

OPERATING AGREEMENT

THIS OPERATING AGREEMENT ("Agreement") is entered into as of January 1, 2023 (the "Effective Date"), by and between the Cleveland-Cuyahoga County Port Authority ("PORT" or "Port Authority"), a body corporate and politic organized and validly existing under the laws of the State of Ohio, and **TBD Material Handling Company, Inc** ("Site Operator"), under the following circumstances:

WHEREAS, the PORT has developed a Sediment Processing and Management Facility ("SPMF" or "Facility") on adjacent Confined Disposal Facilities referred to as CDF 9 and CDF 12, comprising approximately 81 acres located in the vicinity of Burke Lakefront Airport in the City of Cleveland, Ohio ("City").

WHEREAS, the PORT developed the SPMF to accommodate sediments dredged from the Federal Navigation Channel and adjacent private dock areas on the Cuyahoga River and Cleveland Harbor to ensure there would be no disruptions to maritime shipping due to lack of an adequate and lawful placement alternatives for dredging by the US Army Corps of Engineers ("USACE").

WHEREAS, in order to optimize the remaining airspace capacity and extend the life of the CDFs, the PORT developed and refined an operation management approach to sort and harvest a significant quantity of the dredged sediment for beneficial upland uses.

WHEREAS, the USACE hydraulically delivers an average of 120,000 CY of dredged sediment annually to CDF 9, and private operators outside the Federal Navigation Channel deliver an estimated additional 20,000 CY. Additional volume is mechanically delivered and placed into permanent storage cells on CDF 12 outside of the terms and the scope of this Agreement. The volume of dredged sediment, both Federal and private, delivered to the site annually will vary at no fault of the PORT, and the values herein listed may vary as a result.

WHEREAS, the hydraulically delivered dredge sediment to CDF 9 for beneficial use is sourced from STA 0+00 up to STA 40+00 of the Federal Navigation Channel and private berths immediately adjacent to this area of the Cuyahoga River. Material from beyond this location may be directed to the sluiceways as determined by the PORT through special coordination with the Site Operator. Both parties mutually agree to maximize the amount of hydraulically delivered material to the SPMF and minimize the amount of mechanically delivered material to the site on a per cycle basis. The Site Operator should be prepared to handle the historic site average of 120,000 CY of USACE material plus 20,000 CY of private terminal material delivered to the SPMF annually over the spring and fall dredge cycles. However, the Site Operator shall be prepared to handle up to 160,000 CY of material at no additional cost per CY to the PORT. The exact quantity of the hydraulically delivered dredge sediment shall be determined each dredge cycle and shall be based upon the anticipated sediment quality and volumes, sediment location in the Cuyahoga River and the USACE dredge profiles, existing site capacity and conditions, dredging contractor coordination, and dialogue between Site Operator and the PORT. The remaining balance of the material, including that which was dredged beyond STA 40+00, will be placed mechanically in areas of the SPMF designated for mechanical placement and long-term material storage outside of the terms of this Agreement.

WHEREAS, the Site Operator shall be responsible for the dewatering, testing, harvesting and clearing of all hydraulically placed dredged sediment from the sluiceways and water handling ponds and restoring the site to pre-existing conditions in advance of the subsequent dredge cycle. So long as material complies with Ohio Environmental Protection Agency ("OEPA") permits either through initial testing and or subsequent blending and confirmation testing, the Site Operator shall be required to promptly remove and market all hydraulically delivered dredged material from the SPMF facility in a timely matter to accommodate and not delay future dredge cycles. Site Operator's operations are herein referenced as the "Project".

WHEREAS, to accomplish the Project, the PORT requires a contractor to operate and manage activities on the specified area of CDF 9 and CDF 12, because the PORT does not possess the internal qualifications or capacity to perform such operations.

NOW, THEREFORE, in consideration of the foregoing and the agreements set forth herein, the parties do hereby agree as follows:

1. **Scope of Services.** In consideration of the PORT's promise to compensate Site Operator, and subject to the terms of this Agreement, Site Operator Project scope of services shall include but not be limited to:
 - a. Except as otherwise provided in this Agreement, Site Operator shall be responsible for the operation of Project equipment, facilities, and all other components of the Project and performance of all work related thereto, including but not limited to:
 - i. Site operations, routine maintenance, and site restoration in preparation for the subsequent dredge cycle. Dredging generally includes two (2) delivery sessions per year: Session one, in the Spring (May) where upwards of 80,000 CY of dredged material is delivered; and, session 2, in the fall (October/November) where balance of dredged material volume is delivered. Each session lasts approximately 15-20 days – 24 hours per day, seven (7) days per week. PORT shall provide Site Operator no less than one (1) week notice prior to commencing of delivery of dredged material. Any material change to the schedule will be negotiated between the dredging parties.
 - ii. Initial dewatering and moving delivered dredged material from the sluiceways and water handling ponds either to the stockpiling area on CDF 12 for subsequent drying/amending or directly off the SPMF completely.
 - iii. Obtaining all necessary permits, licenses, consents, approvals, entitlements and other authorizations, required under applicable laws (including without limitation Environmental Laws), from all governmental authorities in connection with the beneficial use of the dredged material from the Cuyahoga River. Properly sampling and testing of all deposited material for compliance with beneficial use permit and providing the PORT with annual reports. Additional sample results shall be made available to the PORT upon request. "Environmental Laws" means all applicable Federal, state and local laws, regulations and ordinances relative to air quality, solid waste management, hazardous waste management, hazardous or toxic substances or the protection of human health or the environment, including, but not limited to, the

Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. Section 9601, et seq.) ("CERCLA"), the Hazardous Material Transportation Act (49 U.S.C. Sec. 1801, et seq.), the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251, et seq.), the Resource Conservation and Recovery Act of 1976 (42 U.S.C. Sec. 6901, et seq.), the Clean Air Act (42 U.S.C. Sec. 7401, et seq.), the Toxic Substances Control Act (15 U.S.C. Sec. 2601, et seq.), and the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. Sec. 136, et seq.), as each of these laws may have been amended through the date of this Agreement, and any analogous state or local statutes and the regulations promulgated pursuant thereto.

- iv. Developing a soil beneficial use marketing plan and the sorting/classifying of material needed for potential market purposes, promoting sales, and loading of material for market delivery and distribution.
- v. Placement of un-merchantable material due to contamination into a designated area (per PORT's site plan and direction) for permanent on-site CDF 12 location disposal at no additional cost to the Port Authority.
- vi. Site Operator shall furnish and operate a box scraper to scrape roadways and remove excess material deposited on roadways a minimum of once per week during operations in addition to any other compacted aggregate roadway maintenance equipment necessary to maintain the roadway network supporting the beneficial use operation. Logs recording use of box scraper shall be kept by the Site Operator and shall be made accessible to the Port Authority. Contractor will be responsible for bringing in ODOT 304, or an approved equal clean recycled product, to address routine pot holing/rutting resulting from normal wear and tear from operations. Complete resurfacing and restoration of the roadway to design elevation and geometry shall not be the responsibility of the Site Operator.
- vii. Site Operator shall be responsible for complying with the PORT's Ohio EPA air permits for the site's unpaved roadways and stockpiles, including roadway management as described in Section 1.a.vi of this Agreement and daily inspections and recordkeeping per permit requirements. Site Operator shall manage fugitive dust control and material track out through roadway watering, sweeping, or other means of approved infrastructure within the areas of the site it manages, including without limitation North Marginal Road to East 55th. At all times the Site Operator shall remain aware of their operational impacts on the adjacent marina, Airport, and public Right of Way. Environmental conditions heavily influence need and level of effort. During the active season of beneficial use site haul off from the Facility (April-October), the Site Operator shall be responsible for employing a full-time dedicated individual whose primary responsibility shall be street sweeping and roadway watering.
- viii. Maintaining compliance with all Federal Aviation Administration (FAA) and local airport requirements, including Burke training and badging requirements and FAA work height restrictions and equipment flagging requirements per active Construction Safety & Phasing Plan and 7460 determination letter.

- ix. Operating inventory management areas, provided, however, that the PORT shall be responsible for accepting, inventorying, and billing the PORT's customers for inbound dredge material to be processed by Site Operator as described in Section 2 of this Agreement.
 - x. Maintaining all books and records with respect to the foregoing operation and management of the Project, consistent with the requirements of this Agreement. Any information shared with PORT shall remain confidential, except as otherwise required by the Ohio Public Records Act. Site Operator shall provide an annual budget and accounting of annual expenses. Site Operator shall make these available upon the request of the Port Authority.
 - xi. Any related duties necessary and incidental to Site Operator's obligations as set forth herein, including trash and debris removal, mowing and grounds management of areas surrounding the site trailer near the entrance gate, dust control, and mud/track out control, for areas Site Operator manages. Site Operator shall not be responsible for managing any invasive species anywhere at the SPMF. No materials will be delivered to Site Operator that are not appropriate for CDF 9 or CDF 12. Dredged materials that have no beneficial use value shall be permanently disposed of onsite.
- b. PORT's most recent site Plans and Specifications ("Plans") are incorporated herein by reference. The parties represent that they each possess a true and accurate copy of the Plans. Site Operator shall satisfy itself that the Plans are sufficient for it to perform its obligations under this Agreement.
 - c. The parties understand that due to its on-site presence, Site Operator may be in the position to provide certain site or construction services to PORT in a more efficient or cost-effective manner, compared to other third-party vendors. Accordingly, the parties agree to consult each other where Site Operator may be able to provide lower cost options to PORT for services that may be offered by other third parties and then proceed in accordance with the PORT's procurement requirements and policies. The procurement of any such services by PORT shall be in accordance with PORT procurement policies and requirements.

