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A3-0437-0103

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Gibbons

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Implementation of a Voluntary Cleanup Agreement  
for: the Former Barrier Industries Property  
by: the City of Port Jervis, "Volunteer"

Index #: A3- 0437-0103

**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 is the current owner of the Site and is not otherwise responsible under law to remediate the Existing Contamination. The Site was previously owned and operated by Barrier Industries, Inc. which manufactured industrial cleaning products at the Site between 1978 and 1993. Prior to that time, a silk mill operated on the Site. The Site has been vacant and undeveloped since 1993.

**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": residential.

B. "Existing Contamination": Barrier Industries, Inc. used various chemicals in the manufacture of industrial cleaning products including detergents, polymer-based finishes, phenolic disinfectants, acid cleaners, ammonia and solvent based strippers and cleaners, car care products and insect repellent paints. Drums and containers were removed from the Site by the Environmental Protection Agency in 1995 as an emergency cleanup and removal action; wastes removed from the Site include hydrofluoric, phosphoric, hydroxyacetic, nitric, sulfuric and gluconic acids, 1,1,1-trichloroethylene, toluene, methyl carbitol, mineral spirits, methanol, acetone, chlorine solutions, ammonia solutions, sodium nitrate, pesticides, sodium hydroxide and potassium hydroxide. Preliminary data indicates the presence of metals, volatile organic compounds and semi-volatile organic compounds in soil and groundwater at the Site. The term also includes contamination identified during the implementation of this Agreement, the nature and extent of which were unknown 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.

C. "Site": that property, approximately 6.5 acres in size, located on Route 6 in the City of Port Jervis, Tax Map Identifier Number 14-6-28. Exhibit "A" of this Agreement is a map of the Site showing its general location.

D. "Volunteer": The City of Port Jervis is the Volunteer. For the sole purposes of the Voluntary Cleanup Program, the Volunteer is considered an innocent owner. As a result of this status, the Volunteer need not address off-site contamination (other than an off-site exposure assessment) in relevant work plans.

## 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. "Remedial Action Work Plan" if the Work Plan provides for the Site's remediation to cleanup levels sufficient to allow for the Contemplated Use of the Site; or
4. "OM&M Work Plan" if the Work Plan provides for post-remedial construction operation, monitoring and/or maintenance.



B. Submission/Implementation of Work Plans

1. The first proposed Work Plan to be submitted under this Agreement shall be submitted within 40 days of the effective date of this Agreement. Thereafter, the Volunteer can submit such other and additional work plans it deems appropriate.

2. A 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 Subparagraph XII.A.

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 Subparagraph XII.A.

D. Submission of Final Reports

In accordance with the schedule contained in a Work Plan, Volunteer shall submit a final report which shall include the caption of that Work Plan as set forth in Subparagraph II.A of this Agreement on the cover page. 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; "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 Remedial Action 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; or (iv) terminate this Agreement pursuant to the provisions set forth in Subparagraph XII.A. 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 60 Days of the Department's approval of a final report, the Volunteer shall submit such additional Work Plans that it proposes to implement. Failure to submit any additional Work Plans within such period shall, unless other Work Plans are under review by the Department or being implemented by the Volunteer, result in the termination of this Agreement pursuant to Subparagraph XII.B.

4. All approved final reports shall be submitted to the Department in an electronic format acceptable to the Department within 30 days of approval of such final report.



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 elect to submit for review and approval a proposed Work Plan (or a revision to an existing Remedial Action 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), excluding consideration of cost-effectiveness. At a minimum, the remedial activities contemplated by the proposed Work Plan must eliminate or mitigate all significant threats to the public health and/or the environment and must result in the Site being protective of public health and the environment for 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 Subparagraph XII.A

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 Orange County. 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 requirements other than those remedial actions already conducted at the Site, if any, are necessary to assure protection of public health and the environment based upon the Contemplated Use; 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 progress reports monthly, unless a different frequency is set forth in a work plan, 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 the 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 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:

James Hinkley  
City Clerk Treasurer  
City of Port Jervis  
P.O. Box 1002  
Port Jervis, New York 12771

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 reimbursable 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.L, 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 shall also provide the Department with a copy of such instrument certified by such County Clerk to be a true and faithful copy. 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 Remedial Action 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:

Robert Cozzy, P.E.  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, New York 12233-7010  
Note: four copies (one unbound) of work plans are required to be sent.

