

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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STATE OF NEW YORK and JOHN P. CAHILL,
as Acting Commissioner of the New York State
Department of Environmental Conservation
and Trustee of the Natural Resources,

Civil Action No.
94-CV-0400E(H)

Plaintiffs,

-against-

PANEX INDUSTRIES, INC.; PANEX INDUSTRIES
LIQUIDATING TRUST; DANIEL ROSENBLOOM and
PAUL LAZARE, as Trustees of Panex
Industries, Inc. Liquidating Trust; ALPINE
GROUP, INC.; ROCHESTER BUTTON COMPANY, INC.;
TURBODYNE ELECTRIC POWER CORPORATION;
McGRAW-EDISON COMPANY, INC.; DRESSER-RAND
COMPANY; ABB AIR PREHEATER, INC.; and
VILLAGE OF WELLSVILLE,

Defendants.

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CONSENT DECREE

The State of New York and John P. Cahill, as Acting Commissioner of the New York State Department of Environmental Conservation and Trustee of the Natural Resources (hereinafter collectively the "State") and defendant ABB Air Preheater, Inc. (known variously during the relevant time period as The Air Preheater Corporation, The Air Preheater Company, Inc., C-E Air Preheater, Inc., Air Preheater Corporation, a wholly owned subsidiary of Combustion Engineering, Inc., and ABB Air Preheater, Inc., hereinafter collectively "Air Preheater") agree as follows:

RECITATIONS

WHEREAS, the State alleges that the Village of Wellsville operated a site located on Snyder Road in the Towns of Wellsville and Andover in Allegany County, New York (the "Site") as a municipal and industrial landfill from 1964 through 1983, during which time hazardous substances were disposed at the landfill, and continues to own the Site; and

WHEREAS, the State alleges that the Rochester Button Company, a division of Panex Industries, Inc., Turbodyne Electric Power Corporation and ABB Air Preheater, Inc., and their predecessors, successors and/or alter egos, generated and disposed, or arranged for the disposal of, hazardous substances and other waste materials at the Site; and

WHEREAS, the State filed a complaint in this action on May 25, 1994 relating to activities and conditions at the Site, against the defendants, asserting claims under the Comprehensive Environmental Response, Compensation and Liability Act, as amended by the Superfund Amendments and Reauthorization Act of 1986 ("CERCLA"), 42 U.S.C. § 9601 et seq., New York's common law of public nuisance, and the New York Real Property Actions and Proceedings Law, and New York's common law of restitution; and

WHEREAS, Air Preheater filed an answer to the above complaint on or about July 5, 1994, inter alia, denying liability; and

WHEREAS, the State alleged that there has been a release of hazardous substances from the Site and there was a threat of a release of hazardous substances from the Site in the future; and

WHEREAS, the State seeks judgment, inter alia, for all response costs incurred or to be incurred by the State in responding to the release and threat of release of hazardous substances from the Site; and

WHEREAS, on March 23, 1994, the New York State Department of Environmental Conservation ("DEC") issued a Record of Decision, following public notice and an opportunity for public comment, setting forth the selected remedy for the Site; and

WHEREAS, DEC estimates, based on currently available information, that the total cost incurred and to be incurred by the State, excluding in-kind contributions by other parties, in responding to the release and threat of release of hazardous substances from the Site, including but not limited to implementing the selected remedy, is approximately \$ 7.8 million, plus an amount which may be awarded to DEC's contractor at the Site, IT Corp., beyond the amount of approximately \$ 5.6 million already paid by DEC to IT Corp., to resolve a pending dispute regarding amounts payable under such contract; and

WHEREAS, the State estimates that since the Complaint was filed approximately \$ 375,000 in interest on past costs have accrued as of November 1997 and that its enforcement costs have totaled approximately \$ 30,000; and

WHEREAS, Air Preheater wishes to settle any liability it may have to the State for matters raised in this action in accordance with 42 U.S.C. § 9613 and other applicable federal and state law; and

