

The Department of Natural Resources and Environmental Control Remediation Section (“DNREC-RS”) welcomes your interest in the Brownfields Development Program. In order to participate in the Program a Brownfields Developer must enter into a Brownfields Development Agreement (Agreement” or “BDA”) with DNREC-RS. The BDA provides a description of the activities to be undertaken by the Brownfields Developer in order to investigate and remediate the release of hazardous substances at a site. **In addition, this Agreement addresses significant legal issues, including issues relating to liability, concerning which a prospective Brownfields Developer may desire to consult legal counsel.** This is a generic BDA template developed by DNREC. It contains language of general applicability. As a prospective Brownfields Developer, you are welcome to complete the Agreement by supplying the specific information requested where indicated. You may also propose additional language to supplement or modify the provisions of the BDA for consideration by DNREC-RS. Please submit all additions and modifications in the form of a “blackline” draft indicating any additions by underlining and any deletions by striking through the relevant text. All changes to the BDA template, including merely filling in the requested information where indicated, must be approved by DNREC-RS before a final signature draft is prepared for execution by the parties. **Please DO NOT submit a signed Agreement without the prior approval of DNREC-RS.** An Agreement will not be deemed final until approved by DNREC-RS and executed by the DNREC-RS Administrator and the Brownfields Developer. Thank you for your cooperation.

## DRAFT

### DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL OF THE STATE OF DELAWARE

#### BROWNFIELDS DEVELOPMENT AGREEMENT

This Brownfields Development Agreement (“Agreement” or “BDA”) regarding the [Site Name (DE # )] (“the Site”) is made and entered into pursuant to the Delaware Hazardous Substance Cleanup Act (“HSCA”), 7 *Del. C.* Chapter 91, by and between the Department of Natural Resources and Environmental Control (“DNREC”) and [Legal Name of Brownfields Developer] (“Brownfields Developer”), [Business Address], a [Description of the type of legal entity] organized under the laws of [State of incorporation or domicile] (collectively referred to as “the Parties”). The real property that is the subject of this Agreement is located at [Physical Address] and is further identified as [New Castle/Kent/Sussex] tax parcel number [Number].

#### INTRODUCTION

The Parties agree to undertake all actions required by the terms and conditions of this BDA. The purpose of this Agreement is to set forth a scope and schedule of activities at a certified brownfield to assess and respond to the actual, threatened, or perceived release of hazardous substances at the real property. In addition, this Agreement is intended to settle and resolve the potential liability of Brownfields Developer regarding the Existing Environmental Condition at the Site that might otherwise result under HSCA if Brownfields Developer becomes the owner and/or operator of the real property. By entering into this Agreement, the Parties acknowledge

that Brownfields Developer will be afforded liability protections as set forth in 7 Del. C. § 9105(f) and § 9125 under the conditions specified therein.

Additionally, pursuant to 7 Del. C. § 7406(e)(3) and 7 Del. C. § 7419A, this Agreement provides liability protection to Brownfields Developer for releases of regulated substances from underground storage tanks and aboveground storage tanks provided Brownfields Developer complies with the requirements of the referenced statutory provisions, the Regulations Governing Hazardous Substance Cleanup (“the Regulations”), the provisions of this Agreement.

## I. BACKGROUND/FINDINGS

1. By letter from \_\_\_\_\_, Planner V, to \_\_\_\_\_ dated \_\_\_\_\_, attached hereto as Exhibit 1, DNREC has determined that the real property qualifies as a certified brownfield as defined in 7 Del. C. § 9123(3) (hereafter referred to as “the certified brownfield”).
  2. [Name of owner] is the current owner of the real property.
  3. Brownfields Developer is interested in conducting investigations and/or development at the certified brownfield.
  4. Brownfields Developer’s entry into this Agreement and the actions undertaken by Brownfields Developer in accordance with the Agreement do not constitute an admission of liability on the part of Brownfields Developer.

## II. DEFINITIONS

5. Unless otherwise provided herein, terms used in this Agreement that are defined in HSCA or the Regulations shall have the meaning assigned to them in HSCA or the Regulations, including any amendments thereto, as of the date of this Agreement.
6. “Brownfields Investigation” (“BFI”) means an evaluation that includes the assessment of an actual, threatened, or perceived release of a hazardous substance at the certified brownfield to determine the nature, extent, and impact of the actual, threatened, or perceived release, and the evaluation of the feasibility of the proposed development plan to serve as all or a portion of the remedial action. When directed by DNREC the Brownfields Investigation shall include an evaluation to determine whether the release has migrated off the certified brownfield.
7. “Certified Brownfield” means a brownfield, as defined in 7 Del. C. §9103(3) and §9123(3), that the Secretary has certified upon finding that there is an actual, threatened or perceived release of hazardous substances at the real property that is the subject of the brownfield certification.
8. "Conceptual Site Model and Sampling and Analysis Plan" (“CSM/SAP”) means a written description of activities as issued, approved, modified, or amended by DNREC to be performed at the certified brownfield or any portion of the certified brownfield (*i.e.* an operable unit) to investigate any release or imminent threat of release of any hazardous substances. There

may be more than one CSM/SAP if there are multiple operable units on the certified brownfield, or if the work proceeds in a phased approach.