Kevin Carpenter, P. E.  
Division of Environmental Remediation  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, New York 12233-7010

Gary Litwin  
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

Deborah Christian, Esq.  
Division of Environmental Enforcement  
New York State Department of Environmental Conservation  
50 Wolf Road  
Albany, New York 12233-5500

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

Mayor R. Michael Worden  
City of Port Jervis  
P.O. Box 1002  
Port Jervis, New York 12771

John J. Hicks, Esq.  
Corporation Counsel  
P.O. Box 493  
Chester, New York 10918

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

A. 1. Volunteer may elect in writing to terminate this Agreement without cause while the Department may only elect to terminate this Agreement for cause, which shall be established so long as the Department's stated reason is not arbitrary and capricious. The Department shall include in its notice of termination the basis for its election to terminate this Agreement.

2. In the event of either party's election to terminate this Agreement, 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.

B. Notwithstanding Subparagraph XII.A, this Agreement shall terminate without notice in the event that the Volunteer fails to submit additional Work Plans in accordance with Subparagraph II.E, unless other Work Plans are under review by the Department or being implemented by the Volunteer.

## 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.

#### 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. The Department shall make the results of all sampling under this Subparagraph available to Volunteer and Volunteer shall make the results available pursuant to its reporting obligations.

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. Further, Volunteer shall require all contracts entered into in order to carry out the obligations identified in this Agreement to be in 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 or to a change in any time frame contained in this Agreement. Changes to the 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. 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.

J. Except as provided in Subparagraph XIV.L., 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.

K. 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.

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. The Department shall not take any enforcement action under ECL Article 27, Title 13, under CERCLA, under the Navigation Law, or under comparable statutory or common law theories of remedial liability with respect to the Site's Existing Contamination against Volunteer or a successor or assign during the implementation of this Agreement, provided such party is in compliance with the terms and provisions of this Agreement, including without limitation the requirements of all Work Plans.

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



DATED: Albany, New York  
April 20, 2001

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.

City of Port Jervis

By: R. Michael Wood

Title: MAYOR

Date: 03/16/2001

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF ORANGE )

On the 16<sup>th</sup> day of MARCH, in the year 2001, before me, the undersigned, personally appeared R. Michael Wood, 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.

