

MOTION NUMBER US-57

SERVICE DATE: May 24, 1991
REPLY DATE: _____

OPPOSITION DATE: June 10, 1991
DELIVERED TO COURT: _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

AVX CORPORATION, et al.,
Defendants.

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

AVX CORPORATION, et al.,
Defendants.

CIVIL ACTION NO.
83-3882-Y

**PLAINTIFF UNITED STATES' MOTION TO ENTER
CONSENT DECREE WITH AEROVOX INCORPORATED
AND BELLEVILLE INDUSTRIES, INC.**

Plaintiff United States respectfully requests that this Court approve and enter the proposed Consent Decree between the United States and the Commonwealth of Massachusetts (collectively "Plaintiffs") and two of the five defendants in this case, Aerovox Incorporated ("Aerovox") and Belleville Industries, Inc. ("Belleville").

On December 18, 1990, Plaintiffs lodged the proposed Decree with this Court pending solicitation and consideration of public comments in accordance with 28 C.F.R. § 50.7 and consistent with 42 U.S.C. § 9622(d)(2). The Department of Justice then published

in the Federal Register a notice of the lodging of this Consent Decree, soliciting public comments on the Decree for a period of thirty (30) days from the date of publication. See 56 Fed. Reg. 525 (January 7, 1991). Comments were received by the Department from the following:

1. Nutter, McClennen & Fish, on behalf of defendant AVX Corporation ("AVX"), dated February 5, 1991 (attached as Exhibit A);
2. Foley, Hoag & Eliot, on behalf of defendant Cornell-Dubilier Electronics, Inc. ("CDE"), dated February 6, 1991 (attached as Exhibit B); and
3. National Wildlife Federation ("NWF"), intervenor in the action, dated February 6, 1991 (attached as Exhibit C).

The United States, in consultation with the Commonwealth, has reviewed and considered these comments. For the reasons set forth in the accompanying Memorandum in Support, the United requests that this Court enter the proposed Consent Decree as fair, reasonable, and consistent with the objectives of CERCLA.

Respectfully submitted,

Assistant Attorney General
Environment and Natural Resources
Division



ELLEN M. MAHAN
WILLIAM D. BRIGHTON
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-3581

CERTIFICATE OF SERVICE

I hereby certify that Plaintiff United States' Motion to Enter Consent Decree with Aerovox Incorporated and Belleville Industries, Inc. and accompanying Memorandum of Law and Exhibits was served by first class mail, postage prepaid, on all counsel of record this 24th day of May, 1991.



ELLEN M. MAHAN

Fed. Reg. 525 (January 7, 1991). Comments were received by the Department from the following:

1. Nutter, McClennen & Fish, on behalf of defendant AVX Corporation ("AVX"), dated February 5, 1991 (attached as Exhibit A);
2. Foley, Hoag & Eliot, on behalf of defendant Cornell-Dubilier Electronics, Inc. ("CDE"), dated February 6, 1991 (attached as Exhibit B); and
3. National Wildlife Federation ("NWF"), intervenor in the action, dated February 6, 1991 (attached as Exhibit C).

The United States, in consultation with the Commonwealth, has reviewed and considered these comments, and requests that this Court enter the proposed Consent Decree as fair, reasonable, and consistent with the objectives of CERCLA.

II. Aerovox/Belleville Consent Decree Terms

The Consent Decree with Belleville and Aerovox provides for payments by those defendants of a total of \$12.6 million -- \$9.45 million for past and future study, investigation and cleanup costs ("response costs") and \$3.15 million for natural resource damages. See Consent Decree, Paragraph 8.¹

From the response costs portion of the settlement, \$2.5 million will be used to reimburse EPA and the Commonwealth for the governments' past study and investigation costs, and \$6.95 million will be used toward future response costs for New Bedford Harbor. Id., Paragraphs 10-12.

¹ Most of these amounts will be paid within 5 days after final approval of the Consent Decree, but \$3 million (\$2.25 million for response costs and \$750,000 of the damages portion of the settlement) will be paid over a three-year period.

From the natural resource damages portion of the settlement, \$550,000 and \$16,000 will be paid directly to NOAA and the Commonwealth, respectively, in reimbursement of costs incurred for assessment of the natural resource damages at the site. Id. The remainder of the damages payments (\$2,584,000) will be placed in an interest-bearing account in the Registry of the Court. Monies may be disbursed from that account only by order of the Court, upon joint application of the trustees, for use by them to plan, implement, and oversee actions to restore, replace, or acquire the equivalent of the injured natural resources in accordance with Section 107(f)(1) of CERCLA. Id., Paragraph 17.

The Consent Decree provides Belleville and Aerovox with covenants not to sue for response costs resulting from releases of hazardous substances at the New Bedford Harbor site. The covenant not to sue for future liability does not take effect until certification of completion of the EPA remedial action at the site. Id., Paragraph 18. The Consent Decree also includes reopeners, or reservations of rights, which permit the governments to institute a new action against the settling defendants for response costs or injunctive relief if new information or previously unknown conditions at the site are discovered and indicate that the cleanup action undertaken by EPA is not protective of human health or the environment. See Consent Decree, Paragraphs 20-21. The Consent Decree similarly provides Belleville and Aerovox with covenants not to sue for natural resource damages, and includes a special reopener which allows

the United States and the Commonwealth to seek further damages against those defendants if the governments discover previously unknown resource injury or if new information indicates that there is injury of a different type, or of a substantially greater magnitude, than is currently known. See Consent Decree, Paragraph 22.²

The proposed Consent Decree does not resolve the governments' pending claims against the three remaining defendants in the action, AVX, CDE, and Federal Pacific Electric Company.

III. Summary of Comments Received

Two of the three sets of comments received on the proposed Consent Decree are from other defendants in this action. Neither of these defendants opposes the approval of the proposed Consent Decree with Aerovox and Belleville. AVX and CDE request only that the United States defer seeking entry of the instant Decree. See Exhibits A, B. Both AVX and CDE request deferral until a consent decree with AVX has been lodged with the Court for concurrent consideration. CDE additionally seeks deferral of approval of the proposed Decree until Plaintiffs have provided further information on (1) the governments' total future cleanup

² This Court had previously rejected a settlement between the governments and AVX on the natural resource damages claims because the decree contained no reopener for unknown natural resource damages. In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1038 (D. Mass. 1989) ("Acushnet IV"). The Court also could not determine whether the federal trustee had agreed to the covenant not to sue in the AVX settlement. Id. at 1036-37. The Aerovox/Belleville Consent Decree has been executed by both the federal and Commonwealth of Massachusetts natural resource trustees, thereby indicating that they have reviewed and agreed to the covenant not to sue.

costs and natural resource damages and (2) the basis for the governments' determinations of allocation of liability. Notably, CDE's comments seeking deferral were submitted before it reached its own agreement in principle with the governments and just one month before it was scheduled to go to trial on the governments' remaining costs and damages claims.³

The comments of the National Wildlife Federation ("NWF") also do not challenge the settlement amounts to be recovered under the Aerovox/Belleville Decree. Indeed, NWF states in its comments that it "is pleased that the governments have sought substantial cash settlements from the defendants." Exhibit C at 1. NWF instead raises two concerns based on its reading of Section 122 of CERCLA.

NWF argues, based on Section 122(j)(2)'s requirement that the defendant agree "to undertake appropriate actions necessary to protect and restore the natural resources damaged," that the natural resource trustees cannot settle their claims against Aerovox and Belleville until the trustees have completed and submitted to the public their plan for the restoration, replacement or acquisition of equivalent of the injured resources.

NWF also argues that Section 122(f)(1) of CERCLA, which addresses covenants not to sue in remedial action decrees, prohibits the United States from providing a covenant not to sue in

³ All three of the remaining defendants have now reached their own settlement agreements in principle with the governments and are engaged in preparing the written agreements embodying the settlement terms.

this cost recovery decree -- essentially prohibiting any settlement -- until EPA has completed the process of selecting all remedial actions to be implemented at the New Bedford Harbor.

As discussed below, none of the comments raises any material question as to whether the Aerovox/Belleville Decree is fair, reasonable and consistent with the objectives of CERCLA.

ARGUMENT

I. Judicial Review of the Proposed Consent Decree Should Be Deferential to the Government's Judgment, Examining Only Whether the Decree is Fair, Reasonable, and Faithful to the Objectives of CERCLA.

In reviewing this settlement, the law in this Circuit is clear that this Court "is only to 'satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve.'" United States v. Cannons Engineering Corp., 899 F.2d 79, 85 (1st Cir. 1990). The First Circuit in the Cannons decision noted that "it is the policy of the law to encourage settlements," 899 F.2d at 84 (citing City of New York v. Exxon Corp., 697 F. Supp. 677, 692 (S.D.N.Y. 1988)). The Cannons Court stated that "[t]hat policy has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement," and cautioned district courts to refrain from "second-guessing the Executive Branch." 899 F.2d at 84; see generally Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961) (absent malfeasance or bad faith, courts are not to "assess the wisdom of the Government's judgment in negoti-

ating and accepting [a] consent decree").⁴ The Cannons Court stated:

The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute.

899 F.2d at 84. See also Acushnet IV, 712 F. Supp. at 1027 (D. Mass. 1989) ("Before approving such a settlement, this Court must ascertain 'that it is fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress.'").

