

**USEPA BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT PROGRAM
ENVIRONMENTAL SERVICES AGREEMENT**

THIS BROWNFIELD SITE CHARACTERIZATION AND ASSESSMENT PROGRAM ENVIRONMENTAL SERVICES AGREEMENT ("Agreement"), made and entered into this 8th day of February 2011 by and between Cuyahoga County, (the "County"), on behalf of the Department of Development, ("DOD"), and PARTNERS ENVIRONMENTAL CONSULTING, INC., ("Consultant"), an Ohio Corporation with principal offices located at 31100 Solon Road, Suite G, Solon, Ohio 44139 ("the Consultant") for Ohio Voluntary Action Plan (VAP) Phase I and II Property Assessment activities at the Pierre's Ice Cream Company Expansion Site ("Facility") at 6200 Euclid Avenue, Cleveland, Ohio

WITNESSETH:

WHEREAS, the County currently manages and operates an environmental assessment program, known as the USEPA Brownfield Site Characterization and Assessment Program (the "Program");

WHEREAS, the purpose of the Program is to inventory, characterize, and assess sites throughout the County of Cuyahoga, Ohio, each of which constitutes a "brownfield site" (as such term is defined in Title II, Subtitle A, Section 201 of the Small Business Liability Relief and Brownfields Revitalization Act [the "Act"; Section 101 (39) of the Comprehensive Environmental Response Compensation, and Liability Act of 1980 ("CERCLA") {42 U.S.C. 9601 (39)}]), with respect to the environmental conditions which may be associated with such sites;

WHEREAS, pursuant to Title II, Subtitle A, Section 211 (b) of the Act (42 U.S.C. 9604 (k)), the County is the lead agency in the award of a Brownfields Hazardous/Petroleum Substances Assessment Cooperative Agreement Coalition grant by the USEPA ("Grant");

WHEREAS, the County is empowered to pay monies to the Consultant under Title II, Subtitle A, Section 211(b) of the Act (42 U.S.C. 9604 (b) (2));

WHEREAS, in order that the County may fulfill its responsibilities under the Grant in connection with the Program, the County requires the assistance of one or more environmental consultants;

WHEREAS, the initial site requiring the assistance of the Consultant has been identified and is more particularly described or shown on Exhibit A attached hereto and made a part hereof (the "Facility");

WHEREAS, the Consultant possesses the relevant professional experience, competence and knowledge, as required under the Act and any regulations promulgated thereunder, to render the services ("Services") provided for in this Agreement, and desires to render such Services to the County with respect to the Facility; and

WHEREAS, pursuant to §9.04 of the Ohio Revised Code, the Consultant has represented and the County has determined that the Consultant has no unresolved findings for recovery against it.

NOW, THEREFORE, in consideration of the premises, the covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the County and the Consultant, agree as follows:

1. **Purpose of Services.** The Consultant acknowledges that the purposes of the Services to be provided pursuant to this Agreement shall include making all appropriate inquiry into the previous ownership, uses and environmental condition of the Facility in accordance with "generally accepted good commercial and customary standards and practices" (as defined under Title II, Subtitle A, Section 223 (2) (B) of the Act [42 U.S.C. 9601 (35)]) and as a consequence of such inquiry, to investigate, determine and analyze reasonably identifiable risks inherent in the existence of hazardous materials or wastes, petroleum products, toxic chemicals or substances, pollutants or contaminants, or any other material, chemical, waste, or substance, in any of their various forms ("hazardous substances"), which, in the judgment of the Consultant, reasonably exercised, could give rise to liability or responsibility under any federal, state or local laws, statutes, regulations, ordinances, protocols, guidance or standards or under common law ("environmental laws"), including without limitation, the presence of hazardous substances in the soil, groundwater, or air associated with the Facility.

2. **Quality of Services.** The Consultant shall provide and direct any and all qualified personnel necessary to perform the Services required pursuant to the express and implied terms and conditions of this Agreement, with a degree of skill, care and judgment normally exercised by recognized professional firms performing services of a similar nature in the State of Ohio.