James J. Hinkley  
Signature and Office of individual  
taking acknowledgment

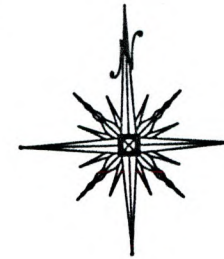
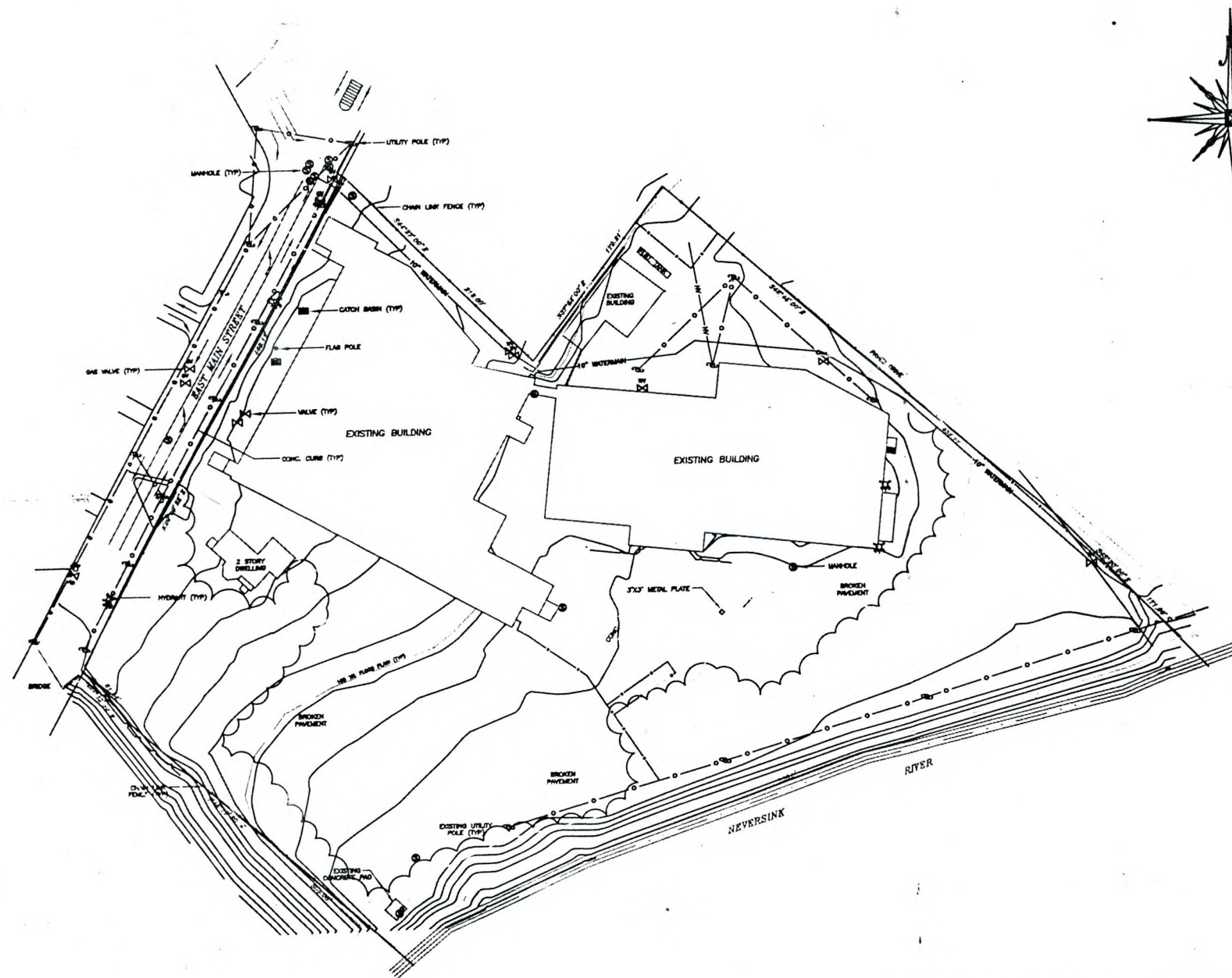
JAMES J. HINKLEY  
NOTARY PUBLIC FOR THE STATE OF NEW YORK  
APPOINTED IN ORANGE COUNTY  
REGISTRATION NO. 4323509  
MY COMMISSION EXPIRES AUG. 31, 2002



**EXHIBIT "A"**

**Map of Site**





Map based on Survey prepared by  
Pietrzak & Pfau Engineering and Surveying,  
PLLC  
dated March 15, 1998



Figure 1 - Site Plan

Project Name: Waters Edge  
Port Jervis, New York  
Project Number: E1015676

IVI Environmental Inc.  
105 Corporate Park Drive  
White Plains, NY 10604  
(914) 694-9600 (tel)  
(914) 694-3724 (fax)

Date: 1/26/01

Scale 1"= 100'



**EXHIBIT "B"**

**Department-Approved Work Plan(s)**



## EXHIBIT "C"

### Release and Covenant Not to Sue

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 City of Port Jervis ("Volunteer"), Index No.A3-0437-0103 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plan(s) relative to the Site, located on Route 6 in Port Jervis, Tax Map Number 14-6-28, has been successfully implemented.

