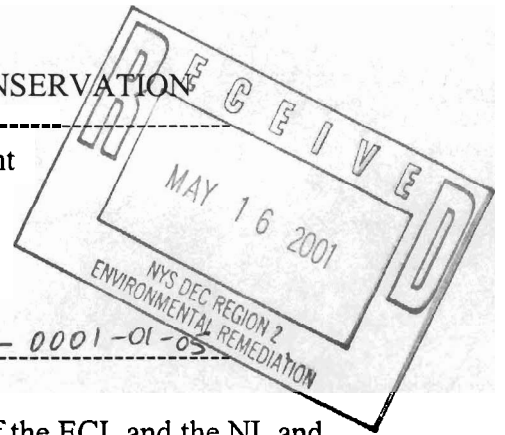


NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Implementation of a Voluntary Cleanup Agreement

for: 503-509 East 75th Street and 502-512 East 76th Street,
by: The Denihan Company," Volunteer"
Site #:

Index #:
P2-0001-01-05



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 (formerly B.J. Denihan, Inc.), the former owner of the Site, owned the 75th Street portion of the Site since 1985 and the 76th Street portion of the Site since 1983. Lycee Francais de New York owns the Site as of January 5, 2001. The Volunteer utilized the Site for primarily commercial and light industrial uses since the early to mid-1980's;

WHEREAS, the specific contemplated use of the Site is for a private school for pre-school through twelfth grade;

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

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

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

I. Site Specific Definitions

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

A. "Contemplated Use": Unrestricted.

B. "Existing Contamination": "Contamination of the subsurface, and possibly the groundwater, by chlorinated volatile organic compounds, including perchlorethylene (and breakdown products), base neutral compounds, and petroleum or petroleum constituents; in addition, the Site contains seven approximately 55-gallon concrete-encased hydraulic oil storage drums and three abandoned 55-gallon drums of hydraulic oil, antifreeze and unknown contents. The foregoing is disclosed in the Phase I Environmental Site Assessment Report (December 2, 1996), the Phase II Site Assessment Report (December 1996) and the Updated Phase I Environmental Site Assessment Report (February 29, 2000), all prepared by AKRF, Inc. The term also includes contamination identified during the implementation of this Agreement, the nature and extent of which were not known or insufficiently characterized as of the effective date of this Agreement, but which shall have been fully characterized and addressed to the Department's satisfaction. (Although the existing buildings on the Site have asbestos-containing material, such material is not considered to be Existing Contamination under this Agreement.)

C. "Site": that property located at 503-509 East 75th Street and 502-512 East 76th Street, Borough of Manhattan, City of New York, Block 1487, Lots 4, 5 and 8. Exhibit "A" of this Agreement is a map of the Site showing its general location.

D. "Volunteer": The Denihan Company, a New York State partnership with its offices at 500 West 37th Street, New York, New York 10018. Volunteer is responsible for the remediation of the Site, pursuant to agreement with the owner.

II. Development, Performance and Reporting of Work Plans

A. Work Plan Labels

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

1. "Investigation Work Plan" if the Work Plan provides for the investigation of the nature and extent of contamination at the Site;
2. "IRM Work Plan" if the Work Plan provides for an interim remedial measure;
3. "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; or
4. "OM&M Work Plan" if the Work Plan provides for post-remedial construction operation, monitoring and maintenance.

B. Submission/Implementation of Work Plans

1. The first proposed Work Plan shall be submitted within 40 Days of the effective date of this Agreement.

2. Any proposed Work Plan shall be submitted for the Department's review and approval and shall include, at a minimum, a chronological description of the anticipated activities, a schedule for performance of those activities, and sufficient detail to allow the Department to evaluate that Work Plan. A Professional Engineer must prepare, sign, and seal all Work Plans other than an Investigation Work Plan. Upon the Department's written approval of a Work Plan, such Department-approved Work Plan shall be incorporated into and become an enforceable part of this Agreement and shall be implemented in accordance with the schedule contained therein. Within 20 Days after receiving written notice that Volunteer's Work Plan has been disapproved, Volunteer shall elect in writing 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 Paragraph XII.

