

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF:

Portland Harbor Superfund Site  
Triangle Park Removal Action Area  
& McCormick & Baxter Site  
Portland, Multnomah County, Oregon

HEARINGS CLERK  
EPA--REGION 10  
BONA FIDE  
PROSPECTIVE PURCHASER  
AGREEMENT AND ORDER ON  
CONSENT FOR REMOVAL  
ACTION

PURSUANT TO THE COMPREHENSIVE  
ENVIRONMENTAL RESPONSE,  
COMPENSATION, AND LIABILITY  
42 U.S.C. §§ 9604, 9606, 9607, 9622

Docket No. CERCLA-10-2007-0027

The University of Portland

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## I. INTRODUCTION

1. This Bona Fide Prospective Purchaser Agreement and Order on Consent for Removal Action (“Agreement”) is voluntarily entered into by and between the United States, on behalf of the Environmental Protection Agency (“EPA”), and the University of Portland (“Purchaser”) (collectively, the “Parties”) under the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. § 9601, *et seq.*, and, in accordance with Paragraph 25, the Federal Water Pollution Control Act, 33 U.S.C. § 1321(c) and (e), as amended, (“CWA”) and the Oil Pollution Act (“OPA”), 33 U.S.C. § 2701 *et seq.* Under this Agreement, Purchaser agrees to perform a CERCLA non-time critical removal action at or in connection with the upland property located at 5828 N. Van Houten Place, Portland, Multnomah County, Oregon (the “Triangle Park Property”) to the extent specified and as expressly limited in Section XVIII (Consideration from Purchaser), and also agrees to the terms set forth in this Agreement in relation to any future acquisition of the upland portion of the property located at 6900 North Edgewater Avenue, Portland, Oregon (the “McCormick & Baxter Property”) (collectively the “Properties”). The Properties are within the Portland Harbor Superfund Site. The Portland Harbor Site Assessment Area initially extended from approximately River Mile 3.5 to River Mile 9.2 of the Willamette River. The Triangle Park Property is located between River Miles 7 and 8, and the McCormick & Baxter Property is located at River Mile 7.

2. The parties agree that Purchaser’s entry into this Agreement and the actions taken by Purchaser in accordance with this Agreement do not constitute an admission of any liability by Purchaser.

## **II. JURISDICTION AND GENERAL PROVISIONS**

3. This Agreement is issued pursuant to the authority vested in the President of the United States by sections 104, 106, 107 and 122 of the CERCLA, 42 U.S.C. §§ 9604, 9606, 9607 and 9622, and the authority of the Attorney General to compromise and settle claims of the United States. In addition, this Agreement is issued pursuant to the authority vested in the President of the United States by section 311(c) and (e) of the CWA, 33 U.S.C. § 1321(c) and (e). These statutory authorities have been delegated to the Administrator of the EPA and further delegated to the undersigned Regional official.

4. The Parties agree that the United States District Court for the District of Oregon would have jurisdiction pursuant to section 113(b) of CERCLA, 42 U.S.C. § 9613(b), section 311(e)(2) of CWA, 33 U.S.C. § 1321(e)(2), and section 1017 of OPA, 33 U.S.C. § 2717(b), for any enforcement action brought under this Agreement.

5. EPA has notified the State of Oregon (the "State") of this action pursuant to section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and section 311(e)(1)(B) of CWA, 33 U.S.C. § 1321(e)(1)(B).

6. The Purchaser represents that it is a bona fide prospective purchaser ("BFPP") as defined by section 101(40) of CERCLA, 42 U.S.C. § 9601(40), that it has and will continue to comply with sections 101(40) and 107(r)(1) during its ownership of the Properties, and thus qualifies for the protection from liability under CERCLA set forth in section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to the Properties. In view, however, of the complex nature and significant extent of the Work to be performed in connection with the removal action, and the risk of claims under CERCLA being asserted against Purchaser notwithstanding section 107(r)(1) as a consequence of Purchaser's buying the Property or its activities pursuant to this Agreement, one of the purposes of this Agreement is to resolve, subject to the reservations and limitations contained in Section XX (Reservations of Rights by United States), any potential liability of Purchaser under CERCLA for the Existing Contamination as defined by Paragraph 14(h) below.

7. The resolution of this potential liability, including the waiver by the United States of any Federal Lien under Section 107(l) of CERCLA, 42 USC §9607(l) and any Prospective Purchaser Lien under 107(r) of CERCLA, 42 USC §9607(r) on the Properties, in exchange for Purchaser's performance of the Work and reimbursement of EPA's Oversight Costs is in the public interest. Purchaser agrees that it will provide and maintain public access along the riverbank on its proposed greenway trail once the Properties are redeveloped as described further below.

8. EPA and Purchaser recognize that this Agreement has been negotiated in good faith. Purchaser agrees to comply with and be bound by the terms of this Agreement and further agrees that it will not contest the basis or validity of this Agreement or its terms.

9. The Confederated Tribes and Bands of the Yakama Nation, The Confederated Tribes of the Grand Ronde Community of Oregon, The Confederated Tribes of Siletz Indians, The Confederated Tribes of the Umatilla Indian Reservation, The Confederated Tribes of the Warm Springs Reservation of Oregon, and The Nez Perce Tribe (collectively "the Tribal Governments") have treaty-reserved rights and resources, and other rights and interests, or resources in the Portland Harbor Superfund Site ("Portland Harbor Site"). The National Oceanic and Atmospheric Administration, The United States Department of the Interior, the Oregon Department of Fish & Wildlife, and the Tribal Governments are designated Natural Resource Trustees overseeing the assessment of natural resource damages at the Portland Harbor Site. To the extent practicable, and if consistent with the objectives of the removal action, EPA intends to ensure that the Work under this Agreement will be conducted so as to be coordinated with any natural resource damage assessment and restoration of the Portland Harbor Site. EPA also intends to provide the Tribal Governments and the federal and state Natural Resource Trustees an opportunity to review and comment on plans, reports, and other deliverables submitted by Purchaser to EPA under this Agreement.

10. EPA and Oregon Department of Environmental Quality ("DEQ") have entered into a Memorandum of Understanding for the Portland Harbor Site ("MOU") under which EPA and DEQ have agreed to share responsibility for investigation and cleanup of the Portland Harbor Site. For the Triangle Park Property, EPA and DEQ have agreed that EPA is the lead agency for conducting upland work. EPA and DEQ also agree that nothing herein shall change EPA's lead agency status for the in-water work at the Portland Harbor Site. The Parties anticipate that the upland removal work is expected to, at a minimum, meet the cleanup objectives of the 2005 DEQ Soil ROD for the Triangle Park Property, but may require additional removal actions.

11. To the extent practicable and consistent with the objectives of this removal action, the Work under this Agreement will be coordinated with work implemented under the Administrative Order on Consent for Remedial Investigation and Feasibility Study of the Portland Harbor Site, dated September 28, 2001, Docket No. CERCLA-10-2001-0240.

### **III. PARTIES BOUND**

12. This Agreement applies to and is binding upon EPA and upon Purchaser and its successors and assigns. Any change in ownership or institutional status of Purchaser including, but not limited to, any transfer of assets or real or personal property shall not alter Purchaser's responsibilities under this Agreement.

13. Purchaser shall ensure that its contractors, subcontractors, and representatives receive a copy of this Agreement and comply with this Agreement. Purchaser shall be responsible for any noncompliance with this Agreement.

