

STATE OF NEW YORK:
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Development and
Implementation of an Environmental Investigation
and Remediation Response Program for the
Brooklyn Navy Yard Industrial Park by

CLEANUP
AGREEMENT

Index No.
02-0001-97-08

The Brooklyn Navy Yard Development Corporation and
The City of New York,

Volunteers.

CONSIDERING,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law of the State of New York ("ECL"). This Agreement is entered into pursuant to the Department's authority under that law.

2. The Brooklyn Navy Yard Development Corporation (the "BNYDC") is a local development corporation pursuant to § 1411 of the New York Not-for-Profit Corporation Law, with its office on Flushing Avenue - Cumberland Street, Brooklyn, New York. The City of New York (the "City") is a municipal corporation organized under the laws of the State of New York and the fee owner of an industrial and commercial park located in the Williamsburgh section of Brooklyn, and more particularly, in the northeastern portion of property formerly held by the U.S. Department of Defense, known as the Brooklyn Navy Yard. The City and BNYDC are hereinafter referred to as the Volunteers.

3. The "Site," which is the subject of this Agreement, consists of 264 acres of the 353 acre industrial park located in the Williamsburgh section of Brooklyn known as the Brooklyn Navy Yard. The Navy Yard, including the Site, is listed as Block 2023, Lot 1 in the tax records of the City of New York. In 1801, the United States Navy purchased the land on which the Navy Yard is located. The U.S. Federal Government sold most of the land in the Navy Yard to the City of New York in 1970. Since 1971, the BNYDC has been the lessee of the City-owned portion of the Navy Yard excluding the Red Hood Water Pollution Control Plant. A copy of the Amended and Restated Lease Agreement between the City of New York, as lessor, and BNYDC, as lessee, dated June 6, 1996, is attached as Exhibit A.

4. The Navy Yard is bounded by the East River, Flushing Avenue to the south, Kent Avenue to the east and Navy Street to the west. Located in the Navy Yard, but not within BNYDC's leasehold, is the 47 acre U.S. Navy Annex site, the 18-acre Red Hook Water Pollution Control Plant, the 5-acre Federal Bureau of Prisons site and the 6-acre U.S. Army Corps of Engineers site. The 13-acre site within the Navy Yard that was the former proposed location for a resource recovery facility is subject to a separate order and, although within the BNYDC leasehold, is not covered by this Agreement. A map of the Navy Yard, including the Site, is attached as Exhibit B.

5. The Department designated the Navy Yard, including the entire Site, as a potential hazardous waste site ("P" site I.D. No. 224019) in March 1994. The Site, and portions thereof, have been subject to several environmental assessments. The following environmental reports document the quality of the subsurface soil, sediment, groundwater, and surface waters throughout portions of the Site and the BNYDC leasehold:

- Tectonic Engineering Consultants. November 1988. *"U.P.S. Distribution Facility Environmental Assessment."* Final.
- Wehran Engineering Consulting Engineers. November 1988. *"The Site Environmental Assessment of Building # 41."* Final.
- Blasland, Bouck & Lee Engineering Consultants. 1991 & 1992. *"Phase I & II Assessments of Building #41."* Final.
- Blasland, Bouck & Lee Engineering Consultants. March 1993. *"Phase II Investigation of Cooling Water Tunnels and Dry Dock No. 2 Sampling."* Final.
- Blasland, Bouck & Lee Engineering Consultants. July 1993. *"Final Environmental Impact Statement, Brooklyn, New York."* Final.
- ENSR Environmental, summarized by Roux Associates, Inc. February 1995. *"Summary of Additional Investigations at the Building No. 41 Facility."* Final.
- Fanning, Phillips and Molnar, May 1995. *"Brooklyn Navy Yard Cogeneration Plant Project, Pipeline Route - Sampling Results."* Final.
- Environmental Consulting Technology, Inc. July 1995. *"Brooklyn Navy Yard Cogeneration Project Joint Federal/State Permit Application Package."* Final.
- PMNC, A Joint Venture. February 1996. *"Brooklyn Navy Yard Cogeneration Project 138 RV Underground Transmission Line Summary of Soil Testing Results."* Final.

- New York State Department of Environmental Conservation, 1995. *"Surficial Soil Sampling."* Final.

