

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Implementation of a  
**Voluntary Cleanup Agreement**  
for: **New York Express Dry Cleaners, "Site"** by: **MacArthur Holding B, Inc., "Volunteer"**  
Site #: V-00199-2 Index #: W2-0885-01-05

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**WHEREAS**, the Department is responsible for enforcement of the ECL and the NL and such laws provide the Department authority to enter into this Agreement;

**WHEREAS**, the Department has established a Voluntary Cleanup Program to address the environmental, legal and financial barriers that hinder the redevelopment and reuse of contaminated properties;

**WHEREAS**, Volunteer represents, and the Department relied upon such representations in entering into this Agreement, that Volunteer's involvement with the Site is as follows: The New York Express Dry Cleaners is a dry cleaning establishment in a small shopping mall located at 69-60 188<sup>th</sup> Street, Queens, New York and within the Fresh Meadows Residential Community and Commercial Development ("Fresh Meadows"). Fresh Meadows was originally owned and developed by New York Life and was later purchased by Fresh Meadows Associates ("FMA"). The managing partner of FMA was Harry Helmsley, and subsequent to the death of John S. MacArthur in 1978, the John D. and Catherine T. MacArthur Foundation ("MacArthur Foundation") held a minority interest in the partnership which it obtained by bequest from Mr. MacArthur. In April 1995, the MacArthur Foundation and an affiliate, MacArthur Holding B, Inc., (collectively MacArthur Foundation) acquired the fee interest in the property through an Exchange Agreement whereby the MacArthur Foundation exchanged interests in other properties that had been bequeathed by Mr. MacArthur to Mr. Helmsley for the fee interest in Fresh Meadows. In December, 1997, MacArthur Foundation sold Fresh Meadows to the Fresh Meadows Development, LLC ("LLC") on an "as is" basis pursuant to a contract of sale. On the same date, upon the LLC's instructions, MacArthur Foundation deeded the commercial properties within Fresh Meadows, including New York Express Dry Cleaners to Street Retail, Inc., an affiliate of Federal Realty Investment Trust. Subsequently, Street Retail, Inc., transferred New York Express Dry Cleaners to Federal Realty Investment Trust. Jash, Inc. is the current operator of New York Express Dry Cleaners.

**WHEREAS**, the parties are entering into this Agreement in order to set forth a process through which the Department will approve and the Volunteer will implement activities designed to address in whole or in part environmental contamination at the Site; and

**WHEREAS**, the Department has determined that it is in the public interest to enter into this Agreement as a means to address environmental issues at the Site with private funds while ensuring the protection of human health and the environment;

**NOW, THEREFORE, IN CONSIDERATION OF AND IN EXCHANGE FOR THE MUTUAL COVENANTS AND PROMISES, THE PARTIES AGREE TO THE FOLLOWING:**

**I. Site Specific Definitions**

For purposes of this Agreement, the terms set forth in the Glossary attached to, and made a part of, this Agreement shall have the meanings ascribed to them in that Glossary. In addition, for purposes of this Agreement, the following terms shall have the following meanings:

A. "Contemplated Use": Restricted Commercial, excluding child care, day care and medical care uses.

B. "Existing Contamination": Perchloroethene ("PCE"), trichloroethene ("TCE"), other solvents and petroleum-impacted soil and groundwater as more specifically described in the Phase I Environmental Site Assessment dated July 10, 1997, the Phase II Environmental Site Assessment dated August, 1997, the Report of Underground Storage Tank System Closure dated December 9, 1997 and Work Plan For Removal Action To Address Soil Contamination And Investigate Groundwater Contamination dated August 25, 1998 prepared by Law Environmental Consultants, Inc. for The John D. and Catherine T. MacArthur Foundation and MacArthur Holding B, Inc. "The term also includes contamination identified during the implementation of this Agreement, the nature and extent of which were unknown or insufficiently characterized as of the effective date of this Agreement, but which shall have been fully characterized and addressed to the Department's satisfaction."

C. "Site": A dry cleaning establishment in a small shopping mall located at 69-60 188<sup>th</sup> Street, Queens, Queens County, New York 11365 at latitude 40° 41' 0"N and longitude 73° 47' 0"E. Exhibit "A" of this Agreement is a map of the Site showing its general location.

A detailed metes and bounds description of the Site must be provided by the Volunteer to the Department prior to issuance of the Release and Covenant Not to Sue provided for in Subparagraph II.H. and no later than the submission of the final report for the Remedial Action Work Plan;

D. "Volunteer": MacArthur Holding B, Inc., a Florida not-for-profit corporation, having its principle place of business at 140 S. Dearborn Street, Suite 1100, Chicago, Illinois 60603-5285. For the sole purposes of the Voluntary Cleanup Program, the Volunteer is considered a Potentially Responsible Party Volunteer. As a result of this status, the Volunteer must address off-Site contamination in relevant work plans.

**II. Development, Performance and Reporting of Work Plans**

**A. Work Plan Labels**

The work plans ("Work Plan" or "Work Plans") under this Agreement shall be captioned

as follows:

1. "Investigation Work Plan" if the Work Plan provides for the investigation of the nature and extent of contamination at the Site;
2. "IRM Work Plan" if the Work Plan provides for an interim remedial measure;
3. "Remedial Action Work Plan" if the Work Plan provides for the Site's remediation to cleanup levels sufficient to allow for the Contemplated Use of the Site; or
4. "OM&M Work Plan" if the Work Plan provides for post-remedial construction operation, monitoring and/or maintenance.

