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VERNE W. VANCE, JR.

January 15, 1985

Mr. Michael Deland
Administrator
Environmental Protection Agency
Region 1
John F. Kennedy Federal
Office Building
Boston, Massachusetts 02114

Superfund
SITE: New Bedford
BREAK: 4.5
OTHER: 221007

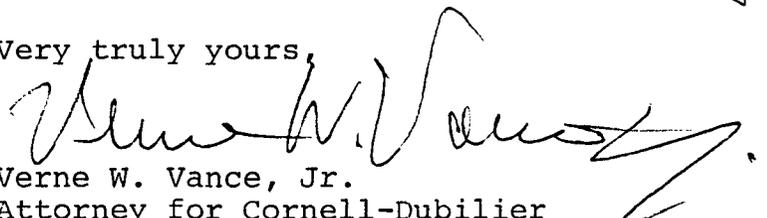
Re: New Bedford Site - Achushnet River Estuary

Dear Mr. Deland:

Enclosed are comments of Cornell-Dubilier Electronics Company with respect to the draft Feasibility Study (FS) prepared by EPA's contractor, NUS Corporation, for remedial action with respect to the upper Achushnet River Estuary in New Bedford, Massachusetts. These comments address only certain legal requirements applicable to the remedial process. They do not address the technical considerations involved in the remedies proposed in the draft FS, in large part because those proposed remedies relate to the Achushnet River Estuary above the Coggeshall Street Bridge whereas, as you know, Cornell-Dubilier's facility is located well below the Coggeshall Street Bridge. In any event, we understand that the technical considerations will be addressed in comments submitted by others. We believe these technical comments require EPA'S careful consideration, particularly as they point out the danger that a remedy involving dredging will markedly increase the currently uncertain rate of transport of PCBs from the upper estuary to the outer harbor.

We trust that our comments will be useful to EPA in forming a remedial process for the New Bedford site that will be operationally sound and in full accordance with all requirements of law.

Very truly yours,


Verne W. Vance, Jr.
Attorney for Cornell-Dubilier
Electronics Company

VWV/las
Enclosure
cc (w/Enc.):

Charles Bering, Esq., Ralph A. Child, Esq., Lee Breckenridge, Esq., Paul B. Galvani, Esq., John R. Quarles, Esq., Marshall P. Simonds, Esq., Daniel J. Gleason, Esq., and David A. McLaughlin, Esq.

SDMS DocID 000221007



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REGION I

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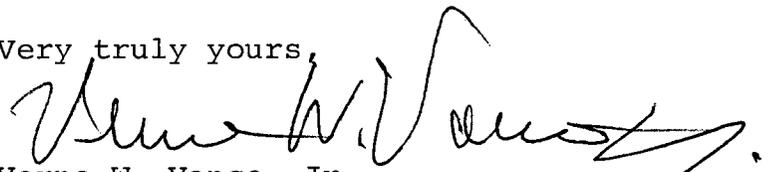
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UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY
REGION 1

Re: NEW BEDFORD SITE,
BRISTOL COUNTY, MASSACHUSETTS.

COMMENTS OF CORNELL-DUBILIER ELECTRONICS COMPANY
CONCERNING NUS CORPORATION'S DRAFT FEASIBILITY
STUDY OF REMEDIAL ACTION ALTERNATIVES FOR THE
ACHUSHNET RIVER ESTUARY ABOVE COGGESHALL
STREET BRIDGE

As a first step in preparation of a Work Plan for a Remedial Investigation and Feasibility Study for the polychlorinated biphenyl (PCB) situation at the New Bedford Site in Bristol County, Massachusetts, NUS Corporation, under contract with the Environmental Protection Agency ("EPA"), has prepared a draft "fast track" Feasibility Study ("FS") of Remedial Action Alternatives for the Achushnet River Estuary Above (north of) the Coggeshall Street Bridge.

In these comments on the FS Cornell-Dubilier Electronics Company ("CDE") does not address the technical aspects of the FS, in large part because CDE's interest in the matter principally relates not to the upper estuary, which is the subject of the FS, but to the outer harbor, where CDE's facility is located. In any event, CDE understands that other parties will address the technical aspect of the FS in their comments. Those technical comments require EPA's careful consideration, particularly as they point out that a remedy involving dredging will markedly increase

the currently uncertain rate of transport of PCBs from the upper estuary to the outer harbor.