9. "Development Activities" means all construction and site preparation work that physically takes place on the certified brownfield involving structures or improvements of any kind, and all land disturbing activities including, but not limited to digging, drilling, excavating, grading, clearing, earth moving, filling, or performing any subsurface work at the certified brownfield or an operable unit thereof. Development Activities do not include environmental investigations, planning, designing, or engineering work related to the certified brownfield or any physical activity performed off the real property in preparation for or related to construction or site preparation work that will occur on the certified brownfield.

10. "Existing Environmental Condition" means all known or discovered releases of hazardous substances which are found to be or to have been existing at or in the vicinity of the certified brownfield prior to Brownfields Developer's entry into this Agreement including, but not limited to, those substances and conditions identified or set forth in the documents attached hereto as Exhibit 2.

11. "Feasibility Study" means an evaluation to identify the potential remedial alternatives that are applicable to satisfy the remedial action objectives for the certified brownfield.

12. "Final Plan of Remedial Action" ("Final Plan") means DNREC's written determination of the appropriate remedial action at a certified brownfield for the current or anticipated land use issued for the protection of public health, welfare and the environment in accordance with HSCA, the Regulations and all applicable DNREC guidance, policies and procedures.

13. "Long-term Stewardship" ("LTS") means the long-term management of environmental media at the certified brownfield that is necessary to protect public health and the environment. LTS activities generally include the establishment and maintenance of physical and legal controls, implementation entities, authorities, accountability mechanisms, information and data management systems, long-term monitoring, operation and maintenance, and/or other activities that are required or authorized by DNREC to ensure that the certified brownfield remains protective of public health or welfare and the environment.

14. "The Parties" means DNREC and Brownfields Developer.

15. "Proposed Plan of Remedial Action" ("Proposed Plan") means a written plan, issued by the Department for public comment, describing the appropriate remedial action at the certified brownfield for the current or anticipated land use to protect public health, welfare or the environment.

16. "Real Property" means the brownfield that has been certified by DNREC located at [Physical Address], encompassing approximately \_\_\_\_\_ acres, and further identified as [New Castle/Kent/Sussex] County tax parcel number \_\_\_\_\_, as depicted on Exhibit 3 attached hereto.

17. "Remedial Action" means the containment, contaminant mass or toxicity reduction, isolation, treatment, removal, cleanup, or monitoring of hazardous substances released into the environment, or the taking of such other actions, including natural resource damage restoration and replacement, as may be necessary to prevent, minimize, or mitigate harm or risk of harm to the public health or welfare or the environment which may result from a release or an imminent threat of a release of hazardous substances.

18. "Remedial Action Work Plan" means a written description of remedial action requirements as set forth in the Final Plan of Remedial Action, as issued, approved, modified, or amended by DNREC, to be performed at the certified brownfield, or any operable unit thereof, to implement the Final Plan to address the release of hazardous substances. There may be more than one Remedial Action Work Plan if there are multiple operable units on the certified brownfield, or if the work proceeds in a phased approach.

19. "Site" means the certified brownfield and all other areas where hazardous substances released at or from the certified brownfield have migrated or otherwise come to be located, and is known as the [SITE NAME (DE# )].

### III. GENERAL PROVISIONS AND PROCEDURES FOR REMEDIAL WORK

20. It is the intent of the Parties that Brownfields Developer be able to conduct investigations, remedial actions and/or Development Activities in accordance with this Agreement and all applicable work plans and the Final Plan without becoming liable pursuant to HSCA for any Existing Environmental Condition at the certified brownfield. In furtherance thereof, the Parties acknowledge that all investigations, remedial actions and Development Activities on the certified brownfield undertaken by Brownfields Developer must be performed in accordance with this Agreement, all applicable work plans and the Final Plan (including any amendments and/or modifications to said documents).

21. Prior to DNREC's issuance of a Final Plan for the certified brownfield or an operable unit thereof, Development Activities are not permitted on the real property. Notwithstanding the foregoing, before issuance of a Final Plan, upon Brownfields Developer's written request, DNREC may permit specified Development Activities to occur pursuant to an approved Contaminated Materials Management Plan or otherwise if it determines that the proposed Development Activities will not pose a threat to public health, welfare or the environment, will not cause an exacerbation of the Existing Environmental Condition, will not cause or threaten to cause a new release, and will not interfere with any remedy that has been, is being, or will be performed at the certified brownfield. Following issuance of the Final Plan, Development Activities are permitted provided they conform to the conditions and requirements of the Final Plan and any applicable Contaminated Materials Management Plan approved by DNREC, and do not otherwise violate the provisions of this Agreement.

22. Upon obtaining DNREC's approval to begin Development Activities, if Brownfields Developer proceeds with development of the certified brownfield, or any portion thereof, it will perform the Development Activities in accordance with all applicable work plans

and the Final Plan. In addition, Brownfields Developer agrees to reimburse DNREC's Oversight Costs in accordance with Section VII of this Agreement and DNREC's HSCA Policy on Brownfields Grants and the Brownfields Grant Eligible Expenses Guidance.