B. Submission/Implementation of Work Plans

1. The first proposed Work Plan to be submitted under this Agreement shall be submitted within 40 Days of the effective date of this Agreement. Thereafter, the Volunteer can submit such other and additional work plans it deems appropriate.

2. A proposed Work Plan shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan. A Professional Engineer must prepare, sign, and seal all Work Plans other than an Investigation Work Plan. Upon the Department's written approval of a Work Plan, such Department-approved Work Plan shall be incorporated into and become an enforceable part of this Agreement and shall be implemented in accordance with the schedule contained therein. In the event the Department disapproves a Work Plan, within 20 Days after receiving written notice of such disapproval, Volunteer shall elect in writing to: (i) modify or expand it; (ii) complete any other Department-approved Work Plan(s); (iii) invoke dispute resolution pursuant to Paragraph XIII; or (iv) terminate this Agreement pursuant to Subparagraph XII.A.

3. During all field activities, Volunteer shall have on-Site a representative who is qualified to supervise the activities undertaken. Such representative may be an employee or a consultant retained by Volunteer to perform such supervision.

C. Revisions to Work Plans

If revisions to a Work Plan are required to satisfy the objectives of such Work Plan, the parties will negotiate revisions which shall be attached to and incorporated into the relevant Work Plan and which shall be enforceable under this Agreement. If the parties cannot agree upon revisions to the relevant Work Plan, then unless the Volunteer invokes dispute resolution pursuant to Paragraph XIII, either party may terminate this Agreement pursuant to Subparagraph XII.A.

D. Submission of Final Reports

1. In accordance with the schedule contained in a Work Plan, Volunteer shall submit a final report which includes the caption of that Work Plan on the cover page. The final report pertaining to that Work Plan's implementation shall include but not be limited to: all data generated relative to the Site and all other information obtained as part of the implementation of the subject Work Plan; all of the assessments and evaluations required by the subject Work Plan; a statement of any additional data that must be collected; and "as-built" drawings, to the extent necessary, showing all changes made during construction. Additionally, the final report for an Investigation Work Plan shall contain a certification by the person with primary responsibility for the day to day performance of the activities under this Agreement that those activities were performed in full accordance with the Investigation Work Plan, and all other final reports must contain such certification made by a Professional Engineer with primary responsibility for the day to day performance of the activities under this Agreement.

2. An OM&M Work Plan, if necessary, shall be submitted in accordance with the schedule set forth in the IRM Work Plan or Remedial Action Work Plan.

E. Review of Submittals other than Work Plans

1. The Department shall timely notify Volunteer in writing of its approval or disapproval of each submittal other than a Work Plan. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. If the Department disapproves a submittal covered by this subparagraph, it shall specify the reasons for its disapproval and may request Volunteer to modify or expand the submittal. Within 20 Days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall elect in writing to either (i) modify or expand it; (ii) complete any other Department-approved Work Plan(s); (iii) invoke dispute resolution pursuant to Paragraph XIII; or (iv) terminate this Agreement pursuant to Subparagraph XII.A. If the Volunteer submits a revised submittal and it is disapproved, the Department and Volunteer may pursue whatever remedies may be available under this Agreement or under law.

3. Within 60 Days of the Department's approval of a final report, Volunteer shall submit such additional Work Plans as it proposes to implement. Failure to submit any additional Work Plans within such period shall, unless other Work Plans are under review by the Department or being implemented by the Volunteer, result in the termination of this Agreement pursuant to Subparagraph XII.B.

4. All approved final reports shall be submitted to the Department in an electronic format acceptable to the Department within 30 Days of approval of such final report.

F. Department's Determination of Need for Remediation

The Department will determine upon its approval of each final report dealing with the investigation of the Site whether remediation, or additional remediation as the case may be, is needed to allow the Site to be used for the Contemplated Use.

1. The Department shall timely notify Volunteer if it determines that remediation, or additional remediation, is not needed to allow the Site to be used for the Contemplated Use. If the Department determines that additional remediation is not needed and such determination is based upon use restrictions, Volunteer shall file a Declaration of Covenants and Restrictions in accordance with Paragraph X within 60 Days of receipt of the Department's determination. Upon receipt of a copy of such instrument, the Department will provide Volunteer with the Release described in Subparagraph II.H.

2. If the Department determines that remediation, or additional remediation, is needed to allow the Site to be used for the Contemplated Use, Volunteer may elect to submit for review and approval a proposed Work Plan (or a revision to an existing Remedial Action Work Plan for the Site) which addresses the remediation of Existing Contamination. Such proposed Work Plan shall include, among other requirements, an evaluation of the proposed remedy considering the factors set forth in 6 NYCRR 375-1.10(c)(1) through (c)(6), excluding consideration of cost-effectiveness. At a minimum, the remedial activities contemplated by the proposed Work Plan must eliminate or mitigate all significant threats to the public health and/or the environment and must result in the Site being protective of public health and the environment for the Contemplated Use. The Department will notice a proposed Work Plan addressing the Site's remediation for public comment in accordance with Subparagraph II.G of this Agreement. If Volunteer elects not to develop a Work Plan under this Subparagraph or either party concludes that a mutually acceptable Work Plan under this Subparagraph cannot be negotiated, then this Agreement shall terminate in accordance with Subparagraph XII.A

