs on Aerovox, Inc., at no time did Aerovox, Inc. sue AVX for contribution. This is because, by virtue of the 1973 sales contract, AVX was contractually protected against such suits, and AVX, further, had indemnity rights against Aerovox, Inc.¹⁰

3. When Aerovox Corporation sold the Site in 1973, it did not do so to dispose of hazardous substances. It sold a fully functioning manufacturing plant which was the location of sustained operations for two successive companies for 24 years thereafter.

The legal ramifications of these facts are discussed at greater length below. In addition, AVX relies upon and incorporates the SEE/CA comment letter into this response to EPA's notice and demand letter as if specifically set forth herein. The technical and legal arguments contained in that submittal explain in greater detail why the proposed removal action is legally and technically deficient, including that it is inconsistent with the NCP. These arguments are briefly summarized below in Section V as they form one of AVX's principal defenses to EPA's claim.

¹⁰ This will be discussed further below, including the fact that Aerovox, Inc. succeeded to all the liabilities of Belleville Industries, Inc. by virtue of the 1978 transaction between the two parties, as adjudicated by the Federal District Court in the NBH litigation.



Finally, the claim for past costs is also analyzed below. Among other things, EPA seeks to recover costs going back as far as 1982; costs incurred without any notice to AVX; and costs incurred, as far as AVX can determine, solely because of the necessity of enforcement actions against Aerovox, Inc. AVX's position as to why any possibly valid claim for past costs must be reduced to a mere fraction of the amount EPA has demanded is set forth below.

I. BACKGROUND.

AVX provides this background information to place EPA's notice and demand letter into the proper context.¹¹ As the following summary of AVX's corporate history and the prior actions involving Aerovox, Inc. and/or the Site illustrate, AVX has defenses that render EPA's current demand invalid.

Aerovox Corporation ("Aerovox I"), the corporate predecessor to AVX, began its operations in 1922, relocating to New Bedford in or around 1938.¹² As mentioned above, over 33 years ago, on or about January 2, 1973, the Aerovox business, including the Site and the Aerovox name, were purchased from Aerovox I by a company named Belleville Industries, Inc., which later changed its name to Aerovox Industries, Inc. ("Aerovox II"). Aerovox II operated the Site from January 1973 to October 1978 and admittedly used PCBs in its capacitor manufacturing. In October 1978, Aerovox, Inc. ("Aerovox III" or "Aerovox"), a newly-organized subsidiary of RTE Corporation ("RTE"),¹³ became the owner and operator of the Site by virtue of a reorganization and sale of assets.¹⁴ While Aerovox III owned and operated

¹¹ AVX submits herewith an appendix of the exhibits referenced in this response. The appendix will be referred to hereinafter as the "App."

¹² We believe the use of numerical designations for the various entities is helpful when discussing the corporate history of the companies that owned and operated the Site. In other contexts, however, we refer to Aerovox, Inc. simply as "Aerovox."

¹³ In 1988, RTE was acquired by Cooper Industries, Inc. ("Cooper"), and Aerovox, Inc. became an indirect wholly-owned subsidiary of Cooper, through Aerovox Holding Company ("AHC"), a Delaware corporation incorporated on May 3, 1988. On May 26, 1989, Aerovox, Inc. was merged into AHC and AHC's name was changed to Aerovox, Inc. The purpose of this merger was to eliminate the passive holding company structure. Cooper, which looked to sell Aerovox, Inc. in 1989, instead transferred the ownership of Aerovox, Inc. to its shareholders. On February 26, 1990, 5,095,086 shares of Aerovox, Inc. common stock were distributed to Cooper shareholders of record on May 5, 1989. This stock "spin-off" transferred ownership of Aerovox, Inc. to Cooper's shareholders, and was described in the New Bedford press as returning ownership to "local control." See press release attached as Exhibit 1 to the App.

¹⁴ In the NBH litigation, Aerovox III was held to be the corporate successor to Aerovox II. See *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1013 (D. Mass. 1989). As a result, Aerovox III inherited all of Aerovox II's debts and obligations, including its obligations under the agreements in connection with Aerovox II's purchase of the business from Aerovox I in 1973. Pursuant to the Asset Purchase Agreement (the "APA") and the Assignment and Assumption Agreement (the "Assignment") for that sale, the parties agreed that: (1) Aerovox II and its successors (which ended up including Aerovox III) could not bring suit against Aerovox I or its successors (including AVX) for any liability arising from Aerovox II's and/or Aerovox III's



it, the Site continued to be used in manufacturing operations, without any express concern by any regulator, until the 1997 TSCA inspection.

From 1978 to June 2001, when it relocated to another manufacturing site in New Bedford, Aerovox manufactured electrical capacitors at the Site. In 1981, Versar, Inc., under contract with EPA, conducted an inspection at the Site for the presence of polychlorinated biphenyls ("PCBs"). Based on this early inspection, EPA determined that PCBs were present in the soils at the Site, in various locations in the manufacturing building, and in the air in the building.

In May 1982, EPA and Aerovox entered into a consent order pursuant to Section 106 of CERCLA (the "1982 Order"). Among other things, the 1982 Order required Aerovox to: (i) conduct an investigation of certain areas of the Site; (ii) assess the relative costs of alternative remedial actions; (iii) recommend a responsive course of action to EPA; and (iv) implement such course of action, subject to EPA approval. Pursuant to the 1982 Order, Aerovox recommended the installation of an asphalt cap over certain contaminated soils and a steel sheet pile cutoff wall to serve as a vertical barrier to groundwater due to the fact that its investigation revealed that PCBs were present in soil and in shallow groundwater at the Site. Aerovox's recommended course of action was approved by EPA, which concluded at that time that there may have been "an imminent and substantial endangerment within the meaning of Section 106 of CERCLA." See 1982 Order, attached as Exhibit 4 to the App., at 2.

ownership of the Site; and (2) Aerovox III, as successor to Aerovox II, had a duty to indemnify Aerovox I and its successors (including AVX) from any liability arising from Aerovox II's and/or III's ownership of the Site. See APA at 3(b), attached as Exhibit 2 to the App.; Assignment at 3(b), attached as Exhibit 3 to the App. The clearest indication of this is included in the following language from the APA and the Assignment:

Buyer [Aerovox II and its successors] will indemnify and save Seller [Aerovox I and its successors] harmless from and against any and all claims, liabilities, or obligations . . . arising out of or resulting from the ownership by Buyer of the Purchased Assets."

APA at 3(b); Assignment at 3(b). The Purchased Assets encompassed, *inter alia*, all the real property of Aerovox I, including the Site. In addition, these agreements specifically inured to the benefit of the parties' successors and assigns. Thus, Aerovox II (and its successors) agreed to indemnify and hold harmless Aerovox I (and its successors) for all claims arising from Aerovox II's and/or III's ownership of the Site, which would include environmental costs and damages caused by Aerovox II and/or III.

This is significant because all of EPA's claims in the Aerovox bankruptcy resulted from Aerovox III's ownership of the Site; therefore, Aerovox III was barred from suing Aerovox I or AVX for such liability (and thus never brought a contribution claim against AVX with regard to the 1999 AOC). More importantly, because at least some portion of AVX's alleged liability is clearly due to the acts or omissions of Aerovox II and/or Aerovox III, *e.g.*, failure to remove drums at the Site and failure to maintain the cap, AVX had a contractual right to indemnity from Aerovox III (and a contingent claim for contribution). As a result, had AVX been given notice of the bankruptcy, it could have asserted a direct claim for contractual indemnification against Aerovox III, with respect to the harm attributable to Aerovox II and Aerovox III, during the bankruptcy based on its failure to comply with, among other things, its obligations under the 1999 AOC.



In 1984, EPA and Aerovox entered into a Supplemental Consent Order pursuant to Section 106 of CERCLA (the "1984 Supplemental Order"), in which EPA specifically acknowledged that it had inspected and approved Aerovox's completed work under the 1982 Order. *See* 1984 Supplemental Order, attached as Exhibit 5 to the App., at 2. Pursuant to the 1984 Supplemental Order, Aerovox agreed to implement a Monitoring and Maintenance Program for the cap and to take such maintenance measures as were reasonably necessary to maintain the cap and the cutoff wall. The Monitoring and Maintenance Program further required that unsatisfactory conditions be promptly remediated.

In May 1997, EPA conducted an inspection of the Site pursuant to TSCA. The inspection revealed the presence of PCBs within the interior of the manufacturing building and in uncapped soils outside of the building, allegedly caused by manufacturing processes at the Site. On July 7, 1998, EPA issued an approval memorandum for the performance of an EE/CA. In August 1998, Blasland, Bouck & Lee, Inc. ("BBL"), a consultant hired by Aerovox, completed the 1998 EE/CA, which then estimated the cost of cleanup of the Site pursuant to the selected alternative to be approximately \$8.3 million. The primary removal objective identified by the 1998 EE/CA was to minimize future potential impacts to human health and the environment caused by the presence of PCBs in the manufacturing building materials, equipment and impacted soil. The 1998 EE/CA went on to consider three response alternatives, all of which involved building demolition and capping.

In October 1998, a Proposed Plan was published, but no public comments were received. The Proposed Plan indicated that the removal actions were appropriate to address two exposure migration pathways, direct contact with impacted surfaces for people working in the plant and migration of PCBs off-site by tracking and weathering. The Proposed Plan made no specific mention of impacted on-site soils, impacts to groundwater or the potential threat posed by fire. The recommended alternative included off-site disposal of all TSCA materials, burying the remainder of materials inside the manufacturing building's foundation, and capping the entire Site.

Aerovox's selection of demolition as its preferred alternative for the removal action appears to have been motivated by economic reasons, as well as environmental reasons. Indeed, press releases in the AR file confirm that Aerovox preferred demolition and relocation to building stabilization because its manufacturing building had become costly and inefficient. In one press release dated January 29, 1998, Robert Elliott, Aerovox's President and CEO at the time, explained: "Our almost 100 year old plant is too old, inefficient and costly to meet the Company's business needs."

In the meantime, the repercussions of the TSCA inspection and its aftermath were the subject of intense political activity and public discussion due to the fact that the outcome threatened to put one of New Bedford's major employers out of business. The City was highly motivated to ensure that the Aerovox business remained in New Bedford. *See* letter from Mayor of New Bedford to EPA dated October 28, 1998, attached as Exhibit 6 to the App.



(“Aerovox’s decision to remain in New Bedford despite efforts from other areas to attract the industry was based largely on an incentives package offered by the City.”).¹⁵ In this respect, the City agreed to: (i) transfer 25 acres of the new site to Aerovox for free; (ii) provide Aerovox with a \$100,000, 20-year loan at 4% interest; (iii) establish that any contamination on the new site had been remediated; (iv) negotiate tax increment financing for Aerovox; and (v) demolish the building located on the new site.¹⁶

EPA seemed similarly willing to cooperate with and award concessions to Aerovox.¹⁷ One indication of the special treatment accorded to Aerovox was the very form the 1999 AOC took. Notwithstanding the fact that all previous EPA actions with respect to the Site had been taken under CERCLA or TSCA, EPA invoked the imminent and substantial endangerment provision of Section 7003 of RCRA, 42 U.S.C. § 6973 as the basis for the AOC that EPA executed in September 1999 (which became effective on December 2, 1999) in connection with

¹⁵ Another indication of the interest in Aerovox remaining in New Bedford and the political attention that the matter was receiving comes from an October 5, 1999 letter written by Congressman Barney Frank to EPA Regional Administrator John DeVillars and Robert Elliott to congratulate them on the result reached by the 1999 AOC. *See* letter from Frank, attached as Exhibit 7 to the App. (“ . . . I was so favorably impressed by the way Aerovox and the New England Region of EPA worked together to come to the agreement which you were just able to announce that I wanted to express my admiration to you both, to congratulate you for giving a superb example of how government and business should relate to each other to pursue societal goals while maximizing economic activity . . .”).

¹⁶ Aerovox’s annual report for 1998 stated that “a reserve was established and charged to income as of December 27, 1997, in the amount of \$7.2 million which the Company believes is adequate to dismantle and dispose of the building, clean equipment located within it, and to pay for related engineering, legal and professional services.” It further reported that Aerovox wrote off, “as of December 27, 1997, the depreciated value of that building, all improvements thereto, and certain machinery and equipment which the Company believes will become surplus, abandoned, or otherwise unusable upon disposal of the building. The amount of this write-off was \$5.8 million.” *See* Aerovox 10-K dated April 1999, attached hereto as Exhibit 8 to App., at 11. As a result, Aerovox’s income for 1997 was reduced by \$13 million in connection with its environmental liabilities (\$7,233,000 for the reserve and \$5,767,000 for the building), causing Aerovox to have a loss of \$11.5 million for the year. The clear tax benefits of these write-offs, which resulted from Aerovox’s decision to demolish the building and relocate to another building, provided further incentive for Aerovox to select demolition, rather than non-destructive alternatives such as building stabilization.

¹⁷ *See* letter from EPA to Robert Elliott dated May 6, 1998 in the AR file (“I understand that Aerovox’s ability to implement this plan is dependent on obtaining additional capital, and that Aerovox can obtain this capital only if potential investors are well informed on the costs of addressing the environmental issues at the New Bedford Facility. Together, Aerovox and EPA have developed a plan to address these environmental issues in a manner that permits Aerovox to obtain necessary capital and to continue to operate a facility in New Bedford. Under that plan, Aerovox will demolish the existing building pursuant to an approved work plan and install an appropriate cap, effectively closing the New Bedford Facility. EPA will cooperate fully in the development of the work plan.”). Another aspect of the extent to which EPA deviated from normal enforcement policy due to Aerovox’s financial situation is that it does not appear from the AR file that EPA required Aerovox to satisfy or meet the usual financial hardship/ability to pay standards that permit such enforcement flexibility.



the cleanup of the Site.¹⁸ The 1999 AOC was to have implemented the preferred alternative as a RCRA action to be completed by November 2011, compared to the 2000-03 timetable contemplated by the July 7, 1998 Approval Memorandum. The decision to proceed under RCRA, as well as the decision to give Aerovox until November 2011 to complete the cleanup at the Site, appear to have been part of the concerted effort to assist Aerovox, and to help the City keep one of its major employers, by choosing a statutory regime that did not require the payment of governmental oversight costs or the preparation of an action memorandum.¹⁹

The terms of the 1999 AOC show, among other things, that once the manufacturing building was vacated, EPA felt no sense of urgency as to the timing of the removal action and apparently no undue concern about the condition of the building. Aerovox agreed to pay for and conduct the cleanup of the Site over an extended period of time under EPA supervision. Among other things, the 1999 AOC required that Aerovox: (i) deposit funds, in specified installments, into a trust fund called the Aerovox Facility Fund (the "Fund"); (ii) begin demolition of the manufacturing building and the installation of an asphalt cap at the Site when the Fund reached \$4.8 million, or 60% of the total estimated cost; and (iii) construct, and relocate to, another manufacturing site located in New Bedford (by 16 months from the effective date of the order, or April 2, 2001). Completion of the demolition of the manufacturing building and installation of the cap at the Site were not required until November 2011. In addition, the 1999 AOC included certain monitoring and reporting requirements, and provided for stipulated penalties for violations of the provisions of the 1999 AOC. *See* 1999 AOC at ¶ 91.²⁰

¹⁸ In addition, proceeding under RCRA permitted Aerovox to avoid addressing, at least with EPA, groundwater issues at the Site. *See* letter of December 2, 1999 from EPA to Robert Elliott, attached as Exhibit 9 to the App., at ¶ 3. The same letter to Aerovox suggests that the 2000 ACO perhaps was the result of EPA's decision not to act with respect to groundwater issues at the Site, and to refer its regulation to the Massachusetts Department of Environmental Protection ("MassDEP"). In the context of the SEE/CA's attempt to dispute the applicability of Chapter 21E and the Massachusetts Contingency Plan (the "MCP") as applicable or relevant and appropriate requirements ("ARARs"), such referral can only be seen as an implicit acknowledgment of the Commonwealth's pre-eminence, under such authorities, to regulate cleanup activities involving groundwater. This letter indicates that EPA was content in 1999 to proceed under RCRA because it did not consider the groundwater issue to be a contributing factor to the imminent and substantial endangerment it found at the Site. Now, however, because EPA wants to bolster the case for the SEE/CA's recommended alternative, EPA has determined to shift focus and concentrate on regulating groundwater under CERCLA and TSCA.

¹⁹ Concessions made to Aerovox now affect the amount of the demand against AVX. In addition to the extended timetable, there was no requirement for removal of abandoned equipment or waste material. EPA's untraditional approach throws into question the validity of the 1999 AOC and whether the decision to proceed under RCRA was based on valid CERCLA-based reasoning. Moreover, the initial selection of demolition of the manufacturing building as the removal action, which was based on factors other than exclusively environmental factors, has improperly influenced the present decision-making process with respect to implementation of a removal action at the Site.

²⁰ Specifically, paragraph 91 of the 1999 AOC provided per day penalties (subject to the notice requirements of paragraph 92) for: (a) failure to decontaminate any equipment relocated from the Site to the new



On February 3, 2000, the Massachusetts Department of Environmental Protection (“MassDEP”) executed an Administrative Consent Order with Aerovox in connection with the Site (the “2000 ACO”).²¹ According to the 2000 ACO, it was intended to complement a Consent Order entered by Aerovox and the Massachusetts Department of Environmental Quality Engineering (“DEQE”) (now MassDEP), effective June 3, 1982 (the “1982 DEQE Order”). See 2000 ACO, attached as Exhibit 11 to the App., at § II, ¶ 3. The 2000 ACO required that Aerovox: (i) continue to conduct the post-closure monitoring program put into place by the 1982 DEQE Order, which consisted of twice-yearly monitoring of groundwater levels and the underlying aquifer, as well as periodic inspection of the cap at the Site, until July 2012; (ii) submit post-closure monitoring reports to MassDEP two weeks after the field inspections and water level readings required by the 1982 DEQE Order; (iii) submit the Demolition and Cap Work Plan and Maintenance Work Plan required by the 1999 AOC to the MassDEP, postmarked by no later than December 31, 2009; (iv) notify MassDEP, within the applicable timeframe, after becoming aware of any 2- or 72-hour notification condition arising from releases that occurred prior to February 3, 2000, pursuant to 310 CMR 40.0311, 40.0312, 40.0313 and 40.0314 or other applicable provisions; (v) conduct an Immediate Response Action (“IRA”) pursuant to 310 CMR 40.0410 and file an IRA completion statement, after providing the notification required in (iv) above; (vi) notify MassDEP, within the applicable timeframe, of any 2- or 72-hour, or 120-day notification condition, after becoming aware of any releases occurring after February 3, 2000, where the respondent is a person required to notify MassDEP pursuant to 310 CMR 40.0331; and (vii) comply with the applicable requirements of Chapter 21E and the MCP for any releases occurring after February 3, 2000. The 2000 ACO provided for stipulated penalties of \$100 per day for violations by Aerovox of any time deadline or requirement set forth therein.

manufacturing facility in compliance with TSCA (\$2,000 per day); (b) failure to complete the relocation of all manufacturing and business operations by 16 months after the effective date of the 1999 AOC (various penalties based on length of time in violation); (c) failure to close the Site, provide security and fire protection, and/or maintain the Site (\$1,000 per day); (d) failure to commence the demolition of the manufacturing building and installation of an asphalt cap on schedule (\$1,500 per day); (e) failure to perform the demolition and cap work in accordance with the work plan specified by the 1999 AOC (\$1,000 per day); (f) failure to submit timely or complete reports required by the 1999 AOC (\$750 per day); (g) failure to submit timely or correct deposits into the Fund (\$1,500 per day); (h) failure to reimburse the Fund for inappropriate disbursements (\$1,000 per day); and (i) failure to complete the demolition and cap work and submit a notice of completion to EPA on schedule (\$1,500 per day).