2. **Site Operator's Compensation.** Site Operator shall be compensated as follows:

- a. The PORT shall pay Site Operator a flat rate of **\$X.XX** per CY to manage the dredge sediment hydraulically delivered to the SPMF, which includes dewatering, testing, excavation from the sluiceways/ponds, stockpiling, and ultimately direct removal of this material from the SPMF and the restoration of the site in advance of the next dredge cycle. This flat rate shall hold for annual hydraulic material volumes delivered from 120,000 CY to 160,000 CY annually. Parties shall have the ability to renegotiate price if annual volume receipts fall outside of these limits. The Site Operator recognizes for this payment, they are contractually obligated to fully remove the hydraulically delivered dredge sediment from the SPMF in a timely matter unless permits restrict the beneficial use of material, in which case, this material will be permanently disposed of on site. At no time shall Site Operator be permitted to stockpile more than 120,000 CY of material at the SPMF at any given time. Material in stockpile is defined as the sum of material in

storage in the southwest corner of CDF 12 plus material deposited into sluiceways and ponds awaiting to be cleared. Upon the termination or expiration of this Agreement, the Site Operator shall be obligated to clear and remove all material within Stockpile. If either party desires a flat rate or adjustment, such party may do so no more frequently than on a biennial basis within 90 days prior to the expiration of the Anniversary Date of this Agreement of the year in which the request is made. Upon such request from either party, the parties will re-evaluate the flat rate prior to the anniversary date of this Agreement and shall determine in good faith whether an adjustment in the rate is appropriate. Adjustments in the rate shall not go in effect until the following dredge cycle year when fees for Cleveland Harbor dredging are reassessed and agreements are entered into between the Port Authority and the end users of the Facility. The requesting party shall provide the other with a written accounting of expenses and market conditions supporting its case for a flat rate adjustment. In the event that the parties do not agree whether a change in the flat rate is appropriate, the parties may invoke the dispute resolution provisions of Section 16 of this Agreement.

- b. For billing purposes, the parties will observe the following sequence:
- i. Federal/private dredging contractor documents the amount of dredged material supplied to PORT. Actual hydraulic volume delivered to the site shall be determined from pre and post in-river hydrographic survey data or dredge scow measurements obtained from the dredging contractor and confirmed/vetted by a third party which is to include the USACE, Cleveland-Cliffs, or an independent marine surveyor/inspector;
 - ii. Dredged materials removed from the CDF 9 & 12 sluiceways and ponds for stockpile and or direct removal from the SPMF by Site Operator are subject to PORT compensation to Site Operator;
 - iii. PORT staff will inspect the CDF 9 & 12 sluiceways and ponds monthly, within 7 days the last day of each month, and the Port Authority will authorize the Site Operator to submit an invoice for work performed during the previous invoicing period;
 - iv. PORT will pay Site Operator **\$X.XX** per CY as described above within thirty (30) days of the PORT receiving from Site Operator an invoice and documentation satisfactory to the PORT supporting the number, equivalent to a percentage, of CY removed from the sluiceways and settling ponds, as a draw on the total volume of sediment delivered from the dredge to the SPMF.
 - v. The Port may, at its own cost, have the SPMF surveyed prior to, and after the dredging season for purposes of ensuring that material has not been disposed of on the SPMF outside of agreed upon areas, or has been placed in inventory for subsequent removal. Any discrepancy related to material on site, related to PORT estimations and Site Operator estimations, shall be reconciled annually.
- c. Notwithstanding any implication to the contrary herein, the duties, obligations, requirements, and liabilities of the PORT under this Agreement are payable solely from the tipping fees paid to the PORT, and the PORT is not obligated to use any

money or assets of the PORT from any other source. PORT shall give advanced notice to Site Operator if it reasonably appears that tipping fees shall not be sufficient to pay Site Operator in full. Site Operator may, but is not required to, cease all responsibilities and activities until it receives assurances from PORT that funds will be made available to pay Site Operator in full for the duration of this Agreement. In addition, Site Operator may terminate this Agreement in accordance with Section 4 as Termination for Cause.