WHEREAS, in consideration of the above factors, and in order to avoid the uncertainties of costly and protracted litigation against Air Preheater, the State has determined that a settlement with Air Preheater on the terms included herein is fair and reasonable, and in the public interest; and

WHEREAS, the State and Air Preheater (together, the "settling parties") have agreed to the terms and conditions for settling any claims that the State may have against Air Preheater, as set forth herein; and

WHEREAS, the settling parties have consented to the entry of this Consent Decree pursuant to CERCLA, 42 U.S.C. § 9613(f)(2); and

WHEREAS, the settling parties recognize, and the Court finds, that this settlement has been negotiated in good faith, and will avoid prolonged and complicated litigation between the settling parties, and the terms of settlement are fair, reasonable, and in the public interest.

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

JURISDICTION

1. The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613 and has jurisdiction over the parties to this Consent Decree.

2. This Consent Decree shall apply to and be binding upon the settling parties, their successors and assigns. The undersigned representative of each settling party certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind the party to its terms.

PAYMENT OF COSTS

3. To resolve all claims against Air Preheater for past and future response costs of the State at the Site, except as provided elsewhere in this Consent Decree, Air Preheater shall pay to the State (a) within thirty (30) days of the effective date of this Consent Decree, the sum of \$ 571,375, and (b) within thirty (30) days after notification by the State, an additional sum equal to 9.5% of the amount, if any, by which the total final payments to DEC's contractor IT Corp. exceed \$ 5.6 million. However, such additional sum payable by Air Preheater pursuant to clause (b) of the preceding sentence shall not exceed \$ 95,000. Payments shall be made by check payable to the State of New York or its designee or by electronic funds transfer.

4. The State will reimburse Air Preheater 7.5% of any amount recovered by the State pursuant to claims relating to the Site from any party whose liability is derived from the Rochester Button Company. However, such reimbursement to Air Preheater pursuant to the preceding sentence shall not exceed \$ 270,675 plus 47.4% of any additional payment made pursuant to paragraph 3(b). Within thirty (30) days of the effective date of any settlement, judgment, or other resolution of the State's claims relating to the Site against any party whose liability is derived from the Rochester Button Company, the State shall provide to Air Preheater notice of and all

documents which memorialize such settlement, judgment, or other resolution. Within thirty (30) days of the receipt by the State of any payment pursuant to any such settlement, judgment or other resolution, the State's reimbursement shall be paid to Air Preheater.

5. The payments to be made by Air Preheater under this Consent Decree represent the fair and reasonable contribution by Air Preheater of the total past response costs which have been incurred by the State and any other party, and the total anticipated future response costs which will be incurred by the State and any other party, for the implementation of the remedial program set forth in the State's Record of Decision for the Site, including but not limited to all construction, post-construction, operation and maintenance, and monitoring response costs, pre-judgment interest, and enforcement costs.

RESOLUTION OF LIABILITY AND COVENANT NOT TO SUE

6. In consideration of the payments to be made by Air Preheater pursuant to this Consent Decree, the State releases, discharges, covenants not to sue and agrees not to assert any claims for relief or any causes of action against Air Preheater pursuant to Section 107(a) or Section 113 of CERCLA, 42 U.S.C. § 9607(a) or § 9613, or under any other federal, state or local statute, regulation or ordinance, or common law, arising out of or relating to environmental conditions at the Site, including without limitation the claims asserted by the State against Air Preheater in the complaint in this action, except claims for natural resources damages, or personal injury or toxic tort, as a result of the release or threatened release of hazardous

substances or constituents at or from the Site or areas in the vicinity of the Site. This covenant not to sue extends only to Air Preheater and its successors and assigns, and does not extend to any other person or entity.