²¹ The 1982 DEQE Order substantially tracked the requirements of the 1982 Order with EPA. Among other things, the 1982 DEQE Order required Aerovox to: (i) implement a sampling and analysis program at the Site; (ii) submit an evaluation of alternative responses based on the results of such sampling and analysis program (including an engineering analysis of each course of action evaluated; estimated costs and schedule for completion for each course of action evaluated; post-cleanup monitoring and maintenance measures for each course of action evaluated; and measures for provision of recorded notice to subsequent owners and operators of any measures taken for long term containment of PCBs at the Site, and any related maintenance or monitoring required); (iii) recommend a responsive course of action to MassDEP; and (iv) implement such course of action, subject to MassDEP approval. See 1982 DEQE Order, attached as Exhibit 10 to the App.



Pursuant to the 1999 AOC, Aerovox relocated to its new manufacturing site by April 2, 2001 (leaving behind a substantial amount of contaminated equipment and machinery and combustible materials). See spreadsheet attached to facsimile dated June 10, 2002 from Aerovox to EPA, detailing estimated costs of removal of waste left at the Site, attached as Exhibit 12 to the App. Aerovox made one \$750,000 payment to the Fund before requesting an extension with respect to its second payment of \$200,000 due on December 31, 2000.²² On or about February 9, 2001, EPA and Aerovox entered into an amendment to the 1999 AOC, which altered the payment schedule such that Aerovox's next payment, adjusted to \$225,000, would be due on June 30, 2001. See First Amendment Agreement, attached as Exhibit 14 to the App. Before the new payment deadline, however, Aerovox filed a voluntary petition for Chapter 11 bankruptcy on June 6, 2001 in the United States Bankruptcy Court for the District of Massachusetts, styled *In re New Bedford Capacitor, Inc. (f/k/a/ Aerovox, Inc.)* (Case No. 01-14680-JNF).²³ As a result, Aerovox never implemented the response actions required by the 1999 AOC. In addition, based on the AR file, it appears that the last time Aerovox complied with its post-closure monitoring obligations was 2002.²⁴ AVX never received notice from any party of the bankruptcy or any of the actions taken as a result of the bankruptcy.

On or about November 15, 2001, EPA filed a proof of claim in the Aerovox bankruptcy to protect its rights with respect to the obligations of Aerovox, asserting that Aerovox was required to clean up and perform operation and maintenance measures with respect to the PCBs and other hazardous substances disposed of in and around the Site, pursuant to CERCLA, the 1984 Supplemental Order and the 1999 AOC. See EPA Proof of Claim, attached as Exhibit 17 to the App.²⁵ On or about November 30, 2002, EPA filed an Application of the United States for Reimbursement of Administrative Expenses (the "Administrative Application") for recovery of response costs EPA expected to incur in cleaning up, and performing operation and maintenance measures with respect to PCBs and other hazardous substances disposed of in and around the Site. See Administrative Application, attached as Exhibit 18 to the App. An administrative expense is entitled to

²² See letter of January 5, 2001 from Aerovox to EPA, requesting 6-month extension, attached as Exhibit 13 to the App.

²³ As of the petition date of the bankruptcy, Aerovox had \$420,000 in a Citizens Bank account. See Emergency Motion by Debtor for Order Authorizing the Use of Cash Collateral, attached as Exhibit 15, at ¶ 16(iii). There was no reason, therefore, for EPA to grant any payment extension. EPA should have demanded on-time payment of the \$200,000 due on December 31, 2000. Unaudited financial results of Aerovox for December 2001 provided to EPA further represent that Aerovox had \$834,000 on hand in cash and cash equivalents as of December 2000. See Attachment to letter from Aerovox to EPA dated February 5, 2002, attached as Exhibit 16 to the App.

²⁴ A letter from Aerovox's AOC Coordinator to EPA dated June 10, 2002 suggests that Aerovox continued to comply with its obligations under the 1999 AOC for at least one year after the Aerovox bankruptcy was filed. See letter from Aerovox to EPA, attached as Exhibit 12 to the App.

²⁵ On July 26, 2002, Aerovox changed its name to New Bedford Capacitor, Inc. per order of the bankruptcy court. New Bedford Capacitor, Inc. was forfeited under Delaware law as of January 7, 2006.



priority payment and must be an actual and necessary cost of the bankruptcy estate. The Administrative Application enumerated the \$8.3 million estimated cost under the 1999 AOC and also certain other items that EPA considered administrative expenses. On or about January 15, 2003, the Creditors' Committee and Aerovox filed a Joint Objection to the Administrative Application (the "Joint Objections"), discussed in detail in Section III.B.2. below. *See* Joint Objections, attached as Exhibit 19 to the App.

On or about November 15, 2001, the Commonwealth filed a proof of claim (the "Commonwealth Proof of Claim"), asserting that Aerovox was required to perform various ongoing activities pursuant to the 2000 ACO, as well as state and federal law. *See* Commonwealth Proof of Claim, attached as Exhibit 20 to the App., at ¶ 2. The Commonwealth took the position that these environmental obligations, and any injunctive obligations under state law, did not constitute "claims" for purposes of the Bankruptcy Code. *Id.* at ¶ 4. To protect its rights, however, the Commonwealth filed a protective claim for: (a) oversight costs; (b) costs incurred by the Commonwealth, if any, in performance of response actions at sites for which Aerovox was liable; and (c) all other costs incurred by the Commonwealth in connection with sites for which Aerovox was liable. *Id.* at ¶ 5.²⁶

On or about November 27, 2002, the Commonwealth filed a Request for Administrative Expenses of the Commonwealth of Massachusetts (the "Commonwealth Application"), which reiterated Aerovox's environmental obligations under the 2000 ACO and applicable state and federal law, and concluded that, "[t]o the extent that Debtor fails to perform necessary cleanup obligations required of it under state and federal law and the Commonwealth of Massachusetts incurs post-petition costs in the performance of assessment[,] containment, or removal activities in relation to this site, . . . such costs constitute administrative expenses for which the Commonwealth is entitled to priority distribution." *See* Commonwealth Application, attached as Exhibit 21 to the App., at ¶ 5.²⁷

On or about November 27, 2002, the City filed a proof of claim for an administrative priority claim in the amount of \$323,300 (the "City Priority Claim").²⁸ *See* City Priority

²⁶ The Commonwealth further stated its intent to seek administrative expense status for any "post-petition costs [incurred by it] in relation to the facility or any other site at which Debtor has environmental liability." *Id.*

²⁷ On or about January 15, 2003, the Creditors' Committee and Aerovox filed a Joint Objection to Motion for Allowance of Administrative Expense Claim by the Commonwealth of Massachusetts Department of Environmental Protection (the "Commonwealth Objections"). *See* Commonwealth Objections, attached as Exhibit 22 to the App. The Creditors' Committee and Aerovox stated that the Commonwealth's claim for administrative expenses was a "claim for an unspecified amount for alleged postpetition response costs it believes it may incur to clean up [the Site]." *Id.* at 1. The Commonwealth Objections claimed that the costs were not entitled to administrative priority because: (i) they arose from prepetition conduct; (ii) there was no threat of imminent harm or danger; and (iii) the claims were contingent because the Commonwealth had not yet incurred any such costs.

²⁸ On November 27, 2002, and on December 2, 2002, respectively, the City filed two additional administrative priority claims for certain real estate taxes due by Aerovox and contingent liabilities in connection



Claim, attached as Exhibit 23 to the App. The City represented that this estimated amount reflected “a projection of five years of maintenance of [the Site].” A letter dated November 27, 2002 and a spreadsheet with estimated annual maintenance costs of the Site (estimated to be \$64,660) were attached to the City Priority Claim. No formal objections were ever filed by Aerovox or the Creditors’ Committee to the City Priority Claim. *See* Section II below.

On or about August 11, 2003, Aerovox, EPA, the Commonwealth and the City, among others, entered into a settlement agreement with respect to the costs for the cleanup of the Site. *See* Settlement Agreement by and Among the Debtor, the Official Committee of Unsecured Creditors, United States of America, Environmental Protection Agency, the Commonwealth of Massachusetts, Department of Environmental Protection and City of New Bedford (the “Settlement Agreement”), attached as Exhibit 24 to the App. The settlement was approved by the bankruptcy court on September 30, 2003. EPA settled all its claims against Aerovox with respect to the Site in exchange for: (1) payment of the \$750,000 placed in the Fund by Aerovox prior to its bankruptcy, plus interest and any appreciation; (2) allowance of EPA’s administrative expense claim on a priority basis in the amount of \$200,000; and (3) allowance of an unsecured claim in the amount of \$8,235,000 (reduced by the amount by which the Fund exceeded \$830,000). By the conclusion of the bankruptcy, EPA received \$200,000 in agreed administrative expenses, \$967,273.52 from the Fund, and \$1,556,111.80 from distributions on its unsecured claim, for a total of \$2,723,385.32. The settlement provided that funds EPA received from the bankruptcy were to be used solely to conduct or finance response actions at the Site. The settlement gave EPA and MassDEP immediate and complete access to the Site for purposes of sampling and conducting response actions. Nothing in the AR file produced to date indicates what EPA’s enforcement strategy was to recover the balance of the monies needed for the removal action. AVX was not notified it was an enforcement target at the time of the settlement.

In addition, the City was designated as first responder to the Site for any problems while Aerovox continued to own the property. The City received \$250,000 on its administrative claim for the purpose of maintaining the fire suppression system at the Site and performing other property maintenance and security measures at the Site.²⁹ The City was also given unlimited Site access. The Commonwealth, in contrast, withdrew its claims based on the allowance of EPA’s and the City’s claims (as described above), and therefore received nothing

with Aerovox’s sublease of the new facility. It appears that the New Bedford Redevelopment Authority (the “NBRA”) also filed an administrative priority claim for contingent liabilities in connection with the same sublease.

²⁹ The City’s acceptance of \$250,000 in administrative expenses on its \$323,300 claim stands in sharp contrast to EPA’s acceptance of \$200,000 in administrative expenses on its claim for millions of dollars in administrative expenses.



from the Aerovox bankruptcy and apparently spared itself from any responsibility in connection with the cleanup of the Site.³⁰

Another result of the settlement with Aerovox was that, after a certain holding period, the Site became the property of the City and/or the NBRA.³¹ The current owner of 740 Belleville Avenue is 740 Belleville Avenue LLC (the "LLC"), which was organized as a Massachusetts limited liability company for the purpose of facilitating the transfer of the property to a brownfields developer. *See* 740 Belleville Avenue LLC Certificate of Organization, attached as Exhibit 25 to the App. The current managers of the LLC are the City and the NBRA.³² Under the Settlement Agreement, the proceeds, if any, from a sale of the Site to a redeveloper or other entity will be apportioned among EPA, the Commonwealth and the City in proportion to their unreimbursed expenses incurred in connection with the cleanup of the Site.³³

In March 2004, nearly six years after the Approval Memorandum, the 1998 EE/CA and publication of the Proposed Plan, and three years after Aerovox filed for bankruptcy, EPA issued an Action Memorandum to initiate a Time-Critical Removal Action ("TCRA") at the

³⁰ It is not clear why the Commonwealth compromised its claims against Aerovox, pursuant to the 2000 ACO and relevant state law, when it received no payment from Aerovox. In fact, AVX has not yet located any information to explain the Commonwealth's complete withdrawal from the bankruptcy and the cleanup efforts at the Site. Its willingness to let other agencies handle the entire matter is somewhat confusing, given its prior involvement with the Site, and MassDEP's likely future role as lead regulator. In any event, to the extent that the Commonwealth could have secured some recovery from the Aerovox bankruptcy, EPA should not now expect AVX to assume the Commonwealth's share.

³¹ In particular, the settlement with Aerovox required Aerovox to retain title to the Site until the earlier of two years from the date of the Settlement Agreement or entry of a final bankruptcy decree (but in no event earlier than December 31, 2003) (the "Holding Period"). The stated purpose of the Holding Period was to give the City an opportunity to arrange for the orderly transfer of the Site to a developer. In fact, documents recently produced by EPA indicate that the City had hoped that it would never take title to the Site. *See* October 29, 2003 letter from EPA to the New Bedford City Solicitor ("City representatives have stated that the City does not wish to take title or transfer title to a redevelopment authority; however, it recognizes the risk that no third party developer will be secured during the Holding Period and acknowledges that as a practical matter, the City will have no choice but to take title in order to facilitate the ultimate redevelopment of the [Site]."). As it turns out, however, the City took title to the Site through a limited liability company in February 2005. Now, more than three years after the settlement, there is no indication that the City is any closer to locating a developer capable of and willing to redevelop the Site.

³² Records from the City's Assessor's Office indicate that the Site consists of approximately 10.48 acres, with a manufacturing style building built around 1921. *See* property tax record for the Site for fiscal year 2006, attached as Exhibit 26 to the App. For tax purposes, the Site has been appraised for the year 2006 at \$1,456,200 (building value \$767,100, yard value \$112,100, land value \$577,000), although this value may not approximate its actual fair market value.

³³ As a result, the governmental entities stand to obtain additional funds from any cleanup performed at the Site, particularly if it enhances the value of the property. Any such funds would further defray the governments' costs, and should be taken into consideration in any demand for payment from AVX.



Site. The stated purpose of the TCRA was to remove drums abandoned at the Site and to repair the asphalt cap installed by Aerovox pursuant to the 1982 Order (which Aerovox was required to monitor and maintain until June 2014). *See* Action Memorandum in AR file. Without the 2004 TCRA, EPA found there may be an imminent and substantial endangerment to public health, welfare, or the environment. While EPA has informed AVX that it spent just under \$500,000 on the 2004 TCRA, an attachment to a letter from Aerovox to EPA dated June 10, 2002 (which estimated cap repair at \$1,500, and provided two quotes for the cost of waste removal at \$28,135.00 and \$35,590.00), and EPA's administrative claim in the Aerovox bankruptcy (which estimated cap repair at \$3,000 and waste removal at \$48,000), both suggest lower estimates for such a removal action. The reason the 2004 TCRA cost as much as it seems to have cost under EPA supervision is discussed further in Section VI.C. below.³⁴

In April 2006, EPA published the SEE/CA, which forms the basis for the NTCRA currently under consideration by EPA. The SEE/CA's opening sentence represents that it supplements the 1998 EE/CA, yet its objectives and proposed alternatives diverge significantly from those of the 1998 EE/CA (as explained fully in the SEE/CA comment letter). Differing with the 1998 EE/CA, the SEE/CA's recommended alternative proposes to demolish the building, to cover the entire Site with a clean protective cover, and to dispose all demolition waste on-site. Further, the objectives for the SEE/CA have expanded in number from two to five (with modifications to the original two), and include coordinating the NTCRA with Site redevelopment, and having the City become the lead agency through a cooperative agreement.

³⁴ The enforcement section of the Action Memorandum was redacted in the version that appears in the AR file. Without seeing the enforcement section, AVX has no way of knowing if it was an enforcement target at the time. Regardless, AVX was provided no notice, and therefore had no opportunity to review and comment on the AR file in advance of the 2004 TCRA.



II. LACK OF MAINTENANCE AND REPAIR OF THE MANUFACTURING BUILDING HAS EXACERBATED AND CONTRIBUTED TO THE RELEASE OR THREAT OF RELEASE OF HAZARDOUS SUBSTANCES, MAKING THOSE RESPONSIBLE LEGALLY LIABLE FOR COSTS OF PROPOSED REMOVAL ACTION.

Between 1998 and 2006, EPA's priorities and objectives for completing a NTCRA shifted dramatically, from a need to eliminate primarily a worker exposure hazard in 1998, to the more urgent need to eliminate a potential major fire incident and hazardous chemical release hazard, largely based on the condition of the manufacturing building. A review of documents in the AR file indicates that, as of 1998, the building was in relatively good condition.³⁵ At that time, the building was not considered an imminent fire hazard, and the primary driver for response actions was PCB contamination. Also as early as 1998, all parties recognized maintenance and repair of the building, as well as maintenance of security and a functioning fire suppression system, as significant factors in allowing building demolition to be deferred to as late as 2011. This responsibility rested on Aerovox at the time of the 1999 AOC and the steps necessary to accomplish the necessary maintenance and security were laid out in the 1999 AOC.

Recent documents in the AR file, however, including the 2006 Conceptual Site Model (the "CSM"),³⁶ the SEE/CA,³⁷ the April 2006 Jacobs Engineering building deterioration e-mail,³⁸ and the June 2006 EPA flyer, *Making the Vacant Aerovox Site Safe*,³⁹ all describe a

³⁵ December 1997 *Preliminary Building Cleanup Alternatives Evaluation*; BBL's April 1998 *Building Demolition Alternative Report*; May 6, 1998 EPA letter (from Regional Administrator John DeVillars) to Aerovox regarding "Remediation Plans for Aerovox Site"; 1998 EPA Community Relations Plan; the 1998 EE/CA; October 1998 EPA notice of comment period on the 1998 EE/CA.

³⁶ In March 2006, the CSM concluded that "[t]he mass flux via the stormwater pathway could increase significantly with deterioration of the building roof and outer shell as well as deterioration of the paved surfaces" and that "airborne transport of particulate containing PCBs could become a more significant transport pathway with deterioration of the building and paved surfaces at the site." CSM at 8-1.

³⁷ In April 2006, the SEE/CA reported that ". . . [t]he long-term vacancy of the building poses a significant fire threat . . . [Since] Aerovox vacated the building, significant deterioration has occurred including increased roof leaks and heavy water damage throughout the building. Trespassing and vandalism and the potential for tracking contamination off-site has become a common problem." *Id.* at 2. "Since 2001 the manufacturing building has continued to deteriorate, and, without ongoing maintenance the existing HAC cap will crack and deteriorate. A major failure of the interior fire suppression system after the building was vacated caused significant water damage throughout the building, and inspections inside the building in 2006 reported that roof leaks have increased. *Id.* at 3. "The vacated, PCB contaminated Aerovox mill remains an imminent and substantial endangerment due to continued building deterioration and the potential for a fire at the site and the close proximity of residential and industrial abutters." *Id.*

³⁸ This e-mail is further discussed below.

³⁹ The June 2006 EPA flyer, *"Making the Vacant Aerovox Site Safe,"* states that "[s]hould a fire erupt in the deteriorating building, burning materials would emit airborne PCBs, asbestos and potentially other more toxic



severely deteriorating building condition. On the stated grounds that the building cannot be safely maintained in its vacated state, the increased risk of a fire and chemical release hazard was included as an added response action objective to justify implementation of the proposed NTCRA in the near term, rather than waiting until 2011 as originally planned.