- d. Revenue from the sale of harvested material by Site Operator during the Term of this Agreement shall be allocated as follows:
- i. For all harvested materials (a) sold directly from the site, Site Operator shall pay the PORT a fee equal to 15% of the gross sales revenue (in dollars) derived from the harvest and sale of harvested materials. If such harvested materials are incorporated into a Site Operator product, the fee paid the PORT shall be on a pro-rata basis by volume; (b), Site Operator shall pay PORT **\$X.XX** per CY for any harvested material removed from the site for later sale and or incorporated into the Site Operator's other lines of business off site. Site Operator shall retain the remainder of all gross sale revenues.
 - ii. PORT, or agents working at the direction of the Port Authority on Port Authority related business, may purchase harvested materials from Site Operator, at the lowest market price **\$X.XX/CY** for unscreened sands and **\$X.XX/CY** for unscreened silty sands exclusive of the 15% royalty, plus at cost transportation expenses. PORT shall not have access to more than 5% of material delivered per dredge cycle without a written agreement from the Site Operator. Other products and/or screened materials will be quoted by the Site Operator at the request of the PORT.
 - iii. Site Operator shall submit to the PORT, a check for such fees under paragraph (i) above on a monthly basis within thirty (30) days after the end of the month during which gross sale revenue has been accrued, earned or recognized, on the books of Site Operator in accordance with its normal business practices.
 - iv. Site Operator shall keep accurate records documenting quantities harvested, quantities sold, the dollar value of harvested material sold, and gross sale revenue of harvested material sold. Site Operator will be responsible for reconciling hydraulically placed dredged sediment delivered into the sluiceways and silt ponds. The material that hydraulically enters the SPMF should be equal to the sum of material leaving the SPMF, the material stockpiled at the SPMF for future use, and the material permanently disposed of at the SPMF. An active inventory log shall be submitted to the PORT bi-annually, prior to the start of each dredge cycle, for its review and shall be easily reconciled with invoices received for the removal of the material from the SPMF and the subsequent sale resulting in a commission to the PORT. Notwithstanding the foregoing, the parties understand and agree that any calculation for harvested bulk material is an estimate or approximation, and that due to the very nature of this material being a moist silt, sand, and clay, it is not a precise calculation.

- e. Site Operator and PORT may elect to enter into a separate Agreement, via the issuance of a special Addendum to this Agreement, whereby the Site Operator shall beneficially harvest material within the mechanical unloading basins per the direction of the Port Authority. Unless such agreement is made, Site Operator shall have no responsibility, and PORT shall retain financial responsibility, for any material, run-off or water loaded into, removed from, or running out of, the mechanical loading basin. Prior to issuance of an Addendum, the PORT must substantiate the total cost of regenerating the mechanical storage space within the basin is less than the mechanical placement fees the market can support to re-consume the usable space generated and there must be a known or defined timeline in which the newly generated space will be consumed. The PORT shall have the ability to beneficially harvest material within the mechanical basins outside of this Agreement. The existence of this Agreement, more specifically this clause of the Agreement, does not give the Contractor exclusive rights to beneficial use of the mechanical basin material.

3. Term of Agreement.

- a. The term of this Agreement shall commence on the Effective Date and expire on December 31, 2027, subject to earlier termination, extensions, or amendments as provided in this Agreement (“Term”).
- b. Should the PORT have access to dredged material at the site beyond the Term, parties shall have a right to mutually extend the Term an additional five-year term, subject to the same terms and conditions set forth herein, unless the parties mutually agree to different terms and conditions.

4. **Termination for Cause.** This Agreement may be terminated by either party upon ten (10) days written notice upon any Event of Default defined in Section 5 below; provided, however, Site Operator shall not terminate this Agreement for non-payment of compensation hereunder if the PORT initiates the payment process for all reasonably undisputed amounts due to Site Operator within ten business (10) days of receipt of the Site Operator's written notice to terminate.

5. **Events of Default.** The appropriate party to this Agreement shall be deemed to trigger an Event of Default if:

- a. There is a default in the payment by Site Operator of any amount due on its due date to any Site Operator employee, agent, contractor or subcontractor engaged by Site Operator with respect to the Project, unless such non-payment results from a bona-fide dispute between Site Operator and such third party;
- b. There is a default in the obligation of PORT to reimburse Site Operator a payment of any amount due on its due date under this Agreement;
- c. There is a default in the obligation of Site Operator to pay PORT a payment of any amount due on its due date under this Agreement;
- d. There is a default in the due observance or performance of any other non-monetary provision of this Agreement and such default shall continue for a period of thirty (30) days after written notice thereof shall have been given to the one party by the other.