23. After conducting a DNREC approved BFI, if Brownfields Developer elects not to proceed with any Development Activities on the certified brownfield, it shall not be required to implement the Final Plan and shall continue to receive liability protection consistent with the provisions of 7 *Del. C.* § 9125 and this Agreement.

24. In the event Brownfields Developer fails to complete a DNREC approved BFI at the certified brownfield within twelve (12) months of entering into this Agreement, DNREC shall revoke this BDA and withdraw the liability protection afforded by 7 *Del. C.* § 9125(a) unless Brownfields Developer establishes to DNREC's satisfaction that good cause exists to justify its failure to complete the BFI as required. The determination as to good cause will be at its sole discretion.

25. In the event Brownfields Developer fails to initiate a remedial action at the certified brownfield within twelve (12) months of DNREC's issuance of the Final Plan DNREC shall revoke this BDA and withdraw the liability protection afforded by 7 *Del. C.* § 9125(a) unless Brownfields Developer establishes to DNREC's satisfaction that good cause exists to justify its failure to initiate a remedial as required by the Final Plan. The determination as to good cause will be made by DNREC at its sole discretion.

26. If Brownfields Developer undertakes Development Activities on a portion of the certified brownfield but does not begin Development Activities on another portion or portions of the certified brownfield, it shall not be required to implement any applicable work plans or undertake remedial actions set forth in the Final Plan as that portion or portions of the certified brownfield upon which Development Activities were not begun. In such a case, Brownfields Developer shall continue to receive liability protection consistent with the provisions of 7 *Del. C.* § 9125 and this Agreement. With respect to any portions of the certified brownfield upon which Development Activities were begun but were then halted, Brownfields Developer shall mitigate any exacerbation of any Existing Environmental Condition, and shall remediate any new releases of hazardous substances or any imminent threats of new releases that are not an Existing Environmental Condition that may have resulted from the Development Activities. For the purpose of this Paragraph the mitigation of any exacerbation of any Existing Environmental Condition shall be considered accomplished if that portion of the certified brownfield has been returned to substantially the same condition as existed prior to beginning the Development Activities.

27. Upon completion of all investigations, remedial actions, and any Development Activities at the certified brownfield or any operable unit thereof, and upon written application to DNREC by Brownfields Developer, DNREC will issue a Certification of Completion of Remedy ("COCR") for the certified brownfield, or the applicable operable unit, provided that all of the required work has been performed and completed to DNREC's satisfaction in compliance with the requirements of 7 *Del. C.* § 9108 and § 13.1 of the Regulations. Upon issuance of the COCR,

Brownfields Developer will receive liability protection consistent with the provisions of 7 *Del. C.* § 9125 and § 9105(f). DNREC reserves the right to withhold issuance of a COCR until all Oversight Costs are paid as required in Section VII of this Agreement.

28. If Brownfields Developer knowingly violates any terms of this Agreement, it shall be liable for all litigation and enforcement costs incurred by DNREC in its efforts to obtain compliance. Further, DNREC may, in its sole discretion, revoke this Agreement, require Brownfields Developer to reimburse any funds provided to it by DNREC pursuant to Section VII of this Agreement, and take any additional actions DNREC deems necessary to protect public health, welfare or the environment.

#### IV. CONCEPTUAL SITE MODEL AND SAMPLING AND ANALYSIS PLAN AND REMEDIAL ACTION WORK PLAN

29. Prior to performing a Brownfields Investigation at the Site, Brownfields Developer shall develop a CSM/SAP. The CSM/SAP shall describe the activities that will be required to document and address any release or imminent threat of release of hazardous substances at the Site. Specifically, at a minimum the CSM/SAP shall include the following:

- a. conceptual plans for the proposed development project;
- b. the nature and scope of the Brownfields Investigation to be performed on the Site or any operable unit thereof; and
- c. a proposed schedule for the investigation of the Site or any operable unit thereof.

30. After the Brownfields Investigation is completed and approved, DNREC may require Brownfields Developer to prepare a Feasibility Study for its review and approval. If DNREC determines that a Feasibility Study is unnecessary, it will issue a Proposed Plan of Remedial Action (“Proposed Plan”) for the Site, or any operable unit thereof. The Proposed Plan must satisfy the requirements of HSCA, the Regulations and all applicable DNREC guidance, policies, and procedures. DNREC will advertise the Proposed Plan for public comment as required by HSCA.

31. After DNREC issues the Final Plan for the Site, or any operable unit thereof, or after the conclusion of any appeals related thereto, the Remedial Action Work Plan shall be finalized consistent the provisions of the Final Plan.

