

MEMORANDUM OF AGREEMENT  
CONCERNING NATURAL RESOURCE DAMAGES IN THE MATTER OF  
United States, et al., v. AVX Corporation, et al.,  
Civil Action No. 83-3882-Y (D. Mass.)

„BETWEEN“

THE UNITED STATES OF AMERICA

AND

THE COMMONWEALTH OF MASSACHUSETTS

I

INTRODUCTION

In December of 1983, the United States and the Commonwealth of Massachusetts filed claims in Federal Court to recover damages for injury to, destruction of, or loss of natural resources resulting from the releases of hazardous substances into the environment of New Bedford Harbor, Massachusetts, and adjacent waters. These releases of hazardous substances have included releases of polychlorinated biphenyls (PCBs) from two electrical equipment manufacturing facilities located on the banks of New Bedford Harbor which have been owned and/or operated at various times since 1947 by the named defendants in the matter of United States, et al., v. AVX Corporation, et al., Civil Action No. 83-3882-Y (D. Mass.) (hereinafter "U.S. v. AVX"). The natural resource damage claims were brought under Sections 9607(a)(4)(C) and 9607(f) of the Comprehensive Environmental Response, Compensation, and Liability Act (hereinafter "CERCLA"), as amended, 42 U.S.C. §§ 9607(a)(4)(C) and 9607(f).

This Memorandum of Agreement (hereinafter "MOA") between the United States, acting by and through the National Oceanic and Atmospheric Administration of the United States Department of Commerce, the United States Department of the Interior and the United States Department of Justice, and the Commonwealth of Massachusetts (hereinafter "Commonwealth" or "State"), acting by and through the Executive Office of Environmental Affairs and the Department of the Attorney General, is entered into (i) to ensure the coordination and cooperation of the Governments in their application of any natural resource damages recovered in the matter of U.S. v. AVX, towards the restoration of natural resources which have been injured, destroyed or lost by the release of hazardous substances into the environment of New Bedford Harbor, Massachusetts; and (ii) to ensure coordination and cooperation of the Governments in carrying out their respective natural resource trustee responsibilities under CERCLA, and other applicable law, in connection with any award, judgment, settlement or other payments to the Governments in the matter of U.S. v. AVX.

Pursuant to Section 9607(f)(2)(A) of CERCLA, as amended, 42 U.S.C. § 9607(f)(2)(A); Executive Order No. 12,580 (January 23, 1987); and Subpart G of the National Oil and Hazardous Substance Pollution Contingency Plan (NCP), 40 C.F.R. Part 300.600, the Secretaries of the United States Departments of Commerce and the Interior have been designated as Federal natural resource trustees for purposes of CERCLA, and otherwise have statutory responsibilities related to the natural resources injured,

destroyed or lost as a result of the discharge of hazardous substances into the environment of New Bedford Harbor, Massachusetts. The Secretary of Commerce has delegated the Department's natural resource trustee authority under CERCLA to the Under Secretary of Commerce for Oceans and Atmosphere of the National Oceanic and Atmospheric Administration (hereinafter "NOAA"), a bureau of the United States Department of Commerce.

Pursuant to Section 9607(f)(2)(B) of CERCLA, as amended, 42 U.S.C. § 9607(f)(2)(B), the Secretary of the Executive Office of Environmental Affairs for the Commonwealth (hereinafter "EOEA") has been designated as the Commonwealth's trustee for natural resources for purposes of CERCLA, and otherwise has statutory responsibilities related to the natural resources injured, destroyed or lost as a result of the discharge of hazardous substances into the environment of New Bedford Harbor, Massachusetts.

## II

### DEFINITIONS

For purposes of this MOA,

A. "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §9601 et seq.

B. "Governments" means the United States and the Commonwealth of Massachusetts.

C. **"Federal Trustees"** means the Secretary of Commerce, acting through NOAA, and the Secretary of the Interior.

D. **"State Trustee"** means the Secretary of the Executive Office of Environmental Affairs, Commonwealth of Massachusetts.

