

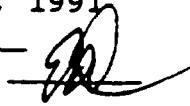
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Motion Number: US 57

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Signature of Counsel: 

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA, and the
COMMONWEALTH OF MASSACHUSETTS,

Plaintiffs,

and

THE NATIONAL WILDLIFE FEDERATION

Intervener

vs.

C.A.No. 83-3882-Y

AVX CORPORATION,
BELLEVILLE INDUSTRIES, INC.,
AEROVOX, INC.,
CORNELL DUBILIER ELECTRONICS CO., and
FEDERAL PACIFIC ELECTRIC CO.

Defendants.

INTERVENER NATIONAL WILDLIFE FEDERATION'S
RESPONSE TO PLAINTIFFS UNITED STATES'
AND COMMONWEALTH OF MASSACHUSETTS' MOTION TO
ENTER CONSENT DECREE WITH AEROVOX, INC. AND
BELLEVILLE INDUSTRIES, INC.

On May 24, 1991, Plaintiff the United States of America
(shortly thereafter joined by the Commonwealth of Massachusetts)
moved that this court enter a proposed consent decree between the
United States, the Commonwealth of Massachusetts (collectively,

"the governments"), and two of the five defendants in this case, Aerovox Incorporated (Aerovox) and Belleville Industries, Incorporated (Belleville).

Intervener National Wildlife Federation (NWF), generally is supportive of the resolution of complex cases such as this through settlement, and is mindful of the Courts' general policy of encouraging such settlements. United States v. Cannons Engineering Corp., 899 F.2d 79, 84 (1st Cir. 1990). However, it is clear that a motion to enter a consent decree is a request that the judicial imprimatur be placed upon a deal negotiated by the parties; consent decrees, therefore cannot be rubber stamped. The Court must determine "whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." Cannons, 899 F.2d at 84; In Re Acushnet River and New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F.Supp. 1019, 1027 (D.Mass. 1989) ("Acushnet IV"). The "protection of the public interest is paramount" in conducting such reviews. Acushnet IV, 712 F.Supp. at 1027.

The Consent Decree that is the subject of the governments' Motion to Enter, unfortunately, does not withstand the requisite scrutiny. First, the governments have not yet decided what type of remedial action (or "cleanup") will be done for much of the New Bedford site. Without such a decision, the governments, this Court and the public cannot appropriately determine the adequacy of the settlement. This is contrary to the terms and objectives

of CERCLA.

Second, the governments have not provided any estimate of the costs of restoration of the environment. Again, this failure prohibits meaningful public and judicial review of the Consent Decree, and is contrary to the Act. It also is directly contrary to the D.C. Circuit's decision in Ohio v. U.S. Department of the Interior, 880 F.2d 432, 449 (1989), which stated that restoration costs are the floor in CERCLA natural resource damage settlements.

By allowing the defendants in this case to "cash out" without an estimate of the total cleanup and restoration costs, the settlement contravenes Congress' "underlying policy" intended to "ensure that the federal government, and ultimately the taxpayer, does not bear the costs" of pollution, but rather that "such costs appropriately should be borne instead by those responsible for the pollution." Acushnet IV at 1037. These issues are discussed in more detail below.

I. THE SETTLEMENT CANNOT BE APPROVED BECAUSE EPA HAS NOT YET DECIDED WHAT CLEANUP IS NEEDED.

As is admitted by the governments, EPA has not yet determined what response actions will be taken at much of the New Bedford Harbor site. United States' "Memorandum in Support of Motion to Enter Consent Decree With Aerovox Incorporated and Belleville Industries, Inc.," (U.S. Motion #57, May 24, 1991) (hereinafter cited as "Memorandum in Support of Entry") at

15 note 8 (a "record of decision" or ROD for the second area of the New Bedford site, including most of the Estuary, the lower Harbor, and the Bay "is anticipated" at some future point).

A complete settlement of a cleanup case against major solvent responsible parties, that grants a covenant not to sue and that is not preceded by an EPA decision on the remedial action to be undertaken, is inconsistent with the terms and objectives of CERCLA §122 and fails the judicially-articulated test of "reasonableness" for CERCLA settlements.

A. The Language and Objectives of CERCLA Section 122 Require that EPA Have Decided Upon Cleanup Before Fully Settling A Cleanup Case With a Major Responsible Party.

