

The Department of Natural Resources and Environmental Control, Site Investigation and Restoration Branch (“DNREC-SIRB”) welcomes your application for a Brownfields Development Agreement (“BDA”). This is DNREC-SIRB’s generic BDA which contains standard language used for BDAs. In an effort to expedite the process, you are welcome to fill it out by supplying the specific information where indicated, or you may propose additional changes for DNREC-SIRB’s consideration. In either case, you must submit all changes to the generic BDA in the form of a blackline draft of the BDA which indicates additions in underline and deletions in strikeout, or some comparable system for indicating all such changes. All changes to the generic BDA, including merely filling out the information where indicated without further changes, must be approved by DNREC-SIRB before a final signature draft is produced by DNREC-SIRB for execution. Please DO NOT submit a signed proposed BDA without DNREC-SIRB’s prior approval. This BDA will not be deemed finalized until approved by DNREC-SIRB and executed by the Program Manager II or Division Director. Thank you for your cooperation and assistance.

## DRAFT

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

#### BROWNFIELDS DEVELOPMENT AGREEMENT

This Brownfields Development Agreement (“Agreement”) regarding the [SITE NAME (DE#)] (“Site”) is made and entered into pursuant to the Hazardous Substance Cleanup Act (“HSCA”), 7 Del. C. Chapter 91, by and between the Department of Natural Resources and Environmental Control (“DNREC”) and [NAME] (“Brownfields Developer”), [ADDRESS], a [ORGANIZATIONAL DESCRIPTION] company organized under the laws of [STATE OF INCORPORATION] (collectively referred to as the “Parties”). The property which is the subject of this Agreement is located at [ADDRESS] and has [COUNTY] tax parcel number [NUMBER] (“Property”).

#### INTRODUCTION

The Parties agree to undertake all actions required by the terms and conditions of this Agreement. The purpose of this Agreement is to set forth a scope and schedule of activities to assess and respond to the actual, threatened, or perceived release of hazardous substances at the Site and settle and resolve the potential liability of Brownfields Developer for the Existing Environmental Condition at the Site which might otherwise result under HSCA from Brownfields Developer becoming the owner and/or operator of the Property. Furthermore, the Parties intend that by entering into this Agreement, Brownfields Developer will be afforded the liability protection as set forth in 7 Del. C. § 9125 under the conditions specified therein.

#### I. FINDINGS/BACKGROUND

1. DNREC has determined that the Property is a Certified Brownfield as defined in 7 Del. C. § 9123(3) in a letter from \_\_\_\_\_, Brownfields Administrator to \_\_\_\_\_ dated \_\_\_\_\_, attached hereto as Exhibit 1.

2. [NAME OF CURRENT OWNER OF RECORD] is the current owner of the Property.

3. Brownfields Developer is interested in conducting investigations and/or development at the Property.

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 any liability by Brownfields Developer.

## II. DEFINITIONS

5. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in HSCA or the Regulations Governing Hazardous Substance Cleanup ("Regulations") shall have the meaning assigned to them in HSCA or in the Regulations, including any amendments thereto as of the date of this Agreement.

6. "Existing Environmental Condition" includes 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 Site prior to Brownfields Developer entering into this Agreement and which includes those substances and conditions identified or set forth in the documents listed in Exhibit 2.

7. "Final Plan" shall mean the Final Plan of Remedial Action for the Site, as issued, approved, modified, or amended by DNREC in accordance with HSCA, the Regulations, and all applicable guidances, policies and procedures.

8. "Development Activities" shall mean all construction and development activities which physically take place on the Property involving structures or improvements of any kind, and all land disturbing activities including, but not limited to, digging, drilling, excavating, grading, earth moving, filling, or performing any subsurface work, prior to the issuance of a Certificate of Completion of Remedy ("COCR") by DNREC for the Site, but excludes all planning, designing, or engineering work related to the Property, as well as any physical activity done off the Property in preparation for, or related to, construction and development activities that will occur on the Property; provided, that if DNREC issues a COCR for a part of the Site ("operable unit"), it shall exclude such activities on the part of the Property that is within the operable unit. Development Activities shall also mean all physical use of the Property for commercial, residential or recreational activities prior to the issuance of a COCR by DNREC for the Site; provided, that if DNREC issues a COCR for an operable unit of the Site, it shall exclude such activities on the part of the Site that is within the operable unit.

