

1 UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action
No. 83-3882-Y

4 * * * * *
5 THE UNITED STATES OF AMERICA, *
6 Plaintiff, *
7 v. *
8 AVX CORPORATION, et al., *
9 Defendants. *
10 COMMONWEALTH OF MASSACHUSETTS, *
11 Plaintiff, *
12 v. *
13 AVX CORPORATION, et al., *
14 Defendants. *
15 * * * * *

HEARING

14 BEFORE: The Honorable William G. Young,
15 District Judge

16 APPEARANCES:

17 JEROME W. MacLAUGHLIN, BRADLEY L. LEVINE
18 and KEITH T. TASHIMA, Attorneys, Environmental
19 Enforcement Section, Environmental and Natural
20 Resources Division, U.S. Department of Justice,
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America

21 MATTHEW BROCK, Assistant Attorney General,
22 Office of the Massachusetts Attorney General,
23 Environmental Protection Division, One Ashburton
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the Commonwealth of Massachusetts

24 1 Courthouse Way
Boston, Massachusetts

25 September 18, 2013

A P P E A R A N C E S (Cont'd)

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15 ALSTON & BIRD LLP (By Douglas S. Arnold,
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17 Wells, Esq.), One Atlantic Center, 1201 West
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19 on behalf of AVX Corporation

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21 KORRIN N. PETERSEN, ESQ., 114 Front Street,
22 New Bedford, Massachusetts 02740

23 - and -

24 SUPER LAW GROUP LLC (By Reed W. Super,
25 Esq.), 131 Varick Street, Suite 1033, New York,
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Coalition, Inc.

BEAUREGARD, BURKE & FRANCO (By Richard
Burke, Esq.), 32 William Street, New Bedford,
Massachusetts 02740, on behalf of Town of
Acushnet, et al.

1 **THE CLERK:** Now hearing Civil Matter 83-3882, the
2 United States of America, et al. v. AVX, et al.

3 **THE COURT:** Well, good afternoon. Would counsel
4 identify themselves.

5 **MR. MacLAUGHLIN:** Your Honor, Jerome MacLaughlin
6 for the United States. With me are Mr. Levine and Mr.
7 Tashima, both from the United States Department of Justice.

8 **MR. BROCK:** Your Honor, Matt Brock for the
9 Commonwealth of Massachusetts.

10 **MR. NG:** Man Chak Ng from EPA.

11 **MR. BOAL:** Maximilian Boal from EPA.

12 **MS. RYAN:** Mary Ryan, your Honor, for AVX
13 Corporation from Nutter McClennen & Fish.

14 **MS. GUIZZETTI:** Good afternoon, your Honor.
15 Cynthia Guizzetti, also for AVX Corporation, from Nutter,
16 McClennen & Fish.

17 **MR. ARNOLD:** Good afternoon, your Honor. Doug
18 Arnold, for AVX Corporation, of Alston & Bird.

19 **MR. WELLS:** Good afternoon. Jonathan Wells for AVX
20 Corporation, also with Alston & Bird.

21 **MR. SUPER:** Good afternoon. Reed Super for
22 proposed intervenor, Buzzards Bay Coalition.

23 **MS. PETERSEN:** Good afternoon. Korrin Petersen,
24 also for the proposed intervenor, Buzzards Bay Coalition.

25 **MR. BURKE:** Good afternoon, your Honor. Richard

1 Burke from Beauregard, Burke & Franco, for the proposed
2 intervenor, Town of Acushnet, et al.

3 **THE COURT:** Thank you. Please be seated.

4 Now, I can't resist saying this, and it's not my
5 practice to single out any attorney, and I welcome you all
6 to this hearing. But I've got to say I welcome Ms. Ryan. I
7 think, but I stand to be corrected, that she is the only one
8 of you who was here in 1983 in the same position that she
9 occupies now.

10 Is that unfair? Is there someone else I'm missing
11 who was in on that case originally? Yes, Mr. Brock.

12 **MR. BROCK:** Yes, your Honor, but not in 1983.

13 **THE COURT:** If I didn't remember you, I apologize.

14 **MR. BROCK:** Not quite that far back, your Honor.

15 **THE COURT:** All right.

16 **MS. RYAN:** Mr. Brock was with the Commonwealth at
17 the time leading up to the settlement, your Honor.

18 **THE COURT:** I see. Ms. Ryan was there in the
19 beginning.

20 Now, let me, given the nature of this proceeding,
21 ask, other than the proposed intervenors, are there other
22 persons at this hearing -- you will all understand that I
23 have read the entire record insofar as it relates to this
24 proceeding -- are there other persons or entities that
25 object to the way the named parties want to modify the

1 consent decree? Are there other objectors? All right.

2 Then hearing none, let me address the proposed
3 intervenor Buzzards Bay and Acushnet. As I understand it,
4 but I stand to be corrected, Acushnet is satisfied with the
5 argument to be presented by Buzzards Bay.

