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October 16, 1989

By Hand

Mr. Merrill Hohman
U.S. EPA - Region I
2203 JFK Federal Building
Boston, Massachusetts 02203

Re: United States, et al. v. AVX Corporation, et al

Dear Mr. Hohman:

This firm represents Aerovox Incorporated. On behalf of Aerovox, I am submitting herewith comments upon the Draft Final Hot Spot Feasibility Study New Bedford Harbor, July 1989. Those comments include the following documents:

Dr. Malcolm Spaulding, Applied Science Associates, Inc., "Review of Draft Hot Spot Feasibility Study, New Bedford Harbor", July 28, 1989.

Dr. Malcolm Spaulding, Applied Science Associates, Inc., "Review of Draft Hot Spot Feasibility Study, New Bedford Harbor", August 30, 1989.

John F. Brown, Jr. and Robert E. Wagner, General Electric Research & Development Center, Schenectady, N.Y., "PCB Dechlorination and Detoxification in the Ahusnet Estuary" and Appendix A (Collection of Chromatographic Data).

J. G. Hoff, F. X. O'Brien, S. A. Moss, Southeastern Massachusetts University, "Critique: Draft Hot Spot Feasibility Study, New Bedford Harbor", May 1989.

Dr. Rudolph Jaeger, Environmental Medicine, Inc., "Critique: Draft Final Baseline Public Health Risk Assessment New Bedford Harbor Feasibility Study", October 12, 1989.

John Whysner, M.D., Ph.D., Peter Shields, M.D., Kenneth Chase, M.D., Washington Occupational Health Associates,

Inc., "Recent Findings Regarding the Toxicity of PCBs - Implications for the Achesonnet Estuary Risk Assessment", including attachments (Final Report Greater New Bedford PCB Health Effects Study 1984-1987 and Evaluation of the Toxicology of PCBs by Kenneth Chase, M.D., et al., March 1, 1989).

John Whysner, M.D., Ph.D., Kenneth Chase, M.D., Washington Occupational Health Associates, Inc., "Review of the Draft Final Baseline Public Health Risk Assessment; New Bedford Harbor Feasibility Study, August, 1989", October 11, 1989, with attached Review of Appendix E.

Affidavits of Daniel Granz, Raymond Castino, Raymond Cabral and Gary Haskins.

Depositions of David A. Kennedy and Gregory Cambra, along with summaries.

Dr. Curt Rose, CDR Environmental Specialists, "Recent Findings Regarding the Toxicity of PCBs - Implications for the Achesonnet Estuary", August, 1989.

Judith C. Harris, Susan F. Coons, Scott A. Foster, Arthur D. Little, Inc., Cambridge, Mass., "Review of Hot Spot Feasibility Study", October 13, 1989.

In addition, Aerovox joins in the submission of comments with other parties which, in addition to the written comments submitted on behalf of Aerovox and other parties under the cover letter of Rizzo Associates, include the following:

Terra, Inc., "New Bedford Harbor Evaluation", October, 1989.

Beyond that, Aerovox specifically reserves the right to rely upon, but not be bound by, any other comments submitted during the public comment period with respect to the Hot Spot Feasibility Study. Aerovox also insists that the entire site file be incorporated into the administrative record and also that the requests for admission submitted by it and by Belleville Industries, Inc. in the litigation before Judge Young -- together with the responses by the government -- be considered part of the administrative record. Since I assume the EPA already has those requests, I have not filed them now, but if you need another set, together with exhibits, please let me know.

You will also find enclosed a letter demanding an adjudicatory hearing for the reasons set forth therein. As

you know, I have been insisting upon such a hearing from the beginning of these proceedings. We do not waive our right to a de novo trial before Judge Young and we continue to insist upon our right to discovery in the Federal Court proceeding in which the United States has sued for recovery of response costs with respect to New Bedford Harbor. You will recall that Judge Young ruled in connection with our attempted discovery of NUS during 1986 that we could take such discovery in the event the EPA elects anything but the no-action alternative.

Included in the submissions is the affidavit of Daniel Granz previously filed by plaintiffs in the court action. Although we do not adopt the affidavit in its entirety, I call your attention in particular to paragraphs 6 and 7, which indicate that the tidal mudflats in the hot spot area are "extremely mucky" -- so much so that he had to place wooden planks to keep from sinking. This affidavit, obviously, is germane to the assumptions in the Risk Assessment that children will be playing in the mud.