This Court has also recognized the importance of encouraging settlements, particularly in CERCLA cases, citing to CERCLA's design to protect and preserve public health and the environment:

That Congressional purpose is better served through settlements which provide funds to enhance environmental protection, rather than the expenditure of limited resources on protracted litigation. Without question Congress passed the SARA amendments to encourage settlements for this very reason.

Id. at 1028-29.

Execution of the Consent Decree by representatives of the U.S. Attorney General, the U.S. Environmental Protection Agency, and the natural resource trustee, the National Oceanic and Atmospheric Administration, evidences the United States' judgment that the settlement with Aerovox and Belleville satisfies the

⁴ Numerous other courts have adopted similarly deferential standards of review of CERCLA consent decrees. E.g., United States v. Town of Moreau, 751 F. Supp. 1044 (N.D.N.Y. 1990); United States v. Rohm & Haas Co., 721 F. Supp. 666, 680 (D.N.J. 1989); Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 516 (W.D. Mich. 1989); State of New York v. Town of Oyster Bay, 696 F. Supp. 841, 843 (E.D.N.Y. 1988); United States v. Hooker Chems. & Plastics Corp., 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982).

relevant criteria of fairness, reasonableness, and consistency with statutory objectives. As discussed below, the comments received on the Decree provide no reason to alter that judgment.

II. The Proposed Consent Decree With Aerovox and Belleville Is Fair, Reasonable, and Consistent with CERCLA's Objectives.

A. Factors Considered in Evaluation of the Settlement

As noted above, none of the commenters opposes the proposed Consent Decree on the grounds that it is unfair or unreasonable in the amounts recovered or any other terms. The settlement recovers a substantial sum of money toward response costs and natural resource damages from Aerovox and Belleville. The Decree does not provide a covenant not to sue to Aerovox and Belleville for future liability until certification of completion of the remedial action, consistent with Section 122(f)(3) of CERCLA. The Decree reserves the governments' rights to reopen the action against Aerovox and Belleville for cleanup costs and natural resource damages, consistent with the policy of CERCLA Section 122(f)(6)(A), if: (1) the governments discover new information or previously unknown conditions indicating that the cleanup is not protective of human health or the environment; or (2) unknown conditions contribute to natural resource injury, or new information indicates that there is injury of a different type or of a substantially greater magnitude than is presently known.

The substantial amounts recovered from Aerovox and Belleville are fair and reasonable, particularly in light of the potential litigation risks, expense, uncertainty and other limitations facing the governments in recovering for past and future

response costs and damages to natural resources. This Court has recognized the risks, expense, and uncertainty of recovery in a case of this complexity, Acushnet IV, 712 F. Supp. at 1029-30, and has noted that the inherent uncertainty "makes settlement desirable for the parties and satisfies the public interest by securing a substantial recovery in the face of unknown and perhaps unknowable odds." Id., at 1030. See Cannons, 899 F.2d at 90 (amount recovered must take into account foreseeable risks of loss and the time and money necessary to collect the damages, making "a settlement which nets less than full recovery of cleanup costs nonetheless reasonable"); Rohm & Haas, 721 F. Supp. at 686 ("Compromise of litigation occurs precisely because there is uncertainty about the underlying factual circumstances and the range of possible recoveries. If a settlement is reasonable in light of those circumstances, it ought to be approved.")⁵

⁵ The governments' claim for past federal and state response costs is approximately \$25-30 million (including prejudgment interest, and enforcement costs). The amount of future cleanup costs to date are approximately \$15 million under the first operable unit Record of Decision ("ROD") for the highly contaminated hot spots of the Estuary, issued to the public in April 1990. The total future cleanup costs are dependent upon which cleanup alternative EPA selects in the second ROD for the remainder of the Estuary, lower Harbor and Bay. Costs of all the alternatives under consideration were estimated in a comprehensive remedial investigation and feasibility study ("RI/FS") for this second ROD, released to the public in the summer of 1990. The natural resource damages claim includes an assessment of the lost use value for the injured natural resources, totaling approximately \$39-47 million assuming no EPA cleanup, and an uncertain amount for any further restoration of the resources that may be necessary after EPA selects and implements its comprehensive remedy.

In addition to the general litigation risks and uncertainties facing the governments in this action, the governments face particular risks against these two defendants. Throughout this hard-fought litigation, to limit or avoid liability, Aerovox and Belleville have vigorously contended that: (1) Aerovox never used PCBs, and Belleville used a less toxic and more degradable PCB Aroclor than AVX and CDE; (2) many of their PCB releases were exempt from CERCLA liability under a discharge permit; and (3) because of their comparatively short period of PCB use and their use of certain pollution controls, the significance of their contribution to the total contamination was minimal.

Moreover, the governments appropriately took into account, in assessing the fairness and reasonableness of the settlement, the financial limitations of the two defendants. Belleville is a dissolved corporation whose residual assets were distributed to its shareholders many years ago. The governments conducted a review of Aerovox's financial situation prior to agreeing to the settlement. This review indicated that Aerovox, though profitable, is a small company whose value, if it were liquidated to pay a judgment, would be on the order of \$21 million.

It was after an evaluation of all these factors -- litigation risks, expense, and other limitations on potential recovery -- that the governments determined that the Aerovox/Belleville settlement in the proposed Consent Decree for \$12.6 million in costs and damages is fair, reasonable and consistent with the objectives of CERCLA.

B. Response to Comments

1. Comments on behalf of AVX

AVX offers no substantive challenge to the proposed Decree. Rather, AVX asserts that consideration of this Consent Decree should be deferred until an expected consent decree between AVX and the governments is lodged for consideration. AVX's stated concern is that piecemeal consideration of the two decrees may result in judicial approval of language employed in the first Decree which differs from language included in an AVX decree.

AVX's concern should not affect the Court's prompt review of the proposed Decree. Judicial review of CERCLA settlements with certain, but not all, defendants in an action is commonplace. See, e.g., Cannons, 899 F.2d at 86. Congress gave the governments broad discretion in the timing and structure of settlements, and rewarding defendants "who settle sooner rather than later is completely consonant with CERCLA's makeup." Id. at 86, 89. AVX's proposal could penalize Aerovox and Belleville by further delaying consideration of their settlement. Moreover, AVX has had several months to negotiate its agreement with the governments, and has had the opportunity to compare the language and terms in its agreement with those in the proposed Aerovox/Belleville Decree. That the two agreements might differ is neither surprising nor inappropriate. Each of the parties is in a different bargaining position in each round of negotiations, based on variations in litigation risks and in the amounts of money recovered. Those factors, as well as lessons learned from

previous rounds of negotiations, have appropriately given rise to clarifications and refinements in language between the proposed Decree and subsequent decrees, to various concessions by the parties, and to the inclusion of wholly new terms. As this Court pointed out in reviewing a prior decree, the intent of Congress was for "the United States to assess the strengths and weaknesses of its case and drive the hardest bargain it can." Acushnet IV, 712 F. Supp. at 1036. The governments should not be "handcuffed" in each phase of negotiations by terms reached with other parties in previous negotiations. See generally Cannons, 899 F.2d at 87. Thus, AVX's concern about its agreement is not relevant to the Court's inquiry whether the governments have struck a fair and reasonable settlement with Aerovox and Belleville, and whether it is consistent with CERCLA. The settlement agreements with the remaining defendants will be reviewed under the same "fair, reasonable, and consistent with the objectives of CERCLA" standard when those agreements are final and lodged with the Court.

2. Comments on behalf of CDE

CDE's comments were submitted prior to the date it reached an agreement in principle with the governments. Even then, CDE did not oppose the proposed settlement with Aerovox and Belleville. Yet because it had not yet reached an agreement with the governments as to its "share" of liability, CDE requested further information about any allocation of liability made by the governments, as well as an estimate of the remaining claims for response costs and natural resource damages. CDE's comments were

submitted no doubt in an effort to protect its interests if it could not reach an agreeable resolution of its liability with the governments. CDE has now reached an agreement in principle as to its liability for the governments' remaining claims. Moreover, the above discussion of the governments' evaluation of the risks, expense, limitations and uncertainties that led to the Aerovox/Belleville settlement demonstrates that the Decree is in accordance with the standard set forth in Cannons and Acushnet IV.

3. Comments on behalf of NWF

The comments submitted on behalf of the NWF raise two statutory arguments challenging the consistency of the proposed Consent Decree with Section 122 of CERCLA.

One issue has already been addressed by this Court in its previous decision on the AVX natural resource settlement. NWF argues that Section 122(j)(2) of CERCLA effectively prohibits a natural resource settlement until a plan for full restoration has been finalized and presented to the public. Section 122(j)(2) provides that the federal natural resource trustee may agree to a covenant not to sue in any agreement under Section 122 if the defendant "agrees to undertake appropriate actions necessary to protect and restore the natural resources damaged. . .". NWF interprets this provision to mean that the full extent of restoration must be known before the parties and the Court can evaluate whether a proposed settlement complies with Section 122(j)(2).

In Acushnet IV, this Court eschewed a similar argument under Section 122(j)(2) made by NWF as "neither requisite nor wise."

