

DECLARATION of COVENANTS and RESTRICTIONS

THIS DECLARATION of Covenants and Restrictions is made as of the ____ day of _____, 2009, by the New York City Parks Department ("NYC Parks"), a municipal department of New York City existing under the laws of the State of New York and having an office at _____, New York, New York _____.

WITNESSETH

WHEREAS, NYC Parks is the owner of approximately 89.3 acres of real property in Bronx, New York, known as the Pelham Bay Landfill which is listed in the Registry of Inactive Hazardous Waste Disposal Waste Sites in New York State as Site # 230001 (the "Site" or the "Controlled Property") and is more particularly bounded and described in Appendix A annexed hereto and made a part hereof;

WHEREAS, the City of New York entered into New York State Department of Environmental Conservation ("DEC") Order on Consent, dated April 17, 1990, Index #2-03-001, EDDS # W2-0255-89-02, for the implementation of a remedial program at the Site (the "Order");

WHEREAS, the DEC issued a Record of Decision ("ROD") for the Site on August 31, 1993 which sets forth the selected remedy for the Site and requires that the Site be subject to engineering and institutional controls and restrictive covenants so that the selected remedy be protective of human health and the environment;

WHEREAS, on March 9, 2009, the DEC approved the Site Management Plan dated April 28, 2008, prepared by Arcadis on behalf of the New York City Department of Environmental Protection ("DEP") (said Site Management Plan, as the same may be amended and approved by the Relevant Agency, as defined below, the "Site Management Plan" or the "SMP") and

WHEREAS, this Declaration of Covenants and Restrictions sets forth those required engineering and institutional controls and restrictive covenants and is made pursuant to ROD which was implemented under the Order.

NOW, THEREFORE, NYC Parks, for itself and its successors and assigns, covenants and agrees as follows:

1. The Controlled Property is hereby made subject to this Declaration of Covenants and Restrictions.
2. This Declaration of Covenants and Restrictions is and shall be deemed a covenant that shall run with the land and shall be binding upon NYC Parks and its successors and assigns. This Declaration of Covenants and Restrictions and the engineering and institutional controls listed below and contained within the Site Management Plan are enforceable in law or equity against any owner of the Controlled Property, any lessee and any person using the Controlled Property. The NYC Parks, its successors and assigns consent to the enforcement of the restrictive covenants set forth herein by the DEC or, if the DEC shall no longer exist or no longer

have jurisdiction with respect to the enforcement, any New York State (the “State”) agency or agencies whose purpose shall be to protect the environment of the State and the health of the State’s citizens (the “Relevant Agency”) and hereby covenant not to contest the authority of the Relevant Agency to seek such enforcement.

3. The Controlled Property may be used for commercial use, as defined in Title 6 of the Codes Rules and Regulations of the State of New York (“6 NYCRR”) Section 375-1.8(g)(2)(iii), provided that the long-term engineering controls are employed and the institutional controls (land use restrictions) are in effect.

4. The Controlled Property may not be used for a less restrictive use than commercial, i.e., restricted-residential, residential or unrestricted (as such terms are defined in 6 NYCRR Section 375-1.8(g)(1) and (2)), without the written approval of the DEC or Relevant Agency authorizing an amendment or termination of this Declaration of Covenants and Restrictions.

5. Engineering Controls

a. All engineering controls must be operated and maintained as specified in the SMP;

b. All engineering controls on the Controlled Property must be inspected and certified at a frequency and in a manner defined in the SMP;

c. Groundwater and other environmental or public health monitoring must be performed as defined in the SMP;

d. Data and information pertinent to site management for the controlled property must be reported at a frequency and in a manner defined in the SMP;

e. On-site environmental monitoring devices, including but not limited to groundwater monitoring wells must be protected and replaced as necessary to ensure continued functioning in the manner specified in the SMP;

f. Compliance with this Declaration of Covenants and Restrictions by NYC Parks and its successors and adherence to all elements of the SMP is required;

g. The actively vented Part 360 cover system consisting of a vegetated topsoil layer, a barrier protection layer, a drainage layer, geomembrane layer and gas collection layer must be inspected, certified and maintained as required in the SMP;

h. The gas collection and recovery system which includes a flare system must be inspected, certified and maintained as required in the SMP;

i. The leachate management system must be inspected, certified and maintained as required in the SMP;

j. The groundwater management system which consists of a slurry wall and

upgradient collector trench along the southwestern edge of the site must be inspected, certified and maintained as required in the SMP;

k. Fencing to limit site access and use must be inspected, certified and maintained as required in the SMP; and

l. Engineering controls may not be discontinued without the written approval of the DEC or Relevant Agency authorizing an amendment or extinguishment of the Declaration of Covenants and Restrictions.

6. Institutional Controls

a. All future activities on the Controlled Property that could damage or compromise the integrity of the remedy or engineering controls are prohibited;

b. Use of the groundwater underlying the Controlled Property is prohibited without treatment rendering it safe for the intended use. Approval by the New York State Department of Health ("NYSDOH") must be obtained prior to such intended use; and

c. NYC Parks and its successors and assigns must submit to the DEC and NYSDOH a periodic report which is a written statement certified by a Professional Engineer (licensed in New York State), under penalty of perjury, that: (A) controls employed at the site are unchanged from the previous certification or that any changes to the controls were approved by the DEC and NYSDOH; and, (B) nothing has occurred that impairs the ability of the controls to protect public health and environment or that constitute a violation or failure to comply with the SMP.

7. Any deed conveying all or a portion of the Controlled Property shall recite that the said conveyance is subject to this Declaration of Covenants and Restrictions.

8. NYC Parks and subsequent owners shall provide all persons who acquire any interest in the Controlled Property a true and complete copy of the DEC-approved Site Management Plan and all DEC-approved amendments to SMP.

9. NYC Parks, for its self, its successors and assigns and subsequent owners, grants to the DEC its agents, employees, or other representatives of the State an irrevocable right to enter and inspect the Controlled Property in a reasonable manner and at reasonable times to assure compliance with this Declaration of Covenants and Restrictions and the SMP until such time as the DEC or Relevant Agency authorizes the extinguishment of this Declaration of Covenants and Restrictions.

10. NYC Parks shall record this instrument, within thirty (30) days of execution of this instrument by its authorized representative in the office of the recording officer for the county or counties where the Controlled Property is situated in the manner prescribed by Article 9 of the Real Property Law.

11. Enforcement.

- a. This Declaration of Covenants and Restrictions is enforceable in law or equity in perpetuity by the DEC, NYSDOH, or the Relevant Agency against any owner of the Controlled Property, and any ground lessee, or any municipal department of the City of New York or any person allowed use of the Controlled Property. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel, or waiver. It is not a defense in any action to enforce this Declaration of Covenants and Restrictions that: it is not appurtenant to an interest in real property; it is not of a character that has been recognized traditionally at common law; it imposes a negative burden; it imposes affirmative obligations upon the owner of any interest in the burdened property; the benefit does not touch or concern real property; there is no privity of estate or of contract; or it imposes an unreasonable restraint on alienation.
- b. The failure of the Relevant Agency to enforce any of the terms contained herein shall not be deemed a waiver of any such term nor bar its enforcement rights in the event of a subsequent breach of or noncompliance with any of the terms of this Declaration of Covenants and Restrictions.

IN WITNESS WHEREOF, the NYC Parks has executed this instrument as of the day first set forth above.

New York City Parks Department

By: _____

Title: _____

Date: _____

[illegible]

On the ____ day of _____; in the year 20____, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacit(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of Individual Taking
Acknowledgment

Appendix A

Metes and Bounds Description of the Site