

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 NOS.
83-3882-Y
83-3889-Y

SETTLEMENT AGREEMENT BETWEEN PLAINTIFFS THE UNITED STATES
AND THE COMMONWEALTH OF MASSACHUSETTS AND
INTERVENOR NATIONAL WILDLIFE FEDERATION

INTRODUCTION

1. The United States, on behalf of the National Oceanic and Atmospheric Administration (NOAA) as a federal trustee for natural resources, and the Commonwealth as a state trustee for natural resources, filed complaints in the U.S. District Court for the District of Massachusetts on December 9 and 10, 1983, respectively, seeking damages for injury to, destruction of, and loss of natural resources resulting from releases of polychlorinated biphenyls ("PCBs") and other hazardous substances in New Bedford Harbor, Massachusetts, and adjacent waters under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 ("CERCLA").

2. The United States and the Commonwealth ("plaintiffs") amended their complaints in these actions in February 1984 to set forth, in addition to the claims for natural resource damages, claims on behalf of the Administrator of the Environmental Protection Agency ("EPA") for recovery of response costs under section 107 of CERCLA and for injunctive relief under section 106 of CERCLA, and claims on behalf of the Commonwealth for recovery of response costs under Section 107 of CERCLA and state law.

3. Plaintiffs filed these actions in order to meet a potential statute of limitations deadline at a time when it was not possible for EPA to have prepared a Record of Decision ("ROD") regarding remedial action to be taken at the site, or for the federal and state natural resource trustees to have developed an estimate of the damages recoverable for natural resource injury.

4. In 1989, plaintiffs requested that the District Court defer previously-scheduled trial dates until after the remedial decision-making process was complete and the final ROD had been issued by EPA. In asking the District Court to defer trial, plaintiffs explained that their "proposal will provide an opportunity for comprehensive settlement discussions at a time when the amount of defendants' potential liability for all of the governments' claims will be known." Plaintiffs' Memorandum in Support of Motion to Modify Court's Pretrial Orders, at 14 (Sept. 25, 1989).

5. Plaintiffs further explained that their "proposal comports with Congressional intent regarding the proper measurement of natural resource damage[s] under CERCLA and the relationship of such damage claims to the Agency's remedial decision-making, will result in a more efficient resolution of all claims in this case, and affords the parties a meaningful opportunity for productive settlement negotiations on all claims before any trial is held." Id. at 3.

6. Plaintiffs also explained that "[b]ecause EPA's selected remedy for the PCB contamination in New Bedford Harbor will then be known [following the issuance of the ROD], plaintiffs will be able to include in their natural resource claim an assessment of damages based on any costs to further restore or replace natural resources once EPA's remedial action is implemented" Id. at 4.

7. The District Court did not grant plaintiffs' motion and thus declined to defer the trials on liability. Instead, the District Court only deferred trial on the amount of cleanup costs and natural resource damages. Faced with impending trials on liability, including causation of injury to natural resources, plaintiffs entered into settlement negotiations with the defendants based on the information regarding cleanup costs and natural resource damages then available.

8. The National Wildlife Federation ("NWF") was permitted to intervene in this action in April 1989 in order to brief and argue the legal requirements applicable to any proposed

consent decree lodged with the District Court for consideration and approval. In re Acushnet River & New Bedford Harbor: Proceedings Re Alleged PCB Pollution, 712 F. Supp. 1019, 1023 (D. Mass. 1989).

9. On April 6, 1990, EPA issued an initial operable unit ROD selecting the remedial action for the area of New Bedford Harbor with the highest levels of PCB contamination (the "Hot Spot ROD"). The Hot Spot ROD calls for dredging of contaminated sediment and incineration of the dredged materials in a temporary treatment facility onshore. This portion of the remedial action was estimated to cost approximately \$15 million.

10. On December 18, 1990, plaintiffs lodged a proposed consent decree with the District Court, which settled all of plaintiffs' claims against two of the five defendants named in the lawsuit, Aerovox Incorporated and Belleville Industries, Inc.