E. **"Trustees"** means the Federal Trustees and the State Trustee.

F. **"Natural resources"** shall have the same meaning as set forth in Section 101(16) of CERCLA, as amended, 42 U.S.C. §9601(16).

G. **"Facilities"** means the manufacturing plants and associated structures and land of the Aerovox facility located at 740 and 742 Belleville Avenue, New Bedford, and the Cornell Dubilier Electronics, Inc. (CDE) facility located at 1605 East Rodney French Blvd., New Bedford, Massachusetts, that were and are controlled by the named defendants in the matter of U. S. v. AVX.

H. **"The New Bedford Harbor Environment"** means New Bedford Harbor, Massachusetts, and the adjacent waters and shore areas containing natural resources which have been or may be injured, destroyed or lost as a result of releases of hazardous substances from the Facilities. This includes the New Bedford Harbor Superfund Site, located in portions of New Bedford, Acushnet and Fairhaven, Massachusetts, including New Bedford Harbor, the Acushnet River Estuary extending north to the Wood Street Bridge,

and any adjacent marine waters and sediments and shoreline areas which are the subject of the United States Environmental Protection Agency's current Remedial Investigation and Feasibility Study, including at least Areas 1, 2 and 3 as defined in 105 CMR 260.005.

I. "Restore" or "Restoration" means any actions undertaken by the Trustees pursuant to CERCLA Section 107(f)(1), as amended, 42 U.S.C. § 9601(f)(1), including planning, implementation, administration and oversight, which serve to restore, replace, acquire the equivalent or provide substitutes for natural resources or natural resource services injured, destroyed or lost as a result of the release of hazardous substances into the New Bedford Harbor Environment.

J. "Natural resource damage recovery(ies)" means any award, judgment, settlement or other payment to the Governments which is received or controlled by either or both of the Governments for or as a result of claims for natural resource damages in the matter of U.S. v. AVX, except any such award which the Governments agree is judgment, settlement, or payment in reimbursement of natural resource damage assessment costs incurred by either Government.

K. "Joint use" means use of natural resource damage recoveries by the Governments, whether separately or collectively, in such a manner as is agreed upon by the Trustees in accordance with the terms of this MOA.

### III

#### AUTHORITY

This MOA is entered into by the Governments pursuant to the natural resource trustee provisions of Section 9607(f) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), as amended, 42 U.S.C. §9607(f); Subpart G of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. §§300.600 - 300.615 (55 Federal Register 8666, 8857), and other applicable law.

### IV

#### PURPOSE

The Governments recognize the importance of coordinating their efforts in order to meet effectively and efficiently their respective natural resource trustee responsibilities under CERCLA with respect to the New Bedford Harbor Environment. The purpose of this MOA is to provide a framework for (1) the coordination and cooperation between the Governments; (2) the planning and implementation of activities the Governments will undertake to determine natural resource restoration costs and to restore the natural resources of the New Bedford Harbor Environment consistent with the requirements of CERCLA and the objectives set forth in Section V of this MOA; and (3) the joint use by the Governments of any natural resource damage recoveries in the matter of U. S. v. AVX.

V

OBJECTIVES

The Governments agree to coordinate their activities under this MOA to achieve the following objectives:

A. The development and implementation of a plan for the restoration of the natural resources of the New Bedford Harbor Environment which have been injured, destroyed or lost by the release of hazardous substances from the Facilities.

B. The determination of the costs and expenses likely to be incurred for restoration of the natural resources of the New Bedford Harbor Environment which have been injured, destroyed or lost by the release of hazardous substances from the Facilities.

C. The assessment, as appropriate, of restoration costs and any other damages for injury, destruction or loss of natural resources of the New Bedford Harbor Environment resulting from the release of hazardous substances from the Facilities.

D. The joint use of any natural resource damage recoveries on projects that the Trustees agree are designed to restore the natural resources of the New Bedford Harbor Environment to the maximum extent practicable, or otherwise are reasonably necessary to carry out the purposes of this MOA.

E. The coordination of activities under this MOA with the ongoing remedial actions being undertaken by the United States Environmental Protection Agency at the New Bedford Harbor National Priorities List (NPL) Site.