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

C. Revisions to Work Plans

If revisions to a Work Plan are required to satisfy the objectives of such Work Plan, the parties will negotiate revisions which shall be attached to and incorporated into the relevant Work Plan and enforceable under this Agreement. If the parties cannot agree upon revisions to the relevant Work Plan, then unless the Volunteer invokes the dispute resolution provisions of this Agreement pursuant to Paragraph XIII, 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 relative to the Site and all other information obtained as part of the implementation of the subject Work Plan; all of the assessments and evaluations required by the subject Work Plan; a statement of any additional data that must be collected; and "as-built" drawings, to the extent necessary, showing all changes made during construction. Additionally, the final report 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 OM&M Work Plan, if necessary, shall be submitted with the final report relative to an IRM Work Plan or a Remediation Work Plan.

E . Review of Submittals Other than Work Plans

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

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

3. Within 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

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 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)(1) through (c)(6). 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 and must be protective for the 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 City of New York. 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.C. If the Department determines that no revisions are required, then the Work Plan shall be attached hereto as Exhibit "B."

H. Release and Covenant Not To Sue

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

III. Progress Reports

Volunteer shall submit written monthly progress reports of its actions under this Agreement to the parties identified in Subparagraph XI.A.1. by the 10th day of each month commencing with the month subsequent to the approval of the first Work Plan and ending with the Termination Date. Such reports shall, at a minimum, include: all actions relative to this Site 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, whether under this Agreement or otherwise, 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 45 Days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement for the State'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.

B. Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by expenditure reports. The Department shall not be required to provide any other documentation of costs.

C. Such invoice shall be sent to the Volunteer at the following address: c/o Joseph N. Rizzo, Jr., Esq., 500 West 37th Street, New York, New York 10018.

D. 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.

E. Each party shall notify the other within 90 days of any change in the foregoing addresses.

F. The Volunteer may contest, in writing, invoiced costs if it believes (1) the cost documentation contains clerical errors, or (2) the costs are not related to the State's activities reimburseable under this Agreement. If Volunteer objects to an invoiced cost, Volunteer shall

pay all costs not objected to. Within ten (10) days of its receipt of an invoice, Volunteer shall identify in writing all costs objected to and identify the basis of the objection. This objection shall be filed with the Division of Environmental Remediation's Director of the Bureau of Program Management. The Director or his or her designee shall have the authority to relieve Volunteer of the obligation to pay invalid costs. Within thirty (30) days of the Department's determination of the objection, Volunteer shall pay to the Department the amount for which the Director or his or her designee determines Volunteer is obligated to pay.

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 or the Trustee's rights including, but not limited to, the right to recover natural resource damages, the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any party, including Volunteer.

B. 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.

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

VIII. Indemnification

Volunteer 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 prior to the Termination Date except for liability arising from willful, wanton or malicious acts or acts constituting gross negligence by the Department, the State of New York, and/or their representatives and employees during the course of any activities conducted pursuant to this Agreement. The Department shall send the Volunteer a written notice pursuant to Paragraph XI of its intention to exercise its rights prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

IX. Notice of Sale or Conveyance

A. Within 30 Days after the effective date of this Agreement, Volunteer shall cause to be filed 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. However, such obligation shall not extend to the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security agreement, lease or any other right accruing to a person to secure the repayment of money or the performance of a duty or obligation by a person not affiliated with Volunteer.

X. Deed Restriction

Within 60 Days of the Department's approval of a Remediation Work Plan which relies upon institutional controls, Volunteer shall, unless otherwise authorized by the Department in writing, cause to be recorded 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 or the owner of the Site 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 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 service, or hand delivered.