A. Building Deterioration Results from 1998 to 2006 Neglect and Inaction.

How is it possible that a building that was an active manufacturing plant in 1998 could deteriorate into a dangerous wreck in the space of eight years while under the ostensible scrutiny of EPA, the Commonwealth, the City, and two successive property owners? Based on information contained in the AR file and other documents obtained from EPA and the bankruptcy court, an analysis of key events in that time period sheds light on this important question and its legal consequences.⁴⁰

- Paragraph 41 of the 1999 AOC mandated that, until plant demolition, Aerovox was “to maintain the Plant’s structural integrity to prevent unauthorized entry, and to minimize potential releases of PCBs from the Plant, in accordance with the Plant Closure Work Plan.” That plan provided that, following Aerovox’s departure from the building and until demolition was accomplished, Aerovox would be responsible to maintain security and a fire suppression and alarm system; regularly inspect and maintain and/or repair the building; and disconnect all utilities other than phone and electric (for lighting, security and fire protection).
- According to an Aerovox press release dated October 17, 2000, attached to Aerovox’s January 5, 2001 letter to EPA, the manufacturing building was substantially vacant as of October 17, 2000, since the administrative offices and several production lines had already relocated. Eighty percent of the equipment at the Site had already been decontaminated and relocated. *See* press release dated October 17, 2000, attached as Exhibit 13 to the App.

fumes like dioxins and furans. Contaminated water from fighting the fire would run-off into the harbor. Trespassers entering the building illegally are also at risk from contact with these hazardous substances and can track the contamination outside the building when leaving.”

⁴⁰ This information includes photographs taken by EPA and MassDEP during site visits of June 27, 2002 and July 31, 2002 (consisting of 378 photographs on three CDs provided to AVX by EPA on July 17, 2006, and July 19, 2006); *Roof Inspection Report*, Massachusetts Division of Capital Asset Management (“DCAM”), April 22, 2003, attached as Exhibit 27 to the App.; *Preliminary Structural Assessment for Aerovox Building Demolition*, prepared by ACE structural engineer John Kedzierski, November 21, 2005 (inspection date), attached as Exhibit 28 to the App.; *Final 2006 Aerovox Asbestos and Lead-Based Paint Survey*, Jacobs Engineering Group, June 2006, attached as Exhibit 29 to the App. For purposes of this discussion, we include only the information from the AR file which is relevant to what happened to the building between 1998 and 2006, although many of these sources contain other important information.



- As of January 5, 2001, Aerovox had spent \$1 million cleaning 700 pieces of manufacturing equipment (and must have already generated the contaminated rinse water which was the focus of the 2004 TCRA), and had already relocated all manufacturing and all but ten people to its new building. Work had reportedly started on building closure, including all security measures required under the 1999 AOC and conversion of the fire sprinkler system to a dry system at a cost of approximately \$300,000. The AR file contains no further explanation concerning how this dry system functioned.
 - Pursuant to the 1999 AOC, Aerovox relocated to its new manufacturing facility by April 2, 2001. It left behind contaminated equipment and machinery and waste material, as well as much combustible material. See Jacobs Engineering e-mail of April 5, 2006 in AR file, quoted below. This did not seem to be contemplated at the time EPA and Aerovox reached an agreement in principle on the terms of the 1999 AOC. See May 6, 1998 EPA letter (from Regional Administrator John DeVillars) to Aerovox in AR file regarding “Remediation Plans for Aerovox Site,” which states that EPA and Aerovox have agreed that “[p]re-demolition measures will include . . . “[c]leaning of equipment or appurtenances that will be removed from the New Bedford Facility and relocated to the new facility . . .” The agreement described in that letter makes no provision for Aerovox to abandon equipment, contaminated or otherwise, in the building.
 - Aerovox filed a voluntary petition for Chapter 11 bankruptcy on or about June 6, 2001 in the United States Bankruptcy Court for the District of Massachusetts.
 - On October 23, 2001, Aerovox filed the “Facility shutdown report,” pursuant to the periodic reporting requirement of paragraph 54 of the 1999 AOC. See letter from Aerovox to EPA, attached as Exhibit 30 to the App. AVX has located no subsequent periodic reports from Aerovox in the AR file, making this Aerovox’s last known building compliance report under the 1999 AOC. As of this time, Aerovox reports the steps taken in compliance with the Plant Closure Work Plan, including completion of installation of the dry fire system and reports that waste materials are still on site. Aerovox also indicates that the equipment left on site constitutes useful product which will be cleaned, tested, and sold. Presumably, this is the waste material and equipment discussed in later EPA documents.
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- On or about November 15, 2001, EPA filed its proof of claim in the Aerovox bankruptcy. The proof of claim relies upon the 1999 AOC’s determination that conditions at the Site may present an imminent and substantial endangerment.
 - By letter dated June 10, 2002, Aerovox provided EPA with cost estimates for building maintenance and waste disposal. See letter from Aerovox to EPA, attached as Exhibit 12 to the App. Aerovox’s AOC Project Coordinator and Facility Manager warned



EPA that maintenance costs could be higher in future years, as maintenance was limited, the building remained empty and the building could be damaged by severe weather. Among other items, he estimated it would only cost \$3,000 a year to maintain the dry sprinkler system.

- On or about November 27, 2002, the Commonwealth filed the Commonwealth Application, reporting that the roof was leaking and in a state of disrepair such that it was “in danger of worsening to a point of a collapse.” Commonwealth Application at ¶ 2.
 - On or about November 27, 2002, the City filed the City Priority Claim, seeking \$323,300 to pay for five years of maintenance of the Site. This claim was based on estimates contained in a letter dated November 27, 2002 from the City to its bankruptcy counsel and intended to “cover basic efforts by the City to restrict unauthorized access to the property, prevent nuisance conditions, and maintain the fire suppression system in the building. Any major repairs or other substantial costs would not be covered by this estimate.” The City estimated it could maintain the fire suppression system for \$25,000 per year.
 - On or about November 30, 2002, EPA filed the Administrative Application for recovery of response costs EPA expected to incur in cleaning up, and performing operation and maintenance measures with respect to PCBs and other hazardous substances disposed of in and around the Site. The Administrative Application listed the \$8.3 million estimated cost under the 1999 AOC and also certain other items EPA considered administrative expenses, including expenses associated with repairing the roof of the facility (estimated to be \$1 million); removal of drums at the Site (estimated to be \$48,000); repairing a cracked asphalt cap (estimated to be \$3,000); and maintenance of a fire suppression and security system (estimated to be \$23,000 per year). In addition, the Administrative Application explained that the cost of decontamination and disposal of machinery and equipment left behind at the Site by Aerovox would cost an additional \$2-3 million. See Administrative Application at ¶¶ 17-18. The Administrative Application cited RCRA as the basis for a determination of substantial endangerment. By filing the Administrative Application, EPA demonstrated its awareness as early as November 2002 of the critical need for these actions.
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- An April 22, 2003 Roof Inspection Report prepared by DCAM documented some roof deterioration and leakage. The report indicated only minor deterioration that could be repaired/secured for \$50,000 to \$100,000.⁴¹
- On September 30, 2003, the bankruptcy court approved a settlement involving Aerovox, EPA, the Commonwealth and the City, among others, with respect to the costs of cleanup of the Site. As described below, EPA settled all its claims against Aerovox with respect to the Site in exchange for: (1) payment of the \$750,000 placed in the Fund by Aerovox prior to its bankruptcy, plus interest and any appreciation; (2) allowance of EPA's administrative expense claim on a priority basis in the amount of \$200,000; and (3) allowance of an unsecured claim in the amount of \$8,235,000 (reduced by the amount by which the Fund exceeded \$830,000). By the conclusion of the bankruptcy, EPA received \$200,000 in agreed administrative expenses, \$967,273.52 from the Fund, and \$1,556,111.80 from distributions on its unsecured claim, for a total of \$2,723,385.32. The settlement provided that funds EPA received from the bankruptcy were to be used solely to conduct or finance response actions at the Site. In addition, under the settlement agreement, the proceeds, if any, from a sale of the Site to a redeveloper or other entity will go to EPA, the Commonwealth and the City, in proportion to their unreimbursed expenses incurred in connection with the cleanup of the Site. The settlement gave EPA and MassDEP immediate and complete access to the Site for purposes of sampling and conducting response actions. Also, the City was designated as first responder to the Site for any problems while Aerovox continued to own the property. The City received \$250,000 on its administrative claim for the purpose of maintaining the fire suppression system at the Site and performing other property maintenance and security measures at the Site. The City was also given unlimited Site access.
- During the settlement negotiations, the City requested assurances that it would not be liable as a PRP should it be forced to take title to 740 Belleville Avenue as a result of being unable to find a brownfields developer in a timely fashion. On October 29, 2003, EPA issued a "comfort letter" to the City. See letter from EPA to City, attached as Exhibit 31 to the App. That letter confirmed that the "City must use the funds it receives from the bankruptcy estate to maintain and secure the Property, including the operation and maintenance of the fire suppression system at the site, until the Property is sold or the funds are exhausted, whichever occurs first." *Id.* at 2.
- In a March 29, 2004 EPA memorandum entitled *Request for a Removal Action at the Aerovox Incorporated Site*, reference is made to three flooding events at unspecified times since building vacancy in 2001 that were due to a malfunction in the sprinkler

⁴¹ It is unclear why this estimate differs so dramatically from the \$1 million EPA used in the Administrative Application unless, as suggested by the Commonwealth Application, it was assumed that the roof needed to be completely replaced to avoid collapse.



system. These floods caused significant water damage to the floor and walls of the building and contributed to the deteriorating condition of the drums left in the building. Apparently, once Aerovox went into bankruptcy, no one else undertook in time the low-cost maintenance or repair of the dry sprinkler system Aerovox had installed to stop this damage. According to this memorandum, the City reportedly controlled access to the Site by means of a locked gate, maintained the electrical system and at some unknown date, presumably after the damage described above, repaired the sprinkler system by maintaining a small section of functioning sprinklers and disconnecting others throughout the building. The small section of active sprinklers contained a heating system to prevent the pipes from freezing and bursting. While this interim measure was in effect, it had a detrimental impact on the ability to rapidly respond to fires.

- In 2004, EPA completed a removal action on site to remove drums and other containers of hazardous wastes. Three Pollution Reports (“POLREPs”), dated April 21, June 22 and December 30, 2004, all describe the need for a hazardous materials removal action to address materials that “. . . will continue to pose a threat to human health and the environment.”⁴²
- Section V of the September 20, 2004 EPA Action Memorandum Addendum #1 (“Addendum #1”) states that “Site conditions can be expected to continue to deteriorate, and the threats associated with the presence of hazardous substances will persist.” *Id.* at 7. Thus, while the City was tasked (as identified in Section V of this memorandum) with monitoring the Site and providing daily Site checks, and maintaining Site security and the fire suppression system, it already was recognized that the efforts being applied to secure and stabilize the building were not sufficient to stem the ongoing building deterioration. Instead of daily monitoring by a mobile security force, as required under the 1999 AOC, the City had one worker check the Site once a day to make sure doors and gates were locked, and requested the police to make frequent stops to discourage vandals. *See Addendum #1*, attached as Exhibit 32 to the App., at 4.
- The December 30, 2004 POLREP #3 issued by EPA describes a Site walk by the City in December 2004 to ensure that waste removal issues were addressed, and states that the City installed a new security system. No further information appears in the AR file about the details of this new security system or the reason it was apparently inadequate to prevent trespass and vandalism.
- In January 2005, the New Bedford Fire Department developed a New Bedford Fire Department Aerovox Preplan (the “Preplan”) which described the fire hazards posed by

⁴² The fire risk and significant fire load issue apparently was not yet considered a risk warranting time-critical removal at that time.



the manufacturing building, provided a set of guidelines that the Fire Department had developed as to how they would respond to a fire at the building, and detailed the systems in place to warn of a fire and perhaps provide some suppression (sprinklers) for the building. The Preplan described the hazards as chemical contamination, poor physical condition of the building, and a large fire load: "Large amounts of ordinary combustibles litter the site and will provide ample fuel to start multiple fires." Preplan at 1. The Preplan notes that the threat of a fire had been elevated due to ongoing vandalism at the facility, which it graphically described: "The security at this plant is being upgraded but vandals and copper thieves have had the run of the plant. . . Vandals have gained access to the buildings and are stripping copper and other materials from the building. There also have been signs of repeated vandalism and damage to the building and its systems. It appears that the vandals have been leaving the elevator and fire doors in the open position." *Id.* at 1-2. The Preplan also noted the lack of an active fire suppression system could result in a fire at the building becoming a major incident. It further noted that the sprinkler system had been repaired and drained of all water and would be kept dry. In the event of a fire, it would be activated through use of outside post-indicator valves by the Fire Department. A heat detector system was also planned to be installed.⁴³

- Another result of the bankruptcy settlement was that, after a certain holding period, the Site would become the property of the City and/or the NBRA. As of February 9, 2005, the owner of 740 Belleville Avenue was the LLC, which was organized as a limited liability company for the purpose of facilitating the transfer of the property to a brownfields redeveloper. *See* 740 Belleville Avenue LLC Certificate of Organization. The current managers of the LLC are the City and the NBRA.
- In an e-mail dated April 4, 2006, Jacobs Engineering provided the following account regarding the interior deterioration of the Aerovox building:

The interior damage within the facility has expanded and increased over the past two years due to rainwater and snow melt intrusion through the roof. This has led to increased ceiling tile damage in some cases entire rooms are covered in wood/fiber pulp. Water between the wood floor and floor tiles has lifted them over hundreds of square feet. The tongue and groove wood flooring is buckling (lifting due to swelling). Mold growth is perpetuated by damp building materials and in some areas standing water. Paper products files, shipping boxes, etc. -- just about anything made of cellulose is moldy and decomposing. Machinery of all sorts are rusting leading to potential problems in moving them in the future. Manufactured products (capacitors)

⁴³ The New Bedford Fire Chief at the June 2006 public meeting confirmed installation of the heat detector at the Site.



are rusting and leaking. Asbestos lagging (Aircell) in some locations is falling to the floor and transite sheeting is efflorescing (loosing the mineral binding) because of water damage. There may be more examples of the continuing water damage but these are probably the key problem areas. (Emphasis added.)

Based on the above-referenced documents from the AR file, the following conclusions should be drawn about the building and its deterioration:

- No roof repairs have been completed since the building was abandoned; the fire suppression system (which had cost Aerovox \$300,000) failed and caused significant damage due to lack of timely, low-cost maintenance and repairs for which funds were available and earmarked; the perimeter security fence was and is inadequate to prevent intruders; and the building electrical system is still active and not fully secured as directed by the 1999 AOC's Plant Closure Work Plan, and the bankruptcy settlement;
- At some point in time, most likely by late 2001 (after Aerovox filed its last periodic report under the 1999 AOC) and certainly by September, 2003, if not earlier (when the bankruptcy settlement became final), it became unreasonable for the regulators and the City to rely upon Aerovox to take the necessary steps to maintain and protect the Site;
- Had EPA enforced the requirements of the 1999 AOC during the time Aerovox owned the property (until February 2005), building deterioration would not be a significant concern today;
- During the period from September 30, 2003, the date of court approval of the bankruptcy settlement, to the present, EPA and the City had the legal authority and the funds to take the steps necessary to prevent further deterioration of the building, including maintaining security, fire suppression and alarm systems, inspecting and maintaining and/or repairing the building, and disconnecting utilities (to a greater extent than was done); and
- The imminent nature of the threat posed by a building fire (and consequently the main reason presently advanced for the NTCRA) could have been avoided had those responsible for the building from 1998 to the present (Aerovox, EPA, the City and the LLC) taken a few straightforward steps to protect and maintain the building and bring it into compliance with state fire codes. Removing combustible and hazardous materials, securing window and door openings, de-energizing the electrical system, and carrying out the utility abandonment items, *i.e.*, abandoning sanitary sewer connections to ensure that unused traps do not dry out, allowing sewer and/or other toxic or hazardous gases to enter the building, if done earlier, would have avoided the present situation, and would have done so for considerably less money than the cost of the proposed removal action. Even simply performing the roof repairs for \$100,000 would have



helped to minimize risk caused by drums left at the Site, a major reason given for why EPA implemented the 2004 TCRA.

At all times, the regulators and the City were well aware of the risks of failing to take necessary action to protect the building's integrity and prevent unauthorized access. The City's course of conduct indicates not only that it was well aware of the potential liability it or its surrogate would face if one of them became owner of the Site,⁴⁴ but also that it was acutely aware of the need to provide the requisite security and maintenance, as evidenced by the actions it did take (which possibly included encouraging EPA to implement the 2004 TCRA prior to the time the LLC took title).

While the City has performed certain maintenance and repairs since 2001, as described above, *e.g.*, security system and sprinkler repairs, those measures were too little and too late if the building condition is actually as bad as the SEE/CA represents it to be.⁴⁵ These measures were patently insufficient to maintain the building condition and minimize the threat of a major fire incident. In fact, the building has never been secured in accordance with the Plant Closure Work Plan of the 1999 AOC,⁴⁶ the bankruptcy settlement or the December 19, 2000 State Fire Marshal Advisory on *Abandoned or Dangerous Building Regulations*, 780 CMR 121 and 527 CMR 10.13.⁴⁷ The "fire load" available to start and maintain a fire is a major concern of the Fire Department, especially because the fire suppression system is not fully functional. The remaining chemical hazards also preclude the Fire Department from entering the building during a fire. On top of that, incidences of vandalism and vagrants leaving windows or fire doors open have exacerbated the hazard. Improved security and removal of combustible materials from the building would significantly reduce the "imminent threat." It appears that there was no clear responsibility assigned or, if assigned, enforced so as to maintain the building or clean it out to minimize the fire hazards and maximize the useful life of the building. While money has been spent for additional studies of the Site condition, *e.g.*, the

⁴⁴ In fact, the "comfort letter" that EPA provided to the City on October 29, 2003 discusses, in detail, the City's potential for liability as an "owner or operator" of the Site. In that letter, EPA opined that the City would not be held liable as an owner or operator of the Site, "*unless* the municipality causes or contributes to the release or threat of release of hazardous substances from the Property" (emphasis added).

⁴⁵ As mentioned above, because of EPA's decision to deny AVX and/or its agents access to the Site to inspect and evaluate current conditions, AVX has not been able to conduct an independent inspection of the current Site conditions.

⁴⁶ The Plant Closure Work Plan, Appendix D to the 1999 AOC, required a six-foot chain link fence with barbed wire, daily mobile security monitoring, maintenance of the fire suppression and alarm system, monthly building inspection and maintenance (to repair damage from weather, vandalism, or unauthorized entry), utility disconnection and warning signs. Not all of this has been done in accordance with the Appendix D specifications.

⁴⁷ In addition to security provisions, this advisory recommends that, in the absence of a fully automatic, functional, and maintained sprinkler system, all combustible materials should be removed from the building. Here, the building was never "cleaned out," *e.g.*, equipment, trash, furniture, office supplies remained, with the exception of the items removed during the 2004 TCRA.



CSM, which basically arrived at the same conclusion as the 1998 EE/CA, *i.e.*, the building should be demolished, it is apparent that the building stabilization and maintenance identified in the 1999 AOC, and what the State Fire Marshal required as of December 12, 2000 for securing abandoned buildings, was given a lower priority and therefore was not fully implemented.

