

**DRAFT DECLARATION OF RESTRICTION**

THIS DECLARATION OF RESTRICTION (hereinafter the “Declaration”) is made this \_\_\_\_\_ day of \_\_\_\_\_, 2012, by \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ (hereinafter the “Declarant”).

**WITNESSETH**

**WHEREAS**, Declarant is the owner of that certain land located at \_\_\_\_\_ (Map \_\_\_\_\_, Parcel \_\_\_\_, Lot \_\_\_\_ and Map \_\_\_\_\_, Parcel \_\_\_\_, Lot \_\_\_\_ ) located in the City of New Bedford, Bristol County, Massachusetts (hereinafter the “Property”), shown on and recorded in the Bristol County District Registry of Deeds at Plan Book \_\_\_\_\_, Page \_\_\_\_ and at Plan Book \_\_\_\_, Page \_\_\_\_\_; and

**WHEREAS**, the Property is subject to the terms and provisions of the Final Determination issued by and between the United States Environmental Protection Agency (hereinafter the “Agency”) and the Commonwealth of Massachusetts (hereinafter the “Commonwealth”) by and through the Massachusetts Department of Environmental Protection and the Executive Office of Energy and Environmental Affairs, within which the Commonwealth has committed to completing mitigation on the Property in compensation for impacts associated with the construction of the New Bedford Marine Commerce Terminal, located in New Bedford, Massachusetts; and

**WHEREAS**, the Commonwealth will be funding the creation of salt marsh, in concert with previously outlined plans of the Declarant to facilitate the construction of a park at the Property, to create and enhance wetlands and parkland within the City of New Bedford for beautification and recreational purposes to serve the Citizens of New Bedford, and for ecological purposes to create functions and values of benefit to the marine life and wildlife of the Acushnet River and the City of New Bedford; and

**WHEREAS**, Declarant agrees to protect such salt marsh areas (hereinafter the “Restricted Area”) created on the Property as depicted on the plan entitled \_\_\_\_\_ dated \_\_\_\_\_, prepared by \_\_\_\_\_ (the “Plan”)(see Attachment A) as depicted in the Legal Description (the “Legal Description”)(see Attachment B); and

**NOW, THEREFORE**, Declarant hereby voluntarily declares and imposes in perpetuity the following covenants, conditions and restrictions on the Restricted Area for the benefit of the Declarant, its successors and assigns, the Commonwealth, and the Agency, and said Property shall be held, transferred, sold, conveyed, occupied and used subject to the covenants, conditions, and restrictions set forth (subject to the Commonwealth’s creation of the salt marsh on the Property as outlined within the Commonwealth’s Final Mitigation Plan, dated October, 2012).

**1. Background**

A. The Commonwealth desires to conduct construction work on the Declarant's Property as described in the document entitled, "Final Mitigation Plan," by the Massachusetts Department of Environmental Protection, dated October, 2012, including but not limited to salt marsh construction, re-grading, excavation and off-site disposal of soil, installation of erosion control measures, restoration work and/or related activities (collectively the "Construction Work").

B. The Declarant desires that the Commonwealth construct the salt marsh on the Property, within the Restricted Area, as the construction of such salt marsh aligns with the Declarant's previously outlined plans to complete the construction of a park on the Property. The Declarant agrees to restrictions imposed on the Restricted Area in exchange for the Commonwealth's construction of the salt marsh.

C. This Declaration is in three parts. Part I is applicable to the Restricted Area during the period in which the Commonwealth is performing the Construction Work on the Restricted Area (the "Construction Period"). Once the Construction Work is completed the Restricted Area, documentation as described herein shall be filed with the Agency. Upon filing of such documentation, the conditions set forth in Part II of this Declaration ("Post-Construction") will supercede the conditions of Part I for that specific Restricted Area. Part III includes conditions applicable to the Restricted Area during both the Construction Period and the Post-Construction Period.

## **2. Applicable Conditions**

### **Part I: The Construction Period**

During the period in which Construction Work is being performed on the Restricted Area, Declarant agrees to the following covenants and conditions for the benefit of the Declarant, its successors and assigns, the Commonwealth and the Agency:

A. The Construction Work will be performed by the Commonwealth in accordance with plans and specifications prepared by the Commonwealth and approved by the Declarant and the Agency. When the Construction Work is completed, the Commonwealth's engineer shall submit a certification to the Agency and the Declarant verifying that the Construction Work was completed (the "Completion Certification"). Upon filing the Completion Certification, the conditions set forth in Part II of this Declaration ("Post-Construction") will supercede the conditions of Part I.