In addition, the following environmental site assessments were conducted at properties contiguous to the BNYDC leasehold:

- Stone & Webster. 1990. *"Site Assessment Report for Red Hook "* Final.
- EA Engineering, Science, and Technology. 1994a. *"Work Plan for Environmental Baseline Survey Phase II at Naval Station - New York Sites (Brooklyn Naval Station)."*
- EA Engineering, Science, and Technology. 1994b. *"Field Sampling Plan for Environmental Baseline Survey Phase II at Naval Station - New York Sites (Brooklyn Naval Station)."* Final.
- EA Engineering, Science, and Technology. 1996 *"Remedial Action Completion Report for Remediation of Transformer Site Soil."* Final.

The above-listed reports and investigations confirmed hazardous waste disposal and identified some additional areas of concern for possible hazardous waste disposal at the Navy Yard, both within the Site and outside the Site. Such concerns included possible soil and groundwater contamination from polychlorinated biphenyls ("PCBs"), volatile organic compounds ("VOCs"), Semi Volatile Organic Compounds ("SVOC"), lead and certain other heavy metals. Most of the environmental concerns identified in the above reports have been addressed or are currently being addressed. The Department has not determined that a significant threat to the public health or environment exists at the Navy Yard as a result of these reports. The existence or absence of hazardous waste at the Site and any threats associated with those wastes will be determined by the investigations performed pursuant to this Agreement.

6. A. ECL 27-1313.3 provides that the Department shall be responsible for remedial programs at inactive hazardous waste disposal sites or potential sites, except as provided in Section 1389-b of the public Health Law. ECL 27-1313.3a provides that whenever the Commissioner of Environmental Conservation finds that hazardous wastes at an inactive hazardous waste disposal site constitutes a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the Order.

B. The Department also has the power, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i

C. Section 176 of the Navigation Law permits, upon approval by the Commissioner, any person to cleanup and remove a discharge of petroleum without admission of responsibility for such discharge.

7. The Volunteers wish to enter into this Agreement in order to ensure, and the Department hereby determines that this Agreement constitutes a demonstration, that the response action undertaken under this Agreement will be in compliance with the ECL and will not:

(1) prevent or interfere significantly with any proposed, ongoing or completed remedial program at the Site, or

(2) expose the public health or the environment to a significantly increased threat of harm or damage.

8. The Volunteers shall implement a response program acceptable to the Department sufficient to allow the use and development of the Site as an industrial and commercial park (the "Contemplated Use") and consent to the terms and conditions of this Agreement.

9. The Volunteers also wish to enter into this Agreement in order to resolve their potential liability for remediating the Existing Contamination (i.e.: environmental conditions known or suspected). The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

10. The Department and the Volunteers agree that the goals of this Agreement are:

A. for the Volunteers to develop and implement a Department-approved investigation and remediation response program, in the form of a work plan, for the Site and to reimburse the State's administrative costs as provided in this Agreement; and

B. for the Department and the Trustee of New York State's natural resources, under the circumstances described within this Agreement, to release the Volunteers and their successors and assigns, under the conditions set forth in this Agreement, from any and all claims, actions, suits, and proceedings (including but not limited to any claims for State administrative costs) by the Department or by the Trustee of New York State's natural resources (the "Trustee"), which may arise under any applicable laws as a result of environmental conditions at the Site that exist as of the effective date of this Agreement.

11. The existence of this Agreement or the fact that the Volunteers participated in activities pursuant to this Agreement shall not constitute, be construed as, nor be considered an admission of liability, fault, wrongdoing, or violation of any law, regulation, or permit condition by the Volunteers, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

12. The Volunteers agree to be bound by the terms of this Agreement. The Volunteers consent to and agree not to contest the authority of jurisdiction of the Department to issue or enforce this Agreement, and agree not to contest the validity of this Agreement or its terms.

IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S RELEASE AND COVENANT NOT TO SUE SET FORTH IN THIS AGREEMENT, THE VOLUNTEERS AGREE TO THE FOLLOWING:

I. Submittal of Work Plan

A. Within 45 days after the effective date of this Agreement, Volunteers shall submit to the Department supplemental plans and protocols to be incorporated as appendices, upon acceptance by the Department, to the Department-approved Detailed Scope of Work (the "Scope of Work") attached to this Agreement and made part hereof as Exhibit C.

