

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the
Implementation of a Remedial
Response Program for
107-23 Farragut Road,
Brooklyn, New York, by

AGREEMENT
INDEX NUMBER W2-0835-98-10

Federal Express Corporation and
Cargex Brooklyn Limited Partnership,
Volunteers

DEFINITIONS

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

A "Contemplated Use" Volunteers intend to use the Site as a distribution facility for the Federal Express Corporation or other commercial or industrial uses

B The Site's "Covered Contamination" the concentrations of Existing Contamination to which the Existing Contamination shall have been remediated in accordance with the requirements of the Work Plan

C "ECL" the Environmental Conservation Law

D "Day" a calendar day unless otherwise specified

E "Department" the New York State Department of Environmental Conservation

F The Site's "Existing Contamination" Trichloroethene (TCE) was previously used as a degreaser at the former Duralab facility which was located on the Site. The groundwater at the Site is at a depth which is approximately 10 feet below the surface grade. TCE was detected to between 100 to 240,000 ppb, and is the primary contaminant of concern. The TCE contamination is concentrated in the top 10 feet of the groundwater within a plume measuring approximately 200 feet by 200 feet which is located in an area beneath the wall of the building which runs parallel to East 108th Street in the northeast section of the property. Certain TCE daughter compounds, 1,2 dichloroethene and vinyl chloride, as well as a TCE sister compound, tetrachloroethene (PCE), have also been detected within the plume. The term also includes contamination encountered during the course of the Work Plan's implementation, 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 shall have been fully characterized to the Department's satisfaction.

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

H "Site" that property located at 107-23 Farragut Road in the Canarsie Section of the Borough of Brooklyn, County of Kings known as the former Duralab Equipment Corporation Facility which is bordered by Farragut Road, East 108th Street, a commercial building across East 105th Street to the south, east and west respectively, while the Long Island Railroad right of way borders the Site to the north and described as Tax Map Identifier number Section 24, Block 8156, Lot 1. Exhibit "A" of this Agreement is a map of the Site showing its general location. The Site is 6.6 acres.

I "Trustee" the Trustee of New York State's natural resources.

J "Volunteers" The Federal Express Corporation, a corporation organized under the laws of the State of Tennessee with offices at 1980 Nonconnah Blvd., Memphis TN 38132 and Cargex Brooklyn Limited Partnership formed under the laws of the State of Delaware with offices at 49 Atlantic Place, South Portland, Maine 04106.

K "Work Plan" the Department-approved remedial work plan pertaining to the Site that Volunteers shall implement and that is attached to this Agreement as Exhibit "B", as may be modified under the terms of this Agreement and, as a result, may appear in such other identified exhibit in this Agreement as this Agreement may provide, and is an enforceable part of this Agreement.

CONSIDERING

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

2 Volunteers represent, and for the purposes of this Agreement, the Department relies on those representations, that Volunteers' involvement with the Site and with the facility on that Site is limited to the following: Volunteer Federal Express Corporation is the sublessee of the Site as of May 1998, has not previously owned or operated the Site, and is not otherwise responsible under law to remediate the Existing Contamination. Volunteer Cargex Brooklyn Limited Partnership is the lessee of the Site having purchased a leasehold estate under the ground lease from the former lessee JAFCI Management Inc. in 1997, and it and its general and limited partners have not previously owned or operated the Site and are not otherwise responsible under law to remediate the Existing Contamination. Duralab Equipment Corporation, a former operator of the Site, was a tenant of JAFCI Management Inc. The Site is owned by the City of New York.

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 1

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 such site and/or any person responsible for the disposal of hazardous wastes at such site

1 to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and

2 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 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

5 A Volunteers also wish to enter into this Agreement in order to resolve Volunteers' potential liability for remediating the Existing Contamination as operators (and, in the event that Volunteer takes title to the Site, 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 Volunteers, desirous of implementing a remedial program acceptable to the Department sufficient to allow Volunteers to proceed with Volunteers' plans to use the Site for the Contemplated Use, consent to the terms and conditions of this Agreement

6 The Department and Volunteers agree that the goals of this Agreement are

A for Volunteers to,

1 implement the Work Plan, and

2 reimburse the State's administrative costs as provided in this Agreement, and

B for the Department and the Trustee to release Volunteers and their successors and assigns, under the conditions set forth in this Agreement, from any and all claims, actions, suits and proceedings by the Department or by the Trustee, which may arise under any applicable law as a result of the Covered Contamination