1. Communication from Volunteer shall be sent to:

Technical Project Manager

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

Central Office VCP Coordinator

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 to be sent, and

Legal Contact

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

Donald Denihan
The Denihan Company
500 West 37th Street
New York, NY 10018

with copies to

Joseph N. Rizzo, Jr., Esq.
500 West 37th Street
New York, NY 10018

Arnold Fleming, P.E.
AKRF, Inc.
117 East 29th Street
New York, NY 10016

Anthony A. Albanese
Albanese Partners LLC
1050 Franklin Avenue
Garden City, NY 11530

Mark A. Chertok
Sive, Paget & Riesel, P.C.
460 Park Avenue
New York, NY 10022

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 non-terminating party's receipt of the written notification terminating this Agreement, except that such termination shall not affect the provisions contained in Paragraphs IV, VI and VIII and in Subparagraph XIV.L, nor Volunteer's obligation to ensure that it does not leave the Site in a condition, from the perspective of human

health and environmental protection, worse than that which prevailed before any activities were commenced under this Agreement, which provisions and obligation shall survive the termination of this Agreement.

XIII. Dispute Resolution

Volunteer may commence dispute resolution in writing within 20 Days of Volunteer's receipt of the Department's notice of disapproval of a submittal or proposed Work Plan, disapproval of a final report, or termination of this Agreement pursuant to Subparagraph XIV.A.2. Disputes regarding Work Plan development and revision shall be heard by the Director of the Bureau of Remedial Action, Division of Environmental Remediation, for the region within which the Site is located. All other disputes subject to dispute resolution shall be heard by the Assistant Division Director of the Division of Environmental Remediation. Volunteer shall serve upon the Department a request for dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Volunteer relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position no later than 20 Days after receipt of Volunteer's Statement of Position. Volunteer shall have the burden of proving that the Department's position should not prevail. A meeting or telephone conference can be scheduled if it will promote a resolution of the issues. A final decision resolving the dispute will be issued in a timely manner. The final decision shall constitute a final agency action and Volunteer shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR 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 Article 6 of the Public Officers Law.

Volunteer may commence dispute resolution in writing within 20 Days of Volunteer's receipt of the Department's notice of disapproval of a submittal or proposed Work Plan, disapproval of a final report, or termination of this Agreement pursuant to Subparagraph XIV.A.2. Disputes regarding Work Plan development and revision shall be heard by the Bureau Director of the Division of Environmental Remediation's remedial bureau within which the Site is located. All other disputes subject to dispute resolution shall be heard by the Assistant Division Director of the Division of Environmental Remediation. Volunteer shall serve upon the Department a request for dispute resolution and a written statement of the issues in dispute, the relevant facts upon which the dispute is based, factual data, analysis or opinion supporting its position, and all supporting documentation upon which Volunteer relies (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position no later than 20 Days after receipt of Volunteer's Statement of Position. Volunteer shall have the burden of proving that the Department's position should not prevail. A meeting or telephone conference can be scheduled if it will promote a resolution of the issues. A final decision resolving the dispute will be issued timely. The final decision shall constitute a final agency action and

Volunteer shall have the right to seek judicial review of the decision pursuant to Article 78 of the CPLR 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 Article 6 of the Public Officers Law.

XIV. Miscellaneous

A. 1. Volunteer hereby certifies that all information known to Volunteer and all information in the possession or control of Volunteer and its agents which relates in any way to the contamination existing at the Site on the effective date of this Agreement, and to any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site, and to its application for this Agreement, has been fully and accurately disclosed to the Department in conjunction with the Volunteer's application for the Voluntary Cleanup Program.

2. If the information provided and certifications made by Volunteer are not materially accurate and complete, this Agreement, except with respect to the provisions of Paragraphs IV, VI and VIII and Subparagraph XIV.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.

B. 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.

C. Volunteer shall allow the Department to attend and shall notify the Department at least 5 business 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.

D. 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. If an interest in property is needed to implement an institutional control required by a Work Plan and such interest can not be obtained, then the Department may require that the Volunteer to modify the Work Plan pursuant to Subparagraph II.C of this Agreement.

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

F. 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 require all contracts entered into in order to carry out the obligations identified in this Agreement upon compliance with the terms of this Agreement.

G. 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.

H 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. Except as set forth herein, 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 and the Commissioner or his designee shall timely respond. This Subparagraph shall not extend to revisions to any Work Plan of to a change in any time frame contained in this Agreement. Changes to a Work Plan shall be accomplished as set forth in Subparagraph II.C of this Agreement. Changes to a time frame set forth in this Agreement shall be accomplished by a written request to the Department's project attorney and project manager, which request shall be timely responded to in writing.