Id.⁶ Instead, the Court interpreted Section 122(j)(2), in a manner more in keeping with the intent and the language of Congress, as requiring the United States "to assess the strengths and weaknesses of its case and drive the hardest bargain it can." Id. In that decision, the Court upheld the amount of the earlier settlement, which provided for a \$2 million cash payment for natural resource damages, as satisfying Congress' concerns that the defendant agree "to undertake appropriate actions necessary to protect and restore the natural resources damaged." Section 122(j)(2) of CERCLA. Acushnet IV, 712 F. Supp. at 1036.⁷ As the discussion above demonstrates, the \$3.15 million natural resource damages recovery under the settlement with Aerovox and Belleville fully satisfies the standard articulated by the Court.

The other issue raised by NWF also derives from Section 122 of CERCLA. NWF argues that Section 122(f)(1) prohibits settlement of this matter until the second Record of Decision ("ROD") for the Estuary, Harbor and Bay has been issued. NWF contends that the uncertainty in the amount of future cleanup costs for

⁶ There the Federation had argued that the provision of Section 122(j)(2) required the settling defendant to provide for full restoration and replacement of the injured resources in order to settle the claim.

⁷ The Court declined to approve that earlier settlement with AVX because it did not contain a reopener for unknown future damages -- a reopener which the proposed Aerovox/Belleville Decree includes.

that second ROD precludes the governments from providing a covenant not to sue for those costs until the ROD is issued.⁸

The language NWF points to in support of this argument is Section 122(f)(1)(D), which states that the President may provide a covenant not to sue for liability for a release "addressed by a remedial action" if "[t]he response action has been approved by the President." 42 U.S.C. § 9622(f)(1). An examination of this provision in its entirety, however, reveals that it is directed to settlements for the performance of cleanup activities by defendants and that its terms are inapplicable to this cash-out settlement with Aerovox and Belleville.

Section 122(f)(1) provides as follows:

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this Act, including future liability, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, . . . if each of the following conditions is met:

- (A) The covenant not to sue is in the public interest.
- (B) The covenant not to sue would expedite response action consistent with the [NCP].

⁸ In April 1990, EPA issued a first ROD to the public, providing for the dredging and incineration of the most highly contaminated sediments in the "Hot Spot" areas of the Upper Estuary. The ROD included an estimated cost of that work as approximately \$15 million. A second ROD is anticipated for the remainder of the Estuary, lower Harbor and Bay. A comprehensive remedial investigation and feasibility study ("RI/FS") for this second ROD, conducted over the past several years, was completed in the summer of 1990 and released to the public for review. The RI/FS outlines various alternatives for cleanup of the remainder of the Estuary, lower Harbor and Bay, and sets forth estimates of the range of costs of these alternatives.

(C) The person is in full compliance with a consent decree under [Section 106 of CERCLA] for response to the release or threatened release concerned.

(D) The response action has been approved by the President.

42 U.S.C. § 9622(f)(1) (emphasis added).

This language reveals unambiguously that this subsection of Section 122 applies only to settlement agreements in which the defendant is performing the cleanup at the facility. Section 122(f)(1)(C), which requires that the defendant be in full compliance with a consent decree under Section 106, can only be read as referring to a consent decree to perform the response actions. Since settlement of a Section 107 cost recovery claim does not entail the performance of response actions by the settling parties, such a settlement could never meet that condition.⁹ Thus, the consequence of NWF's argument that Section 122(f)(1) be applied to cash-out settlements, such as the proposed Decree, would be that cases against (non-de minimis) parties could not be settled if the remedy had not been selected, but would have to be litigated to final judgment, even if all parties -- and the court -- agreed that settlement was appropriate.

There is absolutely no reason to believe that Congress intended to so circumscribe the government's settlement options in drafting Section 122(f)(1). Indeed, such an argument appears

⁹ Notably, however, before any cleanup action is performed by the governments in New Bedford Harbor, the response action will be approved by the top level EPA decisionmakers to whom have been delegated the President's approval authority under the statute.

contrary to the emphasis Congress placed on implementing settlements, as evidenced by Section 113(f)(2). See Acushnet IV, 712 F. Supp. at 1029 ("Indeed, subsection 113(f), as well as section 122, . . . are devoted to facilitating [settlements]").

Section 122's focus on settlements to perform cleanups is also reflected in the language of Section 122(a) ("The President, in his discretion, may enter into an agreement with any person . . . to perform any response action . . . if the President determines that such action will be done properly by such person.") This Court has acknowledged that the language and the legislative history of Section 122 lend significant support to the view that it was designed for cleanup settlements. Id., at 1033.

In two recent decisions involving cash-out settlements under CERCLA, district courts have rejected challenges based on Section 122 similar to NWF's arguments. Based on the government's inherent authority to compromise claims, one court found objections under Section 122 to be "irrelevant" to a Section 107 consent decree. United States v. Bell Petroleum Services, Inc., No. MO-88-CA-05, slip op. at 6 (W.D. Texas July 24, 1990) (attached as Exhibit D). That court held that "such inherent authority indeed exists and is not limited by Section 9622 of CERCLA." Id. at 6 (citing Swift & Co. v. United States, 276 U.S. 311, 331 (1927)).¹⁰ In United States v. Vertac Chemical

¹⁰ That the Attorney General has such inherent authority is well established. See, e.g., Halbach v. Markham, 106 F. Supp. 475, 479-80 (D.N.J. 1952), aff'd, 207 F.2d 503 (3rd Cir. 1953), cert. denied, 347 U.S. 933 (1954); accord United States v.

Corp, et al., No. LR-C-80-109, slip op. at 7 (E.D. Ark. February 4, 1991) (attached as Exhibit E), appeal docketed, No. 91-1887 (8th Cir. Apr. 5, 1991), the court similarly rejected a non-settlor's argument that CERCLA prohibits a "cash out" settlement with a non de minimis party where no remedy has been selected. The court held that such a narrow construction of the statute, circumscribing the government's discretion in fashioning settlements, would not further the objectives of CERCLA. Id.

Notwithstanding that the provisions of Section 122(f)(1) simply could not be applicable to the proposed Consent Decree, the Aerovox/Belleville Decree fully satisfies the policies Congress expressed in Section 122 for settlements of CERCLA actions. The principles underlying Section 122, and its key provisions regarding future liability and unknown conditions, ensure that the public does not bear the costs of future unknown costs and damages. In the proposed settlement, the governments provided for public protection, consistent with Sections 122(f)(3) and (f)(6), by deferring the effective date of the

¹⁰(...continued)
Conservation Chemical Co., 628 F. Supp. 391, 400 (W.D. Mo. 1985) ("[T]he authority of the United States and the Attorney General to settle litigation is well established."). The Attorney General's settlement authority is further evident from Section 122(a), which gives broad discretion to the President not to use the procedures in Section 122. Accord United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283, 1287 (4th Cir.), cert. denied, 439 U.S. 875 (1978) (citing 28 U.S.C. §§ 516 and 519 as a "broad grant ... of authority to agree to dismissal of actions brought by the government [or] .. to compromise and settle any case referred to the Justice Department"); 28 C.F.R. § 0.160 et seq. (setting forth procedures to compromise civil claims).

covenant not to sue for future liability and by including reopeners in the Decree, based on unknown conditions and new information, to seek further response costs, injunctive relief and natural resource damages.

Before entering into this settlement, the governments also evaluated the potential future costs of cleanup and restoration of New Bedford Harbor, as well as the litigation risks and the likelihood of recovery of those costs from these two defendants. In its considerations, the governments had the benefit of the years of information available on the contamination in the Harbor and on the options for and costs of cleanup. The information considered in the governments' evaluation included the plan and underlying data for the first cleanup ROD, which addresses the most highly contaminated "Hot Spot" areas of the Upper Estuary, and the approximately \$15 million estimated cost of that remedial action. In addition, the government considered the information available in the comprehensive RI/FS for the second ROD, including estimates of the range of costs for the various cleanup alternatives under consideration.¹¹ This information, together with the government's assessment of the litigation and recovery uncertainties against these defendants, provided the basis for a reasoned evaluation of the Aerovox/Belleville settlement and of the remaining claims.

¹¹ Information on the various remedial alternatives under consideration and their cost estimates was available for the governments' evaluation of their future claims before the first ROD was issued in April of 1990 and the RI/FS for the second ROD was finalized for release to the public in August 1990.

The inevitable uncertainty in the costs for the upcoming second ROD at the New Bedford Harbor site does not affect the governments' ability to resolve an action under CERCLA in a manner wholly consistent with the objectives of the statute. Indeed, uncertainty, particularly regarding litigation risks and the likelihood of recovery, is routinely associated with settlement of such lawsuits and may be the predominant factor inducing parties to settle. As the Cannons court recognized, uncertainty of future costs is inherent in these cases:

The actual cost of remedial measures is frequently uncertain at the time a consent decree is proposed. Thus, although the settlement's bottom line may be definite, the proportion of settlement dollars to total needed dollars is often debatable. Once again, the agency cannot realistically be held to a standard of mathematical precision. If the figures relied upon derive in a sensible way from a plausible interpretation of the record, the court should normally defer to the agency's expertise.

899 F.2d at 90. Regarding the AVX natural resource settlement, this Court noted that the inherent uncertainty "makes settlement desirable for the parties and satisfies the public interest by securing a substantial recovery in the face of unknown and perhaps unknowable odds." Acushnet IV, 712 F. Supp. at 1030.