6 Do you want to be heard separately?

7 **MR. BURKE:** No, your Honor.

8 **THE COURT:** And I appreciate that.

9 Then let me face right up to this proposed
10 intervention, because intervention in the circumstances of
11 this case is a difficult and complex issue. And as a
12 practical matter, I think the course I propose to follow is
13 best on the grounds of practicality, though I have some
14 significant reservation about this being precedent for
15 intervention. And the practical result is this.

16 I want, having read their papers, I want to hear
17 from them orally. I don't need to grant them the power to
18 intervene to hear from them orally, and this is a manageable
19 hearing to hear not only their written submissions, which I
20 have read, but to hear their oral argument. So, just as a
21 matter of my supervisory power and handling the case, I am
22 going to hear from them.

23 Second, they want to have the right to appeal. And
24 that requires a legal determination, but practically it
25 doesn't make much difference as I see it. If I deny them

1 the right to appeal, they can appeal on the ground that my
2 denial of their right to appeal is error. And I'm positive
3 the court of appeals will at least entertain that claim. On
4 the other hand, if I give them, if I allow them to intervene
5 at least to have the right to appeal then you can say, all
6 of you, the parties to the litigation, that my grant of the
7 right, the grant of intervention was error, but either way
8 the likelihood is there's going to be an appeal.

9 And so, I don't know that it makes much practical
10 difference and I'm inclined to give them the right to appeal
11 as a practical matter. And if that implicates saying that
12 for those purposes they have a right to intervene, I'm
13 inclined to allow it.

14 Now, I'm interested in the merits, but I'm also
15 interested, how does that injure, as a practical or legal
16 matter, how does that injure any right of the current
17 litigants? If I don't give them intervention they'll appeal
18 and you'll have to deal with that before the court of
19 appeals. If I do, you can appeal and say I made a mistake.

20 Practically, does anyone have a problem with how I
21 propose to proceed? We're not talking about evidentiary
22 hearings or anything.

23 **MR. ARNOLD:** Yes, your Honor, Doug Arnold on behalf
24 of AVX.

25 If the Court denies the Coalition's motion to

1 intervene then they would have a right to immediate appeal,
2 you're absolutely correct, your Honor, and that issue would
3 be taken up first by the First Circuit. If the Court, the
4 First Circuit affirms the Court's ruling denying
5 intervention then there will not be an appeal in the event
6 the Court grants the government's motion to entry.

7 So, from a practical perspective our client
8 believes that the right sequence would be for the Court to
9 address the motion to intervene and if it's denied they will
10 appeal it, and if the Court subsequently grants the
11 government's motion then that will be appealed only if the
12 First Circuit reverses the decision on intervention.

13 **THE COURT:** Isn't it more powerful the other way?
14 Shouldn't I structure things so the court of appeals will
15 have the issues that are before me before it and then -- why
16 burden them with two separate appeals? Let's say they win
17 on the first one, then they attack it on the merits.
18 Assuming it goes your way. It may not.

19 **MR. ARNOLD:** Sure.

20 **THE COURT:** And you may be the ones appealing. So
21 if you appeal then, naturally, you're going to say I should
22 have granted this motion to modify the decree --

23 **MR. ARNOLD:** Uh-huh.

24 **THE COURT:** -- substantively and they'll be
25 opposing. I just -- why shouldn't it just be one appeal,

1 one ball of wax?

2 **MR. ARNOLD:** Respectfully, your Honor, if you grant
3 both motions then there will be two appeals.

4 **THE COURT:** Why?

5 **MR. ARNOLD:** Because we will --

6 **THE COURT:** Oh, if I grant --

7 **MR. ARNOLD:** Grant them, yes, your Honor.

8 **THE COURT:** -- both. All right, let's posit that.
9 I grant both motions. I let them in, but I grant the, just
10 for purposes of discussion --

11 **MR. ARNOLD:** Correct.

12 **THE COURT:** -- I grant the present litigants'
13 motion to modify the decree.

14 **MR. ARNOLD:** Correct. Then there will be two
15 appeals.

16 **THE COURT:** Well, they'll be cross-appeals.

17 **MR. ARNOLD:** Correct. But essentially two rulings
18 upon review by the First Circuit. Conversely, if the Court
19 denies their motion to intervene there potentially will be
20 only one appeal.

21 **THE COURT:** Yes.

22 **MR. ARNOLD:** Because if that's affirmed then that's
23 the end of it.

24 **THE COURT:** Potentially there will, but, of course,
25 that's what they pay the court of appeals for.

1 Recognizing -- and I want this very clear on the
2 record -- recognizing the difficulty of the propriety of
3 allowing intervention here, but acting in a fashion that the
4 Court considers prudent, the Court allows the Coalition and
5 Town of Acushnet motion for intervention for the purpose of
6 hearing it today and allowing it to take an appeal, should
7 it desire, or either of the parties, an appeal, should they
8 desire, from the ruling of the Court, whatever it may be.
9 That's the order.

