

**ATTACHMENT I-1**  
**HAZARDOUS MATERIALS**

**1. Definitions**

- A. “AB 389 Agreement” refers to any agreement entered into with an Environmental Regulatory Agency under the California Land Reuse and Revitalization Act of 2004. (Cal. Health & Safety Code, Chapter 6.82, section 25395.60 *et seq.*)
- B. “Closed” or “Closure” refers to the issuance of a “No Further Action” letter or other equivalent written determination from the appropriate Environmental Regulatory Agency confirming the completion of the Remediation (including any required groundwater monitoring) with respect to all or any identified portion of the Development Parcels or Public Open Space.
- C. “DTSC” refers to the California Department of Toxic Substances Control and any successor regulatory agency charged with overseeing the clean up of contaminated properties.
- D. “Environmental Data” means work plans, sampling results, laboratory results, analysis, reports, QAQC forms, field notes, chromatograms, response plans, Removal Action Plans, Remedial Action Plans, corrective action plans and all results thereof, whether in draft or in final form, including without limitation, electronic data, handwritten notes, and typewritten materials.
- E. “Environmental Laws” means any and all federal, state and local, statutes, ordinances, orders, rules, regulations, guidance documents, judgments, governmental authorizations, or any other requirements of governmental authorities, as may presently exist, or as may be amended or supplemented, or hereafter enacted, relating to the presence, release, generation, use, handling, treatment, storage, transportation or disposal of Hazardous Materials, or the protection of the environment or human, plant or animal health, including,

without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986 (42 U.S.C.A. § 9601), the Hazardous Materials Transportation Act (49 U.S.C. § 1801 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), the Oil Pollution Act (33 U.S.C. § 2701 et seq.), the Emergency Planning and Community Right-to-Know Act (42 U.S.C. § 11001 et seq.), the Porter-Cologne Water Quality Control Act (Cal. Wat. Code § 13000 et seq.), the Toxic Mold Protection Act (Cal. Health & Safety Code § 26100, et seq.), the Safe Drinking Water and Toxic Enforcement Act of 1986 (Cal. Health & Safety Code § 25249.5 et seq.), the Hazardous Waste Control Act (Cal. Health & Safety Code § 25100 et seq.), the Hazardous Materials Release Response Plans & Inventory Act (Cal. Health & Safety Code § 25500 et seq.), and the Carpenter-Presley-Tanner Hazardous Substances Account Act (California Health and Safety Code, Section 25300 et seq.).

- F. “Environmental Regulatory Agency” means any governmental agency with jurisdiction over the clean up of environmentally impaired properties and the protection of human health, the environment, plant and animal habitat, or water resources, and any successor Environmental Regulatory Agency.
- G. “Hazardous Materials” means any substance, material, or waste which is or becomes regulated by any local governmental authority, the State of California, or the United States Government, including, but not limited to, any material or substance which is (i) defined as a “hazardous waste”, “acutely hazardous waste”, “extremely hazardous waste”, or “restricted hazardous waste” under Section 25115, 25117 or 25122.7, or listed pursuant to Section 25140 of the California Health and Safety Code, Division 20, Chapter 6.5

(Hazardous Waste Control Law), (ii) defined as a “hazardous substance” under Section 25316 of the California Health and Safety Code, Division 20, Chapter 6.8 (Carpenter-Presley-Tanner Hazardous Substance Account Act), (iii) defined as a “hazardous material”, “hazardous substance”, or “hazardous waste” under Section 25501 of the California Health and Safety Code, Division 20, Chapter 6.95 (Hazardous Materials Release Response Plans and Inventory), (iv) defined as a “hazardous substance” under Section 25281 of the California Health and Safety Code, Division 20, Chapter 6.7 (Underground Storage of Hazardous Substances), (v) petroleum, petroleum based products and petroleum additives and derived substances, (vi) asbestos and lead based paint, (vii) polychlorinated byphenyls, (viii) listed under Article 9 or defined as “hazardous” or “extremely hazardous” pursuant to Article 11 of Title 22 of the California Code of Regulations, Chapter 20, (ix) designated as “hazardous substances” pursuant to Section 311 of the Clean Water Act (33 U.S.C. Section 1317), (x) defined as a “hazardous waste” pursuant to Section 1004 of the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq. (42 U.S.C. Section 6903), (xi) defined as “hazardous substances” pursuant to Section 101 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq., (xii) methyl-tertiary butyl ether, (xiii) mold, fungi, viruses and bacterial matter, or (xiv) any other toxic substance, whether in the form of a solid, liquid, gas or any other form whatsoever, which by any governmental requirements either requires special handling in its use, transportation, generation, collection, storage, handling, treatment or disposal, or is defined as “hazardous” or harmful to human health or the environment.