In addition to the foregoing, I have certain comments to make on behalf of Aerovox. First, the FS contains a notice to the effect that the document "does not represent . . . the EPA's position or policy, and has not been formally released by the EPA." I do not understand what that means. If we are to address a feasibility study during a public comment period that supposedly represents contemplated agency action, the document ought to have been prepared and issued by the Agency. If Agency discretion is to receive any deference, then Agency action ought to be involved, rather than that of an independent contractor for which the Agency apparently is not responsible. Does the EPA adopt the Feasibility Study? Does it disavow it? What is the Agency's position?

The administrative record is rife with references to "personal communications" that are beyond review. Any such personal communications ought to be made part of the record and subjected to analysis and, ultimately cross-examination. In that regard, Mr. Ciavettieri made the comment at a Community Work Group meeting in New Bedford Harbor that "consultants advised him that the combination of Aroclors 1242 and 1254 is more toxic than 1260 and is the basis for the risk assessment." This conclusion is total nonsense and is unsupported by any scientific evidence. If such undocumented, unsubstantiated personal communications are to form the basis for the Agency's decision, then the Agency ought to say so and include the underlying evidence in the record.

I would also note that the Confined Disposal Facility, which was constructed as part of the pilot dredging study, is falling apart. If that CDF is to serve as the basis for anything, then it has demonstrated to be ineffective and is, one reason, among others, for rejecting dredging and incineration. There is no adequate analysis of cost effectiveness of any of the dredging alternatives, nor is there any adequate consideration of the relationship between the hot spot "operable unit" and the rest of the harbor. The record is devoid of any basis upon which conclusions can be drawn concerning the impact of dredging and treating the hot spot upon the overall conditions in the Harbor, including any impacts on biota or on humans.

Although in the ARARs section and elsewhere it is stated that state law is important both in creating ARARs and in considering the state response, I would point out that state environmental laws have been preempted by CERCLA and the related federal legislation. See e.g. Connor v. Aerovox, 730 F.2d 835 (1st Cir. 1984), cert. denied, 470 U.S. 1050 (1985).

At page ES-1 of the feasibility study, it is said that industrial process wastes containing PCBs were discharged into the harbor from the late 1940s through the late 1970s. There is no factual basis for this assertion.

On page ES-2, it is stated that the implementation of remedial action for the hot spot operable unit must be cost-effective and consistent with the overall remedial action selected for the New Bedford Harbor site. But there is no basis in the record to conclude that the proposed remedial action (other than the no action alternative) for the hot spot would be cost effective or consistent with the overall remedial action for the entire site. Indeed, consistency with the overall remedial action for the site cannot possibly be determined prior to the selection of the remedy. In fact, it is clear that by designating the hot spot as an operable unit and proceeding to treat it as an interim remedy the Agency is simply trying to avoid dealing with the site as a whole and also seeks to avoid compliance with the law, including CERCLA, SARA, the NCP and ARARs, as well as the restriction to \$2 million on emergency removal measures. The Agency simply has resorted to a ruse to make up for its own deficiencies. Moreover, given the government's determination of the amount of natural resource damages submitted in the District Court action, it would appear that any remedial action involving costs which approach or exceed that amount is not legally or economically justifiable.

On page ES-3, the statement is made that biological uptake is the greatest concern, yet there is no measure

relating the hot spot to any biological uptake or subsequent impact on public health.

On page 1-1, it is said that the closure of New Bedford Harbor and upper Buzzards Bay to lobstering has resulted in the loss of 18,000 acres of productive lobstering grounds. On the contrary, the closure of the areas has resulted in a nursery for lobster, which has vastly increased the overall lobster population throughout the entire Buzzards Bay area. Far from causing a decrease in lobster, the closure has resulted in an increase.

Page 1-9 again reiterates the notion that the hot spot will be treated as in interim remedy. For the reasons previously stated, there is no basis upon which to implement an interim remedy in this area, and the relevant standards have not been met. It is similarly inappropriate for the Agency to be acting under a proposed rule (i.e., the proposed NCP). Proposed, but unadopted, rules and regulations cannot provide the basis for Agency action.

On page 1-10, it is stated that the hot spot remedial alternative will be consistent with the remedial strategy for the overall site. It is impossible for the EPA to adopt that position since the strategy for the overall site is not known and will not be known for a long time to come. If simply declaring that removal of a source of contamination will be consistent with an overall strategy is adequate to justify interim remedial action, then the Agency could, under that guise, remove contamination of any source at any site in small bites and never address the ultimate decision. Such an approach is inconsistent with the statute and with the regulations thereunder, and certainly with the rights of the defendants. It is arbitrary and capricious.