10 Now, we're ready for argument. I think 15 minutes
11 a side is sufficient because I have read the papers in some
12 detail. It's the government's motion. This isn't 15
13 minutes a party, 15 minutes a side. So, you people work it
14 out. I'll hear from whoever wants to speak.

15 **MR. MacLAUGHLIN:** Your Honor, Jerome MacLaughlin
16 for the United States. Mr. Brock from the Commonwealth of
17 Massachusetts will also present briefly to the Court. And
18 15 minutes will be sufficient for our side.

19 **THE COURT:** As welcome as Ms. Ryan and the others
20 are they're going to go along with it. Right?

21 **MS. RYAN:** I'm sorry, your Honor. I was --

22 **MR. MacLAUGHLIN:** I'm sorry, your Honor.

23 **MS. RYAN:** I'm sorry. I think we missed -- I had
24 one point on the intervention, but I'll get to that at the
25 end of my argument.

1 **THE COURT:** But it's over. I've allowed the
2 intervention for these purposes.

3 **MS. RYAN:** Your Honor, Acushnet, the Town of
4 Acushnet never moved to intervene. They simply asked to be
5 an amicus. So I don't -- certainly, your Honor, it's within
6 your discretion.

7 **THE COURT:** Well, no, if that's all they asked for
8 that's all they get. I just want someone to voice these, if
9 we need it. I want one ball of wax. I've got one ball of
10 wax. Acushnet -- I'm not manufacturing a motion they didn't
11 make. They'll be treated as an amicus and they'll join in
12 the brief of, they'll join in the argument of Buzzards Bay.

13 **MS. RYAN:** And, your Honor, would it assist the
14 court of appeals if you clarified whether the intervention
15 was permissive as of right or simply on the conditions that
16 you indicated?

17 **THE COURT:** It's on the conditions I indicated.

18 **MS. RYAN:** Thank you, your Honor. Excuse me.

19 **THE COURT:** Now, Mr. MacLaughlin, I'll hear you.

20 **MR. MacLAUGHLIN:** Your Honor, on the, back to on
21 the merits.

22 Your Honor, there are four key facts about the
23 Supplemental CD which affect the Court's consideration here,
24 and I want to go through each of those four.

25 First, this is a settlement that obtains \$366.25

1 million cash from AVX under CERCLA. Second, these funds
2 will reduce the time it takes EPA to clean up New Bedford
3 Harbor from 40 down to five to seven years. Third, AVX is
4 not performing any cleanup work here. This is just a
5 cash-out settlement. EPA has been performing the cleanup
6 for the past 20 years and the remedy that EPA is performing
7 is not at issue in this motion or in the settlement.

8 And, your Honor, fourth, and finally, EPA, not AVX,
9 is ultimately responsible for completing the work at this
10 site. EPA has already removed one-third of the sediments as
11 part of this cleanup. EPA has already committed, with
12 Massachusetts support, \$215 million towards this cleanup,
13 and EPA, along with the Commonwealth, will work towards
14 completing the cleanup work on an accelerated schedule that
15 the funds from the settlement will allow.

16 **THE COURT:** Of course there won't be any oversight,
17 will there? You say it will be faster. But if I allow this
18 modification, not that I need to intervene, but there have
19 been these faithful reports over time telling me what's
20 going on, and this cash-out settlement, I'm through then.
21 Correct?

22 **MR. MacLAUGHLIN:** There will not be court
23 oversight, correct, your Honor. As opposed to -- you're
24 referring to the Natural Resource Damages settlement from
25 past times where the Court is periodically updated?

1 **THE COURT:** Correct.

2 **MR. MacLAUGHLIN:** Your Honor, before I get to the
3 legal standards I did want to --

4 **THE COURT:** I mean, in all fairness, there have
5 been these periodic reports that have been required, and
6 though I don't hold hearings because you're all in
7 agreement, I read matters that come to court. And I am
8 sensitive that I've had this continuing jurisdiction. This
9 proposal not only modifies the consent decree but in essence
10 ends the Court's involvement. The federal government,
11 supported by the Commonwealth, has the obligations that it
12 has under statute with respect to this site and it's left to
13 the Executive to carry out its duties under law and they're
14 \$366 and-a-half million better off. But when you tell me
15 it's going to be done much faster you're saying trust us
16 it's going to be done much faster.

17 **MR. MacLAUGHLIN:** Your Honor, to respond to your
18 point about court oversight, the Natural Resource Damages,
19 or NRD, that is in a separate account, it's in a court
20 registry right now. That will continue on. That won't
21 actually end. When I said the oversight will end, it is for
22 the majority of the cleanup work, the actual dredging of
23 sediments. There would be no further court involvement. In
24 that aspect, the NRD would remain.

25 In addition, speaking to more generally the overall

1 cleanup, EPA as part of the government does maintain a
2 website where it publicly updates the public on the goings
3 on at the site. It has public hearings.