G. Notice of Proposed Work Plan for the Site's Remediation

Whenever a Work Plan for the Site's remediation (other than an IRM Work Plan) is proposed, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the opportunity to submit comments on the proposed Work Plan within 30 Days after the date of the issue in which the notice appears. The Department shall mail an equivalent notice to the County of Queens. The Department will notify Volunteer following the close of the public comment period whether the proposed Work Plan needs to be revised. If the Department determines that revisions are necessary for the Site conditions to be protective of public health or the environment based upon the Contemplated Use, Volunteer agrees to negotiate revisions to the proposed Work Plan in accordance with Paragraph II.C. If the Department determines that no revisions are required, then the Work Plan shall be attached hereto as Exhibit "B."

#### H. Release and Covenant Not To Sue

Upon the Department's determination that (i) Volunteer is in compliance with the Agreement; (ii) no requirements other than those remedial actions, exclusive of OM&M activities, already conducted at the Site, if any, are necessary to assure that Site conditions are protective of public health and the environment based upon the Contemplated Use; and (iii) Volunteer has complied, if required, with Paragraph X, the Department shall provide Volunteer with the Release and Covenant Not to Sue attached hereto as Exhibit "C," subject to the terms and conditions stated therein.

#### I. Submission of Annual Reports, if required

If institutional or engineering controls are relied upon as part of the remedy implemented under this Agreement, Volunteer shall cause the filing of an annual report by January 15<sup>th</sup> until the Department notifies Volunteer in writing that the remedial process is concluded. Such annual report shall be signed by a Professional Engineer and shall contain a certification that the institutional and engineering controls put in place pursuant to this Agreement are still in place, have not been altered and are still effective.

#### III. Progress Reports

Volunteer shall submit a written progress reports of its actions under this Agreement to the parties identified in Subparagraph XI.A.1 by the 10<sup>th</sup> day of each month commencing with the month subsequent to the approval of the first Work Plan and ending with the Termination Date, unless a different frequency is set forth in a Work Plan. Such reports shall, at a minimum, include: all actions relative to the Site during the previous reporting period and those anticipated for the next reporting period; all approved activity modifications (changes of work scope and/or schedule); all results of sampling and tests and all other data received or generated by or on behalf of Volunteer in connection with this Site, whether under this Agreement or otherwise, in the previous reporting period, including quality assurance/quality control information; information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule, efforts made to mitigate such delays, and information regarding activities undertaken in support of the Citizen Participation Plan during the previous reporting period and those anticipated for the next reporting period.

#### IV. Enforcement

This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York. Volunteer shall not suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement as a result of a Force Majeure Event provided it notifies the Department in writing within 10 business days of when it obtains knowledge of any such event. Volunteer shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance

of the evidence that an event qualifies as a defense to compliance pursuant to this Paragraph.

V. Entry upon Site

A. Volunteer hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer, by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to the matters addressed in a Department-approved Work Plan, and by any agent, consultant, contractor or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site, for (i) inspecting, sampling, and copying records related to the contamination at the Site; (ii) implementing the activities under this Agreement; and (iii) testing and any other activities necessary to ensure Volunteer's compliance with this Agreement. Volunteer shall provide the Department with suitable office space at the Site, including access to a telephone, to the extent same are available. Upon request, Volunteer shall permit the Department full access to all non-privileged records relating to matters addressed by this Agreement. Raw data is not considered privileged and that portion of any privileged document containing raw data must be provided to the Department.

B. The Department shall have the right to take its own samples and scientific measurements and the Department and Volunteer shall have the right to obtain samples, duplicate samples, or both, of all substances and materials sampled. The Department shall make the results of all sampling and scientific measurements taken under this Subparagraph available to Respondent.

VI. Payment of State Costs

A. Within 45 Days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement for the State Costs for work performed at or in connection with the Site prior to the effective date of this Agreement as well as for negotiating this Agreement and all costs associated with this Agreement, through and including the Termination Date.

B. Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (*e.g.*, supplies, materials, travel, contractual) and shall be documented by expenditure reports. The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.

C. Such invoice shall be sent to the Volunteer at the following address:

Michael Curtis  
MacArthur Holding B, Inc.  
140 S. Dearborn Street, Suite 1100  
Chicago, Illinois 60603-5285

D. Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to: Bureau of Program Management, Division of Environmental Remediation, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7010.

E. Each party shall provide written notification to the other within 90 Days of any change in the foregoing addresses.

F. Volunteer may contest, in writing, invoiced costs under Subparagraph VI.A if it believes (i) the cost documentation contains clerical, mathematical, or accounting errors; (ii) the costs are not related to the State's activities reimbursable under this Agreement; or (iii) the Department is not otherwise legally entitled to such costs. If Volunteer objects to an invoiced cost, Volunteer shall pay all costs not objected to within the time frame set forth in Subparagraph VI.A and shall, within 30 Days of receipt of an invoice, identify in writing all costs objected to and identify the basis of the objection. This objection shall be filed with the Division of Environmental Remediation's Director of the Bureau of Program Management. The Director or the Director's designee shall have the authority to relieve Volunteer of the obligation to pay invalid costs. Within 45 Days of the Department's determination of the objection, Volunteer shall pay to the Department the amount which the Director or the Director's designee determines Volunteer is obligated to pay or commence an action or proceeding seeking appropriate judicial relief.