9. "O & M Activities" shall mean all operations and maintenance and monitoring activities, as approved or modified by DNREC, which are required or authorized by the Final Plan.

10. "Property" shall mean the property located at [Address], encompassing approximately \_\_\_ acres, known as [New Castle/Kent/Sussex] County tax parcel number \_\_\_\_\_, as depicted generally on Exhibit 3.

11. "Site" shall mean the Property, and all areas where hazardous substances and/or pollution or contaminants released from the Property have come to be located, and is known as the [SITE NAME (DE#)].

12. "Work Plan" shall mean a written description of activities, as issued, approved modified, or amended by DNREC, to be performed at the Site, or any operable unit thereof, to investigate any release or imminent threat of release of any hazardous substances and/or to implement the Final Plan to address the release or imminent threat of release of hazardous substances. There may be more than one Work Plan if there are multiple operable units on the Site, or if the work proceeds in a phased approach; all such Work Plans shall be considered the "Work Plan" as defined herein, and as incorporated into this Agreement as Exhibit 4.

### III. GENERAL PROVISIONS/PROCEDURE FOR THE WORK REQUIRED

13. It is the intent of the Parties that Brownfields Developer be able to conduct investigations and/or Development Activities at the Property in accordance with this Agreement and the Work Plan, without becoming liable pursuant to HSCA for any Existing Environmental Condition. The performance of Development Activities on any part of the Property is contingent on Brownfields Developer performing all remedies as required by the Final Plan in accordance with the Work Plan on such part of the Property, unless Brownfields Developer has agreed to an Alternative Remedial Settlement, which settlement shall be attached to this Agreement as an Addendum hereto. Such Alternate Remedial Settlements may specify portions of the Final Plan which the Brownfields Developer is not required to implement as otherwise required by this Agreement.

14. If Brownfields Developer intends to proceed with development of the Property, or any part thereof, that involves any Development Activities, it shall submit for approval to DNREC a proposed Work Plan prior to undertaking any such Development Activities at the Property or any part thereof. All investigations, remedial actions, and Development Activities at the Site must be done in accordance with this Agreement, the Work Plan and Final Plan, and any amendments or modifications thereto.

15. Upon performance of all investigations, remedial actions, and any Development Activities in accordance with this Agreement, the Work Plan and Final Plan, Brownfields Developer will receive the liability protection afforded by 7 Del. C. § 9125 under the conditions specified therein.

16. If Brownfields Developer obtains all necessary approvals and decides to proceed with development of the Property, or any part thereof, it will perform Development Activities in accordance with a Work Plan and the Final Plan, and Brownfields Developer will reimburse all of DNREC's Oversight Costs incurred pursuant to, and within the scope of, Section VI.

17. If Brownfields Developer elects not to proceed with any Development Activities on the Property, Brownfields Developer shall not be required to implement the Work Plan or Final Plan on the Site, and shall continue to receive the protection afforded by this Agreement and 7 Del. C. Section 9125 under the conditions specified therein.

18. If the Brownfields Developer begins Development Activities on part of the Property but, for whatever reason, elects to not begin, or to temporarily or permanently halt, Development Activities on other parts of the Property, Brownfields Developer shall not be required to implement the Work Plan or Final Plan on those parts of the Property where Development Activities were either not begun or were halted, and Brownfields Developer shall continue to receive the protection afforded by this Agreement and 7 Del. C. Section 9125 under the conditions specified therein; provided, however, that on parts of the Property where Brownfields Developer has begun Development Activities, but has temporarily or permanently halted said Activities, Brownfields Developer shall mitigate any exacerbation of any Existing Environmental Condition, and shall remediate any new releases of hazardous substances that are not an Existing Environmental Condition that may have occurred during Development Activities. For the purpose of this Paragraph, the mitigation of any exacerbation of any Existing Environmental Condition shall be considered accomplished if that part of the Property has been returned to substantially the same condition as existed prior to the beginning of Development Activities thereon.