- e. Site Operator makes an assignment for the benefit of its creditors;
 - f. A custodian, liquidator, receiver, or trustee is appointed for Site Operator or if any action is commenced by or against Site Operator under the Federal Bankruptcy Code, or any similar federal or state statute, or if any proceeding for the dissolution or liquidation of Site Operator shall be instituted and, if such appointment, adjudication, petition or proceeding was involuntary and not consented to by the Site Operator, upon the same not being discharged, stayed or dismissed within sixty (60) days;
 - g. There is any material representation or warranty made in this Agreement or in any certificate or other writing delivered pursuant hereto that proves to be incorrect in any material respect as of the time when the same was made.
6. **Remedies for Event of Default.** The remedies for any Event of Default shall be as follows, all at the non-defaulting party's sole election, and shall be cumulative and not exclusive of any rights or remedies provided by law:
- a. As prescribed in this Agreement;
 - b. As prescribed by applicable statutory or common law or principles of equity as prescribed in the State; or,
 - c. As prescribed by the specific statutory provisions now or hereafter enacted and specified in the Uniform Commercial Code as applicable in the State.
7. **Right to Audit and Inspect.** Site Operator shall keep complete and accurate records as may be necessary to track and account for the payment due PORT as set forth in Section 2(d)(i) hereof, and shall allow PORT reasonable access to such records for verification of the calculation and amount to be paid to PORT. PORT and its employees and agents shall be provided reasonable access to CDF 9 & 12 to inspect or observe any aspect of the Project site. Any information shared with PORT shall remain confidential, except as otherwise required by the Ohio Public Records Act.
8. **Correction of Project Defects.** Site Operator agrees to correct all work or to cause its respective employees, agents, contractors, or subcontractors, to correct all work which proves to be defective in terms of processing or managing the dredged material, as such services are set forth herein; provided, however, that Site Operator also be responsible to operate the site as the parties intend and shall be liable to repair or restore the site to its designed shape, contours and dimensions as required during the term of this Agreement, unless limited elsewhere in this Agreement. The parties understand and agree, Site Operator is not responsible for the condition, design, construction, workmanship and materials used on CDF 9 & 12, and therefore, unless there is damage, defect or loss caused by Site Operator's negligence, Site Operator shall have no liability or responsibility for the condition, design of, or workmanship or materials pre-existing on CDF 9 & 12. If Site Operator does not promptly repair or replace defective work, the PORT shall have the right, but not the obligation, to repair or replace such defective work and charge the cost thereof to Site Operator and or its sureties either by invoice or by set off against amounts otherwise due and owing to Site Operator under this Agreement.
9. **Standard of Care.** In performing services under this Agreement, Site Operator agrees to exercise

professional judgment and to use the same degree of care and skill ordinarily exercised in similar circumstances by reputable contractors performing comparable services in the same geographic area.

10. **Compliance with Laws.**

- a. In performing its duties under this Agreement, Site Operator shall, at all times, follow all applicable local, state and federal laws, rules, and guidelines, and require the same of its contractors and sub-contractor. At such times as the PORT requests, Site Operator shall be required to provide the PORT with evidence, reasonably satisfactory to the PORT, that there has been compliance with this Section. Upon completion of the Project, Site Operator shall provide a sworn affidavit of compliance from each contractor or subcontractor.
- b. Site Operator shall comply with the Port Authority's wage and inclusion policies, including a \$15 minimum wage for all Site Operator personnel dedicated to the Project and best efforts towards the Minority Business Enterprise (MBE)/Female Business Enterprise (FBE) sub-contracting goal of 30%.
- c. The parties understand and agree that Site Operator provides its harvesting and recycling services based upon and subject to the consent and approval that is provided by applicable government agencies, and in accordance applicable law. Agency consent and approval may change or be subject to new conditions, and applicable law may be repealed, amended, modified or nullified. In such instances, the continued ability of Site Operator to efficiency or cost effectively provide its services may be negatively impacted. Accordingly, if a change to the permitting process or a change in law creates an unreasonable burden to Site Operator, then Site Operator may either (i) with the consent of PORT dispose of dredged material on the SPMF, or (ii) suspend operations without penalty until a more favorable operating environment can be reached with the applicable government agency or designee.
- d. The parties understand and agree that PORT provides this Facility to the Site Operator for its operation through year-to-year placement agreements and permits/authorization received either direct or through agents acting on the behalf of other Federal, state, and local government agencies. Agency consent and approval may change or be subject to new conditions, restructured agreements, and applicable laws may be repealed, amended, modified, or nullified. In such instances, the continued ability of the PORT to efficiency or cost effectively provide its services may be negatively impacted. If a changes to the permitting process, land use agreements, placement agreement structure, and/or a change in law creates an unreasonable burden or results risk that cannot be reasonably mitigated by the PORT, then PORT may either (i) with the consent of Site Operator restructure the terms of this Agreement, or (ii) suspend this Agreement, without penalty and obligation to the PORT, until a more favorable operating environment can be reached with the applicable government agency or designee.

