

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

IN THE MATTER OF:

OLD FOUNDRY CORPORATION'S SALE
OF A PORTION OF THE MARATHON
BATTERY COMPANY SUPERFUND SITE

UNDER THE AUTHORITY OF THE
COMPREHENSIVE ENVIRONMENTAL
RESPONSE, COMPENSATION, AND
LIABILITY ACT OF 1980, 42 U.S.C.
§§ 9601-9675, as amended.

*
* AGREEMENT AND COVENANT
* NOT TO SUE
* SCENIC HUDSON LAND TRUST,
* INCORPORATED
*

* Index Number
* II-CERCLA-97-0202
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AGREEMENT AND COVENANT NOT TO SUE

I. INTRODUCTION

This Agreement and Covenant Not to Sue ("Agreement") is made and entered into by and between the United States Environmental Protection Agency ("EPA") and Scenic Hudson Land Trust, Inc. ("Respondent").

EPA enters into this Agreement pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9601-9675.

Respondent is a non-profit organization under Section 501(c)(3) of the Internal Revenue Code and is incorporated under the laws of the State of New York. Respondent is located at 9 Vassar Street, Poughkeepsie, New York 12601. One of Respondent's activities is the acquisition of land along the shores of the Hudson River for the purpose of land preservation.

As part of its land preservation program, Respondent seeks to purchase from Old Foundry Corporation ("OFC") OFC's property ("Property") in the Village of Cold Spring, Putnam County, New York.

The Property includes a portion of the Marathon Battery Company Superfund Site ("Site") in Cold Spring, Putnam County, New York. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register in September, 1983. EPA proposed the Site for deletion from the NPL by a notice published in the Federal Register on May 10, 1996. Deletion of the Site from the NPL will be completed in 1996.

The Parties to this agreement agree to undertake the actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to the reservations and limitations contained in Sections VII, VIII, IX, and X, the potential liability, if any, of Respondent for the Existing Contamination at the Property which may potentially result from Respondent becoming the owner of the Property.

The Parties agree that Respondent's entry into this Agreement, and actions undertaken by Respondent in accordance with the Agreement, do not constitute an admission of any liability by Respondent.

The resolution of Respondent's potential liability, in exchange for Respondent providing a substantial benefit to EPA and the public, is in the public interest.

II. DEFINITIONS

1. Unless otherwise expressly provided herein, terms used in this Agreement, which are defined in CERCLA or in regulations promulgated under CERCLA, shall have the meaning assigned to them in CERCLA or in such regulations, including any amendments thereto.

a. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

b. "Existing Contamination" shall mean the hazardous substances, pollutants or contaminants, below EPA's action levels, present or existing on or under the portion of the Property in East Foundry Cove and East Foundry Cove Marsh as of the effective date of this Agreement.

c. "Natural Cap" shall mean the "Bentomat" cap of clay and geotextile installed over the excavated portion of East Foundry Cove Marsh as part of the remedy for the Site.

d. "Old Foundry Corporation" or "OFC" or "the Grantor" shall mean the corporation that presently owns the real property subject to this Agreement and described in Exhibit 1 attached to this Agreement.

e. "Parties" shall mean EPA and the Respondent.

f. "Property" shall mean the real property subject to this Agreement and described more fully in Exhibit 1 attached to this Agreement. The Property is comprised of 84.676 acres, which includes a portion of about 48 acres of the Site. The portions of the Site are known as East Foundry Cove and East Foundry Cove Marsh.

g. "Respondent" shall mean Scenic Hudson Land Trust, Incorporated, the Grantee of the Property.

h. "Site" shall mean the Marathon Battery Company Superfund Site, located in the Village of Cold Spring, Putnam County, New York, which includes a former battery manufacturing facility at Kemble Avenue and surrounding plant grounds of approximately 11 acres, the Hudson River in the vicinity of the Cold Spring pier, East Foundry Cove, West Foundry Cove, East Foundry Cove Marsh and Constitution Marsh, as depicted generally on the maps attached to this Agreement as Exhibit 2.

i. "United States" shall mean the United States of America, its departments, agencies, and instrumentalities.

III. STATEMENT OF FACTS

2. Cadmium and nickel contamination from the former Marathon Battery Company plant, a nickel-cadmium battery manufacturing facility, was discharged by the successive owner/operators of the facility into East Foundry Cove Marsh and the Hudson River in the vicinity of the Cold Spring pier from about 1953 to 1979. Some of the contamination was also carried by tidal action to Constitution Marsh.