4 **THE COURT:** You act as though I meant that
5 critically. I didn't. I simply want to be clear what we're
6 doing. And you're being candid. But for Natural Resources
7 Damages and the reports relative to that settlement, the
8 Court's involvement, if I go for this, is at an end.

9 **MR. MacLAUGHLIN:** Unless AVX doesn't pay the money
10 and then we'll be back before the Court. Yes, your Honor.

11 Your Honor, I just want to address a couple of
12 arguments that the Coalition raises. While the Coalition
13 states that it is not challenging the remedy that EPA has
14 selected through its administrative process, they repeatedly
15 invite the Court to make determinations about the adequacy
16 of the remedy in opposing this motion. For example, the
17 Coalition asks the Court to find that the cleanup levels and
18 the disposal locations in the remedy are deficient and
19 inconsistent with CERCLA.

20 Your Honor, this remedy as I mentioned was selected
21 through EPA's proper administrative procedures which have
22 been followed. That remedy is not before the Court and the
23 Court cannot review the remedy that has been selected and
24 that EPA is performing.

25 Secondly, your Honor, the Coalition states that its

1 goal, if it is successful, is that it expects the Court
2 would require the parties to rectify errors in the
3 settlement and resubmit a new settlement to the Court.

4 Under their theory the settlement would not only require EPA
5 to pay more money to come in line with their assumption that
6 AVX is 100 percent liable for 100 percent of the cost, but
7 also that we would have a new, unknown condition reopener
8 and that we would have a new cost reopener. But, your
9 Honor, that argument ignores the reality that the
10 Supplemental CD is the result of a compromise between the
11 United States, Massachusetts, and AVX. No party in a
12 settlement gets everything it wants. What the Coalition is
13 asking the Court to do is require AVX to give the
14 governments everything they might want. That's simply not a
15 settlement.

16 Your Honor, just briefly on the legal standards
17 which are very clear here in the First Circuit. As stated
18 in Cannons Engineering the Court considers whether the
19 settlement is fair, second, reasonable, and third,
20 consistent with the goals of the statute. Your Honor, the
21 Supplemental CD that the United States and Massachusetts
22 propose meet this test, particularly when viewed with a
23 deference due to the governmental agency's role in crafting
24 the settlement. The Supplemental Consent Decree is fair.
25 It's both procedurally fair and substantively fair. It's

1 procedurally fair because we engaged in years long
2 negotiations with AVX.

3 **THE COURT:** If you're dividing this up equally you
4 have about a minute. Go ahead.

5 **MR. MacLAUGHLIN:** Thank you, your Honor. We're,
6 we're not.

7 It's also substantively fair. Your Honor, this
8 settlement at \$366.25 million will recover 90 percent of the
9 future cost to clean up the site. No specific determination
10 of the percent of liability of AVX is necessary for the
11 Court's determination, nor has the Court ruled on what
12 percent of liability AVX may have.

13 **THE COURT:** Let me ask you this. I hope you won't
14 take this question as an impertinent question, but the
15 thought goes through my mind. None of this, you say this
16 was a years long negotiation, none of this is driven, I
17 imagine you're going to tell me, by the current impasse that
18 has resulted in the systemwide sequestration of funds across
19 the Executive, and indeed the Judiciary, but forget the
20 Judiciary. I mean, one reason this is palatable is you've
21 got cash in hand.

22 Now, we're clear we're going to use this cash for
23 these purposes?

24 **MR. MacLAUGHLIN:** Yes, your Honor. It goes into a
25 special account which is only to be used for the New Bedford

1 Harbor Superfund site.

2 **THE COURT:** Thank you.

3 **MR. MacLAUGHLIN:** And also, your Honor, to answer
4 your earlier question, no, the negotiations were unconnected
5 to the current issues with sequestration.

6 Your Honor, I did briefly want to mention
7 litigation risks which factor into whether the settlement is
8 reasonable. I'm sure AVX will speak to these litigation
9 risks.

10 **THE COURT:** Well, I hadn't anticipated hearing from
11 AVX, if I said 15 minutes a side. Now we're down to about
12 six minutes. Divide it up as you see fit, but you're still
13 going.

14 **MR. MacLAUGHLIN:** Your Honor, just to be clear, 15
15 minutes for the US and AVX combined?

16 **THE COURT:** And the Commonwealth.

17 **MR. MacLAUGHLIN:** I'm going to wrap up very
18 quickly, your Honor, thank you.

19 Your Honor, just briefly, the United States does
20 not believe that section 122(f) of CERCLA is binding on the
21 Court. It provides guidance to the Court. It doesn't apply
22 in this instance because this is a cash-out settlement.
23 This is not a situation where AVX is performing work. The
24 safeguards established in 122(f) are important and necessary
25 when EPA has ceded that authority to the party. That is not

1 the situation here. It is factually different than that.
2 So 122(f) does not apply.

