

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the
Implementation of a Response Program
for 100 Commercial Street, Plainview, N.Y.
by

AGREEMENT
INDEX NUMBER:
D1-0001-97-04

David Doyaga, Esq. in his official
capacity as Trustee in Bankruptcy,

Volunteer.

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CONSIDERING,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of the Environmental Conservation Law of the State of New York ("ECL"). This Agreement is entered into pursuant to the Department's authority under that law.

2. A. The Site is located in Eastern Nassau County in the Town of Oyster Bay, New York. As shown on the attached figure (Exhibit "A"), the site is located approximately 600 feet south east of the Long Island Expressway and approximately 5,000 feet west of the Nassau/Suffolk County border (hereinafter the "Site"). The Site is denominated as Section 13, Block 98, Lot 5 on the Tax Map of the County of Nassau.

B. The "Existing Contamination" means

1. halogenated volatile organic compounds ("VOCs") and semi-volatile organic compounds ("SVOCs"), in particular tetrachloroethane ("PCE"), trichloroethene ("TCE"), toluene, and ethylbenzene, which have been found in the soil and groundwater at and under the Site (including but not limited to the presence of PCE in bottom sediments of an out-of-service leaching pool in the northwest corner of the Site); and

2. polychlorinated biphenyl compounds ("PCBs"), which have been found in the soil at and under the Site

as characterized in the July 15, 1996 report of the H2M Group, the September 29, 1995 letter from the H2M Group to the Department and the on-Site remedial work plan annexed to this Agreement as Exhibit "B" and made an enforceable part of it (the "Work Plan").

3. A. The "Volunteer" is David Doyaga, Esq., solely in his capacity as Chapter 11

Trustee in bankruptcy for Comm 100 Associates, the owner of the Site and debtor in bankruptcy (the "Debtor") and the Debtor. Mr. Doyaga was appointed Trustee by the Bankruptcy Court for the United States District Court of the Eastern District of New York (Case No. 191 B 14097-353(JF) (the "Bankruptcy Case"), by Order entered May 26, 1996. Mr. Doyaga's offices are at 16 Court Street, Suite 2300, Brooklyn, New York. References to the "Trustee" also include Mr. Doyaga's predecessors as Trustees in bankruptcy for the Debtor: Stuart M. Bernstein, Esq. and Robin Weinstein, Esq.

B. Volunteer's intentions respecting the Site, in addition to the Trustee's obligations set forth in the Bankruptcy Code (Title 11 of the United States Code), are to maximize the return to the creditors of the Debtor, including the sale of the Site for commercial, industrial, or light industrial use (the "Contemplated Use").

C. Volunteer represents, and for the purposes of this Agreement, the Department relies on those representations, that (i) the Trustee's involvement with the Site and with the facility on that Site is limited to the sale of the Site to maximize the return to the Debtor's Creditors, (ii) the Debtor's involvement with the Site is limited to being the owner since August 17, 1989, with the use of the Site since that time being for a warehouse and distribution center, and, based upon environmental assessments of the Site conducted by Eikon Planning and Design Corp. and the H2M Group, with no hazardous waste being generated during the Debtor's period of ownership by any manufacturing or other processes, and (iii) the Debtor did not cause or contribute in any way to the contamination of the Site.

4. The Department has the power, *inter alia*, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

5. A. The Department alleges that the Site is an inactive hazardous waste disposal site, as that term is defined at ECL 27-1301.2.

B. ECL 27-1313.3 provides that the Department shall be responsible for inactive hazardous waste disposal site remedial programs, except as provided in Section 1389-b of the Public Health Law. ECL 27-1313.3.a provides that whenever the Commissioner of Environmental Conservation finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order.

C. The regulations implementing ECL Article 27, Title 13 authorize at 6 NYCRR 375-1.2(e)(2)(ii) the proponents of any activity to demonstrate to the Department that such activity will not have the effect described in 6 NYCRR 375-1.2(e)(2)(i) by such demonstration as the Department may find acceptable.

D. Volunteer wishes to enter into this Agreement in order to ensure, and the Department hereby determines that this Agreement constitutes a demonstration, that the response action undertaken under this Agreement will be in compliance with the ECL and will not expose the public health or the environment to a significantly increased threat of harm or damage.