19. Upon compliance with this Agreement and completion of the Work Plan and Final Plan for the Site, or any operable unit thereof, and upon written application to DNREC from Brownfields Developer, DNREC will issue a COCR to Brownfields Developer for the Site, or any operable unit thereof, on which Brownfields Developer has completed the work required by the Work Plan and Final Plan in accordance with HSCA, the Regulations, and all applicable DNREC policies, procedures and guidances. DNREC reserves the right to withhold issuance of any COCR until all Oversight Costs are paid as required herein.

20. Whether or not Brownfields Developer proceeds with any Development Activities, Brownfields Developer shall be required to perform a Facility Evaluation of the Site, as approved by DNREC, within twenty-four (24) months of entering into this Agreement. A Remedial Investigation of the Site, performed in accordance with the Work Plan, shall be deemed to satisfy this requirement for the performance of a Facility Evaluation.

#### IV. WORK PLAN

21. The Work Plan shall contain a description of the proposed development project for the Property, and the Facility Evaluation, Remedial Investigation and/or Remedial Action required to document and address any release of hazardous substances at the Site. Specifically,

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the Work Plan shall, at a minimum, include the following:

- a. Construction plans for the proposed development project;
- b. A description of the Facility Evaluation and/or Remedial Investigation to be performed on the Site or any operable unit thereof;
- c. A description of the anticipated Remedial Actions necessary to address any release of hazardous substances at the Site, or any operable unit thereof, to allow the proposed development project to proceed, including any anticipated land use restrictions or land use controls;
- d. A schedule for the investigation and remediation of the Site or any operable unit thereof; and
- e. A description of the proposed operations and maintenance requirements for the Site.

22. Prior to the performance of a Facility Evaluation, Remedial Investigation, and/or Remedial Action, the Work Plan will set out the activities required for the Facility Evaluation and/or Remedial Investigation, and the anticipated Remedial Actions, to allow the development project to proceed and to address any contamination at the Site.

23. After the Facility Evaluation and/or Remedial Investigation is completed, Brownfield Developer will prepare and submit to DNREC for review and approval a Proposed Plan of Remedial Action (“Proposed Plan”) for the Site, or any operable unit thereof, which meets the requirements of HSCA, the Regulations and all applicable guidances, policies and procedures. With DNREC’s approval, Respondent may prepare a draft Proposed Plan and submit it to DNREC for its review and approval. If the Proposed Plan does not differ significantly from the anticipated remedial action described in the Work Plan, DNREC will advertise the Proposed Plan for public comment; if it does differ significantly from that described in the Work Plan, DNREC may require a feasibility study be developed by the Brownfields Developer prior to advertising the Proposed Plan for public comment.

24. After DNREC’s issuance of the Final Plan for the Site, or any operable unit thereof, or after the conclusion of any appeals thereof, the Work Plan shall be modified, as approved by DNREC, to incorporate any changes needed to implement the Final Plan.

25. The Work Plan may exclude portions of the Remedial Action required by the Final Plan for which the Brownfields Developer has reached an Alternate Remedial Settlement attached hereto as an Addendum.

26. DNREC and Brownfields Developer acknowledge that modification or amendment of the Work Plan or Final Plan may be required based on new information regarding the environmental condition of the Site, or changes to the planned Development Activities, as determined by DNREC in order to protect public health or the environment, which modifications

or amendments will be made in accordance with HSCA, the Regulations, and all applicable DNREC policies, procedures and guidances. If such new information requires amendment of the Work Plan or the Final Plan, Brownfields Developer is not obligated by this Agreement to perform the work required by any such amendments; provided, however, that DNREC shall have the right under this Agreement to modify, suspend or stop further Development Activities on the Property until any such modifications or amendments are implemented at the Site.

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

#### V. DEVELOPMENT ACTIVITIES/REMEDIAL REQUIREMENTS

28. After entering into this Agreement, Brownfields Developer shall not conduct any Development Activities without the prior written approval of DNREC. After Brownfields Developer takes title to, or otherwise has a legal right to control activities on, the Property, Brownfields Developer shall use reasonable care to prevent other persons from conducting Development Activities without DNREC's prior written approval.

