

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Implementation
of a Remedial Response Program for
the Main Street/LaSalle Avenue
Revitalization Project by:

AGREEMENT

INDEX NUMBER: B9-0509-97-02

The City of Buffalo,
Volunteer.

DEFINITIONS

For purposes of this Agreement, the following terms have the following definitions:

A. "Contemplated Use": As used in this Agreement, "Contemplated Use" shall mean the use after construction of single and multiple family residential and commercial and retail units and the services associated with such use.

B. "Covered Contamination": As used in this Agreement, "Covered Contamination" shall mean the residual concentration of contaminants, if any, in those areas where investigation has established Existing Contamination which shall be excavated in accordance with the requirements of the Soils Management Work Plan and this Agreement.

C. "ECL": As used in this Agreement, "ECL" shall mean the Environmental Conservation Law of the State of New York.

D. "Day": As used in this Agreement, "day" shall mean a calendar day unless otherwise specified.

E. "Department": As used in this Agreement, "Department" shall mean the New York State Department of Environmental Conservation.

F. "Existing Contamination": As used in this Agreement, "Existing Contamination" shall mean those concentrations of lead, chromium, cadmium, zinc, arsenic,

mercury, or similar basic metals or one of numerous poly-aromatic hydrocarbons which exceed the levels deemed appropriate for development and use as residential property due to the potential risks of ingestion and exposure, and which have been designated for excavation and removal. The term also includes contamination encountered during the course of the excavations in accordance with the implementation of the Soils Management Work Plan, the nature and extent of which were unknown or inadequately characterized at the time the Work Plan was submitted to the Department for approval, but which shall be fully characterized to the Department's satisfaction during the term of this Agreement.

G. "Professional engineer": As used in this Agreement "professional engineer" shall mean 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.

H. "Site": As used in this Agreement "Site" shall mean that property generally along the former railroad right of way in the City of Buffalo between Main and East Amherst Streets, beginning at or near the southeast corner of the intersection of Main Street and LaSalle Avenue, which parcels are specifically identified and described the Soils Management Work Plan and are replicated as Exhibit "A" of this Agreement, but shall not be deemed to include in any manner any area where rock was excavated during the operations of the former quarry adjacent to the Site, nor shall it include any area where any fill has been placed within, on or over such areas.

I. "Volunteer": As used in this Agreement "Volunteer" shall mean the City of Buffalo, a municipality established in accordance with the laws of the State of New York, having an office address at City Hall, Buffalo, New York 14202.

J. "Work Plan": As used in this Agreement "Work Plan" shall mean the "Main-LaSalle Revitalization Project Soils Management Plan" prepared by URS Greiner Consultants pertaining to the Site as it may be initially approved by the Department and as it may be modified following the review and response to public comments and which shall be attached to this Agreement either as Exhibit "B" or Exhibit "B-1" in accordance with Paragraph I.A.1, and which Volunteer shall implement is an enforceable part of this Agreement. The Work Plan shall consist of the Soils Management Plan and the requirements and conditions related thereto for the preparation of the Site for the development program as presented in the Generic Environmental Impact Statement for the Main-LaSalle Revitalization Project, and shall include such modifications and amendments as may be required in response to comments received during public review of the proposed work plan.

CONSIDERING,

1. The Department is responsible for the enforcement of the ECL. This Agreement is entered into pursuant to the State's authority under that law and constitutes an administrative settlement for purposes of 42 USC 9613(f).

2. Volunteer represents, and for the purposes of this Agreement, the Department relies on those representations, that Volunteer's involvement with the Site is limited to the following: Volunteer has taken title to the property in its current condition through the exercise of its municipal authority; and Volunteer did not operate the Site in any manner which resulted

in the release of hazardous substances at the Site; and Volunteer is not otherwise responsible under law to remediate the Existing Contamination.

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

4. A. ECL 27-1313.3 provides that the Department shall be responsible for inactive hazardous waste disposal site remedial programs, except as provided in Section 1389-b of the Public Health Law. ECL 27-1313.3.a provides that whenever the Commissioner of Environmental Conservation finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of the 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 regulations implementing ECL Article 27, Title 13 authorize at 6 NYCRR 375-1.2(e)(2)(ii) the proponents of any activity to demonstrate to the Department that such activity will not have the effect described in 6 NYCRR 375-1.2(e)(2)(i) by such demonstration as the Department may find acceptable.