Since the above actions have not been implemented by EPA or the City, any fire at the facility is expected to become a “major incident,” according to the Preplan, primarily due to the large combustible fire load, inadequate fire suppression system, and the chemical hazards associated with the building.⁴⁸ As a result, in 2006, EPA concluded that this increased fire and chemical release hazard was an additional response action objective, which warranted implementing the building demolition NTCRA as soon as possible, rather than waiting until as late as 2011.

What this litany of events demonstrates is that the increased risk of fire and chemical release at the Site has not been created by the presence of hazardous substances within the building, but instead by the threat of release created by the building’s deterioration. AVX, which sold the fully-functioning Site over 33 years ago, is not responsible for creating that threat of release, or the conditions that have repeatedly led EPA to make imminent and substantial endangerment determinations. That responsibility lies with others, whose contribution to and exacerbation of Site conditions must be taken into account as set forth below.

B. Based on the Foregoing, LLC, City, and EPA May Be Held Liable for Response Costs in Connection with Proposed Removal Action.

AVX does not adopt the arguments articulated in this section lightly, knowing that the City and EPA have taken limited actions to try to address environmental concerns at the Site and that they are seeking to find a way to return the property to active and beneficial use.⁴⁹ Unfortunately, the steps that the City and EPA have taken fall far short of what was required of Aerovox in the 1999 AOC, and is required under CERCLA and applicable state law to prevent the release or threat of release of hazardous substances.

While EPA, the City, and the LLC all have had control over the Site, in varying degrees, from 1998 until present, AVX has had no control over, or even access to, the Site since 1973. As a result, AVX is now in the undesirable position of having to defend itself

⁴⁸ See the SEE/CA comment letter at 24-25 for suggestions on how the threat of fire could have been addressed consistently with the State Fire Marshal Advisory.

⁴⁹ AVX notes that, while it believes the conclusions set forth in this section are sound based on the information currently available to it, it understands that there may be other facts and circumstances, presently unknown to it, which might affect this analysis, including information requested but not yet received from the City.



against liability that is based on the actions or inactions of others, and is being asked to bear all response costs, including those traceable to the deteriorated condition of the building, which obviously was caused by others. AVX submits that the LLC, the City, and/or EPA all may be legally responsible, at a minimum, for the increased costs caused by the deteriorated state of the building.

1. LLC Is Jointly and Severally Liable for Response Costs Resulting from Its Own Negligence and Inaction, as a Current Owner and Operator of Site.

On February 9, 2005, title to the Site was conveyed to the LLC by the trustee of New Bedford Capacitor, Inc. (f/k/a Aerovox) by fiduciary deed. *See* Fiduciary Deed dated January 25, 2005 (registered with the South Bristol County Registry on February 9, 2005).⁵⁰ As explained below, the LLC is therefore liable under CERCLA, as the current owner and operator of the Site, for response costs incurred in connection with the cleanup of the Site.

Section 107(a) of CERCLA imposes liability on four classes of persons:

- (1) the owner and operator of a vessel or facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . , and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities . . . selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance”

42 U.S.C. § 9607(a).

Here, the LLC certainly comes within Section 107(a)(1)’s reach.⁵¹ Accordingly, the LLC could be held responsible under CERCLA for the costs of cleanup of the Site, regardless

⁵⁰ As part of the bankruptcy settlement, Aerovox agreed that, subsequent to approval of the Settlement Agreement, it would execute a non-recourse mortgage on the Site to the City with a statutory power of sale in favor of the City or its nominee to secure any expenses incurred or to be incurred by the City. Apparently, the City determined to exercise its statutory power of sale in favor of the LLC.

⁵¹ Any argument that the LLC is somehow immune from liability is undercut by the fact that the LLC voluntarily assumed title to the Site, the LLC is not in any sense a governmental entity (though managed by the



of its culpability for the alleged contamination. *See Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 903 F. Supp. 273, 276 (D.R.I. 1995) (holding that CERCLA “is designed to impose strict liability on a variety of actors, including past and present owners, irrespective of their culpability”). Of course, this result is further justified by the LLC’s own neglect and inaction during its ownership of the Site. According to documents in the AR file, since the LLC acquired title to the Site at the beginning of 2005, the manufacturing building has continued to deteriorate with no effective intervention by the LLC. *See* e-mail dated April 4, 2006 from Jacobs Engineering (describing then current condition of the building and fact that the building had worsened substantially “over the past two years,” during at least one of which the LLC owned the Site).

In addition to its liability under CERCLA, the LLC is also liable under Chapter 21E. In particular, the relevant subsections of Chapter 21E impose liability, without regard to fault, on an owner or operator of a site from which there has been a release or threat of release (Chapter 21E, § 5(a)(1)), or any person who “otherwise caused or is legally responsible for” a release or threat of release (Chapter 21E, § 5(a)(5)). The LLC clearly falls under both categories. *See Wellesley Hills Realty Trust v. Mobil Corp.*, 747 F. Supp. 93, 96 (D. Mass. 1990) (holding that, under subsection 5(a)(1), “present owners of property contaminated by either hazardous material or oil are liable solely by reason of their ownership”); *id.* at 98 (denying motion to dismiss subsection 5(a)(5) claim where facts pled were sufficient to support an allegation that the defendant caused the release in question). Under these circumstances, AVX could seek contribution from the LLC in any suit brought against it, and suggests either that EPA take direct action against the LLC as a PRP, or take the LLC’s potential liability into account in any allocation of liability. Moreover, as Aerovox is no longer available to satisfy its share of the increased costs associated with the building deterioration, Aerovox’s orphan share should be allocated to those responsible for these increased costs, and not to AVX.

2. City Is Liable for Response Costs Resulting from Its Own Inaction Concerning the Site.

Even before the LLC took title, the City had access to the Site and to funds from the Aerovox bankruptcy specifically earmarked to finance response efforts at the Site, as well as an obligation to perform maintenance and security for the Site.⁵² Rather than do so, however,

City and the NBRA), and the LLC exacerbated the condition at the Site through its neglect of the building. *See* 42 U.S.C. § 9601(20)(D), which is quoted in full in note 56 below.

⁵² As mentioned above, the Settlement Agreement awarded the City \$250,000 in administrative expenses to be used for purposes of maintaining the fire suppression system at the Site and performing other undefined maintenance and security measures at the Site. Such maintenance and security measures would have been responsive to the requirement under CERCLA and the NCP in similar situations to take “actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release,” including “such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances.” *See* 42 U.S.C. § 9601(21); 40 CFR



the City allowed the building to fall into its current state of disrepair, resulting in the alleged release or threat of release of hazardous substances at the Site. Under the circumstances, the City could be held liable under CERCLA for cleanup costs incurred by EPA due to its negligence or inaction.

In addition, the City, as co-manager of the LLC, may be liable as an “operator” of the Site under Section 107(a)(2).⁵³ Specifically, the City may be liable as an operator because it has managed the LLC’s ownership of the Site and, in particular, has been responsible for the operations at the Site that have resulted in the purported release or threat of release of hazardous substances documented above.⁵⁴ Furthermore, as shown above, the City has made decisions as to certain maintenance and security measures taken in response to environmental concerns at the Site. And, because it has contributed to the allegedly unsafe conditions at the Site, it is not entitled to the usual exemption from suit.⁵⁵ By its management of the LLC, the

300.5. The NCP elaborates that a removal action “includes, in addition, without being limited to, security fencing or other measures to limit access . . .” See 40 CFR 300.5.

⁵³ AVX notes that it does not yet have sufficient facts to determine whether the NBRA’s conduct would make it liable under CERCLA and/or Chapter 21E. It may be that the NBRA would be liable, like the City, for its own negligence and as a co-manager of the LLC.

⁵⁴ “Operator” is defined at 42 U.S.C. § 9607(20)(A) as any person operating the facility. In *United States v. Bestfoods*, the Supreme Court explained the definition of an operator for purposes of CERCLA, as follows:

[U]nder CERCLA, an operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility. To sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.

524 U.S. 51, 66-67 (1998).

⁵⁵ Section 101(20)(D) of CERCLA provides:

The term ‘owner or operator’ does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph *shall not apply* to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively, as a nongovernmental entity, including liability under section 107.

42 U.S.C. § 9601(20)(D) (emphasis added). The City is not immune from suit under CERCLA because, among other things, it “contributed to the release or threat of release of a hazardous substance.” 42 U.S.C. § 9601(20)(D). It is noteworthy that, in the comfort letter discussed above, EPA expressly left open the possibility that the City could be held liable if it “causes or contributes to the release or threat of release of hazardous substances from the Property.” In that comfort letter, EPA also took the position that the City would not be liable as an owner or operator because it would be acquiring the Site involuntarily in its capacity as sovereign. The City, however, acquired the Site through a voluntary settlement with Aerovox, and stands to gain from any sale of the Site, as explained above.



City has thus managed, directed and/or conducted operations at the Site related to the alleged pollution sufficient to impose liability under CERCLA.

In addition, like the LLC, the City also is liable under Sections 5(a)(1) and/or 5(a)(5) of Chapter 21E for its contribution to the ongoing deterioration of the building which caused the release or threat of release of hazardous substances that the NTCRA purportedly seeks to remedy. *See Com. v. Boston Edison Co.*, 444 Mass. 324, 343 (2005) (noting that Boston Redevelopment Authority and Massachusetts Convention Center Authority “could be liable parties if they caused or were responsible for a release at the site”). Consequently, AVX could seek contribution from the City in any suit brought against it. As with the LLC, AVX suggests that EPA take direct action against the City as a PRP, or take its potential liability into account in any allocation of liability.⁵⁶

3. EPA Is Liable for Response Costs Resulting from Its Negligence or Inaction in Cleanup of Site.

As with the others, EPA could also be liable based on its inaction or neglect with respect to response actions at the Site. *See United States v. Ottati & Goss*, 694 F. Supp. 977, 983-84 (D.N.H. 1988) (EPA held to be PRP where “situation was further exacerbated by the EPA cleanup of the Ottati & Goss site”).⁵⁷ In fact, the manufacturing building has fallen into such apparent disrepair that EPA has taken the stance that demolition of the building is the only alternative.

As described above, EPA, like the City, had site access, funds, and an obligation, pursuant to the Aerovox bankruptcy settlement, to finance and perform necessary response actions at the Site. While AVX acknowledges that certain actions take time and planning, EPA should, at a minimum, have made efforts to maintain and secure the building to prevent ongoing deterioration. As a result, if EPA determines to proceed against AVX for the increased costs inextricably tied to the deterioration of the building, AVX could likely seek recovery from EPA, either as a direct claim or a claim for contribution, or under a theory of recoupment. *See Ottati & Goss*, 694 F. Supp. at 986-87 (holding EPA liable as PRP for negligent cleanup efforts).

⁵⁶ In addition, if EPA proceeded against AVX, AVX would assert claims against the City, based on its negligence in maintenance of the Site. As described below, a common law claim for negligence under a recoupment theory may be brought to set-off AVX’s liability, using the liability of another responsible party. The City’s negligent maintenance of the Site should thus be taken into account in any demand against AVX for this additional reason. *See* Section II.B.3. below for a full discussion of recoupment.

⁵⁷ In *Ottati & Goss*, EPA operated a drum-crushing pit that exacerbated the contamination at the site. The court held that EPA was jointly and severally liable with the other PRPs for EPA’s cleanup costs. 694 F. Supp. at 987.



To the extent that EPA contends that it is immune from liability for actions taken in its regulatory capacity, some courts disagree. See *FMC Corp. v. United States*, 29 F.3d 833, 840-41 (3d Cir. 1994) (holding that, “if the United States, even as a regulator, operates a hazardous waste facility or arranges for the treatment or disposal of hazardous wastes, it should be held responsible for cleanup costs, just as any private business would be, so that it will internalize the full costs . . . [that hazardous] substances impose on society and on the environment”) (quotations omitted); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1448-49 (E.D. Cal. 1995) (holding that there is “no ‘regulatory’ or ‘remedial’ exception to CERCLA liability”).⁵⁸ In *Iron Mountain Mines*, the court reasoned that, “even if it is critical to make polluters internalize the costs of their harmful activities, it does not follow that they should also internalize the costs of the government’s negligent response during its cleanup efforts.” 881 F. Supp. at 1446.

Even if EPA had a claim to sovereign immunity, however, AVX could still proceed against the government under a theory of recoupment.⁵⁹ A suit for recoupment would allow AVX to reduce its liability, if any, by the liability attributable to EPA – without requiring any waiver of sovereign immunity. See *Atlas*, 797 F. Supp. at 421 (“A waiver of sovereign immunity is not necessary because a recoupment claim simply allows a court to examine an entire transaction, once the government has decided to bring suit.”). A claim against EPA for contribution, may also be appropriate. See *United States v. Manzo*, 182 F. Supp. 2d 385, 405-06 (D.N.J. 2001) (discussing fact that PRP could proceed against EPA in subsequent action for contribution where parties argued EPA was PRP based on spills that occurred during the cleanup process).

⁵⁸ Section 120(a)(1) of CERCLA creates a waiver of sovereign immunity for purposes of some suits against the federal government:

Each department, agency, and instrumentality of the United States . . . shall be subject to, and comply with, this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this title. Nothing in this section shall be construed to affect the liability of any person or entity under section 9606 and 9607 of this title.

42 U.S.C. § 9620(a)(1).

⁵⁹ “In order to maintain a recoupment claim, a defendant must show the following: 1) that the recoupment claim arises out of the same transaction or occurrence as the government’s suit; 2) that the recoupment claim seeks the same type of relief as is sought by the government; and 3) that the claim is purely a defensive set-off, and does not seek recovery from the government.” See *United States v. Atlas Minerals & Chems., Inc.*, 797 F. Supp. 411, 421 (E.D. Pa. 1992). While some courts have been hesitant to allow private parties to proceed against EPA, acting in its regulatory capacity, for affirmative relief in the form of counterclaims for payment (due to the fact that CERCLA provides a limited waiver of sovereign immunity), courts have been open to claims for recoupment against the government. See *id.* (“Although the government’s sovereign immunity requires the court to dismiss the defendants’ counterclaims, it does not require the court to dismiss the defendants’ recoupment claims since such claims do not require a waiver of sovereign immunity.”). See also *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528, 1552 (E.D. Cal. 1992) (United States acknowledged that “recoupment claim does not require waiver of sovereign immunity”).



Under these circumstances, AVX submits that EPA should take into consideration the increased costs associated with deterioration of the building caused by the actions and inactions of all responsible parties over the past several years in making any demand for payment from AVX. Based on all of the above, if AVX is liable for any cleanup costs at the Site, its liability should be reduced significantly by the liability attributable to these other parties. Moreover, to the extent that other persons, in addition to Aerovox are found to be PRPs, there should be an equitable allocation among such liable parties.

III. AVX WAS PREJUDICED BY EPA'S HANDLING OF THE AEROVOX BANKRUPTCY.

A. Background of EPA's Bankruptcy Claims Against Aerovox.

As described above, the 1999 AOC required Aerovox to pay for and conduct the cleanup of the Site under EPA supervision. Among other things, the 1999 AOC required that Aerovox: (i) deposit funds, in specified installments, into the Fund; (ii) demolish the manufacturing building and install an asphalt cap at the Site; and (iii) construct, and relocate to, another manufacturing facility located in New Bedford. In addition, the 1999 AOC included certain monitoring and reporting requirements, and provided for stipulated penalties for violations of many of its provisions. Pursuant to the 1999 AOC, Aerovox made the initial \$750,000 payment to the Fund, but then filed for bankruptcy on June 6, 2001, before making the second scheduled payment of \$200,000, but after Aerovox requested and received an extension of the December 31, 2000 due date from EPA.⁶⁰ Pursuant to the 1999 AOC, EPA could have imposed penalties on Aerovox for noncompliance with the payment and other obligations of the order. *See* 1999 AOC at ¶ 91.⁶¹

On or about November 15, 2001, EPA filed a proof of claim in the Aerovox bankruptcy to protect EPA's rights with respect to the injunctive obligations of Aerovox and its estate, asserting that Aerovox, as owner and operator of the Site, was required to clean up, and perform operation and maintenance measures with respect to, the PCBs and other hazardous substances disposed of in and around the Site. In its proof of claim, EPA took the position that all of Aerovox's costs of complying with the 1999 AOC were not "claims" under the Bankruptcy Code, but rather were administrative expenses of the estate. *See* EPA Proof of

⁶⁰ *See* letter of January 5, 2001 from Aerovox to EPA, requesting extension because certain measures taken in the relocation of its operations to a new manufacturing facility exceeded the projected budget by about \$2 million. The letter requested until June 30, 2001 to pay an adjusted amount of \$225,000. EPA granted the request and the parties executed the First Amendment Agreement to memorialize the extension.

⁶¹ For example, the EPA could have imposed a \$1,500 per day fine "for failure to submit timely or correct deposits into the Trust Fund." *See* 1999 AOC at ¶ 91(g). As described in detail below, per day penalties were also provided for, among other things, failure to timely complete the cleanup work according to certain specifications, for failure to submit timely or complete reports, and for failure to provide security and fire protection and/or to maintain the Site.



Claim at ¶¶ 18 and 27. All such work was previously estimated to cost approximately \$8.3 million in connection with the 1999 AOC.

On or about November 30, 2002, EPA filed the Administrative Application for recovery of response costs EPA expected to incur in cleaning up, and performing operation and maintenance measures with respect to PCBs and other hazardous substances disposed of in and around the Site. The Administrative Application did not quantify the total amount in administrative expenses claimed, but enumerated the \$8.3 million estimated cost under the 1999 AOC, and certain other items that EPA considered administrative expenses, including expenses associated with repairing the roof of the manufacturing building (estimated to be \$1 million); removal of chemical drums left at the Site (estimated to be \$48,000); repairing a cracked asphalt cap (estimated to be \$3,000); and maintenance of a fire suppression and security system (estimated to be \$23,000 per year). In addition, the Administrative Application explained that the cost of decontamination and disposal of machinery and equipment left behind at the Site – Aerovox having previously agreed to relocate all of its manufacturing and business operations to another manufacturing facility – would cost an additional \$2-3 million. *See* Administrative Application at ¶¶ 17-18.⁶²

On or about January 15, 2003, the Creditors' Committee and Aerovox filed the Joint Objections. Specifically, the Committee and Aerovox objected to elevating to priority payment status the response costs sought by the EPA in the Administrative Application. Each of the four main arguments raised by the Joint Objections is addressed in Section III.B. below.