29. After entering into this Agreement, Brownfields Developer may proceed with Development Activities so long as DNREC determines that it is adequately performing all investigations and remedial actions at the Site required by DNREC, as specified in the Work Plan and Final Plan for the Site, and, further, that such Development Activities are consistent with, and will not interfere with, any actual or potential remedies performed, or to be performed, at the Site. If DNREC determines that Brownfields Developer has not performed, or complied with, the Work Plan or Final Plan for the Site, DNREC shall have the right under this Agreement to modify, suspend, or stop any and all Development Activities; provided, however, that before requiring Brownfields Developer to modify, suspend or stop Development Activities, DNREC will provide written notice of such non-performance or non-compliance and allow Brownfields Developer ten (10) days to cure same unless, in its sole discretion, DNREC determines that such non-performance or non-compliance presents a risk to public health, welfare or the environment, in which case DNREC can require Development Activities be modified, suspended or stopped immediately.

30. Brownfields Developer shall comply, and, to the extent it may reasonably do so, shall require others to comply, with any land use restriction established or imposed in connection with the remedy at the Site.

31. Brownfields Developer shall not impede, and, to the extent it may reasonably do so, shall not permit others to impede, the effectiveness or integrity of any institutional controls employed at the Site in connection with any remedy.

32. Brownfields Developer is responsible for conducting all O&M Activities at the Site, and shall remain responsible for such O&M Activities until DNREC approves a transfer of such responsibility pursuant to Section XIII.

## VI. PAYMENT OF COSTS REIMBURSEMENT

33. Brownfields Developer may be eligible for reimbursement from DNREC for remedial costs totaling up to \$225,000 (two-hundred and twenty-five thousand dollars), of which the first potential \$125,000 (one hundred twenty-five thousand dollars) being dollar to dollar reimbursement, with the second potential remaining reimbursement of \$100,000 (one hundred thousand dollars) being fifty cents to the dollar. [Non-profit or public entity may be eligible for up to \$1,000,000.00 (one million dollars).] Any reimbursement of remedial costs pursuant to this Section: (1) is contingent upon the availability of said funds designated to the Brownfields Development Program during any given fiscal year and may be limited based on funding restrictions; and (2) shall be determined at DNREC's sole, non-reviewable discretion in accordance with DNREC's HSCA Policy on Brownfields Grants, including Attachment A, Brownfields Grant Eligible Expenses Guidance, dated November 2006 ("Brownfields Grant Policy"), or any other applicable policy or procedure as determined by DNREC. Remedial cost statements will be sent by DNREC on a quarterly basis.

34. Brownfields Developer is responsible for payment of DNREC's Oversight Costs. Brownfields Developer may use any reimbursement of remedial costs granted by DNREC to offset such costs which shall be accounted for in the same manner as other remedial costs ( i.e., either dollar to dollar or fifty cents to the dollar).

35. After Brownfields Developer has expended all of the cost reimbursement that DNREC has granted it pursuant to this Section, Brownfields Developer is responsible for payment to DNREC for all other DNREC Oversight Costs. DNREC will send Brownfields Developer a cost statement setting out any Oversight Costs that are subject to repayment.

36. For purposes of this Section, Oversight Costs may include, but shall not be limited to, costs incurred by DNREC in preparing this Agreement, in overseeing Brownfield Developer's implementation of the requirements of this Agreement, in performing activities at the Site relating to this Agreement as part of the implementation of a remedy at the Site, in providing public information and conducting community relations, and in conducting public hearings or complying with public notice and public comment requirements under HSCA or other applicable laws or regulations. Oversight costs shall also include all direct and indirect costs, including but not limited to, time and travel costs of DNREC personnel, and associated indirect costs, contractor costs including legal costs, compliance monitoring, including 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.

37. If Brownfields Developer fails to implement institutional controls at the Site as required by the Final Plan, Brownfields Developer shall reimburse DNREC for the oversight costs it incurs in establishing or reestablishing such institutional controls. In addition, Brownfields Developer agrees to pay the costs incurred by DNREC to review any requests for consent to assign or transfer the benefits conferred by this Agreement.