#### **IV. DEFINITIONS**

14. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA, section 311 of CWA, or the Oil Pollution Act ("OPA") or in regulations promulgated under CERCLA, CWA or OPA shall have the meaning assigned to them in those statutes or in such regulations, including any amendments thereto. Whenever terms listed below are used in this Agreement, the following definitions shall apply:

a. "Agreement" shall mean this Bona Fide Prospective Purchaser Agreement and Order on Consent for Removal Action, all appendices attached hereto (listed in Section XXV) and all documents incorporated by reference into this Agreement. In the event of conflict between this Agreement and any appendix, this Agreement shall control.

b. "BFPP" shall mean a bona fide prospective purchaser as described in section 101(40) of CERCLA, 42 U.S.C. § 9601(40).

c. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

d. "CWA" shall mean the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act, 33 U.S.C. §§ 1251, *et seq.*

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

f. "Effective Date" shall be the effective date of this Agreement as provided in Section XXVIII.

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

h. "Existing Contamination" shall mean:

i. any hazardous substances, pollutants or contaminants present or existing on or under the Properties as of the Effective Date;

ii. any hazardous substances, pollutants or contaminants that migrated from the Properties prior to the Effective Date; and

iii. any hazardous substances, pollutants or contaminants presently at the Sites that migrate onto or under or from the Properties after the Effective Date.

i. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

j. "McCormick & Baxter Property" shall mean only the upland portion of real property located at 6900 North Edgewater Avenue, Portland, Oregon. The current parcel including submerged lands consists of approximately 43 acres legally described in Appendix E, and generally depicted on the map attached as Appendix B. Purchaser does not intend to acquire any of the submerged lands within the McCormick & Baxter Property as currently configured.

k. "McCormick & Baxter Site" shall mean the McCormick & Baxter Superfund Site, in Portland, Multnomah County, Oregon, listed on the National Priorities List (NPL) on May 31, 1994, 59 Fed. Reg. 27989 – 27996.

l. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

m. "Navigable water" shall have the meaning set forth in section 502(7) of CWA, 33 U.S.C. § 1362(7) and section 1001(21) of OPA, 33 U.S.C. § 2701(21), and 40 C.F.R. Part 110.

n. "Oil" shall have the meaning set forth in section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1), for the purposes of the Work to be performed under this Agreement.

o. "OPA" shall mean the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*

p. "OSC" shall mean the On-Scene Coordinator as defined in 40 C.F.R. § 300.5.

q. "Oversight Costs" shall mean all direct and indirect costs incurred by EPA or the United States in monitoring and supervising Purchaser's performance of the Work to determine whether such performance is consistent with the requirements of this Agreement, including costs incurred in reviewing plans, reports and other documents submitted pursuant to this Agreement, as well as costs incurred in overseeing implementation of the Work.

r. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

s. "Parties" shall mean EPA and Purchaser.

t. "Properties" shall mean that portion of the Portland Harbor Site encompassing the Triangle Park Property, and the upland portion of the McCormick & Baxter Property, which are more specifically described in the legal descriptions attached as Appendix A and B respectively, and depicted generally in Appendix C of this Agreement.

u. "Purchaser" shall mean The University of Portland.

v. "Removal Action" shall mean the work necessary to perform: (i) the investigation being conducted under the October 5, 2006 Agreement between the Parties (Docket No. CERCLA 10-2006-0347) and continuing under this Agreement; (ii) the Engineering Evaluation and Cost Analysis (EE/CA); (iii) the removal action to be selected in an EPA Action Memorandum; and (iv) any contingent removal action conducted in accordance with Paragraph 25 below.

w. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

x. "Portland Harbor Site" shall mean the Portland Harbor Superfund Site, in Portland, Multnomah County, Oregon, listed on the National Priorities List (NPL) on December 1, 2000. 65 Fed. Reg. 75179 *et seq.* The Site consists of the areal extent of contamination, including all suitable areas in proximity to the contamination necessary for implementation of the response action, at, from and to the Portland Harbor Superfund Site Assessment Area from approximately River Mile 3.5 to River Mile 9.2 (Assessment Area), and is depicted generally on the map attached as Appendix C. The Site includes the submerged lands, the uplands contiguous with the River including the Properties, and all areas to which hazardous substances and/or pollutants or contaminants have been deposited, stored, disposed of, placed, or otherwise come to be located.

y. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

z. "Sites" shall mean the Portland Harbor Site and the McCormick & Baxter Site.

aa. "SOW" shall mean the Statement of Work in Appendix A to this Agreement and any modifications made in accordance with this Agreement.

bb. "Supervising Contractor" shall mean the principal contractor retained by Purchaser to supervise and direct the implementation of the Work agreed to in this Agreement and to sign and approve the Final Report submitted concerning such Work.

cc. "Triangle Park Removal Action Area" and "Triangle Park Property" shall mean the real property located at 5828 North Van Houten Place, Portland, Oregon, consisting of approximately 35 acres legally described in Appendix D, and generally depicted on the map attached as Appendix B.

dd. "Trust Fund" shall mean that fund required by Section XVI (Financial Responsibility) and Section XVIII (Consideration from Purchaser).

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

ff. "Waste Material" shall mean (1) any "hazardous substance" under section 101(14) of CERCLA, 42 U.S.C. § 9601(14) and as defined in ORS 465.200, et. seq.; (2) any pollutant or contaminant under section 101(33), 42 U.S.C. § 9601(33); (3) any "solid waste" under section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

gg. "Work" shall mean all activities Purchaser is required to perform under this Agreement.

## **V. FINDINGS OF FACT**

15. Based on available information, including the Administrative Record for this matter, EPA finds the following:

### **Purchaser**

a. Purchaser is an independent Catholic not-for-profit university that was founded in 1901. Its main campus is located on 115 acres on Waud Bluff above the Properties. Purchaser currently enrolls more than 3,200 students. There are more than 737 full-time faculty and staff

with an annual operating budget of \$66 million. As such, Purchaser is a significant contributor to the economy of the City of Portland and State of Oregon.

b. Purchaser's only options for expanding its campus in its current location are either the Properties or the single-family residential neighborhoods which otherwise surround it. Purchaser seeks to continue to pursue and expand its educational and service mission by acquiring the Properties to which it plans to relocate certain athletic facilities currently situated above the bluff, freeing up land for academic buildings there. Purchaser indicates that its plan is expected to result in significant increases in faculty hiring with the concomitant substantial increase in tax base for these higher paying jobs.

c. The adjacent residential community appreciates and supports Purchaser's expansion to the south below the bluff in lieu of purchasing and converting local residential properties. Purchaser's plan includes public access to the Properties, and recreational opportunities, including a planned riverfront trail.

d. Purchaser also plans to facilitate a CERCLA early action for the sediments within the embayment adjacent to the Triangle Park Property. The majority of the sediments in that location are held in trust for the people of Oregon by the Oregon Department of State Lands ("Oregon DSL"). The City has expressed interest in pursuing this early action to be followed by a habitat restoration to benefit juvenile salmonids consistent with Purchaser's commitment to maintain in perpetuity the greenway and greenway trail. Purchaser plans to develop the greenway along the river that will feature native plants and trees that will integrate optimally with the proposed juvenile salmonid restoration project to be spearheaded by the City.

e. Purchaser has entered into an agreement with the current owner to purchase the Triangle Park Property. The expected closing date of that transaction is no later than December 31, 2006. Purchaser has also expressed its intent to purchase the upland portion of the McCormick & Baxter Property in the near future assuming a willing seller among other conditions.

f. Both the Properties are currently idle and Purchaser's proposed use provides an opportunity for environmentally beneficial and other redevelopment that might not otherwise exist.