H. “RWQCB” means the California Regional Water Quality Control Board, San Francisco Bay Region or any successor agency authorized to oversee

clean up of contaminated properties and charged with the protection of water resources.

- I. “Remediate,” “Remediation” or “Remedial Action” shall have the same meaning as those terms are defined in 42 USC section 9601(24), except that as used in this context, these terms apply to the clean up of Hazardous Materials defined above.
- J. “Removal” or “Removal Action” shall have the same meaning as those terms are defined in 42 USC section 9601(23), except that as used in this context, these terms apply to the removal of Hazardous Materials defined above.

## **2. Developer and City to Cooperate**

- A. City to rely on Developer’s Environmental Data. Developer has hired environmental consultants to conduct Phase I and Phase II Environmental Site Assessments and will engage environmental consultants or contractors to perform Removal or Remedial Actions. City shall be able to rely on all Environmental Data prepared or to be prepared by or on behalf of Developer and all Environmental Data shall specifically state that the City can rely on such information.
- B. Standard of Care for All Appropriate Inquiries. Developer shall require in its contracts with environmental consultants involved in the assessment or investigation of Hazardous Materials located at the Development Parcels and the Public Open Space that the performance of such consultant’s work shall satisfy or meet (as applicable) the requirements of all appropriate inquiry into the previous ownership and uses of the Public Open Space and the Development Parcels, consistent with the Code of Federal Regulations, part 312 or ASTM 1527-05, in an effort to minimize the Parties’ liability and in order to qualify as a Bona Fide Prospective Purchase under 42 USC section

9601(40) or for the Innocent Landowner defense under 42 USC sections 9607(b)(3) and 9601(35), or a Contiguous Landowner.

- C. City to hire Environmental Consultant. City shall, at Developer's expense, hire an independent environmental consultant of City's choosing to review the Environmental Data, to assist in identifying data gaps, to participate in meetings with Environmental Regulatory Agencies, to advise the City and to perform any additional functions that the City may identify at a later date. Developer's obligations to fund such consultant shall terminate with respect to any portion of the Public Open Space that has been Closed.
- D. Developer to Provide Environmental Data to City. Developer shall provide copies of all Environmental Data to City immediately upon receipt by Developer.
- E. City to Review all Draft Reports and Work Plans. Developer shall make all draft reports and work plans available to City for review and comment at least seven (7) business days prior to submitting any such reports or work plans to any Environmental Regulatory Agency. City shall review and respond to Developer with comments or questions within a reasonable period of time. To the extent City is legally able, it will keep Environmental Data confidential prior to its submission to an Environmental Regulatory Agency.
- F. City to Participate in Meetings with Environmental Regulatory Agencies. City shall be included in all communications with any Environmental Regulatory Agency regarding the Project Site. Developer shall give City reasonable notice of all such phone calls and meetings so that City may participate.
- G. Liability Limiting Tools. Developer intends to enter into an AB 389 Agreement with DTSC for the Development Parcels, and if possible the Public Open Space. Developer will cooperate with City to obtain the same or similar protections for the City on the Public Open Space as the Developer

will receive through and AB 389 Agreement. City may employ one or more liability limiting tools. Developer agrees to work reasonably with City and to modify its Removal or Remedial Action Plans, the timeline or the implementation method in order to allow City to take advantage of any available liability limiting tools available given the intended deal structure (whereby the City takes title to the Public Open Space in an un-Remediated condition and the Developer Remediate such property per the Phasing Schedule in Exhibit \_\_\_\_). Developer may participate in meetings with the Environmental Regulatory Agencies wherein liability limiting tools for the City will be discussed.

- 3. Developer's Duty to Remediate.** Developer shall Remediate, at its sole cost and expense, all Hazardous Materials on, in, below or about the Development Parcels and the Public Open Space according to the Phasing Schedule in Exhibit C. Developer shall expeditiously complete any additional environmental investigation necessary to fill any data gaps. For each phase, Developer shall complete any Remediation on the Public Open Space at the same time or before Developer conducts any necessary Remediation on the Development Parcels. Developer shall be responsible for securing any unoccupied portion of the Public Open Space prior to and during the Remediation, including without limitation providing adequate fencing and signage. Notwithstanding the Phasing Schedule in Exhibit C, if any Environmental Regulatory Agency issues any order, directive or notice that any part of the Public Open Space require clean up, then Developer will Remediate those areas or releases that are the subject of the Environmental Regulatory Agency's directive, order or notice in compliance with the Environmental Regulatory Agency's timeline. For the purposes of this Development Agreement, Developer shall be deemed to have completed the Remediation upon receipt of a closure letter from the appropriate Environmental Regulatory Agency.