3. **Scope of Services.** The Consultant will perform a preliminary environmental assessment of the Facility which is designed to assess the existence and nature of those conditions associated with the Facility which, in the judgment of the Consultant, reasonably exercised, violate or could give rise to liability or responsibility, or which may require remediation or response under environmental laws, including the identification of hazardous substances in the soil, groundwater or air on, over, above, or below the Facility, or any adjacent property ("adjacent property") in the vicinity of the Facility where there has been a release or suspected release of hazardous substances. The Consultant will attempt to determine the nature and extent of the use, storage or disposal of any hazardous substances on, under or about the Facility and any adjacent property and whether any hazardous substances have migrated to or from the Facility. For these purposes, the County authorizes and directs the Consultant to perform the preliminary environmental assessment of the Facility in accordance with the following designated protocol (*check appropriate box*):

☐ ASTM E1527-05 "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process" meeting the requirements for "all appropriate inquiries" under the Act and any regulations promulgated thereunder, 40 C.F.R. Part 312;
or

(v) Ohio EPA Voluntary Action Program Phase I Property Assessment in accordance with Ohio Revised Code § 3746.04 (B)(3) and Ohio Administrative Code §3745-300-06, including a VAP Eligibility Analysis in accordance with Ohio Administrative Code §3745-300-02;

provided however, such preliminary assessment of the Facility shall meet and be performed in accordance with the criteria and requirements set forth in Title II, Subtitle A, Section 223 (2) (B) of the Act [42 U.S.C. 9601 (35)] or any current or proposed regulations promulgated thereunder.

The following descriptions shall serve as guidance for the Consultant in performing Services hereunder:

A. A review of all historical documents, records or other sources and information associated with the Facility and any adjacent property, including without limitation, chain of title documents, aerial photographs, building department records, land use records, plans, maps, surveys, historical city directories, insurance maps, and all reports, studies or any other information or correspondence relevant to the Facility which is readily available or reasonably obtainable by the Consultant, or is provided to the Consultant by the County, but in all events for a period of time at least as far back in the history of the Facility as it can be shown that the Facility contained structures or from the time the Facility was first used for residential, agricultural, commercial, industrial, or governmental purposes.

B. The examination of all relevant readily available or reasonably obtainable federal, state and local records or data bases of government records in an effort to determine whether those records identify known or suspected releases or any environmental impairments at the Facility or any adjacent property that has been placed upon a list of locations requiring remediation or investigation, including, without limitation, "contaminated sites" lists compiled under applicable environmental laws.

C. An evaluation and examination of all relevant readily available or reasonably obtainable federal, state and local records or data bases of government records, of the historic and current uses of the Facility and any adjacent property, incidents likely to cause or contribute to the release of hazardous substances, and the environmental condition of existing structures, including without limitation, records or databases of governmental records regarding the usage of hazardous substances on site, the presence or usage of above ground or underground storage tanks on site, solid waste management, methods of waste water handling or evidence of water or other wells and septic systems.

D. Interviews with past and present owners, operators and current or previous occupants of the Facility and any adjacent property, including persons having knowledge of the historic uses and waste handling activities associated with the Facility and any adjacent property.

E. Interviews with representatives of regulatory agencies having jurisdiction over the Facility, including representatives of the state environmental protection agency, division or bureau of underground storage tank regulation and local fire department.

F. At least one personal site inspection and tour of the Facility with particular emphasis on areas where hazardous substances may be or may have been used, stored, treated, handled, or disposed, including without limitation areas involving the presence or usage of above ground or underground storage tanks on site, the presence of obvious odors, pools of liquid, drums or unidentified containers, materials which may contain polychlorinated biphenyls ("PCBs"), drains, sumps, pits, stained pavement or soil, stressed vegetation, solid waste management, methods of waste water handling or evidence of water or other wells and septic systems. As a part of the site inspection and tour, the Consultant shall tour the surrounding area to determine if there are activities that could have an adverse environmental impact on the Facility. The inspection and tour shall identify all areas that the Consultant suspects contain hazardous substances. Physical limitations to the site inspection must be noted in the Consultant's report.