7 Volunteers agree to be bound by the terms of this Agreement. Volunteers consent to and agree not to contest the authority or jurisdiction of the Department to enter into 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 AND FOR THE MUTUAL COVENANTS, PROMISES, REPRESENTATIONS AND CONDITIONS CONTAINED HEREIN, VOLUNTEERS AGREE TO THE FOLLOWING

I Performance and Reporting of the Work Plan

A 1 Within 21 days after the effective date of this Agreement, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the execution of this Agreement and of the public's opportunity to submit comments to the Department by no later than 30 days after the issue of the Environmental Notice Bulletin in which such notice shall appear on the Work Plan, and shall mail an equivalent notice to the Kings County President's Office and Community Board # 18. If, as a result of its review of the comments received, the Department determines that the Work Plan must be revised

1 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 Volunteers and will immediately commence negotiations with Volunteers to revise the Work Plan and, if necessary, other components of this Agreement accordingly. However, if after goodfaith negotiations, Volunteers and the Department cannot agree upon revisions to the Work Plan, then, except with respect to

iii Volunteers' obligations under Paragraphs VI and VIII of this Agreement, and

iv Volunteers' obligation, here incurred, to ensure that they do 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,

this Agreement shall terminate effective the date of the Department's written notification to Volunteers that negotiations have failed to develop an acceptable modification to the Work Plan, and all parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement. If all parties agree to a revised Work Plan, the revised Work Plan shall be attached to this Agreement as Exhibit "B-1," Volunteers 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 the determination of the final form of the Work Plan after completion of public comment, Volunteers shall commence its implementation in accordance with its provisions

B 1 Volunteers shall carry out the Work Plan in accordance with its terms
2 The parties agree that the Work Plan will be modified in the event that contamination previously unknown or inadequately characterized is encountered during the Work Plan's implementation and that such modification(s) shall appear in Exhibit "B-2" and all references to "Work Plan" in this Agreement shall refer to the one contained in Exhibit "B-2." However, if after goodfaith negotiations, Volunteers and the Department cannot agree upon revisions to the Work Plan, then, except with respect to

i Volunteers' obligations under Paragraphs VI and VIII of this Agreement, and

ii Volunteers' obligation here incurred to ensure that they do 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

iii the Department's right 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,

this Agreement shall terminate effective the date of the Department's written notification to Volunteers 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

3 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 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 1 In accordance with the schedule contained in the Work Plan, as may be modified by agreement in writing between the Department and Volunteers, Volunteers 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 Volunteers pursuant thereto, and this Agreement

2 Volunteers shall submit a detailed post-remedial operation, maintenance, and monitoring plan ("IRM 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, Volunteers shall implement the O&M Plan in accordance with the schedule and requirements of the Department-approved O&M Plan

F 1 1 After receipt of the final engineering report, 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

11 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 construction 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 for the further investigation and remediation of the Site, and for natural resources damages, 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 have been recorded in accordance with Paragraph IX of this Agreement, (c) Volunteers have used best efforts to secure the recording of deed restrictions in accordance with Paragraph X of this Agreement and (d) Volunteers and/or Volunteers' lessees (in the event either Volunteer acquires title to the Site), sublessees, successors, 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 the off-Site presence of petroleum that may have migrated off-Site from an on-Site source, irrespective of whether the information available to Volunteers 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, 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' failure to implement this Agreement to the Department's satisfaction, or

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

Additionally, the Department and the Trustee hereby reserve all of their respective rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to Volunteers if Volunteers cause a, or suffer 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]), other than Covered Contamination, or if Volunteers cause a, or suffer 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 Volunteers' lessees (in the event either Volunteer acquires title to the Site), 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 USC 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 established resulting solely from this Agreement's execution

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, any Department-approved modification to the Work Plan, and Department-approved details, documents, and specifications prepared by or on behalf of Volunteers pursuant thereto 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 "C "

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 one seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph I F or in a "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, the Trustee, 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 Volunteers) that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

II Progress Reports

A Volunteers shall submit to the parties identified in Subparagraph XI A 1 in the numbers specified in that Subparagraph 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 Volunteers or Volunteers' contractors or agents in the previous month, including quality assurance/quality control information whether conducted pursuant to this Agreement or conducted independently by Volunteers,

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 Volunteers' obligations under this Agreement, and efforts made to mitigate those delays or anticipated delays and

6 include any modifications to the Work Plan that Volunteers have proposed to the Department and any that the Department has approved

B Volunteers shall submit these progress reports to the Department by the tenth day of every 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 I F 2 of this Agreement approving Volunteers' final engineering report concerning the Work Plan's implementation. However, Volunteers 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 Volunteers also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of the following 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 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 with generally accepted technical and scientific principles. 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.