#### Triangle Park Property

g. The Triangle Park Property is located at 5828 North Van Houten Place, Portland, Oregon, contiguous with the Willamette River and at the base of Waud Bluff just below the existing campus of the University of Portland. The Triangle Park Property has been used for a variety of industrial activities since at least 1900. Site operations have included:

- lumber manufacture and storage
- concrete batching operations
- woodwork manufacture
- asphalt storage facilities
- prefabricated or portable house manufacture
- scrap metal storage
- wooden barrel manufacture
- marine operations
- electrical power generation
- construction equipment storage
- petroleum fuel storage and distribution
- marine and dredging equipment storage
- chemical and soap manufacture
- railway and logging equipment storage
- environmental emergency response
- ironworks
- regulated hazardous waste storage
- drydock operations
- explosives storage
- painting and sandblasting operations
- used (salvaged) AST and UST tank storage
- general warehousing
- PCB transformer cleaning and storage
- tug and barge operations
- shipbuilding activities

h. A Union Pacific Railroad line crosses the length of the Triangle Park Property. An old oil pipeline runs alongside the railroad line. Also, a pump station for an underground jet fuel pipeline owned by Chevron USA is located on the site, near the southern-most corner. This jet fuel pipeline passes along the full southeastern width of the property. (DEQ Preliminary Assessment, 1995). City of Portland Outfall 48 is located between the Triangle Park Property and the McCormick & Baxter Property. Two private outfalls W-24 and W-248 are located on the Triangle Park Property. (Remedial Investigation for Soil, 6/10/02).

i. In 1995, approximately 40 structures remained on the site. Most of the structures related to historic lumber manufacture or shipbuilding operations had already been removed. (DEQ Preliminary Assessment, 1995). Six buildings were demolished in April 1998, and two buildings were destroyed in fires in 1999, and eight buildings were razed in September 2000. (Beneficial Water Use Determination, 11/5/01).

j. There have been releases of hazardous substances to the environment at and from the Triangle Park Property because of the industrial activities there. In the early 1970's, Riedel International owned and operated a portion of the Triangle Park Property. The main business of Riedel and its related entities was dredging river bottoms, pole driving, and marine construction. In 1972, a division of Riedel International named Environmental Emergency Services ("EES") was created. EES completed a RCRA Part B permit application in 1984 for a 100 foot by 100 foot hazardous waste storage building. In response to objections by neighbors against EES's proposed hazardous waste storage, the city denied a conditional use permit. EES then closed the storage area.

k. A RCRA closure plan was submitted to the Oregon Department of Environmental Quality in March 1986. Soil sampling was conducted in December 1986. Samples taken from six (6) feet ranged from 0.58 ppm to 230 ppm PCBs. Subsequent assessments of the Triangle Park Property (GeoEngineers, 1/92; EMCON Northwest, 12/93; Hahn & Associates, 1995; Geraghty & Miller, 1995) detected additional contamination on the property. Sandblast grit and soils in several areas contained elevated levels of metals. Arsenic, lead, copper, nickel and chromium were present. Groundwater in several areas was contaminated with arsenic, antimony, beryllium, chromium, copper, lead, and nickel. PCB-contaminated wastewaters had been stored in the former hazardous waste storage facility. Underground storage tank excavations encountered high TPH concentrations, including PAHs and free petroleum.

l. Several early removal actions were conducted at the Triangle Park Property, including, but not limited to the following: A RCRA closure certification was received December 13, 1988 and accepted by Oregon DEQ on January 31, 1989. EMCON supervised the removal of waste storage tanks, waste drums, some sandblast grit and miscellaneous debris, and removed leaking underground storage tanks ("USTs"). Hahn & Associates removed petroleum USTs from the area in which Sakrete operated a cement manufacturing facility. A sludge pond near the former Sakrete facility was backfilled.

m. In May 1997, Triangle Park LLC, an Oregon limited liability company associated with the Zidell family of companies, signed a Prospective Purchaser Agreement ("DEQ PPA") with Oregon DEQ and purchased the Triangle Park Property in June 1997. The DEQ PPA provided certain protections under state law. In exchange for those protections, the DEQ PPA required Triangle Park LLC to perform a remedial investigation and feasibility study ("RI/FS") for soil and perform any remedial action for soil contamination selected by Oregon DEQ up to \$750,000. In addition, Triangle Park LLC agreed in the DEQ PPA to spend up to \$50,000 for sediment work at the Triangle Park Property. Triangle Park completed a Baseline Sediment Assessment in November 1997. Triangle Park conducted remedial investigation work and Oregon DEQ issued a soil ROD in March 2005. The State's soil ROD has not yet been implemented.

## McCormick & Baxter Property

n. The McCormick & Baxter Property is located at 6900 North Edgewater Avenue, Portland, Oregon, and consists of approximately 43 acres, and was used as a wood-treating facility by McCormick & Baxter, Inc. from 1944 until the company declared bankruptcy in 1991. Various wood-treating processes were used, including creosote, pentachlorophenol ("PCP"), chromium, ammoniacal copper arsenate, ammoniacal copper zinc arsenate and Cellon (PCP in diesel oil, liquid butane, and isopropyl ether).

o. The McCormick & Baxter Property was separately listed on the NPL in June 1994. More than \$30 million was spent conducting the federally funded remedial action, and construction of the remedial action was determined to be complete in September 2005. Currently the McCormick & Baxter Property is vacant except for a paved parking area, small shop building, two field office trailers and associated utilities which are used to support ongoing creosote extraction. The Union Pacific Railroad line that runs through the adjacent Triangle Park Property also runs along the east border of the McCormick & Baxter Property. A Burlington Northern Railroad line runs along the north border.

p. Contaminants at the McCormick & Baxter Property include polynuclear aromatic hydrocarbons, pentachlorophenol (PCP), arsenic, chromium, copper, zinc and dioxins/furans. Releases from various source areas at the McCormick & Baxter Property significantly impacted soils, groundwater and sediment. Major response actions to address these releases included:

- Soil removal to eliminate the potential for human contact with soil less than four (4) feet deep that has contaminant concentrations above removal action levels;
- Capping of soil where residual soil contamination exceeded human health and ecological risk-based protective levels;
- Subsurface barrier wall encircling approximately 18 acres of the site where impacted groundwater is located; and
- A sediment cap covering approximately 23 acres of sediment at the site.
- The State of Oregon is obligated pursuant to the State Superfund Contract, to conduct long-term operation and maintenance of the remedy at the McCormick & Baxter Site.