B. The supplemental plans and protocols shall include, but are not limited to, the following:

(1) Quality Assurance/Quality Control ("QA/QC") program equivalent to that followed by EPA and consistent with EPA guidance (including EPA QA/R-5, EPA requirement for Quality Assurance Project Plans for Environmental Data Operations, August 1994, Draft Interim Final).

(2) A field sampling plan that defines sampling and data gathering methods in a manner consistent with the "Compendium of Superfund Field Operations Method" (EPA/540/P-87/001, OSWER Directive 9355.0-14, December (1987), or subsequent EPA guidance in effect at the time the supplemental plans and protocols are submitted for approval.

(3) A health and safety plan to protect persons at and in the vicinity of the Site during the implementation of this Agreement which shall be prepared by a certified health and safety professional in accordance with 29 CFR Part 1910 and all other applicable standards.

(4) A schedule for implementation of the Department approved work plan. The schedule shall provide, at a minimum, for the submittal of a Final Engineering Report.

C. The Department will either approve the supplemental plans and protocols or shall require modification of them, in accordance with the procedures set forth in Paragraph IV. After approval by the Department, the final Department-approved Scope of Work (Exhibit C) with the approved plans and protocols, attached and incorporated into and made an enforceable part of this Agreement as Exhibit D, shall comprise the Final Work Plan (the "Work Plan").

II. Performance and Reporting of the Work Plan

A. 1. Within 30 days after receiving the Department's written approval of the Work Plan, Volunteers shall commence implementation of the Work Plan, and implement it in accordance with its terms. Volunteers shall notify the Department of any significant difficulties that may be encountered in implementing the Work Plan or any Department-approved modification to it and shall not modify any obligation unless first approved by the Department.

2. The Scope of Work contemplates the assessment and remediation of the Site being performed in three phases. Volunteers agree to:

(i) develop and implement a Preliminary Site Assessment ("PSA") that will gather information, including historical information, about the Site to determine the presence or potential presence of hazardous wastes at the Site,

(ii) develop and implement a Supplement Site Assessment ("SSA") to characterize any hazardous wastes which are or may be present at portions of the Site, to enable the Department to determine whether such hazardous wastes constitute a significant threat to the public health or the environment necessitating further environmental assessment or remediation,

(iii) if necessary, develop and implement, based upon the results of the SSA, an Interim Remedial Measure ("IRM") Program for impacted portions of the Site, to remediate hazardous waste contamination to a level which provides for the protection of human health and the environment, and which is consistent with the current and future land-use as an industrial and commercial park. Should an IRM be found necessary, the Volunteers will prepare an IRM Work Plan for impacted portions of the Site and submit this plan to the Department for review and approval, and

(iv.) upon the completion of the PSA, the SSA and necessary IRM programs, the Volunteers shall submit to the Department separate Reports summarizing the work performed and conclusions made during each phase of the Work Plan.

3. The parties agree that they will immediately commence negotiations to modify the Work Plan in the event the Department notifies Volunteers in writing that:

(i) contamination previously unknown or inadequately characterized is encountered during the Work Plan's implementation or upon completion of the investigation or remediation of the Site; and

(ii) the Department determines that such contamination must be investigated or remediated further in order to avoid a significant threat to the public health and the environment pursuant to 6 NYCRR Part 375, or the Department determines that Site conditions based upon such contamination are not sufficiently protective of human health and the environment for the Contemplated Use.

If the Department and Volunteers agree upon revisions to the proposed modified Work Plan, the revisions to the Work Plan shall be attached to this Agreement as Exhibit D-1 and made a part of this Agreement and all references to "Work Plan" hereafter shall refer to that contained in Exhibit D and Exhibit D-1.

4. If, after good faith negotiations, Volunteers and the Department cannot agree upon revisions to the Work Plan as provided for in Subparagraph II.A.3 of this Agreement, then except with respect to Volunteers' obligations under Paragraph VII and IX of this Agreement, this Agreement shall terminate effective the date of the Department's written notification to Volunteers that negotiations have failed to develop an acceptable modified Work Plan; Volunteers shall not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before activities subject to this Agreement were commenced; and (except with respect to the Department's right to enforce the obligations of Volunteers previously described in this sentence, which it may enforce under this Agreement) all parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

B. Volunteers shall notify the Department of any significant difficulties that may be encountered in implementing the Work Plan, any Department-approved modification to the Work Plan, or any Department-approved detail, document, or specification prepared by or on behalf of Volunteers pursuant thereto and this Agreement; and shall not modify any obligation unless first approved by the Department.

