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**DEPARTMENT OF COMMERCE
PECFA BUREAU
AGREEMENT TO PERFORM PETROLEUM
CONTAMINATION ASSESSMENT
AND REMEDIATION TASK(S)**

SAMPLE DOCUMENT

AGREEMENT TO PERFORM PETROLEUM CONTAMINATION ASSESSMENT AND REMEDIATION TASK(S)

This Agreement is entered into by and between (CONSULTING FIRM), (consultant) and (CLIENT) which is the party responsible for cleanup of releases from petroleum storage tank systems and who is the party eligible for reimbursement from the Wisconsin Petroleum Environmental Cleanup Fund (PECFA) (the "fund") for cleanup of the releases from petroleum storage tank systems. (CLIENT) and (CONSULTING FIRM) desire to enter into an agreement under which (CONSULTING FIRM) shall fund and arrange for contractors or itself to conduct certain corrective action at a petroleum contaminated site in exchange for the right for (CONSULTING FIRM) to receive reimbursement from the State of Wisconsin, as allowed by Wisconsin Administrative COMM 47, (the "rules"), and as provided in this agreement. In consideration of the promises herein contained the parties hereby agree as follows:

Section I

Site

The property at which the consultant will perform services is hereinafter referred to as the 'site' and is described as:

Description of the Work

Consultant shall provide personnel, services, and materials needed to complete the following tasks (collectively the "work") in accordance with all applicable rules and regulations as established by the Wisconsin Department of Commerce PECFA program, (the "rules"):

Fees and Payment

- a) Deductibles are the responsibility of the client and prior to this agreement being finalized, arrangements must be made by client to satisfy all applicable deductibles for this site as determined by PECFA.
- b) Closure Fees:

The State of Wisconsin may require additional fees for closing your site. These fees are assessed depending upon the severity of the environmental contamination. The fees are:

\$750 DNR Closure Review Fee
\$200 GIS Registry for Contaminated Soils

\$250 GIS Registry for Contaminated Ground Water

These fees are not reimbursable by PECFA. The Client will be responsible for payment of these fees.

- c) In order to insure that costs incurred in performing the work will be reimbursable by PECFA, the work shall be in strict accordance with the rules, the direction of PECFA, and the "Usual and Customary Costs" established by PECFA and as amended from time to time. Consultant agrees to be responsible for seeking such reimbursement from PECFA.
- d) Consultant agrees to accept as payment that amount reimbursed by PECFA. Should any disallowance be made, either initially or by subsequent audit, consultant shall not hold client responsible for payment of these disallowances provided these disallowances are not the result of the termination of PECFA, or any actions of the client which cause the work to be ineligible for reimbursement by PECFA. In the event the site reaches the statutory PECFA coverage limits, this agent agreement shall be terminated.
- e) Client and consultant hereby agree that the actual amount of funds reimbursed by PECFA, associated with each application for reimbursement, shall be assigned to consultant and shall be considered full and final payment for the work which has been applied for reimbursement.
- f) Client further agrees that if reimbursement from PECFA is delayed or held by any governmental agency as a result of client's delinquent tax liability or any other delinquencies to any governmental agency or person(s), client shall immediately pay consultant the exact amount being delayed or held by any such governmental agency or person(s).
- g) Client and consultant understand that PECFA may withdraw its approval of agent status for failing to complete work in a timely manner, failure to meet DNR rules or if there is failure to pay subcontractors within a contracted timeline after receiving payment for them.

Deductible

PECFA may require a deductible for this site. Any deductible not paid by client on work previously performed in compliance with PECFA shall be invoiced to client by consultant and arrangements for payment shall be established before work commences. The deductible amount is determined by PECFA.

Termination of Agreement

This agreement may be terminated by either party, with thirty (30) days written prior notice to the other party, upon the verified discovery of a material misleading, inaccurate or untrue representation made by the other party hereto which substantially affects the ability of a party to perform under this agreement.

