

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

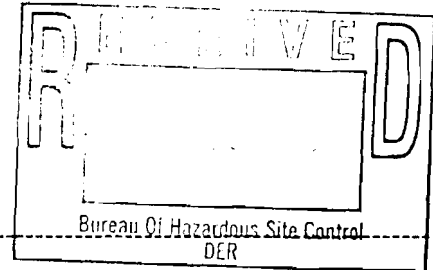
In the Matter of the
Implementation of a
Remedial Response Program
for 38 Homan Avenue, Bay Shore
New York by:

VOLUNTARY CLEANUP AGREEMENT

INDEX NUMBER:

Gibson and Cushman Dredging Co., LLC,

"Volunteer"



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

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

WHEREAS, Volunteer represents, and the Department relied upon such representations in entering into this Agreement, that Volunteer's involvement with the Site is limited to the following: Volunteer purchased the Site in March of 1998 and had not previously owned or operated the Site, and is not otherwise responsible under law to remediate the Existing Contamination;

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

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

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

I. Site Specific Definitions

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

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

B. The Site's "Existing Contamination": A Phase II study was completed for the site on _____ by _____ which indicated levels of petroleum and metals contamination in the soils. The term also includes contamination encountered during the course of this Agreement's implementation, the nature and extent of which were unknown or inadequately characterized as of the effective date of this Agreement, but which shall have been fully characterized to the Department's satisfaction.

C. "Site": that property described as section _____, Block _____, and Lot # _____ as recorded on Map _____ in the Suffolk County Clerk's Office. Exhibit "A" of this Agreement is a map of the Site showing its general location.

D. "Volunteer": _____, a limited liability company organized and existing under the laws of the State of New York, having offices at 38 Homan Avenue, Bay Shore, New York.

II. Development, Performance and Reporting of Work Plans

A. Work Plan Labels

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

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

B. Submission/Implementation of Work Plans

Work Plans shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan. Upon the Department's approval of a Work

Plan, such Department-approved Work Plan shall be incorporated into and become an enforceable part of this Agreement and shall be implemented in accordance with the schedule contained therein. If a proposed Work Plan is rejected by the Department, Volunteer shall elect in writing within 10 days to: (i) modify or expand it; (ii) complete any other Department-approved Work Plan(s); (iii) invoke the dispute resolution provisions of this Agreement pursuant to Paragraph XIII; or (iv) terminate this Agreement pursuant to the provisions set forth in Subparagraph XII.

3. During all field activities, Volunteer shall have on-Site a representative who is qualified to supervise the activities undertaken.

C. Revisions to Work Plans

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

D. Submission of Final Reports

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

An O&M Plan, if necessary, shall be submitted with the final report relative to an IRM Work Plan or the Remediation Work Plan.

E. Review of Submittals

1. The Department shall notify Volunteer in writing of its approval or disapproval of each submittal. In the event the submittal is a final report relative to the implementation of a Work Plan, the Department shall state whether the submittal was

prepared and whether the activities performed under this Agreement were in accordance with this Agreement and generally accepted technical and scientific principles. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. If the Department disapproves a submittal, it shall specify the reasons for its disapproval and may request Volunteer to modify or expand the submittal. Within 30 days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal that corrects the stated deficiencies. If the Department disapproves the revised submittal, the Department and Volunteer may pursue whatever remedies may be available, including dispute resolution pursuant to Paragraph XIII.

3. Within 30 days of the Department's approval of a final report, such report must be submitted to the Department in an electronic format acceptable to the Department.

F. Department's Determination of Need for Remediation

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

1. If the Department determines that remediation, or additional remediation, is not needed to allow the Site to be used for the Contemplated Use, the Department shall provide Volunteer with the Release described in Subparagraph II.H.

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

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

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

H. Release and Covenant Not To Sue

Upon the Department's determination that it is satisfied with the implementation of the Agreement, and further satisfied that no remedial activities other than those previously conducted at the Site, if any, are necessary for the Contemplated Use to proceed with protection of human health and the environment after receipt of a final report relating to the investigation of the Site, the Department shall, upon proof of Volunteer's compliance with Paragraph X, provide Volunteer with a Release and Covenant Not to Sue which is substantially similar to the one attached hereto as Exhibit "C," subject to the terms and conditions stated therein.

III. Progress Reports

Volunteer shall submit written monthly progress reports to the parties identified in Subparagraph XI.A.1 by the 10th day of each month until the Termination Date. Such reports shall, at a minimum, include: all actions taken pursuant to this Agreement during the previous month and those anticipated for the next month; 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; and information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule, and efforts made to mitigate such delays.