In Chapter 2, the Agency grossly exaggerates the reliability of the test data. Not only are the test protocols and analyses not all included or available for scrutiny, but it is clear, from the extent to which we have been able to examine any data, that they are not reliable and do not provide a basis for action by the Agency.

On pages 2-10 and 2-11, it is asserted that risks from metals and PAHs have been analyzed and reported on in the Baseline Risk Assessment. This assertion is incorrect. No analysis from risks of either has been done, and, indeed, contrary to the statement at page 3-1, that a Baseline Environmental Risk Assessment is scheduled for completion in the summer of 1989, no such document has been issued. Similarly, at page 2-7 the bald assertion is made that metals comprise a small component of the total risk when compared to

risks associated with exposure to PCB contaminated sediment. There is no basis for this conclusory statement and none is cited.

At page 2-22, the contractor concedes that site specific data are unavailable for the hot spot area, and, as a result, it is not possible to determine the relative contribution of transport mechanisms on present or future PCB distribution or that these processes are even occurring. In spite of that admission, the Agency is proceeding as if it knows what is happening to PCBs from the hot spot. There is a total absence of valid scientific research with respect to migration from the hot spot and what, if any, impacts it may have on the balance of the site. No action should be taken with respect to the hot spot until an overall remedial plan has been selected.

At page 2-24, it is asserted that there is inadequate data to estimate the half lives of PCBs as a result of biodegradation. This assertion is incorrect. Such data have been submitted. Moreover, the Agency could add nutrients to the site to speed up the process. The Agency has chosen to relegate the dechlorination issue to the scrap heap because it is inconsistent with the Agency's pre-determination that dredging must occur.

In chapters 6 and 7, the EPA contractor refers to the no-action alternative, but does not adequately consider that option. In fact, it is patently evident that, particularly with respect to any interim remedial action for the hot spot, the no-action alternative is the appropriate choice. First, on page 6-6, the statement is made that public health and environmental risks would not be mitigated to acceptable levels by the no-action alternative. That statement assumes that public health and environmental risks now are at unacceptable levels. The evidence is clearly to the contrary. In fact, as the EPA well knows, the PCBs have been in the harbor for perhaps 40 years or more, and there is no evidence that anybody living in and around New Bedford has ever suffered any ill effects as a result, or, for that matter, that any biota have been injured. On the contrary, the Greater New Bedford Health Effects Study demonstrates the opposite, and it also demonstrates -- according to the government -- the success of institutional controls. It will be recalled that when the NBHES was promulgated, government counsel declared that the results had been achieved because of the fishing ban. If that is true, then institutional controls are clearly adequate. The EPA contractor states that institutional controls will be difficult to establish and maintain. On the contrary, they can be easily established and maintained, and the defendants, I am sure,

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will be more than willing to assist in the implementation of reasonable institutional controls.

At page 7-2, it is asserted that the overall remedial strategy for New Bedford Harbor may include a no-action alternative for the upper estuary. If that is so, then I submit that dredging the hot spot is patently inconsistent with the ultimate no-action remedy, unless the Agency has concluded that everything is consistent with a possible no-action alternative. Obviously, that conclusion is not rational or at least is not reasonable.

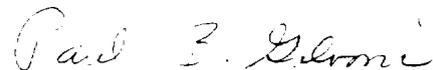
At page 7-4, it is asserted that there will be no decrease in mobility, toxicity, or volume if the no-action alternative is employed. That, again, is incorrect because of the biodegradation that admittedly is occurring in the area.

In paragraph 7.2.4 it is stated that "no action can be expected to reduce biota PCB levels to acceptable levels in the foreseeable future." I agree with that statement although I submit that they already are at acceptable levels.

In paragraph 7.2.7 it is stated that the no-action alternative will not comply with ARARs. I would remind the Agency that, because the operable unit is being treated as an interim remedy, the ARARs do not need to be satisfied.

By having pointed out these flaws in the study, it should not be assumed that the comments of Aerovox are limited to the foregoing. On the contrary, we rely upon all of the other comments submitted. I also would point out that these comments demonstrate the undoubted need, if any such demonstration were necessary, for an adjudicatory hearing, with the right to confront the witnesses against Aerovox and to present its own evidence before an impartial judge and not to Agency staff members who have long since made up their minds with respect to the critical issues.

Very truly yours,



Paul B. Galvani

PBG/amc
Enclosures