C. During implementation of all construction activities identified in the Work Plan, Volunteers shall have on-Site a full-time representative who is qualified to supervise the work done.

D. In accordance with the schedule contained in the Work Plan, as may be modified by agreement between the parties, the Volunteers shall submit to the Department a final engineering report. The final engineering report shall include a final remedy report confirming all known areas of concern have been satisfactorily addressed; a detailed post-remedial operation and maintenance plan ("O&M Plan"), to the extent necessary; "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the Work Plan, any Department-approved modification to the Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteers pursuant thereto, and this Agreement. The O&M Plan, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Should post-remedial operation and maintenance prove to be necessary, upon the Department's approval of the O&M Plan, Volunteers shall implement the O&M Plan in accordance with the schedule and requirements of the Department-approved O&M Plan.

F. 1. (i) Within 60 days after receipt of the final engineering report and certification, the Department shall notify Volunteers in writing whether the Department is satisfied with the implementation of the Work Plan, any Department-approved modification to the Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteers pursuant thereto, and this Agreement.

(ii) Within 60 days after completion of the Department-approved O&M Plan, if any, Volunteers shall submit to the Department a final engineering report and certification that the post-remedial operation and maintenance activities identified in the Department-approved O&M Plan were implemented in accordance with that plan. The Department shall notify Volunteers whether it is satisfied with the O&M Plan's implementation.

2. Upon being satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan have been reached, the Department shall notify Volunteers in writing of its satisfaction and, except for the reservations identified below, the Department and the Trustee release, covenant not to sue, and shall forbear from bringing any action, proceeding, or suit against Volunteers, their successors, successors-in-title and assigns, for the further investigation and remediation of those specific areas within the Site, defined by a metes and bounds

description, that were satisfactorily investigated and remediated, or for natural resources damages, based upon the release or threatened release of any Existing Contamination, provided that (a) timely payments of the amounts specified in Paragraph VII of this Agreement continue to be or have been made to the Department, (b) appropriate notices and deed restrictions have been recorded in accordance with Paragraphs XI and XII of this Agreement, and (c) Volunteers and/or their respective lessees, sublessees, successors, successors-in-title, or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any. Nonetheless, the Department and the Trustee hereby reserve all of their respective rights concerning, and such release, covenant not to sue, and forbearance shall not extend to, any further investigation or remedial action the Department deems necessary:

- (i) due to off-Site migration of contaminants that was not addressed by the Work Plan;
- (ii) due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;
- (iii) due to information received, in whole or in part, after the Department's approval of the final engineering report and certification, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;
- (iv) due to Volunteers causing or suffering the 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]) after the effective date of this Agreement;
- (v) due to the Contemplated Use of the Site changing to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment;
- (vi) due to Volunteer's failure to implement this Agreement to the Department's satisfaction; or
- (vii) due to fraud or mistake committed by the Volunteers in demonstrating that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan were reached.

3. Notwithstanding any other provision in this Agreement, 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 Agreement shall be construed, or deemed, to preclude the State of New York from recovering such claim.

G. If the Department is satisfied with the implementation of the Work Plan and Department-approved design, the Department shall provide Volunteers with a written "no further action" letter substantially similar to the model letter attached to this Agreement and incorporated in this Agreement as Exhibit E.

H. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department or the Trustee, the party seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph II.F or in a "no further action" letter issued under Subparagraph II.G of this Agreement, shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination. In the event the Department were to require Volunteers to undertake remedial activities with respect to contamination other than Existing Contamination, evidence demonstrating that such remedial activities would affect Existing Contamination shall not relieve Volunteers of any obligation they may have to perform such remedial activities.