3 Your Honor, this is a great settlement for the
4 United States, we think it is fully briefed, and we ask the
5 Court to rule as quickly as it can because the money is
6 necessary for dredging at the site.

7 **THE COURT:** Thank you.

8 **MR. MacLAUGHLIN:** With that, your Honor, I'll
9 conclude and I'll ask Mr. Brock to speak.

10 **MR. BROCK:** Thank you, your Honor.

11 Briefly, I would like to focus on the third prong
12 of the Cannons test which is that in the Commonwealth's view
13 this settlement clearly is in the public interest and
14 consistent with the goals of CERCLA.

15 With this settlement, your Honor, the Commonwealth
16 expects at least three important benefits. The first
17 Mr. MacLaughlin's already referred to is to expedite this
18 settlement. Currently it is, with the current funding, your
19 Honor, it's supposed to take 40 years. But with the
20 settlement fund we expect this will be reduced to five to
21 seven years.

22 Second, your Honor, we expect a significant
23 reduction in the risk to public health and the environment
24 by removing a significant amount of the PCBs that currently
25 exist in that system.

1 And finally, New Bedford and Massachusetts should
2 realize some important economic benefits. Once this cleanup
3 is done and done relatively quickly, redevelopment
4 opportunities should be available in New Bedford Harbor that
5 have been precluded for decades.

6 Alternatively, your Honor, if you did deny this
7 motion, we think the public interests clearly will suffer.
8 The cleanup will be delayed, likely for years, potentially
9 decades. The public health will still be put at risk on an
10 extended basis. And Massachusetts taxpayers will
11 potentially be liable for tens of millions of dollars in
12 cleanup costs as part of the state's share of this Superfund
13 cleanup which this settlement otherwise would cover.

14 So, given these factors, your Honor, we think
15 clearly the public interest favors this settlement and we
16 respectfully ask the Court to enter the decree.

17 Thank you.

18 **THE COURT:** Thank you. Ms. Ryan?

19 **MS. RYAN:** Your Honor, I will emphasize only a few
20 points. One is this issue of litigation risk which as you
21 know is a factor under Cannons. We can speak to it perhaps
22 better than the Department of Justice because we're the ones
23 who would be making that.

24 The Coalition has focused on the substantive
25 fairness or accountability of the settlement, whether the

1 settlement is adequate compensation to the public because of
2 the percentage that AVX is paying. As the government has
3 correctly pointed out, AVX is paying at least 90 percent,
4 our calculation is 95 percent of the future cleanup costs.
5 But the Coalition says what about the past costs. And that
6 relates to our litigation defenses, your Honor. As to the
7 past costs, again, the Coalition emphasizes that the costs
8 in this case goes from a \$33 million estimate in 1992 to the
9 current calculation of \$830 million. Using, for example,
10 the 130 million cost estimate in the record of decision in
11 1998, \$700 million difference. You know, it's almost a res
12 ipsa loquitur case, Judge. In the private sector you don't
13 get away with a cost overrun of \$700 million without a lot
14 of explaining to do. So that's one aspect of our defense is
15 essentially to put the government on trial to explain how
16 they did that, and our contention is that they did it by not
17 following the NCP.

18 We also have briefed the issue of the reopeners and
19 whether they can be properly invoked. The cost reopener
20 involves construing the consent decree, taking into account
21 the importance of net present value of calculations. The
22 standard reopener will be simple fact questions for the
23 Court to consider.

24 On the liability front, Mr. MacLaughlin's already
25 mentioned that AVX has never been adjudicated liable. One

1 big difference between now and 1992 is that the U.S. Supreme
2 Court, if you will, has breathed, we hope, some new life
3 into the divisibility doctrine under the Burlington Northern
4 case. AVX, if found liable, and it's obviously not
5 conceding that, would seek to reduce its liability by
6 looking to the conduct of the Army Corps of Engineers and
7 spreading contamination around the harbor when they did the
8 dredging. Same with the highway department. Same with the
9 City of New Bedford when it released contaminants into the
10 harbor through sewers and publicly-owned treatment works.
11 The litigation will not be simple.

12 Perhaps the most important issue for me to address,
13 however, your Honor, is the consistency with CERCLA. In
14 some respects --

15 **THE COURT:** About a minute left. Go ahead.

16 **MS. RYAN:** Thank you, your Honor.

17 Two things. One, it's wishful thinking on the
18 Coalition's part to think that AVX will renegotiate. I
19 would refer you to the affidavit of AVX's CFO who says that
20 given the past history of this case finality is a requisite
21 for them to enter the settlement. It's the linchpin of the
22 settlement.

23 Your Honor, the second point is a legal argument.
24 Your Honor carefully analyzed 122 in Acushnet IV. You said
25 the language of the statute, the legislative intent means

1 that clearly it was intended only to apply to performance
2 settlements, but you said I think congressional intent
3 requires me to apply certain provisions. Your Honor, what
4 we would argue and hopefully have argued to your
5 satisfaction is that in this case congressional intent does
6 not require that. It's the opposite, that you need to
7 recognize finality, you need to deviate from the way other
8 settlements might have been done in the past, to allow this
9 settlement to proceed.