G. An examination of fireproofing, insulation, coatings, ceiling, flooring and other materials at the Facility to determine whether asbestos is present at the Facility with particular attention paid to textured ceiling or wall materials, sprayed-on fireproofing and pipe or boiler insulation. If the Consultant suspects that any materials associated with the Facility contains asbestos, the Consultant shall not (X) obtain bulk or other samples of such materials, obtain a report from a certified laboratory indicating the presence and form of asbestos in the material, and note the location, extent, condition and friability of the material in the Consultant's report. In the event that asbestos or asbestos containing materials, operations or management practices, or existing conditions are determined or suspected by the Consultant to be in violation of environmental laws, including, in particular the National Emission Standards for Air Pollutants promulgated under the Clean Air Act, 42 U.S.C. §§7401 et. seq. or the regulations promulgated under the Occupational Safety and Health Act, 40 C.F.R. Parts 1910 and 1926, the Consultant will immediately notify the County.

H. An examination of the Facility and any pertinent governmental records, together with interviews of any apparently knowledgeable person to determine whether any underground storage tanks are or were present on the Facility. If the Consultant determines that any such tanks are present, then the Consultant shall verify that such tanks have been registered with the appropriate governmental authority and that any required testing and monitoring has been performed. The Consultant will examine any available testing and monitoring data to determine the condition of the tanks, contents of the tanks (if any), and whether the tank or tanks formerly associated with the Facility have leaked.

I. A determination as to whether there is constructed, placed, deposited, stored, disposed or located on the Facility any PCBs or transformers, capacitors, ballasts, or other equipment which contains dielectric fluid containing PCBs. The Consultant shall conduct or cause to be conducted a search of local utility records, including without limitation, a request for confirmation of the PCB content of any ground or full mounted electrical transformers on the Facility.

J. A determination of whether there is constructed, placed, deposited, stored, disposed or located on the Facility any insulating or other construction materials which contain and may emit formaldehyde into the ambient air.

K. An examination of all current and previously issued permits and licenses pertaining to the Facility to determine whether all permits and licenses required to be issued by any governmental authority on account of any or all of the activities associated with the Facility have been issued and are or were in full force and effect, and whether the Facility and the activities thereon are or were in full compliance with the terms and conditions of such permits and licenses. The Consultant will further examine the applications for any current permits and licenses to determine whether any of the facts and circumstances reported or assumed in the applications for or granting of such permits or licenses have materially changed.

The foregoing description of the scope of Services (sometimes hereinafter referred to as the "Phase I Services") to be provided by the Consultant is intended to serve as a minimum guideline, rather than to limit the Consultant's activity. Where additional Phase I Services are required in order to fulfill the purposes of the Services to be provided by the Consultant pursuant to this Agreement, it is understood that the Consultant will provide such Services, for the compensation and otherwise upon the terms, conditions and limitations contained herein. Notwithstanding anything contained in this paragraph 3, the County may reduce the scope of Services required hereunder by eliminating any one or more of items A through K by a written addendum to this Agreement.

4. **Phase II Services.** Consultant acknowledges that certain additional Services ("Phase II Services") may be requested during or following completion of the preliminary environmental assessment provided for herein under items A through K of paragraph 3. The applicable Phase II Services will include one or more of the Services indicated on the Services Selection List attached hereto and made a part hereof as Exhibit B (the "Checklist"). If one or more of the Phase II Services are requested, the Consultant shall submit a proposal to perform those Services, which proposal will, at a minimum, comply with the applicable protocol designated by the County on the Checklist furnished to the Consultant. The proposal shall fully describe the Services to be provided by the Consultant, and if approved, shall become the agreement between the County and the Consultant for the applicable Phase II Services; provided, however, the County reserves the right to furnish a specific form of agreement for the applicable Phase II Services. Approval of the proposal may be given only by the County Administrator or Deputy County Administrator, as evidenced by their written acceptance or execution of or written consent to the proposal or agreement. The terms and conditions of the agreement for the applicable Phase II Services shall be mutually agreed upon between the County and the Consultant; provided, however, Consultant acknowledges that its total compensation for Services, including Phase II Services, under this Agreement, shall in no event exceed \$60,000.00 for the Facility.

In anticipation of a request for Phase II Services, Consultant represents that it has developed a generic Quality Assurance Project Plan ("QAPP") meeting the requirements in "Quality Assurance Guidance for Conducting Brownfields Site Assessment" (www.epa.gov/brownfields) and upon execution of this Agreement will submit its generic QAPP

to USEPA, Region V for approval. If approved, Consultant shall customize its generic QAPP to create a site-specific QAPP including a site-specific health and safety plan and sampling plan.

5. **Compensation.** In consideration of faithful performance of the Phase I Services, designated as Task 1, "Phase I ESA" in the Consultant's proposal attached hereto, the Consultant shall receive compensation in the amount of \$6,000.00. In addition, the Consultant shall receive compensation in the amount of \$0.00 for the creation of a Generic QAPP. The compensation for a Site-Specific QAPP shall be incorporated into the compensation for Phase II Services. The compensation for Phase II Services shall be incorporated by reference to this Agreement into, or be set forth in the proposal or agreement accepted, executed, or consented to by the County in accordance with paragraph 4 above, and, in either case, shall be computed for each quarter of an hour incurred in connection with the Phase II Services at the hourly rates set forth in Section I of the rate schedule ("Rate Schedule") entitled "Fees for Professional Services of the General Terms and Conditions," attached hereto (including all present, state, federal and local sales, use, excise, business and occupation and transportation taxes). With respect to any Phase II Services, the Consultant shall be entitled to its reimbursable expenses calculated as provided in Section II of the Rate Schedule. In the event that the Consultant encounters issues which would require additional time or expense, whether as a part of Phase I Services or Phase II Services, the Consultant shall immediately notify the County and shall not proceed until the Consultant has approval of the County to do so. Phase II Services, such as sub-surface investigation or other Services which may become necessary due to unforeseen circumstances shall only be performed by the Consultant upon prior written approval of the County, and at the rates set forth under Section I of the Rate Schedule plus reimbursable expenses calculated in accordance with Section II of the Rate Schedule.

6. **Time and Performance.** The Consultant will initiate the Services provided for herein within one week of receipt of a written authorization to proceed and will complete the Services and provide the County with a separate written report for the activities within *one hundred and seventy-three days (173)* of the authorization to proceed. The Consultant shall assign the following personnel to perform the Services provided for in this Agreement and shall not remove or replace these individuals without the prior written approval of the County, which approval shall not be unreasonably denied or withheld, and the County's decision with respect to such removal or replacement shall be given in a timely manner. *A list of assigned personnel, titles and responsibilities are included in the attachment to proposal*

The Consultant represents and warrants that the foregoing personnel will be under the supervision or responsible charge of a person meeting the definition of environmental professional as defined in the Act and any current or proposed regulations thereunder. Notwithstanding anything contained herein to the contrary, this Agreement shall end and be of no further force and effect on and after July 31, 2011 unless extended by a written amendment executed by the Consultant and the County.

7. **Report.** The Consultant will prepare a draft report and submit the draft and all supporting information to the County for initial review. If requested to do so, such report and supporting information shall be submitted in electronic (e.g., Word or Adobe Acrobat) and non-electronic form to the County. The draft report for the Phase I Services will include the following sections: executive summary; nature and scope of Services performed; description of searches, interviews and inspections completed; summary of data and information obtained;

findings organized according to the scope of Services to be provided by the Consultant pursuant to paragraph 3; summary and detailed description of conclusions, and recommended actions. Once the County determines the draft is complete and the format is consistent with the format provided for herein, the final report will be submitted to the County for final review. The draft of the report for the Phase II Services shall be in a format as mutually agreed upon between the Consultant and the County.

8. **Termination.** Either the County or the Consultant may suspend the performance by the Consultant of all or any part of the Services to be provided under this Agreement or terminate all or any part of this Agreement, in either case, by written notice sent by certified mail, return receipt requested to a non-terminating party. Such suspension or termination shall be effective two (2) business days after receipt of the written notice. Both parties agree to meet on one occasion after such notice is given to discuss the reason for such suspension or termination. In the event of termination, the Consultant shall be entitled to compensation to the date of termination in accordance with Section I of the Rate Schedule, together with its reimbursable expenses calculated as provided in Section II of the Rate Schedule and shall submit a final invoice to the County within thirty (30) days after the effective date of such termination. Upon request by the County, the Consultant will promptly furnish the County with a written report based upon the data and information collected by the Consultant as of the date of termination of this Agreement, the cost of which shall be paid for in accordance with Section I of the Rate Schedule.

9. **Representations and Warranties.** The Consultant represents and warrants that:

A. The Consultant shall have obtained and shall maintain any and all licenses and permits required by environmental laws for the performance of its Services pursuant to this Agreement;

B. The Consultant shall comply with all applicable environmental laws in performing the Services hereunder, and shall comply with directives of governmental agencies and the County relating to safety, security, traffic or other like matters relating to the Facility; and

C. The Consultant's professional Services will be performed, its findings obtained and its recommendations prepared in accordance with generally and currently accepted scientific and engineering principles and practices and in accordance with industry standards of care exercised by recognized Partners Environmental Consulting INC. performing Services in Ohio, as established at the time the Services hereunder are to be performed.

10. **Indemnity.** The Consultant shall defend, hold harmless and indemnify the County from and against all claims, actions, suits, liabilities, damages and expenses (including attorney's fees) for personal injury (including death), property damage or other claims and liabilities arising out of, related to, or in connection with the Consultant's Services pursuant to this Agreement, including any Services performed by any subcontractor or agent of the Consultant, excepting only such claims, actions, suits, liabilities, damages and expenses arising directly out of the County's willful misconduct or gross negligence.

11. **Insurance.** Consultant agrees to maintain at all times during the life of this Agreement worker's compensation, commercial general liability, comprehensive business automobile, professional liability (in particular covering errors and omissions), and umbrella liability insurances each in an amount not less than Two Million Dollars (\$2,000,000) (collectively the "Insurance Policies").

Each of the Insurance Policies shall state that the issuing company thereof shall have no right of recovery or subrogation against the County or its agents, directors, officers, employees, representatives or insurers, and that the County shall in no way be held responsible for the payment or satisfaction of any deductible thereunder.

Consultant shall name the County as an additional insured on each of the Insurance Policies, up to the amounts specified herein, and shall furnish the County with Certificates of Insurance stating to that effect.

Should any one of the Insurance Policies terminate or be cancelled, refused, or for any other reason no longer be of effect, the Consultant and Insurance Carrier shall immediately furnish written notice to the County of the fact. At such time such notice is received by the County, this Agreement shall be held null and void and no longer enforceable or of effect; provided, however, that if the Consultant is able to obtain coverage from another insurer within five (5) business days of the loss of coverage, this Agreement shall continue to be in full force and effect and shall remain binding on the parties hereto.

All Insurance Policies required hereunder shall cover and include the specific work contemplated by the terms hereof. If such policies do not cover such work, then Consultant shall not be in conformity with the terms hereof, unless Consultant obtains written permission from the County to not be in conformity with such terms.

12. **Independent Contractor.** The Consultant is acting and shall perform its Services under this Agreement as an independent contractor. Nothing contained in this Agreement or in the relationship between the County and the Consultant shall be deemed to constitute a partnership, joint venture, or any other relationship among them, and the Consultant's authority is strictly limited to performing the Services set forth herein in accordance with the terms and conditions hereof. The Consultant shall have no authority to execute any contracts, subcontracts or agreements for or on behalf of the County, nor to assume or create any obligation or liability or make any representation, covenant, agreement or warranty, express or implied, on the County or the County's behalf, or to bind the County in any manner whatsoever, without, in each case, written consent, approval, or instructions having been given or provided by the County. Any and all subcontracts shall be submitted to and approved by the County prior to execution and delivery.

13. **Audits.** The Consultant by his, her or its acceptance of the monies granted hereunder agrees to cooperate in all regards with any audit of the Grants and distributions therefrom, where such audit is performed by any governmental entity or agency duly authorized and empowered to undertake such audit by the Act, whether such entity or agency be from the County of Cuyahoga, State of Ohio or Federal Government (the "Auditor"). Consultant agrees to present information in such format as reasonably requested by the Auditor, and to comply in

all regards with all requirements and procedures as may be reasonably formulated by the Auditor from time to time.

14. **Assignment, Transfer or Delegation.** Neither this Agreement nor any of the rights, interests or obligations of the Consultant hereunder may be assigned, transferred or delegated in whole or in part by the Consultant without the prior written consent of the County, which consent may be denied, withheld or granted in the sole discretion of the County.

15. **Notices: Entire Agreement.** Any notice or other communication required or permitted hereunder shall be in writing and shall be deemed to have been given if and when personally delivered or on the second business day after being deposited in United States registered or certified mail, postage prepaid, and addressed to the County or the Consultant, as the case may be, at the address set forth on the signature page of this Agreement or to such other address as the County or the Consultant may have designated in accordance herewith. The terms and conditions of this Agreement, including Exhibit A, Exhibit B, and the Rate Schedule attached hereto, constitute the final written expression of the agreement between the parties and are a complete and exclusive statement of the terms and conditions of this Agreement and may not be amended except in a writing signed by the parties hereto. Any amendments or modifications to this Agreement and any consents, approvals or instructions which may be required of the County under this Agreement may be given only by the County Administrator or Deputy Administrator. All other notices or other communications required or permitted hereunder may be given by an authorized representative of the County.

16. **Confidentiality.** The Consultant, its officers, agents and employees shall perform the Services in a discrete, confidential manner and shall not disclose any information or materials and reports gathered pursuant to this Agreement, or discuss such information or materials with anyone, other than authorized County representatives, without the prior written permission of the County; provided, however, that the Consultant is expressly authorized and permitted to disclose, where relevant, any such information or materials to any third parties who are required under the terms of this Agreement to be contacted by Consultant in connection with its Services hereunder or who may be entitled to such information as a matter of law or pursuant to court order. All such information, materials and reports shall belong to the County.

17. **Governing Law.** This Agreement shall be governed by the laws of the State of Ohio.

18. **Force Majeure.** The time for performance or observance of any of the covenants and agreements to be performed or observed by Consultants under this Agreement shall be extended for delays caused by Force Majeure. For the purposes hereof, the term Force Majeure shall mean and include: (i) delays in the performance of the work by reasons for strikes, lockouts, accidents, acts of God or other causes beyond the Consultant's reasonable control, (ii) the failure by the County to furnish necessary information required under this Agreement, (iii) the failure by the County to approve or disapprove the Consultant's work as and when required under this Agreement, (iv) delays resulting from late, slow or faulty performance by the County, other contractors or consultants of the County, or by government agencies whose performance of work is precedent to or concurrent with the performance of the Consultant's work under this Agreement.

19. **Disputes.** Any dispute between Consultant and the County arising out of or relating to this Agreement, except for disputes relating to right of either party to terminate this Agreement in accordance with Article 8, shall be subject to mediation as an express condition precedent to the institution of any legal or equitable proceedings by either the Consultant or the County. The parties shall endeavor to resolve any such dispute through mediation conducted pursuant to the Construction Mediation Rules of the American Arbitration Association currently in effect. Request for mediation shall be filed in writing with the other party and with the American Arbitration Association. The prevailing party shall be entitled to reimbursement of the mediator's fee and the filing fees paid by such party. In addition, all costs and expenses incurred by either party in connection with the mediation shall be borne and paid by the unsuccessful party. The mediation shall be held in the County of Cuyahoga (in a place selected by County), unless another location is mutually agreed upon. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

20. **Electronic Documents** By entering into this contract for environmental assessment services, I agree on behalf of the contracting business entity, its officers, employees, subcontractors, subgrantees, agents or assigns, to conduct this transaction by electronic means by agreeing that all documents requiring county signatures may be executed by electronic means, and that the electronic signatures affixed by the County to said documents shall have the same legal effect as if that signature was manually affixed to a paper version of the document. I also agree on behalf of the aforementioned entities and persons, to be bound by the provisions of Chapters 304 and 1306 of the Ohio Revised Code as they pertain to electronic transactions, and to comply with electronic signature policy of Cuyahoga County.

IN WITNESS WHEREOF, the parties have hereto executed this Agreement as of February 8, 2011, which shall be deemed the effective date for all purposes of this Agreement.

PARTNERS ENVIRONMENTAL CONSULTING, INC.

BY: 
DAN B. BROWN, PRESIDENT

CUYAHOGA COUNTY

BY: 