

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,)
Plaintiff,)
v.)
BENJAMIN FARBER, DISCH CONSTRUCTION) Honorable Alfred M.
COMPANY, INC. AND ESSEX CHEMICAL) Wolin
CORPORATION,)
Defendants,) Civil Action No.
BENJAMIN FARBER,) 86-3736
Defendant and Third)
Party Plaintiff,)
v.)
PUREX CORPORATION, et al.,)
Third-Party Defendants.)

CONSENT DECREE

WHEREAS, the United States of America (the "United States"), on behalf of the Administrator of the U.S. Environmental Protection Agency ("EPA"), has filed a complaint herein against Defendants Benjamin Farber ("Farber"), Disch Construction Company ("Disch") and Essex Chemical Corporation ("Essex"), pursuant to Sections 107(a) and 113(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a) and 9613(g), seeking recovery of costs incurred and to be incurred by the United States in responding to the release or threat of release of hazardous substances at or in connection with a site located at 77-81 Jacobus Avenue, South Kearny, New Jersey ("the Site" or

"Syncon"), and a declaratory judgment that Farber, Disch and Essex are each jointly and severally liable for further response costs;

WHEREAS, the United States has incurred and continues to incur response costs in responding to the release or threat of release of hazardous substances at or in connection with the Site;

WHEREAS, in response to the release or threat of a release of hazardous substances at and from the Syncon Site EPA funded a Removal Action, which commenced on February 7, 1984, to abate an imminent and substantial threat caused by the abandoned drums found on the Site;

WHEREAS, the EPA funded a Remedial Investigation/Feasibility Study, completed in August, 1986, to study and analyze the conditions at the Site and to consider alternative remedial actions to be taken at the Site;

WHEREAS, on September 29, 1986, EPA signed a Record of Decision which embodied the selection of a remedy for the conditions at the Site;

WHEREAS, EPA completed the Remedial Design of the selected remedy in January 1989, and EPA is currently performing the Remedial Action;

WHEREAS, the Regional Administrator of the EPA, Region II ("Regional Administrator") has determined that prompt settlement of the potential liability of Disch and Essex ("Settling Defendants") for past and future response costs

incurred and to be incurred by Plaintiff is practicable and in the public interest;

WHEREAS, the settlements herein with each of the Settling Defendants involve only a minor portion of the response costs which have been and will be incurred to remediate the Site;

WHEREAS, the Regional Administrator on September 27, 1993, determined, based on information currently known to him, that the amount of hazardous substances contributed by each Settling Defendant and the toxic or other hazardous effects of the hazardous substances contributed to the Site by each Settling Defendant are minimal in comparison to other hazardous substances at the Site;

WHEREAS, the United States Natural Resource Trustees have agreed to the terms of the Settlement embodied in this Consent Decree;

WHEREAS, the United States and Settling Defendants recognize, and the Court by entering this Consent Decree finds, that settlement and resolution of the claims against and potential liability of each of the Settling Defendants does not constitute any admission or adjudication of any issue of fact or law, and will avoid expensive and protracted litigation, and that entry of this Consent Decree, therefore, is fair, reasonable and in the public interest;

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED as follows:

I. JURISDICTION AND VENUE

A. This Court has both personal and subject matter jurisdiction over this matter and the parties pursuant to Sections 107 and 113(b) of CERCLA, 42 U.S.C. § 9607 and 9613(b), and 28 U.S.C. §§ 1331 and 1345. The complaint states claims upon which relief may be granted. The parties agree to be bound by the terms of this Consent Decree and not to contest its validity in any subsequent proceeding arising from it.

B. Venue is proper in this Court pursuant to 42 U.S.C. § 9613(b) and under 28 U.S.C. §§ 1391(b) and (c).

II. PARTIES BOUND

A. This Consent Decree shall apply to and be binding upon the United States and upon each of the Settling Defendants and their respective successors and assigns. The undersigned representative for each of the Settling Defendants certifies that he or she is fully authorized to enter into this Consent Decree and to execute and to bind legally such party to this document.

B. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree.

III. DEFINITIONS

A. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in

regulations promulgated pursuant to CERCLA shall have the meaning assigned to them therein.

B. "Settling Defendants" shall mean Disch Construction Company and Essex Chemical Corporation.

C. "United States" shall mean the United States of America and its agencies, departments and instrumentalities.

D. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

E. "Regional Administrator" shall mean the Regional Administrator of EPA Region II.

F. "Natural Resources" shall have the meaning provided in Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

G. "Natural Resource Damages" shall mean damages, including costs of damages assessment, recoverable under Section 107 of CERCLA, 42 U.S.C. § 9607, for injury to, destruction of, or loss of any and all Natural Resources of the Syncon Resins Site, or attributable to the Syncon Resins Site..