On or about August 11, 2003 – over two years after Aerovox filed for bankruptcy – EPA, the Commonwealth and the City, among others, entered into a settlement agreement with respect to the costs incurred in connection with the cleanup of the Site. On September 30, 2003, the bankruptcy court approved the Settlement Agreement. EPA settled all its claims against Aerovox with respect to the Site in exchange for: (1) payment of the \$750,000 placed in the Fund by Aerovox prior to its bankruptcy, plus interest and any appreciation; (2) allowance of EPA's administrative expense claim in the amount of \$200,000;⁶³ and (3) allowance of an unsecured claim in the amount of \$8,235,000, reduced by the amount by which the Fund exceeded \$830,000. By the conclusion of the bankruptcy, EPA received

⁶² AVX notes the significant discrepancy between EPA's estimated costs for purposes of the Administrative Application for removal of the chemical drums (\$48,000) and the actual costs incurred for such removal action (according to EPA, the 2004 TCRA cost just under \$500,000). EPA's own estimation calls into question the validity of the 2004 TCRA costs, see Section VI.C. below, but also, to the extent that EPA failed to demand a reasonable amount for removal of the drums as an administrative expense of the estate, EPA should not now look to AVX for any shortfall. Moreover, as discussed below, by not incurring such costs until 2004, after it had settled with Aerovox, EPA undermined any claim to such costs as administrative expenses.

⁶³ As mentioned above, the City was also awarded \$250,000 in administrative expenses to be used for purposes of maintaining the fire suppression system at the Site and performing other undefined maintenance and security measures at the Site.



\$200,000 in administrative expenses, \$967,273.52 from the Fund, and \$1,556,111.80 from distributions on its unsecured claim, bringing the total paid to EPA to \$2,723,385.32.

During the bankruptcy, Aerovox sold its assets and distributed the proceeds to holders of allowed claims in accordance with the payment provisions of its Second Amended Liquidating Plan of Reorganization.⁶⁴ The proceeds of the sales, after satisfaction of Aerovox's three primary secured creditors, totaled approximately \$8.6 million. As of December 1, 2003, after satisfaction of certain administrative and priority claims, including EPA's \$200,000 administrative expense claim, Aerovox still had approximately \$6.6 million on hand, all of which should have been allotted to EPA for cleanup costs (as explained below). Instead, during the first week of December, 2003, the bankruptcy trustee made an initial 10.097% distribution to holders of allowed claims, totaling approximately \$2 million, in accordance with the priorities established by the Bankruptcy Code. Subsequent distributions of 7.00% and 2.12% were made, bringing the final distribution to holders of allowed claims to 19.217%.

B. EPA Should Not Have Compromised Its Valid Claim to Cleanup Costs as Administrative Expenses of Aerovox Estate.

As explained below, EPA's acceptance of a settlement that provided administrative expense status to only \$200,000 of its costs was unjustified and unreasonable. Consequently,

⁶⁴ On April 18, 2002, Aerovox and Parallax Power Components LLC ("Parallax") entered into an Asset Purchase Agreement (the "Parallax APA"), whereby Parallax agreed to purchase a substantial portion of the assets of Aerovox's business, including the Site and the use of the Aerovox trade name. See Parallax APA, attached as Exhibit 33 to the App. The parties specified that a condition of the sale was a court order holding that Parallax could hold itself out as successor to Aerovox for all purposes, but that Parallax would have no liabilities, including environmental liabilities, in connection with the Site. As it turns out, the parties were able to convince the bankruptcy court to approve the Parallax APA and to order that Parallax could not be held responsible for the liabilities of Aerovox, other than a few specifically enumerated and inapplicable obligations set forth in the APA. The bankruptcy court, by its order, endorsed a situation in which Parallax could call itself Aerovox and hold itself out for business purposes as the successor to Aerovox, but not be held liable as a successor.

Subsequent to the sale, Parallax was authorized to, and did, operate its capacitor business under the name Aerovox Corp. (thereby creating an "Aerovox IV") and also referred to itself as the successor to Aerovox. In fact, a recent article from the Boston Business Journal ("BBJ") shows the extent to which the new Aerovox Corp. held itself out as the successor to Aerovox. In that article, the author refers to Aerovox Corp. as the "84-year-old company" that was founded in 1922, built a new manufacturing facility in 2000, "took shelter in Chapter 11 in June 2001," and "rebounded back from bankruptcy" thereafter. See BBJ Article dated June 16-22, 2006, attached as Exhibit 34 to the App. Aerovox IV has since been acquired by Buckingham Capital Partners, L.P. in July 2005 and also holds itself out as the successor to Aerovox Corp. It appears that EPA's inattention has led to a situation where Parallax and its successor have been allowed to far exceed the scope of what the bankruptcy court intended they would represent with respect to being a successor with apparent immunity. In any event, AVX reserves its rights with respect to whether the bankruptcy order is valid or binding on it.



EPA cannot now look to AVX for payment of its unrecovered costs, especially where, as here, holders of unsecured claims received distributions totaling \$6.6 million.

Costs awarded administrative expense status are entitled to payment priority and must be paid in full before any distribution to holders of general, unsecured claims. Administrative expenses are defined in the Bankruptcy Code as the “actual, necessary costs and expenses of preserving the estate” after the commencement of the bankruptcy proceedings. 11 U.S.C. § 503(b)(1). To establish that expenses qualify as administrative expenses, a claimant must show that (1) the right to payment of its expenses arose from a postpetition transaction with the debtor, rather than from a prepetition transaction with the debtor, and (2) the consideration supporting the right to such payment was beneficial to the estate of the debtor. *See In re Mammoth Mart, Inc.*, 536 F.2d 950, 954 (1st Cir. 1976). Under this two-pronged test, those expenses that are incurred “postpetition” and are “actual and necessary” to the bankruptcy estate constitute valid administrative expenses. In this case, EPA could have easily satisfied both prongs with respect to all, or a substantial portion of, its costs, had it taken minimal efforts to initiate necessary response actions at the Site, including maintenance and security necessary to prevent a release or threat of release, as previously required of Aerovox.

1. “Postpetition” Costs.

The “postpetition” prong refers to costs incurred after the commencement of the bankruptcy. Costs incurred prior to the petition date do not satisfy the postpetition prong, while costs incurred after the petition date do satisfy this prong. In the context of the Aerovox bankruptcy, EPA’s costs may be viewed as incurred (i) on a prepetition basis for prepetition conduct; (ii) on a postpetition basis for prepetition conduct; (iii) on a postpetition basis for postpetition conduct; and (iv) on a postpetition basis pursuant to a prepetition administrative order. Each of these four types of costs presents different considerations.

First, it is clear that claims for cleanup costs incurred prepetition (category (i) costs) do *not* satisfy the “postpetition” prong, and therefore do not qualify for administrative expense priority. According to documentation provided by EPA, of the \$531,842.36 in direct costs demanded by EPA, \$122,887.83 was incurred prior to the June 6, 2001 petition date. These costs therefore should have comprised a portion of EPA’s general, unsecured claim.⁶⁵

On the other hand, postpetition cleanup costs incurred in remedying postpetition environmental issues at the Site (category (iii) costs) clearly satisfy the “postpetition prong.”

⁶⁵ It is not possible to determine exactly how much of EPA’s indirect costs demand of \$169,909.41 would have constituted prepetition costs as EPA has not yet provided information requested regarding its yearly indirect costs rates, which change periodically. An assumed indirect costs rate of 27% for the entire period, which we believe is close to the current rate, produces an additional \$33,179.71 in prepetition costs, bringing the total to \$156,067.54. By contrast, as part of its settlement with Aerovox, EPA agreed that its unsecured claim would be for \$8,235,000 (reduced by the amount by which the Fund exceeded \$830,000).



See In re Charlesbank Laundry, Inc., 755 F.2d 200 (1st Cir. 1985). Likewise, postpetition cleanup costs (not based on a prepetition order) incurred in remediating prepetition environmental issues (category (ii) costs) would, in all likelihood, satisfy this prong as well. *See, e.g., In re Hemingway Transport, Inc.* 73 B.R. 494, 503 (Bankr. D. Mass. 1987) (determining administrative expense status would be appropriate for cleanup costs and explaining that “any liability for damages under CERCLA arose postpetition, although the toxic wastes presumably were dumped . . . prepetition”); *In re Chateaugay Corp.*, 944 F.2d 997, 1009-10 (2d Cir. 1991) (environmental cleanup costs incurred postpetition on account of the prepetition release of hazardous wastes entitled to administrative expense priority based upon need to protect public health and safety); *In re Stevens*, 68 B.R. 774, 783 (Bankr. D. Me. 1987) (postpetition cleanup of prepetition environmental hazard constitutes a first priority administrative expense). For purposes of this response, we assume that the specific costs enumerated in the Administrative Application, other than the \$8.3 million in cleanup costs under the 1999 AOC, would fall within these categories of expense. A conservative estimate of EPA’s claim for administrative expenses, not incurred in connection with the 1999 AOC, would be the approximately \$3-4 million in costs listed in the Administrative Application in addition to the \$8.3 million in cleanup costs under the 1999 AOC.⁶⁶

As to cleanup costs covered by the 1999 AOC incurred by EPA on a postpetition basis (category (iv) costs), at least one Massachusetts district court decision has held that administrative priority may be awarded under such circumstances as well. *See In re Distrigas Corp.*, 66 B.R. 382, 387 (D. Mass. 1986) (holding that the State of New Jersey held an administrative claim, contingent on the State spending money, where parties had entered a prepetition administrative consent order but no cleanup costs had yet been incurred).⁶⁷ The

⁶⁶ These costs include the estimated \$2-3 million for decontamination and disposal of the equipment left at the Site, approximately \$1 million for roof repair, approximately \$48,000 for removal of drums, approximately \$3,000 for repair of asphalt capping, and approximately \$23,000 per year for the maintenance of security and fire suppression systems (unless the City paid the expenses for fire and security systems).

⁶⁷ Where, as here, certain costs are covered by a prepetition administrative order, the first question is whether the claim founded on the order constitutes a “claim” for bankruptcy purposes. If the costs in the administrative order are considered a claim for monetary recovery, then these costs constitute a “claim.” *See In re Chateaugay*, 944 B.R. at 1008 (holding that an “order to clean up a site, to the extent that it imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, is a ‘claim’ if the creditor obtaining the order had the option, which CERCLA confers, to do the cleanup work itself and sue for response costs, thereby converting the injunction into a monetary obligation.”). Under *In re Healthco Int’l, Inc.*, 272 B.R. 510, 512 (1st Cir. 2002), any such costs, when incurred, would be prepetition, unsecured claims for monetary payment. If the costs are not considered a claim for monetary recovery, any such costs pursuant to a prepetition order would not constitute a “claim” and would survive bankruptcy. *See In re Chateaugay*, 944 F.2d at 1008 (“Since there is no option to accept payment in lieu of continued pollution, any order that to any extent ends or ameliorates continued pollution is not an order for breach of an obligation that gives rise to a right of payment and is for that reason not a ‘claim.’”). Applying this distinction, the 1999 AOC had the potential to be a “claim,” but was not at the time of the bankruptcy because EPA had not incurred any cleanup costs and was therefore not entitled to monetary relief. At the time of the bankruptcy, the 1999 AOC provided for injunctive relief. Had EPA stepped in and incurred the costs contemplated by the 1999 AOC, the question is whether the right to recovery of such costs would constitute



First Circuit has not yet addressed this precise issue. As the 1999 AOC was based on the 1998 EE/CA's \$8.3 million estimated cost, we assume, for purposes of this response, that the total cleanup costs under the 1999 AOC would have been approximately \$8.3 million.

In the Administrative Application, EPA enumerated this \$8.3 million figure, plus the \$3-4 million in additional costs designed to abate the then current conditions and not contemplated by the 1999 AOC.⁶⁸ As described above, EPA had a strong argument that all such amounts satisfied the "postpetition" prong.

2. "Actual and Necessary."

The law regarding the "actual and necessary" prong has evolved from cases involving debtors' requests to abandon contaminated property that constituted a drain on the debtor's estate. The leading case in this line, *Midlantic Nat'l Bank v. New Jersey*, 474 U.S. 494, 507 (1986), held that a bankruptcy court "does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." Based on this holding, courts have since held that, because the debtor may not abandon property that is in violation of environmental laws, the estate must expend funds, on a priority basis, to ensure that the contaminated property is brought into compliance with the law. *See, e.g., In re Stevens* at 68 B.R. at 783 ("The court finds that improper and illegal storage of waste oil containing PCB's constitutes an imminent and identifiable danger, and that the costs of protecting the public from that danger are entitled to treatment as costs of administration."). Going one step further, courts have held that, because the debtor cannot maintain itself in violation of the law, if the debtor does not remedy the environmental issue, EPA or other governmental agencies may perform the cleanup work and then seek reimbursement from the debtor. *See, e.g., In re Wall Tube & Metal Prods. Co.*, 831 F.2d 118, 122-24 (6th Cir. 1987) (costs incurred by the state to comply with state environmental laws by removing hazardous waste from the debtor's property were entitled to administrative expense priority as actual and necessary costs of the estate because the debtor could not have maintained itself in continuous

a "claim," dischargeable in bankruptcy on an unsecured basis, or whether such costs would constitute administrative expenses. Based on the fact that such costs are more properly viewed as an ongoing postpetition liability, rather than a liability fixed at some prepetition point, EPA would have had the stronger argument that these costs, if incurred during the bankruptcy, were administrative expenses of the estate. *See Kathryn R. Heidt, The Environmental Claim and When it Arose, in Environmental Obligations in Bankruptcy* (2006) at § 3:15 (explaining opinion that in bankruptcy the proper way to view an obligation to clean up is to treat it as a "claim," due to the alternate right to payment provided in CERCLA, if the cleanup will end or ameliorate current pollution; "but [] to the extent that either (1) the debtor continued to own the property or (2) the debtor continued to cause pollution or to pose the threat of injury or further harm to the environment, it [is] a claim that arose every day"). "As such, it was a claim or series of claims that arose postpetition and would continue to arise every day until remedied. The costs might be administrative expenses and to the extent the obligations continued postconfirmation, they would not be discharged." *Id.*

⁶⁸ EPA's proof of claim also took the position that any costs incurred under the 1999 AOC constituted administrative expenses of the bankruptcy estate.



violation of the environmental laws); *In re Peerless Plating Co.*, 70 B.R. 943, 948-49 (Bankr. W.D. Mich. 1987) (“As the estate could not avoid the consequent liability by abandonment in this case, the Trustee had a duty to expend all unencumbered assets of the estate in remedying the situation, as required by *Midlantic*. Since the EPA discharged this obligation of the Trustee, its motion for administrative expense status is granted.”).

In *In re T.P. Long Chem., Inc.*, 45 B.R. 278 (Bankr. N.D. Ohio 1985), the court considered whether the expenses incurred by EPA in removing hazardous material were allowable as administrative expenses. That court rejected the trustee’s claim that the estate was not liable under CERCLA, based on the fact that ownership of the drums containing waste gave rise to liability under CERCLA and the estate could not escape its liability by abandoning the drums. The court further explained:

Since the estate cannot avoid the liability imposed by CERCLA, it follows that the cost incurred by the E.P.A. in discharging its liability is an actual necessary cost of preserving the estate entitled to administrative priority The necessity of the expense cannot be questioned since the removal of the wastes was an obligation of the estate under CERCLA.

Id. at 286-87. See also *In re Stevens*, 68 B.R. at 775 (“Inasmuch as DEP incurred its cleanup expense *after* the filing of the chapter 7 petition in substitute fulfillment of the legal obligation of the trustee . . . , the cleanup did confer benefit on the debtors’ estate by bringing the estate into compliance with the cleanup mandate of state and federal law and by protecting the estate from the increased liability which would result in the event of a spill.”) (citation omitted).

A final important factor in determining whether the “actual and necessary” prong has been met is whether any costs *have actually been incurred* during the bankruptcy. In *In re Microfab*, 105 B.R. 161, 166 (Bankr. D. Mass. 1989), the United States Bankruptcy Court for the District of Massachusetts examined the issue of whether the Commonwealth was entitled to administrative expense priority for expenses in cleaning up the site, if the debtor would not expend its funds to remedy environmental concerns. The bankruptcy court denied the Commonwealth’s request as premature because it had not yet incurred any such cleanup expenses, and therefore the court was unable to determine whether such expenses would be “actual” and “necessary” expenses of the estate. See also *In re HNRC Dissolution Co.*, No. 02-14261, 2006 Bankr. LEXIS 912, at *10 (Bankr. E.D. Ky. May 30, 2006) (“Administrative expenses are generally allowed only after they have been incurred Expenses incurred post-confirmation are not entitled to administrative expense priority treatment.”) (citation omitted). As a result, to the extent EPA did not incur cleanup costs during the bankruptcy, it risked denial of such costs as administrative expenses of the estate. In fact, during the entire



two-year period between the petition date and the date EPA settled with Aerovox, EPA spent only \$1,987.74, in total, for cleanup costs in connection with the Site.⁶⁹

The Creditors' Committee and Aerovox made four principled arguments in the Joint Objections in opposition to allowance of EPA's administrative expense claim. These arguments and an assessment of their validity follow.

(a) EPA's response costs constituted a prepetition claim because any liability arose from prepetition conduct and a series of consent agreements executed by Aerovox prior to its bankruptcy. As to this argument, EPA's expenses can be put into two basic categories, those arising from prepetition environmental damage and those arising from postpetition environmental damage. The first category of expenses can be categorized as those costs to be incurred by EPA in fulfilling Aerovox's obligations under the 1999 AOC (estimated to be approximately \$8.3 million).⁷⁰ The second category of expenses can be categorized as those postpetition costs not covered by the 1999 AOC but necessary to abate current Site conditions (totaling approximately \$3-4 million). As described in Section III.B.1. above, EPA had a solid case that all costs in both categories qualified as administrative expenses, provided it had incurred such costs during the bankruptcy.

(b) EPA failed to establish, as Aerovox and the Creditors' Committee argued it must to award administrative priority to postpetition cleanup costs based on prepetition environmental damage, that the conditions at the Site were such that the public would be imminently harmed if immediate action was not undertaken. Aerovox and the Creditors' Committee argued that, although it is sometimes appropriate to treat postpetition costs for prepetition damage as administrative expenses, such treatment should be limited to those costs that are necessary to protect the public from imminent harm.⁷¹ While some cases have required a showing of imminent harm, had EPA incurred the response costs listed in the Administrative Application, it would have been able to make that showing.⁷² By not incurring such costs, however, despite having funds in escrow to repay it for its efforts, EPA seriously undermined any argument that the public would suffer imminent harm if the response costs

⁶⁹ From the beginning of 2001 to the end of 2003, costs related to time spent by EPA's attorneys totaled \$10,886.84. This amount, which cannot be fairly categorized as cleanup costs, was excluded from this calculation.

⁷⁰ Regardless of the 1999 AOC, EPA had the right to incur, and to seek recovery for, costs incurred to abate contamination at the Site.

⁷¹ In the 1999 AOC, EPA took the position that "[p]resent conditions at the Plant and the Site may present an imminent and substantial endangerment to health or the environment." 1999 AOC at ¶ 31. Likewise, in the Administrative Application, EPA indicated that the cleanup costs requested were necessary to protect the public from imminent harm. EPA cannot credibly argue now that such costs were *not* "actual and necessary" costs of the estate.

⁷² In fact, the Joint Objections pointed to the fact that there was approximately \$1 million in escrow from the Fund, yet EPA had not expended any funds to address concerns raised in the Administrative Application.



were not incurred. Thus, to the extent that the bankruptcy court would have required EPA to show imminent harm, EPA weakened its position by not performing the cleanup work. Of course, AVX should not have to reimburse EPA for costs caused by EPA's own inaction.