6. A. The Trustee also wishes to enter into this Agreement in order to resolve his and the Debtor's potential liability as a responsible party in connection with the Existing Contamination at, under or near the Site as Trustee in bankruptcy for an owner and/or operator under ECL Article 27, Title 13, under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") or under comparable statutory or common law theories of remedial liability as such owner and/or operator, respectively, and upon completion of the Department-approved remedial work plan, to receive, and have the Debtor and the Banque Nationale de Paris (the "Secured Creditor") and other parties acquiring an interest in the Site (including, but not limited to, those subsequent owners of the Site and their secured creditors and lenders that are not parties responsible under law, as of the effective date of this Agreement, for the Existing Contamination) receive, from the Department a Covenant Not to Sue and release from any claim, costs and liability related to, in connection with or arising from the Existing Contamination at or under the Site, including any claims, costs or liability associated with any off-Site contamination (*i.e.*, contamination beyond the boundaries of the Site). The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

B. Volunteer, desirous of implementing a response program acceptable to the Department sufficient to allow Volunteer to proceed with his plans to sell the Site for the Contemplated Use, consents to the terms and conditions of this Agreement.

7. The Department and Volunteer agree that the goals of this Agreement are:

A. for Volunteer to, (i) implement the Department-approved remedial work plan pertaining to the Site, which provides for Volunteer's remediation of the Existing Contamination at the Site (but not of off-Site contamination that may arise from the Site); and (ii) reimburse the State's administrative costs as provided in this Agreement, and

B. for the Department and the Trustee of New York State's natural resources (the "State Trustee") to release Volunteer, the Debtor's Secured Creditor, and those of their respective successors and assigns (including but not limited to subsequent owners of the Site and their secured creditors and lenders) that are not parties responsible under law, as the effective date of this Agreement, for the Site's remediation, under the conditions set forth in this Agreement, from any and all claims, actions, suits, and proceedings (including but not limited to any claims for State administrative costs) by the Department or by the State Trustee, which may arise under any applicable law as a result of, or in connection with, the Existing Contamination.

8. Volunteer and the Department agree to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department for the sole purpose of entering into or enforcing this Agreement, and agrees not to contest the validity of this Agreement or its terms.

VOLUNTEER, IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S NOT CONSIDERING VOLUNTEER OR THE DEBTOR'S SECURED CREDITOR, OR ANY SUBSEQUENT OWNER OF THE SITE WHO IS NOT A PARTY RESPONSIBLE FOR REMEDIATION OF THE EXISTING CONTAMINATION AS OF THE EFFECTIVE DATE OF THIS AGREEMENT, TO BE A RESPONSIBLE PARTY UNDER ECL ARTICLE 27, TITLE 13, UNDER CERCLA, OR UNDER COMPARABLE STATUTORY OR COMMON LAW THEORIES OF REMEDIAL LIABILITY, THE DEPARTMENT'S RELEASE AND COVENANT NOT TO SUE SET FORTH IN THIS AGREEMENT AND FOR OTHER GOOD AND VALUABLE CONSIDERATION, AND THE DEPARTMENT, IN CONSIDERATION OF AND IN EXCHANGE FOR THE PERFORMANCE BY THE VOLUNTEER OF THE REMEDIATION OF THE SITE AND FOR OTHER GOOD AND VALUABLE CONSIDERATION, AGREE TO THE FOLLOWING:

I. Performance and Reporting of the Work Plan

A. 1. Within 21 days after the effective date of this Agreement, the Department will publish a notice in the Environmental Notice Bulletin to inform the public of the execution of this Agreement and of the public's opportunity to submit comments to the Department on the Work Plan by no later than 30 days after the publication of such Environmental Notice Bulletin. The Department shall mail an equivalent notice to the Town of Oyster Bay and the County of Nassau. If the Department reasonably determines, as a result of its review of any comments, that the Work Plan must be revised:

i. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Work Plan; or

ii. due to information received, in whole or in part, after the execution of this Agreement, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use,

then the Department will so notify Volunteer within 30 days of the close of the comment period and will immediately commence negotiations with Volunteer to revise the Work Plan and, if necessary, the deadlines set forth in this Agreement accordingly. If after good faith negotiations, revisions to the Work Plan cannot be made, this Agreement shall terminate upon the Department's so informing Volunteer in writing, and both parties reserve whatever rights they may have had before the execution of this Agreement. If both parties agree to a revised Work Plan, the revised Work Plan shall be attached to this Agreement as Exhibit

