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BY E-MAIL & U.S. FIRST CLASS MAIL

Cynthia E. Catri, Esq.
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U.S. Environmental Protection Agency
One Congress Street
Suite 1100 (SES)
Boston, Massachusetts 02114-0001

Re: Aerovox Facility, 740 Belleville Avenue, New Bedford, MA

Dear Ms. Catri:

On behalf of AVX Corporation ("AVX"), we acknowledge receipt on February 14, 2008 of a draft *Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action* (the "draft settlement agreement"),[1] and a draft *Scope of Work for Non-Time Critical Removal Action* ("draft SOW"), Appendix C to the draft settlement agreement, with respect to the facility at 740 Belleville Avenue, New Bedford, Massachusetts (the "Facility"). In the balance of this letter and as requested, AVX provides its comments on the draft documents.

AVX's perspective is informed by the context of events over the last twenty-one months, i.e., since it received EPA's May 31, 2006 demand and notice letter. AVX invested extraordinary resources in a very limited period of time to provide detailed technical and legal comments on the April 2006 *Supplemental Engineering Evaluation and Cost Analysis* ("SEE/CA") by August 15, 2006, and then to respond to the notice and demand letter by August 31. 2006. AVX's SEE/CA comment letter included numerous arguments in support of the conclusion that the SEE/CA's recommended non-time critical removal action ("NTCRA") alternative was technically and legally deficient.

[1] Please clarify EPA's intent in designating the document an "Administrative Settlement Agreement and Order on Consent for Non-Time Critical Removal Action." In particular, please explain the reason for the use of the words "Settlement Agreement" in addition to the expected "Administrative . . . Order on Consent."

The next substantive discussion between EPA and AVX regarding the Facility took place during a meeting at EPA's office on June 5, 2007, in other words, after a hiatus of nine months. At the June 2007 meeting, AVX learned that the SEE/CA's recommended alternative, which EPA had estimated to cost $7.9 million and included on-site disposal of waste, was no longer being considered. AVX was informed that the change was due primarily to comments from the public, including from the Mayor of the City of New Bedford, demanding that at a minimum all TSCA waste be disposed off-site. EPA indicated that it would memorialize the modification to the NTCRA not by further supplementation of the EE/CA, but in the forthcoming action memorandum. During the same meeting, EPA stated that its estimate of the cost to perform the recommended alternative, modified to require off-site disposal but not including off-site disposal costs, had increased to $13.7 million.

EPA now proposes, after yet an additional nine months, that AVX conduct a NTCRA "to achieve a controlled demolition" of the Facility.[2] Paragraph 34 of the draft settlement agreement most succinctly delineates the specific activities EPA will require.[3] The same provision, however, twice qualifies the scope of the NTCRA by stating that the enumerated list of activities is to be seen as a threshold itemization. ("Respondent shall perform, *at a minimum*, all actions necessary to implement the Action Memorandum and SOW. The actions to be implemented generally include, *but are not limited* to . . ." (emphasis added).) AVX cannot be sure, therefore, that EPA does not intend to include waste disposal as an element of the work, nor whether it will require any number of other activities.

Viewing the situation contextually, AVX is being asked to comment on a framework for settlement that bears little resemblance to any prior information or communications. For one, AVX is no longer being asked to partially fund a NTCRA, but to perform it. Then, in less than a year, estimated costs apparently and without explanation have increased to $20 million. Further, and to highlight just a few inapt provisions in the draft settlement agreement, the financial assurance requirements are excessively burdensome, and the reservation of rights and the conditions for noticing completion of the work are so broad as to preclude any possibility of closure for AVX.

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[2] Draft SOW at 1.

[3] Paragraph 34 lists the following twelve activities: (1) prepare and secure the site; (2) decommission utilities; (3) manage stormwater runoff from the site as well as water produced during site activities; (4) perform air monitoring and dust suppression activities; (5) remove all mercury, asbestos containing material and any other hazardous, controlled, regulated or universal waste material from the buildings; (6) demolish and process all building, structure, equipment and material debris, except the basement/first floor concrete floor slab and walls; (7) load onto transport vehicles all processed debris; (8) backfill areas created by building demolition; (9) fill subsurface storm drains, tanks and chambers; (10) cap entire site with at least a two foot soil cover, including proper drainage, grading, and vegetative plantings; (11) submit as-built drawings; and (12) submit a recommendation for necessary post-removal site controls.