H. "Response Costs" shall mean all costs, including but not limited to direct and indirect costs, together with accrued interest, that the United States has incurred, is incurring and/or will incur in response to the release or threatened release of hazardous substances at or connected with the Site.

I. "Syncon" or "Site" shall mean the site located at 77-81 Jacobus Avenue, South Kearny, New Jersey. The Syncon Site

is comprised of three (3) lots, numbers 12, 13 and 13R of Block 289 of the Tax Map of the Town of Kearny.

IV. COMMITMENTS OF SETTLING DEFENDANTS

A. Disch agrees to pay to the United States the sum of \$412,500 to settle the federal claims and potential claims against it for Response Costs and Natural Resource Damages under Sections 107(a) and 113(g) of CERCLA, 42 U.S.C. §§ 9607(a) and 9613(g), relating to the Syncon Site.

B. Essex agrees to pay to the United States the sum of \$412,500 to settle the federal claims and potential claims against it for Response Costs and Natural Resource Damages under Sections 107(a) and 113(g) of CERCLA, 42 U.S.C. §§ 9607(a) and 113(g), relating to the Syncon Site.

C. Payment of the amount specified in Paragraphs IV.A. and B. above, shall be made within thirty (30) days of entry of this Consent Decree.

D. Payment of \$402,500 by Disch and \$402,500 by Essex, shall be by Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice lockbox bank, referencing the CERCLA Number NJD064263817, and the U.S.A.O. file number DOJ # 90-11-3-116. Payment shall be made in accordance with instructions provided by the United States to the Settling Defendants upon execution of the Consent Decree. Any EFTs received at the U.S.D.O.J. lockbox bank after 11:00 A.M. (Eastern Time) will be credited on the next business day.

E. Within one week of the EFT, the Settling Defendant shall send a letter, which references the date of the EFT, the amount, the name of the Site, the civil action number of this case, the Department of Justice case number (#90-11-3-116), and the name and address of the settling defendant, to the following:

Chief, New Jersey Superfund Branch
Re: Syncor Resin Site
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza, Room 309
New York, New York 10278

Chief, Environmental Enforcement Section
Re: DOJ #90-11-3-116
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

F. Payment of \$5,000 by Disch and \$5,000 by Essex to the United States Fish and Wildlife Service, Department of Interior ("DOI"), shall be by certified checks payable to the "U.S. Fish and Wildlife Service, Department of the Interior" which checks shall be sent by certified mail, return receipt requested, to:

Chief, Division of Finance
U.S. Fish and Wildlife Service
Room 380
4401 North Fairfax Drive
Arlington, Virginia 22203

The checks shall reference the Syncor Resins Superfund Site and account number 14X1618. A copy of the cover letter and the check shall be sent to Director, Office of Environmental Affairs, U.S. Department of the Interior, 1849 "C" Street, N.W., Room 2340, Washington, D.C. 20240.

G. Payment of \$5,000 by Disch and \$5,000 by Essex to the United States Department of Commerce, National Oceanic and Atmospheric Administration ("NOAA"), shall be by certified checks payable to the "U.S. Department of Commerce, NOAA" and shall be sent by certified mail, return receipt requested, to:

General Counsel
National Oceanic and Atmospheric Administration
Herbert Hoover Building, Room 5814
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

The checks shall reference the Syncon Resins Superfund Site. A copy of the cover letter and the check shall be sent to Office of General Counsel, NOAA Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

H. Within one week of sending the certified checks to NOAA and DOI, the Settling Defendant shall send a copy of the cover letter and certified check to the following:

Chief, Environmental Enforcement Section
Re: DOJ #90-11-3-116
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

I. In the event that any payment required by paragraph IV.A. or B. is not made within 30 days of the effective date of this Consent Decree, the Settling Defendant that has failed to make the payment shall pay interest on the unpaid balance at the same rate as is specified for interest on investments of the Hazardous Substance Superfund, and such interest shall be compounded each federal fiscal year. The

interest on such unpaid balance shall begin to accrue on the 30th day after the effective date of this Consent Decree.

J. If the United States must bring an action to collect any payment required under this Consent Decree, the Settling Defendant that has failed to make the payment shall reimburse the United States for all costs of such action, including, but not limited to, attorney's fees.

K. Payments made under paragraphs IV.I. and J. shall be in addition to any other remedies or sanctions available to the United States by virtue of Settling Defendants failure to make timely payment(s), as required by this Consent Decree.