10 Thank you, your Honor.

11 **THE COURT:** Thank you. I'll hear Buzzards Bay.

12 **MR. SUPER:** Your Honor, thank you for hearing from
13 us today.

14 The government says that the remedy is not at
15 issue, not before the Court. In fact, it is before the
16 Court. And it's not just the Coalition that's put it there,
17 it's congress and the First Circuit.

18 Three of the public interest factors in
19 section 122(f)(4), that's (A), (B) and (E) --

20 **THE COURT:** They say it doesn't apply. Don't we
21 have to get it to apply first?

22 **MR. SUPER:** They say that it's guidance. They say
23 that the -- well, they say that the public interest factors
24 do apply to see whether the consent decree is fair,
25 reasonable, and in the public interest.

1 **THE COURT:** But their argument prescinds from
2 Cannons, not from the statutory framework and that, from
3 their point of view, is a difference. Your argument,
4 contrariwise, if I understand it, is that, and you started
5 off that way, that congress, acting through 122(f), requires
6 certain things of me. Deal with why they say the statute
7 doesn't apply here.

8 **MR. SUPER:** Yes, I can deal with 122, but it all
9 comes back to Cannons. Because also, even if they're right
10 and 122 doesn't apply, your Honor still has to consider the
11 effectiveness of the remedy.

12 **THE COURT:** Oh, I agree with that.

13 **MR. SUPER:** Okay.

14 **THE COURT:** Don't waste your time on that. I agree
15 I do.

16 **MR. SUPER:** Okay. But the government's first point
17 was that the remedy is not at issue, and most of their
18 papers were saying that the remedy is not. I'm glad that
19 the Court agrees with us that the remedy is at issue.

20 **THE COURT:** Well, I have to consider the
21 effectiveness.

22 Go ahead.

23 **MR. SUPER:** Okay. The reason why we believe
24 122(f)(3), that's the requirement that a covenant not to sue
25 not take effect until after the remedial action is

1 certified, and 122(f)(6) that requires, except in
2 extraordinary circumstances, requires reopeners, those
3 provisions apply because the text of those provisions said
4 that it applies. The touchstones under those provisions are
5 where a settlement resolves future liability to the U.S.
6 That's an unambiguous term. Clearly this settlement
7 resolves future liability. There must be remedial action.
8 But remedial action is a term defined in CERCLA, also
9 defined in the '92 consent decree, broadly to include both
10 government cleanups and PRP claims. The term cash-out
11 settlement appears nowhere in CERCLA, nor does cleanup
12 settlement appear in CERCLA.

13 The government's argument, and AVX joins in that,
14 is not grounded at all in the statutory text. Their
15 argument that 122(f) does not apply is based entirely on the
16 Eighth Circuit's decision in Hercules. There are a few
17 other cases cited. None of them have any analysis of the
18 statute. Those, and there are very few of them, they all
19 follow Hercules. And Hercules took a very broad, simplistic
20 approach and concluded that subsections (a) through (f) of
21 122 do not apply at all to what the Court said, and again
22 made up this term cleanup settlements as opposed to cash-out
23 settlements. But that's not what the statute said. And
24 whatever one thinks of section 122, clearly congress did not
25 make it as cut and dried as Hercules makes it out to be.

1 I'll point the Court to --

2 **THE COURT:** Well, what about what I said in
3 Acushnet IV? Isn't that, can't that be harmonized with
4 Hercules?

5 **MR. SUPER:** In Acushnet IV, your Honor, the Court
6 was, of course, dealing with a Natural Resource Damages
7 settlement.

8 **THE COURT:** I agree.

9 **MR. SUPER:** And that is covered in a separate
10 section of 122. And 122(h), which covers what CERCLA calls
11 cost recovery zones, is particularly instructive. Had EPA
12 brought a complaint only under section 107 of CERCLA for
13 cost recovery then the provisions that we are bringing to
14 bear would not apply at all. It would be section (h) and it
15 would be section (i) that applies the public participation
16 requirements for such settlements. But subsections (f) and
17 (d) which applies the public participation requirements for
18 this kind of settlement were specifically cited by the
19 government and AVX in the Supplemental Consent Decree. Now,
20 in the briefs they say, well, we cited them just to show
21 that what we did is consistent with those sections. We're
22 not saying they apply. But in one case they said pursuant
23 to, which apparently means that they believe that they
24 apply.

25 If the Court looks at various factors. For

1 example, public interest factor (G), in that one congress
2 asks whether the remedial action will be carried out in
3 whole or in significant part by the responsible parties
4 themselves. If (f) applied only to PRP carried out cleanups
5 congress wouldn't have asked that question.