Section 122 of CERCLA was added to the Act in 1986, as this Court has noted, in part to avoid more "sweetheart deals," Acushnet IV, 712 F.Supp. at 1034, but also to systematize the negotiation, provisions, and review of CERCLA settlements. For example, in addition to the requirements for "reopeners" (discussed in Acushnet IV), section 122(f)(1) provides several prerequisites to inclusion of covenants not to sue polluters in CERCLA settlement agreements.

Specifically, CERCLA § 122(f)(1), 42 U.S.C. § 9622(f)(1) (emphasis added) states 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, resulting from a release or threatened release of a hazardous substance addressed by a remedial action, whether the action is onsite or offsite, 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 National Contingency Plan....
- (C) The person is in full compliance with a consent decree under section 106 (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned.
- (D) The response action has been approved by the President.

Therefore, Congress intended to assure that a covenant not to sue a polluter would not be provided unless the President's delegate, EPA, had approved the cleanup. The reason for this requirement is clear: Congress did not want the government settling cleanup claims without the public, Courts, and the government having a reasonable estimate of how much the cleanup would cost.

Congress was aware that this provision might make it difficult to settle some cases, but chose to adopt it to ensure that polluters, rather than the public, bear the burden of escalating cleanup costs. For example, Senator Mitchell, a key sponsor of the 1986 Superfund Amendments and Reauthorization Act which added § 122 to CERCLA, stated that:

Section 122 authorizes the President to enter into covenants not to sue. Such covenant is clearly reviewable by a court and should be carefully scrutinized, since a covenant not to sue may excuse responsible parties from some obligation. It is expected that such covenants will not be agreed to often, since any reduction in responsibility by the responsible party is a proportional increase in the federal responsibility to pay for any future response costs.

Each of these elements [in section 122(f)(1)] must be present and should be carefully scrutinized by the President. These are requirements not easily met and the first of them, the requirement that the covenant not to sue be in the public interest, may be one of the most difficult tests to meet.

132 Cong. Rec. S14,918-19 (Oct. 3, 1986), reprinted in, Senate Committee on Environment and Public Works, 6 A Legislative History of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499) at 5205-06 (1990).

Section 122(f) has not stifled settlements. Settlements still may include covenants not to sue, if they are signed after the cleanup decision has been made. For example, this occurred in Cannons, where EPA already had issued RODs for the cleanups. See, United States v. Cannons Engineering Corp., 720 F.Supp. 1027, 1039 (D.Mass. 1989) ("EPA has solicited public comments on the selection of a remedy, and issued Records of Decision that selected remedies based on the administrative record."), affirmed, 899 F.2d 79 (1st Cir. 1990).

In addition, if the government wishes to settle a cleanup case before the cleanup decision for cash with a de minimus PRP, it may do so and include a covenant not to sue under the terms of section 122(g). If the government wishes to settle with a major non-de minimus potentially responsible party (PRP), however, no covenant to sue may be given for full cleanup liability until the cleanup has been decided upon.

Before the cleanup decision, the government also is free to settle claims for past expenses and for parts of the site at which cleanup decisions have been reached, and may enter into a settlement to allow a major PRP to conduct the feasibility studies, but no unapproved PRP cleanups may be undertaken once

the remedial investigation and feasibility study is underway. See CERCLA § 122(e). Many PRPs may also be willing to settle cleanup claims without a covenant not to sue before the cleanup decision to avoid substantial litigation costs, or if they are given a shield from contribution actions and are promised that the government will pursue other PRPs before the settling PRPs are pursued for additional cleanup costs. See CERCLA § 113(f).

Thus, Congress has spoken: covenants not to sue generally are not favored. Before offering one to a major PRP, EPA must first decide upon the cleanup at the site so all parties, the courts, and the public know how much the cleanup is going to cost, before a covenant not to sue for cleanup costs is granted.

The United States argues that section 122(f) "applies only to settlement agreements in which the defendant is performing the cleanup at the facility." Memorandum in Support of Entry at 16. This argument apparently is based upon the government's reading of section 122(f)(1)(C), which states that to obtain a covenant not to sue, among other things, the PRP must be "in full compliance with a consent decree under section 106 [of CERCLA] (including a consent decree entered into in accordance with this section) for response to the release or threatened release concerned."