2. Prior to issuance of the release, covenant not to sue, and forbearance pursuant to Subparagraph II.F of this Agreement, the Department shall refrain and forbear from bringing administrative or judicial proceedings against any person or from commencing any investigation or remedial activity in the exercise of its powers under ECL Article 27 with respect to the Existing Contamination at the Site so long as the Work Plan is being implemented in accordance with the terms of this Agreement.

3. Except as above provided in Subparagraphs II.F and II.H.2 of this Agreement and in the "no further action" letter issued under Subparagraph II.G of this Agreement, nothing in this Agreement is intended as a release, forbearance, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Department, the Trustee, or the State of New York may have against any person, firm, corporation, or entity other than Volunteers. In addition, notwithstanding any other provision in this Paragraph II of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph II.F and in the "no further action" letter issued under Subparagraph II.G of this Agreement shall not extend to parties (other than the Volunteers) that were responsible under the law before the effective date of this Agreement to address the Existing Contamination, nor shall they extend to the entire Site. Such provisions shall only extend to those specified areas within the Site that are defined by a metes and bounds description, that were satisfactorily investigated and remediated pursuant to this Agreement.

III. Progress Reports

A. The Volunteers shall submit to the parties identified in Subparagraph XIV in the numbers specified therein copies of written progress reports every other month that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous two months;
2. include all results of sampling and tests and all other data received or generated by the Volunteers or Volunteers' contractors or agents in the previous two months, including quality assurance/quality control information, whether conducted pursuant to the Agreement or conducted independently by the Volunteers;
3. identify all plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous two months;
4. describe all actions, including, but not limited to, data collection and implementation of the Work Plan, that are scheduled for the next two months and provide other information relating to the progress at the Site;
5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of "Volunteers'" obligations under the Agreement, and efforts made to mitigate those delays or anticipated delays; and
6. include any modifications to any plans, including the Work Plan, that the Volunteers have proposed to the Department and any that the Department has approved.

B. The Volunteers shall submit these progress reports to the Department commencing with the tenth day of the month following the effective date of this Agreement and Volunteers' obligation to submit the progress reports shall terminate upon its receipt of the written satisfaction notification identified in Subparagraph II.F of this Agreement.

IV. Review of Submittal

A. The Department shall review each of the submittals Volunteers make pursuant to this Agreement to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Agreement and generally accepted technical and scientific

standards. The Department shall notify Volunteers in writing of its approval or disapproval of the submittal. All Department- approved submittals shall be incorporated into and become an enforceable part of this Agreement.

B. 1. If the Department disapproves a submittal, it shall so notify Volunteers in writing and shall specify the reasons for its disapproval within 30 days (60 days, in the case of the final engineering report and certification) after its receipt of the submittal and may request that Volunteers modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Work Plan. Within 30 days after receiving written notice that Volunteers' submittal has been disapproved, Volunteers shall make a revised submittal to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal, the Department shall notify Volunteers in writing within 30 days of its approval or disapproval.

3. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

4. If the Department disapproves the revised submittal,

(i) Volunteers shall be deemed to be in breach of this Agreement unless, within ten business days of being notified in writing of the Department's disapproval of the revised submittal, Volunteers serve on the Department a request for an appointment of an Administrative Law Judge ("ALJ"), and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis or opinion supporting its position, and all supporting documentation on which Volunteers rely (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation, no later than ten business days after receipt of Volunteers' Statement of Position. Volunteers shall have five business days after receipt of the Department's Statement of Position within which to serve upon the Department a reply to the Department's Statement of Position, and in the event Volunteers serve such a reply, the Department shall have five business days after receipt of Volunteers' reply to the Department's Statement of Position within which to serve upon Volunteers the Department's answer to Volunteers' reply to the Department's Statement of Position. The time periods for exchange of papers may be altered upon agreement by the parties.

(ii) The Department shall maintain an administrative record of any dispute under this Subparagraph. The record shall include the Statement of Position of each party served pursuant to the preceding Subparagraph, and any relevant

information (including all replies and answers). The record shall be available for review of all parties and the public.

(iii) Upon review of the administrative record as developed pursuant to this Subparagraph, the ALJ shall issue a final decision and order resolving the dispute. If determined necessary by the ALJ, Volunteers shall revise the submittal in accordance with the Department's specific comments, as may be modified by the ALJ, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the ALJ revises the time frame in the ALJ's final decision and order resolving the dispute.