Section II

Limitation on Services to be performed by (CONSULTING FIRM)

- a) During the performance of the work, materials other than petroleum or petroleum products, as defined in the rules, including hazardous material, as hereinafter defined, might be discovered at the site. Consultant and client agree that the discovery of any hazardous material constitutes a “changed condition”, as hereinafter defined. If consultant discovers a hazardous material on or about the site in the prosecution of the work, consultant agrees to notify client in writing as soon as reasonably possible and to take such measures as, in consultant’s professional judgment, are necessary to preserve and protect the immediate health and safety of site personnel and the public, as well as owners and occupants of adjacent properties (the “additional work”). Client agrees to reimburse consultant for the reasonable costs of implementing such measures.
- b) Client acknowledges that following completion of the work, the site may continue to have petroleum or petroleum products and/or hazardous materials within the soil and/or groundwater. Consultant warrants and represents that the work will be in compliance with all applicable environmental laws, rules and regulations, and the completion of the work will achieve a cleanup level of petroleum compounds at the site that is in compliance with the rules, or to a level of cleanup which DNR and/or Department of Commerce requires that "no further action" is needed.
- c) Consultant shall be responsible for restoring the site to its pre-work condition as soon as reasonable upon completion of the work and when it is reasonable to accomplish the restoration.
- d) Consultant and its contractors shall not be responsible for damage or injury to any underground improvement or condition if such improvement or condition was not disclosed in writing to consultant or where the location of improvements and conditions were correctly staked or shown on plans or the information furnished by the client, unless such damage was due to the gross negligence of consultant.
- e) Notwithstanding the provisions Section II (d), consultant shall take reasonable precautions to prevent damage to any underground improvements and conditions at the site.
- f) Notwithstanding anything contained herein to the contrary, consultant and its contractors shall in no way be deemed to be an owner or operator of the site; a person arranging for the treatment; disposal or transportation of any hazardous materials; a transporter of hazardous materials; or a person who generates, treats, transports or stores any hazardous materials. Client shall retain all right, title, and interest to any portion of the site when appropriate, including without limitation, any soil, groundwater or petroleum storage tank system removed, transported, replaced or altered in connection with the work; and consultant shall not have any right, title or interest therein. Client hereby names and appoints and constitutes (CONSULTING FIRM) as its duly authorized agent in fact to execute and deliver all such manifests and documentation to owner.

Work on Site

- a) Consultant shall employ or engage only persons competent to perform the work, who shall be under the care, custody, and control of consultant or its contractors or consultants.
- b) It is the responsibility of consultant to provide and maintain a safe work site for the protection of persons and property and to comply with all federal, state, and local laws, rules or regulations pertaining thereto, to keep the location of the work free from unnecessary waste and debris and at the completion of the work, to clean up and remove all waste and to restore the site to a clean and orderly condition. To accomplish this obligation, consultant shall also be responsible for development and maintenance of all health and safety plans for its employees and for ensuring that such plans are developed and maintained by its subcontractors.
- c) Consultant agrees that neither its contractors nor anyone employed by it or its contractors shall cause or

permit any hazardous materials to be brought upon, or used on the site as part of the work except for such hazardous materials which are necessary for the performance of the work. With respect to hazardous material, the term "hazardous material" shall be construed broadly to include any asbestos-containing material; toxic or hazardous substance, material or waste; and any other contaminant, pollutant or constituent thereof, whether liquid, solid, semi- solid, sludge and/or gaseous, including without limitation, chemical compounds, pesticides or other similar substances or materials which are defined as hazardous or toxic under or pursuant to any federal, state or local law, regulation, ordinance or order.

- d) Consultant shall notify client prior to performing any site activities that would interfere with the normal conduct of business at the site and shall make every effort to conduct the work in a manner that causes the least interference possible with the business upon the site.

Insurance

Consultant shall have all necessary professional certifications, licenses, permits and insurance, to be furnished at its expense, including insurance coverage in the forms, types and amounts shown below:

- Worker's Compensation - statutory limits.
- Commercial General Liability (CGL)- \$1,000,000 per each occurrence; \$2,000,000 general aggregate.
- Automotive Liability - combined single limit \$1,000,000.
- Professional Liability - (Errors and Omissions) \$1,000,000.

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Section III

Representations and Warranties of (CLIENT)

Client represents and warrants:

- a) It has furnished all information in its possession relative to the work relating to the existence of any hazardous materials, spills or leaks thereof, or PST (petroleum storage tank) systems, on or about the site.
- b) The execution, delivery, and consummation of this agreement is duly authorized and does not conflict with, or result in a breach of terms and conditions of, or constitute any violation or default under, any agreement or contract in which client is a party or to which the site is subject.
- c) In the event that performance of this agreement requires work to be performed on any site not owned by client, or on which client does not own or operate a business, client will obtain all necessary permission from the owners or operators of the other property for consultant and its contractors to work on the property.
- d) Neither client nor any of the owners or operators has done anything that will cause the site not to be eligible for reimbursement from PECFA.
- e) Client satisfies all criteria to establish PECFA eligibility under the rules.
- f) Should (d) or (e) of this paragraph not be true, client shall be responsible and liable to pay for all work.

Covenants of (CLIENT)

Client covenants and agrees:

- a) Client hereby names and appoints (CONSULTING FIRM) as its duly authorized agent, coupled with a right to execute and deliver all such applications, authorizations, reports, filings and any other documents consultant deems necessary in the procurement of said permits and approvals or in the submission of said reports and filing in connection with the work.
- b) Client acknowledges and agrees that consultant may make periodic applications for reimbursement, which shall not occur more frequently than allowed by the rules, to PECFA, based on the progress of the work completed and the tasks established and approved by PECFA.
- c) Client shall not do anything to seek reimbursement from the fund on behalf of itself or any person other than consultant for the work done by consultant at the site, nor do anything to change the designation of consultant as the party to be reimbursed by PECFA, during the term of this contract.
- d) Client shall not take any action, or fail to take any action, or do or fail to do anything, at any time, that would cause the site or work to no longer be eligible for reimbursement by PECFA.

Representations and Covenants of (CONSULTING FIRM)-Limitation of Liability

- a) Consultant warrants and represents that it has available funding to satisfactorily complete the work.
- b) Consultant shall comply with all applicable federal, state, and local laws and ordinances, including those addressing environmental compliance, worker health and safety, in the performance of the work.
- c) Consultant warrants that it shall use that degree of care and skill ordinarily exercised under similar

circumstances by members of its profession.

- d) Consultant shall maintain all records necessary to verify and validate costs to be reimbursed by PECFA and shall provide copies of said records to client upon request.

Indemnification-(CONSULTING FIRM) and (CLIENT)

- a) Consultant agrees to indemnify, defend, and hold harmless client from and against all claims, demands, causes of action, losses, and judgments, including reasonable attorneys' fees and expenses which client may suffer or be liable for, because of injury to persons, or death or property damage resulting from consultant's sole negligence, intentional acts or failure to comply with the laws of the State of Wisconsin or rules of PECFA.
- b) Client agrees to indemnify, defend, and hold harmless consultant from and against all claims, demands, causes of action, losses, and judgments, including reasonable attorneys' fees and expenses which consultant may suffer or be liable for, because of injury to persons, third party claims, or death or property damage resulting from client's negligence, intentional acts or failure to comply with the laws of the State of Wisconsin or rules of PECFA.
- c) Client agrees that it will be responsible for pre-existing conditions on the site.
- d) The provision of this section shall survive the termination of this agreement.

Proprietary Information

All tools, technologies, processes, equipment, computer software, techniques, and other information used by (CONSULTING FIRM) in the completion of the work, whether verbal or written, shall remain the sole exclusive property of consultant and shall be kept confidential by client.

Section IV

Remedies

- a) In the event that either party breaches this agreement or its warranties, the other party shall be entitled to all rights and remedies at law or in equity.
- b) All disputes and other matters in question between the parties under this agreement or otherwise relating to consultant's performance of the work may be decided by binding arbitration in accordance with the construction industry's arbitration rules of the American Arbitration Association. Any award or decision rendered by the arbitrator shall be final and binding on the parties and shall have the force of applicable law in any court having jurisdiction. Regardless of the outcome of any proceeding, client and consultant shall share equally the cost of said proceeding and shall pay for its own respective fees.
- c) This arbitration provision shall not preclude either party hereto from applying for and receiving an injunction or other equitable relief from a court of competent jurisdiction.

Changed Condition

In the event that there is a changed condition, which materially affects the performance of the work by consultant, client and consultant shall reevaluate promptly the scope of the work and the compensation payable to consultant under this agreement.

In the event that client and consultant do not renegotiate the terms of this agreement satisfactory to both parties hereto as a result of such changed condition, then either party hereto shall be entitled to terminate this agreement, in accordance with 'Termination' described in Section V of this contract, by notice to the other party within thirty (30) days after the determination that this agreement cannot be renegotiated in a manner satisfactory to all parties hereto.

For the purpose of this agreement, the term "changed condition" shall include:

- A change in any local, state or federal law, rule or regulation materially affecting the performance of the work by consultant.
- The requirement by any governmental agency to modify this scope or objectives of the work after the work commences.
- The determination by consultant that the State for whatever reason, including the unavailability of funds, will not fully or timely reimburse consultant from the fund for the performance of the work, except for the standard deductibles established by the fund.
- The institution of any legal proceeding or administrative action which cause the cessation of work at the site for thirty (30) days or more.
- The existence of a concealed or unknown condition existing within the site not known by or disclosed in writing to, consultant prior to its commencement of the work.

Section V

Miscellaneous

- a) Offsite Impact: Client hereby agrees it shall be solely responsible for informing nearby property owners of the nature and degree of offsite impact, as well as, potential human health risks associated with exposure to petroleum constituents, if required. Consultant is available to assist with this effort, but by doing so does not incur any responsibility for such action.
- b) Third Party Claim(s): Client agrees to indemnify, defend, and hold harmless, consultant from and against all third party claim(s), demands, causes of action, losses, and judgements including reasonable attorney's fees and expenses which consultant may suffer or be liable for, associated with exposure to or impact from petroleum constituents.
- c) Entire Agreement: This agreement, together with the attached exhibits, constitutes the entire and complete contract of the parties, exclusive of any other oral or written communication.
- d) Waiver and Delay: No waiver of any breach or delay in enforcing the terms of this agreement by consultant or client shall be construed as a waiver of any subsequent breach.
- e) Governing Law: The validity, construction and enforcement of, and the remedies under, this agreement shall be governed in accordance with the laws of the State of Wisconsin.
- f) This agreement is contractual, not mere recitals and shall be binding on client and consultant, their respective successors and assigns and shall inure to the benefit of such parties.
- g) Any notices to be given to either party hereunder shall be written and shall be sent by registered first class U.S. Mail, postage prepaid, or by overnight courier by a nationally recognized carrier, to the address set forth below or such other address designated by the addressees:

Termination

If either party terminates the whole or any part of this agreement for any reason whatsoever, save and except a changed condition as described in Section IV, client shall be required to pay consultant any deductible amounts due under this agreement for work performed through the effective termination date. The parties agree that consultant shall be allowed to complete the task in process to enable it to submit a claim for reimbursement for the work completed.

If client refuses to allow consultant to complete the task in process, to such state as would allow an application for reimbursement, client shall be liable for the costs for the task in progress. In the event of such termination, consultant shall not have any further obligations under this agreement, except that it, at client's request, shall furnish client with all reports, data and other information obtained by consultant pertaining to petroleum storage tank systems or any hazardous materials located at the site.

ASSIGNMENT CERTIFICATION

I, **(CLIENT)**, assign to **(CONSULTING FIRM)**, the right to act as my agent and to submit a claim on my behalf, for the purposes of a petroleum storage remedial action award under section 101.143 of the Wisconsin State Statutes for eligible costs of remedial action activities at **(SITE NAME & ADDRESS)** in response to the petroleum product discharge that was reported in accordance with section 101.143 (3) (a) 5 and 144.76 of the Wisconsin State Statutes to the Department of Natural Resources on **(DNR NOTIFICATION DATE)**.

Signatures:

(CONSULTING FIRM):

By: _____

(CLIENT):

By: _____

(CONSULTING FIRM) and (CLIENT) hereby execute this Agreement as of:
this _____ day of _____, 20_____.

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