(c) Response costs that had not yet been incurred and/or were contingent in nature should not be allowed as administrative expenses. Once again, EPA impaired its argument for administrative priority by incurring so few of the necessary response costs during the Aerovox bankruptcy. *See Microfab*, 105 B.R. at 166 (denying response costs on administrative basis as premature because not yet incurred). Had EPA incurred the costs listed in the Administrative Application before it settled, it would have had a much stronger argument that its costs were "actual" costs of the estate.⁷³

(d) Costs to remediate the Site, as well as post-remediation maintenance and monitoring, would have exceeded the available estate assets, rendering priority status of such costs inappropriate.⁷⁴ The Creditors' Committee and Aerovox argued that "[c]ourts have held that an administrative claim for environmental cleanup costs is not appropriate . . . where cleanup costs would exhaust all estate assets and would require additional funds as well." Joint Objections at ¶ 31. While some cases have suggested that depletion of the estate by an administrative claim may be a factor weighed under certain circumstances, *see, e.g., In re Shore Co., Inc.*, 134 B.R. 572, 580 n.4 (Bankr. E.D. Tex. 1991) ("In this Court's opinion, depletion of the estate is a relevant, albeit not overriding concern to be considered by the court."), other courts have rejected this argument outright. In *In re T.P. Chemical*, in allowing EPA's cleanup costs on an administrative basis, notwithstanding the fact that such expenses would deplete the estate, the court explained:

Since the estate cannot avoid the liability imposed by CERCLA, it follows that the costs incurred by the E.P.A. in discharging this liability is an actual necessary cost of preserving the estate entitled to administrative expense priority. . . . The necessity of the expense cannot be questioned since the removal of the wastes was an obligation of the estate under CERCLA. The court recognizes that this decision will deplete the assets of the estate. The

⁷³ For example, had EPA repaired the roof, any claim that its request for payment was premature would have been eliminated. As it stood at the end of the Aerovox bankruptcy, it was still unclear whether EPA would ever incur the administrative expenses it had requested. To date, the roof of the manufacturing building is still not repaired.

⁷⁴ In connection with its depletion of the bankruptcy estate argument, Aerovox indicated that, at that time, Aerovox had "on hand the approximate sum of \$9,000,000." Joint Objections at ¶ 14. Of this amount, EPA agreed to accept just \$200,000 on a priority basis. There is no explanation for EPA's acceptance of this \$200,000 amount articulated in the Settlement Agreement or the Administrative Application. As explained above, the Administrative Application requested an unspecified amount of administrative expenses. Although the Administrative Application did include estimates for some of the work EPA considered to be administrative expenses, none of these items were estimated to cost at or around \$200,000.



success of the E.P.A. in pursuing its administrative claim is achieved at the expense of the creditors of the debtor. The court can sympathize with the creditors, but finds that this is a risk which the creditors must bear. Creditors must generally bear the risk of any enterprise. Congress has decided that administrative expenses should be paid prior to other claims against the estate. The estate cannot avoid its legal obligations merely by invoking concern for the general creditors.

45 B.R. at 286-87. As a factual matter, EPA's administrative expenses may or may not have fully depleted the estate, which ended up with \$6.6 million to distribute to its unsecured creditors. Moreover, where, as here, the intent is to liquidate the debtor's estate (not to reorganize and continue operations), it does not make sense to credit this factor. *See In re Peerless Plating Co.*, 70 B.R. at 947 ("The normal course of affairs in any Chapter 7 [bankruptcy] is to deplete the estate by liquidating it and distributing it to creditors as required by law. The fact that one claimant or creditor receives the lion's share does not render that claim onerous.").

In sum, had EPA incurred cleanup costs during the Aerovox bankruptcy, those costs would have likely met the "postpetition" and "actual and necessary" prongs to qualify as administrative expenses of the estate.⁷⁵ As it turns out, however, EPA significantly undermined any claim to administrative expenses by incurring less than \$2,000 in cleanup costs prior to its settlement with Aerovox.

C. EPA Should Have Imposed and Demanded Stipulated Penalties Under 1999 AOC as Administrative Expenses.

Pursuant to the 1999 AOC, EPA could have imposed penalties on Aerovox for noncompliance with the payment and other obligations of the order. *See* 1999 AOC at ¶ 91. For example, EPA could and should have imposed a \$1,500 per day fine "for failure to submit timely or correct deposits into the Trust Fund." 1999 AOC at ¶ 91(g).⁷⁶ Per day penalties were also provided for, among other things, failure to timely complete the cleanup work

⁷⁵ Even if EPA was not able to secure administrative expense status for the entire \$8.3 million under the 1999 AOC and the \$3-4 million in additional costs, any reasonable settlement of EPA's administrative claim certainly should have yielded more than \$200,000 as allowed administrative expenses.

⁷⁶ Had EPA not extended the payment deadline and instead imposed penalties on Aerovox for its failure to make timely payments to the Fund, assuming EPA gave prompt notice of the violation as required under the 1999 AOC, the \$1,500 per day penalty would have amounted to \$1,416,000 in the 944 days between the original payment due date plus five working days (assume January 8, 2001), *see* 1999 AOC at ¶ 92, to the date of EPA's settlement with Aerovox (August 11, 2003). *See Cumberland Farms, Inc. v. Florida Dep't of Env'tl. Protection*, 116 F.3d 16, 21 (1st Cir. 1997) (indicating that penalties continue to accrue during bankruptcy for postpetition environmental violations).



according to certain specifications, for failure to submit timely or complete reports, and for failure to provide security and fire protection and/or to maintain the Site.⁷⁷

Under controlling First Circuit precedent, any penalties imposed by EPA after the petition date would have constituted additional administrative expenses of the estate. *See, e.g., Cumberland Farms*, 116 F.3d at 19-21 (affirming award of administrative expense priority to a fine against the debtor for failure to follow Florida laws and regulations covering the maintenance of underground storage tanks); *Charlesbank Laundry*, 755 F.2d at 203 (awarding administrative expense priority to a civil compensatory fine for violation of an injunction by a debtor corporation engaged in a Chapter 11 reorganization).⁷⁸ In so holding, the First Circuit has relied on the Supreme Court's statement in *Reading Co. v. Brown*, 391 U.S. 471, 483 (1968), that "actual and necessary costs" should "include costs ordinarily incident to operation of a business, and not be limited to costs without which rehabilitation would be impossible," and has focused on the fact that the debtor should not be allowed to deliberately violate the environmental laws without consequences. *See, e.g., Cumberland Farms*, 116 F.3d at 21

⁷⁷ In addition to the penalties for Aerovox's failure to make required payments to the Fund, a \$1,000 per day penalty was provided for failure to close the Site on schedule, provide security and fire protection and/or maintain the Site. *See* 1999 AOC at ¶ 91(c). Although Aerovox relocated on schedule and may have initially met its obligations under the 1999 AOC, *see* Facility shutdown report dated October 23, 2001 attached as Exhibit 29 to the App., at some point it obviously failed to do so. *See* Section II above. The maximum fine for failure to maintain the Site and/or provide fire and security protection (accruing from April 4, 2001 until the matter was settled two years later) would have been \$858,000 (\$1,000 multiplied by 858 days). At least some portion of that should have been recovered by EPA, on top of the \$1,416,000 for failure to make payments to the Fund.

There is also a question as to whether Aerovox submitted the semi-annual reporting required by ¶ 54 (periodic work progress reports) and ¶ 71 (periodic investment reports) of the 1999 AOC. On January 5, 2001, in the letter Aerovox sent to EPA to request the extension of the payment due date (described above), Aerovox represented that it had met all of its reporting requirements up to that date. We have no information confirming that Aerovox submitted any of the subsequent investment reports under ¶ 71, including its next report (which would have been due on January 15, 2001). In addition, while AVX has been able to locate work progress reports submitted by Aerovox pursuant to ¶ 54 through October 23, 2001, it has not been able to locate any subsequent work progress reports. Furthermore, it appears that Aerovox violated the reporting requirement of ¶ 67, which required that Aerovox submit year-end, *audited* financial results for the company at the end of each year. Aerovox submitted *unaudited* year-end financial statements on February 5, 2002 for the year 2001 and there is no indication in the AR file or other documents provided by EPA that Aerovox submitted *any* year-end financial statements for 2002. Failure to submit timely or complete reports under any of these three provisions would have resulted in an additional \$750 per day penalty, subject to the notice requirements of ¶ 92.

As discussed below, only penalties assessed on a postpetition basis would be entitled to administrative expense priority. Assuming the above-described penalties accrued from the petition date (June 6, 2001) to the settlement date (August 11, 2003), or 795 days, \$1,987,500 in penalties should have been treated as administrative expenses. The remaining penalties of \$286,500 (\$2,274,000 minus \$1,987,500) would have comprised a portion of EPA's general, unsecured claim. Based on current information, we cannot make a determination as to whether Aerovox violated any of the other provisions of the 1999 AOC, warranting further per day penalties.

⁷⁸ *See also In re N.P. Mining Co., Inc.*, 963 F.2d 1449, 1453 (11th Cir. 1992) (holding that "punitive, civil penalties assessed for postpetition mining activities qualify as an administrative expense").



(“We think it would be fundamentally unfair to allow Cumberland Farms to flout Florida’s environmental protection laws and escape paying a penalty for such behavior.”).

Thus, had EPA not extended the payment deadline and instead imposed penalties on Aerovox for its failure to abide by the 1999 AOC’s requirements, assuming EPA gave prompt notice of the violation as required under the 1999 AOC, EPA would have been entitled to payment of the \$1,500 per day penalty for nonpayment to the Fund, plus the \$1,000 per day payment for failure to provide security and fire protection and/or to maintain the Site, which combined would have amounted to \$1,987,500 in the 795 days between the petition date (June 6, 2001) and the date of EPA’s settlement with Aerovox (August 11, 2003). This amount would have been a proper administrative expense of the estate. *See Cumberland Farms*, 116 F.3d at 21 (assessing penalties for postpetition environmental violations as administrative expenses of the bankruptcy estate).

In sum, EPA should have: (1) demanded a result that accorded administrative expense status to more of its estimated postpetition expenses of \$11.3-12.3 million; (2) incurred costs to initiate work at the Site to ensure such costs would satisfy the “postpetition” and “actual and necessary” prongs; and (3) imposed and pursued any available stipulated penalties provided by the 1999 AOC as administrative expenses of the Aerovox estate. Under the circumstances, EPA’s decision to accept a settlement that treated only \$200,000 of its costs as administrative expenses is inexplicable. In all likelihood, EPA’s postpetition costs for both postpetition and prepetition environmental damage not covered by the 1999 AOC would have been treated as administrative expenses by the bankruptcy court. In addition, under *In re Distrigas*, 66 B.R. at 387, even the \$8.3 million estimated cleanup costs under the 1999 AOC should have been treated as administrative expenses of the estate.⁷⁹ Moreover, to the extent that EPA had imposed penalties on Aerovox for its postpetition violations of the 1999 AOC, the administrative expense figure would have grown at a rate of several thousand dollars a day, to nearly \$2 million prior to EPA’s settlement. After the distribution made to all other administrative and priority claims, the Aerovox estate had \$6.6 million remaining. EPA should have demanded that this entire amount be allotted to its cleanup costs in any settlement of its claims. As a result, any demand for payment from AVX should be discounted by at least \$6.6 million to account for EPA’s unreasonable settlement of its claims.⁸⁰

⁷⁹ Of course, even if this \$8.3 million did *not* qualify for administrative expense status, EPA would have been entitled to at least the \$2-3 million for decontamination and disposal of the equipment left at the Site, approximately \$1 million for repair of the roof, approximately \$48,000 for removal of chemical drums, approximately \$3,000 for repair of asphalt capping, and approximately \$23,000 per year for the maintenance of security and fire suppression systems (unless the City paid the expenses for fire and security systems). Even a conservative estimate of the amount of EPA cleanup costs entitled to administrative expense status would therefore exceed \$3-4 million. Additionally, it would be unreasonable to think that EPA could not have arranged to receive, if not all, some portion of the \$8.3 million in a negotiated settlement.

⁸⁰ Had AVX been given notice of this claim, and of the EPA response and enforcement actions up through the time of the Aerovox bankruptcy, AVX could have filed not only a contribution claim but also a direct contractual



IV. AVX IS NOT LIABLE BECAUSE 1973 SALE OF SITE CONSTITUTED SALE OF A USEFUL PRODUCT.

The 1973 sale of the Site by Aerovox I (AVX's predecessor) to Aerovox II (Aerovox III's predecessor) constituted the sale of a useful product, and therefore AVX is not liable for any of the costs demanded by EPA in connection with the cleanup of the Site.⁸¹ While the transfer of a property for purposes of disposing of hazardous wastes can result in CERCLA liability, the sale of a useful product to a purchaser for its originally intended purpose does not. *See Yellow Freight Sys., Inc. v. ACF Industries, Inc.*, 909 F. Supp. 1290, 1298 (E.D. Mo. 1995). (“[A] sale does not constitute an arrangement for disposal unless the seller is primarily motivated to dispose of hazardous substances through the sale.”). *See also G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 384 (7th Cir. 1995) (holding that “the sale of a product which contains a hazardous substance cannot be equated to the disposal of the substance itself or even the making of arrangements for its subsequent disposal”).⁸² As explained in *Branch Metal Processing, Inc. v. Boston Edison Co.*, 952 F. Supp. 893, 913 (D.R.I. 1996):

The paradigmatic case in which CERCLA liability should not arise involves the sale of a hazardous substance to another party for productive use. Indeed, it is difficult to equate this type of transaction with the disposal of a hazardous substance or even the making of arrangements for its disposal (citation omitted).

By its 1973 sale to Aerovox II, Aerovox I intended to and did transfer a useful manufacturing building, which was used by Aerovox II and Aerovox III as such for nearly 30 years, and working manufacturing equipment, which was also used for years in the business operations of the successor owners. Like the defendant in *Yellow Freight*, Aerovox I sold the

indemnity claim, and therefore would have been able to protect its interests in the bankruptcy case, as well as ensure that EPA maximize its recovery. EPA's and/or Aerovox's failure to notify AVX of the Aerovox bankruptcy deprived AVX not only of the opportunity to monitor EPA's handling of its claims against Aerovox, but also to press its own contractual claim for indemnification against Aerovox, pursuant to the 1973 purchase agreements. As a result, EPA's demand should be discounted further to account for any harm attributable to Aerovox II's and Aerovox III's ownership of the Site.

⁸¹ To recap the key facts of corporate history relevant to the present discussion, on January 2, 1973, the Aerovox business, including the Site, together with the Aerovox name, were purchased from Aerovox Corporation (Aerovox I) by Belleville Industries, Inc. (Aerovox II), which changed its name to Aerovox Industries, Inc. Later that year, on June 4, 1973, Aerovox I merged with AVX Ceramics Corporation to form AVX. In 1978, RTE Corporation purchased all of the assets of Aerovox II through its newly-organized subsidiary, Aerovox, Inc. (Aerovox III). In earlier litigation, Aerovox III was held to be the corporate successor to Aerovox II. *See In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1010, 1013 (D. Mass. 1989).

⁸² The useful product doctrine was derived from CERCLA's definition of “facility,” which “expressly exempts consumer products from the definition of facility for purposes of determining liability under the statute.” *Dayton Indep. School District v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990). *See* 42 U.S.C. § 9601(9). Useful buildings have been held to fall within the “consumer products” definition for purposes of this statutory provision. *See id.* at 1066, n.4.



Site, not to dispose of hazardous substances, but for business reasons. *Yellow Freight*, 909 F. Supp. at 1299 (stating that “sale was motivated by business considerations relating to [the defendant’s] inability to make continued productive use of the Site”). Moreover, according to URS, AVX’s technical consultant, nothing in a recent asbestos and lead-based paint survey conducted by Jacobs Engineering Group indicated that building materials and/or equipment were in other than a useful product condition at the time of transfer. See *Final 2006 Aerovox Asbestos and Lead-Based Paint Survey* dated June 29, 2006. Under these circumstances, the useful product doctrine dictates that AVX cannot be held liable for costs incurred in performing cleanup work with respect to the manufacturing building in its current condition. See, e.g., *Yellow Freight*, 909 F. Supp. at 1298-99 (holding that sale of property was sale of useful product because the buildings at issue were in suitable condition for continued use); *Florida Power & Light Co. v. Allis-Chalmers Corp.*, 893 F.2d 1313, 1319 (11th Cir. 1990) (holding that manufacturers of transformers that contained PCB-contaminated mineral oil were not liable because they sold a useful and valuable product which the buyer used for an extensive length of time); *G.J. Leasing*, 54 F.3d at 384 (holding that sale of a building that happened to contain asbestos insulation is not disposal of a hazardous substance).

Recovery of costs incurred by EPA in the removal of any asbestos and mercury from within the structure of the manufacturing building and/or in equipment at the Site is further barred by Section 104(a)(3) of CERCLA, which precludes a removal or remedial action “in response to a release or threat of release . . . (B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures.” 42 U.S.C. 9604(a)(3)(B). With respect to asbestos, in particular, courts have repeatedly held that its removal is *not* covered by CERCLA. See, e.g., *G.J. Leasing*, 54 F.3d at 385 (“[T]he release of asbestos inside a building, with no leak outside . . . is not governed by CERCLA.”); *Dayton*, 906 F.2d at 1066 (“Based upon the language of the statute, its legislative history, and the relevant case law, we hold that Congress did not contemplate recovery under this statute of the costs incurred to effect asbestos removal from buildings.”); *First United Methodist Church of Hyattsville v. United States Gypsum Co.*, 882 F.2d 862, 869 (4th Cir. 1989) (“To extend CERCLA’s strict liability scheme to all past and present owners of buildings containing asbestos . . . would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context.”). AVX is therefore not liable for any costs incurred by EPA in connection with the removal of asbestos and/or mercury from the manufacturing building or equipment in advance of the demolition of the building.

CERCLA liability is not limitless. AVX simply cannot be held liable for costs associated with normal building decommissioning and demolition, as well as for the cleanup of the Site, because the sale of the Site to Aerovox II, more than 30 years ago by AVX’s predecessor, constituted the sale of a useful product – not a disposal of hazardous waste. Assuming for these purposes only that AVX could be held liable generally for cleanup of the



Site, EPA is further precluded by Section 104(a)(3) of CERCLA from seeking to recover costs incurred in the removal of asbestos and/or mercury from the Site.

V. AS SET FORTH IN THE SEE/CA COMMENT LETTER, EPA CANNOT RECOVER COSTS OF PROPOSED NTCRA BECAUSE OF FAILURE TO COMPLY WITH STATUTORY AND REGULATORY REQUIREMENTS.

AVX submits that the SEE/CA's recommended removal alternative is technically and legally deficient for the reasons outlined in its SEE/CA comment letter, and that these deficiencies are a defense to cost recovery for the proposed action. To briefly recapitulate, there are seven principal arguments advanced.⁸³ They are as follows.