2 1 If the Department disapproves a submittal, it shall so notify Volunteers in writing and shall specify the reasons for its disapproval after its receipt of the submittal and may request Volunteers 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 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.

ii After receipt of the revised submittal, the Department shall notify Volunteers in writing of its approval or disapproval. If the Department disapproves the revised submittal, the Department and Volunteers 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. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

B Within 30 days after the Department's approval of the final engineering report, 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

IV Enforcement

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

B 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, 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 Volunteers' reasonable control ("*force majeure* event") Volunteers shall within five working days of when they obtains knowledge of any such *force majeure* event, notify the Department in writing Volunteers shall include in such notice the measures taken and to be taken by Volunteers to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement 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 IV B of this Agreement

V Entry upon Site

Volunteers hereby consent to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteers by any duly designated employee, consultant, contractor, or agent of the Department or 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 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, Volunteers shall provide the Department with 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

VI Payment of State Costs

A Within thirty days after receipt of an itemized invoice from the Department, Volunteers 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 2 of this Agreement of its approval of the final engineering report 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 certified 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 NY 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.

B. Payment of such State expenses shall not exceed \$5,000.00 annually starting on the effective date of this Agreement as defined in Subparagraph XII N. The Department, however, may aggregate its billing for more than one year.

VII. Department Reservation of Rights

A. Except as provided in Subparagraph I F 2 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 or Trustee'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 this Agreement shall prejudice any rights of the Department or Trustee to take 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 Volunteers fail to comply substantially with this Agreement's terms and conditions.

E. Except as otherwise provided in this Agreement, Volunteers specifically reserve all defenses Volunteers may have under applicable law respecting any Departmental assertion of remedial liability against Volunteers, and reserve all rights Volunteers may have respecting the enforcement of this Agreement. The existence of this Agreement or Volunteers' compliance with this Agreement shall not be construed as an admission of liability, fault, or wrongdoing by 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.

VIII. Indemnification

Volunteers shall indemnify and hold the Department, the Trustee, 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 Volunteers and/or any of Volunteers' directors, officers, employees, servants, agents successors, and assigns. However, Respondents shall not be required to indemnify the Department, the State of New York, and/or their representatives and employees regarding any liability arising from willful, wanton or malicious acts or acts constituting gross negligence by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Order.

IX Notice of Sale or Conveyance

- A Within 30 days after the effective date of this Agreement, Volunteers shall
- 1 file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the Office of the Registrar of the City of New York 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

Volunteers may terminate the Notice when the Department notifies Volunteers 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 Volunteers propose to convey the whole or any part of Volunteers' leasehold 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. Nothing herein shall be interpreted to limit or foreclose the rights of any secured lender to foreclose or exercise any rights it may have with respect to the property.

X Deed Restriction

A Within 30 days of Volunteers' receipt of the Department's notification pursuant to Subparagraph I F 2 of this Agreement approving Volunteers' final engineering report concerning the Work Plan, Volunteers shall use best efforts to have the City of New York, the fee owner, record an instrument with the Office of the Registrar of the City of New York, 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 Volunteers and Volunteers' successors and assigns to continue in full force and effect any institutional and engineering controls the Agreement requires Volunteer to put into place and maintain and

4 shall provide that Volunteers, 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 For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration for obtaining same If despite Volunteers' best efforts Volunteers are unsuccessful, Volunteers shall promptly notify the Department and shall include in that notification a summary of the steps Volunteers have taken to attempt to secure the recording of such instrument If Volunteers are successful, Volunteers shall provide the Department with a copy of such instrument certified by the Office of the Registrar of the City of New York to be a true and faithful copy of the instrument as recorded in the Office of the Registrar of the City of New York

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 Volunteers shall be sent to

Richard Gardineer, P E
New York State Department of Environmental Conservation
Division of Environmental Remediation
47-40 21st Street
Long Island City, NY 11101

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

Rosalie K. Rusinko
New York State Department of Environmental Conservation
Division of Environmental Enforcement
200 White Plains Road 5th Floor
Tarrytown, New York 10951-5805