I. The remedial activities to be undertaken under the terms of this Agreement are subject to review under the State Environmental Quality Review Act ("SEQRA"), ECL Article 8, and its implementing regulations; the Department concurs that the New York City Industrial Development Agency shall be designated as the lead agency for the SEQRA process.

J. 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.

K. 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.

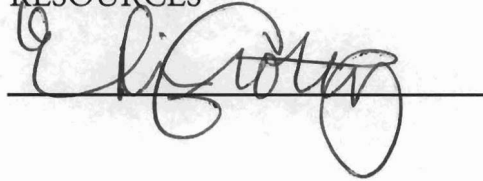
L. Volunteer and its employees, servants, agents, lessees, sublessees, successors, and assigns hereby waive any right to pursue reimbursement of monies expended by Volunteer prior to the Termination Date as against the State or the Spill Fund, and agree to indemnify and hold harmless the Spill Fund from 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.

M. Volunteer, Volunteer's lessees, sublessees, successors, and assigns shall be bound by this Agreement. Any change in ownership of Volunteer including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Volunteer's responsibilities under this Agreement. Volunteer's successors and assigns shall provide to the Department a certification that they agree to be bound by this Agreement within 30 Days of becoming a successor or assign.

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

DATED: 5/10/01

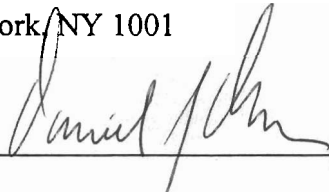
ERIN M. CROTTY, COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION AND
TRUSTEE OF THE STATE'S NATURAL
RESOURCES

A handwritten signature in black ink, appearing to read "Erin M. Crotty", 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 herein as provided by law, and agrees to be bound by this Agreement.

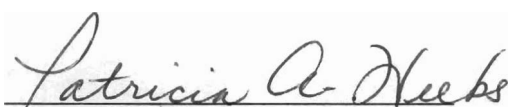
The Denihan Company
500 West 37th Street
New York, NY 1001

By: 