G. In the event any instrument for the payment of any money due under this Agreement fails of collection, such failure of collection shall constitute a violation of this Agreement, provided (i) the Department gives Respondent written notice of such failure of collection, and (ii) the Department does not receive from Volunteer a certified check or bank check within 14 Days after the date of the department's written notification.

## VII. Reservation of Rights

A. 1. Except as provided in the Release and Covenant Not to Sue (Exhibit "C") after its issuance and except as provided in Subparagraphs VII.A.2, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to, the right to recover natural resource damages, the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any party, including Volunteer.



2. Except for the Department's right to take any investigatory or remedial action deemed necessary as a result of a significant threat resulting from the Existing Contamination or to exercise summary abatement, the Department shall not take any enforcement action under ECL Article 27, Title 13, under CERCLA, under the NL, or under comparable statutory or common law theories of remedial liability with respect to the Existing Contamination, to the extent that such contamination is being addressed under the Agreement, against Volunteer or Volunteer's grantees, successors or assigns during the implementation of this Agreement, provided such party is in compliance with the terms and provisions of this Agreement, including, without limitation, the requirements of all Work Plans and amendments thereto.

B. Except as otherwise provided in this Agreement, Volunteer specifically reserves all rights and defenses under applicable law to contest, defend against, dispute or disprove any actions, proceedings, allegations, assertions, determination or order of the Department, including any assertion of remedial liability by the Department against Volunteer, and further reserves all rights including the rights to notice, to be heard, to appeal, and to any other due process respecting any action or proceeding by the Department, including the enforcement of this Agreement. The existence of this Agreement or Volunteer's compliance with it shall not be construed as an admission of liability, fault, wrongdoing or violation of law by Volunteer, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

C. Except as provided in Subparagraph XIV.L, Volunteer reserves such rights as it may have to seek and obtain contribution, indemnification and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers, for past or future response and/or cleanup costs or such other costs or damages arising from contamination at the Site as provided under applicable law.

#### VIII. Indemnification

Volunteer shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement prior to the Termination Date except for liability arising from willful, wanton or malicious acts or acts constituting gross negligence by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement. The Department shall send the Volunteer a written notice pursuant to Paragraph XI of its intention to exercise its rights prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

#### IX. Public Notice

A. Within 30 Days after the effective date of this Agreement, Volunteer shall cause to be filed a Department-approved Notice of Agreement, which Notice shall be substantially similar to the Notice of Agreement attached to this Agreement as Exhibit "D," with the County

XI. Communications

A. All written communications required by this Agreement shall be transmitted by United States Postal Service, by private courier service, or hand delivered.

1. Communication from Volunteer shall be sent to:

Shaminder Singh  
Technical Project Manager  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
1 Hunters Point Plaza  
Long Island City, New York 11101

Note: four copies (one unbound) of work plans are required to be sent.

Kevin Carpenter  
Central Office VCP Coordinator  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
625 Broadway  
Albany, New York 12233-7015

Gary A. Litwin  
Director  
Bureau of Environmental Exposure Investigation  
New York State Department of Health  
Flanigan Square  
547 River Street  
Troy, New York 12180-2216

Note: two copies of work plans are required to be sent, and

Denise J. D'Ambrosio  
Assistant Counsel  
Division of Environmental Enforcement  
New York State Department of Environmental Conservation  
200 White Plains Road - 5<sup>th</sup> Floor  
Tarrytown, New York 10591-5805

2. Communication from the Department to Volunteer shall be sent to:

Michael Curtis  
MacArthur Holding B. Inc.  
140 S. Dearborn Street, Suite 1100  
Chicago, Illinois 60603-5285

James F. Warchall, Esq.  
Sidley Austin Brown & Wood LLP  
One First National Plaza  
Chicago, Illinois 60603

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other.

C. Each party shall notify the other within 90 Days after any change in the addresses listed in this Paragraph XI or in Paragraph VI.

## XII. Termination of Agreement

A. 1. Volunteer may elect in writing to terminate this Agreement without cause while the Department may only elect to terminate this Agreement for cause, which shall be established so long as the Department's stated reason is not arbitrary and capricious. The Department shall include in its notice of termination the basis for its election to terminate this Agreement.

2. In the event of either party's election to terminate this Agreement, this Agreement shall terminate effective the 5th Day after the non-terminating party's receipt of the written notification terminating this Agreement, except that such termination shall not affect the provisions contained in Paragraphs IV, VI and VIII and in Subparagraph XIV.L, nor Volunteer's obligation to ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any activities were commenced under this Agreement, which provisions and obligation shall survive the termination of this Agreement.

B. Notwithstanding Subparagraph XII.A, this Agreement shall terminate without notice in the event that the Volunteer fails to submit additional Work Plans in accordance with Subparagraph II.E, unless other Work Plans are under review by the Department or being implemented by the Volunteer.