In sum, NWF's interpretation of Sections 122(j)(2) and 122(f)(1) are without merit, and the government's efforts to evaluate the litigation risks, the potential costs of the second ROD and restoration, and the likely recovery from these defendants, coupled with the proposed Decree's provisions for deferral of the covenant not to sue for future liability and the reopeners, fully satisfy the intent and objectives of CERCLA.

CONCLUSION

For the foregoing reasons, this Court should approve and enter the proposed Consent Decree with Aerovox and Belleville as fair, reasonable, and consistent with the objectives of CERCLA.

Respectfully submitted,

Assistant Attorney General
Environment and Natural Resources
Division

A handwritten signature in cursive script, appearing to read "Ellen M. Mahan", written over a horizontal line.

ELLEN M. MAHAN
WILLIAM D. BRIGHTON
Senior Counsel
Environmental Enforcement Section
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-3581

EXHIBIT A

Mahan

NUTTER, McCLENNEN & FISH

ONE INTERNATIONAL PLACE
BOSTON, MASSACHUSETTS 02110-2699
TELEPHONE: 617 439-2000 FACSIMILE: 617 973-9748

DIRECT DIAL NUMBER:
(617) 439-2212

February 5, 1991
11478-0026

VIA FEDERAL EXPRESS

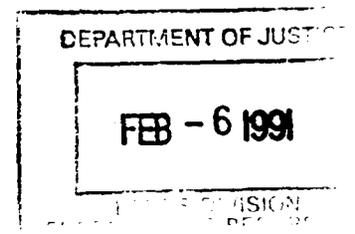
Richard B. Stewart, Esquire
Assistant Attorney General
Environment and Natural Resources Division
Department of Justice
Tenth and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Re: United States v. AVX Corporation, D.J. Ref. 90-11-2-32
Comments of AVX Corporation

Dear Mr. Stewart:

This letter is submitted on behalf of AVX Corporation ("AVX") to convey its comments regarding the proposed consent decree in the above-referenced matter between the United States and the Commonwealth of Massachusetts and Aerovox Incorporated and Belleville Industries, Inc. (the "Aerovox/Belleville decree"). AVX is a defendant in the lawsuit in which the proposed Aerovox/Belleville decree has been lodged (United States v. AVX Corporation, et al, C.A. No. 83-3882-Y (D. Mass.)) and has itself reached an agreement in principle with the United States and the Commonwealth to settle the claims asserted therein against AVX. AVX is presently negotiating specific terms of its settlement with the United States and the Commonwealth. If such negotiations are successful, AVX anticipates that a proposed consent decree (the "AVX decree") will be ready for lodging shortly.

90-11-2-32



Richard B. Stewart, Esquire
February 5, 1991
Page 2

AVX files these comments due to concerns regarding the wisdom and procedural fairness of considering the proposed Aerovox/Belleville decree in isolation from the AVX decree. See United States v. Cannons Engineering Corp., 899 F.2d 79, 86 (1st Cir. 1990) (test for approval of proposed CERCLA consent decree includes examination of procedural fairness). From the standpoint of the public interest, clearly it is preferable, once different defendants have entered into separate agreements in principle to settle, that the settlement terms reached with the individual defendants be examined against the background of the entire package of rights the government plaintiffs will gain, or retain, by virtue of the terms of separate consent decrees. Piecemeal consideration of the Aerovox/Belleville and AVX consent decrees may result in judicial endorsement of terms appearing in the earlier-filed decree which proves to be problematic or ill-advised when viewed in light of a subsequent decree.

For its own part, AVX is concerned that there may be differences between the language employed in the proposed Aerovox/Belleville decree and that to be employed in any AVX decree which do not reflect an intent on the part of the United States or the Commonwealth that the two decrees operate differently. The spectre of unintended consequences from differing language raises questions of substantive fairness, since, by definition, the differential treatment of the settling parties would be "arbitrary, capricious, and devoid of a rational basis." Cannons, 899 F.2d at 87. The government plaintiffs cannot hope to defend differential treatment of parties which they concede that they did not intend in the first place. Given the presently incomplete posture of its negotiations, however, AVX is constrained from raising any such questions at this time. While AVX does not suggest that negotiations on the two decrees have been manipulated to produce this result, the procedural unfairness of the situation is no less real, whether intended or not.

It may be necessary, in some circumstances, to sacrifice the virtues inherent in plenary consideration of multiple proposed settlements in order that other, more pressing objectives can be met. In the present situation, however, no such concerns reasonably can be advanced. Where virtually a full year already has elapsed since the Aerovox/Belleville agreement in principle was reached, and where the culmination of the AVX negotiations -- successful or otherwise -- is at hand, there can be no justification for a refusal to await the lodging of an AVX decree (or the unsuccessful conclusion of the AVX negotiation) before entry of the proposed Aerovox/Belleville decree is sought.

NUTTER, McCLENNEN & FISH

Richard B. Stewart, Esquire
February 5, 1991
Page 3

AVX accordingly urges the Department of Justice to forebear the filing of a motion to enter the proposed Aerovox/Belleville decree until such time as the anticipated AVX decree has been lodged for concurrent consideration, or until it determines that the present negotiations have failed.

Respectfully submitted,

NUTTER, McCLENNEN & FISH

By: Mary K. Ryan
Mary K. Ryan

MKR:emf
cc: Ellen M. Mahan, Esquire
Matthew T. Brock, Esquire
7292e

EXHIBIT B

Mahan

FOLEY, HOAG & ELIOT

1615 L STREET, N.W.
WASHINGTON, D.C. 20036
TELEPHONE (202) 775-0600
TELECOPIER (202) 857-0140

IN BOSTON
ONE POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109
TELEPHONE (617) 482-1390
CABLE ADDRESS FOLEYHOAG
TELECOPIER (617) 482-7347
TELEX 940693

February 6, 1991

Richard B. Stewart
Assistant Attorney General
Environmental and Natural Resources Division
United States Department of Justice
Washington, DC 20530

Re: United States v. AVX Corporation
D.J. Ref. 90-11-2-32

Dear Mr. Stewart:

Enclosed on behalf of Cornell-Dubilier Electronics, Inc. please find comments on the proposed consent decree in United States v. AVX Corp., et al., C.A. No. 83-3882-Y (D. Mass.), resolving the claims of the United States and the Commonwealth of Massachusetts against Belleville Industries, Inc. and Aerovox Incorporated.

Thank you for your assistance in this matter.

Very truly yours,

Laurie Burt

Laurie Burt

VWV:chm
Enclosure

cc: Ellen M. Mahan, Esquire
Matthew T. Brock, Esquire
Paul B. Galvani, Esquire
David A. McLaughlin, Esquire
Mary K. Ryan, Esquire

90-11-2-32

DEPARTMENT OF JUSTICE

FEB - 7 1991

RECORDS DIVISION
GENERAL RECORDS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, et al.,)	CIVIL ACTION
Defendants.)	NO. 83-3882-Y
)	
COMMONWEALTH OF MASSACHUSETTS,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, et al.,)	
Defendants.)	

COMMENTS OF DEFENDANT CORNELL-DUBILIER ELECTRONICS, INC.
ON PROPOSED CONSENT DECREE FOR RESOLVING CLAIMS AGAINST
AEROVOX INCORPORATED AND BELLEVILLE INDUSTRIES, INC.

Cornell-Dubilier Electronics Inc. ("CDE"), which has been one of the defendants herein since the actions were filed in 1983, respectfully submits these comments with respect to the proposed consent decree in United States, et al. v. AVX Corporation, et al., C.A. No. 83-3882-Y (D. Mass.), resolving the claims of the United States and the Commonwealth of Massachusetts against defendants Belleville Industries, Inc. ("Belleville") and Aerovox Incorporated ("Aerovox").

While CDE fully supports the use of negotiated settlements to resolve claims under CERCLA, including the claims against the various defendants in this complex case, CDE urges the Court to defer consideration of the proposed Aerovox/Belleville consent

decree until additional necessary information as detailed hereafter is available.

The judicial approval of any settlement, which is required under CERCLA, can only be given when the Court, all affected parties, and the public have adequate information on which to evaluate a proposed settlement. Any such settlement may be approved only after a determination by the Court that the proposed consent decree is "fair, adequate, and reasonable, and consistent with the Constitution and the mandate of Congress." In Re Acushnet River & New Bedford Harbor, 712 F.Supp. 1019, 1027 (D. Mass. 1989.) See also United States v. Cannons Engineering Corp., 899 F.2d 79, 84-85 (1st Cir. 1990).

In the Cannons Engineering case the First Circuit opined that substantive fairness in a consent decree must honor the well-established principle that "a party should bear the costs of the harm for which it is legally responsible . . . [S]ettlement terms must be based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP [Potentially Responsible Party] has done." Cannons at 87. While the Court in Cannons recognized that "what constitutes the best measure of comparative fault at a particular Superfund site under particular factual circumstances should be left largely to the EPA's expertise," it also made clear that in any particular case the EPA's formula for measuring comparative fault and allocating liability should be

upheld only "so long as the agency supplies a plausible explanation for it, welding some reasonable linkage between the factors it includes in its formula or scheme and the proportionate shares of the settling PRPs." Id. at 87 (emphasis added).

Finally, in Cannons the Court emphasized that the reasonableness of a proposed consent decree must take into account "whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures."