CDE's comments will focus on certain requirements of law with which EPA's remedial process under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§9601-9657, must comply in this case. Foremost among those requirements are the requirements of CERCLA itself, which mandates among other things, that remedial actions with respect to hazardous substances, pollutants or contaminants must be "consistent with the national contingency plan [NCP]... to protect the public health and welfare or the environment" 42 U.S.C. §9604(a) (1)(B). CDE understands that Federal Pacific Electric Company is submitting comments with respect to EPA's obligations pursuant to CERCLA and the NCP. Those requirements will not be discussed in these comments, as CDE subscribes to, and endorses, the comments of Federal Pacific with respect to CERCLA and the NCP.

In addition to CERCLA and the NCP, EPA's planning process for dealing with the PCBs in the Upper Achushnet River, and any remedial action selected, must comply with a number of federal and state environmental statutes. Particularly where, as here, the remedial actions proposed by EPA involve dredging or other activities which could have a substantial environmental impact on New Bedford Harbor, the procedural, permitting and approval processes under these statutes are extensive. All of such statutes are intended to secure important environmental objectives so that any effort to short circuit such statutes, whether by a "fast track" approach or otherwise, must be rejected in EPA's planning and

implementation process. Any responsible, and legally valid, planning and implementation process for the Upper Achushnet River Estuary must take account of these legal requirements and of what must be done to comply fully with them. What has been done to date, through the FS, has fallen woefully short of doing so.

1. EPA must comply with the Environmental Impact Statement (EIS) requirements of the National Environmental Policy Act (NEPA).

For remedial actions under CERCLA such as those involved here, EPA is required to comply with the Environmental Impact Statement (EIS) requirement of the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4231 et seq. Section 102(2)(C) of NEPA, 42 U.S.C. §4332, requires "all agencies of the Federal Government" (emphasis added) to prepare a "detailed" Environmental Impact Statement (EIS) for all "major Federal Actions significantly affecting the quality of the human environment." That detailed EIS must fully delineate five core concerns of NEPA:

1. the environmental impact of the proposed action;
2. any adverse environmental effects which cannot be avoided should the proposal be implemented;
3. alternatives to the proposed action;
4. the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;
5. any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The EIS process must comply with procedures promulgated by the Council on Environmental Quality, including full opportunity for public comment on a draft EIS and a full response to such comments in the final EIS. 40 C.F.R. §§1503.1 - 1503.4.

NEPA's mandatory directive that "all" federal agencies must comply with the EIS process has been in the law since its original enactment in 1969 and has remained unchanged since that time. The statutory language in NEPA exempts no agency, whether the Environmental Protection Agency or anyone else.

Congress has, on occasion, exempted, through amendment of other statutes, certain specific activities of EPA. E.g., EPA actions pursuant to the Clean Air Act, 15 U.S.C. §793(c)(1); EPA actions pursuant to the Clean Water Act, except providing financial assistance for construction of publicly owned water treatment works and the issuance of permits for the discharge of any pollutant by a new source. 33 U.S.C. §1371(c)(1). There is no such statutory exemption for any remedial activities undertaken pursuant to CERCLA by EPA or anyone else. See 46 U.S.C. §9604. Not surprisingly, it has been held by at least one court that the EPA is required by NEPA to comply with the EIS process before taking an action under the Clean Water Act which is not covered by the statutory exemption. Kilroy v. Quarles, 440 F.Supp. 316, 320 (C.D. Cal. 1977), aff'd, 614 F.2d 225 (9th Cir. 1980).

Notwithstanding the seemingly all-inclusive mandatory language of NEPA, and the carefully drawn statutory exemptions from the EIS requirement enunciated by that language, in a number of decisions lower federal courts have carved out a kind of

non-statutory, ad hoc exemption from the specific, formal EIS process. This exception, known as the "functional equivalent" exception, has been applied by courts to permit an agency such as EPA to avoid compliance with the statutory EIS process where it is found to have achieved in substance NEPA's objective of full disclosure of environmental effects through means deemed comparable to the EIS process. That exception was developed, and has been principally applied, to certain regulatory activities of EPA the procedures for which require full environmental assessment and formal opportunity for public comment. E.g., Amoco Oil Co. v. EPA, 501 F.2d 722, 749-50 (D.C. Cir. 1974) (issuance of fuel-additive regulations under the Clean Air Act); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (promulgation of new source performance standards under the Clean Air Act). Significantly, it was following those decisions carving out the "functional equivalent" exception for EPA actions under the Clean Air Act that Congress promulgated the specific statutory exemption from the EIS process for actions under the Clean Air Act. It has promulgated no such exemption for many other EPA actions, including actions pursuant to CERCLA.

The "functional equivalent" exception has never been sanctioned by any decision of the U.S. Supreme Court, and it is difficult to square with the carefully drawn language of NEPA and of the statutes which do provide for exemptions from the EIS process.