3. The Property includes those portions of the Site known as East Foundry Cove and East Foundry Cove Marsh. Sampling of the sediment in East Foundry Cove Marsh performed during the Remedial Investigation and the Remedial Design for Area I of the Site detected high levels of cadmium, nickel and cobalt. The Record of Decision ("ROD") for Area I of the Site, signed in September, 1986, selected, inter alia, the excavation of sediments in the marsh containing in excess of 100 mg/kg of cadmium, the restoration of the marsh by the addition of a natural "Bentomat" cap of clay and placement of clean fill and revegetation of the capped marshland.

4. In accordance with the requirements of a Consent Decree, entered by the District Court for the Southern District of New York at 91 Civ. 6544 on April 1, 1993, three Settling Parties, Gould Inc., Marathon Battery Company and the United States on behalf of the Army, agreed to fund and perform the Remedial Action for the Site and to perform Long-Term Monitoring and Maintenance for East Foundry Cove, East Foundry Cove Marsh and the adjacent Constitution Marsh in accordance with an EPA-approved Long-Term Monitoring and Maintenance Plan.

5. Respondent represents, and for the purposes of this Agreement EPA relies on those representations, that Respondent's involvement with the Property and the Site has been limited solely to its role as prospective purchaser of the Property.

IV. - CONSIDERATION

6. No monetary payment shall be required from Respondent in exchange for the United States' Covenant Not to Sue in Section VIII herein in recognition of Respondent's commitment to protect and preserve the Hudson River Valley and in consideration of and in exchange for Respondent's agreement to:

- a. preserve the natural, scenic, historic and potential recreational assets of the Property,
- b. refrain from disturbing in any way the Natural Cap in East Foundry Cove Marsh,
- c. reserve in the deed and upon any transfer of the Property, as set forth in Section V herein, a use restriction to protect the Natural Cap in East Foundry Cove Marsh, and
- d. allow continued access for performance of Long-Term Monitoring and Maintenance and such other response actions as may be necessary at the Property related to the Consent Decree for the Site.

V. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

7. Commencing upon the date that it acquires title to the Property, Respondent agrees to provide EPA, its authorized officers, employees, representatives, and other persons performing response actions, if any, and Long-Term Monitoring and Maintenance under EPA oversight, an irrevocable right of access at all reasonable times to the Property and via the Property to any portion of the Site for which access is required for the implementation of Long-Term Monitoring and Maintenance and any response actions at the Site, to the extent access to such other property is controlled by Respondent, for the purposes of performing and overseeing such response actions at the Site. Response actions, at a minimum, shall include monitoring and maintenance in East Foundry Cove Marsh and adjacent Constitution Marsh in compliance with federal and State law.

8. EPA agrees to provide reasonable notice to Respondent of the timing of any response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901, et seq., and any other applicable statute or regulation, including any amendments thereto.

9. Respondent shall ensure that assignees, successors in interest, lessees, and sublessees of the Property shall provide the same access and cooperation during the period required for Long-Term Monitoring and Maintenance. Respondent shall cause any lease, grant, or other transfer of an interest in the Property to include a provision requiring the lessee, grantee, or transferee to comply with this requirement.

10. Respondent shall not damage or leave exposed the Natural Cap or the soils beneath the cap in East Foundry Cove Marsh and shall not permit anyone else to damage or leave exposed the Natural Cap or the soils beneath the cap in East Foundry Cove Marsh. Respondent shall ensure, as discussed in Paragraphs 11 through 14 herein that assignees, successors in interest or title, lessees, and sublessees of the Property shall not damage or leave exposed the Natural Cap or the soils beneath the cap, which was installed over the excavated marshland approximately two feet below the surface of East Foundry Cove Marsh as part of the EPA-approved remedy for the Site. Respondent shall cause any deed, lease, grant, or other transfer of an interest in the Property to include a provisions requiring the lessee, grantee, or transferee to comply with this requirement.

11. Respondent shall accept a deed transferring the Property from OFC, the Grantor, to Scenic Hudson, the Grantee, which includes, but is not limited to, covenants, conditions and restrictions that run with the Property to preserve and protect the remedial action implemented as part of the EPA-approved remedy for the Marathon Battery Company Superfund Site, as required in Paragraph 10, above. The form and substance of such covenants, conditions and restrictions related to the EPA-approved remedy as recited in the deed shall be subject to review and approval by EPA prior to filing of the deed..