C. Volunteer wishes to enter into this Agreement to ensure, and the Department hereby determines that, this Agreement constitutes a demonstration, that the response actions 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.

5. A. Volunteer wishes to enter into this Agreement to resolve its potential liability, if any, for remediating the Existing Contamination as an owner under ECL Article 27, Title 13. The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

B. Volunteer, desirous of implementing a remedial program acceptable to the Department sufficient to allow Volunteer to proceed with its plans to use the Site for the Contemplated Use, consents to the terms and conditions of this Agreement.

6. The Department and Volunteer agree that the goals of this Agreement are:

A. for Volunteer to (i) implement the Work Plan for the Site and (ii) reimburse the State's administrative costs as provided in this Agreement, and

B. for the Department to release Volunteer and its 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 which may arise under any applicable law as a result of the Covered Contamination.

7. Volunteer agrees to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department to enter into or enforce this Agreement, and agrees 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, AND
FOR THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN,
VOLUNTEER AGREES TO THE FOLLOWING:

I. Performance and Reporting of the Work Plan

A. 1. Within 21 days after the Department approves the Work Plan, the
Department will publish a notice in the Environmental Notice Bulletin to inform the public of
this Agreement and of the public's opportunity to submit comments to the Department on the
Work Plan and this Agreement by no later than 30 days after the issue of the Environmental
Notice Bulletin in which such notice shall appear, and the Department shall mail an equivalent
notice to the County of Erie. If, as a result of its review of the comments received, the
Department determines that the Work Plan must be revised:

i. due to environmental conditions related to the Site that
were unknown to the Department at the time of its approval of the Work Plan; or

ii. due to information received, in whole or in part, after the
execution of this Agreement, 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;

then the Department will so notify Volunteer and will immediately commence negotiations with
Volunteer to revise the Work Plan, and, if necessary, other components of this Agreement,
accordingly. However, if after good faith negotiations, Volunteer and the Department cannot
agree upon revisions to the Work Plan, then, except with respect to:

iii. Volunteer's obligations under Paragraphs VI and VIII of this Agreement; and

iv. Volunteer's obligation, here incurred, 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 remedial activities were commenced; and

v. the Department's right to enforce the obligations described in Subparagraphs I.A.1.iii and I.A.1.iv of this Agreement under Paragraph IV of this Agreement;

then this Agreement shall terminate effective the date of the Department's written notification to Volunteer that negotiations have failed to develop an acceptable modification to the Work Plan; and both parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement. If both parties agree to a revised Work Plan, the revised Work Plan shall be attached to this Agreement as Exhibit "B-1;" Volunteer shall implement that Work Plan instead of the one contained in Exhibit "B;" and, unless revised as provided in Subparagraph I.B.2 of this Agreement, all references to "Work Plan" in this Agreement shall refer to the one contained in Exhibit "B-1."

2. Within 30 days after completion of the public comment period and after the approval of any required revisions to the Work Plan, Volunteer shall commence its implementation.

B. 1. Volunteer shall carry out the Work Plan in accordance with its terms.

2. The parties agree that the Work Plan as developed and incorporated into this Agreement may be modified in the event that contamination previously unknown or inadequately characterized is encountered during the implementation of the Work Plan and that such modification(s) shall be attached to this Agreement as a supplement to the Work Plan. However, if after good-faith negotiations, Volunteer and the Department cannot agree upon modifications to the Work Plan, or if Volunteer elects in writing to the Department not to proceed with such modifications, then except with respect to:

i. Volunteer's obligations under Paragraphs VI and VIII of this Agreement, and

ii. Volunteer's obligation, here incurred, 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 activities were commenced, and

iii. the Department's rights to enforce the obligations described in Subparagraphs I.B.2.i and I.B.2.ii of this Agreement under Paragraph IV of this Agreement, Volunteer's prospective obligations under this Agreement shall be waived, effective the date of the Department's written notification to Volunteer that negotiations have failed. The parties shall then retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

3. Volunteer 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 Volunteer pursuant thereto, and shall not modify any obligation

unless first approved by the Department.

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

D. 1. In accordance with the schedule contained in the Work Plan, as may be modified by agreement in writing between the Department and Volunteer, Volunteer shall submit to the Department a final engineering report that shall include "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 Volunteer pursuant thereto, and this Agreement.

2. Volunteer shall submit a detailed post-remedial operation, maintenance, and monitoring plan ("O&M Plan"), if needed, along with the final engineering report.