The Department and the Trustee of New York State's natural resources ("Trustee"), therefore, hereby release, covenant not to sue, and shall forbear from bringing any action, proceeding, or suit pursuant to the Environmental Conservation Law, the Navigation Law or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department, against Volunteer and Volunteer's lessees and sublessees, successors and assigns, and their respective secured creditors, for the further investigation and remediation of the Site, and for natural resource damages, based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of the Agreement continue to be or have been made to the Department, (b) appropriate deed restrictions remain recorded in accordance with Paragraph X of the Agreement, and (c) Volunteer and/or its' lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Work Plan providing for OM&M, 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:

- due to off-Site migration of petroleum;
- due to environmental conditions or information related to the Site which were unknown at the time this Release and Covenant not to Sue was issued and which indicate that the Contemplated Use cannot be implemented with sufficient protection of human health and the environment;
- due to Volunteer's failure to implement the Agreement to the Department's satisfaction; or



- due to fraud committed by Volunteer in entering into or implementing this Agreement.

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 Volunteer nor to any of Volunteer's lessees, sublessees, successors, or assigns who cause or allow a 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 cause or allow the use of the Site to change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment; nor to any of Volunteer's lessees, sublessees, successors, or assigns who is otherwise a party responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same resulting solely from the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department or the Trustee, 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 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 letter shall be construed or deemed to preclude the State of New York from recovering such claim.
- except as provided in this letter and in Agreement, nothing contained in the Agreement or in this letter shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's or Trustee's rights (including, but not limited to, the right to recover natural resources damages) with respect to any party, including Volunteer.
- nothing contained in this letter shall prejudice any rights of the Department or Trustee to take any investigatory or remedial action it deems necessary if Volunteer fails to comply with the Agreement or if contamination other than Existing Contamination is encountered at the Site.
- nothing contained in this letter shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.



- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement under the terms of the Agreement at any time during its implementation if Volunteer fails to comply substantially with the Agreement's terms and conditions.

In conclusion, the Department is pleased to be part of this effort to return the Site to productive use of benefit to the entire community.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL  
CONSERVATION AND TRUSTEE OF NEW YORK  
STATE'S  
NATURAL RESOURCES

By: \_\_\_\_\_

Date: \_\_\_\_\_

**Appendix “A”**

**(to Exhibit “C”)**

**Map of the Site**



## Exhibit "D"

### NOTICE OF AGREEMENT

**This Notice** is made as of the \_\_\_\_ day of \_\_\_\_\_, 2001 by the City of Port Jervis regarding a parcel of real property located on Route 6 in the City of Port Jervis bearing Tax Map Number 14-6-28 (the "Property"); and

**WHEREAS**, the City of Port Jervis ("Volunteer"), entered into an agreement with the Department, Index # A3-0437-0103 ( the "Agreement"), concerning the remediation of contamination present on the Property, which Agreement was signed by the Commissioner of Environmental Conservation on \_\_\_\_\_, 2001; 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 cause the filing of a notice of the Agreement with the Orange 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.

JAMES J. HINKLEY  
NOTARY PUBLIC FOR THE STATE OF NEW YORK  
APPOINTED IN ORANGE COUNTY  
REGISTRATION NO. 4523509  
MY COMMISSION EXPIRES AUG. 31, 2002



**Appendix "A"**

**(to Exhibit "D")**

**Map of the Property**

**Exhibit "E"**

**DECLARATION of COVENANTS and RESTRICTIONS**

THIS COVENANT, made the \_\_\_ day of \_\_\_\_\_ 2\_\_\_\_, by the City of Port Jervis, a municipal corporation organized and existing under the laws of the State of New York and having offices located at The Port Jervis Municipal Building, 20 Hammond Street, Port Jervis, New York 12771.