IV. Enforcement

This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York. Volunteer shall not suffer any penalty or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement as a result of a Force Majeure Event provided it notifies the Department in writing within 10

business days of when it obtains knowledge of any such event. Volunteer shall include in such notice the measures taken and to be taken to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event qualifies as a defense to compliance pursuant to this Paragraph.

V. Entry upon Site

Volunteer hereby consents, upon reasonable notice under the circumstances presented, to entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer, by any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to the matters addressed in a Department-approved Work Plan, and any agent, consultant, contractor or other person so authorized by the Commissioner, all of whom shall abide by the health and safety rules in effect for the Site. Upon request, Volunteer shall permit the Department full access to all non-privileged records relating to matters addressed by this Agreement and to job meetings. Raw data is not considered privileged and that portion of any privileged document containing raw data must still be provided to the Department.

VI. Payment of State Costs

A. 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 for work performed at or in connection with the Site prior to the effective date of this Agreement, as well as for negotiating this Agreement and all costs associated with this Agreement, but not including any expenses incurred by the State after the Termination Date. 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. 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. Reservation of Rights

A. Except as provided in the Release and Covenant Not to Sue (Exhibit "C") after its issuance, nothing contained in this Agreement shall be construed as barring,

diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to, the right to recover natural resources damages, the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any party, including Volunteer.

B. This Agreement may be terminated by the Department if Volunteer fails to comply substantially with its terms and conditions.

C. Except as otherwise provided in this Agreement, Volunteer specifically reserves all defenses under applicable law respecting any Departmental assertion of remedial liability against Volunteer, and further reserves all rights 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 it 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.

D. Except as provided in Subparagraph XIV.L, Volunteer reserves such rights as it may have to seek and obtain contribution and/or indemnification from its insurers and from other potentially responsible parties or their insurers for past or future response costs.

VIII. Indemnification

Volunteer shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement except for liability arising from willful, wanton or malicious acts or acts constituting gross negligence by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement.

IX. Notice of Sale or Conveyance

A. Within 30 days after the effective date of this Agreement, Volunteer shall file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the County Clerk in the county in which the Site is located and provide evidence of such filing to the Department. Volunteer may terminate such Notice on or after the Termination Date.

B. If Volunteer proposes to convey the whole or any part of Volunteer's 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

Within 60 days of the Department's approval of the Remediation Work Plan which relies upon institutional controls, Volunteer shall record a Department-approved instrument to run with the land with the County Clerk in the county in which the Site is located which is substantially similar to Exhibit "E" attached to this Agreement, and shall provide the Department with a copy of such instrument certified by such County Clerk to be a true and faithful copy. The Volunteer may petition the Department to terminate the deed restriction filed pursuant to this Paragraph when the Site is protective of human health and the environment for residential uses without the reliance upon the restrictions set forth in such instrument. The Department will not unreasonably withhold its approval of such petition.

XI. Communications

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

1. Communication from Volunteer shall be sent to:

Christopher Alonge
New York State Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233
Note: four copies (one unbound) of work plans are required.

G. Anders Carlson
Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
Flanigan Square
547 River Street
Troy, New York 12180-2216
Note: two copies of work plans are required, and

Anthony Quartararo, Esq.
New York State Department of Environmental Conservation
50 Wolf Road, Room 627
Albany, NY 12233

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

John V. Soderberg, Esq.
771 New York Avenue
Huntington, NY 11743

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

XII. Termination of Agreement

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

XIII. Dispute Resolution

Volunteer may commence dispute resolution within 10 days of Volunteer's receipt of the Department's notice of disapproval of a submittal or proposed Work Plan. Volunteer shall serve upon the Department a request for the appointment of an ALJ and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Volunteer relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position no later than 10 days after receipt of Volunteer's Statement of Position. Volunteer shall have the burden of proving by a preponderance of the evidence that the Department's position should not prevail. Upon review of the Administrative Record, the ALJ shall issue a final decision and order resolving the dispute. The ALJ's decision and order shall constitute a final agency action and Volunteer shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR if Volunteer commences such proceeding no later than 30 days after receipt of a copy of the decision. The invocation of dispute resolution shall not extend, postpone or modify Volunteer's obligations under this Agreement with respect to any item not in dispute unless or until the Department agrees or a court determines otherwise. The Department shall keep an administrative record which shall be available consistent with the New York State Freedom of Information Law.

XIV. Miscellaneous

A. 1. Volunteer hereby certifies that all information known to Volunteer and all information in the possession or control of Volunteer and its agents which

relates in any way to the contamination existing at the Site on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site, and to its application for this Agreement has been fully and accurately disclosed to the Department.

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

C. Each party shall have the right to take samples and to obtain split samples, duplicate samples, or both, of all substances and materials sampled by the other party.