Nevertheless, in 1982 the then general counsel of the EPA issued an opinion that "it is likely" that remedial actions taken

pursuant to section 104 of CERCLA, 42 U.S.C. §9604 -- the activity involved here -- will qualify for the "functional equivalent" exception to the EIS requirements "if EPA conducts this review [CERCLA-mandated thorough review of environmental factors] in accordance with procedures set forth in the NCP [National Contingency Plan] and incorporates public participation in the decision-making process." Memorandum from EPA General Counsel on Applicability of Section 102(2)(C) of NEPA to Superfund Response Actions (Sept. 1, 1982), 13 Environmental Reporter 709, 711 (hereinafter cited as "NEPA Memorandum").

EPA's general counsel acknowledges in his 1982 opinion that the traditional use of the functional-equivalent exception by the courts has been for broad regulatory action, NEPA Memorandum at 711, note 19, as to which environmental impacts are not site-specific and as to which the regulatory statutes or regulations pertaining thereto make specific provision for public participation.

There is, however, little judicial authority applying the "functional equivalent" exception to site-specific, non-regulatory actions such as the CERCLA remedial actions involved here. In view of the highly dubious nature of the exception, it should not, in any event, be applied to such remedial actions. Such actions, unlike the promulgation of a general ambient air quality standard or new source performance standard, involve tangible and specific impacts on specific sites and on those persons living or working at or near such sites. Site-specific actions of the sort contemplated here, such as substantial dredging, are the kinds of

actions which have been held many, many times to require compliance with the EIS process. E.g., Sierra Club v. Sigler, 695 F.2d 957 (5th Cir. 1983); Environmental Defense Fund v. Froehlke 473 F.2d 346 (8th Cir. 1972); Fritiofson v. Alexander, 20 ERC 203 (S.D.Tex. 1984).

That such actions in those cases did not involve the EPA is of no legal moment. The nature of the action, and the complexities of the environmental consequences, are the same. So, too, is the interest of those persons who will be directly affected by such actions in having a full and explicit opportunity to participate in the decision-making that will so immediately affect their well-being. This is particularly important in remedial actions under CERCLA because cleanup alternatives for a hazardous waste site are a subject of unusual concern to the affected public and often involve potential cures that may be as bad as, or worse than, the disease. The EPA has apparently recognized the need for, and appropriateness of, an EIS in similar site-specific remedial actions. For example, in Kilroy v. Ruckelshaus, 21 ERC 1385 (9th Cir. July 31, 1984), the EPA did prepare an EIS with respect to disposition of sludge from a wastewater treatment plant which had been discharging such sludge into the Pacific Ocean. An EIS was held to be required in that case. Kilroy v. Quarles, 440 F.Supp. 316, 320 (C.D. Cal. 1977), aff'd, 614 F.2d 225 (9th Cir. 1980).

In his 1982 opinion EPA's general counsel recognizes that "CERCLA does not prescribe requirements for public involvement in the remedial planning process that would enable remedial actions

to meet the public participation criterion for a functional equivalent exception," NEPA Memorandum at 712, and that such requirements are also absent from the National Contingency Plan (NCP). EPA's general counsel suggests that perhaps this deficiency can be cured by the EPA's incorporating into the remedial actions "procedures that afford the public a meaningful opportunity to comment on environmental issues before the final selection of a remedial alternative." NEPA Memorandum at 712.

Such an objective, while laudable, is hardly a "functionally equivalent" substitute for the clear and specific public-participation procedures mandated for NEPA by the Council for Environmental Quality. 40 C.F.R. §§1503.1 - 1503.4 et seq. The fashioning of ad hoc rules by the EPA to govern public participation in its CERCLA remedial-action process is no adequate substitute for clear general rules promulgated for all such actions by a body such as Congress or the Council on Environmental Quality, other than that charged with operational responsibility for compliance with NEPA.

The only assurance, in highly sensitive matters such as remedial actions under CERCLA, that procedures used are truly the "functional equivalent" of the EIS procedures is to employ procedures that track -- and thus constitute -- the EIS procedures. Only by so doing can there be assurance that a court will not subsequently determine either that the "functional equivalent" exception is not legal, or does not apply, or that the ad hoc procedure employed was not the "functional equivalent" of the EIS procedure. In such a sensitive, volatile situation where the law

is, admittedly, not clear, the responsible, and the only clearly legal, way for the EPA to proceed is in full accordance with the EIS process.

