

**California Regional Water Quality Control Board
San Francisco Bay Region**

**Attachment to Resolution No. R2-2004-0016
Mutual Release and Covenant Not To Sue
Former Port of Oakland Overflow Parking Lot
Pardee Drive & Swan Way, Oakland, California**

I. Introduction

This **Mutual Release and Covenant Not to Sue** ("Mutual Release") is provided in response to a request by the prospective purchaser, Arrowhead Marsh LLC ("Buyer"), a Delaware Limited Liability Company and pursuant to San Francisco Bay Regional Water Quality Control Board ("Regional Board") Resolution No. R2-2004-0016 ("Resolution") authorizing its Executive Officer to finalize negotiations and sign the Mutual Release and associated documents concerning the former Port of Oakland Airport Overflow Parking Lot located at Pardee Drive and Swan Way, Oakland, California ("Property"). The legal description of the Property is attached hereto and incorporated by reference as "Exhibit A."

Buyer desires a commitment, to the maximum extent permitted by law, that it, its parents, subsidiaries, partners, partnerships, affiliates, subsequent purchasers, tenants, lenders, and any occupants of the Property, as well as all of their members, partners, partnerships, shareholders, directors, officers, employees, agents, attorneys, and their respective successors and assigns (individually, "Released Party" and collectively, "Released Parties") will not be subject to liability for, or the subject of any actions, orders, or other liabilities or requirements related to or arising from the "Known Conditions" (defined below).

II. Definitions

For purposes of this Mutual Release, "Known Conditions" or "Known Condition" means all conditions of pollution in, at, under, originating from or migrating onto or off of the Property or any portion thereof, that were known to the Regional Board as of the Effective Date (defined below). The phrase "known to the Regional Board" refers to information regarding pollution in, at, under, originating from or migrating onto or off of the Property, or any portion thereof, that was disclosed to the Regional Board or is reasonably discernible from the reports, investigations, workplans, or any other information submitted to the Regional Board prior to the Effective Date. With respect to any claim, cause of action, investigation, or enforcement action asserted or required by the Regional Board, the Released Parties shall bear the burden of proving to the Regional Board that the condition of pollution at, under, or originating from the Property for which the Regional Board is pursuing a claim, cause of action, investigation or enforcement action is a Known Condition.

III. Findings of Fact

This Mutual Release is based on the following findings by the Regional Board:

1. The Property is within the jurisdiction of the Regional Board due to the Known Conditions. The Regional Board enters into this Agreement pursuant to California Water Code Sections 13000 et seq. The Regional Board may release and covenant not to sue or assert claims for environmental investigation or remediation or other related claims against prospective purchasers, and related parties, of environmentally impacted properties, especially where, as here, the agreement is sufficiently in the public interest.

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2. Investigations have shown that the Property was historically marshland that was filled by the Port of Oakland with undocumented fill materials during the 1960's and 1970's. Recent soil and groundwater testing of the Property shows that it contains detectable concentrations of a number of regulated chemical compounds, including polycyclic aromatic hydrocarbons, total petroleum hydrocarbons as diesel, gasoline and motor oil, grease, volatile organic compounds, chlorinated solvents, and heavy metals. No further soil or groundwater cleanup is required or anticipated with respect to the Known Conditions. The contaminant concentrations are low enough to not present an unacceptable risk to human health or the environment if the Site is operated in a manner consistent with the Soil Management Plan ("SMP"), attached hereto and incorporated by reference as Exhibit B and the Covenant and Environmental Restriction ("CERP") attached hereto and incorporated by reference as Exhibit C.
3. No active unknown discharge of pollutants is believed to be currently occurring on the Property.
4. The Released Parties are not responsible parties or affiliated with a responsible party for the known contamination or pollution, and will not be prior to March 29, 2004, an owner of the Property. The sole interest of Buyer in the Property is to purchase and redevelop the Property.
5. Buyer is arranging for the redevelopment of the Property to a productive use that will benefit the public and the community. Estimated benefits to the community include infilling, the use of existing infrastructure, providing jobs for about 1,000 persons at full buildout, with increased payroll, income and real estate taxes accruing to the State and locality.
6. By entering into this Agreement, Buyer certifies that to the best of its knowledge and belief, it has fully and accurately disclosed to the Regional Board any and all information known to its officers, directors, employees, contractors and agents about pollution and/or contamination of the Property.
7. The Property is not the subject of active enforcement actions or agreement(s) with another agency to address the residual pollution at the site.
8. Buyer will pay for all reasonable costs associated with the Regional Board's development and oversight of this Mutual Release pursuant to the California Water Code.
9. This Mutual Release is consistent with the goals and purposes of state and federal law, including the Porter-Cologne Act and the federal Clean Water Act.
10. In order to ensure that no activities at the Property, with the exercise of due care, will aggravate, contribute to or create a condition of pollution or nuisance as a result of the Known Conditions, this Mutual Release requires the application of acceptable institutional controls to the Property as more fully set forth below.

IV. Agreement

1. In accordance with the Resolution, the Regional Board expressly finds that the Released Parties shall not be liable or otherwise responsible for such Known Conditions and hereby covenants and agrees not to initiate, bring, or support any claim, order, demand, enforcement action or other civil or administrative proceeding against the Released Parties or their respective successors and assigns upon satisfaction of the conditions set forth in the next sentence with respect to such Known Conditions under any local, state or federal statute, common law, or equitable doctrine, including but not limited

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to, in their entirety, the United States Code, the various California Codes, or other applicable laws, regulations, ordinances, or civil, judicial or administrative authorities, having application to the handling, release, presence, migration to, through or from, cleanup, containment or maintenance of the Known Conditions at, on, under or originating from the Property, or any portion thereof. This Mutual Release shall inure to the benefit of, and pass with each and every portion of the Property and shall benefit any respective successors and assignees of the Released Parties, provided such successors and assignees did not cause or contribute to the Known Conditions and provided further each such party that is not a signatory to this Mutual Release executes a written instrument in the form of Exhibit D hereof.