12. Respondent shall record in the Registry of Deeds, Putnam County, New York, the deed from OFC, as Grantor, to Scenic Hudson, as Grantee, that clearly states the covenants, conditions and restrictions that run with the Property, setting forth the controls applicable to the Property.

13. Any covenants, conditions and restrictions to be filed in the deed for the Property pursuant to this Agreement shall conform with local and State law in order to create an enforceable property restriction that runs with the land and can be modified or terminated only with the written consent of EPA upon ninety (90) days notice sent to EPA and to the persons listed in Section XV (Notices and Submissions). If a question arises under State or local law after the deed has been filed relating to the enforceability of such covenants, conditions and restrictions that run with the Property in the deed, the United States may require the Respondent to enter into and record a

Declaration of Restrictions which amends the language so that it is enforceable under State and local law.

14. Respondent shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XI (Parties Bound/Transfer of Covenant), of the Agreement. In the event of any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property, notice shall be sent to EPA ninety (90) days prior to the event and to the persons listed in Section XV (Notices and Submissions).

VI. DUE CARE/COOPERATION

15. Respondent shall exercise due care at the Site with respect to the Existing Contamination and the remedy performed at the Property and shall comply with all applicable local, State, and federal laws and regulations. Respondent recognizes that the implementation of response actions, if any, at the Site may potentially interfere with Respondent's use of the Property. Respondent agrees to cooperate fully with EPA and its agents who are implementing response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibility under applicable law, to use reasonable efforts to minimize any interference with Respondent's use by such entry and response.

16. In the event Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

VII. CERTIFICATION

17. By entering into this agreement, Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Respondent and all information in the possession or control of its officers, directors, employees, contractors and agents relating to Existing Contamination, any future use of the Property that may impact the completed remedy, or any potential future release of hazardous substances, pollutants or contaminants at or from the Site and to

its qualification for this Agreement. Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at the Property. If the United States determines that information provided by Respondent is not materially accurate and complete, the Agreement, within the sole discretion of the United States, shall be null and void and the United States reserves all rights it may have.

VIII. UNITED STATES' COVENANT NOT TO SUE

18. Subject to the Reservation of Rights in Section IX of this Agreement, the United States covenants not to sue or take any other civil or administrative action against Respondent for any and all civil liability for injunctive relief or reimbursement of response costs pursuant to Sections 106 or 107(a) of CERCLA, 42 U.S.C. §§ 9606 or 9607(a) with respect to the Existing Contamination.

IX. RESERVATION OF RIGHTS

19. The covenant not to sue set forth in Section VIII above does not pertain to any matters other than those expressly specified in Section VIII (United States' Covenant Not to Sue). The United States reserves and the Agreement is without prejudice to all rights against Respondent with respect to all other matters, including but not limited to, the following:

- a. claims based on a failure by Respondent to meet a requirement of this Agreement, including but not limited to Section V (Access/Notice to Successors in Interest), Section VI (Due Care/Cooperation) and Section XIV (Payment of Costs);
- b. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Respondent, its successors, assignees, lessees or sublessees;
- c. any liability resulting from exacerbation by Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;
- d. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Property after the effective date of this Agreement, not within the definition of Existing Contamination;
- e. criminal liability;

- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by federal agencies other than EPA; and
- g. liability for violations of local, State or federal law or regulations.

20. With respect to any claim or cause of action asserted by the United States, Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

21. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the United States may have against any person, firm, corporation or other entity not a party to this Agreement.

22. Nothing in this Agreement is intended to limit the right of EPA to undertake future response actions at the Site or to seek to compel parties other than Respondent to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by EPA in exercising its authority under federal law. Respondent acknowledges that it is purchasing property where response actions may potentially be required.

X. SETTLING RESPONDENT'S COVENANT NOT TO SUE

23. In consideration of the United States' Covenant Not To Sue in Section VIII of this Agreement, Respondent hereby covenants not to sue and not to assert any claims or causes of action against the United States, its authorized officers, employees, or representatives with respect to the Site or this Agreement, including but not limited to, any direct or indirect claims for reimbursement from the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507, through CERCLA Sections 106(b)(2), 111, 112, 113, or any other provision of law, any claim against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or any claims arising out of response activities at the Site, including claims based on EPA's oversight of such activities or approval of plans for such activities.