(iv) After receipt of the revised submittal, the Department shall notify Volunteers in writing of its approval or disapproval of the revised submittal.

(v) If the revised submittal fails to address the Department's specific comments, as may be modified by the ALJ, and the Department disapproves the revised submittal for this reason, Volunteers shall be in breach of this Agreement.

(vi) In review by the ALJ of any dispute pursued under this Subparagraph, Volunteers shall have the burden of proving that there is no rational basis for the Department's position.

(vii) Respondent shall have the right to challenge the Department's final determination regarding the disputed matter in New York State Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") of New York. A Petition under Article 78 of the CPLR challenging the Department's final determination on a disputed matter must be filed within thirty (30) calendar days of Respondent's receipt in writing of such determination.

The invocation of dispute resolution procedures under this paragraph shall not extend or postpone Volunteers' obligations under this Agreement except for those obligations which are dependent upon the disputed matter.

C. Within 30 days after the Department's approval of the final engineering report and certification, Volunteers shall submit to the Department one microfilm copy (16 millimeter roll film M type cartridge) of that report and all other Department-approved drawings and submittals. Such submission shall be made to:

Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

V. Enforcement

A. This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York.

B. The Volunteers shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lighting, 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 the Volunteers' reasonable control ("force majeure event"). The Volunteers shall, within five business days of when it obtains knowledge of any such force majeure event, notify the Department in writing. The Volunteers shall include in such notice the measures taken and to be taken by the Volunteers to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. The Volunteers shall have the burden of proving by a preponderance of the evidence that an event is a defense to compliance with this Agreement pursuant to this Subparagraph.

VI. Entry upon Site

The Volunteers hereby consent to the entry upon the Site or areas in the vicinity of the Site which may be under the control of the Volunteers by any duly designated employee, consultant, or agent of the Department or any State agency for purpose of inspection, sampling, and testing and to ensure the Volunteers' compliance with this Agreement. The Department shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Upon request, the Volunteers shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Agreement and to job meetings.

VII. Payment of State Costs

Within thirty days after receipt of an itemized invoice from the Department, Volunteers shall cause to be paid to the Department a sum of money, not to exceed a total of \$35,000.00, which shall represent reimbursement for 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 this Agreement, reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, collecting and analyzing samples, and administrative costs associated with this Agreement, but not including the State's expenses incurred after the Department's notification identified in Subparagraph II.F.I. of this Agreement. Based upon information available as of the date of this Agreement, the Department estimates that its costs under this Agreement shall be

\$22,000.00. Such payment shall be made by certified check payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environment Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

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 intends to provide the Volunteers with an invoice as described in this Paragraph VII upon completion of the activities required by the Work Plan.

VIII. Reservation of Rights

A. Except as provided in Subparagraph II.F.2 of this Agreement and in any "no further action" letter issued under Subparagraph II. G of this Agreement, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's or Trustees's rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to any party, including Volunteers.

B. Nothing contained in the Agreement shall prejudice any rights of the Department to take an investigatory or remedial action it may deem necessary if the Volunteers fail to comply with this Agreement or if contamination other than existing contamination is encountered at the Site.

C. Nothing contained in this Agreement shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers consistent with this Agreement.

D. Nothing contained in this Agreement shall be construed to affect the Department's right to terminate this Agreement at any time during its implementation if the Volunteers fail to comply substantially with this Agreement's terms and conditions.

E. Volunteers reserve its rights to notice, to be heard, to defend, to contest, to appeal and to any other due process in any action or proceeding brought by the Department pursuant to or to enforce this Agreement. The existence of this Agreement

or the fact that Volunteers participated in activities pursuant to this Agreement shall not constitute or be construed as an admission of liability, fault, wrongdoing or violation of any law or regulation.

IX. Indemnification

The Volunteers 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 by the Volunteers and/or any of the "Volunteers" directors, officers, employees, servants, agents, successors, and assigns.

