

DEAR THE DEPARTMENT OF JUSTICE,

THIRTY YEARS IS A LONG TIME TO WAIT FOR THE HAND OF JUSTICE. MY NAME IS THOMAS A. KENNEDY, (NO RELATION TO THE HYANNIS KENNEDY'S), AND FOR THAT LENGTH OF TIME HAVE BEEN BATTLING TO RECTIFY AN INJUSTICE CAUSED BY THE PCB CONTAMINATION INTO THE ACUSHNET RIVER. MY BACKGROUND INCLUDES SERVING ON THE NEW BEDFORD CITY COUNCIL 1979-1983. I AM GRATEFUL TO BE ABLE TO COMMENT ON THE NEW SETTLEMENT AGREEMENT BETWEEN THE U.S. AND A.V.X. (366 MILLION DOLLARS).

MY REMARKS TODAY ARE SPECIFICALLY CONCERNING THE 110 MILLION QUOHOGS (SHELLFISH) NONHARVESTABLE OR DESTROYED IN THE DREDGING PROCESS TO DATE. WHEN I SERVED ON THE CITY COUNCIL I WAS CHAIRMAN OF THE SHELLFISH COMMITTEE AND WAS HEARTENED BY THE ORIGINAL CONSENT DECREE BY JUDGE YOUNG. JUDGE YOUNG STATED THAT THE SET ASIDE FUNDS COULD ONLY BE USED TO RESTORE, REPLACE, OR ACQUIRE THE EQUIVALENT OF THAT WHICH WAS DAMAGED BY THE PCB CONTAMINATION. AVX AGREED TO 66 MILLION DOLLARS AND THE JUDGE SET ASIDE AND ADDITIONAL 6.7 MILLION FOR DAMAGE TO NATURAL RESOURCES OR 10% APPROXIMATELY. THESE SET ASIDE FUNDS WERE COMBINED WITH OTHERS AND FOR THE LAST TWENTY YEARS WERE DISPERSED FOR VARIOUS ENVIRONMENTAL PROJECTS IN THE ACUSHNET RIVER WATERSHED BY THE HARBOR TRUSTEE COUNCIL. AS THE HTC DIMINISHED THE RELEVANCE OF SHELLFISH CONTAMINATION BY NOT RECOGNIZING THE POINT OF INJURY ASPECT WHATSOEVER IN THE ORIGINAL, THEY JUST CONTINUED TO IGNORE IT THROUGHOUT THE GRANTMAKING PROCESS. WE UNDERSTOOD AT THE TIME THAT TO RESTORE AND REPLACE OR EVEN ACQUIRE THE EQUIVALENT OF 110 MILLION QUOHOGS WOULD LEAVE NO FUNDS FOR ANYTHING ELSE. WE WERE PATIENT AS THEY STATED, WELL THE DAMAGE ASSESSMENT OF THE AREA HADN'T BEEN COMPLETED YET. INITIALLY THIS WAS THE RESPONSIBILITY OF THE DEPARTMENT OF INTERIOR WHO THEN PASSED IT OFF TO THE HTC. BY THE TIME THE SECOND ROUND OF FUNDING CAME AND WENT IN JANUARY 2001 (EXHIBIT A) THEIR OWN DOCUMENT STATED THAT THE ASSESSMENT HADN'T BEEN COMPLETED. WE KNEW BETTER. A DOCUMENT ON SHELLFISH STOCK ASSESSMENT WAS COMPLETED WITH THEIR FUNDING IN 1999. IT IS TITLED "CROP SURVEY" BY DAVE WHITTAKER JUNE 6, 1999. IF YOU'RE INTERESTED IT'S ON PAGE 8. THE BREAKDOWN IS AS FOLLOWS;

SEED	16 million 680 thousand
LITTLE NECKS	21 MILLION 346 thousand
CHERRY STONES	28 MILLION 330 thousand
CHOWDERS	44 MILLION

*#25-30 million
VALUE*

*1999
DATE
Completed*

THE FUNDING THAT WAS RECEIVED WAS FOR PROJECTS OUTSIDE THE INNER HARBOR AS THE ENTIRE STOCK JUST MENTIONED CAN NEVER BE HARVESTED AND MOST OF IT ALREADY DESTROYED BY EPA DREDGING. THIS POINT OF INJURY ASPECT MUST BE CONSIDERED BY THE JUDGE AS HIS WISDOM IN THIS SETTLEMENT OF 366 MILLION GETS HIS OR HER REVIEW. BELIEVE ME WE UNDERSTAND THE EVOLUTION OF THE CERCLA REGULATIONS AND HOW THEY MAY AFFECT THE CURRENT SETTLEMENT PARTICULARLY IF NO SET ASIDE SPECIFICALLY FOR SHELLFISH IS GRANTED. JUST IMAGINE IF NONE IS GRANTED. THE EPA CAN THEN STATE THAT THERE WERE NO INJURIES TO THE SHELLFISH IN THE INNER HARBOR DUE TO CONTAMINATION OF PCBs. YOU KNOW THEY WOULD BE RIGHT BECAUSE DAMAGES UNDER CERCLA ARE ONLY COUNTED WHEN THERE IS COMPENSATION. NO COMPENSATION NO DAMAGES. NO DAMAGES NO INJURY. THIS IS WHY THAT WHOMEVER IS READING THIS COMMENT THAT SOMEHOW THE JUDGE REVIEWING THIS SETTLEMENT CAN RECTIFY THE SHELL FISH DILEMMA.