## XIII. Dispute Resolution

A. If Volunteer disagrees with the Department's notice of disapproval of a submittal or a proposed Work Plan, disapproval of a final report, nullification of this Agreement pursuant to Subparagraph XIV.A.2, or rejection of Volunteer's assertion of a Force Majeure Event, Volunteer shall, within 30 Days of receipt of such notice, request in writing informal negotiations with the Department in an effort to resolve the dispute. A copy of such request shall be sent by Volunteer to the appropriate Remedial Bureau Chief in the Department's Central Office. The Department and Volunteer shall consult together in good faith and exercise best efforts to resolve any differences or disputes without resort to the procedures described in

Volunteer's request for informal negotiations. If the parties cannot resolve a dispute by informal negotiations during this period, the Department's position shall be considered binding unless Volunteer notifies the Department in writing within 30 Days after the conclusion of the 30 Day period for informal negotiations that it invokes the dispute resolution provisions provided under Subparagraph XIII.B.

B. 1. Volunteer shall serve upon the ADD a request for formal dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Volunteer relies (hereinafter called the "Statement of Position"). A copy of such request and written statement shall be provided to the parties listed under Subparagraph XI.A.

2. The Department shall serve its Statement of Position no later than 20 Days after receipt of Volunteer's Statement of Position.

3. Volunteer shall have the burden of proving by a preponderance of the evidence that the Department's position is not in accordance with law or otherwise should not prevail. The ADD can conduct meetings, in person or via telephone conferences, and request additional information from either party if such activities will facilitate a resolution of the issues.

4. The ADD will issue a final decision resolving the dispute in a timely manner. The final decision shall constitute a final agency action and Volunteer shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR provided that Volunteer commences such proceeding within 45 Days after receipt of a copy of the decision. Volunteer shall be in violation of this Agreement if it fails to comply with the final decision resolving this dispute within 45 Days after the date of such final decision, or such other time period as may be provided in the final decision, unless it seeks judicial review of such decision within the 45 Day period provided. In the event that Volunteer seeks judicial review, Volunteer shall be in violation of this Agreement if it fails to comply with the final order or settlement within 30 Days after its effective date, unless otherwise directed by the Court. For purposes of this Subparagraph, a determination shall not be final until the time to perfect an appeal of that determination has expired.

5. The invocation of dispute resolution shall not extend, postpone or modify Volunteer's obligations under this Agreement with respect to any item not in dispute unless or until the Department agrees or a court determines otherwise.

6. The Department shall keep an administrative record which shall be available consistent with Article 6 of the Public Officers Law.

#### XIV. Miscellaneous

A. 1. Volunteer hereby certifies that all information known to Volunteer and all

information in the possession or control of Volunteer and its agents which relates in any way to the contamination existing at the Site on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site, and to its application for this Agreement, has been fully and accurately disclosed to the Department in conjunction with the Volunteer's application for the Voluntary Cleanup Program.

2. If the information provided and certifications made by Volunteer are not materially accurate and complete, this Agreement, except with respect to the provisions of Paragraphs IV, VI and VIII and Subparagraph XIV.O, at the sole discretion of the Department, shall be null and void *ab initio* 15 Days after the Department's notification of such inaccuracy or incompleteness and the Department shall reserve all rights that it may have, unless, however, Volunteer submits information within that 15 Day time period indicating that the information provided and the certifications made were materially accurate and complete.

B. Volunteer shall allow the Department to attend, and shall notify the Department at least 7 Working Days in advance of, any field activities to be conducted pursuant to this Agreement, as well as any pre-bid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

C. Volunteer shall use "best efforts" to obtain all Site access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls, or authorizations necessary to perform Volunteer's obligations under this Agreement, except that the Department may exempt Volunteer from the requirement to obtain any permit issued by the Department for any activity that is conducted on the Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit. If, despite Volunteer's best efforts, any access, permits, easements, rights-of-way, rights-of-entry, approvals, institutional controls, or authorizations required to perform this Agreement are not obtained within 45 Days after the effective date of this Agreement or within 45 Days after the date the Department notifies Volunteer in writing that additional access beyond that previously secured is necessary, Volunteer shall promptly notify the Department, and shall include in that notification a summary of the steps Volunteer has taken to obtain access. The Department may, as it deems appropriate and within its authority, assist Volunteer in obtaining access. If an interest in property is needed to implement an institutional control required by a Work Plan and such interest cannot be obtained, the Department may require that Volunteer modify the Work Plan pursuant to Subparagraph II.C of this Agreement.

D. Volunteer shall not be considered an operator of the Site solely by virtue of having executed and/or implemented this Agreement.

E. Volunteer shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and shall condition all contracts entered into to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteer or its contractor(s) shall provide written notice of this Agreement to all subcontractors hired to perform any portion of the work required by this Agreement. Volunteer shall nonetheless be responsible for ensuring that Volunteer's contractors and subcontractors perform the work in satisfaction of the requirements of this Agreement.

F. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any provisions of this Agreement.

G. 1. The terms of this Agreement shall constitute the complete and entire agreement between the Department and Volunteer concerning the implementation of the Work Plan(s) attached to this Agreement. No term, condition, understanding or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement. In the event of a conflict between the terms of this Agreement and any Work Plan submitted pursuant to this Agreement, the terms of this Agreement shall control over the terms of the Work Plan(s) attached as Exhibit "B." Volunteer consents to and agrees not to contest the authority and jurisdiction of the Department to enter into or enforce this Agreement.