F. The coordination of efforts to assist the United States Department of Justice and the Massachusetts Department of the Attorney General in the matter of U.S. v. AVX for the recovery of natural resource damages.

## VI

### JOINT USE OF NATURAL RESOURCE DAMAGE RECOVERIES

A. State and Federal Trusteeships. The Governments recognize that each of them has trusteeship, through their respective natural resource Trustees, under CERCLA over natural resources in the New Bedford Harbor Environment and that the scopes of their respective trusteeships overlap.

B. Joint Use of Natural Resource Damage Recoveries. The Governments agree that any natural resource damage recoveries, as defined in this MOA, obtained or received by the Governments in the matter of U.S. v. AVX, and any interest earned thereon, shall be jointly used to restore natural resources which have been injured, destroyed or lost as a result of the release of hazardous substances into the New Bedford Harbor Environment.

C. Registry Account. The Governments agree that any natural resource damage recoveries in the matter of U.S. v. AVX, will be held in an interest bearing account administered by the Registry of Court of the United States District Court for the District of Massachusetts in accordance with Rule 67 of the Federal Rules of Civil Procedure and Local Rule 67.2(c) of the Local Rules for the United States District Court for the District

of Massachusetts (hereinafter "Registry Account"). The Registry Account shall be established for the purpose of holding natural resource damage recoveries in the matter of U.S. v. AVX. Disbursements from the Registry Account to carry out the purposes of this MOA shall be made by the Clerk of the Court only upon joint application to the Court by the Governments, on behalf of the Trustees, in accordance with Local Rule 67.3 of the Local Rules for the U.S. District Court for the District of Massachusetts. If an individual Trustee is designated to carry out a project or task under this MOA monies allocated for that project or task may be disbursed from the Registry Account to a specific account or repository available to that Trustee. This may include placement of monies into the Commonwealth's "Boston and Lynn Harbors and Massachusetts, Buzzards and Cape Cod Bays Environmental Trust Fund" or to NOAA's "Damage Assessment and Restoration Revolving Fund" or to similar accounts established or available to the State or Federal Trustees.

D. Divided Recoveries. If holding and disbursement of any natural resource damage recoveries by the Registry Account must terminate, or if either Government withdraws from this MOA as allowed under Paragraph B of Section XI of this MOA, or if this MOA is declared invalid by a Court of competent jurisdiction, disposition of any unobligated natural resource damage recoveries and any interest earned thereon in the Registry Account shall be determined by further agreement of the Governments or, if an agreement cannot be reached, by allocation of such recoveries and

interest by the United States District Court for the District of Massachusetts, in accordance with applicable law. In making a fair and reasonable allocation of these monies between the Governments, the Governments agree that the Court primarily should consider the need to achieve, to the maximum extent practicable, the objectives of this MOA and of Section 107(f)(1) of CERCLA, 42 U.S.C. §9607(f)(1), to restore the injured, destroyed or lost natural resources of the New Bedford Harbor Environment.

**E. Coordination After Division.** In the event a division of natural resource damage recoveries is made under Paragraph D of this Section, the Governments expressly agree that they will continue to coordinate their activities to the greatest extent practicable to restore the natural resources of the New Bedford Harbor Environment, and that they will be guided by the objectives set forth in Section V of this MOA.

## VII

### NEW BEDFORD HARBOR ENVIRONMENT TRUSTEE COUNCIL

**A. Composition.** There shall be created, within ten (10) days of the execution of this MOA, or as soon as practicable thereafter, a New Bedford Harbor Environment Trustee Council (hereinafter the "Trustee Council") consisting of three members. Each Federal Trustee and the one State Trustee shall designate one permanent representative to the Trustee Council (hereinafter referred to as the "Representative(s)"). Each Trustee shall also designate an alternate representative to serve in the absence of

the designated Representative. In addition, each Trustee may designate up to two (2) ex-officio (non-voting) members to the Trustee Council from their respective State or Federal agencies or sub-divisions. The U.S. Department of Justice and the Massachusetts Department of the Attorney General may each designate one ex-officio (non-voting) advisor to the Trustee Council. The Trustee Council may invite up to three (3) individuals from the public or non-government environmental organizations to serve as ex-officio (non-voting) members to the Trustee Council.