"B-1"; Volunteer shall implement that revised Work Plan instead of the one contained in Exhibit "B;" and all references to "Work Plan" later in this Agreement shall refer to the one contained in Exhibit "B-1." In the event that contamination previously unknown or inadequately characterized is encountered during the Work Plan's implementation and, after good faith negotiations, Volunteer and the Department cannot agree upon modifications to the Work Plan then, except with respect to Volunteer's obligations under Paragraphs VI and VIII of this Agreement and the Department's right to enforce such obligations under Paragraph IV of this Agreement, this Agreement shall terminate effective the date of the Department's written notification to Volunteer that negotiations have failed to develop an acceptable modification to the Work Plan; Volunteer shall not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before remedial activities were commenced; and (except with respect to the Department's right to enforce the obligations of Volunteer under Paragraphs VI and VIII of this Agreement) both parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

2. Within 30 days after the determination of the final form of the Work Plan after completion of public comment, Volunteer shall commence his implementation in accordance with its provisions.

B. Volunteer shall carry out the Work Plan in accordance with its terms. Volunteer shall notify the Department of any significant difficulties that may be encountered in implementing the Work Plan, any Department-approved modification to the Work Plan, or any Department-approved detailed document or specification prepared by or on behalf of Volunteer pursuant thereto and shall not modify any obligation unless first approved by the Department.

C. During implementation of all construction activities identified in the Work Plan, Volunteer shall have on-Site a full-time representative who is qualified to supervise the work done.

D. In accordance with the schedule contained in the Work Plan as may be modified by agreement between the parties and which modifications shall appear in Exhibit "B-2" of this Agreement, Volunteer shall submit to the Department a final engineering report. The final engineering report shall include a detailed post-remedial operation and maintenance plan ("O&M Plan"), to the extent necessary; "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the Work Plan, any Department-approved modification to the Work Plan, or any Department-approved detailed document or specification prepared by or on behalf of Volunteer pursuant thereto. The O&M Plan, "as built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Should post-remedial operation and maintenance prove to be necessary, upon

the Department's approval of the O&M Plan, Volunteer shall implement the O&M Plan in accordance with the schedule and requirements of the Department-approved O&M Plan.

F. 1. Within 45 days after receipt of the final engineering report and certification, the Department shall notify Volunteer in writing whether the Department is satisfied with the implementation of the Work Plan, any Department-approved modification to the Work Plan, or any Department-approved detailed document or specification prepared by or on behalf of Volunteer pursuant thereto, which notification shall not be unreasonably withheld.

2. Upon being satisfied that the Site-specific closure criteria identified in the Work Plan have been reached, the Department shall immediately thereafter notify Volunteer in writing of its satisfaction and the Department and the State Trustee shall, except for the reservations identified below, release, covenant not to sue and forbear from bringing any action, proceeding, or suit against Volunteer and its Secured Creditor and against those of their respective successors and assigns (including, but not limited to, subsequent owners of the Site and lenders to such subsequent owners) that, as of the effective date of this Agreement, are not parties responsible under law to remediate the Existing Contamination for the further investigation and/or remediation at, on, under or near the Site, or for natural resources damages, based upon the release or threatened release related to or in connection with the Existing Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of this Agreement continue to be or have been made to the Department, (b) notices and deed restrictions ordered by the Bankruptcy Court have been recorded in accordance with Paragraph X of this Agreement, and (c) Volunteer and/or his lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Department-approved operation and maintenance plan, if any. Nonetheless, the Department and the State 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 under ECL Article 27, Title 13:

i. due to off-Site migration of petroleum that was not addressed by the Work Plan;

ii. due to environmental conditions on the Site that were unknown to the Department at the time of its approval of the Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;

iii. due to information received, in whole or in part, after the Department's approval of the final engineering report and certification, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;

iv. due to Volunteer's failure to implement this Agreement to the

Department's satisfaction, which determination shall not be unreasonably withheld; or

v. due to fraud committed, or material mistake made, by Volunteer in demonstrating that the Site-specific closure criteria identified the Work Plan were reached.