3. A professional engineer must prepare, sign, and seal the O&M Plan, "as-built" drawings, final engineering report, and certification.

E. Should post-remedial operation and maintenance prove to be necessary, upon the Department's approval of the O&M Plan, Volunteer shall implement the O&M Plan in accordance with the 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 Volunteer in writing whether the Department is satisfied with the implementation of the Remedial Work Plan, any Department-approved

modification to the referenced Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteer pursuant thereto, and this Agreement.

ii. Within 60 days after completion of the Department-approved O&M Plan, if any, Volunteer shall submit to the Department a final engineering report and certification that the post-remedial construction operation and maintenance activities identified in the Department-approved O&M Plan were implemented in accordance with that plan. The Department shall notify Volunteer 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 Volunteer in writing of its satisfaction and, except for the reservations identified below, the Department shall release, covenant not to sue and shall forbear from bringing any action, proceeding, or suit against Volunteer for the further investigation and remediation of the Site based upon the release or threatened release of any Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI 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 IX and X of this Agreement, and (c) Volunteer and/or its lessees, sublessees, successors or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any.

Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to, natural resources damages, nor to any further investigation or remedial action the Department deems necessary:

i. due to the off-Site presence of contaminants, other than petroleum, that may have migrated off-Site from an on-Site source resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential and to the off-Site presence of petroleum that may have migrated off-Site from an on-Site source, irrespective of whether the information available to Volunteer and the Department at the time of the development of the Work Plan disclosed the existence or potential existence of such off-Site presence;

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 Volunteer's failure to implement this Agreement to the Department's satisfaction; or

v. due to fraud committed or mistake made by Volunteer in demonstrating that the Site-specific clean-up levels identified in, or to be identified in accordance with the Work Plan, were reached.

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 if

Volunteer causes a, or suffers the, release or threat of release of any hazardous substance (as that term is defined at 42 U.S.C. 9601[14]) or petroleum (as that term is defined in Navigation Law 172[15]) other than Covered Contamination; or if Volunteer causes a, or suffers 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 causes a, or suffers the, release or threat of release, at the Site of any hazardous substance (as that term is defined at 42 U.S.C. 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination, after the effective date of this Agreement; who causes a, or suffers 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; or 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 this Agreement's execution.

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 any Department-approved modification to the Work Plan, and Department-approved

details, documents, and specifications prepared by or on behalf of Volunteer pursuant thereto and with the provisions for implementation of the O&M Plan, then the Department shall provide Volunteer with a separate written "no further action" letter substantially similar to the model letter attached to this Agreement and incorporated in this Agreement as Exhibit "C."

H. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph I.F or in the "no further action" letter issued under Subparagraph I.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 Covered Contamination.

2. Except as above provided in Subparagraph I.F of this Agreement and in the "no further action" letter issued under Subparagraph I.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 or the State of New York may have against any person, firm, corporation, or other entity not a party to this Agreement. In addition, notwithstanding any other provision in this Paragraph I of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph I.F and in the "no further action" letter issued under Subparagraph I.G of this Agreement shall not extend to parties (other than Volunteer) that were responsible under law before the effective date of this Agreement to address the Existing Contamination. In addition, notwithstanding any other inference or provision in this Agreement or in the Work Plans attached to this Agreement, the forbearance, covenant not to sue, and

release described in Subparagraph I.F and in the "no further action" letter issued under Subparagraph I.G of this Agreement shall not extend to any parties, including Volunteer, who may be responsible under law for any investigation or remedial activity caused by or associated with the area known as the former quarry, nor to any incremental remedial problems or costs associated with the disposal of excavated soils as contemplated in this Agreement.

II. Progress Reports

A. Volunteer shall submit to the parties identified in Subparagraph XI.A.1, in the numbers specified therein, copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;
2. include all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteer;
3. identify all work plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous month;
4. describe all actions, including but not limited to, data collection and implementation of the Work Plan that are scheduled for the next month 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 Volunteer's obligations under this Agreement, and efforts made to mitigate those delays or anticipated delays;

6. include any modifications to any work plans, including the Work Plan, that Volunteer has proposed to the Department or that the Department has approved.

B. Volunteer shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Agreement, and Volunteer's obligation to submit the progress reports shall terminate upon its receipt of the written notification identified in Subparagraph I.F of this Agreement approving Volunteer's final engineering report concerning the Work Plan's implementation. However, Volunteer shall continue to submit reports concerning the implementation of any O&M Plan that may be required under this Agreement, in accordance with that Plan's requirements.