32. The Remedial Action Work Plan shall set forth the activities required for the implementation of all remedial actions in accordance with the Final Plan. At a minimum, the Remedial Action Work Plan shall include the following:

- a. construction plans for the proposed development project;
- b. a description of the Remedial Action required by the Final Plan in order to address the release or imminent threat of release of hazardous substances at the Site, or any operable unit thereof, as well as any anticipated land use

restrictions or controls, so as to allow the proposed development project to proceed; and

- c. a proposed schedule for implementation of Remedial Action at the Site, or any operable unit thereof.

33. DNREC and Brownfields Developer acknowledge that, in order to protect public health, welfare or the environment, DNREC may require modification or amendment of the CSM/SAP, the Remedial Action Work Plan and/or the Final Plan as a result of obtaining new information regarding the environmental condition of the Site, or as the result of changes to the planned Development Activities. Any such required modifications or amendments will be implemented in accordance with HSCA, the Regulations, all applicable DNREC guidance, policies, and procedures and this Agreement. In the event the newly discovered information causes DNREC to amend the applicable plan or plans to require that additional work be performed, Brownfields Developer is not obligated to undertake such additional work. If Brownfields Developer chooses not to undertake the additional work, however, DNREC may modify or suspend further Development Activities if it determines that it is necessary to do so in order to protect public health, welfare or the environment.

34. Nothing in this Agreement shall affect Brownfields Developer's right to comment upon or request a hearing with respect to the Proposed Plan and/or to appeal the Final Plan in accordance with applicable law.

#### V. DEVELOPMENT ACTIVITIES/REMEDIAL REQUIREMENTS

35. Brownfields Developer shall not conduct any remedy or Development Activities on the certified brownfield without DNREC's prior written approval. After Brownfields Developer takes title to or otherwise has a legal right to control activities on the certified brownfield, it shall use reasonable efforts to prevent other persons from conducting any Development Activities on the real property without DNREC's prior written approval. In the event DNREC becomes aware of Development Activities occurring on the certified brownfield without its approval, it may order the activities to be halted immediately.

36. Brownfields Developer may proceed with Development Activities provided DNREC has determined that Brownfields Developer is adequately performing all investigations and remedial actions as specified in the CMP/SAP, any Contaminated Materials Management Plan, the Remedial Action Work Plan and the Final Plan for the certified brownfield, and that such Development Activities will not pose a threat to public health, welfare or the environment, will not cause an exacerbation of the Existing Environmental Condition, will not cause or threaten to cause a new release, and will not interfere with any actual or potential remedies performed or to be performed at the real property. If it determines that Brownfields Developer has not performed or complied with any of the investigative or remedial action requirements at the certified brownfield, DNREC shall have the right to modify or suspend the Development Activities. Before requiring Brownfields Developer to modify or suspend the Development Activities, DNREC will provide written notice of the non-performance or non-compliance and allow Brownfields Developer ten (10) days to cure the same unless, in its sole discretion, DNREC determines that

such non-performance or non-compliance presents an increased risk to public health, welfare or the environment, in which case DNREC may require that the Development Activities be modified or suspended immediately.

37. Brownfields Developer shall comply with any land use restrictions established or imposed in connection with the remedy at the certified brownfield, and to the extent it may reasonably do so it shall require others to comply with any such restrictions.

38. Brownfields Developer shall not impede or interfere with the effectiveness or integrity of any institutional controls employed at the certified brownfield in connection with any remedy, and, to the extent it may reasonably do so, it shall prohibit others from impeding or interfering with any such institutional controls.

39. Brownfields Developer is responsible for conducting all LTS activities at the certified brownfield and shall remain responsible for such LTS activities until DNREC approves the transfer of such responsibility pursuant to Section XV of this Agreement.

#### VI. CERTIFIED BROWNFIELD - PERMITTED ACTIVITIES

40. Brownfields Developer shall not engage in any industrial, commercial, residential, agricultural, or recreational activities on the certified property prior to DNREC's issuance of a COCR. In the event the certified brownfield has been divided into operable units and DNREC has issued a COCR with respect to a particular operable unit, then such use activities shall be permitted on the portion of the certified brownfield that is within the operable unit, provided that such activities do not interfere with any remedy being conducted on any other portion of the real property.

#### VII. REIMBURSEMENT/PAYMENT OF COSTS

41. A Brownfields Developer that is a for-profit organization may be eligible for reimbursement from DNREC for remedial costs up to a maximum of \$200,000.00, the first \$125,000.00 to be reimbursed on a dollar for dollar basis and the remaining \$75,000.00 reimbursement on a fifty cents to the dollar basis. A Brownfields Developer that is a non-profit organization may be eligible for reimbursement for remedial costs up to a maximum of \$625,000.00, the first \$500,000.00 to be reimbursed on a dollar for dollar basis and the remaining \$125,000.00 reimbursement on a fifty cents to the dollar basis. A Brownfields Developer that is a Small Business for-profit organization may be eligible for reimbursement from DNREC for remedial costs up to a maximum of \$200,000 to be reimbursed on a dollar for dollar basis. A Brownfields Developer that is a Small Business non-profit organization may be eligible for reimbursement from DNREC for remedial costs up to a maximum of \$625,000 to be reimbursed on a dollar for dollar basis.