- A. Developer to Keep City Informed. Representatives of Developer will regularly meet and consult with City regarding the environmental investigation or the Removal or Remedial Action implementation and the status and results of thereof and will submit written and verbal reports to City to the extent necessary to keep City fully informed on the status of the clean up.
- B. Standard of Care. Developer shall perform the cleanup hereunder in strict compliance with applicable federal, State and local laws and regulations. Developer represents and warrants that it shall clean up the Public Open Space in accordance with generally accepted professional practices and standards for environmental Remediation.
- C. Cleanup Levels. The Development Parcels and the Public Open Space shall be Remediated to levels protective of human health, the environment and water resources (both surfacewater and groundwater).
- D. Financial Assurance. Developer shall provide the following financial assurance to secure the Remediation of the Public Open Space in the event of Developer's default of Developer's obligation to Remediate the Public Open Space (the "Secured Remediation Funds"):
1. Timing. The Secured Remediation Funds shall be in place prior to transfer of the Public Open Space to the City.
  2. Initial Amount:
    - a. For any portion of the Remediation insured by a Cost Cap Policy: Developer shall provide Secured Remediation Funds in an amount equal to the total complete cost of any additional environmental investigation necessary plus the Remediation costs up to the attachment point of the Cost Cap Policy, plus the premium amount and amount of any deductible for the Pollution Legal Liability Policy.
    - b. For any portion of the Remediation not insured by a Cost Cap Policy:

Developer shall provide Secured Remediation Funds in an amount equal to 125% of the estimated cost to implement such Remediation (which estimate shall be prepared by Developer's consultant and reasonably approved by the City). To the extent that the initial estimate is not based on an approved Response Plan, the City and the Developer shall revise the estimate (and corresponding portion of the Secured Remediation Funds) to incorporate any subsequently approved Response Plan.

- c. Priority of Use. The Secured Remediation Funds shall be for the benefit of the City and the State of California, acting by and through its States Lands Commission ("SLC"). The City and Developer agree that the City shall have the first priority for the use of the Secured Remediation Funds and Developer will take all necessary steps to provide the City first priority, including, without limitation, Developer shall use its best efforts to incorporate the City's first priority right in to the Exchange Agreement with SLC, and filing necessary UCC 1 forms. In the event that SLC refuses to incorporate this right of priority into the Exchange Agreement, then the amounts set forth in subsections (a) and (b) shall be increased by 25%.

3. Adjustment of the Secured Remediation Funds.

- a. Annual Increases. Developer shall increase the amount of Secured Remediation Funds by a percentage equal to the increase in the **[insert agreed upon engineering cost index]** over the preceding year, which increase shall occur on the anniversary of the original posting of the Secured Remediation Funds.
- b. Decreases. Developer shall be entitled to reduce the amount of the Secured Remediation Funds by the estimate to complete the

Remediation for any portion of the Public Open Space that has been Closed.

4. Form. City in its sole discretion shall have the right to approve the allowable forms of the Secured Remediation Funds and will do so prior to the expiration of the Due Diligence Period, but in no event will the Secured Remediation Funds include personal or corporate guarantees. The form of the Secured Remediation Funds shall expressly state that the use of such funds is the environmental investigation and Remediation of the Public Open Space and City may access the Secured Remediation Funds for such purposes as necessary.
5. Assignment of Claims. In the event of Developer's default of its Remediation obligations Developer assigns all rights and claims Developer has or may have in the future against any party liable or potentially liable party under any statutory or common law for the costs of cleanup of the Public Open Space, Parcel N and the low and moderate income housing parcels including all rights Developer has or may have under the California Underground Storage Tank Cleanup Fund or any successor program for funding the clean up of Hazardous Materials from underground storage tanks. In the event of Developer's default on its obligations to obtain a Closure of the Public Open Space, City shall have the right, but not the obligation, to Remediate the Public Open Space.

4. **Due Diligence and Right to Refuse Dedication.** City shall have the right to investigate the condition of the Public Open Space ("Due Diligence"), including without limitation, its environmental condition and the Developer's intended Remediation Plan. City shall conduct its Due Diligence prior to November 1, 2006 ("Due Diligence Period"); provided, however, that the City may request a thirty day extension, which request shall not be unreasonably denied by Developer. Notwithstanding the above, or anything to the contrary in this

Development Agreement, City may, in its sole and absolute discretion, refuse to accept the transfer of the Public Open Space to the City prior to the expiration of the Due Diligence Period.