C. Volunteer also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

III. Review of Submittals

A. 1. The Department shall review each of the submittals Volunteer makes 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 principles. The Department shall notify Volunteer 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.

2. i. If the Department disapproves a submittal, the Department shall so notify Volunteer in writing and shall specify the reasons for its disapproval within 30 days after its receipt of the submittal, except with respect to the final engineering report and certificate (in which case the period shall be 60 days); and it may request Volunteer to 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 Volunteer's submittal has been disapproved, Volunteer 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.

ii. Within 30 days after receipt of the revised submittal, the Department shall notify Volunteer in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement. If the Department disapproves the revised submittal, the Department and Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same.

B. Within 30 days after the Department's approval of the final engineering report and certification, Volunteer shall submit to the Department such copies of that report and all other Department-approved drawings and submittals as may be directed by the project manager for the Department.

IV. Enforcement

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

B. Volunteer 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, 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 ("force majeure event"). Volunteer shall, within five working days of when it obtains knowledge of any such force majeure event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer 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 is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B of this Agreement.

V. Entry Upon Site

Volunteer hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer by any duly designated employee, consultant, contractor, or agent of the Department or of any State agency having jurisdiction with respect to the matters addressed in the Work Plan for purposes of inspection, sampling, and testing and to ensure Volunteer's compliance with this Agreement. The Department shall abide by the health and safety rules in effect for work being performed at the Site under the terms of this Agreement. Upon request, Volunteer 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 attend job meetings.

VI. Payment of State Costs

Within 30 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'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 I.F of this Agreement of its approval of the final engineering report and certification pertaining to the implementation of the Work Plan, or if any, of the Department-approved O&M Plan, whichever is later. Each such payment shall be made by check 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
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.

VII. Department Reservation of Rights

A. Except as provided in Subparagraph I.F of this Agreement and in any "no further action" letter issued under Subparagraph I.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 rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to any party, including Volunteer.

B. Nothing contained in this Agreement shall prejudice any rights of the Department to take, or require the undertaking of, any investigatory or remedial action it may deem necessary.

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

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 Volunteer fails to comply substantially with this Agreement's terms and conditions.

E. Except as otherwise provided in this Agreement, Volunteer specifically reserves all defenses Volunteer may have under applicable law respecting any Departmental assertion of remedial liability against Volunteer, and reserves all rights Volunteer may have respecting the enforcement of this Agreement, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Agreement or Volunteer's

compliance with this Agreement shall not be construed as an admission of liability, fault, or wrongdoing 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.

VIII. Indemnification

Volunteer shall indemnify and hold the Department and 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 Volunteer and/or any of Volunteer's directors, officers, employees, servants, agents, successors, and assigns; provided, however, that Volunteer shall not be required to indemnify and hold the Department, the State of New York, or their representatives and employees harmless for any claims, suits, actions, damages, and costs of any name and description arising out of or resulting from the unlawful, willful, or malicious acts or omissions of the Department, the State of New York, and their representatives and employees.

IX. Notice of Sale or Conveyance

A. Within 30 days after the effective date of this Agreement, Volunteer shall:

1. file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the Erie County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement; and
2. provide the Department with evidence of such filing.

Volunteer may terminate the Notice when the Department notifies Volunteer in writing

pursuant to Subparagraph I.F.2 of this Agreement that the Department is satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan have been reached and that the O&M Plan has been successfully implemented.

B. If the owner or Volunteer proposes to convey the whole or any part of its ownership interest in the Site, Volunteer shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Agreement.

X. Deed Restriction

A. Within 30 days of Volunteer's receipt of the Department's notification pursuant to Subparagraph I.F of this Agreement approving Volunteer's final engineering report concerning the Work Plan, Volunteer shall require the owner to record an instrument with the Erie County Clerk, to run with the land, that:

1. shall prohibit the Site from ever being used for purposes other than for the Contemplated Use without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau or other entity replacing the Department;

2. 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 Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department;

3. shall require Volunteer and Volunteer's successors and assigns to continue in full force and effect operation and maintenance of the cap and cover over the excavated soils placed within the park area as described in the Work Plan, and any other additional obligations set forth in the approved O&M Plan;

4. shall provide that Volunteer, on behalf of itself and its successors and assigns, hereby consents to the enforcement by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department, of the prohibitions and restrictions that this Paragraph X requires to be recorded, and hereby covenants not to contest such enforcement.