2. i. Except as set forth herein, if Volunteer desires that any provision of this Agreement be changed, other than a provision of a Work Plan or a time frame, Volunteer shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph XI.A.1. The Commissioner or the Commissioner's designee shall timely respond.

ii. Changes to the Work Plan shall be accomplished as set forth in Subparagraph II.C of this Agreement.

iii. Changes to a time frame set forth in this Agreement shall be accomplished by a written request to the Department's project attorney and project manager, which request shall be timely responded to in writing. The Department's decision relative to a request for a time frame change shall be subject to dispute resolution pursuant to Paragraph XII.

H. 1. If there are multiple parties signing this Agreement, the term "Volunteer" shall be read in the plural where required to give meaning to this Agreement. Further, the obligations of the Volunteers under this Agreement are joint and several and the "bankruptcy" or failure by any Volunteer to implement the obligations under this Agreement shall not affect the obligations of the remaining Volunteer(s) to carry out the obligations under this Agreement.

2. If Volunteer is a partnership, the obligations of all general partners, including limited partners who act as general partners, to finance and perform obligations under this Agreement and to pay amounts owed the Department under this Order are joint and several. In the event of the insolvency or other failure of any one or more of the general partners to implement the requirements of this Agreement, the remaining general partners shall complete all such requirements.

3. Notwithstanding the foregoing Subparagraphs XIV.H. 1 and 2, if multiple

Subparagraph II.F.2, to implement a Work Plan, then all Volunteers are jointly and severally liable for each and every obligation under this Agreement through the completion of activities in such Work Plan that all such parties consented to; thereafter, only those Volunteers electing to perform additional work shall be jointly and severally liable under this Agreement for the obligations and activities under such additional Work Plan(s). The parties electing not to implement the additional Work Plan(s) shall have no obligations under this Agreement relative to the activities set forth in such Work Plan(s). Further, only those Volunteers electing to implement such additional Work Plan(s) shall be eligible to receive the release and covenant not to sue as provided under Subparagraph II.H.

I. Except as provided in Subparagraph XIV.O, and to the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law Section 15-108, and any other applicable law, Volunteer shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2) for "matters addressed" pursuant to and in accordance with this Agreement. "Matters addressed" in this Agreement shall mean all response actions taken to implement this Agreement for the Site and all response costs incurred and to be incurred by any person or party in connection with the work performed under this Agreement, including reimbursement of the State's costs pursuant to this Agreement.

J. Volunteer, Volunteer's grantees, lessees, sublessees, successors, and assigns shall be bound by this Agreement. Any change in ownership of Volunteer including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Volunteer's responsibilities under this Agreement.

K. All activities undertaken by Volunteer pursuant to this Agreement shall be performed in accordance with the requirements of all applicable federal and State laws and regulations.

L. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in ECL Article 27, Title 13 or in regulations promulgated under such statute shall have the meaning assigned to them under said statute or regulations. Whenever terms listed in the Glossary attached hereto are used in this Agreement or in the attached Exhibits, the definitions set forth in the Glossary shall apply. In the event of a conflict, the definition set forth in the Glossary shall control.

M. Volunteer's obligations under this Agreement represent payment for or reimbursement of response costs, and shall not be deemed to constitute any type of fine or penalty.

N. This Agreement may be executed for the convenience of the parties hereto, individually or in combination, in one or more counterparts, each of which shall be deemed to have the status of an executed original and all of which shall together constitute one and the same.

O. Volunteer and Volunteer's employees, servants, agents, lessees, sublessees, grantees, successors, and assigns hereby waive any right to pursue reimbursement of monies expended by Volunteer prior to the Termination Date as against the State or the Spill Fund, and agree to indemnify and hold harmless the Spill Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever with respect to the Site that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the Site.

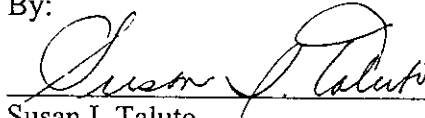
P. The effective date of this Agreement is the 10<sup>th</sup> Day after the date it is signed by the Commissioner or the Commissioner's designee.

DATED:

MAR 8 2002

ERIN M. CROTTY, COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By:

A handwritten signature in cursive script, appearing to read "Susan I. Taluto", written over a horizontal line.

Susan I. Taluto  
Deputy Commissioner  
Water Quality and Environmental Remediation



## CONSENT BY VOLUNTEER

Volunteer hereby consents to the issuing and entering of this Agreement, waives Volunteer's right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

MacArthur Holding B, Inc.


By:

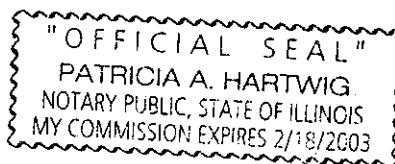
Title: General Counsel

Date: 12/21/01

STATE OF <sup>ILLINOIS</sup> ~~NEW YORK~~ )  
 ) ss:  
COUNTY OF Cook )