24. Respondent reserves, and this Agreement is without prejudice to, actions against the United States based on negligent actions taken directly by the United States, not including oversight or approval of Respondent's plans or activities, if any, that are

brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA. Nothing herein shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700 (d).

XI. PARTIES BOUND/TRANSFER OF COVENANT

25. This Agreement shall apply to and be binding upon the United States, and shall apply to and be binding on the Respondent, its officers, directors, employees, and agents. Each signatory of a Party to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

26. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Respondent under this Agreement may be assigned or transferred to any person with the prior written consent of EPA in its sole discretion.

27. Respondent agrees to pay the reasonable costs incurred by EPA to review any subsequent requests for consent to assign or transfer the Property. In the event that the Property is to be assigned or transferred to New York State or an agency or department of New York State for land preservation, Respondent may apply to EPA for a waiver of these costs.

28. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as EPA and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement including but not limited to the certification requirement in Section VII of this Agreement in order for the Covenant Not to Sue in Section VIII to be available to that party. The Covenant Not To Sue in Section VIII shall not be effective with respect to any assignees or transferees who fail to provide such written consent to EPA.

XII. DISCLAIMER

29. This Agreement in no way constitutes a finding by EPA as to the risks to human health and the environment which may be posed by Existing Contamination at the Property nor constitutes any representation by EPA that the Property is fit for any particular purpose.

XIII. DOCUMENT RETENTION

30. Respondent agrees to retain and make available to EPA all business and operating records, contracts, site studies and investigations, if any, and documents relating to operations at the Property, for at least ten years, following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten years, Respondent shall notify EPA of the location of such documents and shall provide EPA with an opportunity to copy any documents at the expense of EPA.

XIV. PAYMENT OF COSTS

31. If Respondent fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by the United States to enforce this Agreement or otherwise obtain compliance.

XV. NOTICES AND SUBMISSIONS

32. As to the United States or EPA:

Chief, New York/Caribbean Superfund Branch
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region II
290 Broadway
New York, NY 10007-1866

Attention: Site Remedial Project Manager

Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
U.S. Environmental Protection Agency, Region II
290 Broadway
New York, NY 10007-1866

Attention: Site Attorney

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044

Chief, Environmental Enforcement Unit
U.S. Attorney's Office, S.D.N.Y.
100 Church Street, 19th Floor
New York, New York 10007

33. As to Scenic Hudson:

Executive Director
The Scenic Hudson Land Trust, Inc.
9 Vassar Street
Poughkeepsie, New York 12601

Lewis & Greer, P.C.
11 Raymond Avenue
P.O. Box 2990
Poughkeepsie, New York 12603

XVI. EFFECTIVE DATE

34. The effective date of this Agreement shall be the date upon which EPA issues written notice to Respondent that EPA has fully executed the Agreement after review of and response to any public comments received.

XVII. ATTORNEY GENERAL APPROVAL

35. This Agreement shall be deemed to be issued upon written concurrence that the Attorney General of the United States or her designee has issued written approval of the settlement embodied in this Agreement.

XVIII. TERMINATION

36. If any Party believes that any or all of the obligations under Section V (Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of the Agreement, that Party may request in writing that the other Party agree to terminate the provision(s) establishing such obligations; provided, however, that the provision(s) in question shall continue in force unless and until the party requesting such termination receives written agreement from the other party to terminate such provision(s).

XIX. CONTRIBUTION PROTECTION

37. With regard to claims for contribution against Respondent, the Parties hereto agree that Respondent is entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Agreement. The matters addressed in this Agreement are all response actions taken or potentially to be taken and response costs, if any, to be incurred by the United States or any other person for the Property with respect to the Existing Contamination.

38. Respondent agrees that with respect to any suit or claim for contribution brought by it for matters related to this Agreement it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

39. Respondent also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Agreement it will notify in writing the United States within 10 days of service of the complaint on it.

XX. EXHIBITS

40. Exhibit 1 attached to this Agreement includes a description of the Property and two maps of the Property.

41. Exhibit 2 attached to this Agreement includes two maps of the Site.

XXI. PUBLIC COMMENT

42. This Agreement shall be subject to a thirty-day public comment period, after which EPA may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper or inadequate.

IT IS SO AGREED:
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:




Jeanne Fox
Regional Administrator, Region IX

10/10/58
Date

IT IS SO AGREED:
SCENIC HUDSON LAND TRUST, INC.