Additionally, the Department and the State Trustee hereby reserve all of their respective rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to, any further investigation or abatement the Department deems necessary to be undertaken in the event that Volunteer causes or suffers the release or threat of release at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law §172[15]) after the effective date of this Agreement; or Volunteer causes a, or suffers the use of the Site to, change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment.

3. Notwithstanding any other provision in this Agreement, if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this Agreement shall be construed, or be deemed, to preclude the State of New York from recovering such claim.

G. Upon completion by Volunteer of the Work Plan, the Department shall provide Volunteer and the Debtor's Secured Creditor with a separate written "no further action" letter based upon and consistent with the model letter attached to this Agreement and incorporated in this Agreement as Exhibit "C." Volunteer may provide a copy of such "no further action letter" to a subsequent owner of the Site, and by such subsequent owner to further subsequent owners (and to the secured creditors and lenders of such subsequent owners, and each such copy shall have the force and effect as if an original of such document.

H. Within 30 days after the closure criteria identified in the Work Plan are met, the Department shall reclassify the Site to a Class "4" or "5" inactive hazardous waste disposal site in the New York State Registry of Inactive Hazardous Waste Disposal Sites, as appropriate.

I. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department or the State Trustee, the one seeking the benefit of the release, covenant not to sue, or forbearance set forth in Subparagraph I.F or a "no further action" letter issued under Subparagraph I.G of this Agreement shall bear the burden of proving that the claim or cause of action, or any part thereof, arises as a result of, or in connection with, the Existing Contamination.

2. Except as above provided in Subparagraph I.F of this Agreement and

in the "no further action" letter issued under Subparagraph I.G of this Agreement, nothing in this Agreement is intended as a release, forbearance, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Department or the State of New York may have against any person, firm, corporation, or other entity not a party to this Agreement. In addition, notwithstanding any other provision in this Paragraph I of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph I.F and in the "no further action" letter issued under Subparagraph I.G of this Agreement shall not extend to parties that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

II. Progress Reports

A. Volunteer shall submit to the parties identified in Subparagraph XI.A.1 in the numbers specified therein copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;
2. include all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteer;
3. identify all work plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous month;
4. describe all actions, including, but not limited to, data collection and implementation of the Work Plan, that are scheduled for the next month and provide other information relating to the progress at the Site;
5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Volunteer's obligations under the Agreement, and efforts made to mitigate those delays or anticipated delays;
6. include any modifications to any work plans, including the Work Plan, that Volunteer has proposed to the Department and any that the Department has approved.

B. Volunteer shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Agreement and Volunteer's obligation to submit the progress reports shall terminate upon his receipt of the written satisfaction notification identified in Subparagraph I.F of this Agreement. However, Volunteer shall continue to submit reports concerning the implementation of any O&M Plan that may be required under this Agreement, in accordance with that Plan's requirement.

C. Volunteer also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of the following formal meetings: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting, other than meetings which include Volunteer's counsel during which matters subject to the attorney-client privilege, work product privilege, or other applicable privilege are to be discussed.

III. Review of Submittals

A. 1. The Department shall review each of the submittals Volunteer makes pursuant to this Agreement to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Agreement and generally accepted technical and scientific principles. The Department shall notify Volunteer in writing of its approval or disapproval of the submittal within 30 days of its receipt, except as set forth in Subparagraph III.A.2.i of this Agreement. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. i. If the Department disapproves a submittal, whether in whole or in part, except with respect to the final engineering report and certification (in which case the period shall be 45 days), it shall so notify Volunteer in writing and shall specify the reasons for its disapproval within 30 days after its receipt of the submittal and may request Volunteer to modify or expand the submittal; provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Work Plan. Within 30 days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal to the Department which endeavors to address and resolve the Department's stated reasons for disapproving the first submittal.

ii. After receipt of the revised submittal, the Department shall notify Volunteer in writing within 30 days of its approval or disapproval. If the Department disapproves the revised submittal, the Department and Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement.

B. Within 30 days after the Department's approval of the final engineering report and certification, Volunteer shall submit to the Department one microfilm copy (16 millimeter roll film M type cartridge) of that report and all other Department-approved drawings and submittals. Such submission shall be made to:

Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, New York 12233-7010

IV. Enforcement

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

B. Volunteer shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, judicial intervention or intervening action of a competent governmental agency or court, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Volunteer's reasonable control ("*force majeure* event"). Volunteer shall, within five working days of when it obtains knowledge of any such *force majeure* event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer 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 is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B of this Agreement.