Cannons at 90.

In CDE's view, the present record is woefully insufficient for the Court to make the necessary determination that the proposed Aerovox/Belleville consent decree is, by the principles of the Cannons decision, "fair, adequate and reasonable, and consistent with the Constitution and the mandate of Congress." The proposed Aerovox/Belleville consent decree provides but the barest information as to the proposed settlement with defendants Belleville and Aerovox and the basis therefor. It tells only that the total settlement for Belleville is \$4 million and for Aerovox \$8.6 million, with the \$12.6 million total allocated just under 75% for response costs and the balance for natural resource damages. However, the proposed consent decree is devoid of anything whatsoever that provides the necessary "plausible explanation" by the EPA for its measurement of "comparative fault" or allocation of liability. Furthermore, neither the proposed consent decree nor the administrative record provides anything whatsoever that enables the Court to determine "whether the

settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures," as required by Cannons.

The proposed consent decree seeking approval of the settlement with Belleville and Aerovox is but the first piece in a very complicated puzzle which implicates the rights and obligations of not only the public but also three other defendants who are alleged to be jointly and severally liable with Aerovox and Belleville for all response costs and natural resource damages allegedly caused by PCB contamination of New Bedford Harbor. Those defendants are AVX Corporation, which has reached agreement in principle for settlement of the claims against it, and CDE and Federal Pacific Electric Company ("FPE"), which together are scheduled to go to trial on March 4, 1991. The settlements in this matter have, not surprisingly, followed the trial schedule for claims against the various defendants established by the Court. Thus, Aerovox and Belleville settled first, on the eve of their trial in February 1990, and AVX settled next, some seven weeks before its trial was scheduled to begin in October of 1990. CDE, through no fault of its own, is last in line for trial and, possibly, settlement.

By these comments it is not CDE's intention to oppose the proposed Aerovox/Belleville consent decree per se but only to urge the Court to defer consideration of it until the government has submitted to the Court: (i) a proposed consent decree concerning the settlement with AVX; (ii) a factually substantiated estimate

of the total response costs for remedial action throughout New Bedford Harbor and of natural resource damages; and (iii) a full explanation of the basis for the government's determinations of comparative fault and allocation of liability. At the present time the EPA has reached an administrative record of decision only on remedial measures for the so-called PCB "hot spot" adjacent to the Aerovox facility but has not yet made a decision on possible remedial measures for other areas of the harbor. In April of 1990, two months after the government reached the agreement in principle for settlement of the claims against Aerovox and Belleville, the EPA issued its record of decision selecting remediation measures for the "hot spot" with an estimated cost of \$14,379,300. Various remediation measures being considered by EPA as of autumn of 1990 for other areas of the harbor carry estimated price tags ranging from \$4 million to \$347 million, depending on which remedial measures are ultimately selected. While CDE does not urge that any settlement approval should necessarily await a final administrative decision on such remedial measures, unless the EPA provides some less imprecise estimate of total response costs, approval of the Aerovox/Belleville settlement could amount to little more than approving a number picked out of the air.

The proposed AVX settlement, as reported in a September 4, 1990, press release, calls for a total payment by AVX of \$66 million, with a reopener under certain conditions if total cleanup costs for the harbor exceed \$130.5 million. There is no information provided as to allocation of the \$66 million as

between natural resource damages and past and future response costs.

The fairness and reasonableness of the proposed Aerovox/Belleville consent decree cannot be considered in isolation from the proposed settlement with AVX. At various times each of those three parties operated the same facility, so the Aerovox/Belleville settlement must consider liability allocation between those parties, as well as between them and the operators of the CDE plant. Indeed, issues as to the allocation of liability as between the Aerovox facility and the CDE facility have been at the heart of this case since the beginning. Clearly those allocation issues cannot now be ignored at this critical stage of consideration of settlement proposals that must reflect, as a matter of law, some plausible basis for such allocation.

For these reasons, CDE respectfully requests that the Court defer consideration of approval of the proposed Aerovox/Belleville consent decree until it has before it a proposed AVX consent decree and the other necessary information described above.

Respectfully submitted,



Verne W. Vance, Jr. BBO #547540
Sandra Lynch BBO #309220
Foley, Hoag & Eliot
One Post Office Square
Boston, Massachusetts 02109
(617) 482-1390

Attorneys for Cornell-Dubilier
Electronics, Inc.

Dated: February 6, 1991

EXHIBIT C

Robert

Working for the Nature of Tomorrow.



NATIONAL WILDLIFE FEDERATION

1400 Sixteenth Street, N.W., Washington, D.C. 20036-2266 (202) 797-6800

February 6, 1991

Richard B. Stewart
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Re: Comments on Proposed Consent Decree in U.S. v. AVX et al., Civ. A. No. 83-3882-Y (D. Mass.), D.J. Ref. 90-11-2-32

Dear Mr. Stewart:

The National Wildlife Federation (NWF) is the nation's largest citizen environmental organization, with over 5.8 million members and supporters and with affiliated organizations in 51 states and U.S. territories. NWF is an intervener in the above-captioned case. The Federation appreciates the opportunity to comment on the proposed consent decree in the above-captioned case, signed by the United States, the Commonwealth of Massachusetts, and two defendants (Aerovox Inc. and Belleville Industries, Inc.). Public comment on this decree was solicited at 56 Fed. Reg. 525 (January 7, 1991).

Overall Comments

This case involves a suit against five defendants, two of whom are parties to the consent decree here at issue, in which the State and federal governments are seeking cleanup costs and natural resource damages for releases of PCBs into and around New Bedford Harbor, Massachusetts. NWF is pleased that the Justice Department, and the Federal and State trustees, have brought this litigation, and have sought to amicably settle this case. NWF also is pleased that the governments have sought substantial cash settlements from the defendants.

However, as noted below, the Federation is deeply concerned about certain provisions in the proposed consent decree.

1. A Covenant Not to Sue for Response Costs Is Provided Before The Response Action Has Been Approved by the President.

The consent decree as drafted gives the settling defendants a covenant not to sue for future response action costs

DEPARTMENT OF JUSTICE
FEB - 8 1991
90-11-2-32

(hereinafter "cleanup costs") for the entire "New Bedford Harbor Site." Consent Decree ¶¶ 18-19. This covenant not to sue is provided before the government can say with any confidence what the cleanup costs at the site are likely to be, because EPA has not yet decided on the cleanup requirements for much of the site.

In other words, the covenant is proposed to be issued before all of the relevant Records of Decision (RODs) have been issued, and before the response action has been approved by the President.¹ Section 122(f)(1)(D) of the Comprehensive Environmental Response, Cleanup, and Liability Act (CERCLA), 42 U.S.C. 9622(f)(1)(emphasis added), provides, in pertinent part, that,

The President may, in his discretion, provide any person with a covenant not to sue concerning any liability to the United States under this chapter, including future liability, ... if each of the following conditions is met: ... (D) The response action has been approved by the President.

Thus, in order for the government to offer a covenant not to sue for future response costs under CERCLA, the response action must have already been approved by the President, presumably in the form of a ROD.

This provision is important. If the governments were to discover, between now and the time any new ROD is issued, that the total cleanup costs for the New Bedford Harbor site will far exceed current cost estimates, the governments apparently could not seek additional funds for cleanup from the settling defendants. The "reopener" provisions in the Consent Decree at ¶¶ 20-21, apparently would only allow the government to reopen the settlement agreement and to seek additional cleanup costs from the settling defendants if they were to discover such new problems after the ROD is completed. In other words, with a reopener provision that allows the settlement to be reopened only

1. While a ROD has been issued for one of the operable units at the site, this ROD obviously does not cover any of the other areas of the site for which a covenant not to sue for cleanup costs has been issued. We understand that at least one other ROD for one other operable unit at the site is contemplated.

if new information or conditions are discovered after the ROD is issued, the costs of the cleanup could escalate significantly between now and the time any subsequent ROD(s) is (are) issued, leaving the governments with no remedy against the settling defendants. Cf., In Re: Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1037-38 (D. Mass. 1989) (holding that reopener is critical to assure that polluter, not taxpayer, ultimately bears responsibility for unforeseen cleanup costs or damages).

In this case, the response action has not been approved for the entire New Bedford Harbor site. Thus, it appears to be contrary to the intent and language of section 122(f) of CERCLA for the government now to enter into a covenant not to sue for cleanup costs for areas for which no cleanup decision has been reached.

2. Settling Without Information on Restoration Costs.

The Federation also is troubled by the governments' settling of this case for natural resource damages without any indication as to the plans for (or costs of) the restoration, replacement, or acquisition of natural resources equivalent to those resources injured or destroyed by the PCB releases at the New Bedford Harbor site (hereinafter referred to as "restoration"). Section 122(j)(2) of CERCLA requires, as Judge Young has pointed out in this case, that the federal trustees certify that the responsible party has agreed "to undertake appropriate actions necessary to protect and restore the natural resources damaged" by the release. In Re: Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1036 (D. Mass. 1989).

To our knowledge, no restoration plan or restoration cost assessments have been completed, and no information has been made available to the public or the Court that the costs of any such restoration have been assessed. Thus, it is difficult to understand how the proposed consent decree can satisfy the requirement of CERCLA that it must assure that restoration will occur, without a public accounting for the projected costs and plans for such restoration.

Conclusion.