6 Similarly, if you go up to 122(b)(3), and this is
7 within the range of provisions that Hercules said do not
8 apply to, quote, unquote, cleanup, cash-out settlements,
9 congress asked if, as part of any agreement, the President
10 will be carrying out any action and the parties would be
11 paying amounts to the President. So, clearly congress
12 contemplated a variety of different types of agreements that
13 would be subject to sub-provisions (a) through (f). It's
14 not as clean as the government would have it. And really
15 it's not the type of settlement that's at issue, it's the
16 type of relief that the government sought in the complaint.

17 Let me turn to Cannons, because your Honor asked
18 about that, and at page 89 where the panel was starting to
19 talk about reasonableness, and let me just read out a
20 sentence from this. It says the first facet of
21 reasonableness of the decree's likely efficaciousness --
22 that's Judge Selya -- as a vehicle for cleansing the
23 environment is of cardinal importance. Except in cases
24 which involve only recoupment of cleanup costs already
25 spent, the reasonableness of the consent decree, for this

1 purpose, will basically be a question of technical adequacy,
2 primarily concerned with the probable effectiveness of the
3 proposed remedial responses.

4 There's two very important aspects to that quote.
5 One is that the Court was drawing a line between consent
6 decrees that merely recoup costs already expended, which is
7 not what this one is. As Mr. MacLaughlin pointed out, these
8 moneys will go to fund the future cleanup. And the second
9 important point, and as your Honor has said, you do have to
10 consider the effectiveness of the remedy. The remedy is
11 entirely uncertain at this point.

12 Just to run down a couple of points. EPA has said
13 they don't know how much PCB sediments need to be dredged
14 because they're still finding it in the marshes and
15 sediments. That was just a couple of years ago. They don't
16 know what levels they'll be dredging to because the land
17 uses have changed. Twenty years ago when this case started,
18 New Bedford was not the same city it is now with a lot more
19 residential and recreational use.

20 **THE COURT:** But isn't what they have argued,
21 especially what the Commonwealth itself has argued, doesn't
22 that resonate as a practical matter? Isn't the -- what
23 you're asking this Court to do in essence is start all over
24 again and look at the matter today. This was settled after
25 considerable pretrial preparation and thought. And the

1 settlement has been whatever it has been over the
2 intervening years. There is a value to finality, isn't
3 there?

4 **MR. SUPER:** This was settled 20 years ago with
5 reopeners because your Honor told the parties in Acushnet
6 IV, and in the hearing that followed, that reopeners were
7 critically important. They remain critically important.

8 We're not asking anyone to go back to the
9 beginning. And we recognize the value of settlement and
10 finality. But more important here, and congress and the
11 First Circuit have said it in giving the Court the factors
12 to apply, that the effectiveness of the remedy, as well as
13 corrective justice, fairness and the polluter paying, but
14 particularly the effectiveness of the remedy is the most
15 important factor. And we contend it will be premature to
16 release AVX. Not only do we not know the amount of sediment
17 to be dredged and to what level, the government doesn't know
18 where to dispose of it yet because the off-site disposal
19 option, the containment audit disposal option and the
20 shoreline disposal option, are still to be examined in a
21 focused feasibility study. So we don't know what to dredge,
22 to what level, where to put it. We don't know the
23 effectiveness of some of those solutions, such as burying it
24 in aquatic disposal sites, and the cost for all of that
25 isn't overrunning the cost by dramatic amounts all along, we

1 don't know what the remedy's going to be so we don't know
2 what the costs are, and we don't know what the costs of even
3 the current components are.

4 **THE COURT:** Doesn't that, doesn't that feed into
5 AVX's own argument about litigation risks here. You say
6 there's been such dramatic cost overruns. The EPA will
7 still bear the responsibility as the responsible agency and
8 it will have this fund of \$366 and-a-half million, and they
9 say, anyway, they will move more rapidly than has been the
10 case under the consent decree I approved.

11 **MR. SUPER:** As the Court said at the beginning,
12 they're asking us to trust them and the track record hasn't
13 shown them to be worthy of that kind of trust. We want to
14 see the harbor cleaned up faster than anyone. But we
15 don't -- we are nowhere near five to seven years from being
16 done. That's wishful thinking at best. We're a long way
17 from being done. And all we're asking for is reopeners that
18 if needed would keep AVX on the hook to pay their fair
19 share.

20 In, in the original settlement --

21 **THE COURT:** But I'm always trying to look at it
22 practically. I understand why you would want that. But how
23 would you ever settle one of these cases then? Aren't you
24 looking to a regime where a cash-out settlement is
25 impossible?

1 **MR. SUPER:** No, it's not impossible, your Honor.