**5. Environmental Insurance.** Prior to the transfer of title to the Public Open Space to City, Developer will provide Pollution Legal Liability Insurance and Cost Cap Insurance, or sufficient evidence of its ability to obtain adequate Cost Cap Insurance, in the amounts and on the terms identified in paragraphs 5.A, and 5.B, below. The Environmental Insurance shall provide coverage for Developer's environmental indemnity obligations in this Development Agreement and in all other contracts or agreements in which Developer indemnifies City. Developer agrees to work jointly with City or its insurance brokers in negotiating the terms of the insurance policies that are reasonably acceptable to City.

A. Pollution Legal Liability Insurance. Developer shall purchase pollution legal liability insurance, naming Developer and City, SLC and the Port as insureds and meeting the requirements of Paragraph 5.3.5 of the Development Agreement, to commence upon City's taking title to the Public Open Space, covering liability arising out of known, unknown and pre-existing pollution conditions, seeking damages for bodily injury, property damage, environmental investigation or Remediation. The insurance shall also cover any Developer actions that may discover or exacerbate a previously unknown release of Hazardous Materials. Such Pollution Legal Liability Insurance shall be issued with a deductible or retention of not more than Two Hundred Fifty Thousand Dollars (\$250,000) for each occurrence and indemnity limits for each occurrence or in the aggregate equal to the greater of (a) Twenty Million Dollars (\$20,000,000) or (b) such amount as may be obtained for a premium of One Million Five Hundred Thousand Dollars (\$1,500,000.000) but in no event shall the insurance coverage be less than Ten Million Dollars (\$10,000,000). The term of any Pollution Legal Liability Policy shall be for at

least twenty (20) years, but may be in the form of a single policy with a term of at least twenty (20) years or in two consecutive policies with terms of at least ten (10) years each as long as coverage is continuous and the policy terms are not materially different. The remaining terms of the Pollution Legal Liability Policy shall be subject to the City's approval, which approval shall not be unreasonably withheld. Further, Developer shall obtain a form following excess insurance policy for the sole benefit of the City in an amount equal to Three Million Dollars (\$3,000,000.00). The parties agree that the City shall have the right to purchase additional excess insurance or co-insurance at its sole discretion and expense and Developer will cooperate with City, and if necessary, assist City in obtaining such excess insurance or co-insurance.

- B. Cost Cap Insurance. Developer agrees to provide a Remediation Cost Cap Insurance policy(ies) for the Remediation of the Public Open Space with limits of at least one hundred percent (100%) above the anticipated remediation costs for the Public Open Space under an approved Removal or Remedial Action Plan or equivalent cleanup plans. Such policy(ies) shall be in place for the term required to obtain Closure. The remaining terms of the Cost Cap Policy shall be subject to the City's approval, which approval shall not be unreasonably withheld. Developer, City, SLC and the Port shall either be a named insured or shall be an additional insured under the policy(ies) and shall provide that the insurance may be tendered by and the proceeds provided to City should City be conducting the Remediation efforts, either voluntarily or by reason of Developer's default. The parties agree that the Cost Cap Policy required under this Section 5(B) may be combined with any cost cap policy for the Remediation of the Development Parcels, but such combination shall not reduce the indemnity limits required hereunder.

C. Secured Funds Alternative. In the event that Developer is unable to obtain or the Parties are unable to agree upon the form of the insurance policies required in Sections 5(A) and 5(B), above, Developer shall provide secured funds as an alternative. The amount, term and uses of the secured funds shall conform to the insurance being replaced thereby. The allowable forms of the secured funds shall be identical to the Secured Remediation Funds in section \_\_\_\_\_.

6. **Environmental Indemnity**. Until a closure or no further action letter is issued by the appropriate Environmental Regulatory Agency, Developer will indemnify, protect, defend (with counsel satisfactory to the Indemnitees), and hold the Indemnitees harmless from any claims (including without limitation third party claims for personal injury or real or personal property damage, toxic tort liability suits or any claims by any agency, employee, invitee guest, vendee or tenant), actions, administrative proceedings (including without limitation both formal and informal proceedings), judgments, damages, punitive damages, penalties, fines, costs, liabilities (including without limitation sums paid in settlements of claims), interest, or Losses, including without limitation reasonable attorneys' and paralegals' fees and expenses (including without limitation any such fees and expenses incurred in enforcing this Agreement or collecting any sums due hereunder), reasonable consultant fees, and expert fees, together with all other reasonable costs and expenses of any kind or nature (collectively, the "Costs") that arise prior to the Public Open Space being operational as a public park or the Public Improvements being dedicated to the City, directly or indirectly from or in connection with the presence, suspected presence, release, or suspected release of any Hazardous Materials in, on or under the Project Site or in or into the air, soil, soil gas, groundwater, or surface water at, on, about, around, above, under or within the Project Site, or any portion thereof, resulting from any activity of Developer or any previous uses of the Project Site, including without limitation