B. Applicable Conditions to Restricted Area During the Construction Work.

1. Allowed Uses and Reserved Rights.

The following provisions apply to each particular Restricted Area while Construction Work is being performed on it:

- (i) activities to complete the Construction Work including but not limited to the reasonable use of heavy equipment, vehicles and personnel necessary to: (a) perform vegetation and tree removal, site preparation, soil excavation, re-grading, planting, installation of erosion control measures, and restoration; (b) accomplish monitoring, maintenance, repair and removal activities; (c) perform any necessary corrective action obligations; and (d) perform activities required by governmental entities or the Agency.

## 2. Prohibited Acts and Uses.

No acts and uses are explicitly prohibited in the Restricted Area during the Construction Period.

**C. Monuments and Signage.** After completion of the work, the boundaries and turning points of the Restricted Area shall be marked/monumented by the Commonwealth.

## **Part II: Post-Construction Period**

The following conditions shall apply after the Commonwealth submits a Completion Certification to the Declarant and the Agency.

### A. Uses and Reserved Rights.

#### 1. The following activities shall be allowed on the Restricted Area:

##### (i) Monitoring and maintenance activities:

(a) monitoring, maintenance, repair and removal activities, including but not limited to the reasonable use of heavy equipment, vehicles and personnel necessary to perform vegetation and tree removal, including but not limited to cutting, pruning or removal of trees and vegetation for the protection of persons and property; and

(b) construction of fences, walls or necessary boundary markers on the Restricted Areas upon written consent by the Agency, such consent not to be unreasonably withheld.

##### (ii) Governmental required activities:

(a) perform any necessary corrective action obligations or other work as required by the Agency, governmental entities, including, but not limited to, corrective actions or operation

and maintenance activities in accordance with Final Mitigation Plan, dated October 2012.

2. The following acts and uses are prohibited in the Restricted Area, except as allowed above in Part II, Section A.1:

- (i) construction or placing of any tennis court, landing strip, mobile home, swimming pool, fences, asphalt or concrete pavement, sign, billboard or other advertising display;
- (ii) mining, excavating, dredging or removing soil, loam, peat, gravel, sand, rock or other mineral resource or natural deposit;
- (iii) placing, filling, storing or dumping of soil, refuse, trash, vehicle bodies or parts, rubbish, debris, junk, waste or the installation of underground storage tanks;
- (iv) cutting, removing or otherwise destroying trees, grasses or other vegetation or disturbance of shrubs, ground, forest floor or leaf litter; and
- (v) the use of motorized vehicles of any kind, except as required by the police, fire department or any other governmental agents in carrying out their lawful duties.

**B. Monuments and Signage.** The Commonwealth shall maintain in good condition any, bounds, monuments, markers and signs shown on the Plan, demarcating the boundaries of the Restricted Areas, and shall repair and or replace said monuments and signage on an as needed basis.

3. **Part III: Conditions Applicable During the Construction and Post-Construction Periods.** The Declarant has the right to establish, enforce, waive, alter and amend such additional rules, regulations, covenants, conditions and restrictions governing use of the Restricted Area as are not otherwise prohibited by this Declaration and allowed by applicable federal, state or local law or regulation.
4. **Invasive Species Monitoring and Maintenance.** Invasive species monitoring shall be conducted in accordance with the document entitled "Final Mitigation Plan" dated October 2012 by the Massachusetts Department of Environmental Protection.
5. **Term.** This Declaration of Restriction and its provisions herein set forth shall run with the Property as shown on said Plan in perpetuity from the date of recordation in the Bristol District Registry of Deeds and shall be binding upon Declarant, Declarant's successors and assigns, and any other party having an ownership interest in said Property or claiming to have an interest with respect to said Property as tenants, invitees, licenses

or otherwise, and all of the respective heirs, successors, grantees, mortgages, assigns, agents, contractors, subcontractors and employees of the foregoing.

Notwithstanding anything inconsistent or to the contrary set forth above, the Agency is hereby authorized to record and file any notices and/or instruments that the Agency deems appropriate to assure the legal validity and enforceability in perpetuity of this Declaration.