2 And 20 years ago when they presented the Court with a
3 settlement that didn't have reopeners you sent them back and
4 they revised the settlement and came back with one with
5 reopeners. That can be done again. AVX says they won't --
6 they want finality. They won't settle with reopeners.
7 Well, there is a reopener here. A Natural Resource Damage
8 reopener. So, they are willing to live with certain
9 reopeners it appears. They've signed, they've signed this
10 document. And if the Court rejects this settlement both
11 parties will have to go back to the negotiating table or
12 take a hard look at it and decide whether to negotiate or
13 whether to litigate. But letting them off the hook
14 prematurely means that the government will necessarily run
15 out of funds to fund this cleanup. There is just no way it
16 can be done under the time frame predicted and those costs
17 given the track record, given the uncertainty.

18 **THE COURT:** But the government as the primary
19 agency responsible is willing to undertake that risk.

20 **MR. SUPER:** The government, I can't speak for the
21 government's motivation, but they seem to be jumping at what
22 is admittedly a large sum of money and willing to forgo the
23 long-term future of the harbor and the cleanup. At the end
24 of the day, we and others can challenge the record. And the
25 question of whether the cleanup is adequate will be squarely

1 before the Court not only to determine whether settlement's
2 adequate but whether more cleanup is required. And at that
3 point if the Court says more cleanup is required there will
4 be no more money from the primary polluter to cover it.
5 Even before then the money's going to run out.

6 **THE COURT:** But I am supposed to give these
7 proposals deference to the skill and good faith -- I'm not
8 getting into matters of trust -- good faith of the Executive
9 agency that's supposed to understand these things. And
10 that's why we're before a Court, because I must take into
11 account the public interest. But I'm supposed to do it with
12 some deference to the judgment of the people who bear the
13 obligation to act here.

14 Doesn't this fit within those parameters?

15 **MR. SUPER:** Well, you have, the public interest is
16 the primary concern.

17 **THE COURT:** It is. You're right there.

18 **MR. SUPER:** And what's being lost is not only the
19 Court oversight but the funding from the primary polluter,
20 the only party that has the wherewithal to fund this
21 cleanup. And it would be premature to relieve them of that.

22 Yes, the parties have negotiated, you know, this
23 settlement. But that was done under the assumption that
24 they could forgo the reopeners and put a covenant on it so
25 that it becomes effective in two years. If that is not the

1 case, if this Court tells them that is not allowed it
2 changes the landscape on which they negotiate. And that is
3 exactly what happened 20 years ago.

4 **THE COURT:** Thank you.

5 **MR. SUPER:** Thank you, your Honor.

6 **THE COURT:** First, let me say that I have been
7 extraordinarily well aided by all the briefing in this case.
8 These are responsible parties, both the federal government,
9 the Commonwealth of Massachusetts in its briefing in this
10 iteration, I think AVX is to be praised for its candor and
11 thoroughness, and equally, putting aside the iffiness, if
12 you will, of formal intervention, as to which this Court
13 candidly admits uncertainty, the Buzzards Bay Coalition here
14 has done a fine job. It is what one would want to see on
15 behalf of interested citizens and entities in vetting the
16 proper considerations that should be before the Court. And
17 I express my appreciation for their brief and for the able
18 argument that's been presented here this afternoon.

19 That said, I don't see a reason to stay my hand
20 here. The Court approves the Supplemental Consent Decree
21 and approves this settlement as proffered by the United
22 States, the Commonwealth of Massachusetts, and by AVX.

23 While I reserve my right to file a more thorough
24 explication with respect to the legal reasoning, the major
25 aspects that drive the Court's conclusions are, as follows,

1 and should permit an adequate basis for appellate review
2 should any be sought.

3 I do not read what this Court said in this case in
4 Acushnet IV as contrary to the Eighth Circuit's opinion in
5 Hercules and I rule as matter of law that section 122(f) is
6 not applicable by its terms to this case. The primary
7 driver of this Court's analysis is the controlling decision
8 of the First Circuit in Cannons Engineering. The Court
9 especially takes into account the litigation risk. On the
10 record as I have reviewed it, there is here some significant
11 litigation risk to the federal and state entities that is
12 appropriate for compromise. But most important, and the
13 most important aspect that drives this Court's ruling is
14 this Court's careful consideration. On the basis of the
15 entire record, this Court finds and rules that this
16 settlement is in the public interest given the situation
17 that obtains today. The extent of the cash in hand, the
18 fact that this will be carefully segregated, and the Court
19 expects that, the moneys will be used for the cleanup
20 remedy, the Court's appropriate deferences to the federal
21 agency as to the selection and accomplishment of that
22 remedy, and the appropriate interest in finality all
23 properly represent a public interest that favors this
24 settlement. It is so ordered.

25 I do thank you all very much. We'll recess.

1 **COUNSEL:** Thank you, your Honor.

2 **THE CLERK:** All rise.

3 (Whereupon the matter concluded.)

7 **C E R T I F I C A T E**

10 I, Donald E. Womack, Official Court Reporter for
11 the United States District Court for the District of
12 Massachusetts, do hereby certify that the foregoing pages
13 are a true and accurate transcription of my shorthand notes
14 taken in the aforementioned matter to the best of my skill
15 and ability.

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