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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

UNITED STATES OF AMERICA, STATE OF
CONNECTICUT, COMMONWEALTH OF
MASSACHUSETTS,

Plaintiff(s),

HOUSATONIC ENVIRONMENTAL
ACTION LEAGUE, INC &
THE SCHAGHTICOKE INDIAN TRIBE
Plaintiffs-Intervenor

V

GENERAL ELECTRIC COMPANY,

Defendant(s).

CIVIL ACTION NOS. 99-CV-30225-MAP,
99-CV-30226-MAP, 99-CV-30227-MAP
(Consolidated)

MEMORANDUM OF LAW IN OPPOSITION TO ENTRY
OF THE PROPOSED CONSENT DECREE

I. INTRODUCTION

The Schaghticoke Indian Tribe (the Schaghticoke), and the Housatonic Environmental Action League (HEAL) oppose entry of the Proposed Consent Decree because it is not consistent with the goals of CERCLA, it does address the long term and continuing pervasiveness of the PCB contamination, and the proposed decree fails to protect the public health.

II. DISCUSSION

A. The "Church Group's" Memorandum

HEAL and the Schaghticoke hereby incorporate the arguments set forth in the MEMORANDUM OF LAW IN OPPOSITION OF ENTRY OF THE CONSENT DECREE (the "Church Memorandum") filed by Caroline Church and others by and through their attorneys,

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Law Offices Of Cristobal Bonifaz, and Kohn, Swift & Graf, P.C., and present further arguments in the paragraphs below.

B. The Consent Decree as proposed is not consistent with the goals of CERCLA

As the "Church Memorandum" points out, those supporting entry of the consent decree in its current form, characterize the plan for addressing the PCB contamination as removal actions rather than remedial actions. By doing so, those parties attempt to circumvent one of the more significant protections of the National Contingency Plan (NCP) which "prescribes more detailed procedures and standards for remedial actions." State of Minnesota v. Kalman W. Abrams Metals, Inc., 155 F.3d 1019, 1024 (8th Cir. 1998).

The "Church Memorandum" also clearly describes the distinctions under federal law, between "removal", and "remedial" actions. Despite all of the attempts at using language to the contrary, the overall scope, duration, and purpose of the cleanup activities are remedial actions and should clearly be stated as such. CERCLA Section 9621(b), General rules for cleanup states:

1(I) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity, or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practical treatment technologies are available.

Furthermore, 40 CFR Sec. 761.25 (c)(4) "Requirements for PCB Spill Cleanup" are not complied with under the terms of the currently proposed consent decree. Section (v) of the standards under that provision require that "Soil contaminated by the spill will be

decontaminated to 10 ppm PCBs by weight provided that soil is excavated to a minimum of 10 inches. The excavated soil will be replaced with clean soil, i.e., containing less than 1ppm PCBs, and the spill site will be restored."

As pointed out in the "Church Memorandum" as well as in many comments of record, there are many sites along the Housatonic Riverbank, and elsewhere which are not meeting these federal standards.

Although the proper cleaning of the contaminated soils will be more costly, that is not a valid reason to opt for the capping methods proposed in the current form of the consent decree. The failure to clean the PCB contamination, but instead to hide it until it becomes an even greater disaster should not be acceptable to this Court acting in its duty to protect the public.

The desirability of using thermal desorption as a method for cleaning the contaminated soils was discarded by those proposing entry of the Consent Decree in its current form. As discussed in the "Church Memorandum", the use of thermal desorption to clean the contaminated soils will be more expensive. However, the cost to GE will be minor compared to the need for a thorough cleanup of contaminated soils and waters. (See GE memo attached as (Exhibit A) stating any remediation of on-going litigation will not significantly impact their financial well-being) The USEPA has successfully used thermal desorption in a number of sites and is highly regarded by that agency for cleaning PCBs from contaminated soils. (see attached documents from the USEPA website, Exhibit B.) If the current form of the Consent Decree is entered as a Court Order, the massive amounts of PCBs left for further contamination and recontamination of the groundwater, and the Housatonic River will continually keep those living on or near, or using the Housatonic River and its floodplains in a perpetual state of danger. The obvious fact is that the governmental agencies are tired of trying to get GE to clean up and live up to its responsibilities. The government argues that due to the cost of trial this consent

decree in its current form is the best result in battling a powerful giant such as General Electric. The people of the United States should expect more of their representatives.

If the PCBs are not cleaned from the soils and waters of the Housatonic, as well as those waterways (groundwater, Silver Lake, etc.) which feed the Housatonic, HEAL and the Schaghticoke and other downstream families and their children and grandchildren will continue to be at the mercy of a failed attempt to force a polluter to face its responsibilities. The Court cannot approve of a Consent Decree where the agreement is "illegal, a product of collusion, inequitable, or contrary to the public good." United States v. Town of Moreau, New York, 751 F.Supp 1044, 1051 (N.D.NY.1990), quoting Kelly v. Thomas Solvent Company, F.Supp. 507, 515 (W.D.Mich.1989). This Consent Decree cannot be approved by the Court.

C. The natural resource damages assessment is arbitrary, capricious, unsubstantiated and undervalues the actual damages to the River

There remains no real economic basis for the damages contemplated in the Consent Decree.

Industrial Economics, Incorporated ("IEC"), the contractor who performed the "*Preliminary* Natural Resource Damage Assessment" (emphasis added) of January 28, 1997 clearly states the same when addressing the shortcomings of the assessment in its "LIMITATIONS" section.