Date: 2-15-01

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

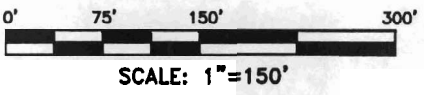
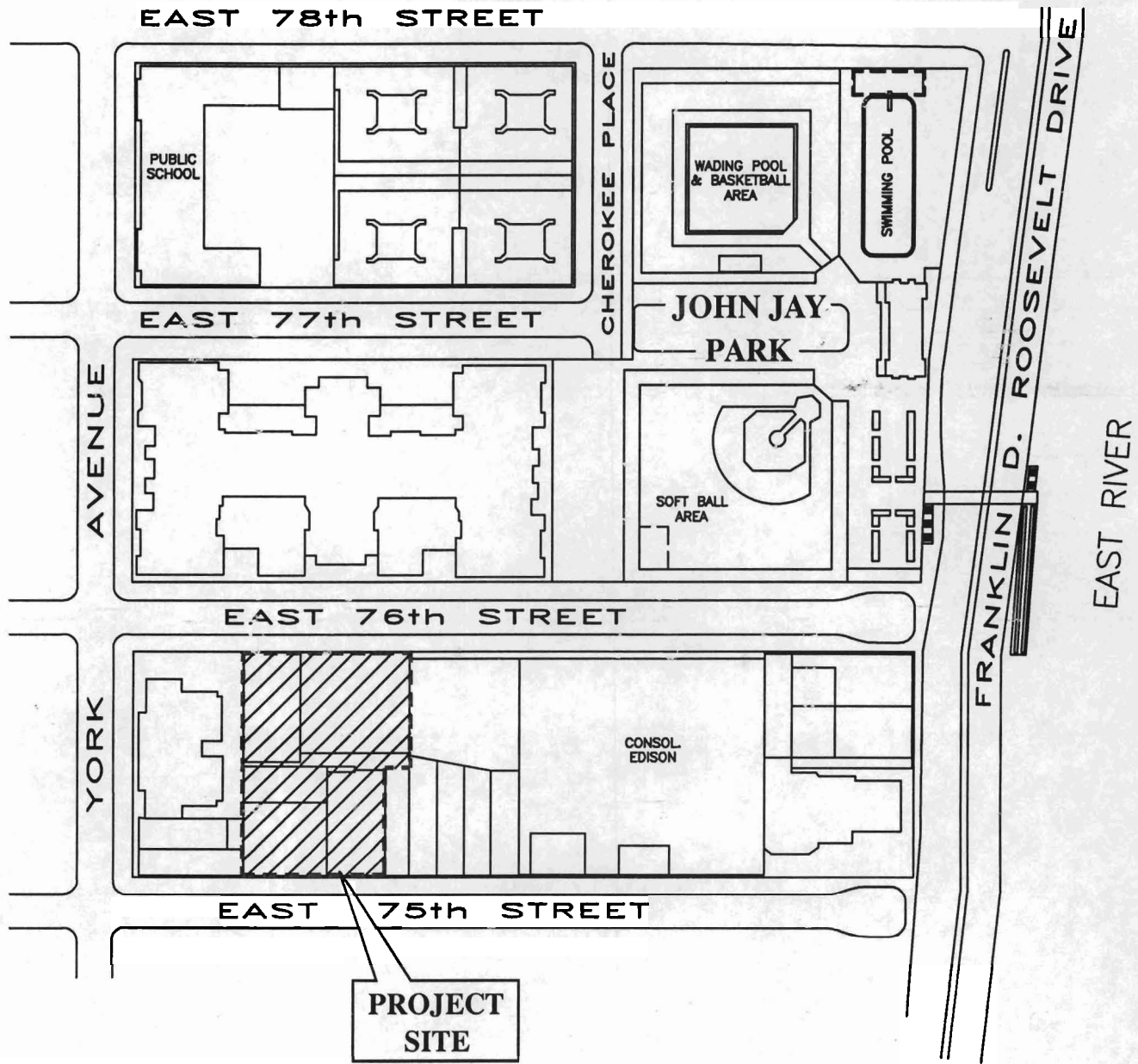
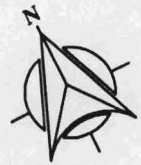
On the 15th day of FEBRUARY, in the year ²⁰⁰¹ ~~2000~~, before me, the undersigned, personally appeared DANIEL J. Denihan, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (~~are~~) subscribed to the within instrument and acknowledged to me that he/~~she~~/they executed the same in his/~~her~~/their capacity(ies), and that by his/~~her~~/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.


Signature and Office of individual
taking acknowledgment

PATRICIA A. WEEKS
Notary Public, State of New York
No. 01WE6025522
Qualified in Westchester County
Commission Expires May 24, 20 01

EXHIBIT "A"

Map of Site



Environmental Consultants C:\AKRF-DWG\30164-0008\F2

© 20

EAST 75th STREET/ EAST 76th STREET
New York, New York

SUBJECT PROPERTY AND SURROUNDING AREA

AKRF, Inc.
Environmental Consultants
117 East 29th Street New York, N.Y. 10018

DATE	02.09.01
PROJECT No.	30164
FIGURE No.	2

EXHIBIT "B"
Department Approved Work Plan(s)

EXHIBIT "C"
Assignable Release and Covenant Not To Sue

[On Department Letterhead]

[Insert Date]

The Denihan Company
500 West 37th Street
New York, NY 10018

Unless otherwise specified in this letter, all terms used in this letter 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 Denihan Company ("Volunteer"), Index No. _____ (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plans, covering the investigation and/or remediation of the Existing Contamination as defined in the Agreement at 503-509 East 75th Street and 502-512 76th Street, Borough of Manhattan, City of New York, Block 1487, Lots 4, 5 and 8 ("Property" or "Site"), have been successfully implemented. Attached as Exhibit "A" is a map of the Site showing its general location.