There is no need or justification for the EPA to seek to avoid the EIS process in a matter such as this. It involves very substantial and potentially costly remedial actions that can only be implemented over an extended period of time and the effects of which will be felt for years, perhaps decades, to come. It is now estimated that any remedial work could not be begun until 1986. There is time for compliance with the EIS process and the EPA should make full use of it to comply fully with that process.

The manifest deficiencies of the FS attest to the critical need for full compliance by the EPA with the EIS process. As discussed in more detail in the comments of others, the FS includes only the most summary discussion of the severe environmental impacts of the proposed remedial actions. The FS does not even attempt to assess the nature or magnitude of many of the environmental risks that are summarily described, in large part because of the substantial scientific uncertainties involved. In circumstances of such uncertainty, the NEPA regulations of the Council on Environmental Quality require that the EIS include a worst-case analysis of environmental effects. 40 C.F.R. §1502.22 (1981); see Sierra Club v. Sigler, 695 F.2d. 957, 968-75 (5th Cir. 1983). Nothing like a worst-case analysis has been done in the FS. One cannot from the FS know with any confidence what the probable environmental consequences of various of the remedial alternatives are likely to be. For example, virtually no

consideration is given to the effect of PCB resuspension or storm events during dredging operations on the Harbor or Buzzards Bay. Without a thorough analysis of these and other potentially devastating impacts, including worst-case impacts, EPA has, to date, utterly failed to comply with the spirit much less the law, of NEPA. It must comply fully with both.

2. An Environmental Impact Report (EIR) must be prepared pursuant to the Massachusetts Environmental Policy Act.

The Massachusetts Environmental Policy Act (MEPA), Mass. Gen Laws c.30, §§61 et seq, requires that an Environmental Impact Report be prepared with respect to the remedial action because of the Commonwealth's financial assistance to, and permit issuance for the proposed dredging operations, 301 C.M.R. §10.32(3)(b)(1), §10.32(2)(b), or the construction of an in-harbor storage site. 301 C.M.R. §10.32(2)(a). The purpose of an EIR is to enable state agencies to evaluate fully the environmental impact of any projects undertaken and to "use all practicable means and measures to minimize damage to the environment" and to administer all statutes "so as to minimize and prevent damage to the environment." Mass. Gen Laws c.30, §61; Sec'y of Environmental Affairs v. Massachusetts Port Authority, 366 Mass. 755, 760 (1974).

An EIR under MEPA, much like an EIS under NEPA, must adequately describe:

1. the nature and extent of the proposed project and its environmental impact;
2. all measures being used to minimize environmental damage;

3. any adverse short-term and long-term environmental consequences which cannot be avoided should the project be undertaken; and
4. reasonable alternatives to the proposed project and their environmental consequences.

Unlike NEPA, which is regarded as basically a procedural statute without substantive requirements concerning minimization of environmental damage, e.g., Lathan v. Brinegar, 506 F.2d.677, 693 (9th Cir. 1974); Citizens Against Toxic Sprays, Inc., v. Bergland, 428 F. Supp. 908, 921-22 (D. Ore. 1977), MEPA specifically requires that any activity subject to the statute be carried out so as to "minimize damage to the environment" and that the EIR specify the measures being used to achieve that end. Nevertheless, an EIS required for a project under NEPA may be submitted in lieu of an EIR required under MEPA, Mass. Gen. Laws c. 30, §62G, providing, presumably, that it adequately addresses the four subjects required to be covered by an EIR.

Under MEPA, no agency may undertake a project, or grant a permit or financial assistance for such a project, until 60 days after the secretary of environmental affairs issues notice of the availability of the EIR. After notice of the availability of a draft or final EIR there is a period of thirty days for public and agency review of, and comment on, the EIR. The period for such review and comment may be extended up to an additional thirty days by the Secretary of Environmental Affairs for a draft EIR on a major and complicated project.

Under MEPA, there is no doctrine of "functional equivalence" so the MEPA EIR requirement is clearly applicable to the remedial action involved here. Inasmuch as that requirement can be fulfilled by an adequate EIS under NEPA, it is only sensible, as well as legally required by NEPA, for EPA to comply with the EIS process.

3. EPA must comply with many other requirements of federal and state law.

In addition to the requirements of CERCLA, the NCP, NEPA, and MEPA, there are many other federal and state requirements that must be met with respect to the remedial actions that have been proposed here. There is no need to discuss these in detail at this time, because they largely require obtaining permits and other forms of authorization. The key point to note here is simply that the remedial process, no matter how "fast track" it may wish to be, must take account of the need to comply with these requirements, and possibly others, as well, depending on the option selected.