## **VI. DETERMINATIONS**

16. Based on the Findings of Fact set forth above, and the Administrative Record supporting this removal action, EPA has determined that:

a. The Properties are each a "facility" as defined by section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and include onshore facilities as defined in section 311(a)(10) of the CWA, 33 U.S.C. § 1321(a), and sections 1001(24) of OPA, 33 U.S.C. § 2701(24).

b. The contamination found at or adjacent to the Properties, as identified in the Findings of Fact above, are "hazardous substances" as defined by section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and/or "oil" as defined by section 311(a)(1) of the CWA, 33 U.S.C. § 1321(a)(1).

c. The Willamette River is a "navigable water" as defined by section 502(7) of CWA, 33 U.S.C. § 1362(7) and section 1001(21) of OPA, 33 U.S.C. § 2701(21), and 40 C.F.R. Part 110.

d. Purchaser is a "person" as defined by section 101(21) of CERCLA, 42 U.S.C. § 9601(21), and section 311(a)(7) of CWA, 33 U.S.C. § 1321(a)(7), and by section 1001(27) of OPA, 33 U.S.C. § 2701(27).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The Work is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Agreement, will be considered consistent with the NCP, as provided in section 300.700(c)(3)(ii) of the NCP.

## **VII. AGREEMENT**

17. In consideration of and in exchange for the United States' Covenant Not to Sue in Section XIX, Purchaser agrees to provide consideration and comply with all provisions of this Agreement.

## **VIII. DESIGNATION OF CONTRACTOR AND PROJECT COORDINATORS**

18. Purchaser shall retain one or more contractors to perform the activities set forth in the SOW and shall notify EPA of the names and qualifications of such contractors within ninety (90) days of the Effective Date. Purchaser's contractor must demonstrate compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental

Data Collection and Environmental Technology Programs” (American National Standard, January 5, 1995), by submitting to EPA a copy of the contractor’s Quality Management Plan (“QMP”). The QMP must be prepared in accordance with “EPA Requirements for Quality Management Plans (QA/R-2)” (EPA/2400/B0-1/002), or equivalent documentation as required by EPA.

19. Within ninety (90) days after the Effective Date, Purchaser shall designate a Project Coordinator who shall be responsible for administration of all actions by Purchaser required by this Agreement and shall submit to EPA the designated Project Coordinator’s name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on the Triangle Park Property or readily available during the Work. Receipt by Purchaser’s Project Coordinator of any notice or communication from EPA relating to this Agreement shall constitute receipt by Purchaser.

20. EPA has designated Mark Ader of EPA Region 10 as its Project Coordinator. Except as otherwise provided by this Agreement, Purchaser shall direct all submissions required by this Agreement to the EPA Project Coordinator at:

U.S. Environmental Protection Agency, Region 10, ECL-115  
1200 Sixth Avenue  
Seattle, WA 98101

21. The EPA Project Coordinator shall be responsible for overseeing Purchaser’s implementation of this Agreement. The Project Coordinator shall have the authority vested in an On-Scene Coordinator (OSC) by the NCP, including the authority to halt, conduct, or direct any Work required by this Agreement, or to direct any other removal action undertaken at the Triangle Park Property, as well as the authority of a Remedial Project Manager (RPM) as set forth in the NCP. Absence of the EPA Project Coordinator from the Triangle Park Property shall not be cause for stoppage of work unless specifically directed by the EPA Project Coordinator.

22. EPA and Purchaser shall have the right to change their respective designated project coordinators. Purchaser shall notify EPA ten (10) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by written notice.

#### **IX. WORK TO BE PERFORMED**

23. Purchaser shall perform, at a minimum, all actions necessary to implement the SOW unless or until all moneys in the Trust Fund are depleted. Except as provided in this Paragraph and Paragraphs 29 and 63 below, Purchaser is under no obligation to perform Removal Action activities that will result in costs that exceed available moneys in the Trust Fund.

(a) The actions to be implemented generally include, but are not limited to, investigation of the nature and extent of the contamination at the Triangle Park Property, preparation of an Engineering Evaluation and Cost Analysis ("EE/CA"), and conduct of the removal action selected by EPA after appropriate public comment. To the extent possible, the EE/CA must describe and consider future land use contemplated by the Purchaser.

(b) In the event that there are insufficient moneys in the Trust Fund to complete the Removal Action: (1) Upon depletion of the Trust Fund, Purchaser may cease implementing the Removal Action; (2) No later than thirty (30) days prior to the depletion of the Trust Fund, Purchaser shall submit an Interim Report as described in Paragraph 31 below; and (3) Purchaser shall comply with the EPA-approved Interim Report. Purchaser shall budget, in consultation with EPA, as necessary to accommodate the requirement to prepare the Interim Report using the moneys available in the Trust Fund.

(c) In addition, Purchaser must facilitate sediment work adjacent to the Property that may be conducted by other parties or EPA, by providing access at reasonable times for such work that EPA may approve in the future. Purchaser is not obligated to perform any in-water removal or remedial action, including sediment removal, under this Agreement.

24. Purchaser shall perform all actions required by this Agreement in accordance with all applicable local, state, and federal laws and regulations, except as provided in section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Agreement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental or state environmental or facility siting laws. Purchaser shall identify ARARs as required by the SOW subject to EPA approval.

25. Contingent Action Under OPA If, after reviewing report(s) containing results of the Triangle Park Property investigation, EPA determines that the Existing Contamination includes a discharge or substantial threat of discharge of oil which is occurring or may occur at the Triangle Park Property to navigable waters due to past releases of oil to the soil or groundwater at the Property, in addition to the CERCLA removal actions, Purchaser agrees to undertake removal actions pursuant to CWA/OPA pursuant to and in accordance with this Agreement including the monetary cap on Purchaser's costs in Section XVIII. Specifically, Purchaser shall conduct removal actions that EPA determines necessary to protect the public health and welfare or to abate the actual discharge or substantial threat of a discharge of oil from the Triangle Park Property into navigable waters, or the adjoining shoreline in accordance with section 311(c) and (e) of CWA, 33

U.S.C. § 1321(c) & (e) and as directed by EPA. EPA will notify Purchaser of such determination and the basis for its determination in writing.

**26. Implementation of Work**

a. In accordance with the schedule in the SOW, Purchaser shall submit to EPA for approval all documents required by this Agreement. The documents shall provide a description of, and an expeditious schedule for, the actions required by this Agreement.

b. EPA may approve, disapprove, require revisions to, or modify any submission required under this Agreement in whole or in part. If EPA requires revisions, Purchaser shall submit a revised document within thirty (30) days of receipt of EPA's notification of the required revisions. If the document, such as a work plan, requires action, Purchaser shall implement the action required as approved in writing by EPA in accordance with the schedule approved by EPA. Once approved, or approved with modifications, the document, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Agreement.

c. Purchaser shall not commence any Work except in conformance with the terms of this Agreement. Purchaser shall not commence implementation of the Work set forth in any document submitted hereunder until receiving written EPA approval pursuant to Paragraph 26.b.

d. Purchaser shall copy EPA regarding any public notices relating to the development of the Properties and otherwise keep EPA informed regarding development plans and activities.

**27. Health and Safety Plan.** In accordance with the schedule set forth in the SOW, Purchaser shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-Site Removal Action activities under this Agreement. This plan shall be prepared in accordance with EPA's Standard Operating Safety Guide (PUB 9285.1-03, PB 92-963414, June 1992). In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration ("OSHA") regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Purchaser shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the Removal Action.