In addition, the Certified Brownfields project will be eligible for an additional funding amount up to sixty-five thousand (\$65,000) for reimbursement/direct payment of DNREC approved groundwater and soil gas remedial actions at the source areas with the goal of reducing migration of groundwater and soil gas contamination offsite. In addition, the Certified Brownfields project will be eligible for an additional funding amount up to twenty-five thousand dollars (\$25,000) for

reimbursement/direct payment for DNREC approved limited additional investigation, if there is potential or actual migration of groundwater and/or soil gas contamination offsite. In addition, the Certified Brownfields project will be eligible for an additional funding amount up to twenty-five thousand dollars (\$25,000) for reimbursement/direct payment where a DNREC approved Green Remediation is included in the Final Plan of Remedial Action. In addition, the Certified Brownfields project would be eligible for an additional amount up to twenty-five thousand dollars (\$25,000) for reimbursement/direct payment for the Long Term Stewardship (LTS) activities including site inspection and maintenance, and Long-Term Monitoring (LTM) for groundwater, surface water and/or soil-gas if required in the Final Plan of Remedial Action. Any reimbursement of remedial costs pursuant to this Section is conditioned as follows: (1) compliance with the terms and conditions of this Agreement by Brownfields Developer; (2) the availability of funds designated to the Brownfields Development Program during any given fiscal year which may be limited based on funding restrictions; and (3) all reimbursements shall be determined in accordance with DNREC's HSCA Brownfields Grant Funding Policy, dated July 2020, including the Brownfields Grant Funding Eligible Expenses Guidance, or any other applicable policy or procedure as determined by DNREC in its sole discretion. Remedial cost statements will be sent by DNREC to Brownfields Developers on a quarterly basis.

42. Brownfields Developer may use any reimbursement of its remedial costs granted by DNREC to offset DNREC Oversight Costs, which shall be accounted for in the same manner as other remedial costs, *i.e.* either dollar for dollar or fifty cents on the dollar.

43. After it has expended all the cost reimbursement granted by DNREC pursuant to this Section, Brownfields Developer is responsible for payment of all other DNREC Oversight Costs. DNREC will send Brownfields Developer cost statements identifying any Oversight Costs that are subject to repayment.

44. For purposes of this Agreement, Oversight Costs may include but are not limited to the following costs incurred by DNREC: costs associated with in the preparation of this Agreement; costs of overseeing Brownfields Developer's implementation of the requirements of this Agreement; costs related to performing activities at the Site relating to the implementation of a remedy pursuant to this Agreement; and, costs incurred in providing Site related public information, conducting community relations, holding public hearings or otherwise complying with public notice and comment requirements under HSCA, the Regulations or other applicable laws or regulations. Oversight Costs shall also include all direct and indirect costs of DNREC including but not limited to time and travel costs personnel and associated indirect costs, contractor costs, including legal costs, costs of compliance monitoring, collection and analysis of split samples, Site visits, inspection of field activities, review and approval or disapproval of reports and work plans, and preparation of Proposed and Final Plans.

45. If Brownfields Developer fails to implement any institutional controls at the certified brownfield as required by the Final Plan, it shall reimburse DNREC for all costs DNREC incurs in establishing or reestablishing such institutional controls.

46. Brownfields Developer agrees to pay the costs incurred by DNREC in reviewing any requests for consent to assign or transfer the benefits conferred by this Agreement.

47. Any payments Brownfields Developer is required to make pursuant to this Section must be submitted to DNREC within ninety (90) days of the date of DNREC's cost statement. DNREC shall have the right to withhold approval of any report, work plan, Final Plan, Environmental Covenant or COCR if payment is not received within the required ninety (90) days. In the event Brownfields Developer has not made payment within one hundred and eighty (180) days, DNREC shall have the right to restrict all Development Activities related to the Site and to direct all of Brownfields Developer's employees, agents and contractors to stop all activities on or at the certified brownfield.

#### VIII. SITE ACCESS

48. Commencing upon the date that it acquires title to the real property, Brownfields Developer agrees to provide to DNREC, its authorized officers, employees, representatives, agents, and all other persons performing remedies under DNREC oversight, an irrevocable right of access to the certified brownfield at all reasonable times, as well as to any other area to which access is required for the implementation of remedies at the Site, provided access to such other areas is controlled by Brownfields Developer. This right of access is intended to permit DNREC's authorized personnel to perform and/or oversee remedies at the Site in accordance with applicable law. Unless an emergency or other extraordinary condition exists that poses an immediate risk to public health, welfare or the environment, DNREC agrees to provide reasonable notice to Brownfields Developer before accessing the certified brownfield.

49. Brownfields Developer shall require any assignee, successor-in-interest, lessee or sub-lessee of the certified brownfield, or a portion thereof, to provide DNREC with the same irrevocable right of access. Further, Brownfields Developer shall make such access a condition of any contractual agreement between it and any such assignee, successor-in-interest, lessee or sub-lessee.