B. Within 30 days after Volunteer's receipt of the Department's notification pursuant to Subparagraph I.F.2 of this Agreement approving Volunteer's final engineering report concerning the Work Plan, Volunteer shall provide the Department with a copy of such instrument certified by the Erie County Clerk to be a true and faithful copy of such instrument as recorded in the Office of the Erie County Clerk.

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:

Martin L. Doster, P.E.
New York State Department of Environmental
Conservation
Division of Environmental Remediation
270 Michigan Avenue
Buffalo, New York 14203-2999

with copies to:

G. Anders Carlson, Ph. D.
Director, Bureau of Environmental Exposure
Investigation
New York State Department of Health
2 University Place
Albany, New York 12203

and to: Glen R. Bailey, Esq.
New York State Department of Environmental
Conservation
Division of Environmental Enforcement
270 Michigan Avenue
Buffalo, New York 14203-2999

Copies of work plans and reports shall be submitted as follows:

Three copies (one unbound) to Martin Doster

One copy to G. Anders Carlson

One copy to Glen R. Bailey

2. Communication to be made from the Department to Volunteer

shall be sent to:

Frank A. Manuele
Director of Planning
901 City Hall
65 Niagara Street
Buffalo, New York 14202

and to: Michael R. Risman
Office of Corporate Counsel
1100 City Hall
65 Niagara Square
Buffalo, New York 14202

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

XII. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that it has, to the best of its ability, fully and accurately disclosed to the Department all information known to Volunteer and all information in the possession or control of Volunteer's officers, directors, employees, contractors, and agents which relates in any way to the contamination existing at the Site on the effective date of this Agreement, or 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. Volunteer also certifies that it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at, or from, the Site.

2. If the Department determines that information Volunteer provided and certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void ab initio except with respect to the provisions of Paragraphs VI and VIII and except with respect to the Department's right to enforce those obligations under this Agreement, and the Department shall reserve all rights that it may have.

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

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Volunteer, and the Department

also shall have the right to take its own samples. Volunteer shall make available to the Department the results of all sampling and or tests or other data generated by Volunteer with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement.

D. Volunteer shall notify the Department at least 5 working days in advance of any field activities to be conducted pursuant to this Agreement.

E. 1. Subject to Subparagraph XII.E.2 of this Agreement, Volunteer shall obtain all permits, easements, right-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteer's obligations under this Agreement.

2. In carrying out the activities identified in the Work Plan, the Department may exempt Volunteer from the requirement to obtain any Department permit 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.

F. Volunteer, Volunteer's officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's lessees, successors and assigns shall be bound by this Agreement. Any change in ownership of the Site or status 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. Volunteer's 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 Volunteer.

G. Volunteer shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteer with respect to the Site 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 Volunteer's contractors 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.

H. 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 of the provisions of this Agreement.

I. 1. 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 Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by Volunteer, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Martin L. Doster and to Glen R. Bailey.

J. In undertaking the work required under this Agreement, Volunteer and its officers, directors, employees, representatives, agents, contractors and subcontractors are deemed for the purpose of ECL 27-1321.3 and any other similar provision of state or federal law, to be performing services related to cleanup or restorative work which is conducted pursuant to a contract with the Department.

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

L. Volunteer and Volunteer's employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever 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.

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

DATED: 4/6/99

JOHN P. CAHILL
Commissioner
New York State Department of
Environmental Conservation

A handwritten signature in cursive script, appearing to read "John P. Cahill", is written over a horizontal line.

CONSENT BY VOLUNTEER

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

City of Buffalo

**APPROVED
AS TO FORM ONLY**

Anthony M. Masiello
By: Anthony M. Masiello, Mayor
[Name and Title of the signatory]

By *Richard G. [Signature]*
Corporation Counsel

Date: February 4, 1999

STATE OF NEW YORK)
) s.s.:
COUNTY OF ERIE)

On this 4th day of February, 1998, before me personally came Anthony M. Masiello, to me known, who being duly sworn, did depose and say that he resides in the City of Buffalo, State of New York, that he is the Mayor of the City of Buffalo, New York, the entity described in and which executed the foregoing instrument; and that he signed his name on behalf of said municipality and was authorized to do so.