BY:



Name and Title
Klara B. Sauer
Executive Director

10.7.96
Date

SUMMARY OF IMPORTANT FACTS AND CONCLUSIONS

OWNER:

Old Foundry Corp.
c/o Jerome S. Spevack
160 West Pinebrook Drive
New Rochelle, NY 10804-4521

LOCATION OF PROPERTY:

End of Kemble Avenue, the east side of Bank Street
and on the Hudson River, Village of Cold Spring,
Town of Philipstown, Putnam County, New York

VALUE APPRAISED:

Fee simple

RIGHTS APPRAISED:

Market value

LAND AREA:

84.676 acres gross BUILDINGS: None of value

PROPERTY TYPE:

Potential development land on and near the Hudson
River, including parts of Foundry Cove, a marsh.

ASSESSED VALUE:

Tax Parcel - 48.12-1-44 and 49.9-1-10
Year - 1995
Amount - \$27,595

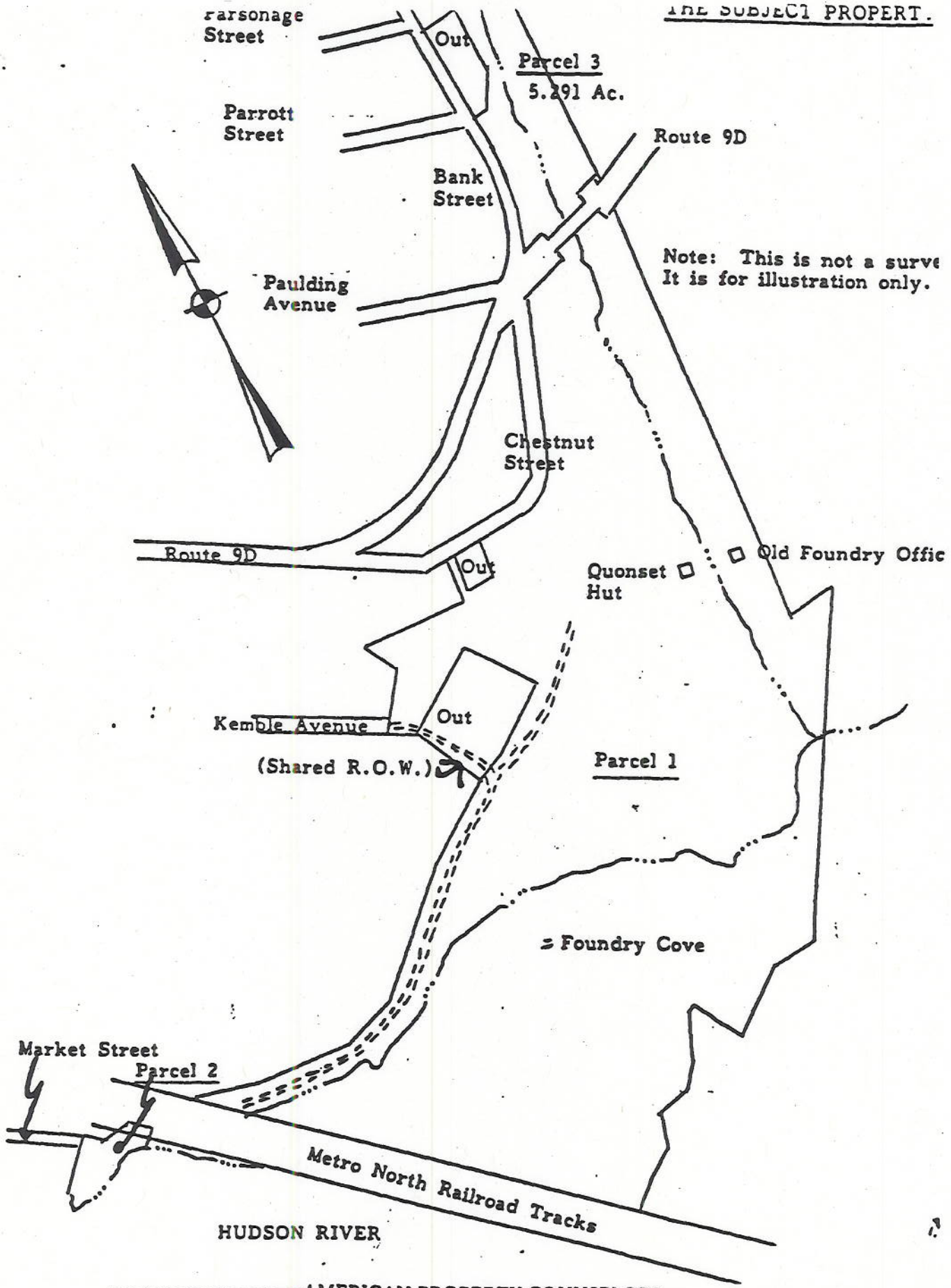
TAXES:

Year - 1995 - 1996
Amount - \$13,772.