construction releases. The indemnification provided in this paragraph shall specifically apply to and include claims or actions brought by or on behalf of employees of Developer and Developer hereby expressly waives any immunity to which Developer may otherwise be entitled under any industrial or worker's compensation laws. In the event the Indemnitees shall suffer or incur any such Costs or Losses, the Developer shall pay to the Indemnitees the total of all such Costs suffered or incurred by the Indemnitees upon demand therefore by the Indemnitees. Notwithstanding anything to the contrary in this Agreement, Developer's indemnity shall not apply to any claims, Costs or Losses arising from the Indemnitees' sole gross negligence or willful misconduct. The Parties agree that Developer may obtain Closure on a Phase by Phase, sub-Phase by sub-Phase or parcel by parcel basis.

7. **Termination.** In the event that (a) the City elects not to approve the acceptance of the Public Open Space during the Due Diligence Period, (b) Developer fails to post the Secured Remediation Funds in accordance with Section \_\_\_\_, or (c) Developer is (i) unable to obtain the insurance policies required under Sections 5(A) and 5(B), above, and fails to post the secured funds alternatives set forth in Section 5(c), above, the parties shall meet and confer to discuss alternatives acceptable to the parties. In the event the parties are unable to agree upon such alternative, then either party may terminate this Agreement in accordance with Article 11 of the Development Agreement. The City Administrator or his or her designee is hereby authorized to determine whether or not the City should approve the acceptance of the Public Open Space during the Due Diligence Period and to approve or disapprove the forms of the Secured Remediation Funds and insurance policies (or secured funds alternatives thereto).
8. **Right of Entry.** Developer shall be provided access to the Public Open Space to accomplish the Remediation in accordance with the terms and provisions of the Ground Lease or Right of Entry attached hereto and incorporated herein.

**9. Parcel N/Estuary Park.** The City will not accept the dedication of Parcel N until the Developer has completed the Remediation of Parcel N as provided in section \_\_\_\_ of this Development Agreement. City shall have the right to participate in any discussions with DTSC or any other Environmental Regulatory Agency regarding any liability limiting tools that Developer intends to use, including AB 389, on Parcel N and the low income housing parcels to ensure that all risk and liability protections are transferable to City. Developer shall have the obligation to maintain and secure the unoccupied portions of Parcel N until the City accepts the dedication. Nothing herein obligates the City to accept the dedication of Parcel N.

**10. Dispute Resolution.**

- A. Technical Disputes. Because the Parties believe that it is in the best interest of the Project for technical disputes to be resolved prior to presenting proposals to the Environmental Regulatory Agencies, in the event the Parties cannot agree on any issues of a technical nature, each party shall submit two names of neutral environmental consultants (consultants who have no prior knowledge of the Development Parcels or the Public Open Space), and the Parties will choose one consultant among the four to resolve the technical dispute. If the Parties cannot agree on one neutral consultant within ten (10) business days after either party triggers the dispute resolution provision of this Section in writing, then the parties will submit the names of the environmental consultants to the Chief Judge of the Alameda County Superior Court and the Chief Judge will select a consultant from the list of four to render a neutral decision. The Parties agree to abide by the technical decision made by the neutral consultant.
- B. All non-technical disputes will be resolved according to the procedures provided elsewhere in this Development Agreement.

**11. Release and Covenant Not to Sue by City.** Effective upon transfer of the Public Open Space to the City, the City:

- (a) fully and finally releases the Port from all claims related to the physical condition of the Project Site, including, but not limited to all claims associated with the presence of Hazardous Materials located at or under the Project Site, and
- (b) covenants not to sue each of the Persons identified on Exhibit 13-1 of Exhibit A to the Option Agreement (who have been identified by the Port as current or former lessees of portions of the Project Site) for claims relating to the presence of Hazardous Materials at, under or emanating from the Ninth Avenue Terminal, the Seabreeze Yacht Center or the Praxair site, nor initiate any action to recover costs or other damages resulting from presence of Hazardous Materials at, under or emanating from the Ninth Avenue Terminal, the Seabreeze Yacht Center or the Praxair site as those locations are specifically identified and defined in Exhibit 13-2 of Exhibit A to the Option Agreement.

**12. Survival of Terms. [Most of the environmental terms should survive termination – this can be added later when we know paragraph numbers.]**