D. Volunteer shall allow the Department to attend and shall notify the Department at least 5 working days in advance of any field activities to be conducted pursuant to this Agreement as well as any prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

E. Volunteer shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteer's obligations under this Agreement, except that the Department may exempt Volunteer from the requirement to obtain any permit issued by the Department for any activity that is conducted on the Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

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

G. Volunteer shall provide a copy of this Agreement to each contractor and subcontractor 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 in order to carry out the obligations identified in this Agreement upon performance in conformity with the terms 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 provisions of this Agreement.

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

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application to the Commissioner with copies to the parties listed in Subparagraph XI.A.

J. The remedial activities to be undertaken under the terms of this Agreement are not subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations.

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

L. Except as provided in Subparagraph XIV. M., and to the extent authorized under 42 U.S.C. Section 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 alleged contamination which is the subject matter of this Agreement. 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 provisions of 42 U.S.C. Section 9613(f)(3) shall apply.

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

New York State Department of Environmental Conservation
Division of Environmental Enforcement
Central Field Unit, Room 627
50 Wolf Road, Albany, New York 12233-5500
Phone: (518) 457-2286 • **FAX:** (518) 485-8478
Website: www.dec.state.ny.us



September 27, 2000

John V. Soderberg, Esq.
771 New York Avenue
Huntington, NY 11743

Re: Gibson and Cushman Dredging Co., LLC
Voluntary Cleanup Application

Dear Mr. Soderberg:

This letter is in response to your letter of September 19, 2000. Please be advised that the new Voluntary Cleanup Program model agreement is not subject to negotiation. As you know, the Department solicited comments from the Environmental Bar on the model agreement and used those comments to come up with the current model. We may review all the comments we have received since adopting the current model for a future revision, but for now, proposed changes are not being considered on a site by site basis. As for State oversight costs, the Department will no longer be including cost caps in the voluntary agreements.

Please feel free to contact me if you have any questions regarding these matters.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Anthony B. Quartararo'.

Anthony B. Quartararo
Assistant Counsel

cc: D. Desnoyers

JOHN V. SODERBERG, P.E., ESQ.

771 New York Avenue
Huntington, New York 11743

Phone 631 351-3555
Fax 631-351-3615
Email jvsode@hotmail.com

Anthony B. Quartararo, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
Central Field Unit, Room 627
50 Wolf Road
Albany, NY 12233-5500

September 19, 2000

RE: Gibson and Cushman Dredging, LLC

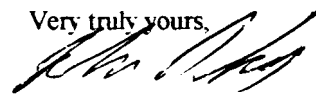
Dear Mr. Quartararo,

I am writing in furtherance of your August 23, 2000 letter concerning the Voluntary Clean up Agreement (Agreement) for the above firm. In that regard, there are several issues that I believe should be addressed with respect to the proposed Agreement. The most important issues are past oversight costs and a cap on future oversight costs.

I am enclosing a draft work plan for the Department's review. Please contact me once staff has reviewed this draft so that we may resolve the issue of future oversight costs. With respect to the remaining issues, I respectfully request that paragraph XIV E be modified slightly to read that Volunteer be required to "use its best efforts" to obtain all necessary permits etc. Secondly, I submit that the effective date set forth in paragraph XIV N be changed to the date on which Volunteer's counsel receives a copy of the duly executed Agreement.

Please contact me if you have any questions or require further information.

Very truly yours,



John V. Soderberg

cc: Mr. C. Kirk (w/encl.)

New York State Department of Environmental Conservation
Division of Environmental Enforcement
Central Field Unit, Room 627
50 Wolf Road, Albany, New York 12233-5500
Phone: (518) 457-2286 • **FAX:** (518) 485-8478
Website: www.dec.state.ny.us



August 23, 2000

John V. Soderberg, Esq.
771 New York Avenue
Huntington, NY 11743

Re: Gibson and Cushman Dredging Co., LLC
Voluntary Cleanup Application

Dear Mr. Soderberg:

Please find enclosed a copy of the Voluntary Cleanup Agreement for the above-referenced site with several modifications. First, the Voluntary Cleanup Program's model agreement has been recently modified to include a paragraph addressing contribution protection which is found at paragraph XIV. L. The other comments that were incorporated into the agreement were the clarification of the contemplated use definition and the correction in the spelling of the name of the Volunteer. I have not attached new copies of the exhibits or the glossary as those pages have remained the same from the first draft.

Thank you for your assistance, and please feel free to call if you have any questions.

Sincerely,

A handwritten signature in black ink, reading 'Anthony B. Quartararo'.

Anthony B. Quartararo
Assistant Counsel

Encl.