**28. Quality Assurance and Sampling.**

a. All sampling and analyses performed pursuant to this Agreement shall conform to EPA direction, approval, and guidance regarding sampling, quality assurance/quality control ("QA/QC"), data validation, and chain of custody procedures. Purchaser shall ensure that the

laboratory used to perform the analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Purchaser shall submit a Quality Assurance Project Plan ("QAPP") as required by the SOW. The QAPP must be prepared in accordance with "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001, re-issued May 2006), and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/240/R-02/009, December 2002) and the SOW. Purchaser shall follow, as appropriate, "Quality Assurance/Quality Control Guidance for Removal Activities: Sampling QA/QC Plan and Data Validation Procedures" (OSWER Directive No. 9360.4-01, April 1990), as guidance for QA/QC and sampling. Purchaser shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995) or ANSI/ASQ E-4 2004, "Quality Systems for Environmental Data and Technology Programs – Requirements with Guidance for Use" (American National Standard, February 4, 2004), and "EPA Requirements for Quality Management Plans" (QA/R-2) (EPA/240/B-01/002, March 2001, re-issued May 2006), or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

b. Upon request by EPA, Purchaser shall have such a laboratory analyze samples submitted by EPA for QA monitoring. Purchaser shall provide to EPA the QA/QC procedures followed by all sampling teams and laboratories performing data collection and/or analysis.

c. Upon request by EPA, Purchaser shall allow EPA or its authorized representatives to take split and/or duplicate samples. Purchaser shall notify EPA not less than fourteen (14) days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Purchaser to take split or duplicate samples of any samples it takes as part of its oversight of Purchaser's implementation of the Work.

29. Post-Removal Action Site Control. Upon completion of the Removal Action, notwithstanding any other provision of this Agreement, in accordance with the schedule in the SOW or as otherwise directed by EPA, Purchaser shall submit a proposal for post-Removal Action site control consistent with section 300.415(I) of the NCP and OSWER Directive No. 9360.2-02. Upon EPA approval, Purchaser shall implement such controls, including operation and maintenance, and shall provide EPA with documentation of all post-Removal Action site control arrangements. In the event that the Trust Fund is not depleted at the time that EPA determines that the Removal Action required under this Agreement is complete, then Purchaser may use the remaining money in the Trust Fund at least up to the amount of its original investment of \$3 million to conduct such controls, if any.

### **30. Reporting.**

a. Purchaser shall submit a written progress report to EPA concerning actions undertaken pursuant to this Agreement every 30th day beginning one-hundred and fifty (150) days after the Effective Date until completion of the Work, unless otherwise directed in writing by the EPA Project Coordinator. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Purchaser shall submit three (3) copies of all plans, reports or other submissions required by this Agreement, the SOW, or any approved work plan. Purchaser shall also submit a copy to the Oregon DEQ. Purchaser shall submit such documents in both hard-copy and electronic form.

### **31. Interim Report and Final Report.**

a. In accordance with Paragraph 23(b) above, Purchaser shall submit for EPA review and approval in accordance with Paragraph 26.b. an Interim Report. The Interim Report shall address the relevant subject matters required to be included in the Final Report, as set forth in Paragraph 31.b. below, and a plan to stabilize the partially implemented Removal Action and restrict access pending resumption of the Removal Action.

b. In accordance with the schedule in the SOW, Purchaser shall submit for EPA review and approval in accordance with Section XXVI (Notice of Completion) a final report entitled "Removal Action Completion and Institutional Control Implementation Report" that summarizes the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in section 300.165 of the NCP entitled "OSC Reports" and with "Superfund Removal Procedures: Removal Response Reporting – POLREPS and OSC Reports" (OSWER Directive No. 9360.3-03, June 1, 1994). The final report shall include a statement of actual costs incurred in complying with the Agreement, a listing of quantities and types of materials removed off-site or handled on-site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the Removal Action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by the Supervising Contractor who supervised or directed the preparation of said report:

“Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

32. Off-Site Shipments.

a. Purchaser shall, prior to any off-site shipment of Waste Material from the site to an out-of-State waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility’s state and to the EPA Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed ten (10) cubic yards.

i. Purchaser shall include in the written notification the following information: 1) the name and location of the facility to which the Waste Material is to be shipped; 2) the type and quantity of the Waste Material to be shipped; 3) the expected schedule for the shipment of the Waste Material; and 4) the method of transportation. Purchaser shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

ii. The identity of the receiving facility and state will be determined by Purchaser following the award of the contract for the Removal Action. Purchaser shall provide the information required above as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

b. Before shipping any hazardous substances, pollutants, or contaminants from the site to an off-site location, Purchaser shall obtain EPA’s certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Purchaser shall only send hazardous substances, pollutants, or contaminants from the site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

**X. PAYMENT OF OVERSIGHT COSTS**

33. Payment of Oversight Costs Upon Receipt of Periodic Bills.

a. Purchaser shall pay EPA all Oversight Costs not inconsistent with the NCP separate and apart from the consideration set forth in Section XVIII (Consideration from Purchaser). On a periodic basis, EPA will send Purchaser a bill requiring payment that includes a

Superfund Cost Recovery Package Imaging and On-Line System (SCORPIOS) cost summary, which includes direct and indirect costs incurred by EPA and its contractors. Purchaser shall make all payments required by this Paragraph by certified or cashier's check made payable to "EPA Hazardous Substance Superfund," referencing the name and address of Purchaser, the Site name, EPA Region and Site/Spill ID Number 10EC, and the EPA docket number for this action. Purchaser shall send each check to Mellon Bank, EPA Region 10 Superfund, P.O. Box 371099M, Pittsburgh, PA 15251. Alternatively, Purchaser may send payment by Electronic Funds Transfer (EFT) to Mellon Bank, ABA Number 043000261, Account Number 9109125, 22 Murrow Drive, Pittsburgh, PA 15235.

b. In the event that a payment for Oversight Costs is not made within thirty (30) days of Purchaser's receipt of a bill, Purchaser shall pay Interest on the unpaid balance. Interest shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment.

c. The total amount to be paid by Purchaser pursuant to Paragraph 33 shall be deposited in the Portland Harbor Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Portland Harbor Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

34. At the time of each payment, Purchaser shall send notice that such payment has been made to the EPA Project Coordinator identified in Paragraph 20; the Servicing Finance Office, EPA Finance Center, MS-NWD, Cincinnati, OH 45268; and Ms. Jennifer G. MacDonald, Assistant Regional Counsel, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, Seattle, WA 98101

35. Purchaser may dispute all or part of a bill for Oversight Costs if Purchaser believes that EPA has made a mathematical error or included a cost item that is outside the definition of Oversight Costs, or if Purchaser believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Purchaser shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 33.a. on or before the due date. Within the same time period, Purchaser shall pay the full amount of the contested costs into an interest-bearing escrow account. Purchaser shall simultaneously transmit to the persons listed in Paragraph 34 a copy of the transmittal letter and check paying the uncontested Oversight Costs, and a copy of the correspondence that established and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Purchaser shall ensure that the prevailing party in the dispute receives the amount upon which it prevailed from the escrow funds plus any interest accrued within twenty (20) calendar days after the dispute is resolved.

## **XI. ACCESS/NOTICE TO SUCCESSORS/INSTITUTIONAL CONTROLS**

36. Upon acquiring title to each property, Purchaser agrees to provide EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight, an irrevocable right of access at all reasonable times to the Triangle Park Property and the McCormick & Baxter Property, respectively, for the implementation of response actions, including institutional controls and, operation and maintenance of the remedy. EPA agrees to provide reasonable notice to Purchaser of the timing of response actions to be undertaken at the Triangle Park Property. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and other authorities.