2. To the extent the Release Parties are entitled to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. Section 9613(f)(2), for matters addressed in the Resolution, the Mutual Release and Covenant Not to Sue, the CERP and SMP, the parties agree that the Released Parties are entitled to invoke such protection.
3. This Release shall remain effective notwithstanding the revocation or modification of Board Resolution No. R2-2004-0016, and shall be without prejudice to the ability of the Regional Board to take action against any party other than the Released Parties, relating to the investigation, cleanup, or cost of investigation or cleanup of the Known Conditions. Except as provided in Paragraph 6, nothing contained in this Mutual Release is intended to waive, limit, preclude, diminish or hinder any right of the Released Parties now or in the future available in law, equity, or by agreement.
4. Notwithstanding any other provisions of this Mutual Release, the Regional Board reserves the right to assert any claims, enforcement actions or other civil or administrative proceeding against the respective Released Parties arising after the Effective Date which are based on the failure of the respective Released Parties, to the extent they have control over the Property, to (i) exercise due care at the Property with respect to the Known Conditions, (ii) comply with the above-described findings, (iii) comply with the CERP and the SMP, and (iv) cooperate in providing reasonable access to the Property as required by the Regional Board. If the Regional Board determines that a Released Party has failed to materially comply with any of these four enumerated requirements, after notice and reasonable opportunity for cure, and the Regional Board elects to proceed against that Released Party, then this Mutual Release shall be suspended as to that Released Party, and the Regional Board and the Released Party shall then have any rights or defenses they would have had as if this Mutual Release and Covenant Not to Sue had not existed. If, following such proceeding, the Regional Board determines such action to be warranted, it may declare this Mutual Release to be null and void, with respect to that specific Released Party.
5. The reservation by the Regional Board set forth in Paragraph 4 shall be separately and distinctly applied with respect to each of the Released Parties, the intent being that failure by a particular Released Party to comply with any applicable requirement shall not render the Regional Board's covenant inapplicable to any other Released Party. Nothing contained in this Mutual Release shall be deemed a waiver of, or a release by, any Released Party of any defense available to such Released Party in response to any claim, order, demand, enforcement action or other civil or administrative proceeding by the Regional Board in contravention of this Mutual Release.
6. In partial consideration therefore, the Released Parties, on behalf of themselves and their respective successors in interest, hereby release and covenant not to sue the Regional Board, its authorized officers, employees or representatives, with respect to any and all liability or claims associated with or arising out of the Known Conditions.

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7. The Mutual Release shall not prohibit the Regional Board from asserting any claim, enforcement action, or other civil or administrative proceeding related to any condition of pollution at, under, or originating from the Property that are not Known Conditions.
8. Buyer will submit a deed restriction referred to as CERP in a form acceptable to the Executive Officer and in accordance with the provisions of Paragraph 10, below. Upon execution by the Regional Board's Executive Officer, Buyer will record the CERP on the Property. In relevant part, the CERP will restrict land use, restrict the use of groundwater, notify future owners and occupants of subsurface contamination, and restrict the excavation of soil. This CERP shall be recorded with the Alameda County Recorder's Office within the time period set forth in Paragraph 11, below.
9. Each Released Party not represented as a signatory below shall, as a precondition to receiving the benefits conferred by this Mutual Release, execute a written instrument in the form attached hereto and incorporated by reference as Exhibit D. Execution and mailing of Exhibit D to the Regional Board by or on behalf of any corporation, partnership, or other entity, shall be sufficient to confer the benefits of the Mutual Release upon all affiliates, parent or subsidiary corporations, and the respective directors, officers, employees, partners, members, agents, successors, and assigns of each such entity.
10. The Released Parties further agree to exercise due care at the Property with respect to the Known Conditions, to comply with the above-described CERP and SMP, to comply with all applicable local, state, and federal laws and regulations regarding the Property, and to cooperate in providing the Board reasonable access to the Property for any necessary monitoring purposes and any necessary operation, maintenance, and repair of wells and remediation facilities.
11. This Mutual Release shall be in full force and effect from the Effective Date. The Effective Date shall be March 29, 2004 . Buyer shall have ninety (90) days from adoption of Resolution No. R2-2004-0016 to record the Mutual Release and Exhibits A-D against the Property, provided that such ninety (90) day period shall be extended by the period of time required by the Executive Officer to fully execute the Mutual Release and CERP. A copy of the recorded Mutual Release and Exhibits A-D shall be provided to the Regional Board within twenty (20) days of the recording. The Regional Board shall provide acknowledgement of receipt of the recordings as required by this paragraph. Notwithstanding anything to the contrary in the foregoing, if Buyer or its successor(s) fails to record the Mutual Release and Exhibits A-D within the time frame set forth above, and the Board or Executive Officer in its discretion does not extend the time, this Mutual Release shall automatically terminate.
12. This Mutual Release may be executed in one or more counterparts, each such counterpart being deemed an original but all counterparts constituting a single instrument.
13. Each of the undersigned parties hereby certifies, and warrants that he or she is authorized to bind his or her agency or entity to the continuing obligations described herein.