X. Public Notice

This Agreement shall be publicly noticed and the public shall be provided with an opportunity to provide written comments to the Department. The Department will hold a public meeting at which the Department and the Volunteers will explain the Agreement and respond to public comments and questions with respect to the Agreement. Notice of the Agreement and of the public meeting shall be published by the Volunteers at least two times in a newspaper of general circulation in the City of New York. The Department shall place the notice in the Environmental Notice Bulletin and shall prepare the notice. The Department shall provide to the Volunteers all comments regarding the Agreement received from the public. The Department may request that the Volunteers take into account significant and material concerns, if any, raised by the public in its written comments or at the public meeting, and the Volunteers agree to endeavor to cooperate with the Department to address such concerns.

XI. Notice

A. Within 30 days after the effective date of this Agreement, the Volunteers shall file a Declaration of Covenants and Restrictions with the Kings County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement.

XII. Deed Restriction

Within 30 days of the completion of the Department-approved Work Plan which is designated to allow the safe human use of the Site for the purposes of an industrial and commercial park, the Volunteers shall record an instrument with the Kings County Clerk which provides that, unless otherwise authorized by the Department, the Site shall only be used for industrial and commercial purposes and purposes ancillary thereto as described in the "Amended and Restated Lease Between the City of New York and the BNYDC (see Exhibit A). In the event that the Volunteers propose to use the Site for any purpose other than the Contemplated Use as an industrial and commercial park,

Volunteers shall immediately notify the Department. Pursuant to the ECL, the Department shall have the authority to determine that additional environmental investigation and/or remediation occur prior to the time that such proposed new use commences.

XIII. Removing P Designation

Upon being satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan have been reached, and/or that the Site, or any portion thereof, is not a hazardous waste disposal site within the meaning of Article 27 of the ECL and 6 NYCRR Part 375, the Department shall promptly take all necessary actions to remove the P designation from the Site or such portion of the Site.

XIV. Communications

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

I. Communication from Volunteers shall be sent to:

Vadim Brevdo, P.E.
Environmental Engineer
NYS Department of Environmental Conservation
Division of Environmental Remediation, Region 2
47-40 21st Street
Long Island City, NY 11101

with copies to:

Robert K. Davies, Esq.
NYS Department of Environmental Conservation
Division of Environmental Enforcement
50 Wolf Road Room 410-A
Albany, New York 12233-5550

Copies of plans and reports shall be submitted as follows:

- Two copies (one bound) to Vadim Brevdo
- One copy to Robert K. Davies, Esq.

2. Communication to be made from the Department to the Volunteers shall be sent to:

Nicholas A. Mann
Environmental Engineer
Brooklyn Navy Yard Development Corporation
Brooklyn, NY 11205

Robert Orlin
New York City Law Department
Environmental Law Division
100 Church Street, Rm 3-127
New York, NY 10007

Andrew Schwartz
General Counsel
New York City Department of Business Services
110 William Street
New York, NY 10038

B. The Department and the Volunteers reserve the right to designate additional or different addresses for communication on written notice to the other given in accordance with this Paragraph XIV.

XV. Miscellaneous

A. The Volunteers shall retain professional consultants, contractors, laboratories, and quality assurance/quality control personnel acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Agreement. The responsibility for the performance of the professional retained by the Volunteers shall rest solely with the Volunteers.

B. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the , and the Department also shall have the right to take its own samples. The Volunteers shall make available to the Department the results of all sampling and/or tests or other data generated by the Volunteers with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement.

C. The Volunteers shall notify the Department at least five working days in advance of any field activities to be conducted pursuant to this Agreement.

D. The Volunteers shall obtain all permits, easements, right-of-way, rights-of-entry, approvals, or authorizations necessary to perform the Volunteers' obligations under this Agreement.

E. The Volunteers, the Volunteers' officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of the Volunteers), and Volunteers' lessees successors, and assigns shall be bound by this Agreement. Any change in ownership or corporate status of the Volunteers including, but not limited to, any transfer of assets or real or personal property shall in no way alter the Volunteers' responsibilities under this Agreement. The Volunteers' officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Agreement in the performance of their designated duties on behalf of the Volunteers.

F. All references to "professional engineer" in this Agreement are to any individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law.

G. All references to "days" in this Agreement are to calendar days unless otherwise specified.

H. The section headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provision of this Agreement.

I. (1) The terms of this Agreement shall constitute the complete and entire Agreement between the Department and the Volunteers concerning the remediation of the Site. 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 regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving the Volunteers or Volunteers' obligation to obtain such formal approvals as may be required by this Agreement.