V. STIPULATED PENALTIES

A. On any amounts due under paragraphs IV.A. or B., but not paid by the required date, the Settling Defendant that failed to make the payment shall pay as a stipulated penalty, in addition to the interest and costs required by paragraphs IV.I. and J., \$ 1000 per day for each day that such payment is tendered untimely. The payment of stipulated penalties by any Settling Defendant is due upon demand.

B. All amounts owed to the United States under paragraph V.A. shall be due and payable within 30 days of a Settling Defendant's receipt from EPA of a demand for payment of the penalties. All payments made under paragraph V.A shall be by cashier's or certified checks made payable to the "EPA Hazardous Substance Superfund," which shall be transmitted to:

.. EPA - Region II
Attention: Superfund Accounting

Re: NJD064263817
P.O. Box 360188M
Pittsburgh, PA 15251

The checks and the transmittal letters shall reference the name of the Site, the civil action number of this case, the Department of Justice ("DOJ") case number (#90-11-3-116), and the name and address of the settling defendant. Copies of the checks and transmittal letters shall also be submitted to EPA and DOJ, as follows:

Chief, New Jersey Superfund Branch
Re: Syncon Resin Site
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza, Room 309
New York, New York 10278

Chief, Environmental Enforcement Section
Re: DOJ #90-11-3-116
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

C. Any payment made pursuant to paragraph V.A. is not deductible for tax purposes.

VI. CIVIL PENALTIES

In addition to any other remedies or sanctions available to the United States, any Settling Defendant who fails or refuses to comply with any terms or condition of this Consent Decree shall be subject to a civil penalty of up to \$25,000 per day of such failure or refusal pursuant to Section 122(1) of CERCLA, 42 U.S.C. § 9622(1).

VII. CERTIFICATION AND STIPULATION

A. Each Settling Defendant certifies, for the purposes of this Consent Decree and to the best of its knowledge, that: (1) it has provided to EPA all information currently in its possession or in the possession of its officers, directors, employees, contractors, agents or assigns, which relate in any way to the generation, treatment, transportation, storage, or disposal of hazardous substances at or in connection with the Site; (2) the hazardous substances it has contributed to the Site, if any, do not contribute disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site, and the toxic or other hazardous effects of such substances are minimal in comparison to the effects of other hazardous substances at the Site; and (3) the hazardous substances it has contributed to the Site, if any, do not amount to more than a minimal amount of the total volume of hazardous substances disposed of at the Site.

B. Each Settling Defendant certifies, for the purposes of this Consent Decree and to the best of its knowledge, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for

information pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

VIII. ACCESS TO INFORMATION; RETENTION OF RECORDS

A. Each Settling Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

B. Until 10 years after the entry of this Consent Decree, each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control which relate in any manner to response actions taken at the Site or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary.

C. At the conclusion of this document retention period, each Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, shall deliver any such records or documents to EPA.

D. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Consent Decree to the

extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), the public may be given access to such documents or information without further notice to Settling Defendants.

E. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site, and any other information relating to potentially responsible parties at the Site.

F. The Settling Defendants may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If any Settling Defendant asserts such a privilege, it shall provide EPA with the following information: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4)

the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted. However, no document, reports, or other information created or generated pursuant to the requirements of this Consent Decree shall be withheld on the grounds that they are privileged.

IX. COVENANT NOT TO SUE

A. Subject to the reservations of rights in Section X, upon the United States' receipt from each of the Settling Defendants of the respective amounts specified in Section IV, for such settling defendant, the United States covenants not to sue or to take any civil or administrative action against that Settling Defendant for "Response Costs" and "Natural Resource Damages", as those terms are defined under this Consent Decree.

B. Each Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States, its agencies, officers or representatives with respect to the Site or this Consent Decree, or arising out of response activities at the Site, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund under CERCLA Sections 106(b)(2), 111, 112, or 113, 42 U.S.C. §§ 9606(b)(2), 9611, 9612 or 9613, or any other provision of law, any claim against the United States, including any department, agency, or instrumentality of the United States under CERCLA Sections 107 or

113, 42 U.S.C. §§ 9607 or 9613, related to the Site, or any claims arising out of response activities at the Site.

C. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

X. RESERVATIONS OF RIGHTS

A. The United States reserves all claims, demands, and causes of action, past or future, judicial or administrative, in law or equity, including but not limited to, cost recovery and injunctive relief and natural resource damages, against any person or entity, not a signatory to this Consent Decree. Nothing contained herein shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106, and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, and 9607, or any other provision of law, against any person or entity not a party to this Consent Decree. Any claim or defense which the United States or any Settling Defendant may have against any other person or entity not a party to this Consent Decree, including but not limited to claims for indemnity or contribution, is expressly reserved.