1. The SEE/CA does not satisfy CERCLA § 104(a)(1) because it fails to adequately identify the threat or potential threat of release to the environment which the SEE/CA proposes to address. The SEE/CA is based on a flawed administrative record in which the only Approval Memorandum is eight years old and principally identifies risks of PCBs to on-site workers as the only exposure pathway, while the SEE/CA rests on unsubstantiated assertions with respect to the threat of fire.
2. For numerous reasons, the SEE/CA does not comply with the NCP. These include improper reliance on an unsubstantiated risk evaluation based on incomplete site characterization; the failure to state clear and appropriate risk-based objectives; the failure to adequately address the two relevant NCP factors that apply, namely the actual and potential exposure to human populations, animals or the food chain and the threat of fire or explosion; the fact that the remedial alternative does not contribute to the efficient performance of any long term remedial action; and the fact that there is no accounting for costs of post-removal site control.
3. The recommended alternative is not implementable, most notably because the SEE/CA mistakenly concludes that the building demolition material will all fit into the foundation hole.

⁸³ Since the date of the SEE/CA comment letter, a new concern has emerged. In reviewing the First Five-Year Review Report for the New Bedford Harbor Superfund Site, attached as Exhibit 35 to the App., it became clear that it contained numerous references to the Aerovox mill (*id.* at iv, vii), which collectively are treated as an issue for the New Bedford Harbor Site (*id.* at iv). The title pages of both the 2006 CSM and the *Final 2006 Aerovox Asbestos and Lead-Based Paint Survey*, Jacobs Engineering Group, June 2006, include in the labeling of these reports, "New Bedford Harbor Superfund Site." At a minimum, this raises questions about whether key decisions concerning the Aerovox facility are being made on the basis of the Aerovox AR file alone. If not, this would be a further example of lack of consistency with the NCP.



4. The recommended alternative is not an effective and implementable alternative with the lowest cost because the SEE/CA fails to adequately consider a building stabilization alternative that could be implemented at a substantially lower cost than the proposed NTCRA.
5. The recommended alternative does not obtain attain ARARs, taking into account the exigencies of the situation and the scope of the proposed removal action, particularly with regard to Chapter 21E and the MCP.
6. CERCLA § 104(a)(3)(B) precludes a removal action in response to a release or threat of release from products which are part of the structure of, and result in exposure within, a building. Costs incurred in the removal of asbestos and mercury from within the structure of the manufacturing building and/or in equipment at the Site do not constitute proper response costs. *See* also Section IV above.
7. EPA is not entitled to the CERCLA § 104(c)(1) consistency exemption because the proposed removal action will not contribute to the efficient performance of any anticipated long term remedial action but instead will impede future remedies or result in a wasteful restart of response actions.

VI. EPA'S DEMAND FOR PAYMENT OF PAST COSTS IS NEITHER SUPPORTED BY LAW NOR ADEQUATELY DOCUMENTED.

AVX understands that EPA still has approximately \$2.5 million remaining from the Aerovox bankruptcy, an amount that would more than cover all outstanding past costs incurred in connection with the Site. Any demand for payment of these past costs from AVX would therefore effect a double payment to EPA for the same costs already recovered from Aerovox. Under the circumstances, and as discussed below, EPA should withdraw its demand for past costs.⁸⁴

⁸⁴ Even if the payments received in connection with the Aerovox bankruptcy could not be used to reimburse EPA for past response costs – which is not clear from the Settlement Agreement – such payments should, at a minimum, be taken into account as a set-off in the calculation of any demand for payment from AVX. In addition, EPA could and should have used the payments from the Aerovox bankruptcy to fund the 2004 TCRA at the Site. It appears the bankruptcy proceeds were used to pay the direct costs incurred by Shaw Environmental, Inc. (“Shaw”) only. According to the Special Account Regional Report dated June 6, 2006, the starting balance of the account was \$2,723,385.32, interest (as of May 9, 2006) amounted to \$114,717.61, and disbursements totaled \$290,933.15 (with an open obligation of \$2,066.85, leaving \$2,545,102.93 in the account as of May 9, 2006). The disbursement amount corresponds to the costs attributed to Shaw in EPA’s August 2, 2006 cost summary. Regardless of how this amount is or was spent, it should be deducted from any demand for payment from AVX, particularly in light of EPA’s June 2006 EPA flyer, “*Making the Vacant Aerovox Site Safe*,” which states that EPA will partially fund cleanup at the Site with the funds recovered from the Aerovox bankruptcy.



As described above, the notice and demand letter initially sought \$1,610,208.88 from AVX in past response costs. On August 9, 2006, AVX received a revised cost summary from EPA that eliminated four entries for DOJ past costs which totaled \$695,180.72 (plus EPA indirect costs of \$177,469.32). AVX assumes for purposes of this response that: (i) the revised cost summary represents EPA's current demand from AVX; and (ii) the original demand was revised to account for the fact that AVX cannot be held liable for costs incurred in connection with the Aerovox bankruptcy and/or other proceedings involving enforcement against Aerovox alone. Of course, AVX makes these assumptions based on limited knowledge because EPA has not provided any documentation or other information regarding its decision to revise the original cost summary. Moreover, given that the original cost summary did not contain any details regarding the now apparently withdrawn DOJ costs, AVX has no basis for determining how those costs differ, if at all, from the DOJ costs still sought by EPA.

To date, AVX has received only a single page, the DOJ Cost Summary attached to the notice and demand letter, with respect to the \$52,678.10 in DOJ costs currently demanded by EPA. The DOJ Cost Summary provides scant detail, merely listing fiscal years 2002 through 2005 and the total hours billed by DOJ during these years, with no itemization of the type of work performed or the personnel involved. The DOJ Cost Summary, however, bears the caption of the Aerovox bankruptcy, which suggests that these costs are related to the Aerovox bankruptcy.⁸⁵ If these costs were incurred in those proceedings, we can see no reason to distinguish these costs from the other DOJ costs already withdrawn. Moreover, as explained below, the law provides no basis for recovery of any costs incurred in the Aerovox bankruptcy from AVX, which was provided no opportunity to participate in those proceedings. Of course, without adequate documentation, AVX is left at a loss to speculate as to what the demanded DOJ costs actually represent.⁸⁶

The NCP requires EPA, among other things, to provide documentation "sufficient to provide an accurate accounting of Federal or private party costs incurred."⁸⁷ As explained

⁸⁵ Even assuming that the Aerovox bankruptcy caption was placed at the top of the DOJ documentation in error, some of the DOJ costs date as far back as 2002 and 2003, and they appear to cover most of the Aerovox bankruptcy period, *i.e.*, the stated time period covered is "10/01/99 - 02/18/06." If the DOJ costs from 2002 and 2003 somehow relate to AVX, then AVX was an enforcement target back then and should have been notified of that fact. In any event, without further documentation, AVX simply cannot determine the bases for these response costs.

⁸⁶ The DOJ Cost Summary displays the "Site Name" as New Bedford Harbor, which raises the question of whether these costs even relate to the separate Aerovox Site. Moreover, according to the DOJ Cost Summary, of the \$52,678.10 in DOJ costs demanded, \$35,807.07, or two-thirds of DOJ's costs, is for indirect costs. AVX cannot understand why the indirect costs figure would be so high. Once again, given the lack of adequate documentation and the confusing nature of the information that was provided, AVX cannot make an informed assessment of the propriety of DOJ's costs.

⁸⁷ In particular, the relevant provision for CERCLA cost recovery actions provides:

During all phases of response, the lead agency shall complete and maintain documentation to support all actions taken under the NCP and to form the basis for cost recovery. In general,



above, EPA has not provided documentation concerning the DOJ costs sufficient for an “accurate accounting.” In addition, the documentation provided for EPA costs generally do not include adequate information to assess the validity of any of EPA’s past costs. That is, other than relying on the years listed beside certain entries in the EPA cost summaries (which AVX assumes correspond loosely to certain events), AVX has no way of determining the tasks and/or matters on which EPA personnel were working at any point in time. Finally, AVX has requested but not received information regarding EPA’s indirect costs rates. Without this information, AVX cannot determine the amount of indirect costs assessed at any relevant time period.

Based on such lack of adequate documentation, an overarching issue for EPA in this matter, EPA has not provided documentation sufficient to meet “the threshold criteria” for showing that the response costs are consistent with the NCP.⁸⁸ That EPA has not complied with its obligations under the NCP is further underscored by the fact that the August 2, 2006 cover memorandum sent by EPA with the revised cost summary indicates that the information therein “should be considered draft as the costs have not been reconciled against documentation.” If EPA has not yet verified the accuracy of the details constituting its past costs demand, AVX cannot be expected to respond meaningfully to EPA’s demand. AVX thus reserves its rights to supplement this response if and when EPA provides further documentation in support of its demand for reimbursement of past costs.

A. Recovery of EPA Costs Incurred in Connection with 1982 Order and 1984 Supplemental Order Is Time-Barred.

As described above, in May 1982, Aerovox entered into the 1982 Order with EPA, whereby it agreed to: (i) conduct an investigation of certain areas of the Site; (ii) assess the relative costs of alternative remedial actions; (iii) recommend a responsive course of action to EPA; and (iv) implement an approved course of remedial action. *See* 1982 Order at 6-8. Pursuant to the 1982 Order, Aerovox recommended the installation of an asphalt cap over certain contaminated soils and a steel sheet pile cutoff wall to serve as a vertical barrier to impede the flow of PCB-contaminated groundwater into the Acushnet River estuary. Aerovox’s recommended remedial program was approved by EPA, and Aerovox proceeded to perform the work.

documentation shall be sufficient to provide the source and circumstances of the release, the identity of responsible parties, the response action taken, accurate accounting of federal, state, or private party costs incurred for response actions, and impacts and potential impacts to the public health and welfare and the environment.

40 CFR § 300.160(a)(1). *See also United States v. Amer. Cyanamid Co.*, 786 F. Supp. 152, 157-58 (D.R.I. 1992).

⁸⁸ *Amer. Cyanamid*, 786 F. Supp. at 159-60 (disallowing certain response costs on grounds of inadequate documentation).



In late 1984, Aerovox entered into the 1984 Supplemental Order with EPA. In that order, EPA specifically acknowledged that, by September 20, 1984, Aerovox had completed its work under the 1982 Order, subject to completion of certain repairs. *See* 1984 Supplemental Order at 2. On December 7, 1984, EPA inspected the repairs by Aerovox and, based on that inspection, approved all the work completed under the 1982 Order. *See id.* at 1-2.⁸⁹ Pursuant to the 1984 Supplemental Order, Aerovox agreed to implement a monitoring and maintenance program for the cap and to take such maintenance measures as were reasonably necessary to maintain the cap and the cutoff wall to prevent the release of PCBs to the river.⁹⁰

Section 113(g)(2) of CERCLA provides that an initial action for recovery of costs incurred in connection with a remedial action must be brought “within 6 years after initiation of physical on-site construction of the remedial action.” 42 U.S.C. § 9613(g)(2). *See also Reardon v. United States*, 947 F.2d 1509, 1519 (1st Cir. 1991) (CERCLA statute of limitations “gives EPA three years after a removal action is completed or six years after a remedial action is commenced to bring . . . suit.”). This section was added to CERCLA by the Superfund Amendment and Reauthorization Act of 1986 (“SARA”). “Courts interpreting this statute of limitations have held that, with respect to claims accruing prior to the SARA amendments but not yet filed as of its effective date, the statute begins to run on October 17, 1986.” *One Wheeler Road Assocs. v. The Foxboro Co.*, 843 F. Supp. 792, 795 n.2 (D. Mass. 1994).⁹¹

In this case, on-site physical construction of the remedial action was commenced in 1983, when installation of the asphalt cap and/or the steel sheet pile cutoff wall began. *See* SEE/CA at 1-2. As a result, the statute of limitations began to run on October 17, 1986 (as commencement of the remedial action occurred prior to the SARA amendments). Accordingly, any action after October 17, 1992 for recovery of costs associated with the remedial action undertaken pursuant to the 1982 Order and its 1984 supplement is barred. Recovery of such costs from AVX, including costs incurred in connection with the post-

⁸⁹ A letter in the AR file confirms EPA’s approval of the work completed by Aerovox pursuant to the 1982 Order. Specifically, on September 21, 1984, EPA sent Aerovox a letter stating that, following an inspection on September 18, 1984, EPA concluded that Aerovox has complied with the 1982 Order “in implementing the approved course of remedial action,” completing the work satisfactorily (subject to repair of a crack in the cap). *See* Attachment 1 to *Soil Sampling Plan*, prepared by BBL, April 1998.

⁹⁰ In accordance with the monitoring and maintenance program, Aerovox agreed to perform semi-annual monitoring at the Site from June 1986 until June 2014. The program included taking and reporting water level readings, and to ensure the integrity of the cap, inspecting the cap, performing necessary repairs, and submitting cap inspection reports.

⁹¹ Section 113(g)(2)(B) of CERCLA provides the following: “A subsequent action or actions under section 9607 of this title for further response costs at the . . . facility may be maintained at any time during the response action, but must be commenced no later than 3 years after the date of completion of all response action.” This provision is inapplicable here as the initial remedial action was commenced in 1983 and completed in 1984. No action was taken by EPA against AVX until the current demand made in 2006 – over 20 years after completion of the remedial action implemented in 1983.



construction monitoring program, which was part and parcel of the earlier remedial action, is therefore precluded by the applicable statute of limitations.⁹²

Based on the above discussion, EPA should eliminate from its demand \$111,585.00 in direct costs.⁹³ As a result, EPA's direct costs should be reduced to \$420,257.36.⁹⁴ Any indirect costs related to this amount should also be deducted from EPA's total demand.⁹⁵

⁹² Time and again, EPA has characterized the work done pursuant to the 1982 Order as a "remedial action." See, e.g., 1982 Order at 3, 7; 1984 Supplemental Order at 1-3, 5; SEE/CA at 14. See also John Joseph Gushue & Robert Steven Cummings, *On-Site Containment of PCB-Contaminated Soils at Aerovox Inc. New Bedford, Massachusetts*, at 376 (1984) (explaining that purpose of study was to "develop the information needed to determine the most appropriate method of remedial action for the Aerovox property") (emphasis added). Moreover, given the permanent nature of the action taken, i.e., installing an asphalt cap and a steel sheet pile cutoff wall, the action should clearly be viewed as a remedial action. See, e.g., *California v. Hyampom Lumber Co.*, 903 F. Supp. 1389, 1393 (E.D. Cal. 1995) (holding that action was remedial action - not removal action - where it "played a critical role in the implementation of the permanent remedy"). Nevertheless, even if the action was somehow deemed to be a removal action, recovery in connection with the 1982 Order would still be barred because, according to EPA's own account, that work was completed by no later than December 1984. The three-year statute of limitations thus would have begun run on October 17, 1986 (as the removal action was completed prior to the SARA amendments), and the action to recover costs, therefore, would have been untimely after October 17, 1989. See *United States v. Ambroid Co., Inc.*, 34 F. Supp. 2d 86, 91 (D. Mass. 1999) (recovery of costs of first removal action barred where "government failed to bring its recovery claim within three years of the completion of the first removal action"). Thus, no matter whether the action is considered a remedial action or a removal action, EPA, at a minimum, cannot collect from AVX any costs incurred prior to December 1984.

⁹³ The sum of \$111,585 includes: \$7,341.21 Regional Payroll; \$32,390.23 Headquarters Payroll; \$46.08 Regional Travel; \$5,170.53 Headquarters Travel; \$862.56 O.H. Materials; \$12,173.60 Coast Guard; and \$53,600.79 Roy F. Weston, costs AVX believes are associated with the work performed pursuant to the 1982 Order and/or the 1984 Supplemental Order. As the past costs documentation does not sufficiently detail the work performed, we have been forced to make certain assumptions with respect to the work performed during the relevant time periods. To the extent that EPA disagrees with any assumptions made herein, we request that EPA supplement the documentation provided to date. For purposes of this calculation, in particular, we assume that any work done up to but not including 1997 was done in connection with the 1982 Order and/or the monitoring program under the 1984 Supplemental Order. If EPA believes any costs incurred before the 1997 TSCA inspection represent other work, we request that EPA disclose and explain it. Based on current information, we cannot make a determination as to the appropriateness of such costs and/or the consistency of such costs with the NCP.

⁹⁴ AVX understands that, in 1988 and 1990, respectively, DEQE and MassDEP performed certain environmental work at the Site with respect to petroleum and/or oil storage containers and impacted soils located at the Site. See July 7, 1998 Approval Memorandum at 2-3. AVX assumes that none of EPA's costs for this timeframe include costs in connection with these actions taken by DEQE and/or MassDEP. Of course, such costs would not constitute proper response costs under CERCLA in any event.

⁹⁵ AVX is currently awaiting information from EPA concerning its indirect costs rates, which change periodically. Without that information, it is impossible to determine the exact amount of the indirect costs associated with any of the enumerated direct costs.



B. Costs Incurred in Connection with 1999 AOC and Aerovox Bankruptcy Are Not Recoverable from AVX.

From 1997 to at least September 30, 2003, the costs incurred by EPA were attributable to enforcement costs related to events preceding and leading to the 1999 AOC with Aerovox and/or the Aerovox bankruptcy. In May 1997, EPA conducted an inspection at the Site for compliance with TSCA. That inspection revealed the presence of PCBs at the Site. From that point until the 1999 AOC was executed, EPA and Aerovox expended costs to arrange for the cleanup of the Site and negotiate an agreement to ensure its implementation. Their efforts culminated in the 1999 AOC. Aerovox made only one payment under the 1999 AOC before filing for bankruptcy on June 6, 2001. Over the following two years, EPA negotiated with Aerovox and others a settlement of EPA's claims against Aerovox in the bankruptcy. On September 30, 2003, the bankruptcy court approved the settlement, which resulted in EPA receiving approximately \$2.7 million from the Aerovox bankruptcy (of the then estimated \$10.3-11.3 million in total cleanup costs; \$8.3 million for the 1998 EE/CA and \$2-3 million for removal of contaminated equipment left at the Site).

EPA cannot recover from AVX any enforcement costs which were directed solely toward Aerovox, and fully incurred prior to AVX's involvement. Indeed, as discussed in Section I above, AVX was not provided an opportunity to participate in, the negotiation and implementation of the 1999 AOC or any of the Aerovox bankruptcy proceedings. Law and equity dictate that response costs expended in pursuing claims against Aerovox years prior to AVX's involvement are not recoverable from AVX. *See, e.g., United States v. Davis*, 20 F. Supp. 2d 326, 338 (D.R.I. 1998) (allocating 100% of litigation costs incurred in first phase of litigation to initial PRP because other PRPs did not participate in that phase of the litigation); *United States v. Bell Petroleum Servs., Inc.*, 734 F. Supp. 771, 783 (W.D. Tex. 1990) (holding initial PRP severally liable for all litigation costs incurred by EPA in bankruptcy adversary proceeding before suit was filed against subsequent PRP). Moreover, where, as here, EPA previously entered into a settlement with one PRP, it is reasonable to conclude that EPA already accounted for its costs incurred in pursuing that settlement as part of the consideration received. *See Amer. Cyanamid*, 786 F. Supp. at 164 ("Assuming that DOJ operates logically, it is difficult to believe that these settlement amounts do not already include the costs of pursuing such settlements.").⁹⁶ Thus, such enforcement costs should not be included in any demand against AVX.

The correctness of this legal conclusion is borne out by the fact that DOJ has withdrawn its claim for \$695,180.72 (plus related indirect costs of \$177,469.32), presumably because those costs related to the Aerovox bankruptcy. The logic and rationale behind this decision should apply with equal force to any and all bankruptcy-related costs.