WHEREAS, the City of Port Jervis is the owner of a parcel of property which is participating in the New York State Department of Environmental Conservation's (the "Department's") Voluntary Cleanup Program, namely, the former Barrier Industries, Inc. Site, located on Route 6 in the City of Port Jervis, County of Orange, State of New York, which is part of lands conveyed by { } to {X} by deed dated 4/14/97 { } and recorded in the Orange County Clerk's Office on {date} in Book 4670 of Deeds at Page 155, Tax Map Number 14-6-28, and being more particularly described in Appendix "A," attached to this declaration and made a part hereof, and hereinafter referred to as "the Site"; and

WHEREAS, the Site is the subject of a voluntary cleanup agreement entered into by the City of Port Jervis and the Department; and

WHEREAS, the Department approved a remedy to eliminate or mitigate all significant threats to the environment presented by the contamination disposed at the Site such remedy requires that the Site be subject to restrictive covenants.

NOW, THEREFORE, the City of Port Jervis, for itself and its successors and/or assigns, covenants that:

First, the Site subject to this Declaration of Covenants and Restrictions, is as shown on a map attached to this declaration as Appendix "B" and made a part hereof, and consists of that property listed as Tax Map Number 14-6-28

Second, unless prior written approval by the New York State Department of Environmental Conservation and the New York State Department of Health, or any New York State agency or agencies subsequently created to protect the environment of the State and the health of the State's citizens, all hereinafter referred to as "the Relevant Agencies," is first obtained, there shall be no construction, use or occupancy of the Site which results in the disturbance or excavation of the Site, which threatens the integrity of the soil cap, or which results in unacceptable human exposure to contaminated soils.

Third, the owner of the Site shall maintain the cap covering the Site by maintaining its grass cover or, after obtaining the written approval of the Relevant Agencies, by capping the Site with another material.



Fourth, the owner of the Site shall prohibit the Site from ever being used for purposes other than for [define Use] without the express written waiver of such prohibition by the Relevant Agencies.

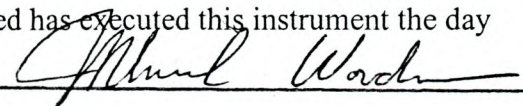
Fifth, the owner of the Site shall prohibit the use of the groundwater underlying the Site without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the user first obtains permission to do so from the Relevant Agencies.

Sixth, the owner of the Site shall continue in full force and effect any institutional and engineering controls that Respondent is required under the Agreement to put into place and maintain unless the owner first obtains permission to discontinue such controls from Relevant Agencies.

Seventh, this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of the Site and shall provide that the owner, and its successors and assigns, consent 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 Paragraph X of the Agreement requires to be recorded, and hereby covenants not to contest the authority of the Department to seek enforcement.

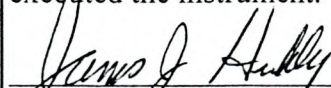
Eighth, any deed of conveyance including the portion of the Site referred to as the Site shall recite that the said conveyance is subject to this Declaration of Covenants and Restrictions.

IN WITNESS WHEREOF, the undersigned has executed this instrument the day written below.



STATE OF NEW YORK )  
 ) ss:  
COUNTY OF ORANGE )

On the 16<sup>th</sup> day of March, in the year 2001, before me, the undersigned, personally appeared R Michael Wendel, 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

JAMES J. HINKLEY  
NOTARY PUBLIC FOR THE STATE OF NEW YORK  
APPOINTED IN ORANGE COUNTY  
REGISTRATION NO. 4323593  
MY COMMISSION EXPIRES AUG. 31, 2002



## 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 expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday or State holiday. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday or State holiday, the period shall run until the close of business of the next working day.

"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.

"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.