NWF is aware that the parties have expended substantial resources in seeking to settle this case, and that the settlement

was reached in good faith. Moreover, NWF generally favors settlement of cases without protracted litigation. This proposed consent decree, however, like the previous settlement with AVX, simply does not appear to comply with the intent of Congress as expressed in section 122 of CERCLA. NWF therefore requests that the governments renegotiate the settlement to comply with the Act. We remain willing to discuss these concerns with you or your staff.

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Olson', with a long horizontal flourish extending to the right.

Erik D. Olson
Counsel
Environmental Quality
Division

EXHIBIT D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

JUL 24 1990

U. S. DISTRICT COURT
CLERK'S OFFICE
BY.....DEPUTY

UNITED STATES OF AMERICA)
v.) MO-88-CA-05
BELL PETROLEUM SERVICES, INC.,)
et al.)

ORDER

BEFORE THIS COURT came the parties for a hearing on the Government's Motion for Entry of Partial Consent Decree and hearing on Phase III¹ of above numbered action pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9605 et seq. Having reviewed the testimony at both hearings, the voluminous record in the cause and the relevant authorities, this Court now enters its findings on the matters.

The Partial Consent Decree calls for payment by Defendants Regal International, Inc. ("Regal") and Bell Petroleum Services, Inc. ("Bell") of \$1,000,000.00 in return for an agreement by the Government not to sue Bell and Regal for all current and future response costs incurred in connection with the Odessa Chromium I Site and not to seek to compel them to perform future response actions at that Site. The Decree also provides Bell and Regal with

¹ Phase III of the cause consisted of proof by the parties of the divisibility of the harm caused by the chromium each Defendant placed on the ground which leaked down to and polluted the Trinity Aquifer.

4

contribution protection from claims by other potentially responsible parties ("PRPs") in connection with the Odessa Chromium I Site. A notice seeking comments on the Partial Consent Decree was published in the Federal Register on March 8, 1990. Fed. Reg. Vol. 55 #4, p.8611. None of the numerous Defendants hereto, save for Sequa Corporation and Chromalloy American Corporation (collectively referred to as "Sequa"), objected to the terms or conditions of the Partial Consent Decree. The arguments of Sequa go to the issue of fairness, i.e. whether the amount to be paid by Defendant Bell is commensurate with the harm caused by Bell. Sequa's main concern is that, with the settlement between Bell and the Government, Sequa shall be left to pay the remaining liability for the damages caused by the chromium contamination of the Trinity Aquifer by chromate wastewater poured onto the ground by John Leigh, Bell Petroleum, Sequa and Chromalloy.

The proposed Partial Consent Decree was lodged with this Court on March 2, 1990, after which a 30-day period commenced wherein the United States Department of Justice received public comments on the proposed decree. In reviewing a consent decree in a CERCLA action, this Court must keep in mind the strong judicial policy favoring voluntary settlements between parties, without merely rubber stamping the decree. See, e.g.: Kelley v. Thomas Solvent Co., 717 F.Supp. 507 (W.D. Mich. 1989); Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) cert. denied, 467 U.S. 1219, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984); United States v. Hooker Chemicals & Plastics Corp., 540

F.Supp. 1067, 1080 (W.D.N.Y. 1982) aff'd, 776 F.2d 410 (2d Cir. 1985); United States v. Louisiana, 527 F.Supp. 509, 511 (E.D.La. 1981), aff'd, 669 F.2d 314 (5th Cir. 1982); United States v. Seymour Recycling Corp., 554 F.Supp. 1334, 1337-8 (S.D.Ind. 1982).

The legislative history behind the 1986 amendments to CERCLA establish that a court's role in reviewing a Superfund settlement is to "satisfy itself that the settlement is reasonable, fair, and consistent with the purposes that CERCLA is intended to serve." Kelley, at 516 [citing: H.R.Rep. No. 253, Part 3, 99th Cong., 1st Sess. 19 (1985)]. Factors considered by other courts charged with reviewing a proposed consent decree include: the strength of Government's case, the good faith efforts of the negotiators, the opinions of counsel, the possible risks involved in the litigation if the settlement is not approved, the ability of the settlers to withstand a greater judgment, the adequacy of the remedy called for in the consent decree in solving the hazards of contamination at the site, and the effect of the settlement on the public interest as expressed in CERCLA. United States v. Hooker Chemical & Plastics Corp., supra; City of New York v. Exxon, 697 F.Supp. 677 (S.D.N.Y. 1988); United States v. Conservation Chemical Co., 628 F.Supp. 391 (W.D.Mo. 1985); U.S. v. Acton Corp., 733 F.Supp. 869, 872 (D.N.J. 1990).

This Court notes Bell is currently in bankruptcy and Regal is in very poor financial shape. Settlement talks have been numerous and heated, culminating in a pretrial conference among all of the parties before this Court wherein this Court was informed

the parties would not agree to any type of settlement. The funding of the consent decree is by agreement among various insurance companies, none of whom admit to liability, but all of whom apparently desire the litigation and liability costs in this matter to finally come to an end. Should this Court deny approval of the Partial Consent Decree, litigation shall undoubtedly be protracted and it is highly unlikely any money will be forthcoming from either Regal or Bell.

Sequa does not attack the diligence of the parties in attempting to reach a settlement, but rather the fairness of the settlement in light of the entire liability and the responsibility of each party for such liability. Sequa's complaints regarding the consent decree are divided thusly: (1) The Government is not authorized under CERCLA to settle its cost recovery claims in the manner set forth in the Consent Decree; (2) any inherent authority of the Government to settle cost recovery claims does not include the ability to unilaterally provide contribution protection to settlors; (3) the Government is without authority to grant a complete release as contemplated by the Consent Decree; (4) a Consent Decree must be fair and the consideration must equal a party's proportionate liability under §113(f)(1); (5) the consideration paid by Bell and Regal under the Consent Decree is disproportionate to their liability under §113(f)(1) of CERCLA; and (6) rather than disproving the Consent Decree, this Court should flexibly interpret the concept of joint and several liability to prevent the inequitable transfer of liability. Each point shall

be discussed seriatim.

1. The Government's Authority for Settling its Cost Recovery Claims in the Manner Set Forth in the Submitted Consent Decree Must Be Inherent because Such Action is Not Authorized by CERCLA. Sequa's first argument focuses upon the authority of the Government to settle its claims with Bell and Regal. According to Sequa, the Government may only settle with regard to (a) performance of response actions; (b) de minimis potentially responsible parties ("PRPs"); or (c) cost recovery claims under §107 prior to the time that claim is referred to the Department of Justice (the "DOJ"). Sequa does not contest the Government's inherent powers to settle a CERCLA action and this Court is of the opinion such inherent authority indeed exists and is not limited by Section 9622 of CERCLA. See, e.g.: Swift & Co. v. United States, 276 U.S. 311, 331, 48 S.Ct. 311, 72 L.Ed.2d 587 (1927).

2. Any Inherent Authority of the Government to Settle Cost Recovery Claims Does Not Include the Ability to Unilaterally Provide Contribution Protection to Settlers. Sequa's next argument is premised upon that portion of the Partial Consent Decree which insulates Bell and Regal from any liability for contribution to the remaining PRPs. This Court is of the opinion CERCLA directly addressed this point in Section 9613(f)(2) which states:

A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential

liability of the others by the amount of the settlement.

42 U.S.C. §9613(f)(2) (Supp. 1990). As this Court is of the opinion the Consent Decree should be approved, the Court's approval thereof brings the Consent Decree within the terms of §9613(f)(2) and the settlors' liability for contribution shall disappear by statute.

3. The Government is without authority to Grant Bell and Regal a Complete Release as Contemplated by the Submitted Consent Decree. Sequa next argues the Consent Decree does not comport with the requirements of Section 9622 of CERCLA. As the Government points out, however, the Consent Decree was not entered pursuant to Section 9622, but instead by the inherent powers of the Government to enter into settlement agreements. Therefore, this Court finds Sequa's arguments under Section 9622 irrelevant.

4. Before the Settlement of a Governmental Cost Recovery Action can be Judicially Approved, There Must Be a Finding that the Settlement is Fair in that it Requires the Payment of Consideration Equal to a Party's "Fair Share" of liability under §113(f)(1).

Section 113(f)(1) of CERCLA states:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal Law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court

deems are appropriate.

42 U.S.C. §9613(f)(1) (Supp. 1990). Nothing in the above-quoted language limits a court to approving settlements on the basis of "fair share" of liability. See, e.g.: In re Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1029 (D. Mass. 1989); U.S. v. Acton Corp., 733 F.Supp. 869, 872 (D.N.J. 1990).

Even if the statute required liability apportionment on the basis of fault, where measurable, this Court is of the opinion the chromium contamination found in the ground waters below the Odessa I Site is not divisible. The evidence at both the Phase I and Phase III hearings clearly demonstrated there is no method of dividing the liability among the Defendants which would rise to any level of fairness above mere speculation. Different methods suggested by the parties for apportioning liability included the amount of chrome flake purchased by each of the Defendants, the amount of electricity used (subtracting out any electrical usage not devoted to electroplating), chrome reduction in the aquifer, and periods of occupation of the Chromium I Site. Having heard the evidence adduced at trial of Phase III, this Court is of the opinion none of the above offer viable methods for dividing liability among John Leigh, Bell or Sequa. Each involves a significant assumption factor as records have been lost, and theories differ significantly. Therefore, this Court is of the opinion the liability of the parties for contamination of the Chromium I Site is indivisible other than by equitable means.