While paragraph 122(f)(1), like much of section 122, "is not a model of clarity," Acushnet IV, 712 F.Supp. at 1033, nothing in its language or legislative history suggests that it was intended

to limit the applicability of section 122(f) to cases in which the PRP is doing the cleanup. Indeed, this Court already has made statements implying that to the contrary, that § 122(f)(6) (regarding reopeners), by its terms, applies to "cleanup settlements." Acushnet IV, 712 F.Supp. at 1035. The thrust of §122(f)(1)(C) simply is the common sense notion that a PRP who is violating a § 106 order or a section 122 settlement should not be given the benefit of a covenant not to sue.¹

The Government's argument that all of section 122(f) applies only to settlements where the PRP is agreeing to perform a cleanup, and not to "cash out" settlements would create an anomalous gaping hole in Congress' settlement scheme. EPA could

1. While the United States' Brief in Support of Entry cites two unpublished District Court cases for the proposition that cash-out settlements under section 107 are not covered by section 122, neither of these cases provides any reasoned support for such a proposition. In United States v. Bell Petroleum Services, Inc., No. MO-88-CA-05 (W.D.Tex. 1990) the Court fails to provide any rationale for its suggestion that section 122 is irrelevant to cash settlements, other than the sweeping and gratuitous assertion that the government has "inherent powers" to settle cases, including CERCLA § 107 cases. Id. at 6. However, this extreme and unsupported position would enable the government to ignore § 122 whenever it pleased. Similarly, in United States v. Vertac Chemical Corp., No. LR-C-80-109 (E.D.Ark. 1991) appeal docketed No. 91-1887 (8th Cir. April 5, 1991), the Court's holding that section 122 did not prohibit a cash out settlement where no remedy had been selected is based not upon a careful parsing of the statute or legislative history, but rests upon the Court's view that the nonsettling PRP challenging the settlement had failed to show that the settlement was a "sweetheart deal" that was reached in bad faith or collusively. Neither Court conducted any meaningful review of the language or legislative history of the Act. Thus, these decisions are unsupported by substantive analysis of (or citation to) relevant language or legislative history, and are of no persuasive weight.

simply avoid all of the protections of the provision, including the reopener requirements, by settling for cash instead of specific performance.

This type of completely illogical major exception to Congress' frequently announced effort to prohibit "sweetheart deals" clearly was not intended. The governments can point to nothing in the legislative history that remotely suggests that Congress had such an illogical and narrow view of the covenant not to sue and reopener provisions.

Even assuming arguendo that the precise terms of section 122(f)(1) could be read to suggest that the subsection only applies to PRP cleanups, this Court appropriately has made it clear that "the general intent of Congress with respect to settlements cannot be ignored." Acushnet IV, 712 F.Supp. at 1036. Thus, if this Court were to find that the precise terms of § 122(f)(1) are ambiguous, the settlement still should be rejected. It is contrary to the "general intent of Congress" to assure that covenants not to sue should be granted only after EPA has approved the cleanup so the public is not "caught holding the bag" for the polluters.

B. A Covenant Not to Sue is Not "Reasonable" In this Case Before a Cleanup Decision.

The First Circuit's Cannons decision establishes "reasonableness" as one of the key elements of the review of a CERCLA consent decree. 899 F.2d at 89. The reasonableness of a CERCLA decree is determined by an analysis of the settlement's

technical adequacy, primarily concerned with the probable effectiveness of proposed remedial responses. A second important facet of reasonableness will depend upon whether the settlement satisfactorily compensates the public for the actual (and anticipated) costs of remedial and response measures.

Id. at 89-90. Accord, United States v. Conservation Chemical Co., 681 F.Supp. 1394, 1418-20 (W.D.Mo. 1988) (in determining reasonableness of CERCLA consent decree, Court must evaluate, inter alia, the "adequacy of the technical proposal of the work to be undertaken in connection with the cleanup....").

Moreover, it is clear that the Court must be "provide[d] with sufficient information to intelligently evaluate the settlement" and that Courts "will evaluate whether "the settling parties had a sufficient factual record upon which to reach an informed decision as to settlement terms." City of New York v. Exxon Corp., 697 F.Supp. 677, 692, 693 (S.D.N.Y. 1988). Still, as the Cannons Court cautioned, "the agency cannot realistically be held to a standard of mathematical precision" in making the required showing that the "proportion of settlement dollars to total needed dollars" is reasonable. Id. at 90.