37. Purchaser shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Multnomah County, State of Oregon, following acquisition of the respective Properties, which shall provide notice to all successors-in-title that the Triangle Park Property is part of the Portland Harbor Site and that EPA issued an Action Memorandum providing for the performance of a removal action at the Triangle Park Property that Purchaser will be performing. Purchaser shall record the notice(s) within thirty (30) days of EPA's approval of the notice(s). Purchaser shall provide EPA with a certified copy of the recorded notice(s) within ten (10) days of recording such notices(s).

38. Purchaser shall implement and comply with any land use restrictions and institutional controls on the Properties or required to be placed on the Properties through this Agreement.

39. For so long as Purchaser is an owner or operator of the Properties, Purchaser shall require that assignees, successors in interest, and any lessees, sublessees and other parties with rights to use the Properties shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that assignees, successors in interest, and any lessees, sublessees, and other parties with rights to use the Properties implement and comply with any land use restrictions and institutional controls on the Properties in connection with a response action, and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Properties.

40. Upon sale or other conveyance of the Properties or any part thereof, Purchaser shall require that each grantee, transferee or other holder of an interest in the Property or any part thereof shall provide access and cooperation to EPA, its authorized officers, employees, representatives, and all other persons performing response actions under EPA oversight. Purchaser shall require that each grantee, transferee or other holder of an interest in the Properties or any part thereof shall implement and comply with any land use restrictions and institutional controls on the

Properties in connection with a response action and not contest EPA's authority to enforce any land use restrictions and institutional controls on the Properties.

41. Purchaser shall provide a copy of this Agreement to any lessee, sublessee, and other party with rights to use the Properties within ninety (90) days of the date that Purchaser becomes record owner of the Properties.

**XII. RECORD RETENTION, DOCUMENTATION, AND AVAILABILITY OF INFORMATION**

42. Until ten (10) years after Purchaser's receipt of EPA's notification pursuant to Section XXVI (Notice of Completion), Purchaser shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person under CERCLA with respect to the Triangle Property, regardless of any institutional retention policy to the contrary. Until ten (10) years after Purchaser's receipt of EPA's notification pursuant to Section XXVI (Notice of Completion), Purchaser shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the Work.

43. At the conclusion of this document retention period, Purchaser shall notify EPA and the State at least ninety (90) days prior to the destruction of any such records or documents, and, upon request by EPA or the State, Purchaser shall deliver any such records or documents to EPA or the State. Purchaser may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Purchaser asserts such a privilege, they shall provide EPA or the State with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Purchaser. However, no documents, records or other information created or generated pursuant to the requirements of this Agreement shall be withheld on the grounds that they are privileged.

44. Purchaser may assert a business confidentiality claim pursuant to 40 CFR § 2.203(b) with respect to part or all of any information submitted to EPA pursuant to this Agreement, provided such claim is allowed by section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7). Analytical and other data specified in section 104(e)(7)(F) of CERCLA shall not be claimed as confidential by Purchaser. EPA shall disclose information covered by a business confidentiality claim only to the extent permitted by, and by means of the procedures set forth at, 40 CFR Part 2

Subpart B. If no such claim accompanies the information when it is received by EPA, EPA may make it available to the public without further notice to Purchaser.

### **XIII. DISPUTE RESOLUTION**

45. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Agreement. EPA and Purchaser shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally. If EPA contends that Purchaser is in violation of this Agreement, EPA shall notify Purchaser in writing, setting forth the basis for its position. Purchaser may dispute EPA's position pursuant to Paragraph 46.

46. If Purchaser disputes EPA's position with respect to Purchaser's compliance with this Agreement or objects to any EPA action taken pursuant to this Agreement, including billings for Oversight Costs, Purchaser shall notify EPA in writing of its position unless the dispute has been resolved informally. EPA may reply, in writing, to Purchaser's position within twenty (20) days of receipt of Purchaser's notice. EPA and Purchaser shall have thirty (30) days from EPA's receipt of Purchaser's written statement of position to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Such extension may be granted verbally but must be confirmed in writing.

47. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by both Parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, the Division Director of the Office of Environmental Cleanup will review the dispute on the basis of the parties' written statements of position and issue a written decision on the dispute to Purchaser. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Purchaser's obligations under this Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Purchaser shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

### **XIV. FORCE MAJEURE**

48. Purchaser agrees to perform all requirements of this Agreement within the time limits established under this Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Purchaser, or of any entity controlled by Purchaser, including but not limited to its

contractors and subcontractors, which delays or prevents performance of any obligation under this Agreement despite Purchaser's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work, or increased cost of performance, or a failure to attain performance standards/action levels set forth in the Action Memorandum.

49. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a *force majeure* event, Purchaser shall notify EPA orally within two (2) days of when Purchaser first knew that the event might cause a delay. Within seven (7) days thereafter, Purchaser shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Purchaser's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Purchaser, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Purchaser from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

50. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Purchaser in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Purchaser in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

51. If Purchaser elects to invoke the dispute resolution procedures set forth in Section XIII (Dispute Resolution), Purchaser shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Purchaser shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a *force majeure* event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Purchaser complied with the requirements of Paragraphs 49 and 50 above. If Purchaser carries this burden, the delay at issue shall be deemed not to be a violation by Purchaser of the affected obligation of this Agreement.

## **XV. STIPULATED PENALTIES**

52. Purchaser shall be liable to EPA for stipulated penalties in the amount of \$ 500 per day per violation for failure to comply with any requirement of this Agreement unless excused under Section XIV (Force Majeure). "Compliance" by Purchaser shall include completion of the activities under this Agreement or any work plan or other plan approved under this Agreement in accordance with all applicable requirements of law, this Agreement, and any plans or other documents approved by EPA pursuant to this Agreement and within the time schedules established by and approved under this Agreement.

53. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section IX (Work to be Performed), during the period, if any, beginning on the 31<sup>st</sup> day after EPA's receipt of such submission until after the date that EPA notifies Purchaser of any deficiency; and 2) with respect to a decision by the Division Director of the EPA Region 10, Office of Environmental Cleanup, under Paragraph 47 of Section XIII. (Dispute Resolution), during the period, if any, beginning on the 21<sup>st</sup> day after the Negotiation Period begins until the date that the Division Director issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

54. Following EPA's determination that Purchaser has failed to comply with a requirement of this Agreement, EPA may give Purchaser written notifications of the failure and describe the noncompliance. EPA may send Purchaser a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Purchaser of a violation.

55. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Purchaser's receipt from EPA of a demand for payment of the penalties, unless Purchaser invokes the dispute resolution procedures under Section XIII (Dispute Resolution). All payments to EPA under this Section shall be paid by certified or cashier's check made payable to "EPA Hazardous Substances Superfund," shall be mailed to Mellon Bank, EPA Region 10 Superfund, P.O. Box 371099M, Pittsburgh, PA 15251, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID Number 10EC, the EPA Docket Number CERCLA-10-2007-0027, and the name and address of the party making payment. Copies of the check paid pursuant to this Section, and any accompanying transmittal letter, shall be sent to EPA as provided in Paragraph 20 (designation of EPA Project Coordinator), and to:

Jennifer G. MacDonald  
Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue  
Seattle, WA 98110

56. The payment of penalties shall not alter in any way Purchaser's obligations to complete performance of the Work required under this Agreement.

57. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

58. If Purchaser fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Purchaser shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 54. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Purchaser's violation of this Agreement or of the statutes or regulations upon which it is based, including, but not limited to, penalties pursuant to section 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to section 106(b) or 122(l) of CERCLA or punitive damages pursuant to section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Agreement or in the event that EPA assumes performance of a portion or all of the Removal Action pursuant to Section XX, Paragraph 70. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Agreement.

## **XVI. FINANCIAL RESPONSIBILITY**

59. Purchaser shall establish Financial Responsibility for the benefit of EPA in the form of a trust fund to be initially funded by the \$3,000,000 cash consideration required herein which may be paid in installments as further described below. The terms of the trust fund must be satisfactory in form and substance to EPA (the "Trust Fund"), including but not limited to meeting the following requirements: (i) a restriction on the withdrawal of funds to ensure that they are expended on the Removal Action required under this Agreement as set forth more fully in Paragraph 64; (ii) a provision that attorney's fees and redevelopment costs are not eligible for trust payments; (iii) all disbursements from the account are subject to review and approval by EPA as set forth more fully in Paragraph 65; (iv) EPA may deposit additional funds into the account as set forth more fully in Paragraph 63.

60. Purchaser has selected, and EPA has approved, as an initial Financial Responsibility mechanism a trust fund pursuant to Paragraph 59. Within ninety (90) days of the Effective Date, Purchaser shall submit all executed and/or otherwise finalized instruments and other documents required in order to make the selected Financial Responsibility mechanism legally binding, to EPA in accordance with Section XXXI (Notices and Submissions).

61. The commencement of any Removal Action Takeover pursuant to Paragraph 70 of this Agreement (Removal Action Takeover) shall trigger EPA's right to receive moneys from the Trust Fund, as needed to complete the Removal Action.

## **XVII. CERTIFICATION**

62. By entering into this Agreement, Purchaser certifies that to the best of its knowledge and belief it has fully and accurately disclosed to EPA all information known to Purchaser and all information in the possession or control of its officers, directors, employees, contractors and agents which relates in any way to any Existing Contamination or any past or potential future release of oil, hazardous substances, pollutants or contaminants at or from the Sites and to its qualification for this Agreement. Purchaser 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 oil, hazardous substances or pollutants or contaminants at the Sites. If the United States determines that information provided by Purchaser is not materially accurate and complete, the Agreement, within the sole discretion of EPA, shall be null and void and EPA reserves all rights it may have.

## **XVIII. CONSIDERATION FROM PURCHASER**

63. In consideration of, and in exchange for, the mutual promises and agreements set forth in this Agreement, Purchaser will pay into the Trust Fund the sum of Three Million Dollars (\$3,000,000). Purchaser shall pay into the Trust Fund in installments with \$1,000,000 due when the Trust Fund documents are complete as required by Paragraphs 59 and 60, an additional \$1,000,000 due in 12 months thereafter (or if the fund is sooner depleted, then at the time of depletion), and the final third installment of \$1,000,000 due 25 months after the Effective Date (or if the fund is sooner depleted, then at the time of depletion). In addition, EPA agrees that it may from time to time deposit in the Trust Fund or a special account the proceeds of any payment made by any PRPs or other third parties to the United States pursuant to any settlement or other resolution of such parties' CERCLA liability arising out of or associated with the Triangle Park Property. Except as otherwise specified in Paragraphs 29 and 31, in no event shall Purchaser be obligated to pay more than \$3,000,000 to conduct the Removal Action. In the event that Removal Action activities remain to be done after the funds in the Trust have been expended, EPA and the University shall meet to discuss what additional Removal Action activities remain and what

available funding sources can be sought so as to complete the Removal Action in a good-faith expeditious manner. EPA's Oversight Costs shall be paid by Purchaser from its own account separate from the Trust and without regard to the \$3,000,000 cap.

64. Funds shall be withdrawn from the Trust Fund to pay for the Removal Action required under this Agreement in accordance with the payment provisions in the trust agreement. Purchaser's costs for the Removal Action hereunder shall be paid from the Trust Fund only for Removal Action costs. Attorneys' fees and redevelopment costs are not eligible for trust payments.

65. Purchaser may submit invoices demonstrating expenditures pursuant to the October 5, 2006 BFPP agreement between EPA and Purchaser for preliminary investigative work. Upon EPA review of the invoices documenting investigative work by Purchaser and in accordance with the trust agreement, Purchaser shall be reimbursed for that investigative work from the Trust Fund.

#### **XIX. COVENANT NOT TO SUE BY UNITED STATES**

66. In consideration of the actions that will be performed and the payments that will be made by Purchaser under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, the United States covenants not to sue or to take administrative action against Purchaser pursuant to sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for Existing Contamination. This covenant not to sue shall take effect upon the Effective Date and is conditioned upon the complete and satisfactory performance by Purchaser of all obligations under this Agreement, including, but not limited to, payment of Oversight Costs pursuant to Section X. This covenant not to sue extends only to Purchaser and does not extend to any other person.

#### **XX. RESERVATION OF RIGHTS BY UNITED STATES**

67. Except as specifically provided in this Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of oil, hazardous substances, pollutants or contaminants, or hazardous or solid waste on, at or from the Sites. Further, nothing herein shall prevent EPA or the United States from seeking legal or equitable relief to enforce the terms of this Agreement, from taking other legal or equitable action as it deems appropriate and necessary.

68. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. The United States reserves, and this Agreement is

without prejudice to, all rights against Purchaser with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Purchaser to meet a requirement of this Agreement;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- d. liability for violations of federal, state, or local law or regulations during or after implementation of the Work other than as provided in the documents submitted in accordance with this Agreement and approved by EPA, the Work, or otherwise ordered by EPA;
- e. liability resulting from the release or threat of release of oil, hazardous substances, pollutants or contaminants at or in connection with the Sites after the Effective Date, not within the definition of Existing Contamination;
- f. liability resulting from exacerbation by Purchaser, its successors, assigns, lessees, or sublessees, of Existing Contamination; and
- g. liability arising from the disposal, release or threat of release of Waste Materials outside of the Sites.

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

70. Removal Action Takeover. In the event EPA determines that Purchaser has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the Removal Action as EPA determines necessary. Prior to taking over the Removal Action, EPA will issue written notice to Purchaser specifying the grounds upon which such notice was issued and providing Purchaser with fifteen (15) days within which to remedy the circumstances giving rise to EPA's issuance of the notice. Purchaser may invoke the procedures set forth in Section XIII (Dispute Resolution) to dispute EPA's determination that takeover of the Removal Action is warranted under this Paragraph. After commencement and for the duration of any Removal Action Takeover, EPA shall have immediate access to and benefit of the trust fund provided pursuant to Section XVI (Financial Responsibility) of this Agreement. Notwithstanding

any other provision of this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law. In no event shall Purchaser be required to reimburse or hold harmless EPA for Work done pursuant to a Removal Action Takeover beyond the balance remaining in the Trust Fund at the time of such Removal Action Takeover.

## **XXI. COVENANT NOT TO SUE BY PURCHASER**

71. Purchaser covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to Existing Contamination, the Work, Oversight Costs, or this Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Properties, including any claim under the United States Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Properties.

72. Nothing in this Agreement shall be deemed to constitute approval or 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).

## **XXII. CONTRIBUTION PROTECTION**

73. Nothing in this Agreement precludes the United States or Purchaser from asserting any claims, causes of action, or demands for indemnification, contribution, or cost recovery against any person not a party to this Agreement, including any claim Purchaser may have pursuant to section 107(a)(4)(B) of CERCLA or section 1009 of OPA. Nothing herein diminishes the right of the United States, pursuant to sections 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to section 113(f)(2).