-- 1. The Coastal Zone Management Act (CZMA), 15 U.S.C. §§1451 et seq., imposes substantial requirements on EPA.

Pursuant to the CZMA, Massachusetts has developed a coastal zone management program which covers New Bedford Harbor. The EPA's proposed cleanup activities for the harbor, which will directly affect the coastal zone, must be consistent "to the maximum extent practicable" with this state management program. See 17 U.S.C. §1456(c)(1); cf. Secretary of the Interior v. California,

52 U.S.L.W. 4063 (1984) (sale by Interior Department of oil and gas leases located on the outer continental shelf does not directly affect the coastal zone).

To ensure consistency, the EPA will be required to submit a consistency determination "at the earliest practical time in the planning or reassessment of the activity," which must be "before the Federal agency reaches a significant point of decisionmaking in its review process." 15 C.F.R. 930.34(b). The content of the EPA's consistency determination is controlled by the standards specified in 15 C.F.R. 930.39, which requires, among other things, a detailed description of the EPA's proposed activities, their associated facilities, their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. 15 C.F.R. 930 (a). See also 15 C.F.R. 930(b) and (c) (specifying the effects of Federal activities and the state policies and provisions of the Federal agency must consider in its consistency determination).

Once Massachusetts' Coastal Zone Management ("CZM") Office receives the EPA's consistency determination, information related to the proposed EPA activities will be published and otherwise made available to the public. The CZM Office then shall determine whether the EPA's consistency determination complies with state regulations and the policies of the coastal zone management

program. If the CZM office rejects the EPA's consistency determination, either party may request mediation directed by the Secretary of the U.S. Department of Commerce. 301 CMR §21.04. The mediation procedures include public hearings and mediation conferences. Either the CZM Office or the EPA may resort to the judicial process to resolve a disagreement concerning the consistency determination without having first exhausted the mediation process. 15 C.F.R. §930.110-.116.

- 2. The Federal Water Pollution Control Act, 33 U.S.C. §§1251 et seq. requires a permit for any dredging, 13 U.S.C. §1344(a), after first obtaining a certification from the state that any discharge from dredging operations will not violate applicable water quality standards. 33 U.S.C. §1341(a).
- 3. The Rivers and Harbors Act, 33 U.S.C. §§401 et seq. requires authorization from the Army Corps of Engineers for the construction of any obstruction in navigable waters. 33 C.F.R. §322.3(c).
- 4. The Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §§6910 et seq., requires EPA, in treating and storing any sediments that are contaminated with heavy metals, to comply with the stringent RCRA regulations applicable to operators of hazardous waste treatment and storage facilities, RCRA §6001, 42 U.S.C. §6961, including the obtaining of a permit. RCRA §§3004, 3005, 42 U.S.C. §§6924, 6925.

- 5. The Toxic Substances Control Act ("TSCA"), 15 U.S.C. §2601 et seq., requires EPA to comply with the regulations promulgated under TSCA for the handling and disposal of PCB's, including performance, record-keeping and monitoring requirements. 40 C.F.R. §§761.1(b), 761.3(aa), 761.60-80.
- 6. The Massachusetts Hazardous Waste Program, M.G.L. c.21C §§1 et seq., 310 C.M.R. §§ 30.000-30.909 provides strict standards that must also be met by the operator of a hazardous waste facility.
- 7. The Massachusetts Hazardous Waste Facility Siting Act, M.G.L. c.21D, §§1 et seq. establishes a complex and lengthy siting process for any developer of a hazardous waste facility in Massachusetts, including federal agencies. Essentially, the process entails regulated negotiations, and arbitration if negotiations are unsuccessful, between the developer and the host community concerning the terms and conditions for the siting of the facility.
- 8. The Massachusetts Wetlands Protection Act, M.G.L. c.131, §40, requires that for any dredging or any other work affecting any wetlands, a notice of intent must be filed, and an order of conditions concerning such activity must be obtained from the local conservation commission and/or the Department of Environmental Quality Engineering (DEQE). 310 C.M.R. §10.05(4).

- 9. The Massachusetts Waterways Act, M.G.L. c.91 §§1 et seq., requires that a license be obtained from DEQE for any dredging operations, §53, and for the construction of any structure, such as the proposed on-site disposal area, in tidelands, §14.
- 10. Mass. Gen. Laws c.21, §43 requires that a state sewer connection permit be obtained before any wastewater from the proposed sediment dewatering system can be passed through the City sewage treatment plant, 3.14 C.M.R. §7.03, with all such discharges being subject to federal and state pretreatment standards. 4 C.F.R. Part 403; 314 C.M.R. §12.08(4).

Respectfully submitted,



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