Copies of work plans and reports shall be submitted as follows

- Two copies (one unbound) to Mr. Gardineer
- Two copies to Dr. Carlson

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

Aaron J. Werbin
Federal Express Corporation
One Century Drive
Parsippany, New Jersey 07054

Allen M. Bornheimer, Esq.
Choate, Hall & Stewart
Exchange Place
53 State Street
Boston, Massachusetts 02109

and

David P. Littell, Esq.
Pierce Atwood
One Monument Square
Portland, Maine 04101-1110

B. The Department and Volunteers 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, Volunteers certify that Volunteers have fully and accurately disclosed to the Department all information known to Volunteers and all information in the possession or control of Volunteers' members, partners, officers, directors, employees, contractors, and agents which relates in any way to the contamination existing on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants, at or from the Site and to their application for this Agreement. Volunteers also certify that Volunteers have 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, upon the reasonable determination 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 Volunteers 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 Volunteers shall rest solely with Volunteers

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

D Volunteers shall notify the Department at least five 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, Volunteers shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals or authorizations necessary to perform Volunteers' obligations under this Agreement

2 In carrying out the activities identified in the Work Plan, the Department may exempt Volunteers 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 Volunteers, Volunteers' members, partners, officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteers), and Volunteers' lessees (in the event either Volunteer acquires title to the Site), sublessees, successors, and assigns shall be bound by this Agreement. Any change in ownership or corporate status of Volunteers including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Volunteers' responsibilities under this Agreement. Volunteers' members, partners, 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 Volunteers

G Volunteers shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteers with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteers or Volunteers' contractors shall provide written notice of this Agreement to all subcontractors hired to perform any portion of the work required by this Agreement. Volunteers shall nonetheless be responsible for ensuring that Volunteers' 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 Volunteers of Volunteers' obligation to obtain such formal approvals as may be required by this Agreement.

2 If Volunteers desire that any provision of this Agreement be changed, 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 Mr. Gardiner and to Ms. Rusinko.

J The remedial activities to be undertaken under the terms of this Agreement are subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations, 6 NYCRR Part 617. ECL 8-0105 5(1), 6 NYCRR 617 5(c)(29). The Department issued a Negative Declaration on November 19, 1998.

K In undertaking the work required under this Agreement, Volunteers and Volunteers' members, partners, 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.

L The provisions of this Agreement do not constitute and shall not be deemed a waiver of any right 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, Volunteers 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 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


M Volunteers and Volunteers members, partners, officers, directors, employees, servants, agents, lessees (in the event either Volunteer acquires title to the Site), sublessees, 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 Volunteers entering into or fulfilling the terms of this Agreement with respect to the Site

N The obligations of Volunteers to finance and perform obligations under this Agreement and to pay amounts owed the Department under this Agreement are joint and several

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

DATED 12/14/98

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

By: 
FRANK V BIFERA
General Counsel

CONSENT BY VOLUNTEER

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

Federal Express Corporation

By David M Jensen
David M Jensen, Managing Attorney

Date 11/24/98

STATE OF TENNESSEE)

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COUNTY OF SHELBY)

On this 24TH day of NOVEMBER, 1998, before me personally came David M Jensen, to me known, who being duly sworn, did depose and say that he resides in SHELBY COUNTY, TENNESSEE, that he is the Managing Attorney of Federal Express Corporation the corporation described in and which executed the foregoing instrument, and that he signed his name on behalf of Federal Express Corporation and was authorized to do so


Sanford L. Luford
Notary Public

CONSENT BY VOLUNTEER

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

Cargex Brooklyn Limited Partnership

By Cargex Brooklyn Properties, Inc.
General Partner

By 
Andrew L. Ala, President


Date NOV 24 1998

STATE OF NEW HAMPSHIRE)

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COUNTY OF HILLSBORO)

On this 24th day of November, 1998, before me personally came Andrew L. Ala, to me known, who being duly sworn, did depose and say that he resides in Manchester, New Hampshire, that he is President of Cargex Brooklyn Properties, Inc., the General Partner of Cargex Brooklyn Limited Partnership, the limited partnership described in and which executed the foregoing instrument, and that he signed his name on behalf of Cargex Brooklyn Properties, Inc. in its capacity as General Partner of Cargex Brooklyn Limited Partnership and was authorized to do so


Notary Public