At the same time EPA makes such demands, AVX is without the benefit of any information concerning how EPA has dealt with its past comments. Section VI, Paragraph 29 ("Settlement Agreement and Order") of the draft settlement agreement, states that Respondent "shall perform the actions set out in Appendices A [Action Memorandum] and C [SOW] of this Settlement Agreement." There is, however, no action memorandum establishing a clear and well-founded administrative record. Nor is there a responsiveness summary providing responses to AVX's extensive and substantive comments.[4] On such basis, AVX has more questions than there appear to be answers for. Such questions include:

- What is the status of the action memorandum and responsiveness summary? Without the information that might be available in these documents, AVX must assume that little if any heed has been paid to its comments.
- Without first finalizing the action memorandum, how is it possible for EPA to generate the draft SOW? AVX does not understand how it can participate in negotiations with EPA without at a minimum the requisite regulatory documentation establishing the basis and framework for the performance of a NTCRA.
- In its August 2006 comments, AVX raised a number of questions concerning the proposed NTCRA's failure to comply with CERCLA and the NCP, including the fact that the proposed NTCRA did not have any connection with a very aged approval memorandum from 1998.[5] AVX is profoundly troubled by significant gaps in the administrative record, which in the aggregate could be seen as a substantial procedural defect.
- EPA has given no information in the draft documents as to a number of important questions, among them:
  - Past costs. Will EPA make concessions as result of our 2006 comments?
  - Status of approximately $2.75 million and accrued interest received as a distribution from the Aerovox bankruptcy. Will EPA contribute these funds to the performance of Facility-related response actions, as required by the bankruptcy settlement?
  - Status of funds that were to have been provided to the City under a cooperative agreement in the amount of approximately $8 million and accrued interest thereon. Will EPA contribute these funds to the performance of the NTCRA, as it committed when the City was expected to be the performing party?

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[4] AVX understands that EPA, during the months following the SEE/CA's public comment period, among other things, drafted a responsiveness summary to include in the action memorandum.

[5] As previously stated, the 1998 approval memorandum principally identifies risks of PCBs to on-site workers as the only exposure pathway and the basis for performance of a NTCRA. The SEE/CA, in contrast, rests on assertions with respect to the threat of fire.

- Future revenue from a sale of the property. Will EPA contribute any revenues realized, in accordance with certain terms of the August 11, 2003 Aerovox bankruptcy settlement agreement, from a future sale of the property?

The above-enumerated comments and questions are not comprehensive. They are, though, indicators of deficiencies that must be addressed for AVX to engage in serious and substantive discussions. Otherwise, AVX's essential takeaway from its review of the draft settlement agreement is that EPA has geometrically increased its demands, maintained silence with respect to AVX's earlier comments, minimally acknowledged threshold concerns,[6] and offered no indication of any readiness for compromise.

Finally, and significantly, it is essential that the City and the Commonwealth participate in any settlement. There is ample discussion on this subject in our letters of August 15 and 31, 2006. Neither EPA, the City, nor the Commonwealth should be surprised in this regard. We summarize and supplement below our reasons as to each.

The City must be a party to any settlement.[7] The City is not an innocent landowner and is responsible for its equitable share, including at a minimum providing access. The City controls funds distributed from the Aerovox bankruptcy for purposes consistent with the performance of a NTCRA. As owner, the City stands to benefit economically from any expenditures directed to the cleanup of the property. Under the August 11, 2003 Aerovox bankruptcy settlement agreement, the City will share the proceeds from a sale of the property. The City is also the appropriate party to take responsibility for post-removal site controls, and is a necessary party with respect to any activity and use limitations controlling access to soil, and any restrictive covenants to control access to groundwater. These issues involve key components of any settlement, and cannot be treated as collateral issues to be dealt with independently.

The Commonwealth also must be a party to any settlement. AVX has repeatedly stated that the NTCRA proposed in the SEE/CA would not contribute to the efficient performance of any anticipated long term remedial action, and would instead impede a future remedy or result in a wasteful restart of response actions. AVX has also critiqued the NTCRA's failure to attain ARARs.[8] In addition, AVX has pointed out that one of the SEE/CA's significant flaws

[6] We note that the draft settlement agreement includes bracketed references to the Commonwealth and MassDEP, indicating a potential for their involvement.

[7] The City's participation includes by reference the participation of 740 Belleville Avenue LLC, and the New Bedford Redevelopment Authority.

[8] AVX remains unaware of any statement by MassDEP indicating its concurrence that the NTCRA's recommended alternative complied with Massachusetts ARARs. As for ARARs that might apply to the presently-proposed NTCRA, there is no way to know whether MassDEP concurs given the absence of any enumeration or description of them.

is its improper reliance on an unsubstantiated risk evaluation based on incomplete site characterization. None of these criticisms is any less valid because of a change from on-site to off-site disposal.

Much also has been said regarding the intent to transition the Facility from EPA to MassDEP jurisdiction following completion of the NTCRA. In the context of the comments summarized immediately above, such future transition must not preclude the present applicability of the Massachusetts Contingency Plan, 310 CMR 40.0000, to the disposal site, i.e., the Facility. In particular and as an initial matter, the requirement to complete the site characterization, i.e., perform a Phase II, must be integrated with the work EPA would have performed. This is the only way for the NTCRA to contribute to the efficient performance of the long term remedial plan.

Please include these comments in the Administrative Record. Please do not hesitate to call if you have any questions or wish to discuss anything raised by the above.

Very truly yours,

Gary L. Gill-Austern

cc *(by e-mail only)*:
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