50. Brownfields Developer shall ensure that a copy of this Agreement is provided to any current lessee or sub-lessee on the real property as of the effective date of this Agreement. Further, Brownfields Developer shall ensure that any subsequent lease, sublease, assignment or transfer of the real property or an interest in the real property includes a provision granting DNREC an irrevocable right of access to the certified brownfield and that any such lease, sublease, assignment or transfer complies with the provisions of this Agreement.

#### IX. DUE CARE/COOPERATION

51. Brownfields Developer shall exercise due care at the certified brownfield with respect to the Existing Environmental Condition and shall comply with all applicable local, county, state, and federal environmental laws and regulations pertaining to the Site. Brownfields Developer recognizes that the implementation of remedies at the certified brownfield may interfere with Brownfields Developer's use of the real property. DNREC agrees to use reasonable efforts

to minimize any interference with Brownfields Developer's permissible operations while engaged in remedial actions on the certified brownfield.

52. Brownfields Developer agrees to cooperate fully with DNREC in the implementation of remedies at the certified brownfield and agrees that it will not interfere with such remedies. Consistent with its responsibilities under applicable law, Brownfields Developer shall comply with any request for information from DNREC or any administrative subpoena issued by DNREC in accordance with applicable law.

53. In the event Brownfields Developer becomes aware of any incident or occurrence that causes or threatens a release of hazardous substances, pollutants or contaminants at or from the certified brownfield constituting an emergency situation or presenting an immediate threat to public health, welfare or the environment, Brownfields Developer shall immediately take all appropriate actions to prevent, abate, or minimize such release or threat of release, and shall immediately notify DNREC of the facts and circumstances relating to the incident or occurrence.

#### X. CERTIFICATION

54. By entering into this Agreement, Brownfields Developer certifies that:

- a. to the best of its knowledge and belief, it has fully and accurately disclosed to DNREC all information known to it and all information in its possession or control or that of its members, officers, directors, managers, partners, employees, contractors or agents that relates in any way to:
  - (i) Brownfields Developer's eligibility and qualifications to enter into this Agreement;
  - (ii) the Existing Environmental Condition at the certified brownfield; and
  - (iii) any past release of hazardous substances, pollutants or contaminants at or from the certified brownfield.

The certification in this subparagraph a, shall not apply to information in the possession or control of a contractor that was generated pursuant to a contract with any person other than Brownfields Developer or an Affiliated Person as described in subparagraph c. below.

- b. to the best of its knowledge and belief, it has not taken any actions, other than its investigation of and due diligence at the certified brownfield for which it would be potentially liable for any release or imminent threat of release of hazardous substances at or from the certified brownfield pursuant to 7 *Del. C.* § 9105(a); and

- c. Brownfields Developer is not affiliated with any other person (“Affiliated Person”) that is potentially liable pursuant to 7 *Del. C.* § 9105(a) for any release of hazardous substances at or from the certified brownfield through:
  - (i) any direct or indirect familial relationship to include spouse, domestic partner, parent, grandparent, brother, sister, son, son-in-law, daughter, daughter-in-law, grandson, granddaughter, step-parent, the parent, son or daughter of a son or daughter of the person’s spouse or domestic partner, nephew, niece, aunt, uncle, brother-in-law, sister-in-law, grandparent-in-law or any relative or friend living in Brownfields Developer’s household; or
  - (ii) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the real property is conveyed or financed or by a contract for the sale of goods or services); or
  - (iii) the result of a reorganization of a business entity that was potentially liable for a release of a hazardous substance.

55. If the information provided by Brownfields Developer pursuant to Paragraph 54 is not materially accurate and complete, DNREC may declare this Agreement null and void as of the date of its execution and take such other action as may be available to it under applicable law.

#### XI. DNREC’S RELEASE AND COVENANT NOT TO SUE

56. Subject to the reservation of rights in Section XII of the Agreement, DNREC releases and covenants not to sue or take any other civil or administrative action against Brownfields Developer with respect to the Existing Environmental Condition of the certified brownfield as of the date this Agreement is executed by the Parties in accordance with the provisions of 7 *Del. C.* § 9123 and § 9125(a). This release includes without limitation, any claim of civil liability for reimbursement of DNREC’s costs or for injunctive relief pertaining to the Existing Environmental Condition. In addition, DNREC releases and covenants not to sue or take any other civil or administrative action against Brownfields Developer for injury to, destruction of, or loss of natural resources or services, or the restoration or replacement of such natural resources or services arising from or related to the Existing Environmental Condition at the certified brownfield.