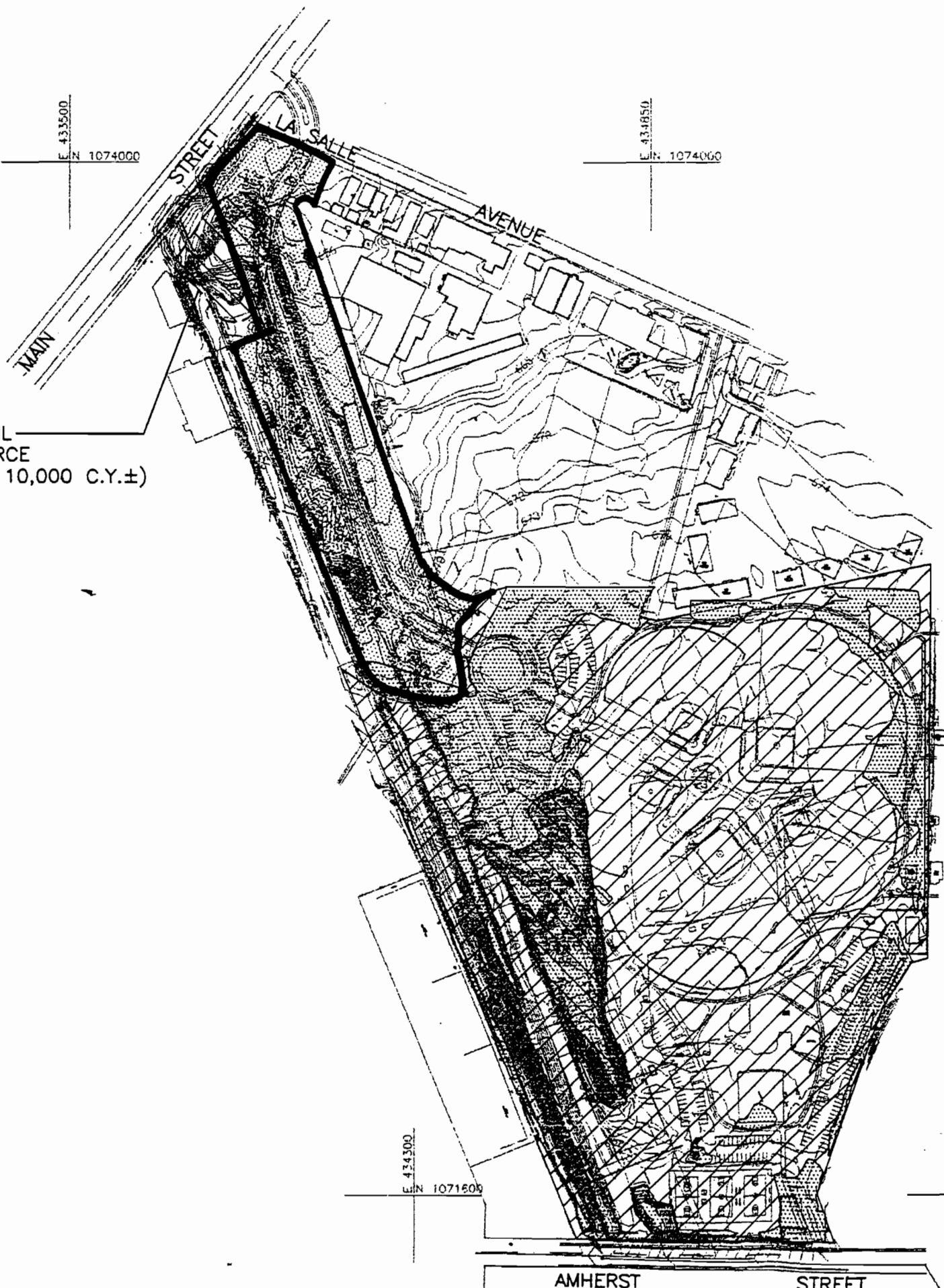
Joanne Cavalieri
Notary Public


JOANNE CAVALIERI
Notary Public, State of New York
Qualified in Erie County
My Commission Expires Jan. 31, 2001

EXHIBIT
"A"


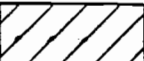

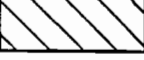


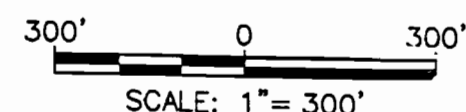
POTENTIAL SOIL
BORROW SOURCE
(SOIL PILE = 10,000 C.Y.±)



 VOLUNTARY AGREEMENT "SITE"
OUTLINED IN BOLD.