⁹⁶ To the extent that EPA decided not to include such past costs as a component of its earlier settlement with Aerovox, EPA should not now be allowed to pursue those costs from AVX, an unrelated third party.



As a result, EPA's previously adjusted direct costs claim of \$420,257.36 should be reduced by an additional \$25,254.49 to \$395,002.87, to account for costs incurred by EPA in connection with the 1999 AOC and the Aerovox bankruptcy.⁹⁷ Any indirect costs related to this amount should also be deducted from EPA's total demand.

C. Costs Incurred in Connection with 2004 TCRA Are Not Recoverable from AVX and Are Not Supported by Record.

1. The removal action involved more than drum removal, and more than PCBs or even hazardous waste.

To determine whether the TCRA costs are consistent with the NCP and properly allocated to AVX, the initial inquiry involves determining what activities were implemented. The scope of the 2004 TCRA which EPA implemented from March to December 2004, far exceeded the limited scope of a drum removal, work for which EPA sought \$48,000 in the bankruptcy case,⁹⁸ and which the SEE/CA described as the "removal and off-site disposal by EPA of various hazardous wastes left inside the building when it was vacated and repair of cracks in the HAC cap." *Id.* at 2. As described in detail below, those activities resulted in the cost growing to an amount somewhere between \$325,683 (POLREP #3) and the budget ceiling of \$510,000, or \$743,067 with direct and indirect costs added. *See* Addendum #1.

The bankruptcy papers, the Action Memorandum, Addendum #1, and the three POLREPs in the AR file repeatedly emphasize the presence of PCB contamination in rinse water stored in drums in the building. For example, in POLREP #3, annotated as the "Final" such report because removal activities were then complete, EPA reported that the sampling conducted by Aerovox "documented the presence of PCB contamination in the rinse water used to decontaminate various pieces of machinery previously in the building. . . . The rinse water was stored in drums staged in the shipping and receiving area of the facility." Pursuant to paragraph 40 of the 1999 AOC, before relocating machinery from the Site to its new manufacturing facility, Aerovox engaged in decontamination activities that generated the rinse water. These activities were completed by no later than October 23, 2001, and most likely earlier than that. Thus, upon closer scrutiny, this explanation of a proposed drum removal action cannot be reconciled with the record. More precise detail is supplied in Addendum #1 at page 3:

⁹⁷ The sum of \$25,254.49 includes: \$25,202.90 Regional Payroll and \$51.59 Regional Travel. For this calculation, we assume that all costs incurred in 1997 through the end of 2003, plus all costs for Eve Vaudo's work, were incurred in connection with the 1999 AOC and/or the Aerovox bankruptcy.

⁹⁸ In fact, on a closer look, it appears that the TCRA included at least some of the work for which EPA had sought \$2-3 million in the bankruptcy, then described as the cost of decontamination and disposal of machinery and equipment left at the Site. The TCRA at least accomplished the characterization of the machinery and equipment, if not the actual disposal.



The removal action began on April 21, 2004, when EPA and its contractors, namely the Emergency Rapid Response Services (ERRS) contractor and the Superfund Technical Assessment and Response Team (START), mobilized to the Site and performed a site walk of the facility. The On Scene Coordinator (OSC) and two START members formed a Level B Entry Team to further characterize the highly contaminated impregnation room on the second floor of the building. This room contains vats used for dipping and heating the capacitors. The Entry Team checked all vats and tanks for residual waste. No material was found to still exist. EPA and its contractors reported to the site on Monday, May 3, 2004. ERRS began site work by organizing the office area, setting up a decontamination zone and staging their personal protective equipment (PPE) for use in the hot zone. All drums and containers were collected throughout the building and staged on the first floor of the facility. The drums and containers were then separated and sampled for waste characterization. The tanks in the basement of the facility were investigated with a thermal imaging unit. Most tanks were empty with some needing further investigation. The tanks needing further investigation were opened, inspected for product, and emptied if necessary. The PCB contaminated asphalt piles in the parking lot were picked up and placed in a roll off can for disposal. Approximately half of the staged drums have been loaded into trucks and taken off site for disposal.

POLREP #3 later reports that the tanks that needed further investigation were opened and found to be empty. Thus, the plant areas of most intense PCB use – the basement pump room where Aroclor was stored before it was pumped up to the impregnation room, and the impregnation room itself – were found to be free not just of PCB contamination but of any contamination. Since the capacitor manufacturing process required that the dielectric fluid be as pure as possible, it is likely that all of the process tanks and vats had been thoroughly cleaned out if they were used in manufacturing with different dielectrics after Aroclor/PCB use was discontinued in 1978. Even as to vats and tanks that might not have been used for different dielectrics, if any, the removal action documented that they were clean as well. POLREP #3 further describes the removal:

Other hazardous materials present in the drums included PCB contaminated personal protective gear, solvents, acids, etc. In addition, there were some compressed gas cylinders located throughout the facility. The cap on the eastern end of the facility was cracked with vegetation growing through it. The vegetation has been removed and the cracks have been filled.

To better understand the removal costs and the waste materials that were disposed of during the removal, URS researched available information concerning the manifested wastes. URS's file memorandum summarizing its research is attached as Exhibit 36 to the App. Based on its investigation, URS reached several significant conclusions:



1. The waste streams in the 2002 cost estimates and POLREP #3 were very similar, and the actual cost of the drum removal was comparable to the 2002 estimates of \$28,000 to \$35,000.
2. It is unclear how much, if any, PCB-impacted rinse water was removed from the Site as part of the TCRA. POLREP #3 does not identify PCB-impacted water as a waste stream disposed as part of the TCRA. Nor is it identified in either of the 2002 quotes, and there is no reason to believe that any decontamination rinse water was generated after the quotes were prepared or the companies preparing the quotes missed any drums that were on site.
3. PCBs comprised only a small portion of the waste removed from the Site. POLREP #3 tabulates the disposition of waste stream, quantity, manifest number and disposal facility. Out of 35 line items, only the following four mention PCBs:

Non DOT, Non RCRA Regulated Material (Empty Drums L/C, Transformer Oil w. PCBs)	7000 lbs	MAQ368146	Transformer Service Inc.
RQ, Polychlorinated Biphenyls (PCB), Solid	7750 kg	MI9559017	Michigan Disposal Waste Treatment Plant
RQ, Polychlorinated Biphenyls (PCB), Solid	91000 kg	NYH1425753	CWM Chemical Services, LLC
RQ, Polychlorinated Biphenyls (PCB), Solid	3800 kg	NYH1425789	CWM Chemical Services, LLC

As to the first item, Transformer Service Inc. had no record of the manifest number identified in POLREP #3 associated with 7,000 lbs of empty drums last containing transformer oil with PCBs. It appears EPA listed the wrong number since the same number is listed for disposal of different material to General Chemical Corp. (MAQ368146). Note that these were treated as Non-DOT, Non-RCRA waste. As to the second item, these wastes reportedly consisted of 23 drums and two yard boxes of "solids." Information provided by the disposal facility identified the material as "70% to 90% poly and rags, 5% to 10% speedi-dry, and 5% to 20% oil." With respect to the last two entries, there are significant errors in POLREP #3 regarding the reported removal of 91,000 kg of PCB solid (NYH1425753) and 3,800 kg of PCB solid (NYH 1425789). According to the disposal facility, the 91,000 kg of PCB solid (NYH1425753) was actually 11,860 pounds (5,380 kg) of waste profiled as 50% soil, and waste including metal, poly, wood and air filters; and the 3,800 kg of PCB solid (NYH 1425789) was actually 19,160 pounds (8,691 kg) with the same profile.

4. The source of PCB-contaminated soils is unclear. Neither the Action Memorandum nor the POLREPs indicate soil removal was planned or



completed during the TCRA. Given that the New Bedford Harbor dredging project was operating a sludge treatment system at the Aerovox site during the time of the TCRA (POLREP #3), the question arises whether PCB-impacted solids from that operation could have been disposed as part of the TCRA. The source of the PCB-contaminated asphalt mentioned in POLREP #1 is unknown.

5. Taking into account the adjusted volumes for the PCB solids shipped to CWM Chemical Services, LLC, as reflected on the PSC cost estimate attached to the URS memorandum, the total costs of PCB-contaminated waste removed from the Site was \$11,096 out of an estimated total of \$39,665 (all in 2006 dollars), or 28%. While the percentage may not have been exactly the same in actual dollars, the comparability of the estimates obtained in 2002 and 2006 suggests that it should be roughly the same.
6. The Action Memorandum does not appear to have authorized removal of material manifested as “Non-DOT, Non-RCRA” regulated waste in POLREP #3.⁹⁹ Material manifested as such would be suitable for general landfilling, and would not require special handling.
7. It appears that waste disposal costs represent a small portion of the total TCRA costs and that the majority of costs were related to assessment and characterization activities conducted by EPA contractors, which ultimately resulted in a *waste removal* action comparable to that proposed by Aerovox in 2002 at an estimated cost between \$28,135 and \$35,590.

2. Liability for TCRA Costs Should Be Allocated to Other PRPs.

There is little to no evidence linking any of the waste – even PCB waste – to AVX rather than to the independent conduct of Aerovox. Assuming that there were, in fact, drums of PCB-contaminated rinse water taken from the Site, they were generated by Aerovox. Likewise, Aerovox was responsible, since at least 1984, for inspecting and repairing the asphalt cap at the Site. At the time AVX’s predecessor left the Site in 1973, there was no asphalt cap to maintain. To hold AVX responsible for maintenance of the cap, when it had not owned the Site for 30 years prior to the 2004 TCRA makes no sense, especially where Aerovox specifically agreed to maintain the cap. To the extent that Aerovox did not meet its obligations, it alone should be held responsible for repair of the asphalt cap. Nor is there any

⁹⁹ The Action Memorandum states “Hazardous substances present in drums and containers in the abandoned facility, if not addressed by implementing the response actions selected in this Action Memorandum, will continue to pose a threat to human health and the environment.” The Action Memorandum further states, under Proposed Action Description, that “Removal activities will include a Site walk with the Emergency Rapid Response Service (ERRS) contractor, sampling the drums, containers, vats and tanks for waste characterization, repackaging of the hazardous wastes as necessary, removing the drums and cylinders from the facility, and off-site disposal of hazardous substances at approved disposal facilities.”



reason to believe the broader site characterization costs, and the disposal of miscellaneous hazardous and non-hazardous waste, were necessitated by AVX rather than by Aerovox's and Belleville's 28 years of plant operations after 1973 and the conditions those two companies created and left behind when Aerovox abandoned the building and could not afford to properly finish the plant cleanup and closure pending demolition.

The law developed under CERCLA endorses the acceptance of the defense of divisibility, as the means to "avoid imposing excessive liability on parties for harm that is not fairly attributable to them." *Coeur d'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1119 (D. Idaho 2003). Divisibility may be invoked where the harm at issue is clearly divisible, such that "damages should be apportioned" to the responsible PRP alone. *O'Neil v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989). *See also In the Matter of Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895 (5th Cir. 1993) ("Apportionment is appropriate [where harms are successive], because 'it is clear that each has caused a separate amount of harm, limited in time, and that neither has responsibility for the harm caused by the other.'") (quoting Restatement (Second) of Torts, § 433A).¹⁰⁰ If the defendant can show divisibility, then "damages should be apportioned according to the harm to the environment caused by that particular tortfeasor." *Acushnet Co. v. Mohasco Corp.*, 191 F.3d 69, 75 (1st Cir. 1999).¹⁰¹ In this case, the costs expended by EPA in connection with the 2004 TCRA are not recoverable from AVX because Aerovox, not AVX, was responsible for the distinct damage that precipitated the 2004 removal action.

The role of the City in connection with the TCRA also bears analysis. According to the Action Memorandum, the City participated in the Preliminary Assessment/Site Investigation ("PA/SI") conducted on February 18, 2004 which preceded the removal action.¹⁰² In December 2004, according to POLREP #3, "the City . . . performed a final site walk to ensure that all removal issues were addressed." A strong inference arises that the City, on behalf of itself, the NBRA and the LLC, was the driving force behind the timing and breadth of the TCRA. In order to minimize any future liability for those parties as Site owners and operators, the City had a strong interest to ensure that all hazardous materials were removed from the Site. In many respects, the TCRA looks like it was a general cleanup of the building

¹⁰⁰ The defense of divisibility is derived from principles in the Restatement (Second) of Torts. Section 433A of the Restatement provides, in relevant part:

- (1) Damages for harm are to be apportioned among two or more causes where
 - (a) there are distinct harms, or
 - (b) there is a reasonable basis for determining the contribution of each cause to a single harm.

¹⁰¹ *See also United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3d Cir. 1992) ("If two or more persons, acting independently, tortiously cause distinct harms . . . , each is subject to liability only for the portion of the total harm that he has himself caused.") (quoting Restatement (Second) of Torts, § 881).

¹⁰² AVX has requested, but not yet received a copy of the documentation concerning the PA/SI.



before the LLC became the owner. If the TCRA was done for the benefit of the City, AVX should not bear those costs.

The extent to which the TCRA costs were caused by building deterioration documented in the AR file, for which AVX has no responsibility, also dictates against imposing liability for the TCRA on AVX. As one example only, the Jacobs April 5, 2006 e-mail mentions rusting and leaking capacitors. This condition, as well as many of the conditions noted during the removal, was likely caused by water damage due to rain and flooding. If these rusting capacitors contained PCBs, they could just as well have been manufactured by Belleville, which used PCBs, as by AVX. And even if PCB capacitors manufactured by AVX were somehow still in the plant 31 years later, there is no evidence that in 1973, they were anything but useful product for which AVX is not responsible.

3. EPA Failed to Notify AVX of the TCRA.

AVX received no notice of the 2004 TCRA, contrary to the mandate of the NCP and fundamental principles of due process. As explained above, the NCP, in particular 40 CFR 300.415(a)(2), requires that the EPA locate known responsible parties and request that they undertake the contemplated response for all removal actions.¹⁰³ Here, of course, AVX was well known to EPA through the earlier NBH, Sullivan's Ledge and Re-Solve matters. Yet, EPA never made any effort to contact AVX or to give it an opportunity to undertake the planned removal action. Based on this lack of notice, AVX therefore had no opportunity to participate in the formulation of a plan or to make a determination to do the work itself, which based on evidence of cost estimates provided by City and Aerovox, could have been done for significantly less by Aerovox itself – or by AVX.

As a result, EPA's previously adjusted direct costs claim of \$395,002.87 should be reduced by an additional \$363,645.00 to \$31,357.87, to account for costs incurred by EPA in connection with the 2004 TCRA.¹⁰⁴ Any indirect costs related to this amount should also be deducted from EPA's total demand.

¹⁰³ To the extent that EPA contends that notice was not required for the 2004 TCRA because it was a time-critical removal action, as opposed to a non-time-critical removal action, the NCP does not make such a distinction. Moreover, there appears to have been no reason to implement the 2004 TCRA on an expedited basis, given that the drums of waste involved were at the Site since at least 2001 and the cap was in the same or substantially the same condition as it had been in 2001. It appears that the only urgency in play was the City's desire to assume title to the Site, as repaired, in a timely fashion (which it did in February 2005).

¹⁰⁴ The sum of \$363,645 includes: \$12,832.81 Regional Payroll; \$85.50 Regional Travel; \$290,933.15 Shaw (which was already paid out of the bankruptcy proceeds); and \$59,793.54 Weston Solutions, Inc. For this calculation, we assume that all costs incurred in 2004, other than the costs of Eve Vaudo's work, were incurred in connection with the 2004 TCRA. All work completed by Shaw falls into this category, as the summary provided indicates that all Shaw's services were performed (even if invoiced later) from April 19, 2004 to December 31, 2004. Weston Solutions, Inc. ("Weston") also performed some work invoiced in 2005 (\$2,271.19), but we cannot determine from current information whether this work was in connection with the 2004 TCRA or



In sum, the only past costs for which AVX possibly could be responsible total \$31,357.87, plus indirect costs.¹⁰⁵ Of course, EPA must look to the funds received and remaining from the Aerovox bankruptcy before demanding payment for *any* past costs from AVX. See 42 U.S.C. § 9613(f)(2) (stating that a settlement by one PRP “reduces the potential liability of the others by the amount of the settlement”). See also *Amer. Cyanamid*, 786 F. Supp. at 164 (explaining that “the government cannot recover *twice* for the same work”) (emphasis in original).¹⁰⁶

VII. CONCLUSION.

As discussed above, EPA has eschewed use of the statutory special notice procedure and a formal negotiation process in favor of a more informal approach. Within the time available to it, AVX has endeavored to learn as much as it could about the events of the last nine years affecting the former Aerovox manufacturing plant at 740 Belleville Avenue, New Bedford, Massachusetts. Based on its investigations to date, AVX believes that it has good faith, meritorious defenses to EPA’s claims for the reasons presented in this letter. For that reason, it cannot – and should not reasonably be expected to – accede to EPA’s demand. Should EPA wish to engage AVX in further discussions concerning the basis for EPA’s claim and the reasons for AVX’s position, AVX would be willing to participate in such discussions.

AVX notes that nothing in this response is intended to or should be construed as an admission of law or fact with respect to issues that must be proved in any future cost recovery action or other actions concerning this Site, and AVX reserves all rights and defenses it may have in any such actions. Because AVX believes that the arguments contained in this letter

otherwise. To be conservative, we have excluded the 2005 work by Weston from this calculation, but we request that EPA provide further information from which we can determine the nature of the services performed by Weston in 2005.

¹⁰⁵ The sum of \$31,357.87 consists of \$16,871.03 in DOJ direct costs, \$12,215.65 in Regional Payroll costs for 2005-06, and the \$2,271.19 in payments to Weston in 2005. As discussed above, the DOJ cost claim is highly suspect given the little documentation provided to date. And also as noted above, AVX has requested information from EPA regarding its indirect costs rates, and therefore cannot determine the exact amount of indirect costs related to the costs which total \$31,357.87. Assuming an indirect costs rate of 27%, which AVX believes is close to the current rate, indirect costs would amount to an additional \$8,466.62, making \$39,824.49 the total amount of potentially recoverable past costs.

¹⁰⁶ Guidance issued by EPA on the matter of cost recovery confirms that EPA should take into account the amount already received in the Aerovox settlement. See *Written Demand for Recovery of Costs Incurred Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)* (OSWER Directive No. 9832.18, March 21, 1991) (“If a settlement has been reached with fewer than 100% of the PRPs for only a portion of costs incurred, . . . [t]he demand letter should request reimbursement of the total cost of remediation, oversight, and operation and maintenance, *less the amount settled*, plus interest. If appropriate, the demand letter should indicate that a portion of the response and/or costs have already been settled and note the settled amount”) (emphasis added). The notice and demand letter, which does not mention the prior settlement, fails to comply with this guidance.



should be considered by EPA in determining how to proceed at this Site, AVX also requests that this letter be included in the AR file for the Site.

Very truly yours,

Mary K. Ryan

Gary L. Gill-Austern

Appendix

cc: David Dickerson, EPA
Scott Alfonse, City of New Bedford
Joseph Coyne, MassDEP
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