11. On May 24, 1991, after soliciting public comment on the proposed Aerovox/Belleville decree, plaintiffs filed a motion with the District Court for approval of the decree. The Aerovox/Belleville decree provided that these defendants would pay a total of \$12.6 million in settlement of the United States' claims for both past response costs and future cleanup costs and for natural resource damages. In exchange for this cash settlement, the decree provided Aerovox and Belleville with covenants not to sue for response and cleanup costs and natural resource damages, although it contained reservations of the

governments' rights with respect to previously unknown conditions and new information.

12. In response to plaintiffs' motion, NWF argued that the District Court should not approve the Aerovox/Belleville decree because EPA, in April 1990, had only issued a ROD for one portion of the New Bedford Harbor site known as the "Hot Spot" region. NWF also maintained that plaintiffs should not be permitted to release Aerovox and Belleville from liability for natural resource damages because plaintiffs had not estimated the amount of money that would be needed to restore damaged resources in New Bedford Harbor.

13. In reply to NWF's objections to the proposed decree with Aerovox and Belleville, plaintiffs stated that, "as the record of this case demonstrates, the Plaintiffs generally agree with NWF that it is preferable to settle cleanup cost claims after EPA has made its cleanup decision and a specific estimate of the costs of cleanup is available." Plaintiffs' Reply Memorandum in Support of Motion to Enter Consent Decree With Aerovox Incorporated and Belleville Industries, Inc., at 9 (July 3, 1991) (emphasis in original). However, the District Court had denied in material part Plaintiffs' 1989 motion to defer trial until after the final ROD was issued, and plaintiffs took the position that, under these circumstances, they were not "prohibited from negotiating an otherwise favorable pretrial settlement containing a covenant not to sue." Id. (emphasis omitted).

14. On July 16, 1991, the District Court granted plaintiffs' motion to approve the Aerovox/Belleville decree. NWF appealed this ruling to the United States Court of Appeals for the First Circuit. In a decision dated April 21, 1992, the Court of Appeals dismissed NWF's appeal for lack of jurisdiction without reaching the merits of NWF's arguments. See United States v. AVX Corporation, No. 91-1895 (1st Cir., April 21, 1992).

15. On September 19, 1991, plaintiffs filed with the District Court a proposed consent decree with defendant AVX Corporation and, on December 20, 1991, plaintiffs moved the District Court to approve the decree. Under the AVX decree, plaintiffs will recover \$66 million, plus interest accrued on that amount from August 23, 1990 to the date payment is made, to compensate plaintiffs for response and cleanup costs and natural resource damages. In exchange for this cash settlement, plaintiffs granted to AVX covenants not to sue for response and cleanup costs and natural resource damages. The AVX decree contains reservations of the governments' rights with respect to previously unknown conditions and new information, and also provides that plaintiffs may "institute proceedings against AVX in this action or in a new action seeking to compel AVX (1) to perform additional response actions in connection with the Remedial Action to the extent that the total Remedial Costs exceed \$130.5 million, and (2) to reimburse the United States and

the Commonwealth for any Remedial Costs over and above the first \$130.5 million in Remedial Costs."

16. The consent decree with AVX was approved by the District Court on February 3, 1992, and the Court entered final judgment against AVX on March 6, 1992. On May 1, 1992, NWF filed a notice of appeal of the AVX judgment to the United States Court of Appeals for the First Circuit.

17. In January 1992, EPA issued its Proposed Plan for the Estuary and lower Harbor/Bay portion of the site (the "PRAP"). Under the PRAP's "preferred alternative," EPA would dredge sediment in the Estuary and the lower Harbor/Bay contaminated with PCBs at concentrations exceeding 50 parts per million. Dredged sediments would be disposed of in shoreline confined disposal facilities that would be constructed as part of the remedial action. The PRAP also states that EPA, in coordination with the Federal and State Natural Resource Trustees, is conducting a Supplemental Feasibility Study on additional areas of concern in the Bay portion of the site. After this work is completed, EPA will issue an addendum to the PRAP. The estimated cost of the proposed alternative in the January 1992 PRAP is \$33 million. The public will have an opportunity to submit written comments on the preferred alternative, the supplemental FS, and the addendum PRAP, as well as on eight other alternatives summarized in the PRAP, and a public information meeting and public hearing will be held.