"The nature of existing, readily available data and information limited our ability to complete all of the objectives described in the Statement of Work. In particular, our injury assessment does not identify and quantify all of the natural resource injuries likely to be present in the Housatonic River environment." See Exhibit 9, p. 1-3; United States Memorandum of Law in Support

It is evident from the subsequent language of the report upon which the parties supporting the Consent Decree rely that this assessment is, in fact, preliminary at best and non-comprehensive. For example, the assessment admits "No studies have been conducted to measure boating rates on the Connecticut Housatonic." See *Ibid.*, Exhibit 9, p. D-3. Furthermore, there has been no delineation, testing and/or study of the floodplain areas in Connecticut and no recognition that many floodplain areas are utilized for agriculture and possibly subject to seasonal recontamination.

The analysis forming the basis of settlement is admittedly perfunctory and not based on relevant factors. (See p.66 of US Motion to Enter Consent Decree). In short, the IEC preliminary estimate of damages was not designed or intended to evaluate the possible broad range of alternative scenarios, or combination of scenarios, that could constitute reasonable and acceptable compensation for NRD.

It is hard to fathom how an actual and fair dollar amount can be calculated when further study is contemplated and the actual harm remains unknown.¹ It is significant that nobody to date has been provided the raw and relevant data upon which the assessment of IEC was based, despite numerous FOIA requests, representations to the contrary and the pending Motion to Enter. (See Exhibit C Correspondence of Audrey Cole, President of HEAL, pp.3-5.)

While the Consent Decree contemplates a \$15 million dollar award for compensatory restoration projects, with \$7.5 million earmarked for the State of Connecticut, the assessment states, "... our best estimate of damages associated with lost or diminished recreational fishing and boating trips is \$11 million- \$32 million" and furthermore in calculating passive use lost due to PCB contamination, indeed as this Court has commented it wouldn't put its elbow in the Housatonic, "we estimate that passive use damages are in the range of \$25 million- \$250 million." Op. Cit, Exhibit 9, at F-3. Therefore, the preliminary report calculates damages between \$37 million- \$282 million dollars, while the Sovereigns are willing to settle for only \$15 million. There is no justification for this amount, not the United States claim that this is the largest such award in the region, (has there been any comparable destruction to an environment and ecosystem?), nor their unfounded fears about the results and involvement of litigation. This issue has been in the Sovereigns realm for over twenty-three years, since Congress banned the indiscriminate use and dumping of PCBs.; it is more than disingenuous to suggest the Consent Decree needs to be approved now and to falsely create a sense of urgency because they have failed to take action or fear the outcome of litigation. It is more than reasonable to assume that with the enormity of resources available to the defendant, GE would have eliminated any liability and attendant costs if it had

¹ Further deep core studies, for example, would provide critical information as to the extent of PCB contamination in the riverbed sediment and allow real world calculations as to safe river use and access based on any number of decontamination scenarios.

a realistic opportunity to do so. Because the methodology and assessment model employed to calculate the compensatory aspect of the natural resource damage is admittedly preliminary, limited and clearly not based on necessary information, the Consent Decree should be rejected as technically inadequate, undervalued in terms of compensating the public, not representative of the minimal risks of litigation and therefore not in the public's best interest.

D. Neither this Court, nor the other parties, should be hoodwinked by GE's patently ambiguous commitment to the Consent Decree

The most important aspect of the proposed Consent Decree that all parties need to recognize is that GE's commitment to the Consent Decree is on paper only. As the Court contemplates this heavy decision, whether to move forward on the proposals critical to the Consent Decree, the defendant, GE, is hard at work undermining the two basic tenets that drive the Decree, namely, the removal and remediation of PCBs to "acceptable levels" and the methodology contemplated to accomplish that removal.

According to a recently published article, GE is lobbying to lower the acceptable limits required to clean-up the first mile and one-half of the river (See Exhibit D, p. 36) and has continued a well-orchestrated and heavily funded lobbying effort to stop all dredging, until the negative effects of dredging are determined. Ostensibly if GE gets its way, it would be done cleaning up before it even had to begin and would be able to halt any on-going dredging or remediation, instead opting to leave the PCB contamination in place. Unfortunately, rivers do not "clean" themselves through anaerobic bacteria deep in the sediment of the river bottom.¹ *Ibid*, pp. 33. Furthermore, GE is apparently active in efforts to

¹ In areas of low PCB contamination, less than 30 ppm, partial dechlorination via anaerobic bacteria does not occur. In fact, it is argued that the dechlorinated PCBs are more water soluble and more volatile than PCBs in their original state and produce the most neurotoxic and possibly estrogenic effects in both humans and animals, including effects on intelligence, learning and memory according to Dr. David Carpenter, dean of the School of Public Health, State University of New York at Albany.

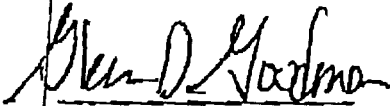
subvert the entire NRDA process through its involvement in the coalition for NRD Reform, an "aggressive and highly coordinated effort" to cripple NRD and to weaken all of Superfund.¹ *Ibid* p.36.

Conclusion

For the foregoing reasons the proposed Consent Decree should be REJECTED.

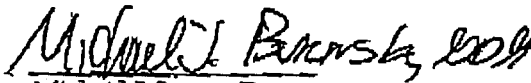
RESPECTFULLY SUBMITTED

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¹ GE is also lobbying for the elimination of past "lost use" claims, which compensate the public for the period in which they were deprived of the resources; and of "non-use" claims for the hard-to-quantify cultural or religious value the public places on a pristine resource. *Ibid*

CERTIFICATE OF SERVICE

Counsel for the Intervenor hereby certifies that on October 2, 2000 they caused copies of the foregoing document and the attachments thereto to be served on counsel to the parties to this action and on counsel of the movants for intervention by first class mail.

Glenn D. Goodman

Glenn D. Goodman

Michael Burns
6/10/00

Michael Burns