6. **Enforceability.** The Agency and the Commonwealth shall have the authority and right to enforce this Declaration.

The Agency and the Commonwealth shall have the authority and right to enter the Restricted Area, in a reasonable manner and at reasonable times, for the purposes of (i) completing such actions as are outlined within Part I and Part II of this Declaration (ii) inspecting the Restricted Area to determine compliance with this Declaration of Restriction; (iii) enforcing this Declaration of Restriction; and (iv) taking any other action which may be necessary to ensure the success of the mitigation as outlined within “Final Mitigation Plan” by the Commonwealth of Massachusetts, dated October 2012. The Agency and/or the Commonwealth shall provide reasonable notice to the Declarant prior to entering the Restricted Area. The Agency shall abide by all Declarant’s rules and safety protocols.

The Agency and/or the Commonwealth shall have the right to bring proceedings at law or equity against any party or parties violating or attempting to violate the terms of this Declaration of Restriction to enjoin them from so doing and to cause any such violation to be remedied, including but not limited to restoration of the Restricted Area adversely affected, after providing written notice to such party or parties and all mortgagees of record if the names and addresses of such parties and mortgagees have been provided in writing to the Agency.

7. **Severability.** If any court or other tribunal of competent jurisdiction determines that any provision of this Declaration of Restriction is invalid or unenforceable, such provision shall be deemed to have been modified automatically to conform to the requirements for validity and enforceability as determined by such court or tribunal. In the event the provision invalidated is of such a nature that it cannot be so modified, the provision shall be deemed deleted from this instrument as though it had never been included herein. In either case, the remaining provisions of this instrument shall remain in full force and effect.
8. **Non-Waiver.** Any election by the Agency and/or the Commonwealth as to the manner and timing of its right to enforce this Declaration of Restriction or otherwise exercise its rights hereunder shall not be deemed or construed to be a waiver of such rights.
9. **Access.** This Declaration of Restriction does not grant to the Agency and/or the Commonwealth, the general public, or any other person or entity any right to enter upon the Restricted Area except the right of the Agency and/or the Commonwealth to enter the

Restricted Area at reasonable times and in a reasonable manner for the purpose of inspecting the same to determine compliance herewith, as set forth in Paragraph 6 above.

**10. Incorporation Into Deeds, Mortgages, Leases and Instruments of Transfer.**

Declarant and Declarant’s successors and assigns, including all subsequent owners of the Property or portions on which one or more Restricted Area are located, shall incorporate this Declaration, in full or by reference, into all deeds, easements, mortgages, leases, licenses, occupancy agreements or any other instrument of transfer by which an interest in and/or a right to use the Restricted Area or any portion thereof is conveyed. Any such deed, mortgage or other interest purporting to convey any portion of the Property on which one or more Restricted Area are located without including this Declaration in full or by reference shall be deemed and taken to include said Declaration in full even through said Declaration is not expressly described or referenced therein.

**11. Recordation/Registration.** Declarant shall record and/or register this Declaration of Restriction with the appropriate Registry of Deeds and/or Land Registration Office within thirty (30) days of its date of execution.

**12. Amendment and Release.** No amendment or release of this Declaration shall be effective unless it has been approved in writing by the Agency and the Commonwealth and said amendment or release and the Agency’s and the Commonwealth’s approval of such has been recorded with the appropriate Registry of Deeds and/or Land Registration Office.

**IN WITNESS WHEREOF,** \_\_\_\_\_[name of signatory, Declarant] has caused these presents to be signed, acknowledged and delivered in its name and behalf this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

**CITY OF NEW BEDFORD**

By: \_\_\_\_\_  
Title: \_\_\_\_\_

**COMMONWEALTH OF MASSACHUSETTS**

\_\_\_\_\_, ss. \_\_\_\_\_, 20\_\_

On this day before me, the undersigned notary public, personally appeared \_\_\_\_\_, proved to me through satisfactory evidence of identification, which was  photographic identification with signature issued by a federal or state governmental agency,  oath or affirmation of a credible witness,  personal knowledge of the undersigned, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that he signed it voluntarily for its stated purpose.

\_\_\_\_\_

Draft

Notary Public

SEAL

My Commission Expires: \_\_\_\_\_