V. Entry upon Site

Volunteer hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer by any duly designated employee, consultant, contractor, or agent of the Department or any State agency having jurisdiction with respect to the Work Plan for purposes of inspection, sampling, and testing and to ensure Volunteer's compliance with this Agreement. The Department shall abide by the health and safety rules in effect for work performed at the Site under the terms of this Agreement. Upon request, Volunteer shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Agreement (other than those portions of records constituting attorney-client communications that are protected by the attorney-client privilege or are otherwise privileged, in which event, however, Respondent shall make no claim that sampling results generated pursuant to this Agreement are privileged or are otherwise protected from disclosure) and to job meetings (other than meetings which include Volunteer's counsel during which matters subject to the attorney-

client communication are to be discussed).

VI. Payment of State Costs

Subject to the approval of the Court (the "Bankruptcy Court") in the Bankruptcy Case pursuant to 11 USC 503, the Department shall be entitled to reimbursement for the State's expenses including, but not limited to, direct labor, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating this Agreement and for reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, collecting and analyzing samples, and administrative costs associated with this Agreement, but not including the State's expenses incurred after the Department's notification identified in Subparagraph I.F.2 of this Agreement; provided, however, that Volunteer's obligation to reimburse the Department under this Paragraph VI of this Agreement shall not exceed \$30,000.

After receipt of an itemized invoice from the Department, Volunteer shall, with reasonable promptness and on notice to interested parties, apply to the Bankruptcy Court for approval to reimburse the Department for State expenses pursuant to 11 USC 330, 331, and 503 and, not more than 30 days after the entry of a final, non-appealable order approving such reimbursement, shall pay to the Department the amount of reimbursement approved by the Bankruptcy Court. Each such payment shall be made by check payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233-7010

Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (*e.g.*, supplies, materials, travel, contractual) and shall be documented by expenditure reports.

VII. Reservation of Rights

A. Except as provided in Subparagraph I.F of this Agreement and in any "no further action" letter issued under Subparagraph I.G of this Agreement, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's or State Trustee's rights with respect to any party, including Volunteer and the Secured Creditor and those of their respective successors or assigns (including but not limited to subsequent owners of the Site and lenders to such

subsequent owners of the Site) who are not parties responsible under law to remediate the Existing Contamination as of the effective date of this Agreement.

B. Nothing contained in this Agreement shall prejudice any rights of the Department or the State Trustee to take any investigatory or remedial action as authorized by applicable law it may deem necessary if Volunteer fails to comply with this Agreement or if contamination other than Existing Contamination is encountered at the Site.

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

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

E. Except as otherwise provided in this Agreement, Volunteer specifically reserves all defenses Volunteer may have under applicable law respecting any Departmental assertion of remedial liability against Volunteer; and reserves all rights Volunteer may have respecting the enforcement of this Agreement by the Department, including the rights to notice, to be heard, to appeal and any other due process. The existence of this Agreement 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.

VIII. Indemnification

The Department and Volunteer consent to the core jurisdiction of the Bankruptcy Court (28 U.S.C. 157[b][2]) over: (A) the interpretation and enforcement of the obligations of the Trustee in Bankruptcy and (B) the liquidation and/or enforcement of any and all indemnity claims (within the meaning of 11 USC 101[5]), including any indemnity claim against Volunteer; and Volunteer shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description solely arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement by Volunteer and/or any of Volunteer's directors, officers, employees, servants, agents, successors, and assigns, except that such indemnity and hold harmless obligation shall not apply to any acts or omissions of the Department, the State of New York on their representatives or employees, constituting gross negligence or willful misconduct.

IX. Notice of Sale or Conveyance

A. If Volunteer proposes to convey the whole or any part of 100 Comm Associates' ownership interest in the Site, Volunteer shall, not fewer than 60 days before

miscthe 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.