11. **Indemnity.** Site Operator shall defend, indemnify and hold the PORT and any and all of its officials, members, directors, officers, attorneys, employees, and agents and their respective successors and assigns (collectively, "Indemnitees") harmless from any and all loss, cost, expense, claims or actions arising out of or in connection with this Agreement or the Project and the consummation

of the transactions provided for herein and contemplated hereunder, including, without limitation, all liabilities, claims, costs, losses and expenses joint or several, imposed upon or asserted against the PORT arising out of the disposal in CDF 9 or CDF 12 of material dredged from the Cuyahoga River or Cleveland Harbor as part of the Project or in any other manner regarding Site Operator's Project operations or otherwise pertaining to the deposited material, including without limitation, damages for personal injury or property damage, costs of investigation, abatement, or remediation of environmental conditions as required by applicable law and regulations, attorney fees, expenses of litigation, fines, or penalties. The foregoing indemnity shall be perpetual and shall survive the termination of this Agreement. Notwithstanding the foregoing, Site Operator shall not be required to defend, indemnify or hold the PORT harmless for willful acts of the PORT. In any and all claims, demands or causes of action against any of the Indemnitees, the indemnification obligation hereunder shall not be limited in any way by any limitation on the amount of damages, compensation or benefits payable by or for the Site Operator under Workers' Compensation Acts, disability benefits acts or other employee benefit acts; provided, however, that said indemnification obligation shall not confer or be deemed to confer upon any such claimant any rights of recovery in addition to those or other than as otherwise available to such claimant at law or in equity.

12. **Reserved.**

13. **Insurance.** Site Operator and each of its agents, contractors and subcontractors hereunder (to the extent applicable to the portion of services to be performed by subcontractors), if any, shall, from the time of commencement of the requested Services until completion of Services, place and maintain in effect the types and amounts of insurance as indicated below with "A" rated insurance companies. At any time during this agreement the PORT reserves the right to request Site Operator to modify coverage levels or seek additional coverage in order to mitigate risk to the PORT.

- a. Workers' Compensation Insurance and Employers' Liability Insurance - including, but not limited to, Workers' Compensation in compliance with the applicable federal, state, local and foreign ordinances, laws, rules and regulations and Employers Liability Insurance with a minimum limit of \$1,000,000 per occurrence/\$1,000,000 aggregate.
- b. Commercial General Liability Insurance - including, but not limited to, contractual liability, broad form property damage, and independent contractor's liability all applicable to personal injury, bodily injury, and death and property damage with a minimum limit of \$3,000,000 per occurrence/\$3,000,000 aggregate. Limits to be met through primary GL/UMB providing excess.
- c. Automobile Liability Insurance - including, but not limited to, owned, hired and non-owned automobiles, all applicable to personal injury, bodily injury, death and property damage with a minimum limit of \$1,000,000 per occurrence/\$1,000,000 aggregate.
- d. Pollution Legal Liability Insurance for final destination of beneficially used material with a minimum combined single limit of \$3,000,000.
- e. Contractor's Pollution Liability Insurance - with a minimum combined single limit of \$3,000,000.