Thus, this Court is of the opinion that although

reasonableness is in fact a significant factor in this Court's decision regarding approval of the proposed consent decree, the proportionate liability of the parties is neither a requirement of the reasonableness inquiry, nor relevant to the particular facts before the Court. Therefore, Sequa's fourth point is without merit.

5. The Consideration Being Paid by Bell and Regal to Settle Claims Against Them is Disproportionate to Their Liability Under §113(f)(1) of CERCLA. As discussed hereinabove, the Court is of the opinion proportionate liability is not relevant to the Court's decision herein. The Court is not inclined to agree the pollution at issue is capable of logical or factual divisibility. Therefore, the Court is of the opinion Sequa's Fifth point should likewise be overruled.

It is this Court's opinion that the proposed Partial Consent Decree is the result of great effort on the part of insurance carriers for Bell and Regal to compromise their differences and offer a significant amount of money to settle this matter to avoid protracted litigation and defray expenses thereof. This Court previously determined Bell was liable to the Government for Response Costs. As earlier stated, it is unlikely the Government would receive any amount of money from Bell or Regal in the end. In terms of the public interest and the congressional intent behind CERCLA, the approval of the Partial Consent Decree far outweighs forcing Bell and Regal into bankruptcy with no clean up costs recovered by the Government. Thus, it is the finding of this Court

the proposed Partial Consent Decree is fair, adequate and reasonable in light of the record.

In the alternative, this Court is of the opinion the responsibility for costs should be divided roughly equally among the parties with Bell and Sequa shouldering 35% of the burden each and John Leigh shouldering 30%. The reasons for such division are purely equitable, as Bell occupied the Site for the longest period of time and Sequa gained access to the Site with knowledge that chromium contamination was a problem and measures to correct the contamination were necessary. John Leigh accrued the least financial gain from his chrome-plating venture and has cooperated at every juncture with the Government in the Government's efforts to discover the sources behind the chrome contamination. This finding by no means dilutes the Court's approval of or confidence in the Partial Consent Decree as this Court need not consider the fairness of the decree to non-settling parties. U.S. v. Acton Corp., at 872.

This Court's approval of the Partial Consent Decree moots several issues currently pending between the parties. These issues include: (1) the United States' Motion for Summary Judgment as to Successor Liability against Defendants Bell and Sequa; and (2) Third Party Defendant Small Business Association's ("S.B.A.") Motion for Summary Judgment as to Bell's Cross-Claim against the S.B.A. This Court shall dismiss those Motions as moot per adoption of the Partial Consent Decree.

Accordingly, and in light of the foregoing,

IT IS ORDERED the Government's Motion for Entry of Partial Consent Decree is hereby GRANTED. The Partial Consent Decree filed in this case on March 2, 1990 is hereby APPROVED AND ENTERED.

IT IS FURTHER ORDERED Sequa's Motion for Reconsideration of Decision on Joint and Several Liability is hereby DENIED.

IT IS FURTHER ORDERED the Government's Motion for Summary Judgment as to Successor Liability against Defendants Bell and Chromalloy is hereby DISMISSED AS MOOT.

IT IS FURTHER ORDERED Third Party Defendant S.B.A.'s Motion for Summary Judgment is hereby DISMISSED AS MOOT.

SIGNED AND ENTERED this 24th day of July, 1990.

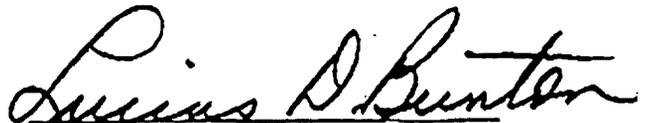

LUCIUS D. BUNTON
CHIEF JUDGE

EXHIBIT E

W. Brents

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

FEB 04 1991

CARLE BRENTS, CLERK
By: *[Signature]*
DEP. CLERK
PLAINTIFF

UNITED STATES OF AMERICA

v. Civil No. LR-C-80-109

VERTAC CHEMICAL CORP.,
ET AL.

DEFENDANTS

ARKANSAS DEPARTMENT OF
POLLUTION CONTROL AND
ECOLOGY

PLAINTIFF

v. Civil No. LR-C-80-110

VERTAC CHEMICAL CORP., ET AL.

DEFENDANTS

UNITED STATES OF AMERICA

PLAINTIFF

v. Civil No. LR-C-87-833

PHOENIX CAPITAL ENTERPRISES,
ET AL.

DEFENDANTS

MEMORANDUM OPINION AND ORDER

Pending before the Court is the motion of the United States for entry of a consent decree.¹ The proposed Consent Decree arises out of a consolidated action against Phoenix Capital Enterprises, Inc., Inter-Ag Corporation, InterCapital Industries, Inc., Pat Bomar, and J. Randal Tomblin (referred to collectively

¹ Tomblin and the other Phoenix defendants have also filed motions for entry of the proposed consent decree.

as the "Phoenix parties") under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §9607(a), section 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6973, and the Federal Priority Statute, 31 U.S.C. §3713. The proposed Consent Decree resolves the Phoenix parties' liability under these and other applicable state and federal environmental statutes identified in the Consent Decree at paragraph 12, "Covered Matters," in exchange for the Phoenix parties' agreement to reimburse the United States for a portion of cleanup costs necessary to complete the response actions at the Vertac site. Pursuant to 28 C.F.R. §50.7 and section 122(d)(2)(B) of CERCLA, 42 U.S.C. §9622(d)(2)(B), the United States published a Notice of Lodging of the proposed Consent Decree in the Federal Register on November 22, 1989, 54 Fed. Reg. 48331-32 (1989). The Notice of Lodging described the proposed Consent Decree and invited the public to comment on the proposed decree for 30 days.

The United States received two comments, letters from Hercules Incorporated ("Hercules"), and Dow Chemical Company ("Dow"), both defendants at the time in this action.² After reviewing both the public comments, the United States on April 30,

² The claims the United States had against Dow were resolved in a May 12, 1989, Settlement Agreement between the United States and Dow. On November 6, 1989, the Court dismissed the claims of the United States against Dow with prejudice.

1990, filed a motion for entry of the consent decree. Hercules opposed the motion on several grounds to be discussed below.³

HISTORY OF LITIGATION

The instant action was commenced in 1980 when the United States and the Arkansas Department of Pollution Control and Ecology ("ADPC&E") filed suit against Vertac and Hercules pursuant to the RCRA, the Clean Water Act, the Refuse Act, and Arkansas law, and seeking injunctive relief against these parties for the contaminated conditions at the Vertac Chemical Corporation Superfund Site.⁴

The Court issued a preliminary injunction against Vertac in May, 1980, requiring it to conduct remedial action to construct and repair clay cover areas over waste burial areas. On January 18, 1982, the Court entered a Consent Decree, under which Vertac agreed to take certain action in regard to the clean-up on-site.

³ Dow stated that it no longer opposed the entry of the Consent Decree.

⁴ Located in Jacksonville, Arkansas, the Vertac Site is a former pesticide manufacturing plant which was operated first by Hercules from 1962 through 1971, and then operated by Transvaal, later named Vertac, from 1971 through 1987. Until the late 1970's, the plant was used to manufacture a variety of pesticides and herbicides, including 2, 4, 5-T which contained the contaminant dioxin. After further production of 2,4,5-T was prohibited, the plant continued to manufacture a variety of other pesticides and herbicides until it was abandoned in 1987. During Transvaal's and Vertac's fifteen year operation of the plant, numerous drums of waste from the pesticide operations were buried beneath the ground and stored above ground at the Site, and a variety of hazardous wastes, including dioxin, escaped, contaminating local waterways, residential property, and a publicly owned sewage treatment plant.

In 1986, Vertac wanted to spin-off several of its assets, including other plant sites. The United States, ADPC&E, and Vertac entered into a stipulation under which the United States and ADPC&E agreed not to challenge Vertac's spin-off after Vertac agreed to provide financial assurances that it would meet its environmental clean up responsibilities under the Consent Decree. In particular Vertac agreed to put up a \$6.7 million trust fund, a \$4 million letter of credit for environmental cleanup of the Vertac site, and a \$3.15 million disbursement from the shareholders. The money in the letter of credit was later placed in the trust fund. After the spin-off, Vertac owned only the Jacksonville plant site and a pesticide marketing operation run from its Memphis, Tennessee headquarters. The Jacksonville plant site had ceased operations; there were, however, 28,000 drums and 194 bulk storage tanks of waste left aboveground. Additionally, the soils and buildings in the manufacturing area were contaminated.

By late 1986, Vertac was a wholly-owned subsidiary of Phoenix Capital Enterprises, Inc. ("Phoenix"). C.P. Bomar, Jr., was the sole shareholder of Phoenix as well as its president and sole director. Bomar was also chairman of the board of Vertac. J. Randal Tomblin was president and a director of Vertac. Bomar incorporated InterCapital Industries, Inc. ("InterCapital") as a subsidiary of Phoenix, and Inter-Ag Corporation ("Inter-Ag") as a subsidiary of InterCapital. Bomar was president and sole

director of both InterCapital and Inter-Ag; Tomblin was executive vice-president of Inter-Ag.