B. The covenant not to sue set forth in Section IX, Paragraph A above shall not apply, inter alia, to the following:

- (1) claims based upon the failure of a Settling Defendant to meet the requirements of this Consent Decree;
- (2) claims based on criminal liability;
- (3) liability arising from future disposal activities by a settling defendant at the site; or
- (4) any claim or cause of action not expressly included in the covenant not to sue.

C. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States to seek or obtain further relief from any of the Settling Defendants, and the covenant not to sue in Section IX, Paragraph A, of this Consent Decree is null and void, if information not currently known to the United States is discovered which indicates that any Settling Defendant contributed hazardous substances to the Site in such amount or of such toxic or other hazardous effect that Settling Defendant no longer qualifies as a de minimis party at the Site because such party contributed greater than a minimal amount of the hazardous substances at the Site or contributed disproportionately to the cumulative toxic or other hazardous effects of the hazardous substances at the Site.

D. Nothing in this Consent Decree constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States to seek or obtain further relief from any of the Settling Defendants, and the covenant not to sue

in Section IX, Paragraph A, of this Consent Decree is null and void, if any Settling Defendant has made material misrepresentations in the certification made pursuant to Section VII.

E. Nothing in this Consent Decree shall be deemed to limit the authority of the United States under Section 104 or 106 of CERCLA, 42 U.S.C. §§ 9604 or 9606, or as otherwise provided by law, to take any response actions in connection with the Site.

F. The United States and the Settling Defendants agree that the actions undertaken by the Settling Defendants in accordance with this Consent Decree do not constitute an admission of any liability by any Settling Defendant. This Consent Decree shall not be used as evidence in any judicial or administrative proceeding except one to enforce this Consent Decree.

XI. CONTRIBUTION PROTECTION

A. With regards to claims for contribution against Settling Defendants for matters addressed in this Consent Decree, the Parties hereto agree that, upon receipt by the United States of the payment required by Section IV, the Settling Defendant is entitled to such protection from contribution actions or claims as is provided by Section 113(f)(2) and 122(g)(5), 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

B. Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States

in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree.

C. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief related to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defense based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue set forth in Section IX, Paragraph A.

XII. PUBLIC COMMENT

A. This Consent Decree shall be subject to a thirty-day public comment period. The United States may withdraw or withhold its consent to a judgment based on this Consent Decree

if comments received disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendants agree to the entry of this Consent Decree without further notice.

B. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendant in writing that it no longer supports entry of this Consent Decree.

XIII. MODIFICATION

No modification shall be made to this Consent Decree without written agreement of both parties and written notification to and written approval of the Court. The notification required by this Section shall set forth the nature of and reasons for the requested modification. No oral modification of this Consent Decree shall be effective. Nothing in this paragraph shall be deemed to alter the Court's power to supervise or modify this Consent Decree.

XIV. RETENTION OF JURISDICTION

The District Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XV. EFFECTIVE DATE

This Consent Decree shall become effective upon entry by the Court.

So Ordered This _____ Day Of _____, 1993.

UNITED STATES DISTRICT JUDGE
DISTRICT OF NEW JERSEY

FOR PLAINTIFF - UNITED STATES

Lois J. Schiffer
Acting Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice
10th & Pennsylvania Avenue
Washington, DC 20530

DATE: Oct. 23, 1993

Peter M. Flynn
Peter M. Flynn
Trial Attorney
Environment and Natural Resources
Division
United States Department of Justice
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530

DATE: Oct. 1, 1993

Michael Chertoff
United States Attorney
District of New Jersey

BY:

Susan C. Cassell
Susan C. Cassell
Assistant United States Attorney
Deputy Chief, Civil Division
970 Broad Street
Newark, New Jersey 07102

DATE: _____

Will J. Muszynski

William J. Muszynski, P.E.
Acting Regional Administrator
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

DATE: 9/30/83

Deborah L. Mellott

Deborah L. Mellott
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency
Region II
26 Federal Plaza
New York, New York 10278

DATE: 9/29/83

FOR DEFENDANT, DISCH CONSTRUCTION COMPANY, INC.

Warren Disch.
[name] WARREN DISCH
title PRES.
address] Box 142 Summit Rd. 07901

DATE:

4-1-93

Agent authorized to accept service on behalf of the
above-signed party:

Name:
Title:
Address:

FOR DEFENDANT, ESSEX CHEMICAL CORPORATION

Arnold Geyzer
Name Arnold Geyzer
title President
address] 2030 Dow Center, Midland MI 48674

DATE: June 3, 1993

Agent authorized to accept service on behalf of the
above-signed party:

Name: Michael J. Guju
Title: Attorney
Address: 2030 Dow Center, Midland, MI 48674-2030