The Department, therefore, hereby releases, covenants not to sue, and shall forbear from bringing any action, proceeding, or suit against Volunteer and Volunteer's lessees and sublessees and Volunteer's successors and assigns and their respective secured creditors, for the further investigation and remediation of the Property based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VIII of the Agreement continue to be or have been made to the Department, and (b) Volunteer and/or Volunteer's successors, or assigns promptly commence and diligently pursue to completion the Department-approved OM&M Plan, if any notices and deed restrictions have been recorded in accordance with Paragraphs XI and XII of this Agreement. Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to natural resource damages nor to any further investigation or remedial action the Department deems necessary:

due to off-Site migration of contaminants related to the Existing Contamination resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential and to off-Site migration of petroleum, irrespective of whether the information

available to Volunteer and the Department at the time of the development of the RA Work Plan disclosed the existence or potential existence of such off-Site migration;

due to environmental conditions related to Existing Contamination at the Property that were known to the Department at the time of its approval of the RA Work Plan which indicate that Property 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, which indicates that the activities carried out in accordance with the RA 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 cleanup levels identified in, or to be identified in accordance with, the RA 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 permits or allows the, release or threat of release, at the Property 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 Volunteer causes a, or suffers the use of the Property 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 Property 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 the Agreement; who causes a, or suffers the use of the Property 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 any party 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 the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted

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

Notwithstanding any other provision in this release, covenant not to sue, and forbearance, if with respect to the Property 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 II.J 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 rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to Volunteer or any other 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 Property.

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

Nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement 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 Property to productive use of benefit to the entire community.

Dated: _____, 2001

JOHN P. CAHILL, COMMISSIONER
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____

Its: _____

Appendix "A"

(to Exhibit "C")

Map of the Property

Exhibit "D"

NOTICE OF AGREEMENT

This Notice is made as of the _____ day of _____, ²⁰⁰¹2000 by The Denihan Company, 500 West 37th Street, New York, NY 1001 regarding a parcel of real property located at 503-509 East 75th Street and 502-512 East 76th Street, Borough of Manhattan, City of New York, Block 1487, Lots 4, 5 and 8 bearing Tax Map Number _____ (the "Property"); and

WHEREAS, The Denihan Company("Volunteer"), entered into an agreement with the Department, Index # _____ (the "Agreement"), concerning the remediation of contamination present on the Property, which Agreement was signed by the Commissioner of Environmental Conservation on _____; and

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

WHEREAS, pursuant to the Agreement, Volunteer agreed to give notice of the Agreement to all parties who may acquire any interest in the Property by filing this Notice with the New York County Clerk,

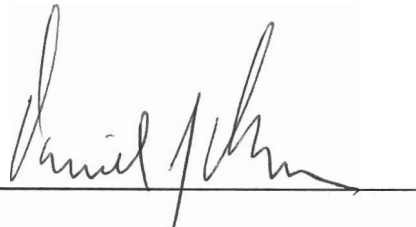
NOW, THEREFORE, Volunteer, for itself and for its successors and assigns, declares that:

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

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

Dated: 2-15-01

By: _____



STATE OF NEW YORK)
) ss:
COUNTY OF)

On the _____ day of _____, in the year 2000, before me, the undersigned, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Signature and Office of individual
taking acknowledgment

Appendix "A"
(to Exhibit "D")
Map of the Property

Exhibit "E"

DEED RESTRICTION

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;

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;

shall require Volunteer and Volunteer's successors and assigns to continue in full force and effect any institutional and engineering controls the Department requires Volunteer to put into place and maintain; and

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.

Glossary of Terms

The following terms shall have the following meanings:

“ALJ”: Administrative Law Judge

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

“ECL”: the Environmental Conservation Law.

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

“Day”: a calendar day unless otherwise specified.

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

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

“NL”: the Navigation Law

“OM&M Plan”: the Department-approved work plan detailing post-remedial operation, maintenance, and monitoring at the Site that Volunteer shall implement.

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

“Spill Fund”: the New York State Environmental Protection and Spill Compensation Fund

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

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

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

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