B. Decisionmaking and Dispute Resolution. Any action taken by the Trustee Council must be approved by the unanimous consent of all of the three Trustee Representatives on the Trustee Council or their respective alternates. If any matter does not achieve the unanimous consent of all three Trustee Representatives, the representatives initially shall attempt to achieve agreement through discussion and negotiation. In the event agreement cannot be reached, the matter may be presented by the Representatives to the ex-officio members of the Trustee Council for advice or a recommended decision. Such recommended decision, if made, is advisory only and shall not bind any Trustee. If unanimous consent still cannot be reached after consultation with the ex-officio members of the Trustee Council,

the Representatives shall elevate the matter to the Trustees for decision or further instruction. The Trustees may establish or agree upon other mechanisms, consistent with the provisions of this MOA, by which disputes may be resolved.

C. Duties and Authority. The Trustee Council shall coordinate and authorize all Trustee activities and matters under this MOA. The Trustee Council's duties and authority, subject to review and direction by the Trustees, shall include, but not be limited to, the following:

1. The Trustee Council shall have the authority to make all decisions and to take any actions that are reasonably necessary to carry out the purposes of this MOA.
2. The Trustee Council shall have authority to make all decisions relating to restoration activities or the use of any natural resource damage recoveries, and any interest earned thereon, for restoration activities, including but not limited to the payment of reasonable and necessary costs for each Trustee's participation in the Trustee Council process and for the planning, implementation, administration and oversight of any activities that the Trustee Council determines are reasonably necessary to carry out the purposes of this MOA; provided that no money may be expended for any purpose without first obtaining the unanimous consent of the Trustee Council.

3. The Trustee Council shall have the duty to provide for reasonable public notice and comment, in accordance with applicable law, for all restoration projects under this MOA.

D. Administrative Trustee. The Trustee Council shall designate an Administrative Trustee. The responsibilities of the Administrative Trustee may include:

1. coordination and monitoring of the natural resource restoration process, and monitoring of the EPA remedial action process;
2. scheduling of meetings of the Trustee Council and the Technical Advisory Committee (provided for under Section VIII of this MOA) and preparation of agendas for those meetings and the recording of all actions taken at such meetings;
3. acting as a central contact for the Trustee Council and the Technical Advisory Committee;
4. maintenance of all records and relevant documents received or generated by the Trustee Council or the Technical Advisory Committee;
5. contracting with consultants to provide such technical services to the Trustee Council as the Technical Advisory Committee may advise or as the Trustee Council determines are necessary;
6. preparing and issuing, from time to time, public reports on the work of the Trustee Council;

7. such other duties as are unanimously agreed upon by the Trustee Council.

## VIII

### THE NEW BEDFORD HARBOR ENVIRONMENT TECHNICAL ADVISORY COMMITTEE

A. Composition. The Trustee Council may establish a committee known as the New Bedford Harbor Environment Technical Advisory Committee (hereinafter the "Technical Advisory Committee"). The State Trustee and the Federal Trustees each may designate up to three (3) members from their respective State or Federal agencies or sub-divisions to serve on the Technical Advisory Committee. The Trustee Council may invite up to three (3) individuals from the public or non-government environmental organizations to serve on the Technical Advisory Committee. The Technical Advisory Committee may invite representatives of other public agencies and members of the public to its meetings unless, subject to applicable law, the Trustee Council determines that the subject of the meeting is privileged for purposes of litigation or that public disclosure of the Trustee Council's work would prejudice the effectiveness of the Trustee Council or the Technical Advisory Committee.

B. Duties. At the request of the Trustee Council, the Technical Advisory Committee may review and provide technical comment to the Trustee Council on proposals for natural resource restoration. If requested, the Technical Advisory Committee may also review and comment upon work that is in progress or that has been completed under contract for the Trustee Council to ensure its compliance with such contract.