(2) If the Volunteers desire that any provision of this Agreement be changed, the Volunteers shall make timely written application, signed by the Volunteers, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Vadim Brevdo and to Robert K. Davies.

J. This Agreement constitutes an exercise of the Department's enforcement discretion and, accordingly, the investigatory and remedial activities required herein shall be exempt from the provisions of the State Environmental Quality Review Act. The Volunteers are also exempt from any on-site Department permitting requirement in the

implementation of the Work Plan and are authorized to undertake the foregoing programs under the authority of this Agreement.

K. The provision of this Agreement does not constitute and shall not be deemed a waiver of any right the Volunteers otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Volunteers' insurers, for payments made previously or in the future for response costs. To the extent authorized under 42 USC 9613 and any other applicable law, the Volunteers shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the alleged contamination which is the subject matter of this Agreement. In any future action brought by the Volunteers against a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the provision of 42 USC 9613(f)(3) shall apply.

L. The Volunteers and their employees, servants, agents, lessees, successors, and assigns hereby release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes or action, or demands whatsoever as result of the Volunteers' entering into or fulfilling the terms of this Agreement.

M. By entering into this Agreement, the Volunteers certify that they have fully and accurately disclosed to the Department all information known to the Volunteers and all information in the possession or control of the Volunteers' officers, directors, employees, contractors, and agents which relates in any way to the contamination existing on the effective date of this Agreement on or under the Site or any past or potential future release of hazardous wastes, hazardous substances, pollutants, or contaminants at or from the Site and to their application for this Agreement. To the best of their knowledge, the Volunteers also certify that they have not caused or contributed to a release or threat of release of hazardous wastes, hazardous substances, pollutants or contaminants at, or from, the Site.

N. The effective date of this Agreement shall be the date it is signed by the Commissioner or his designee.

DATED: *Albany*, New York
May 5, 1998

JOHN P. CAHILL, COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
AND TRUSTEE OF THE STATE'S
NATURAL RESOURCES

A handwritten signature in dark ink, appearing to read "J.P. Cahill", is written over a horizontal line.

CONSENT BY BNYDC

The Brooklyn Navy Yard Development Corporation hereby consents to the issuing and entering of this Agreement, waives its right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

BROOKLYN NAVY YARD DEVELOPMENT CORPORATION

By: Alan H. Rosebaum C.V.P.C.O. General Counsel

Date: March 24, 1998

STATE OF NEW YORK)
) S.S.:
COUNTY OF Kings)

On this 24th day of MARCH, 1998, before me personally came ALAN H. ROSEBAUM, to me known, who being duly sworn, did depose and say that he/she resides in Brooklyn, N.Y. 11215; that he/she is C.V.P.C.O. General Counsel of Brooklyn Navy Yard Development Corporation, the corporation described in and which executed the foregoing instrument; and that he/she signed his/her name on behalf of Brooklyn Navy Yard Development Corporation and was authorized to do so.

Scott E. Shostak
Notary Public State of New York

My commission expires Sept. 30, 1998

SCOTT E. SHOSTAK
Notary Public, State of New York
No. 24-1830702
Qualified in Kings County
Commission Expires Sept. 30, 1998

CONSENT BY CITY OF NEW YORK

The City of New York hereby consents to the issuing and entering of this Agreement, waives its right to a hearing herein as provided by law, and agrees to be bound by this Agreement.

THE NEW YORK CITY DEPARTMENT OF BUSINESS SERVICES

By:

Date:

NEW YORK CITY DEPARTMENT OF BUSINESS
Paul Andrews
 March 27, 1993

STATE OF NEW YORK)
) S.S.:
COUNTY OF)

On this 27 day of March, 1997, before me personally came Earl Andrews, Jr., to me known, who being duly sworn, did depose and say that he/she resides in New York, NY; that he/she is Commissioner of the New York City Department of Business Services, the Agency described in and which executed the foregoing instrument; and that he/she signed his/her name on behalf of the City of New York and was authorized to do so.

Notary Public for the State of New York
Qualified in Westchester County
Commission Expires October 31, 1975

Andrew Schwartz
Notary Public State of New York
My commission expires 10/31/98

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