

IMPLEMENTATION AGREEMENT

This Implementation Agreement ("Agreement"), dated March \_\_\_\_, 1992, is between Charles M. Hopkins, an individual person, R. Scott Montgomery, an individual person, and the City of Portland, a municipal corporation.

**I. Recitals**

**1. Definitions:**

a. "Person" as used in this Agreement shall have the meaning given at ORS 465.200(13): "an individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, partnership, association, corporation, commission, state and any agency thereof, political subdivision of the state, interstate body or the Federal Government including any agency thereof."

b. "Hopkins" as used in this Agreement shall refer to both R. Scott Montgomery and Charles M. Hopkins, and their successors and assigns.

c. "City" as used in this Agreement shall refer to the City of Portland, Oregon.

d. "Property" as used in this Agreement shall refer to the real property located at 3019 and 3033 N.W. Yeon Avenue and legally described as set forth in attachment A.

e. "Consent Order" or "1991 Consent Order" as used in this Agreement shall refer to DEQ Consent Order No. ECSR-NWR-91-09, dated December 16, 1991, among the City,

the Oregon Department of Environmental Quality ("DEQ"), and Marathon U.S. Realities, Inc.

f. "Remedial action costs" as used in this Agreement shall have the meaning given at ORS 465.200(16): "reasonable costs which are attributable to or associated with a removal or remedial action at a facility, including but not limited to the costs of administration, investigation, legal or enforcement activities, contracts and health studies."

g. "Remedial design costs" as used in this Agreement shall refer to those remedial action costs related to the design work required by Attachment C to the 1991 Consent Order.

h. "Defined Contamination" as used in this Agreement shall refer to heavy metals (including specifically lead, barium, selenium, and arsenic), other metals (including specifically iron, manganese, and magnesium), organics (including specifically nitrate and cyanide), hydrocarbons generated by or arising out of the City's past waste disposal activities in the vicinity of the Property, and any other contamination which Hopkins and the City later agree was generated by or arises out of the City's past waste disposal activities in the vicinity of the Property.

2. Hopkins currently owns the Property.

3. A portion of the Property contains Defined Contamination produced by a municipal incinerator and landfill

that was previously located on adjacent property. Hopkins and the City have previously executed a settlement agreement (the "Settlement"), a copy of which is attached hereto as "Exhibit B," defining the respective obligations of the parties regarding remediation of this contamination.

4. Hopkins and the City continue to desire to resolve the legal and financial responsibility for remediating the contamination of the Property in a responsible and equitable manner.

NOW, THEREFORE, in consideration of the mutual covenants and promises stated below, Hopkins and the City agree as follows:

1. Implementation of Remedial Action. The City accepts responsibility for all actions required to remediate the Defined Contamination on the Property, including but not limited to oversight, maintenance, and long-term monitoring to assure the long-term effectiveness and integrity of the remedial action. The scope of remedial action and post-certification work shall be defined generally by reference to plans drafted pursuant to Attachment C of the 1991 Consent Order or any revisions thereto adopted by mutual agreement of the parties, or at DEQ's request. The specific remediation of the Property is planned as an extension of the remediation project on adjacent property owned by Marathon U.S. Realties, Inc. ("the Marathon remediation"), is planned to be completed in the same time frame as the Marathon remediation, and will provide the same degree of protectiveness as the Marathon remediation. Hopkins will provide reasonable

access to the Property as necessary for the City for the performance of its obligations under this Agreement.

2. Cooperation on Remedial Design Work. The City and Hopkins will cooperate on all design work required in connection with the remedial action, with Hopkins having primary responsibility for the preliminary remedial design phase. All plans for design work must be reviewed and approved in writing by Project Coordinators designated by Hopkins and the City. Such review and approval shall be completed expeditiously so that compliance is maintained with the scheduling requirements of the 1991 Consent Order. The City's Project Coordinator is Al Smith, Director, Environmental Services, City of Portland, 1120 S.W. Fifth Avenue, Portland, Oregon 97204-1972; Hopkins' Project Coordinator is Michael Hopkins, Lincoln & Allen Bindery, 3033 N.W. Yeon Avenue, Post Office Box 10745, Portland, Oregon 97210. No design work shall be initiated without the prior written approval of both Project Coordinators. The cost reasonably incurred by Hopkins in retaining its remedial design engineer shall be reimbursed by the City. Hopkins and the City agree to negotiate expeditiously and in good faith to resolve any disagreements that might arise concerning the reasonableness of any recommendations or decisions made by that remedial design engineer. For this remedial design work, Hopkins intends to retain Van Domelen/Looijenga/McGarrigle/Knauf ("Van Domelen"); subject to reaching an agreement with that firm acceptable to both Hopkins and the City, the City hereby accepts that selection.

3. Retention of and Supervision by Environmental Consultant. Hopkins shall retain a qualified environmental consultant mutually acceptable to the City and Hopkins to assist in the preparation of all documents required by this project or pursuant to requests made by DEQ, and to review all remedial work performed thereunder. The cost reasonably incurred by Hopkins in retaining said environmental consultant shall be reimbursed by the City. Hopkins and the City agree to negotiate expeditiously and in good faith to resolve any disagreements that might arise concerning the reasonableness of any recommendations or decisions made by that consultant. Hopkins intends to retain Northwest Geological Services ("NGS") to perform these tasks; subject to reaching an agreement with NGS acceptable to both Hopkins and the City, the City hereby accepts that selection. Hopkins' consultant shall be directed to assist and cooperate with Van Domelen and the City's environmental consultant on this project as required by Van Domelen and that consultant. It is the parties' intention that Hopkins' consultant shall be most active during the remedial design phase, and the City's consultant shall be most active during the remedial action phase.

4. Preliminary Procedure. Subject to all other provisions of this Agreement, the parties now plan and agree to proceed as follows:

a. Bid Phase. Subject to Paragraph 3 and in full cooperation with the City, Hopkins (through Van Domelen) shall prepare the relevant bid documents, review and analyze the received bids, and provide its analyses to the City. The bid

documents shall be prepared in accordance with standard City specifications, and shall be expeditiously reviewed and approved by the City's Project Coordinator prior to bids being solicited. The City shall select and engage the contractor(s) that will perform the remedial action, and shall contract for the performance of that work.

b. Change Orders. During the Design Phase, the Bid Phase, or any later phase, Hopkins may present the City's selected contractor with additive change orders; any increases in costs or expenses flowing from those changes shall be at Hopkins's sole expense. This provision is intended to permit Hopkins the option of further protecting or enhancing its existing facilities (e.g., by extending paving); this provision is not intended to permit Hopkins to compel the City's contractor to construct new buildings or to substantially modify existing ones.

5. Minimization of Impact. The City shall implement the remediation in a manner that reasonably minimizes its impact on Hopkins or Hopkins's tenants.

As an example only, not as a limitation, the City shall:

(1) attempt to avoid the use of "moonsuits" or other high profile contamination protection by, for example, wetting the soil work surface. If high profile protective clothing is necessary for any of the site work, such work shall be completed on weekends;

(2) schedule work in a manner that reasonably minimizes interaction with Hopkins's tenants and interference with the business routine of those tenants. Where scheduling difficulties place a similar burden on both the City and Hopkins's tenants, the City shall assume the burden of rescheduling work. The parties expect that most work on the site can be done during normal working hours, and that the work can be conducted in a manner that preserves ingress and egress by Hopkins's tenants. It is not the intent of the parties to require scheduling of work in a manner that prevents work on the site whenever Hopkins's tenants are also on the site.

6. Quality Assurance. The City shall conduct all sampling, sample transport, and sample analysis in accordance with the Quality Assurance/Quality Control ("QA/QC") provisions approved by DEQ as part of the workplan. The City shall make available to Hopkins a split or duplicate of any sample taken in connection with the 1991 Consent Order or otherwise on the Property and copies of all analytical data for such samples upon request. The City shall also permit Hopkins to inspect and copy all records, files, photographs, documents, and data relating to work under this consent order or on the Property.

7. Notification of On-Site Activity. The City shall make every reasonable effort to notify Hopkins of any on-site activity at least five (5) days prior to such activity, but in no event less than twenty-four (24) hours prior to such activity.

8. Progress Reports. During each month of the 1991 Consent Order up to certification of completion under

Subsection 7.P., the City shall deliver to Hopkins on or before the tenth (10th) day of each month two copies of the progress report required by DEQ containing (a) actions taken under the 1991 Consent Order during the previous month; (b) actions scheduled to be taken in the next month; (c) sampling, test results, and any other data generated by the City during the previous month; and (d) a description of any problems experienced during the previous month.

9. Deed Restriction. Prior to transferring title to the Property, Hopkins shall insert reasonable deed restrictions concerning excavation, disturbance, and removal of contaminated material from the Property and use of groundwater satisfactory to the City. The City and Hopkins agree that the deed restrictions attached hereto as Attachment C are such reasonable restrictions.

10. Restriction on Use Before Sale. Hopkins agrees to prohibit activities on the Property that may interfere with the remedial action, oversight, or long-term monitoring.

11. Effect of Transfer of Title. Upon transfer of fee title to the Property or any portion thereof in the event the Property is subdivided, the subsequent owners, successors, and assigns shall assume all obligations under this Agreement and the Settlement Agreement. Upon such transfer, both Hopkins and all subsequent owners, successors, and assigns shall retain all rights under this Agreement and the Settlement Agreement, including but not limited to rights of indemnification, reimbursement, oversight, and access to the dispute resolution mechanism provided herein. No rights conferred in the Settlement



and this Agreement shall be impaired by a transfer of title to the Property.

12. Dispute Resolution. The City and Hopkins agree to resolve through binding arbitration any dispute under this Agreement which is not settled within sixty (60) days of notification in writing by either party. The arbitration shall be conducted by a single arbitrator to be selected by the parties, or if the parties are unable to agree, by an arbitrator selected by the Presiding Judge (Civil) in the Circuit Court of the State of Oregon for the County of Multnomah; each party shall assume its own legal costs and the parties shall share equally the fee of the arbitrator; any such arbitration shall be conducted according to the procedures of Chapter 13 of the Oregon Uniform Trial Court Rules, unless both parties agree to alternative procedures. The arbitration shall be concluded within thirty (30) days of appointment of an arbitrator and decision shall be rendered no later than sixty (60) days of an appointment of an arbitrator. Failure of either party to cooperate fully in finalizing the process and in the arbitration proceeding shall be considered by the arbitrator in reaching a decision. The arbitration award shall be enforceable in any court of competent jurisdiction.

To the maximum extent possible, if a dispute does not necessarily preclude activity at the facility, dispute resolution shall not delay that activity. The delay inherent in resort to the dispute mechanism could preclude summer construction without which development could ultimately be delayed for up to a year.

In such situations, remediation and development should proceed contemporaneous with resort to the dispute resolution mechanism provided herein.

13. Hopkins's Right to Seek Contribution. Nothing in this Agreement is intended to or is to be construed to waive Hopkins's right to seek contribution from other persons responsible for any contamination occurring on the Property. Except as specifically provided herein, nothing in this Agreement shall be construed as allocating or accepting responsibility or liability for remedial action costs or other costs associated with contamination of the Property.

14. City's Right to Seek Contribution. Nothing in this Agreement is intended to or is to be construed to waive the City's right to seek contribution from other persons responsible for Defined Contamination on the Property. Except as specifically provided herein, nothing in this Agreement shall be construed as allocating or accepting responsibility or liability for remedial action costs or other costs associated with contamination of the Property.

15. Reimbursement Mechanism. With respect to any reimbursements due to Hopkins under this Agreement, Hopkins will submit to the City detailed and itemized summaries of these costs. The City will reimburse Hopkins within thirty (30) days following the City's receipt of such summaries.

16. Parties. This Agreement shall bind the parties hereto and their successors and assigns.

17. Entire Agreement. This document incorporates the Settlement Agreement between the City and Hopkins. Together, these two Agreements express the entire agreement between Hopkins and the City regarding this matter as of this date.

18. Future Agreements. The City and Hopkins acknowledge that details of the elements of this Agreement will require future negotiation between the City and Hopkins and may result in the execution of additional agreements between both parties. The City and Hopkins agree to conduct these negotiations in a reasonable and expeditious manner.

Charles M. Hopkins

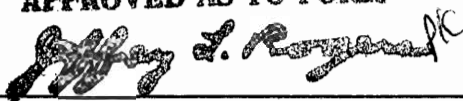
\_\_\_\_\_  
R. Scott Montgomery

\_\_\_\_\_  
CITY OF PORTLAND

By \_\_\_\_\_  
Commissioner of Public Works

By \_\_\_\_\_  
City Auditor

Approved as to form  
**APPROVED AS TO FORM**

  
\_\_\_\_\_  
City Attorney  
**CITY ATTORNEY**

\_\_\_\_\_  
Counsel for Hopkins

## ATTACHMENT 'C' TO IMPLEMENTATION AGREEMENT

WITH RESPECT ONLY TO THAT PORTION OF THE PROPERTY  
SHOWN ON THE DRAWING ATTACHED HERETO AND DESCRIBED AS  
FOLLOWS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_:

## [Deed Restrictions]

(a) Except as authorized in writing by the Oregon Department of Environmental Quality ("DEQ") and the City of Portland ("City"), Grantee will not:

(1) Disturb the asphalt/concrete cap or soil on the Property in a manner that causes a release or threat of release of any contamination generated by or arising out of past waste disposal activities on the Property, and will not use the groundwater from the Property.

(2) Install dry wells or surface water impoundments or engage in any activities on the Property which increase beyond naturally occurring levels the infiltration of surface water through ash on the Property.

(b) Grantee will reasonably cooperate with the DEQ and the City in the implementation of the remedial actions required under the terms of DEQ Consent Order No. \_\_\_\_\_, and will not interfere with the maintenance of the cap or monitoring on the Property.

(c) In the event the City is required to install stormwater drainage or methane venting or collection facilities on the Property, Grantee will, at no cost to the City or to Charles M. Hopkins and R. Scott Montgomery (collectively, "Grantor"), provide reasonable easements for construction, location, and maintenance of such facilities, provided that the location of such facilities is selected and the facilities are designed to minimize interference with Grantee's use of or access to the Property.

(d) Grantee will use reasonable efforts to prevent others from engaging in any activities that might compromise the protectiveness of the remedy set out in the above-referenced consent order.

(e) Grantee will give at least 10 days' prior written notice to Grantor, the City (c/o its Director, Environmental Services), and the DEQ (c/o its Environmental Cleanup Division) of Grantee's conveyance of fee title to any portion of the Property.

Grantee is an assignee of Grantor under the Agreement dated June 27, 1991, between Grantor and the City, and referenced in the City's Ordinance No. \_\_\_\_\_; as an assignee, Grantee may be entitled to certain indemnification from the City to compensate Grantee in connection with certain of Grantee's obligations set forth above.

Violation of the foregoing restrictive covenants shall entitle Grantor, the City, and the DEQ (and each of them) to seek any appropriate legal or equitable remedies (including, without limitation, recovery of damages or injunctive relief) to enforce compliance with the restrictive covenants. If Grantor, the City, or the DEQ (or any of them) initiate legal proceedings to enforce compliance with the restrictive covenants, Grantor, the City, and the DEQ (and each of them) shall be entitled to recover from Grantee (and Grantee's successors, heirs, and assigns) all costs and disbursements (including, without limitation, attorney fees) incurred by Grantor, the City, and the DEQ or any of them) in such action or arising from any appeal thereof.

The restrictive covenants and obligations contained herein shall be binding upon Grantee and Grantee's successors, heirs, and assigns. Grantor and Grantee intend the restrictive covenants and obligations contained herein to run with the land as a burden to the Property until the restrictions are removed by written certification from the DEQ that such restrictions are no longer required to protect human health and the environment.

#### [Form of Easements]

Grantor hereby reserves an easement for itself and its successors and assigns and hereby grants a limited, nonexclusive easement to the City and the DEQ (and their respective successors and assigns) over, across, and under the Property solely for the purpose of complying and monitoring compliance with any remedial action of Grantor, the City, or the DEQ required pursuant to the terms of the above-referenced consent order subject to the restrictive covenants set forth above, such easements shall not unreasonably interfere with Grantee's use of the Property (including building thereon). The easements reserved and granted herein shall be binding on and inure to the benefit of Grantor, the City, and the DEQ, and their respective successors and assigns. Grantor and Grantee intend the easements reserved and granted herein to run with the land as a burden to the Property until the DEQ provides written certification that such easements are no longer required to protect human health and the environment.