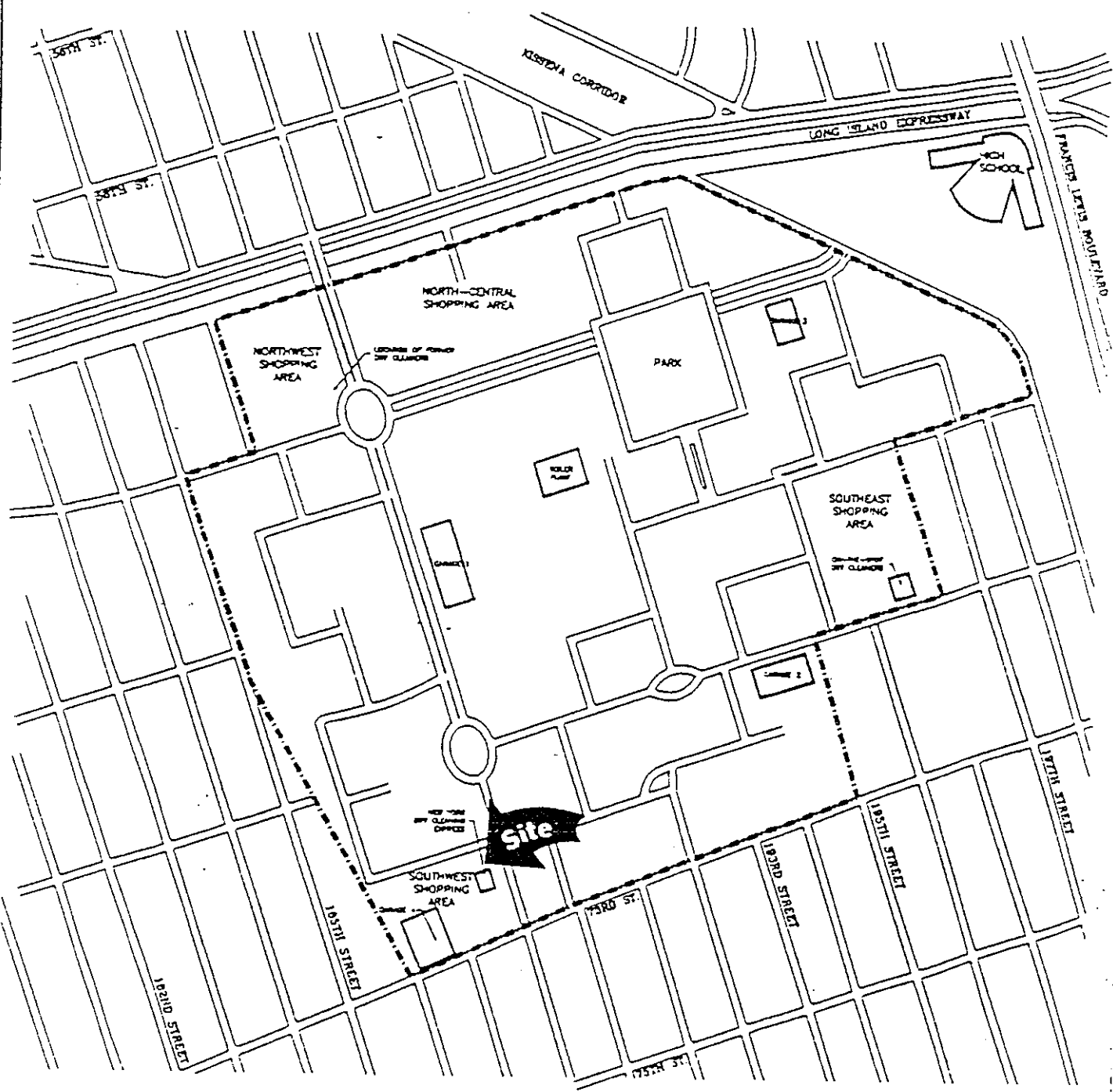
On the 21<sup>st</sup> day of December, in the year 2001, before me, the undersigned, personally appeared Sash M. Ortiz, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(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



**EXHIBIT "A"**

**Map of Site**



REFERENCE. U.S. GEOLOGICAL SURVEY MAP. FIELD NOTES

NOT TO SCALE

FRESH MEADOWS  
QUEENS, NEW YORK



LAW  
ENVIRONMENTAL CONSULTANTS, INC.  
666 FIFTH AVENUE, 24TH FLOOR  
NEW YORK, NEW YORK 10103

Figure 2: Site Plan

PROJECT: 20770-7-7015  
PHASE: 001 TASK: 908  
PREPARED: T.A. 04/03.97  
CHECKED: R.S. 04/03.97

**EXHIBIT "B"**

**Department-Approved Work Plan(s)**

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to Volunteer nor to any of Volunteer's lessees, sublessees, successors, or assigns who cause or allow a release or threat of release at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination; or cause or allow the use of the Site to change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; nor to any of Volunteer's lessees, sublessees, successors, or assigns who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same resulting solely from the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of this release, covenant not to sue, and forbearance shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Covered Contamination.

Notwithstanding any other provision in this release, covenant not to sue, and forbearance,

- if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this letter shall be construed or deemed to preclude the State of New York from recovering such claim.
- except as provided in this letter and in Agreement, nothing contained in the Agreement or in this letter shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights (including, but not limited to, the right to recover natural resources damages) with respect to any party, including Volunteer.
- nothing contained in this letter shall prejudice any rights of the Department to take any investigatory or remedial action it deems necessary if Volunteer fails to comply with the Agreement or if contamination other than Existing Contamination is encountered at the Site.
- nothing contained in this letter shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.
- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement under the terms of the Agreement at any time during its implementation if Volunteer fails to comply substantially with the Agreement's terms and conditions.