B. Notwithstanding any other provision of this Agreement, if a prospective transferee of the Debtor's ownership interest in the Site which is not a party responsible under law, as of the effective date of this Agreement, to remediate the Existing Contamination agrees in writing, upon acquisition of such interest, to assume full responsibility for Volunteer's undertaking and performance of the terms and conditions of this Agreement not previously completed, Volunteer shall request in writing that the Department agree to substitute such transferee for Volunteer, which agreement shall not be unreasonably withheld, and upon such written agreement of the Department, Volunteer shall be fully released from performing any and all terms and conditions of this Agreement.

X. Institutional Controls

A. Volunteer shall make reasonable efforts to obtain an Order from the Bankruptcy Court authorizing Volunteer to record an instrument with the office of the Nassau County Recording officer, to run with the land, that:

1. shall prohibit the Site from being used for purposes other than for the Contemplated Use without the express written waiver of such prohibition by the Department;

2. shall prohibit the use of the groundwater underlying the Site without treatment rendering it safe for drinking water or industrial purposes, as appropriate, without the express written approval of the Department, which approval shall not be unreasonably withheld; and

3. shall require Volunteer and Volunteer's successors and assigns to continue in full force and effect such institutional and engineering controls, including operation, and maintenance and monitoring, as the Department may require pursuant to the Work Plan to ensure that the Site-specific cleanup levels are reached and maintained.

B. Volunteer shall provide the Department with a copy of such order, and with a copy of the instrument certified by the Nassau County Recording Officer to be a true and faithful copy of the instrument as recorded in the office of the Nassau County Recording Officer.

C. The institutional controls required by Subparagraph X.A of this Agreement may be modified by agreement of the Department and Volunteer (or a subsequent owner of the Site) based upon, *inter alia*, the implementation of the Work Plan and, in such event, Volunteer (or a subsequent owner of the Site) shall file an appropriate instrument with the Nassau County Recording Officer, and the Department shall be provided with a copy of the

instrument certified by the Nassau County Recording Officer to be a true and faithful copy of such instrument as recorded in the office of the Nassau County Recording Officer.

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 Becherer, P.E.
New York State Department of
Environmental Conservation
Region 1 Office
Building 40
State University of New York
Stony Brook, N.Y. 11794

with copies to:

G. Anders Carlson, Ph.D.
Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203

Charles E. Sullivan, Jr., Esq.
New York State Department of Environmental Conservation
50 Wolf Road, Room 621
Albany, New York 12233-5500

Copies of work plans and reports shall be submitted as follows:

- Four copies (one unbound) to Mr. Becherer
- Two copies to Dr. Carlson
- One copy to Mr. Sullivan

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

David Doyaga, Esq.
16 Court Street, Suite 2300
Brooklyn, New York 11241

Richard Baldwin
H2M Group
575 Broad Hollow Road
Melville, New York 11747-5076

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

Michael J. Venditto, Esq.
Kensington & Ressler, L.L.P.
400 Madison Avenue
New York, New York 10017

Office of the United States Trustee
825 East Gate Blvd.
Garden City, New York 11530

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other given in accordance with this Paragraph XI.

XII. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that it has fully and accurately disclosed to the Department all reasonably available information known to Volunteer and all readily available information in the possession or control of Volunteer's officers, directors, employees, contractors, and agents which relates in any way to the contamination existing on the Site on the effective date of this Agreement or any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site and to their application for this Agreement. In addition to the Existing Contamination defined in Paragraph 1.B of this Agreement, Volunteer has reported to the Department the release of petroleum from an underground storage tank on the Site; Volunteer has agreed that this release will be remediated. Volunteer also certifies that it has not caused or contributed to a release or threat of release of hazardous substances or pollutants or contaminants at, or from, the Site (except to the extent that the Department considers the foregoing petroleum release to be within the scope of this certification).

2. If the Department determines that information Volunteer provided and

certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void *ab initio* except with respect to the provisions of Paragraphs VI and VIII and except with respect to the Department's right to enforce those obligations under this Agreement, and the Department shall reserve all rights that it may have.

3. Subject to Subparagraph XII.B.2 of this Agreement, Volunteer's entry into this Agreement and compliance with its terms shall not in any way be construed as an admission that it has any remedial liability respecting the Site.

B. 1. Volunteer shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Agreement. The responsibility for the performance of the professionals retained by Volunteer shall rest solely with Volunteer. Subject to the foregoing, Volunteer retains the right to select or change professionals in his sole discretion.