Thus, while mathematical precision is not required, it is manifest from Cannons and other court's discussions that there must be a cleanup decision against which to measure the settlement. This is necessary to enable the court and the public to weigh its reasonableness and whether it satisfactorily compensates the public.

Here, EPA has not decided how to clean up most of the harbor, estuary, and bay. The cases cited above stand for the notion that it is unreasonable for the governments to ask the public and the Courts to buy a pig in a poke, which is what is what we are asked to do in this case. The settlement should be rejected as unreasonable.

C. The Reopener in The Settlement Runs From the Date of Certification of Cleanup Completion, So it Does Not Save the Settlement From Potentially Saddling the Public With a Large Cleanup Bill.

In theory, a broad reopener provision could have been included in the settlement to assure that the settling polluters could be sued at any time if substantial unexpected cleanup costs were to arise because of newly discovered information or conditions. This may have allayed many concerns regarding uncertainties regarding the future cleanup costs.

However, the Proposed Consent Decree presented to the Court in this matter is drawn narrowly. The settlement apparently precludes the governments from reopening the case and suing the settling polluters for unexpected cleanup costs necessitated by information or conditions received or discovered before the ROD is completed. Consent Decree ¶¶ 18-21.

Thus, the governments apparently have agreed that the settling polluters are not responsible for any additional cleanup costs needed if substantial new information or conditions are

discovered between now and some time in the future when EPA's final cleanup decisions are reached. Therefore, it appears that the public, not the polluters, will bear the costs of any such unexpected additional cleanup.

This is contrary to the principles this Court articulated in Acushnet IV, 712 F.Supp. at 1037-38, that reopeners must be included to assure that the polluters, not the taxpayer, bear the costs of unknown future damages. Thus, the decree is not salvaged by the reopener.

II. THE SETTLEMENT CANNOT BE APPROVED BECAUSE THE GOVERNMENTS HAVE NOT PROVIDED AN ESTIMATE OF THE COST OF RESTORATION, NOR HAVE THEY REQUIRED THAT THE PRPs TAKE ACTIONS NECESSARY TO PROTECT AND RESTORE THE NATURAL RESOURCES DAMAGED.

A. The Governments Have Presented No Options for Restoration and Have Provided No Estimate of Restoration Costs.

As noted above, the governments have first requested that this Court approve the decree without the benefit of any EPA decision on the cleanup. In addition, the governments ask this Court to ratify the natural resource damage aspects of the settlement for the site despite their failure to provide any estimate of the costs of--much less provide any description of the plans for--the restoration, replacement, or acquisition of natural resources similar to those injured by the releases (hereinafter referred to collectively as "restoration").

While it is clear that in a "before-the-fact" settlement, the costs of restoration cannot be estimated with "mathematical

precision," cf. Cannons 899 F.2d at 90, here the governments have provided no estimate of the options for or actual costs of restoration.² Without such a publicly available estimate, there is no basis upon which the Court or the public can review the adequacy of the settlement. It is unreasonable and contrary to CERCLA for a settlement to be presented to this Court and the public without so much as a shred of evidence regarding the restoration options or the possible range of costs of those options.³

B. The Governments Have Failed to Demonstrate that the Consent Decree Requires the PRPs Take Appropriate Actions to Protect and Restore Injured Natural Resources

The failure to provide an estimate of the possible range of costs for restoration of the environment runs directly contrary to the dictate of CERCLA §122(j)(2) that CERCLA settlements require that PRPs will "take appropriate actions necessary to

2. See, U.S. Memorandum in Support of Motion to Enter, at 9, note 5 ("The natural resource damages claim includes an assessment of the lost use value for the injured natural resources, totalling 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.") (emphasis added).

3. The United States mischaracterizes the position of NWF by suggesting that NWF urged that the settlement await the completion of a full and detailed restoration plan for the site. U.S. Memorandum in Support of Entry at 13. All that NWF has urged, however, is that there needs to be "a public accounting for the projected costs and plans for such restoration." NWF Comments on Proposed Aerovox and Belleville Consent Decree, at 3 (February 6, 1991). In addition, obviously, there must be some reasonable relationship between the expected restoration costs and the settlement amount. Cf., Cannons, 899 F.2d at 90.

protect and restore the natural resources damaged...." Without any inkling as to the possible costs of restoration (will they be \$100 million? \$1 billion? \$10 billion?), it is impossible for this Court or the public to meaningfully review the adequacy of the settlement or its compliance with §122(j)(2).