[Termination of Restrictive Covenants  
and/or Easements]

Notwithstanding anything in the deed to the contrary, each or all of the restrictive covenants set forth therein and the easements reserved and granted therein may be removed wholly or in part at any time upon the Grantee (or Grantee's successors and assigns) obtaining from the DEQ written certification that the restriction(s) and/or easement(s) are no longer required to protect human health and the environment, and Grantee (or Grantee's successors and assigns), the City, or DEQ may record appropriate documents setting forth the removal.

# ORDINANCE No. 165296

\*Authorize execution of an agreement with Charles M. Hopkins and R. Scott Montgomery for implementation of DEQ Consent Order. (Ordinance)

The City of Portland ordains:

Section 1. The Council finds:

1. On June 27, 1991, Charles M. Hopkins, R. Scott Montgomery (the "Owners") and the City of Portland entered an Agreement regarding remedial action at the property located at 3019 and 3033 N.W. Yeon Avenue, Portland, Oregon (the "Property"), in which the City accepted responsibility for the remedial action costs for contamination of the soil and groundwater on the Property generated by or arising out of the City's past waste disposal activities on the Property.
2. The Department of Environmental Quality of the State of Oregon ("DEQ") has developed a Consent Order requiring the City to perform remedial design and remedial action at the Property. The attached Implementation Agreement establishes a contractual relationship between Owners and the City to provide a mechanism for implementing the Consent Order.
3. The obligations assumed by the City pursuant to the Implementation Agreement are consistent with the obligations accepted by the City in the original settlement agreement between Owners and the City.
4. Owners and the City continue to desire to resolve the legal and financial responsibility for remediating the contamination of the Property in a responsible and equitable manner.

NOW, THEREFORE, the Council directs:

- a. The Commissioner of Public Works and the Auditor are authorized to sign the Implementation Agreement attached hereto as Exhibit "A".


Section 2. The Council declares that an emergency exists in that the Consent Agreement requires completion of various tasks within a specified schedule, and it will not be possible to comply with that schedule if the execution of the Implementation Agreement is delayed until 30 days following adoption of this ordinance; therefore, this ordinance shall take effect immediately upon its adoption.

Passed by the Council, APR 8 1992

Commissioner Blumenauer  
Peter Kasting  
March 30, 1992

**BARBARA CLARK**

Auditor of the City of Portland

By  Deputy

660

Agenda No.

ORDINANCE NO. 165296

Title

\*Authorize agreement with Charles M. Hopkins and  
R. Scott Montgomery for implementation of DEQ Consent Order.  
(Ordinance)

INTRODUCED BY	Filed:
Commissioner Blumenauer	APR 3 - 1992
NOTED BY COMMISSIONER	Barbara Clark Auditor of the City of Portland
Affairs	By: <u>Cary Krashner</u> Deputy
Finance and Administration	For Meeting of:
Safety	Action Taken:
Utilities	___ Amended
Works <u>EB/jp</u>	___ Passed to Second Reading
BUREAU APPROVAL	___ Continued to:
Bureau:	
Prepared by Date Peter Kasting 3/30/92	
Budget Impact Review:	
___ Completed ___ Not Required	
Bureau Head:	

AGENDA	FOUR-FIFTHS AGENDA	COMMISSIONERS VOTED AS FOLLOWS:		
			YEAS	NAYS
Consent <input checked="" type="checkbox"/> Regular	Blumenauer	Blumenauer	<input checked="" type="checkbox"/>	
NOTED BY	Bogle	Bogle	<input checked="" type="checkbox"/>	
City Attorney	Kafoury	Kafoury	<input checked="" type="checkbox"/>	
City Auditor	Lindberg	Lindberg	<input checked="" type="checkbox"/>	
City Engineer	Clark	Clark	<input checked="" type="checkbox"/>	