LEGEND

-  PHASE 1 AREA - CONTAMINATED
SOIL TO BE EXCAVATED
-  PROPOSED CONTAMINATED
SOIL DISPOSAL AREA
-  MATERIAL IN PARK AREA TO BE EXCAVATED
-  C & D MATERIAL WITH <10 ppm TOTAL CPAH



MAIN-LASALLE
SOILS MANAGEMENT PLAN

URS
CONSULTANTS, INC.

FIGURE 5-1

EXHIBIT
"B"

[Department-approved Soils Management Work Plan.]

**EXHIBIT
"C"**

Assignable Release and Covenant Not to Sue

[On Department Letterhead]

[Date]

Michael R. Risman, Esq.
Office of Corporate Counsel
1100 City Hall
65 Niagara Street
Buffalo, New York 14202

Dear Sir:

Unless otherwise specified in this letter, all terms used herein shall have the meaning assigned to them under the terms of the Voluntary Agreement entered into between the New York State Department of Environmental Conservation (the "Department") and The City of Buffalo, ("Volunteer"), Index # B9-0506-97-02 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plan covering the remediation of the Site, located at the parcels of land along Main Street, between LaSalle Avenue and East Amherst Street in the City of Buffalo, a general map and description which is attached hereto as Appendix "A", has been successfully implemented.

The Department, therefore, hereby releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against Volunteer for the further investigation or remediation of the Site based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of the Agreement continue to be, or have been, made to the Department, and (b) appropriate notices and deed restrictions have been recorded in accordance with Paragraphs IX and X of the Agreement, and (c) Volunteer and/or its lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved O&M Plan, if any.

Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to, any natural resource damages or to any further investigation or remedial action the Department deems necessary:

due to offsite migration of contaminants resulting in impacts to environmental resources, to human health, or to other biota, which impacts are not inconsequential;

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 the Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;

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;

due to Volunteer's failure to implement the Agreement to the Department's satisfaction; or

due to fraud committed or mistake made by Volunteer in demonstrating that the Site-specific clean-up levels identified in, or identified in accordance with, the Work Plan were reached.

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, if it causes a, or suffers the release or threat of release at the Site of any hazardous substance (as that term is defined at 42 U.S.C. § 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination, or if it causes a, or suffers 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 causes a, or suffers the, release or threat of release at the Site of any such hazardous substance or petroleum, other than Covered Contamination, after the effective date of the Agreement; or who causes a, or suffers 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; or who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation the party may have respecting the same resulting solely from the Agreement.

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 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 release shall be construed or deemed to preclude the State of New York from recovering such claim;

- . except as provided in Subparagraph I.F of the Agreement and in this letter, 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 nor exemplified by 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 may deem necessary if Volunteer fails to comply with the Agreement or if contamination other than Existing Contamination or Covered 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; and
- . nothing contained in this letter shall be construed to affect the Department's right to terminate 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: _____

Its: _____

**EXHIBIT
"D"**

NOTICE OF AGREEMENT

This Notice is made as of this _____ day of _____, 1997, by **The City of Buffalo**, the fee owner of parcels of real property located at Main Street near Lasalle and East Amherst Streets in the City of Buffalo, Erie County, as more particularly described in Appendix "A" attached hereto (the "Property"); and

Whereas, The City of Buffalo, by authorized signature, entered into an administrative agreement with the Department bearing Index Number B9-0506-97-02 ("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 the City and its lessees, sublessees, 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, the City agreed that it would give notice to all parties who may acquire any interest in the Property by filing this Notice with the Erie County Clerk,

NOW, THEREFORE, The City of Buffalo, for itself, its successors and its assigns declares that:

1. Notice of the Agreement is hereby given to all parties who may acquire any interest in the Property; and that
2. This Notice shall terminate upon the filing by the City of Buffalo 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.

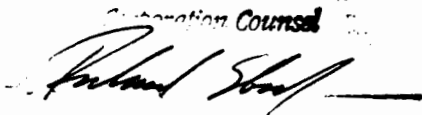
IN WITNESS WHEREOF, the City of Buffalo, has executed this Notice of Agreement by its duly authorized representative.

Dated: _____

By: 
Anthony M. Masiello, Mayor

[Acknowledgment]

**APPROVED
AS TO FORM**


Robert S. [unclear]
[unclear] Counsel