74. In the event of a suit or claim for contribution brought against Purchaser, notwithstanding the provisions of section 107(r)(1) of CERCLA, 42 U.S.C. § 9607(r)(1), with respect to Existing Contamination (including any claim based on the contention that Purchaser is not a BFPP, or has lost its status as a BFPP), the Parties agree that this Agreement is an

administrative settlement for purposes of section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and that Purchaser is entitled, from the Effective Date, to protection from contribution actions or claims as provided by sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to the Existing Contamination including but not limited to response actions on, at, or under the Triangle Park Property, the McCormick & Baxter Property, and the Sites including uplands, soil, groundwater, surface water, and any and all submerged lands including the sediments of the Willamette River.

75. In the event Purchaser were found, in connection with any action or claim it may assert to recover costs incurred or to be incurred with respect to Existing Contamination, not to be a BFPP, or to have lost its status as a BFPP, the Parties agree that this Agreement is an administrative settlement within the meaning of section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Purchaser has resolved its liability for all response actions taken or to be taken and all response costs incurred or to be incurred by the United States or by any other person with respect to Existing Contamination.

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

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

### **XXIII. INDEMNIFICATION**

78. Purchaser shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Purchaser, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Agreement. In addition, Purchaser agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Purchaser, Purchaser's officers, directors, employees, agents, contractors, subcontractors and any persons acting on Purchaser's behalf or under Purchaser's control, in carrying out activities pursuant to this Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Purchaser in carrying out

activities pursuant to this Agreement. Neither Purchaser nor any such contractor shall be considered an agent of the United States.

79. The United States shall give Purchaser notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Purchaser prior to settling such claim.

80. Purchaser waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Purchaser and any person for performance of Work on or relating to the Sites, including, but not limited to, claims on account of construction delays. In addition, Purchaser shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Purchaser and any person for performance of Work on or relating to the Sites, including, but not limited to, claims on account of construction delays.

#### **XXIV. MODIFICATION**

81. The EPA Project Coordinator may make minor modifications to any plan or schedule or the SOW in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the Project Coordinator's oral direction. Any other requirements of this Agreement may be modified in writing by mutual agreement of the Parties.

82. If Purchaser seeks permission to deviate from any approved work plan or schedule, Purchaser's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Purchaser may not proceed with the requested deviation until receiving oral or written approval from the EPA Project Coordinator.

83. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Purchaser shall relieve Purchaser of its obligation to obtain any formal approval required by this Agreement, or to comply with all requirements of this Agreement, unless it is formally modified.

#### **XXV. APPENDICES**

84. The following appendices are attached to and incorporated into this Agreement.

a. Appendix A shall mean the SOW.

- b. Appendix B shall mean the map depicting the Properties.
- c. Appendix C shall mean the map depicting the Portland Harbor Superfund Site.
- d. Appendix D shall mean the legal description of the Triangle Park Property.
- e. Appendix E shall mean the legal description of the McCormick & Baxter Property

#### **XXVI. NOTICE OF COMPLETION**

85. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Agreement, with the exception of any continuing obligations required by this Agreement, including continued compliance with CERCLA section 101(40) with respect to the Properties in accordance with Paragraph 6 of this Agreement, post-removal site controls, record retention, compliance with institutional controls, operation and maintenance, etc., EPA will provide written notice to Purchaser. If EPA determines that any such Work has not been completed in accordance with this Agreement, EPA will notify Purchaser, provide a list of the deficiencies, and require that Purchaser modify the document if appropriate in order to correct such deficiencies. Purchaser shall implement the modified and approved document and shall submit a modified Final Report in accordance with the EPA. Failure by Purchaser to implement the approved modified document shall be a violation of this Agreement.

#### **XXVII. RELEASE AND WAIVER OF LIENS**

86. Subject to the Reservation of Rights in Section XX of this Agreement, upon satisfactory completion of the Work, EPA agrees to release and waive any lien it may have on the Properties now and in the future under sections 107(l) and (r) of CERCLA, 42 USC § 9607(l) & (r), for costs incurred or to be incurred by EPA in responding to the release or threat of release of hazardous substances at the Site before Purchaser acquired ownership of the respective Properties.

#### **XXVIII. EFFECTIVE DATE**

87. The effective date of this Agreement shall be the date upon which EPA and the Purchaser have fully executed the Agreement, whichever is later, after EPA review of and response to any public comments received.

## **XXIX. DISCLAIMER**

88. 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 contamination at the Properties or the Sites nor constitutes any representation by EPA that the Properties or the Sites are fit for any particular purpose.

## **XXX. PAYMENT OF COSTS**

89. If Purchaser 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.

## **XXXI. NOTICES AND SUBMISSIONS**

90. Any notices, documents, information, reports, plans, approvals, disapprovals, or other correspondence required to be submitted from one party to another under this Agreement, shall be deemed submitted either when hand-delivered or as of the date of receipt by certified mail/return receipt requested, express mail, or facsimile.

Submissions to Purchaser shall be addressed to:

Dr. Roy Heynderickx  
Vice President for Financial Affairs  
University of Portland  
5000 N. Willamette Blvd.  
Portland, OR 97203

With copies to:

Mr. Leonard Farr  
AMEC Earth & Environmental, Inc.  
7376 SW Durham Road  
Portland, OR 97224

Mr. David L. Blount  
Landye Bennett Blumstein LLP  
1300 SW Fifth Avenue, Suite 3500  
Portland, OR 97201

Submissions to U.S. EPA shall be addressed to:

Mark Ader, EPA Project Coordinator  
U.S. Environmental Protection Agency, Region 10, ECL-115  
1200 Sixth Avenue  
Seattle, WA 98101

With copies to:

Jennifer G. MacDonald, Assistant Regional Counsel  
U.S. Environmental Protection Agency, Region 10, ORC-158  
1200 Sixth Avenue  
Seattle, WA 98101

### **XXXII. PUBLIC COMMENT**

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

The undersigned representative of Purchaser certifies that it is fully authorized to enter into the terms and conditions of this Agreement and to bind the party it represents to this document.

IT IS SO AGREED:

PURCHASER, UNIVERSITY OF PORTLAND  
BY:

  
\_\_\_\_\_  
Signature

Date December 19, 2006

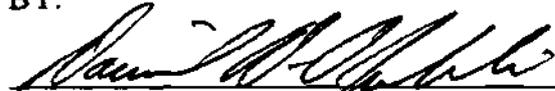
Print Name: John T. Goldrick

Title: Vice President for Student Services

IT IS SO AGREED:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

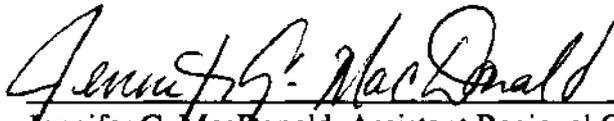
BY:



12/20/2006

Daniel D. Opalski, Director  
Office of Environmental Cleanup, Region 10

Date

  
Jennifer G. MacDonald, Assistant Regional Counsel  
Office of Regional Counsel, Region 10

12/20/2006

Date

IT IS SO AGREED:

UNITED STATES DEPARTMENT OF JUSTICE  
BY:



ELLEN M. MAHAN  
Deputy Section Chief  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice

Dec. 21, 2006  
Date