7. Air Preheater hereby releases, discharges, covenants not to sue and agrees not to assert any claims or causes of action against the State pursuant to § 107(a) or § 113 of CERCLA, 42 U.S.C. § 9607(a) or § 9613, or under any other federal, state or local statute, regulation or ordinance, or common law, arising out of or relating to environmental conditions at the Site, except claims for natural resources damages, or personal injury or toxic tort, as a result of the release or threatened release of hazardous substances or constituents at or from the Site or areas in the vicinity of the Site. This covenant not to sue extends only to the State and its assigns, and does not extend to any other person or entity.

8. The discharge and release provisions and covenants not to sue provided in this Consent Decree shall not apply to claims or counterclaims relating to any additional response costs necessitated by the discovery of any release or threatened release of hazardous substances at or from the Site or any other environmental or engineering condition related to the Site which was not known by the State on or before the effective date of this Consent Decree, and which indicates that the remedial action required by the Record of Decision for the Site is not protective of human health or the environment.

9. For purposes of the foregoing reopener provision, previously known releases or threatened releases at or from the Site consist of all releases, threatened

releases, or conditions known to the State, as of the effective date of this Consent Decree, including, but not limited to, all conditions considered and relied upon by DEC or contained or submitted for inclusion in the DEC administrative record, and all conditions known by the State through discovery in this action.

10. Air Preheater shall not be liable for claims for contribution in accordance with CERCLA, Section 113(f)(2), 42 U.S.C. § 9613(f)(2). The matters addressed in this Consent Decree include any and all claims, current or prospective, by any party, against Air Preheater for past and future damages and response costs concerning or relating to or arising from the Site, and claims for pre-judgment interest thereon and enforcement costs. All claims of non-settling parties against Air Preheater which have or could have been brought against Air Preheater, including claims under CERCLA, Sections 107(a) and 113(f)(2), 42 U.S.C. §§ 9607(a) and 9613(f)(2), are hereby dismissed with prejudice and without costs. Upon the filing of any further amended pleadings, non-settling parties in this action shall not plead for contribution or common law indemnification against Air Preheater.

11. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this settlement. Each of the settling parties expressly reserves any and all rights, defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person or entity not a party hereto.

JUDICIAL APPROVAL OF CONSENT DECREE

12. The proposed Consent Decree is not binding upon, and is without prejudice to, the settling parties if the Court does not grant judicial approval in accordance with 42 U.S.C. § 9613. In that event, the Consent Decree shall not be construed as an admission of liability or of any fact in the pending action and may not be used in any other proceeding. In the event that the Court does not judicially approve the terms of this settlement in haec verba, then in that event, the obligations and covenants of each settling party shall be deemed null and void and this Consent Decree shall be null and void.

EFFECTIVE DATE

13. This Consent Decree shall be effective upon the date that the Court approves and enters this Consent Decree. All times for performance of activities under this Consent Decree shall be calculated from that date.

CONTINUING JURISDICTION OF THE COURT

14. The Court shall retain jurisdiction over this Consent Decree in order to enforce compliance with its terms.

COMPLETE AGREEMENT

15. The terms of this Consent Decree shall constitute the complete and entire agreement between Air Preheater and the State concerning the matters addressed herein. No term, condition, understanding or agreement purporting to modify or vary any term of this Consent Decree shall be binding unless made in writing and subscribed by the parties to be bound.

SO AGREED:

DATED: June 11, 1998

DENNIS C. VACCO
ATTORNEY GENERAL OF THE
STATE OF NEW YORK

BY: Eugene Martin-Leff
EUGENE MARTIN-LEFF
ASSISTANT ATTORNEY GENERAL, Of Counsel

ATTORNEY FOR STATE OF NEW YORK AND
THE COMMISSIONER OF ENVIRONMENTAL
CONSERVATION

DATED: June 16, 1998

ABB AIR PREHEATER, INC.

PHILLIPS, LYTTLE, HITCHCOCK,
BLAINE & HUBER

BY: Kevin M. Hogan
KEVIN M. HOGAN, ESQ.

SO ORDERED this ____ day
of _____, 1998

U.S.D.J.

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