In conclusion, the Department is pleased to be part of this effort to return the Site to productive use of benefit to the entire community.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By: \_\_\_\_\_

Date: \_\_\_\_\_

**Appendix "A"**

**(to Exhibit "C")**

**Map of the Site**

**Exhibit "D"**

**NOTICE OF AGREEMENT**

**This Notice** is made as of the \_\_\_\_ day of \_\_\_\_\_, 2001 by \_\_\_\_\_ regarding a parcel of real property located at 69-60 188<sup>th</sup> Street, Queens, Queens County, New York 11365 at latitude 40° 41' 0"N and longitude 73° 47' 0"E (the "Property"); and

**WHEREAS**, (the "Volunteer"), MacArthur Holding B, Inc., a Florida not-for-profit corporation, having its principle place of business 140 S. Dearborn Street, Suite 1100, Chicago, Illinois 60603-5285, Index # W2-0885-01-05 (the "Agreement"), concerning the remediation of contamination present on the Property, which Agreement was signed by the Commissioner of Environmental Conservation on \_\_\_\_\_; and

**WHEREAS**, in return for the remediation of the Property pursuant to the Agreement to the satisfaction of the Department, the Department will provide Volunteer and its lessees and sublessees, grantees, successors and assigns, including their respective secured creditors, with a release, covenant not to sue, and forbearance from bringing any action, proceeding, or suit related to the Site's further investigation or remediation, subject to certain reservations set forth in the Agreement; and

**WHEREAS**, pursuant to the Agreement, Volunteer agreed to cause the filing of a notice of the Agreement with the Queens County Clerk,

**NOW, THEREFORE**, Volunteer, for itself and for its successors and assigns, declares that:

1. This Notice of the Agreement is hereby given to all parties who may acquire any interest in the Property; and
2. This Notice shall terminate upon the filing by Volunteer, or its successors and assigns, of a termination of notice of Agreement after having first received approval to do so from the New York State Department of Environmental Conservation or having terminated the Agreement pursuant to its Paragraph XII.

**IN WITNESS WHEREOF**, Volunteer has executed this Notice of Agreement by its duly authorized representative.

Dated:

By: \_\_\_\_\_

STATE OF NEW YORK

)

) ss:

COUNTY OF

)

On the \_\_\_\_\_ day of \_\_\_\_\_, in the year 2001, 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 capacity(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"**

**(to Exhibit "D")**

**Map of the Property**



with another material.

Fourth, the owner of the Site shall prohibit the Site from ever being used for purposes other than for unrestricted use including residential without the express written waiver of such prohibition by the Relevant Agency.

Fifth, the owner of the Site shall prohibit the use of the groundwater underlying the Site without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the user first obtains permission to do so from the Relevant Agency.

Sixth, the owner of the Site shall continue in full force and effect any institutional and engineering controls required under the Agreement and maintain such controls unless the owner first obtains permission to discontinue such controls from the Relevant Agency.

Seventh, this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of the Site and shall provide that the owner, and its successors and assigns, consent to the enforcement by the Relevant Agency, of the prohibitions and restrictions that Paragraph X of the Agreement requires to be recorded, and hereby covenants not to contest the authority of the Department to seek enforcement.

Eighth, any deed of conveyance including the portion of the Site referred to as the Site shall recite that the said conveyance is subject to this Declaration of Covenants and Restrictions.

IN WITNESS WHEREOF, the undersigned has executed this instrument the day written below.

[acknowledgment]

## **Glossary of Terms**

The following terms shall have the following meanings:

“ADD”: Assistant Division Director, Division of Environmental Remediation

“CERCLA”: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

“Covered Contamination”: the concentrations of Existing Contamination remaining on the Site on the date that the Department issues the Release set forth in Exhibit “C.”

“CPLR”: the Civil Practice Law and Rules, as amended.

“Day”: a calendar day unless expressly stated to be a working day. “Working Day” shall mean a day other than a Saturday, Sunday or State holiday. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday or State holiday, the period shall run until the close of business of the next working day.

“Department”: the New York State Department of Environmental Conservation.

“ECL”: the Environmental Conservation Law, as amended

“Force Majeure Event”: an event which is brought on as a result of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Volunteer’s reasonable control.

“IRM”: an interim remedial measure which is a discrete set of activities which can be undertaken without extensive investigation and evaluation to prevent, mitigate, or remedy environmental damage or the consequences of environmental damage attributable to a Site.

“NL”: the Navigation Law, as amended.

“OM&M”: Operation, monitoring and maintenance.

“Professional Engineer”: an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

“Spill Fund”: the New York State Environmental Protection and Spill Compensation Fund, as amended.

“State Costs”: all the State’s expenses including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating, implementing, and administering this Agreement. Approved agency fringe benefit and indirect cost rates will be applied.

“Termination Date”: the date upon which (i) the Release (Exhibit “C”) is issued or the Department approves the final report relative to the OM&M at the Site, whichever is later; or (ii) the Agreement terminates pursuant to Paragraph XII or is nullified pursuant to Subparagraph XIV.A.2.

“Trustee”: the Trustee of New York State’s natural resources.

“Work Plan”: a Department-approved work plan, as may be modified, pertaining to the Site that Volunteer shall implement and that is attached to this Agreement.