ZONING:

I-1 and I-2, Industrial, and R-1, Residential

THE SUBJECT PROPERTY.

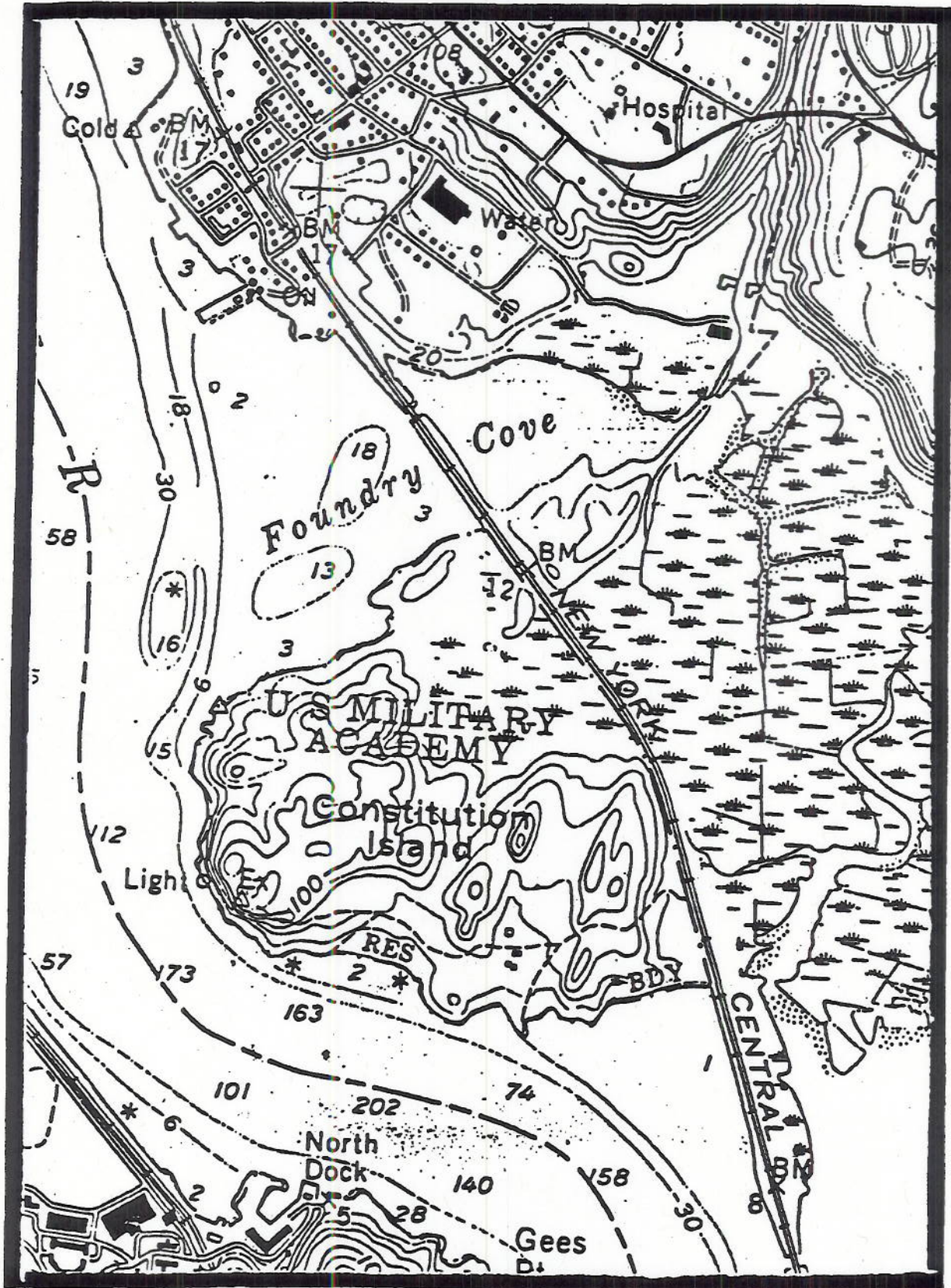


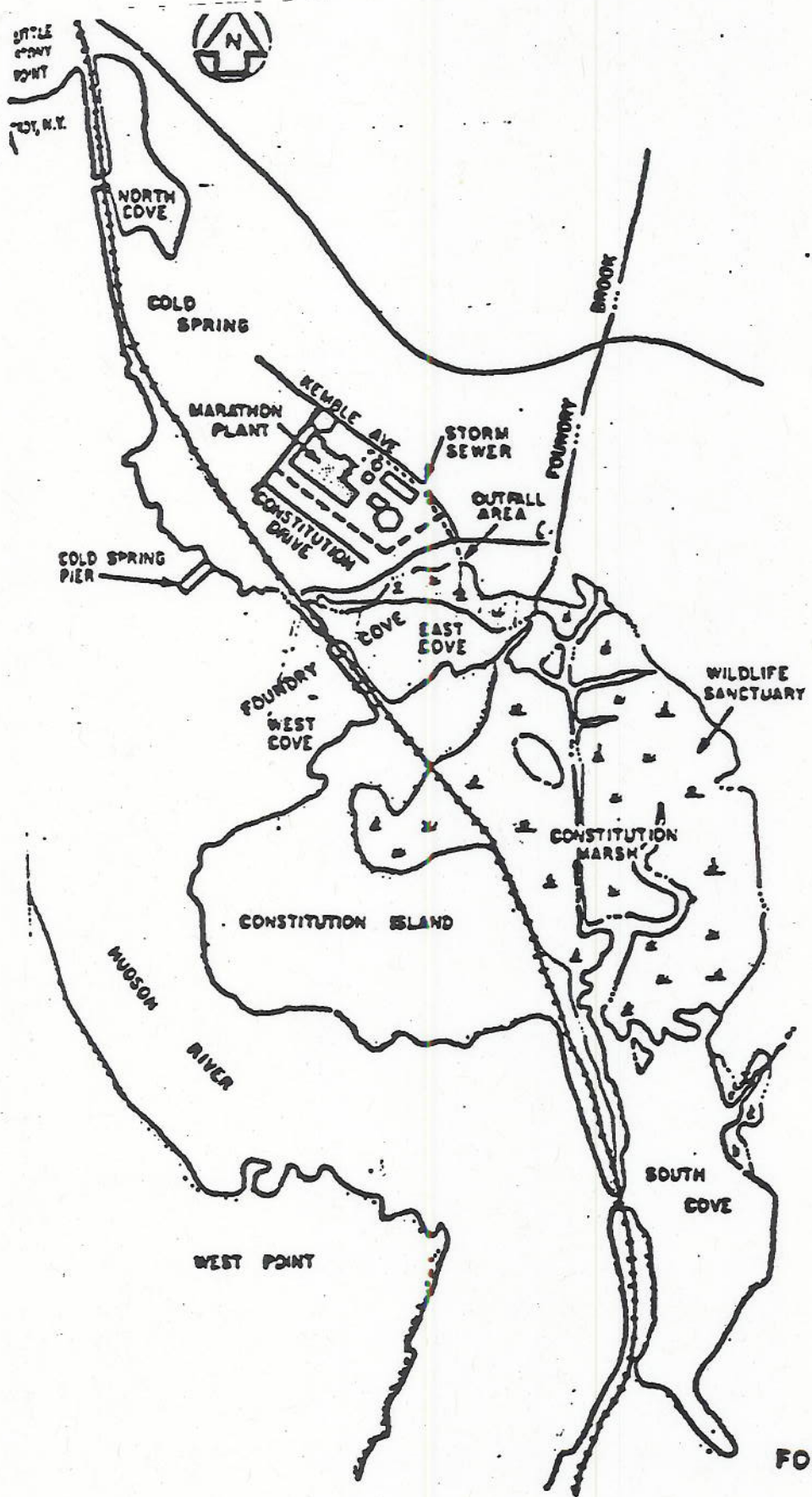
Note: This is not a survey
It is for illustration only.

HUDSON RIVER

Metro North Railroad Tracks

AMERICAN PROPERTY COUNSELORS





FOUNDRY COVE AND VICINITY
 Figure 2