In February, 1987, Vertac sold the pesticide marketing operation to Inter-Ag for \$1.675 million. Inter-Ag occupied the same offices, hired the same employees, and sold the same products to the same customers as Vertac had. Dow transferred the supply contract it had with Vertac to Inter-Ag.

Upon learning of the transfer of Vertac's assets, the United States and ADPC&E filed a motion seeking the appointment of a receiver for Vertac and to have Inter-Ag be declared a successor to Vertac. After a hearing, the Honorable Judge Henry Woods held that Inter-Ag was a successor to Vertac, and appointed a receiver for Vertac and Inter-Ag. United States v. Vertac Chemical Corporation, 671 F.Supp. 595 (E.D. Ark. 1987). The Eighth Circuit Court of Appeals subsequently vacated the order as to Inter-Ag because only Vertac had been served with process. United States v. Vertac Chemical Corp., 855 F.2d 856 (8th Cir. 1988).

The United States subsequently added Inter-Ag as a party to the original 1980 action and filed a separate suit against Phoenix, Bomar, and Tomblin, alleging they were liable under section 107(a) of CERCLA, 42 U.S.C. §9607(a), section 7003 of RCRA, 42 U.S.C. §9673, and the Federal Priority Statute, 31 U.S.C. §3713. A trial was scheduled, but prior to its commencement, the United States and the Phoenix parties began negotiations which resulted in the proposed Consent Decree.

DISCUSSION

The proposed Consent Decree resolves the liability of the Phoenix parties under CERCLA, RCRA, the Federal Priority Statute, and other federal and state environmental laws in return for their payment of \$1.84 million for cleanup costs, \$126,000 for natural resource damages caused by the contamination, and 33 percent of all future pre-tax profits earned over the next twelve years, or forty percent of the liquidation value, in the event Phoenix is liquidated before the termination date.

The Court has carefully reviewed the proposed Consent Decree and the lengthy objection filed by Hercules. In reviewing the proposal, the Court is guided by several basic principles. The law favors settlements. The policy encouraging settlements "has particular force where, as here, a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990). Furthermore, the public policy favoring settlement is reflected in the governing statute, CERCLA. See United States v. Acton Corp., 733 F.Supp. 869, 872 (D.N.J. 1990).

Before approving a CERCLA settlement, the Court must be convinced that it is fair, reasonable, and consistent with the objectives of CERCLA. Cannons Engineering, 899 F.2d at 84. See also City of New York v. Exxon Corp., 697 F.Supp. 677, 692 (S.D.N.Y. 1988); United States v. Conservation Chemical Co., 681 F.Supp. 1394, 1415 (W.D. Mo. 1988).

Hercules raises a number of objections. It contends that the settlement is contrary to the express provisions of the CERCLA provisions governing settlements. 42 U.S.C. § 9622. In particular, Hercules argues that the statute prohibits a "cash out" settlement with a non de minimis party where no remedy has been selected or completed; that the covenant not to sue is permitted only when remedial action has been completed; and that the settlement does not contain a reopener provision as required by section 122(f)(6)(A).

The Court is not persuaded that the statutory language of section 122 is to be construed so narrowly. CERCLA is a remedial statute, and the EPA must be granted some discretion in fashioning settlements which are fair and reasonable under the circumstances, while furthering the objectives of CERCLA. In passing the Superfund legislation, Congress directed the President to "expedite effective remedial actions and minimize litigation." City of New York, 697 F.Supp. at 693.

The Court notes that the legislative history surrounding Section 122 reveals a congressional concern that so-called "sweetheart" deals not be approved. The Court is persuaded that the settlement offered here is the result of good faith, arms' length negotiations. The Court also notes that certain provisions in the proposed Consent Decree reveal that it is a far cry from a sweetheart deal. Certain stringent limitations are imposed on the Phoenix parties to ensure that they will be able to fully meet their financial obligations under the decree: their salaries,

fringe benefits, and ability to borrow money are severely limited. The Phoenix parties must undergo an annual audit by a certified public accountant. If it is determined at any time that material assets have not been disclosed by any of the Phoenix parties, the covenant not to sue shall not be effective, thereby invalidating the decree.

Hercules also argues that the Consent Decree is not fair, reasonable, and consistent with CERCLA. The gravamen of Hercules' complaint is that the Phoenix parties are getting a "bargain basement" deal, and that they should be held fully liable as a successor to Vertac.

The Court notes that although the amount of money the Phoenix parties will have to pay will in all likelihood be a small percentage of the total response costs, the Court is persuaded that the settlement represents a recovery of the maximum possible amount of money obtainable from the Phoenix parties given their net worth and their limited ability to pay. The United States states that the \$1.84 million represents about fifty percent of the Phoenix parties' net worth. Certainly, the finite resources of the Phoenix parties are better put to use in helping to clean up the Jacksonville site than in litigation costs.

In sum, the Court finds that the Consent Decree is fair, reasonable, and consistent with the purposes and objectives of CERCLA and that the entry of the proposed decree is appropriate. A copy of the decree, signed by the Court, is appended hereto.

Accordingly, the motions for entry of the consent decree are granted.

IT IS SO ORDERED this 4 day of January, 1991.

George Howard, Jr.
UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON COURT SHEET IN
COMPLIANCE WITH RULE 60 AND ON 70(a) FRCP
ON 2-5-91 BY *[Signature]*

MOTION NUMBER US-57

SERVICE DATE: May 24, 1991
REPLY DATE: _____

OPPOSITION DATE: June 10, 1991
DELIVERED TO COURT: _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, et al.,)	
Defendants.)	Civil Action No.
)	83-3882-Y
)	
COMMONWEALTH OF MASSACHUSETTS,)	
Plaintiff,)	
)	
v.)	
)	
AVX CORPORATION, et al.,)	
Defendants.)	

**MEMORANDUM OF AEROVOX INCORPORATED
AND BELLEVILLE INDUSTRIES, INC.
IN SUPPORT OF MOTION TO ENTER CONSENT DECREE**

Defendants Aerovox Incorporated ("Aerovox") and Belleville Industries, Inc. ("Belleville") support the motion, served by the United States of America on May 24, 1991, for entry of the consent decree among the United States, the Commonwealth of Massachusetts, Aerovox and Belleville.

Terms of the proposed decree are summarized in the United States' memorandum in support of the motion for entry of the

decree.¹ Aerovox and Belleville submit that the decree is fair, reasonable and consistent with the objectives of CERCLA.

Rather than burden the Court with additional argument, we rely upon the plaintiff's Memorandum in Support of Motion to Enter Consent Decree. Aerovox and Belleville respectfully reserve the right to file a reply memorandum should any party oppose the allowance of the motion.

Respectfully submitted,

BELLEVILLE INDUSTRIES, INC.

AEROVOX INCORPORATED

David A. McLaughlin

David A. McLaughlin
McLaughlin & Folan
448 County Street
New Bedford, MA 02740
(508) 992-9800

Paul B. Galvani

Paul B. Galvani
Roscoe Trimmier, Jr.
Ropes & Gray
One International Place
Boston, MA 02110
(617) 951-7000

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail / by hand.

On 6/10/91 Paul B. Galvani

¹ The description of the general terms of the proposed decree, of course, does not cover all of its provisions. See e.g., Consent Decree, ¶¶ 18-24 concerning covenants not to sue and statutory reopener.

COPY

MOTION NUMBER US-57

SERVICE DATE: May 24, 1991
REPLY DATE: _____

OPPOSITION DATE: June 10, 1991
DELIVERED TO COURT: _____

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,
Plaintiff,

v.

AVX CORPORATION, et al.,
Defendants.

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff,

v.

AVX CORPORATION, et al.,
Defendants.

Civil Action No.
83-3882-Y

MEMORANDUM OF AEROVOX INCORPORATED
AND BELLEVILLE INDUSTRIES, INC.
IN SUPPORT OF MOTION TO ENTER CONSENT DECREE

Defendants Aerovox Incorporated ("Aerovox") and Belleville Industries, Inc. ("Belleville") support the motion, served by the United States of America on May 24, 1991, for entry of the consent decree among the United States, the Commonwealth of Massachusetts, Aerovox and Belleville.

Terms of the proposed decree are summarized in the United States' memorandum in support of the motion for entry of the

decree.¹ Aerovox and Belleville submit that the decree is fair, reasonable and consistent with the objectives of CERCLA.

Rather than burden the Court with additional argument, we rely upon the plaintiff's Memorandum in Support of Motion to Enter Consent Decree. Aerovox and Belleville respectfully reserve the right to file a reply memorandum should any party oppose the allowance of the motion.

Respectfully submitted,

BELLEVILLE INDUSTRIES, INC.

AEROVOX INCORPORATED

David A. McLaughlin

David A. McLaughlin
McLaughlin & Folan
448 County Street
New Bedford, MA 02740
(508) 992-9800

Paul B. Galvani

Paul B. Galvani
Roscoe Trimmier, Jr.
Ropes & Gray
One International Place
Boston, MA 02110
(617) 951-7000

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party by mail / by hand.

Da. 6/10/91 Paul B. Galvani

¹ The description of the general terms of the proposed decree, of course, does not cover all of its provisions. See e.g., Consent Decree, ¶¶ 18-24 concerning covenants not to sue and statutory reopener.