#### XII. RESERVATION OF RIGHTS

57. The release and covenant not to sue set forth in Section XI above does not pertain to any claims other than those expressly specified therein. DNREC expressly reserves all rights it may have against Brownfields Developer with respect to matters other than a claim of liability relating to the Existing Environmental Condition of the certified brownfield as of the date this Agreement is executed by the Parties, including, but not limited to:

- a. any claim based upon a failure by Brownfields Developer to meet a requirement of this Agreement;

b. any claim of liability pursuant to 7 *Del. C.* § 9105(a) for actions of Brownfields Developer other than its activities at the certified brownfield related to the Existing Environmental Condition undertaken in compliance with the requirements of this Agreement;

c. any claim of liability resulting from the exacerbation of the Existing Environmental Condition by Brownfields Developer, its successors, assignees, lessees or sub-lessees, excepting therefrom, any exacerbation resulting from activities of Brownfields Developer that were previously approved by DNREC pursuant to the terms of this Agreement, any applicable work plan or the Final Plan;

d. any claim of liability resulting from the release or imminent threat of release of a hazardous substance, pollutant or contaminant, at the certified brownfield after the effective date of this Agreement, not within the definition of Existing Environmental Condition;

e. any claim of liability resulting from criminal conduct; or

f. any claim of liability for violations of local, state or federal law or regulations.

58. With respect to any claim or cause of action asserted by DNREC, Brownfields Developer shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable to the Existing Environmental Condition at the certified brownfield.

59. With respect to any claim or cause of action asserted by DNREC under Paragraph 57 c. or d. not involving a knowing violation of this Agreement, Brownfields Developer's liability shall be limited to performing such work as is necessary to abate any increased risk to public health, welfare or the environment arising from the actions of Brownfields Developer, its contractors or consultants or any "Released Person" as defined in Section XV of this Agreement. Alternatively, Brownfields Developer may reimburse DNREC its costs in the event DNREC chooses to perform the work necessary to abate the increased risk. In the event of any other claim or cause of action by DNREC based upon non-compliance with the provisions of this Agreement and not involving a knowing violation, Brownfields Developer's liability shall be limited to performing the activity or obligation required by the Agreement, or, if applicable, reimbursing DNREC's costs of performing the required activity or obligation. In no event shall Brownfields Developer be liable for a remedy at the certified brownfield, or for reimbursing DNREC's costs, except as expressly agreed to and set forth in this Agreement.

60. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, that DNREC or the State of Delaware may have against any person, firm, company, corporation, partnership or other entity not a party to or a Released Person under this Agreement.

61. Nothing in this Agreement is intended to limit DNREC's right to undertake future remedies at the Site or to seek to compel a person other than a Released Person, as defined in Section XV of this Agreement, to perform or pay for any remedies at the Site.

### XIII. BROWNFIELDS DEVELOPER'S COVENANT NOT TO SUE

62. In consideration of DNREC's release and covenant not to sue in Section XI of this Agreement, Brownfields Developer agrees not to assert any claims or causes of action against DNREC or its employees, agents or contractors related to this provisions of this BDA or to any expenses incurred, payments made, or work performed at the certified brownfield, or to seek any other costs, damages, or attorneys' fees arising out of any investigations, remedial work, or Development Activities undertaken at or related to the certified brownfield except as may be allowed pursuant to the express terms of any applicable loan, grant or financial assistance program administered by DNREC.

63. Notwithstanding the provisions of paragraph 63, Brownfields Developer reserves the right to assert any claim or cause of action against DNREC based solely upon the alleged negligent acts of DNREC and its employees; provided however Brownfields Developer agrees not to assert any claim or cause of action related to DNREC's oversight or approval of Brownfields Developer's plans or activities or DNREC's issuance or non-issuance of any work plans, Proposed Plan or Final Plan that relate to the Existing Environmental Condition, and for which a statutory waiver of sovereign immunity is expressly provided.

64. Brownfields Developer shall indemnify the State of Delaware, its agencies, departments, employees, contractors and agents and hold them harmless from any and all claims or causes of action arising from or on account of acts or omissions of Brownfields Developer, its employees, contractors, consultants, agents, representatives or assignees, or any persons including, but not limited to, firms, corporations, subsidiaries, companies, partnerships, or other entities or business organizations in carrying out activities under this Agreement; provided, however, that this indemnification provision shall not apply to any alleged negligent acts or omissions of the State of Delaware, its agencies, departments, employees or agents. The State of Delaware and any department, agency, employee or authorized representative thereof, shall not be included as a party to any contract entered into by Brownfields Developer for the purpose of carrying out any activities related to this Agreement, or be named as an additional insured with respect to any insurance policy obtained by Brownfields Developer or any of its employees, contractors, consultants, agents or representatives, related to any of the provisions of this Agreement or to the work, activities or other actions taken pursuant to this Agreement.

### XIV. CONTRIBUTION PROTECTION

65. As provided by HSCA, the Parties agree that Brownfields Developer is entitled to protection from contribution actions or claims by other persons for matters addressed in this Agreement. The matters addressed in this Agreement include without limitation: any remedy, remedial action, or other action taken to respond to, prevent, minimize, or mitigate harm or risk of harm to public health, welfare or the environment relating to the Existing Environmental Condition; any remedial costs incurred or to be incurred by DNREC or any other person relating to the Existing Environmental Condition; and, any natural resource damages claims including without limitation costs of pre-assessment actions, assessment, restoration, rehabilitation,

replacement, mitigation, acquisition, compensation or loss of use relating to the Existing Environmental Condition.

#### XV. PARTIES BOUND/TRANSFER OF COVENANT

66. This Agreement shall apply to and be binding upon the State of Delaware and DNREC and shall apply to and be binding upon Brownfields Developer, its officers, directors, members, partners and employees. Sections XI and XIV of this Agreement shall apply to Brownfields Developer, its subsidiaries and affiliates and each of their respective officers, directors, members, partners, and employees, and to any successor, transferee, or assignee of Brownfields Developer, collectively “Released Persons”, provided such Released Persons have not taken any actions for which they would be potentially liable for a release or threatened release of hazardous substances pursuant to 7 *Del. C.* § 9105(a).

67. Each person executing this Agreement on behalf of a Party represents that he or she is fully authorized to enter into the Agreement and to bind such Party with respect to the terms, conditions, rights, benefits, protections and obligations contained herein.

68. Consistent with the provisions of this Agreement, the rights, benefits, protections and obligations conferred upon Brownfields Developer herein, may be assigned or transferred to any person with the prior written consent of DNREC in its sole discretion. In the event of an assignment or transfer of the certified brownfield (or an assignment or transfer of an interest in the certified brownfield) that is the subject of this Agreement, the assignor or transferor shall continue to be bound by all of the terms and conditions and subject to all the benefits of the Agreement unless otherwise agreed to by DNREC and the assignor or transferor. In the case of such an Agreement, DNREC and the assignor or transferor shall execute a written assignment or transfer document identifying with specificity the nature and effect of the modifications to this Agreement. Any terms of the Agreement that are unaffected by the assignment or transfer shall remain in full force and effect as to the Brownfields Developer.

69. Prior to or simultaneously with any assignment or transfer of the certified brownfield, the assignee or transferee must execute its own Brownfields Development Agreement with DNREC. The failure of the assignee or transferee to provide such written acknowledgement will render Sections XI and XIV of the Agreement inapplicable to the assignee or transferee.

#### XVI. DISCLAIMER

70. This Agreement does not constitute any finding by DNREC relating to the risks to public health, welfare or the environment that may be posed by contamination at the Site, nor does it constitute any representation or affirmation by DNREC that the certified brownfield is fit for any particular purpose.

#### XVII. RECORDS RETENTION

71. Brownfields Developer agrees to retain and make available to DNREC certain records in either electronic or hard copy form for a minimum of ten (10) years from the date of the

execution of this Agreement. Such records shall include the following: all business and operating records; contracts; Site studies; investigations, data, and other related materials pertaining to activities and operations conducted at the certified brownfield in connection with the use, disposal, remediation, generation, storage, or transport of hazardous substances; all records related to environmental conditions at the Site; and all records related to any activities that could interfere with any remedy at the certified brownfield. Brownfields Developer further agrees that prior to disposing of the records at any time after the ten-year retention period, it will provide DNREC with reasonable notice and shall permit DNREC to make copies of the records at DNREC's expense.

#### XVIII. NOTICE AND SUBMISSIONS

72. Unless otherwise agreed upon by the Parties, any written notice or other submissions required by this Agreement shall be hand delivered or sent by certified mail return receipt requested, to the following:

DNREC-RS  
391 Lukens Drive  
New Castle, DE 19720  
Attn: [name of DNREC project officer]

[Name of Brownfields Developer]  
[Business Address]  
Attn: [Name of Brownfields Developer's representative]

#### XIX. EFFECTIVE DATE

73. This Agreement is effective upon the date it is fully executed by the Parties.

#### XX. PUBLIC COMMENT

74. Pursuant to 7 Del. C. § 9126, this Agreement is subject to a twenty-day public comment period. If requested, the Secretary of DNREC or his designee shall conduct a public meeting to provide information regarding the proposed development project. Following the receipt of any public comments, DNREC may modify or withdraw its consent to this Agreement if it determines that facts have been provided that establish that the Agreement fails to satisfy the requirements of HSCA and/or the Regulations.

#### XXI. LIST OF EXHIBITS

75. The following exhibits are attached hereto and incorporated herein by reference and are a part of this Agreement:

- a. Exhibit 1 means the brownfield certification approval letter from \_\_\_\_\_, Planner V to \_\_\_\_\_ dated \_\_\_\_\_.

- b. Exhibit 2 means the list of documents identified and incorporated herein by reference.
- c. Exhibit 3 means the parcel map and the legal description of the Real Property.

## XXII. COUNTERPARTS

76. This Agreement may be executed in multiple counterparts each of which shall be deemed an original, but which together shall constitute one and the same instrument. An electronic signature may also constitute an original signature pursuant to 6 *Del. C.* Chapter 12A.

**\*\*SIGNATURE PAGE FOLLOWS\*\***

IT IS SO AGREED:

Department of Natural Resources and Environmental Control

By: \_\_\_\_\_  
Qazi Salahuddin, Administrator  
Remediation Section  
Division of Waste and Hazardous Substances

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

[BROWNFIELDS DEVELOPER]

By: \_\_\_\_\_  
[NAME]  
[TITLE]

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

JWH20049  
August 10, 2020