- f. Such policies, with the exception of (a) and (d) shall name the PORT, the State of Ohio, and the City of Cleveland as additional insured and shall contain a waiver of subrogation rights against the PORT and City of Cleveland.
14. **Certificates.** Before performance of the Services commences, Site Operator shall furnish the PORT with insurance certificates, certifying that the insurance coverages specified hereunder are in force and that the PORT will be given thirty (30) days written notice prior to any expiration, cancellation or material change of any of such policies. Failure of the PORT to demand such insurance certificate or to identify a deficiency from any insurance certificate will not be construed as a waiver of Site Operator's obligation to maintain such insurance.
15. **Cooperation among the Parties.** The parties shall have equal access to information developed during performance of the Project. Site Operator shall consult with the PORT in the event that substantive or interpretive issues arise during the performance of the Project. Site Operator shall consult regularly with the PORT during the performance of the Project.
16. **Dispute Resolution.** The parties in good faith shall attempt to resolve any dispute arising under this Agreement. Before any dispute is referred to a third party for resolution, the parties shall exchange written position statements, and there shall be a meeting between the parties to discuss and attempt to resolve the dispute. In the event that the parties do not resolve the dispute as a result of such a meeting, within ten (10) business days of the meeting, the dispute will be referred to one or more qualified mediators, to resolve the dispute. If the mediation is unsuccessful, then the parties may pursue their remedies in any court of competent jurisdiction sitting in Cuyahoga County, Ohio. Both parties hereto waive any right to a jury in any litigation between them and all issues of fact and law shall be tried to the judge in a bench trial.
17. **Administrative Provisions.**
- a. **Notices.** All notices, consents and communications required hereunder (each, a "Notice") shall be in writing and shall be deemed to have been properly given when: 1.) hand delivered with delivery acknowledged in writing; 2) sent by U.S. Certified mail, return receipt requested, postage prepaid, with receipt; 3) sent by overnight delivery service (Fed Ex, UPS, etc.) with receipt; or 4) sent by fax or email. Notices shall be deemed given two business days following transmission unless the receiving party otherwise notifies the transmitting party. Any party may change its address for receipt of Notices upon notice to the other party. If delivery cannot be made at any address designated below for Notices, a Notice shall be deemed given on the date on which delivery at such address is attempted. Notices shall be addressed in the case of the PORT:
- i. to William D. Friedman, President & CEO, Cleveland-Cuyahoga County Port Authority, 1100 W. 9th Street, Suite 300, Cleveland, Ohio 44113, Telefax (216) 367-6721, Email: william.friedman@portofcleveland.com, and,
- ii. in the case of Site Operator to: **TBD Material Handling Company, Inc**
- b. **Governing Law.** The validity, interpretation, and performance, of this Agreement will be determined in accordance with the laws of the State of Ohio.

- c. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute but one and the same instrument. Any party hereto may deliver a copy of its counterpart signature page to this Agreement electronically pursuant to Ohio Revised Code Chapter 1306. Each party hereto shall be entitled to rely upon an electronic signature of any other party delivered in such a manner as if such signature were an original.
- d. **Modifications.** This Agreement may be modified only in a writing signed by both parties.
- e. **Successors and Assigns.** Neither this Agreement nor any rights, duties or obligations hereunder may be assigned or transferred in whole or in part by the Site Operator, without the prior written consent of the PORT.
- f. **Severability.** Each provision hereof shall be separate and independent and the breach of any provision by either party hereto shall not discharge or relieve the other party from its obligations to perform each and every covenant to be performed by it hereunder. If any provisions hereof (or the application thereof to any person, firm or corporation or to any circumstances) shall be deemed invalid or unenforceable by any court of competent jurisdiction, the remaining provisions of this Agreement (or the application of such invalid provision to such persons, firms or corporations or circumstances other than those as to which it is invalid or unenforceable), shall not be affected thereby, and said provisions hereof shall be valid and enforceable to the fullest extent permitted by law.
- g. **Waiver.** A waiver by any party of any breach or default by the other party under this Agreement shall not constitute a continuing waiver by such party of any subsequent act in breach of or in default hereunder.
- h. **Survival.** The obligations of the Parties under Sections 7, 11, and 18 of this Agreement shall survive for a period of two years following the termination of this Agreement.
- i. **Entire Agreement.** This Agreement contains the entire agreement between the parties hereto and shall not be modified, amended or supplemented, or any rights herein waived, unless specifically agreed upon in writing by the parties hereto. This Agreement supersedes any and all previous agreements, whether written or oral, between the parties. The recitals in this Agreement shall be interpreted and enforceable the same as any other provision of this Agreement.
- j. **Force Majeure.** Any delay or failure in the performance by Site Operator hereunder shall be excused if and to the extent caused by the occurrence of a Force Majeure. For purposes of this Agreement, Force Majeure shall mean a cause or event that is not reasonably foreseeable or otherwise caused by or under the control of Site Operator, including acts of God, fires, floods, explosions, riots, wars, hurricane, sabotage terrorism, vandalism, accident, restraint of government, governmental acts, injunctions, labor strikes, or unanticipated circumstances, and other like events that are beyond the reasonable control of Site Operator, and which events or the effects thereof are not attributable to Site Operator's failure to perform its obligations under this Agreement, provided, however, that a Force Majeure shall not include the unwillingness or inability

of Site Operator to pay any amounts due to any party necessary to perform its obligations under this Agreement. Force Majeure shall include, but not be limited to, governmental action, or failure to act, which prohibits or impedes Site Operator ability to reasonably provide its services pursuant to this Agreement.