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AGREEMENT

18. In view of EPA's issuance of the January 1992 PRAP and the circumstances of this case, and in light of plaintiffs' position as set forth in §§ 19-22 below, NWF hereby agrees to dismiss with prejudice its pending appeal in the First Circuit with respect to the AVX consent decree, and hereby waives any right to seek further judicial review of the Court of Appeals' decision dismissing NWF's appeal with respect to the Aerovox/Belleville decree. NWF may, consistent with this Court's 1989 order granting its intervention, raise legal objections to any consent decree subsequently presented to the Court, but it waives any right to appeal from approval of any such consent decrees in this case. NWF is waiving its right to seek further review of the Court of Appeals' decision dismissing its appeal with respect to the Aerovox/Belleville decree because this agreement makes any review of that decision moot. NWF does not waive any right to raise any claim in any other case that is either now pending or that may be filed in the future.

19. Plaintiffs will invite a member of NWF to hold the position of ex-officio, non-voting member of the Trustee Council created pursuant to Section VII of the Memorandum of Agreement Concerning Natural Resource Damages in the Matter of United States, et al., v. AVX Corporation, et al., Civil Action No. 83-3882-Y (D. Mass). That Council serves as the planning and implementation group for the restoration activities the Governments will undertake with respect to the natural resources

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of the New Bedford Harbor Environment, using the monies recovered in any settlements in this action.

20. Without waiving their respective positions on the law, the United States, the Commonwealth, and NWF (collectively "the parties") agree that it is generally preferable for a government not to settle natural resource damages claims until it has a reasonable estimate of the damages recoverable for the natural resource injuries known to have occurred at a site, including, as appropriate, the funds that will be needed to restore, replace, or acquire the equivalent of the injured natural resources. If such an estimate is available, the government may assess whether a particular settlement agreement, or combination of agreements, will provide for appropriate actions necessary to protect and restore the natural resources that have been injured.

21. The parties agree that there may be circumstances in which it is neither feasible nor required for the United States or the Commonwealth to postpone settlement until it has a reasonable estimate of natural resource damages. The parties do not necessarily agree on precisely what circumstances would justify a settlement of natural resource damage claims before the government has a reasonable estimate of the recoverable damages. Plaintiffs believe that such circumstances include, for example, cases where a court refuses to postpone a trial until a damages assessment has been completed, where a responsible party's ability to pay is limited such that it is a dominant

consideration in settlement negotiations, where the cost of a damages assessment would be disproportionate to the expected damages, or where the litigation risks on liability against an allegedly responsible party are serious. Unless these or other justifying circumstances are present, plaintiffs believe that it is appropriate to refrain from releasing responsible parties for natural resource damage claims until the government has a reasonable estimate of damages.

22. The United States will publish this agreement in the Federal Register.

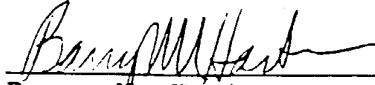
THE FOREGOING Settlement Agreement Between Plaintiffs the United States of America and the Commonwealth of Massachusetts and Intervenor the National Wildlife Federation, in United States v. AVX Corporation, Civ. No. 83-3882-Y (D. Mass.), is hereby APPROVED AND ENTERED THIS ____ DAY OF _____, 1992.

WILLIAM G. YOUNG
United States District Judge
District of Massachusetts

[Consent Decree Between Plaintiffs the United States and the Commonwealth of Massachusetts and Intervenor National Wildlife Federation in United States v. AVX Corporation, Civ. No. 83-3882-Y (D. Mass.)]

FOR THE UNITED STATES OF AMERICA

Date: 6/5/92



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