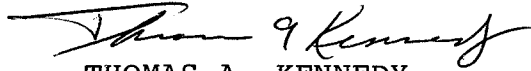
CERCLA ALSO HAS WITHIN ITS EVOLVING REGULATIONS A NOTION OF "DISCOVERY" WHICH CAN BE HELPFUL CONCERNING OUR PLEA. COMMONLY REFERRED TO AS THE SOUTH TERMINAL PROJECT, A CONSULTING FIRM HAD TO PERFORM A SHELLFISH SURVEY TO DETERMINE HOW MUCH STOCK IN THE SOUTHERNMOST AREA OF THE INNER HARBOR WOULD BE AFFECTED BY THE SUBSEQUENT DREDGING OF THIS MOST IMPORTANT PROJECT THAT WE ARE ALL IN FAVOR OF. MITIGATION TOOK PLACE AND FOR 5 MILLION SHELLFISH THAT WOULD BE DISPLACED 25 MILLION SEED WOULD BE USED TO REPLACE THE FIVE MILLION STOCK. A DERIVATIVE PROCESS WAS USED AND LIKE MOST DERIVATIVES VALUATIONS BECAME PERVERTED AND WHEN IT COMES TO LIVE ORGANISMS THAT PERVERSION BECOMES FURTHER PERVERTED BECAUSE OF MORTALITY RATES IN RESEEDING. CERCLA ALLOWS FOR THE DERIVATIVE PROCESS. WE DIDN'T LIKE IT BUT BECAUSE OF THE IMPORTANCE OF THE OVERALL PROJECT WE WERE GLAD TO SUPPORT IT. WE ALSO HAVEN'T BEEN INFORMED OF WHERE THE FUNDING FROM THE DERIVATIVE RESEEDING WILL COME FROM SINCE IT IS SEPARATE AND DISTINCT FROM THE CURRENT SETTLEMENT BEFORE YOU. I MENTION IT BECAUSE IT IS THE FIRST TIME ANY COMPENSATION HAS BEEN GRANTED FOR SHELLFISH STOCK IN THE INNER HARBOR AND HOPEFULLY CAN BE USED FOR DISCOVERY PURPOSE. (THE CONSULTING COMPANY THAT PERFORMED THAT SURVEY IS CALLED APEX) EXHIBIT B EPA DRAFT DETERMINATION P. 29.

IN CLOSING WE BELIEVE THE JUDGE CAN SET ASIDE AS PER THE ORIGINAL CONSENT DECREE, A CERTAIN AMOUNT OF FUNDS TO BE PLACED IN AN ESCROW ACCOUNT SPECIFICALLY FOR SHELLFISH RESTORATION IN CLEAN WATERS IN THE CITY OF NEW BEDFORD IN AN ATTEMPT TO MAKE WHOLE THAT WHICH WAS DESTROYED BY THE PCB CONTAMINATION. UNDERSTANDING THAT THE FIGURE WOULD BE IN THE TENS OF MILLIONS OF DOLLARS WE ARE NOT ASKING FOR THAT. WE ARE ASKING THAT YOU WHO ARE READING THIS MAKE A DETERMINED EFFORT TO GET THIS INFORMATION BEFORE THE JUDGE SO THAT JUSTICE CAN FINALLY BE SERVED. OUR RECOMMENDATION IS THAT AN ESCROW ACCOUNT BE ESTABLISHED RESTRICTED FOR SHELLFISH IN NEW BEDFORD WATERS IN THE AMOUNT OF 15 MILLION DOLLARS WITH ONLY THE MAYOR OF THE CITY AND THE REGIONAL DIRECTOR OF THE DEPARTMENT OF MARINE SERVICES BEING ABLE TO ACCESS THIS ACCOUNT. FURTHER THAT ALL FUNDS BE USED FOR

SHELLFISG PROPAGATION INCLUDING SEEDING AND TRANSPLANTING.

THANK YOU FOR YOUR TIME.

RESPECTFULLY,



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ps WE SUPPORT THE SETTLEMENT AND HOPE THEIR IS A SET ASIDE!

*INITIAL SETTLEMENT WOEFULLY INADEQUATE
AND SO WAS ORIGINAL SET ASIDE
TK*

THIS IS FROM NBHTC, JAN. 2001 Re LACK of FULL DAMAGE Assessment
IT WAS THE FIRST DISCLOSURE AND AFTER HTC SETUP!

(A)

RP/EIS Section 3.5.1.2, EPA has informally estimated that once the cleanup is completed, water quality target levels for PCBs may take another ten years to achieve (Dickerson, PC, 1996). The Harbor cleanup will reduce the concentration and volume of PCBs, but residual PCBs will continue to remain and affect natural resources for an additional 16-100 years.

2.2 The Preferred Alternative: Natural Resource Restoration

Funds to restore injured natural resources are available from settlements with the parties responsible for releasing contaminants into the New Bedford Harbor Environment. The Trustee Council has the legal responsibility to use this money to restore, replace or acquire the equivalent of the natural resources that were injured.

Natural resource restoration will accelerate the natural recovery process and, in turn, should lead to additional economic benefits through increased use and greater confidence in the health of the Harbor. The sooner injuries can be corrected through cleanup efforts and natural resource restoration, the sooner natural resources can thrive in a healthy environment. Such an environment will support larger populations of marine organisms, healthier individuals and a greater diversity of species. This will also lead to increasing the services provided by the natural resources such as, *inter alia*, fishing, shoreline use and boating.

(2001)

* Due to time constraints and settlement of the litigation, the damage assessment performed was incomplete and was a generalized approach for determining the impacts of the contamination on natural resources. It remains for the Trustee Council to determine the best approach for restoration. Other environmental impacts are present in the area which may mask or increase the impacts of PCB contamination. Historical information does not describe the quality to which resources should be restored. Accordingly, the preferred approach is to take a holistic view and address natural resource restoration opportunities throughout the affected environment. This will provide ecological benefits throughout the watershed while having additional positive effects on the human environment.

Projects will be selected to address the restoration priorities (RP/EIS Section 2.2.6) and by applying the selection criteria (RP/EIS Section 2.2.5). The restoration priorities have equal weight under this approach, which promotes a broad perspective for the restoration actions. Projects may be distributed throughout the affected environment or the supporting environment if that environment contains affected natural resources.

2.3 Specific proposals/alternatives

Please Consider THIS } Discovery
Issue

(B)

In general, stormwater will be rerouted around the construction area using swales, diversions, checkdams and temporary sediment basins. Sediment and erosion controls will prevent sediment runoff into the Harbor waters without prior treatment for suspended solids and other TMDL limits. Outfalls in the northern portion of the proposed CDF will be extended through the new sheet pile wall to ensure stormwater does not discharge into the bulkhead area. Existing pipelines will be modified and strengthened or replaced as necessary to accommodate loads from filling, storage, truck traffic and heavy equipment, including the 600 ton cranes needed to transfer wind turbine equipment on and off the proposed CDF from and back onto vessels waiting along the bulkhead.

An Activity and Use Limitation pursuant to M.G.L. c. 21E will be recorded for the entire filled and upland area of the terminal. Any development or activity on the proposed CDF shall be designed, implemented and maintained in a manner to prevent any release or exposure to any material contaminated with PCBs at greater than 1 ppm concentration. Institutional controls will be implemented that prohibit use or contact with groundwater, that prohibit activities that would adversely affect the cap, and that prohibit any land use activities that were not considered as part of the TSCA determination. Once completed, the Commonwealth will secure a M.G.L. c.91 license as well as other regulatory permits for use of the CDF.

Mitigation Measures

Item 4 was determined by what they found in the shellfish survey, the only survey known to the public as of this date, 10/20/12

To compensation for impacts caused to resource areas, the Commonwealth is required to implement the following mitigation measures:

1. Creation/enhancement of 4.47 acres of intertidal habitat and 14.91 acres of subtidal habitat south of the hurricane barrier in the area of the Superfund pilot cap;
2. Creation/enhancement of 1.9 acres of a combination of successional marsh in a tidal tributary along the western end of the hurricane barrier;
3. Creation of 22.73 acres of winter flounder habitat in the Outer Harbor
4. EPA recommends reseeding of 24,542,803 shellfish over 10 years given the expected 40% survival rate; and
5. Completion of Tern Monitoring Program

10% survives

Addition of clean sand to existing Superfund pilot cap located south of hurricane barrier to create or enhance 19.38 acres of aquatic habitat: This mitigation will consist of creation/enhancement of 4.47 acres of intertidal habitat and 14.91 acres of subtidal habitat through the placement of suitable dredged material outside the Harbor, adjacent to the hurricane barrier between the barrier and the existing Superfund pilot cap³⁰. This mitigation creates intertidal and subtidal areas with clean sand generated from dredging activities while simultaneously capping and isolating sediments with less than 10 ppm

³⁰ Page 6 of the 1998 ROD identified two areas located just south of the hurricane barrier in the outer harbor as containing sediment with PCB concentrations greater than the lower harbor cleanup level of 50 ppm and determined that these areas would be addressed on an interim basis as part of the remedy. A pilot underwater cap was placed in 2005 over one of the areas of contaminated sediment to evaluate the performance of an underwater cap in the outer harbor. See Figure 7 for location of the cap. Additional information about the pilot underwater cap may be found at www.epa.gov/nbh.



PCB contamination. This will enhance spawning and foraging areas for winter flounder, scup, black sea bass and windowpane flounder, shellfish habitat, and horseshoe crab habitat. See Attachment A of the Commonwealth's June 29, 2012 submittal for engineering plans for this area.

Hurricane barrier vegetated swale rehabilitation and restoration: Conditional upon the U.S. Army Corps of Engineers' concurrence, in accordance with 33 U.S.C. § 408 that the channel design will have no adverse effect on the operation of the Hurricane Barrier, this mitigation will consist of creation/enhancement of 1.9 acres of a combination of successional marsh area (mudflat, low marsh, high marsh, and transitional area) within the tidal tributary area behind the hurricane barrier between Cove and Gifford Streets. This involves removal of some of the PCB contaminated sediment that has filled the tributary, disposal of that material in CAD cell 3 and capping the area with clean material and grading to prevent direct contact with the remaining residual impacted sediment. Replanting with native wetland plants and installation of a public access walkway/bike path adjacent to the newly created marsh area will also be part of this mitigation measure. A monitoring program will be implemented to protect against invasive species. This mitigation measure will enhance the hydraulic capacity of the tidal tributary to transport stormwater from behind the Barrier and will enhance spawning and foraging areas for winter flounder, scup, black sea bass and windowpane flounder, and enhance foraging area for avian wildlife identified within the resource delineation. See Attachment A of the Commonwealth's June 18, 2012 submittal for plans and cross-sections for these mitigation activities.

Creation of 22.73 acres of winter flounder habitat in Outer Harbor:³¹ This measure consists of filling a relative depression west of the Federal Channel, immediately north of the Butler Flats lighthouse. The eastern edge of the area to be filled (the edge closest to the channel) is 90 feet from the western boundary of the Federal Channel. Clean navigational dredged fill will be placed in this area to raise the elevation from -20 MLLW to a depth of approximately -16.4 MLLW.

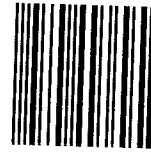
Shellfish seeding: To compensate for the approximately 9,817,121 shellfish lost during filling and/or dredging operations, the seeding proposed is designed to provide between 1,000,000 and 2,000,000 seed per year for the next five to ten years in order to provide approximately 9,817,121 seed for this project. See Attachment E of the Commonwealth's June 18, 2012 submittal and Attachment A of the June 29, 2012 submittal for engineering plans for this area. Given the expected 40% survival rate, EPA recommends reseeding of 24,542,803 shellfish over 10 years to replace 9,817,121 impacted shellfish.

Completion of the Tern Monitoring Program: The Commonwealth is proposing a survey to confirm the presence of foraging habitat as well as tern use of the area. As terns are migratory birds, the best time to conduct the survey would be from May to mid June timeframe with boat transects completed once every 2 weeks to count the type and number of terns flying over the transect. If this proposed Project is approved, the Commonwealth anticipates conducting the survey during the Spring/Summer of 2013.

³¹ Acreage proposed for Winter Flounder habitat was increased from the original 17.73 acres presented by the Commonwealth in its January 18, 2012 submittal to the present 22.73 acres in its June 18, 2012 submittal. The additional mitigation was added to compensate for the potential federal channel dredging and potential widening and deepening of the deep draft channel; however, because this additional work is uncertain at this time, there is no commitment from the Commonwealth to perform this increased mitigation work.

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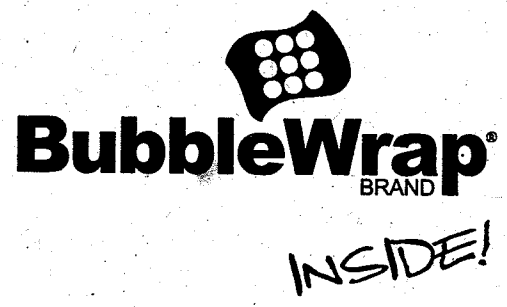
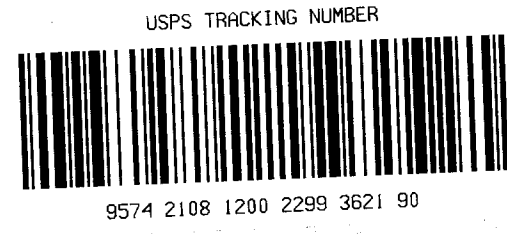
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