- k. **Site Operator Customers.** The PORT will not voluntarily provide customer information to any successor to Site Operator during or following the term of this contract for a period of 24 months, unless required by a valid and enforceable public records request.
 - l. **Exclusivity Provision.** By entering into this Agreement, the Site Operator agrees they are prohibited from developing alternative solutions and/or participating in any off-site Cuyahoga River and/or Cleveland Harbor dredge material handling or beneficial use operations that would directly compete, divert material from, or limit the viability of the Facility long term, unless authorized in writing by the PORT.
 - m. **CDF 9 & 12 Operation Limitations.** The Site Operator's operation on CDFs 9 & 12 shall be limited to the terms of this Agreement unless special consent/authorizations are provided by the PORT and any other necessary agencies. The Site Operator shall not use the Facility to stage business and/or special projects unrelated to the annual offsite movement beneficial use of hydraulic dredge sediment delivered into CDF 9 & 12 as part of the Cuyahoga River and Cleveland Harbor annual maintenance dredging contract.
 - n. **Normal Operating Hours & Overtime.** Subject to access modifications by the City of Cleveland and/or the Federal Aviation Administration, normal operating hours for the Facility are Monday-Friday 7am to 3:30 pm, excluding holidays. The Site Operator shall be responsible for planning all their work during these normal hours. Operations outside of these hours shall be coordinated and approved by the PORT. If operations outside of these hours will require extended access control security and escort personnel, the Site Operator shall be responsible for reimbursing the PORT at cost for the additional efforts unless the additional hours are being done at no fault of the Site Operator.
18. **Unanticipated Circumstance.** Subject to the provisions of this Agreement, if either PORT or Site Operator should encounter an unanticipated circumstance beyond its reasonable control during the Project, the impact of which would create a financial hardship to Site Operator, then upon three (3) days' notice to the PORT, the parties agree to negotiate in good faith as to equitable allocation of such financial hardship. If after reasonable efforts, an equitable allocation cannot be agreed upon, then either party may institute the process set forth in Section 16 herein.
19. **Unavailability of Sediment Material.** The parties understand and agree that (i) the majority of sediment material that is harvested is deposited by the USACE and/or its agents and contractors who are not a party to this Agreement, and that (ii) Site Operator will make a substantial financial investment in time and capital (including heavy equipment) to meet its obligations as defined in this Agreement. Accordingly, should USACE intentionally cease to deliver, or purposefully and substantially reduce the amount of dredge sediment delivered into CDF 9 and CDF 12, the parties shall negotiate a new rate in good faith based upon the actual volume of sediment material delivered by USACE. Lower limits of the cubic yardage threshold are detailed in Section 2a of the Agreement. General guidance for the renegotiated compensation rate shall be as follows:

- a. Isolate the fixed costs/CY contained in the base compensation fee detailed in Section 2 of the Agreement that were unable to be reduced/limited as result of the unavailability of sediment.
- b. Multiply the fixed costs/CY determined in above step by the unrealized annual volume not received into the Facility below the lower target threshold limit listed in the Agreement.
- c. Divide this fee by the total CY of hydraulic material received for the year; this will be the cost per cubic yard premium added to the base fee paid to the Site Operator.

The Site Operator shall be entitled to remain on the SPMF for the balance of the Term, at no cost to Site Operator, to process, store, blend or otherwise manage or handle all materials that Site Operator may control.

- 20. **Site Operation’s Trailer Occupancy.** Site Operator shall provide a site operations trailer with sufficient space to house the PORT’s site access control and security staff of two guards. No additional rent or fees will be collected by Site Operator for the PORT’s use and partial occupancy of the trailer. The Site Operator shall be responsible for keeping the trailer and the grounds immediately surrounding the trailer clean, maintained, and in good order. The trailer shall be equipped with the following: adequate heating/cooling, two workstations, interior/exterior lighting, a guard stationing room with direct line of site of the existing access control gate and integrated in with the existing access control system and security gate intercom, maintained and regularly cleaned restroom facilities, and drinking water.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Cooperative Agreement as of the date first above written.

TBD Material Handling Company, Inc

Cleveland-Cuyahoga County Port Authority

By:

By:

Print:

William D. Friedman

Print:

Title:

President/CEO

Title:

Date:

Date: