

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

OFFICE OF COMPLIANCE AND INSPECTION

In Re: Kevin T. Malloy
United States Investment and Development Corporation

File No.: SR 2001-031
AAD No.: 08-002/SRE

CONSENT AGREEMENT

A. INTENT & PURPOSE

This Agreement is entered by and between the Rhode Island Department of Environmental Management's Office of Compliance & Inspection ("RIDEM") and Kevin T. Malloy and United States Investment and Development Corporation (the "Respondents"). This Agreement is entered in accordance with Section 42-17.1-2 *et seq.* of the Rhode Island General Laws ("R.I. Gen. Laws") for the purpose of resolving the administrative enforcement action set forth in an Amended Notice of Violation ("NOV") issued to the Respondents by RIDEM on February 16, 2010.

B. STIPULATED FACTS

- (1) WHEREAS, the subject property is located at #1 and #11 Mashapaug Street in the city of Providence, Rhode Island, Assessor's Plat 43, Lots 956, 957, 958, 959 and 989 (the "Property").
- (2) WHEREAS, the Respondents own the Property.
- (3) WHEREAS, on February 16, 2010, the RIDEM issued a NOV to the Respondents alleging certain violations of the RIDEM's *Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases* (the "*Remediation Regulations*").
- (4) WHEREAS, the Respondents requested an administrative hearing to contest the NOV.
- (5) WHEREAS, on September 13, 2011, the Respondents submitted a Remedial Action Work Plan ("RAWP") to the RIDEM to comply with Sections D.1 of the NOV.
- (6) WHEREAS, the RIDEM issued a letter to the Respondents' attorney on September 27, 2011, that identified deficiencies in the RAWP (the "Deficiency Letter"). The Deficiency Letter is attached hereto and is incorporated herein as Attachment A.
- (7) WHEREAS, in lieu of proceeding to an administrative adjudicatory hearing on the NOV and to effect a timely and amicable resolution of the NOV, RIDEM and the

Respondents hereby agree that it is in the best interest of the parties and in the public interest to resolve the issues raised in the NOV.

- (8) WHEREAS, RIDEM finds that this Agreement is a reasonable and fair settlement and adequately protects the public interest in accordance with the RIDEM's *Remediation Regulations*.

C. **AGREEMENT**

- (1) **JURISDICTION** – RIDEM has jurisdiction over the subject matter of this Agreement and has personal jurisdiction over the Respondents.
- (2) **FORCE and EFFECT** – This Agreement shall have the full force and effect of a final compliance order issued after a full hearing on the merits pursuant to the Administrative Procedures Act, R.I. Gen. Laws Section 42-35-1 et seq. from which no timely appeal was taken, and which is enforceable in Superior Court in accordance with R.I. Gen. Laws Section 42-17.1-2(21)(v).
- (3) **APPLICATION** – The provisions of this Agreement shall apply to and be binding upon RIDEM, the Respondents and their agents, servants, employees, successors, assigns and all persons, firms and corporations acting under, through and for the Respondents in the performance of work relating to or impacting the requirements of this Agreement.
- (4) **RECORDING OF AGREEMENT** – Within ten (10) days of the receipt of the fully executed Agreement from the RIDEM, the Respondents shall record this Agreement with the Office of Land Evidence Records in the city of Providence, Rhode Island and shall provide a copy of the recorded Agreement to RIDEM. The recording shall be at the sole expense of the Respondents.
- (5) **CONDITIONS** –
- (a) **Within sixty (60) days of execution of this Agreement**, the Respondents shall complete and submit a revised RAWP to the RIDEM Office of Compliance and Inspection in accordance with the RIDEM's *Remediation Regulations* that satisfactorily addresses all the issues in the Deficiency Letter. If any deficiencies still remain in the revised RAWP, the Respondents shall address all subsequent comments until the RAWP is approvable. The Respondents shall submit the Remedial Action Approval Application Fee of One Thousand Dollars (\$1,000.00) along with the revised RAWP.
- (b) **Within ten (10) days of receipt of the approved RAWP from the RIDEM**, the Respondents shall record a RIDEM approved Environmental Land Usage Restriction ("ELUR") with the Office of Land Evidence Records in the city of Providence, Rhode Island and shall provide a copy of the recorded ELUR to the RIDEM. The recording shall be at the sole expense of the Respondents.

- (c) **Within thirty-six (36) months of the execution of this Agreement**, the Respondents shall undertake and complete all work in accordance with the approved RAWP.
- (d) The Respondents must maintain all engineered controls at the Property, including fencing at all times. Respondent shall with the ELUR, including the annual reporting and maintenance of any engineered controls during and after the work described in C. 5. (c).
- (e) Penalty – Respondents shall pay to the RIDEM the sum of **Four Thousand Eight Hundred Dollars (\$4,800.00)** in administrative penalties assessed as follows:
 - (i) Upon execution of this Agreement by the Respondents, the Respondents shall pay to the RIDEM the sum of **Two Thousand Four Hundred Dollars (\$2,400.00)**.
 - (ii) The remainder of the penalty, **Two Thousand Four Hundred Dollars (\$ 2,400.00)**, shall be paid to the RIDEM by March 15, 2012.
 - (iii) Penalties that the Respondents agree to pay in this Agreement are penalties payable to and for the benefit of the State of Rhode Island and are not compensation for actual pecuniary loss.
 - (iv) In the event that the Respondents fail to remit to the RIDEM a payment on or before its due date, that payment will be considered late and the Respondents will be in default. If the payment is not received within thirty days of its due date, interest shall begin to accrue on the entire unpaid balance at the rate of twelve percent per annum. Interest will accrue at this rate beginning with the day after the due date specified in this Agreement until such date all past due installment payments and interest owed are remitted. Interest shall be calculated using the following generally established accounting principle:

$$\text{Interest due} = (\text{number of days late}/365) \times (0.12) \times (\text{amount of unpaid balance})$$

This provision does not preclude the RIDEM from seeking additional penalties according to Section D for failure to comply with the remaining provisions of this Agreement.

- (v) All penalty payments shall be in the form of a certified check, cashiers check, or money order, payable to the ***R.I. General Treasurer – Environmental Response Fund Account***. All payments shall be delivered to:

Chief, RIDEM Office of Compliance and Inspection
235 Promenade Street
Providence, RI 02908-5767

- (6) **RIGHT OF ACCESS** – The Respondents provide to the RIDEM, its authorized officers, employees and representatives an irrevocable right of access to the Property

at all reasonable times for the purpose of monitoring compliance with this Agreement. The Respondents shall ensure that assignees, successors in interest, lessees, sublessees, tenants in possession and/or occupants of the Property shall provide the same access and cooperation as long as they control the Property. The Respondents shall provide a copy of this Agreement to any current lessee, sublessee, tenant in possession and/or occupant of the Property as of the effective date of this Agreement. Any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property shall include this right of access provision and shall otherwise be consistent with the terms of this Agreement.

D. COMPLIANCE

- (1) EFFECT OF COMPLIANCE – Compliance with and fulfillment of this Agreement shall be deemed to resolve all issues raised in the NOV. Upon the Respondents successful completion of the requirements set forth in this Agreement, the RIDEM shall issue a Release and Discharge of the NOV and the Agreement to the Respondents for recording. The recordings shall be at the sole expense of the Respondents.
- (2) FAILURE TO COMPLY – In the event that the Respondents fail to comply with items specified in Section C(5)(a), C(5)(b), C(5)(c) and C(5)(d) of the Agreement, the Respondents shall pay a stipulated penalty of Five Hundred Dollars (\$500.00) per month for each and every month during which the noncompliance continues, except that the RIDEM may, for good cause shown, defer or reduce such penalty. The payment of a penalty in accordance with this section shall not preclude the RIDEM from seeking any other appropriate remedy (e.g., injunctive relief in Superior Court).
- (3) COMPLIANCE WITH OTHER APPLICABLE LAWS – Compliance with the terms of this Agreement does not relieve the Respondents of any obligation to comply with any other applicable laws or regulations administered by, through or for RIDEM or any other governmental entity.
- (4) ADDITIONAL ENFORCEMENT ACTIONS – Upon a determination by the Director that there is a threat to the public health or the environment, or upon discovery of any new information, RIDEM reserves the right to take additional enforcement actions as provided by law or regulation, including, but not limited to, the issuance of “Immediate Compliance Orders” as authorized by R.I. Gen. Laws Section 42-17.1-2(21). This Agreement shall not restrict any right to hearing or other right available by statute or regulation that the Respondents may have regarding any new enforcement action commenced by RIDEM after the execution of this Agreement.
- (5) FUTURE ACTIVITIES AND UNKNOWN CONDITIONS – This Agreement shall not operate to shield the Respondents from liability arising from future activities, as of the date of execution of this Agreement.
- (6) SCOPE OF THE AGREEMENT – The scope of the Agreement is only violations alleged in the NOV.

- (7) NOTICE AND COMMUNICATION – Communications regarding this Agreement shall be directed to:

Tracey D’Amadio Tyrrell, Supervising Environmental Scientist
RIDEM Office of Compliance and Inspection
235 Promenade Street, Providence, RI 02908
(401) 222-1360, ext. 7407

Joseph J. LoBianco, Esq.
RIDEM Office of Legal Services
235 Promenade St., Providence, RI 02908
(401) 222-6607, ext. 2023

Brian A. Wagner, Esq.
Tower Hill Law Center
4879 Tower Hill Rd.
Wakefield, RI 02879
(401) 788-0600

- (a) At any time prior to full compliance with the terms of this Agreement, the Respondents agree to notify the RIDEM in writing of any change in ownership of the Property, and provide the name and address of the new owner(s). Notice of any change in address/telephone/fax of either party shall be sent to all other parties by certified mail.
- (b) All communications regarding compliance with this Agreement shall be forwarded to the above-referenced addressees by certified mail.
- (8) DEFERRAL – The Director may, for good cause shown, defer any of the compliance dates prescribed herein. Good cause for deferral of any compliance date shall be forwarded to the RIDEM in writing at least fifteen days prior to the prescribed deadline.
- (9) AMENDMENT – The Agreement may be amended by mutual agreement of the parties in writing.
- (10) EFFECTIVE DATE – This Agreement shall be deemed entered as of the date of execution by all parties.

IN WITNESS WHEREOF, the undersigned consent to this Agreement in substance and in form.

For Kevin T. Malloy

By: _____ (Print Name)

Dated: _____

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2012, before me personally appeared Kevin T. Malloy to me known and known by me to be the party executing the foregoing instrument and he acknowledged said instrument and the execution thereof, to be his free act and deed.

Notary Public
My Commission Expires: _____

For United States Investment and Development Corporation

By: _____ (Print Name)

Its: _____ (Title)

Dated: _____

In my capacity as _____ of United States Investment and Development Corporation, I hereby aver that I am authorized to enter into this Agreement and thereby bind United States Investment and Development Corporation to satisfy any obligation imposed upon it pursuant to said Agreement.

STATE OF RHODE ISLAND
COUNTY OF _____

In _____, in said County and State, on this _____ day of _____, 2012, before me personally appeared _____, the _____ of United States Investment and Development Corporation, a Rhode Island corporation, to me known and known by me to be the party executing the foregoing instrument on behalf of United States Investment and Development Corporation, and he/she acknowledged said instrument by him/her executed, to be his/her/ free act and deed in said capacity and the free act and deed of United States Investment and Development Corporation.

Notary Public
My Commission Expires: _____

For the State of Rhode Island Department of Environmental Management

David E. Chopy, Chief
Office of Compliance and Inspection

Dated: _____