2. The Department acknowledges that H2M is an acceptable consulting firm to assist Volunteer in carrying out the terms of this Agreement.

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

D. Volunteer shall notify the Department at least five working days in advance of any field activities to be conducted pursuant to this Agreement.

E. 1. Subject to Subparagraph XII.E.2 of this Agreement, the Volunteer shall seek to obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteer's obligations under this Agreement.

2. In carrying out the activities identified in the Work Plan, Volunteer is exempt from the requirement to obtain any Department permit for any activity that is conducted on the Site and that satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. Volunteer, Volunteer's officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's lessees, successors, and assigns shall be bound by this Agreement. Volunteer shall be responsible

for ensuring that Volunteer's contractors and subcontractors perform the work in satisfaction of the requirements of this Agreement.

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

H. All references to "days" in this Agreement are to calendar days unless otherwise specified.

I. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Agreement.

J. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by the Volunteer, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Mr. Becherer and to Mr. Sullivan.

K. This Agreement constitutes an exercise of the Department's prosecutorial discretion and accordingly, the remedial activities to be undertaken under the terms of this Agreement are not subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations, 6 NYCRR Part 617. ECL 8-0105.5(i), 6 NYCRR 617.5(c)(29).

L. In undertaking the work required under this Agreement, Volunteer and his officers, directors, employees, representatives, agents, contractors and subcontractors are deemed for the purpose of ECL 27-1321.3 and any other similar provision of state or federal law, to be performing services related to cleanup or restorative work which is conducted pursuant to a contract with the Department.

M. The provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteer otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Volunteer's insurers, for payments made previously or in the future for response costs. To the extent

authorized under 42 USC 9613 and any other applicable law, Volunteer shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties in connection with or related to the Existing Contamination. 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 provision of 42 USC 9613(f)(3) shall apply.

N. Volunteer and Volunteer's employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the costs incurred to effectuate the Work Plan.

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

P. The Department and the State Trustee acknowledge and agree that they may look only to the assets and property of the estate of Comm 100 Associates, Debtor in the Bankruptcy Case presently pending in the United States Bankruptcy Court for the Eastern District of New York, for performance and execution by Volunteer, provided Volunteer complies with the terms and conditions of this Agreement. It is further understood and agreed that David Doyaga is executing this Agreement solely in his capacity as the court-appointed Trustee of the Debtor and that, provided he complies with the terms and conditions of this Agreement, he has no personal obligation or liability for the performance or nonperformance of any terms or provisions of this Agreement.

Q. The terms, conditions, and covenants of this Agreement shall not become binding upon Volunteer until an Order has been entered by the Bankruptcy Court authorizing and empowering Volunteer to (i) execute and deliver, and (ii) perform under, the Agreement on behalf of the Chapter 11 estate.

DATED: 9/16/98

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

A handwritten signature in cursive script, reading "John P. Cahill", is written over a horizontal line.

CONSENT BY VOLUNTEER

Volunteer hereby consents to the issuance and entry of this Agreement and waives his right to a hearing before the Department as provided by law, and agrees to be bound by this Agreement, provided, however, that notwithstanding such waiver or any other provision of this Agreement, this Agreement is subject to the approval of the United States Bankruptcy Court for the Eastern District of New York, without which Volunteer's consent [] shall be null, void, and without effect. All parties to this Agreement understand that such approval requires a hearing pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure.

David Doyaga

DAVID DOYAGA, Trustee in Bankruptcy for Comm 100 Associates; and
COMM 100 ASSOCIATES, by David Doyaga, Trustee in Bankruptcy for
Comm 100 Associates

Date: NOVEMBER 19, 1998

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

On this 19TH day of NOVEMBER, 1998, before me personally came David Doyaga, to me known, who being duly sworn, did depose and say that he resides in EAST WILKINSON, New York; that he is the Trustee in Bankruptcy for Comm 100 Associates, and that he signed his name as Trustee and was authorized to do so by the United States Bankruptcy Court for the Eastern District of New York.

M A Chertok

Notary Public

MARK A. CHERTOK
NOTARY PUBLIC, State of New York
No. 0625698
Qualified in Westchester County
Certificate filed in New York County
Commission Expires Sept 30, 1999
Nov 15, 1999