38. 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 the cost statement

received from DNREC. DNREC shall have the right to withhold approval of any report, Work Plan, Final Plan, Environmental Covenant or COCR required for the Site if payment is not received within ninety (90) days. In the event Brownfields Developer has not made payment within one hundred and eighty days (180) days, DNREC shall have the right to restrict all Development Activities on the Site and to direct all of Brownfield Developer's employees, agents or contractors immediately to stop all work related to the Site.

39. If Brownfields Developer fails to comply with the terms of this Agreement, it shall be liable for all litigation and other enforcement costs incurred by DNREC to enforce this Agreement or to otherwise obtain compliance with the Work Plan or Final Plan.

## VII. ACCESS/SUCCESSORS IN INTEREST

40. Commencing upon the date that it acquires title to the Property, Brownfields Developer agrees to provide to DNREC, its authorized officers, employees, representatives, and all other persons performing remedies under DNREC oversight, an irrevocable right of access at all reasonable times to the Property, and to any other area to which access is required for the implementation of remedies at the Site to the extent access to such other areas is controlled by Brownfields Developer, for the purposes of performing or overseeing remedies, or restoration of damages to natural resources, at the Site under federal and state law. DNREC agrees to provide reasonable notice to Brownfields Developer of the timing of remedies or restoration to be undertaken at the Site. Nothing herein shall limit DNREC's right of access under applicable law.

41. Brownfields Developer shall require that assignees, successors-in-interest, lessees and sublessees of the Property shall provide the same access and cooperation as provided herein and shall make such access and cooperation a condition of any contractual agreement between Brownfields Developer and any such assignee, successor-in-interest, lessee and sublessee of the Property. Brownfields Developer shall ensure that a copy of this Agreement is provided to any current lessee or sublessee on the Property as of the effective date of this Agreement and shall ensure that any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property are consistent with this Section, and Section XIII (Parties Bound/Transfer of Covenant).

## VIII. DUE CARE/COOPERATION

42. Brownfields Developer shall exercise due care at the Site with respect to the Existing Environmental Condition and shall comply with all applicable local, State, and federal laws and regulations. Brownfields Developer recognizes that the implementation of remedies at the Site may interfere with Brownfields Developer's use of the Property, and may require closure of their operations or a part thereof. Brownfields Developer agrees to cooperate fully with DNREC in the implementation of remedies at the Site and further agrees not to interfere with such remedies. DNREC agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with Brownfields Developer's operations by such entry and performance of remedies. Brownfields Developer shall comply with any request for information or administrative subpoena issued by DNREC in accordance with applicable law.

43. In the event Brownfields Developer becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Brownfields Developer shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under HSCA, or any other law, immediately notify DNREC of such.

## IX. CERTIFICATION

44. By entering into this Agreement, Brownfields Developer certifies to the following:

- a. To the best of its knowledge and belief, it has fully and accurately disclosed to DNREC all information known to Brownfields Developer and all information in its possession or control, or that of its members, officers, directors, employees, contractors and agents which relates in any way to any Existing Environmental Condition or any past or potential future release of hazardous substances, pollutants or contaminants at or from the Site and to its qualifications for this Agreement; provided, however, that this shall not apply to information in the possession or control of contractors that was generated under contract with any person other than Brownfields Developer, its members, officers, directors, employees, agents or other Affiliated Persons as described in subparagraph b, below. Brownfields Developer also certifies that, to the best of its knowledge and belief, it has not taken any actions, other than its investigations and due diligence of the Site for the Project that is the subject of the Agreement, for which it would be potentially liable for releases of hazardous substances at the Site pursuant to 7 Del. C. Section 9105(a); and
- b. The Brownfields Developer is not affiliated with any other person ("Affiliated Person") that is potentially liable pursuant to 7 Del. C. Section

9105(a) for releases of hazardous substances at the Site 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 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 the 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 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.

45. If the information provided by Brownfields Developer pursuant to Paragraph 44 a. and b. is not materially accurate and complete, DNREC may declare this Agreement to be null and void and DNREC reserves all rights it may have.

#### X. DNREC'S COVENANT NOT TO SUE

46. Subject to the reservation of rights in Section XI of this Agreement, and effective upon execution by the Secretary of this Agreement, DNREC releases and covenants not to sue or take any other civil or administrative action against Brownfields Developer, including without limitation, civil liability for reimbursement of DNREC's costs or for injunctive relief pursuant to 7 Del. C. Chapter 91, for any Existing Environmental Condition.

#### XI. RESERVATION OF RIGHTS

47. The release and covenant not to sue set forth in Section X above does not pertain to any matters other than those expressly specified in Section X (DNREC's Covenant Not to Sue). DNREC reserves, and the Agreement is without prejudice to, all rights against Brownfields Developer with respect to all other matters, including, but not limited to, the following:

- a. claims based on a failure by Brownfields Developer to meet a requirement of this Agreement;
- b. any liability pursuant to 7 Del. C. Section 9105 (a) for actions of Brownfields Developer other than its investigation and due diligence of the Site for the Project that is the subject of the Agreement:

- c. any liability resulting from exacerbation by Brownfields Developer, its successors, assignees, lessees or sublessees, of any Existing Environmental Condition, excepting therefrom any work previously approved by DNREC pursuant to the terms of this Agreement, the Work Plan or the Final Plan;
- d. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Environmental Condition;
- e. criminal liability; and
- f. liability for violations of local, State or federal law or regulations.

48. 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 any Existing Environmental Condition.

49. In the event of any claim or proceeding by DNREC under Paragraph 43 c. or d., Brownfields Developer's liability shall be limited to performing or reimbursing DNREC for the costs of performing such work as is necessary to abate any increased risk to human health or the environment arising from the actions of Brownfields Developer, its contractors or consultants or any Released Person (as defined in section Section XIII of this Agreement). In the event of any claim or proceeding by DNREC based on any other provision of this Agreement, Brownfields Developer's liability shall be limited to performing or reimbursing DNREC for the costs of performing the activity or obligations set forth in this Agreement. In no event shall Brownfields Developer be liable for the performance or costs of performing a remedy at the Site except as expressly agreed to and set forth in this Agreement.

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

51. Nothing in this Agreement is intended to limit the right of DNREC to undertake future remedies at the Site or to seek to compel parties other than the Released Persons (as defined in Section XIII of this Agreement) to perform or pay for remedies at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of remedies which may be taken or be required by DNREC in exercising its authority under federal or state law.

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

52. In consideration of DNREC's covenant not to sue in Section X of this Agreement, Brownfields Developer agrees not to assert any claims or causes of action against DNREC or its contractors or its employees arising out of expenses incurred or payments made or work

performed at the Site, or to seek any other costs, damages, or attorney's fees arising out of any remedial work or Development Activities at, or related to, the Site, except as may be allowed by any loan, grant or financial assistance program administered by DNREC.

53. Brownfields Developer reserves, and this Agreement is without prejudice to, actions against DNREC based on negligent actions taken directly by DNREC, but not including any actions related to DNREC's oversight or approval of Brownfields Developer's plans or activities or DNREC's issuance or non-issuance of any proposed or final plans, that are brought pursuant to any statute other than HSCA, and for which the waiver of sovereign immunity is found in a statute other than HSCA.

54. Brownfields Developer shall indemnify the State of Delaware, its agencies, departments, agents and employees 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, agents, representatives or assignees, or any persons including, but not limited to, firms, corporations, subsidiaries, contractors and consultants in carrying out activities under this Agreement; provided, however, that this shall not apply to any negligent acts or omissions of the State of Delaware, its agencies, departments, agents or employees. The State of Delaware, or any department, agency, employee or authorized representative thereof, shall not: (1) be held as a party to any contract entered into by Brownfields Developer in carrying out activities under this Agreement, or (2) be named as additional insured on any insurance policy obtained by Brownfields Developer, or any of its contractors, consultants, agents or representatives, which covers any work, activities or other potential liabilities related to carrying out activities under this Agreement.

### XIII. PARTIES BOUND/TRANSFER OF COVENANT

55. This Agreement shall apply to and be binding upon DNREC, the State, and shall apply to and be binding upon Brownfields Developer, its officers, directors, and employees. DNREC's Covenant Not to Sue in Section X and Contribution Protection in Section XVIII shall apply to Brownfields Developer, its parents, shareholders, members, partners, subsidiaries, and affiliates, and each of their respective officers, directors, agents or employees and to its successors, transferees, and assignees (collectively "Released Persons"), provided that such Released Persons have not taken any actions, other than any investigations and due diligence of the Site for the Project that is the subject of this Agreement, for which they would be potentially liable for releases of hazardous substances at the Site pursuant to 7 Del. C. Section 9105 (a) Each signatory of the Parties to this Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

56. Notwithstanding any other provisions of this Agreement, all of the rights, benefits, protections and obligations conferred upon Brownfields Developer under this Agreement may be assigned or transferred to any person with the prior written consent of DNREC in its sole discretion, which consent shall not be unreasonably withheld. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as DNREC and the assignor or transferor

agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or simultaneous with any assignment or transfer of the Property, the assignee or transferee must agree in writing to be bound by the terms of this Agreement, in a manner and form approved by DNREC, in order for the Covenant Not to Sue in Section X to be available to that party. The Covenant Not to Sue in Section X shall not be effective with respect to any assignees or transferees who fail to provide such written agreement to DNREC.

#### XIV. DISCLAIMER

57. This Agreement in no way constitutes a finding by DNREC as to the risks to human health and the environment which may be posed by contamination at the Site nor constitutes any representation by DNREC that the Site is fit for any particular purpose.

#### XV. DOCUMENT RETENTION

58. Brownfields Developer agrees to retain and make available to DNREC all business and operating records, contracts, Site studies and investigations, and documents relating to operations at the Site in connection with the use, disposal, generation, storage, or transport of hazardous substances, or environmental conditions at the Site and any activities that could interfere with any DNREC remedy at the Site for at least ten (10) years following the effective date of this Agreement unless otherwise agreed to in writing by the Parties. At the end of ten (10) years, Brownfields Developer may notify DNREC of its intent to dispose of such documents and in that event shall identify the location of such documents and shall provide DNREC with an opportunity to copy any documents at the expense of DNREC.

#### XVI. NOTICES AND SUBMISSIONS

59. Any notices or submissions due hereunder shall be sent by hand delivery, reputable overnight courier, or certified mail with return receipt requested, to the following:

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

[Name and address of Brownfields Developer]

#### XVII. EFFECTIVE DATE

60. The effective date of this Agreement shall be the date it is signed by all parties.

#### XVIII. CONTRIBUTION PROTECTION

61. With regard to claims for contribution against Brownfields Developer, the Parties hereto agree that Brownfields Developer is entitled to protection from contribution actions or claims as provided by HSCA for matters addressed in this Agreement. The

matters addressed in this Agreement include, without limitations, any remedy taken and response costs incurred or to be incurred by DNREC or any other person as to the Site with respect to the Existing Environmental Condition.

#### XIX. PUBLIC COMMENT

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

#### XXI. LIST OF EXHIBITS

63. The following exhibits are attached hereto, or incorporated herein and made an integral part hereof:

- a. Exhibit 1 shall mean the Letter from \_\_\_\_\_, Brownfields Administrator to \_\_\_\_\_ dated \_\_\_\_\_, attached hereto.
- b. Exhibit 2 shall mean the documents set out in the list attached hereto, all of which said documents are incorporated herein.
- c. Exhibit 3 shall mean the parcel map and the legal description of the Property (attached hereto).
- d. Exhibit 4 shall mean the Work Plan (as incorporated herein).

#### XXI. COUNTERPARTS

64. 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.

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

IT IS SO AGREED:

Department of Natural Resources and Environmental Control

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

Kathleen M. Stiller, Program Manager II  
Division of Air and Waste and Management  
Site Investigation and Restoration Branch

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

[BROWNFIELDS DEVELOPER]

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

[NAME]  
[TITLE]

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

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