## IX

### TECHNICAL SERVICES

A. The Trustee Council may determine that it needs technical advisors, consultants or other service providers to assist it in carrying out its responsibilities under this MOA. The Trustee Council may expend natural resource damage recoveries for service providers to perform the following services:

1. provide project design and technology review, site analysis, restoration planning or services, testing, sampling, and other services related to the development or implementation of a restoration plan for the New Bedford Harbor Environment;
2. provide the Trustee Council with logistical support and coordination;
3. organize and prepare for Trustee Council meetings;
4. provide technical advice to the Trustee Council during Trustee Council meetings;
5. provide technical or other advice to the Trustee

Council and the Technical Advisory Committee as required to carry out the purposes of this MOA;

6. provide such other services, consistent with applicable law, as requested by the Trustee Council.

B. To obtain technical services, the Trustee Council may direct the Administrative Trustee to enter into one or more contracts with professional consultants, advisors, or other service providers that the Trustee Council determines are qualified to provide services to the Trustee Council.

## X

### AMENDMENT

A. This MOA may be amended by agreement of the Governments if it is determined that an amendment is necessary to accomplish the objectives of this MOA, or is necessary to modify the objectives of this MOA consistent with the requirements of CERCLA, any amendments thereto, or other applicable Federal or State law.

B. Any amendment of this MOA shall only be effective if it is in writing, executed by the parties to this MOA.

## XI

### TERMINATION

A. This MOA shall be in effect from the day of execution until the Trustee Council determines that the restoration plan or plans implemented under this MOA have been completed, except that this MOA may be extended by written agreement, as provided in Section X of this MOA.

B. Either Government may withdraw from this MOA, but only after efforts have been made to resolve any dispute in accordance with paragraph B of Section VII of this MOA. Such withdrawal shall only be effective upon written notice between the Assistant Attorney General for Environment and Natural Resources, U.S. Department of Justice and the Chief, Environmental Protection Division, Department of the Attorney General for the Commonwealth of Massachusetts. In the event either Government withdraws from this MOA, any unobligated natural resource damage recoveries in the Registry Account shall be divided between the Governments pursuant to Paragraph D of Section VI of this MOA.

## XII

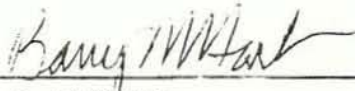
### GENERAL

Nothing in this MOA shall be construed as obligating the United States or the Commonwealth, their officers, agents or employees, to expend any funds in excess of appropriations or other amounts authorized by law.

The Governments, through their designated representatives, have signed this MOA on the day and year appearing opposite their signatures.

[Memorandum of Agreement Concerning Natural Resource Damages in the Matter of United States, et al., V. AVX Corporation, et al., Civil Action No. 83-3882-Y (D. Mass.) Between the United States of America and the Commonwealth of Massachusetts]

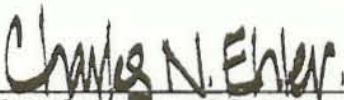
FOR THE UNITED STATES OF AMERICA

  
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BARRY M. HARTMAN  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

7/16/1991


THE FEDERAL NATURAL RESOURCE TRUSTEES

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
NATURAL RESOURCE TRUSTEE  
AUTHORIZED OFFICIAL

  
\_\_\_\_\_  
Charles N. Ehler  
Director, Office of Oceanography and  
Marine Assessment

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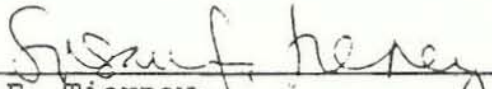
FOR THE DEPARTMENT OF THE INTERIOR


  
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Jonathan P. Deason  
Director, Office of Environmental Affairs  
Office of the Secretary

5/3/1991

[Memorandum of Agreement Concerning Natural Resource Damages in the Matter of United States, et al., V. AVX Corporation, et al., Civil Action No. 83-3882-Y (D. Mass.) Between the United States of America and the Commonwealth of Massachusetts]

FOR THE COMMONWEALTH OF MASSACHUSETTS

 4/23/1991  
Susan F. Tierney  
Massachusetts Secretary of Environmental Affairs  
State Trustee for Natural Resources

 5/10/1991  
Matthew T. Brock  
Special Assistant to the Chief  
Public Protection Bureau  
Department of the Attorney General