Of course, this Court stated in Acushnet IV, 712 F.Supp. at 1036, that it would not upset a \$2 million natural resource damage settlement based merely upon NWF's argument that the settlement failed to provide for full restoration of the environment. This Court reasoned that "few settlements would ever be possible where the United States' bottom line is 100% of asserted damages." Id.

However, this issue deserves further consideration in the review of this new settlement. Questions regarding how much the public and Court need to know about restoration options and costs before a settlement is approved bear careful scrutiny and consideration in light of two important developments that have occurred since Acushnet IV was decided. First, the D.C. Circuit recently has stated that the full cost of restoration is the "floor" for CERCLA settlements, and second, as noted above, the trustees in this case now openly have admitted that they have not provided any public estimate of the costs of restoring the injured resources.

1. The D.C. Circuit's Ohio Decision Found that Restoration Costs are the Minimum Settlement Costs in Natural Resource Damage Settlements.

In a decision clearly of central importance to this case, the D.C. Circuit recently has conducted an exhaustive and authoritative review of CERCLA's natural resource damage provisions in Ohio v. U.S. Department of the Interior, 880 F.2d 432 (1989). In that decision, the Court found, after a thorough review of the statute and legislative history that the restoration of the environment is the fundamental goal of the natural resource damage provisions of the statute, Ohio, 880 F.2d at 441-59.

In reaching this conclusion, the Court relied upon numerous indications of legislative intent. In particular, the Court relied heavily upon its reading of section 122(j)(2) as providing that "a responsible party can settle only if it pays restoration costs." Id. at 449 (emphasis added). The Court went on to note that "[t]he fact that Congress insisted on restoration costs as a floor for settlements shows it must have intended a similar measurement of damages to operate in the litigation itself." Id. at 449 (emphasis added).

The D.C. Circuit's conclusion that restoration costs are the floor for settlements must be viewed in light of its additional holding that PRPs are responsible not only for restoration costs, but also for lost use and nonuse values of injured natural resources. Id. at 462-64. Thus, it would be perfectly rational

for a PRP to settle for 100% of the costs of restoration, or for more than 100% of the restoration costs, to avoid paying the "transaction costs" of litigation, Ohio at 449 & n. 20, and to avoid paying for some of the use and nonuse values of the injured resources. Therefore, this Court's reluctance to rule that section 122(j)(2) means that PRPs must agree to pay for restoration, should be overcome in light of the Ohio court's ruling.

2. The Governments' Recent Admission that They Have Not Provided an Estimate of the Costs of Restoration Underscores the Need for More Information Before the Consent Decree Can Be Approved.

The governments have admitted to this Court that they have not provided any public estimate of the plans for or costs of restoration. This clearly highlights the need for information to enable this Court and the public to evaluate the reasonableness of the settlement and its compliance with section 122(j)(2).

The principles governing judicial review of the reasonableness of CERCLA consent decrees enunciated in Cannons, 899 F.2d at 89-90, suggest that it is unreasonable for the Court and the public to be presented with a Consent Decree that is supported by absolutely no showing that it bears any resemblance to the statutory minimum settlement costs. It also is clear that, contrary to the requirements enunciated in the Exxon case, the Court has not been "provide[d] with sufficient information to intelligently evaluate the settlement" and that the settling

parties did not have "a sufficient factual record upon which to reach an informed decision as to settlement terms." City of New York v. Exxon Corp., 697 F.Supp. 677, 692, 693 (S.D.N.Y. 1988).

Thus, the settlement should be rejected unless the government can show that it bears a reasonable relationship to the statutory floor for CERCLA natural resource damage settlements--the costs of restoration.

III. CONCLUSION.

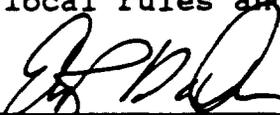
For the reasons stated above, the proposed settlement should be rejected. A proposed deal should not be approved unless and until the governments show that: (1) the cleanup decisions have been made; or, (2) the covenant not to sue for cleanup costs has been eliminated; or (3) the cleanup costs reopener has been broadened; and, (4) the restoration options and costs have been made available to the Court and the public; and, (5) the settlement bears the required reasonable relationship to the cleanup and restoration costs.

Respectfully Submitted,



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I hereby certify that this document was served upon all counsel of record by mail in accordance with local rules and Fed. Rule Civ. Pro. 5, on June 17, 1991;



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