

5-R-04

A RESOLUTION

**Authorizing the City Manager to Enter Into
A Tiered Approach Corrective-Action Agreement With
Exxon Mobil Corporation Concerning the
Contamination Clean-up at 2966 Central Street**

WHEREAS, Exxon Mobil Corporation ("Exxon") has requested that the City enter into the Tiered Approach to Corrective-Action Agreement in order for Exxon to obtain a "No Further Action" letter from the Illinois Environmental Protection Agency concerning the leaking underground storage tank formerly located on the Property at 2966 Central Street; and

WHEREAS, a "No Further Action" letter is an important step in making the property attractive to potential purchasers who would redevelop the property and make it available for beneficial reuse, and it is important to the City that the property be utilized again; and

WHEREAS, the Agreement allows Exxon to leave in place soil under the roadway that is contaminated from the leaking tank, but the agreement requires Exxon to perform any soil remediation required in connection with the City's regular maintenance of the relevant roadway; and

WHEREAS, the City has agreed to give notice of the contamination to any persons seeking permission to perform work in the roadway, so that such persons can safely perform such work; and

WHEREAS, the City Council has determined it is in the best interest of the City to enter into said Agreement,

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EVANSTON, COOK COUNTY, ILLINOIS:

SECTION 1: That the City Manager is hereby authorized and directed to sign, and the City Clerk hereby authorized and directed to attest on behalf of the City, a Tiered Approach Corrective-Action Agreement with Exxon Mobil Corporation, concerning contamination clean-up at 2966 Central Street, attached as Exhibit A and made a part hereof.

SECTION 2: That the City Manager is hereby authorized and directed to negotiate any additional conditions or terms of the Agreement as may be determined to be in the best interest of the City.

SECTION 3: That this Resolution shall be in full force and effect from and after the date of its passage and approval in the manner provided by law.

Adopted: February 23, 2004

Lorraine A. Martor
Mayor

ATTEST:

Mary P. Morris
City Clerk

TIERED APPROACH TO CORRECTIVE ACTION OBJECTIVES AGREEMENT

This Agreement is entered into this _____ day of _____, 2004 pursuant to 35 Ill. Admin. Code Section 742.1020 by and between Exxon Mobil Corporation referred to herein as "Owner/Operator", and the City of Evanston ("Evanston"). The Owner/Operator and Evanston are referred to as "Parties."

1. This Agreement is not binding upon Evanston until it is signed by the undersigned representative of Evanston and before signing, this Agreement constitutes an offer by Owner/Operator. The duly authorized representatives of Owner/Operator have signed this Agreement, and this Agreement is binding upon it, its successors and assigns upon execution by Evanston.

2.a. Owner/Operator is pursuing Corrective Action for the property located 2966 Central Street (southeast corner of the intersection of Central Street and Central Park Avenue), Evanston, Illinois ("the Site"). As part of the Owner/Operator's Corrective Action it is pursuing a Highway Authority Agreement for the highway right-of-ways ("Right-of-Way") located adjacent to the Site, east of the intersection of Central Street and Central Park Avenue, south of the intersection of Central Street and Central Park Avenue, and east of the intersection of the first alley south of Central Street and Central Park Avenue in Evanston, Cook County, Illinois. "Corrective Action" is defined as active remediation, passive remediation, investigation and monitoring of "Contaminants of Concern" which are defined as those contaminants released from the Site which have possibly impacted soil/and or ground water within the right-of-way area in excess of applicable Tier 1

objectives as described in Exhibits A and B, or any combination of these activities defined herein.

2.b. Attached as Exhibit A are site maps prepared by Owner/Operator which show the area of estimated contaminated soil and/or groundwater at the time of this Agreement in the Right-of-Way above Tier 1 residential levels under 35 Ill. Admin. Code Part 742. Also shown in Exhibit A are tables prepared by Owner/Operator showing concentrations of Contaminants of Concern, hereafter "Contaminants," in soil and/or groundwater within the area described in Exhibit B and which shows the applicable Tier 1 soil remediation objectives for property and Tier 1 objectives for groundwater of the Illinois Pollution Control Board ("IPCB") that are exceeded. The Right-of-Way, and only the Right-of-Way, as described in Exhibit B, hereinafter "Right-of-Way," adjacent to the Site is subject to this Agreement. As the drawings in the Exhibits are not surveyed plats, the boundary of the Right-of-Way in the Exhibits may be an approximation of the actual Right-of-Way lines. The Right-of-Way has been sampled for Contaminants. The parties believe that the area of the Right-of-Way is adequate to encompass soil and groundwater possibly impacted with Contaminants from a release at the Site.

2.c. The Illinois Emergency Management Agency has assigned Incident Number 902449 to this matter.

2.d. Owner/Operator intends to request risk-based, site specific soil and/or groundwater remediation objectives from the Illinois Environmental Protection Agency ("IEPA") under 35 Ill. Admin. Code Part 742.

2.e. Under these rules, use of risk-based, site specific remediation objectives in the Right-of-Way may require the use of a Highway Authority Agreement as defined in 35 Ill. Admin. Code Section 742.1020.

3. Evanston holds a fee simple interest or a dedication for highway purposes in the Right-of-Way, or the Right-of-Way is a platted street, and has jurisdiction of the Right-of-Way. As such, Evanston exercises access control over the use of the ground water beneath the Right-of-Way and over access to the soil beneath the Right-of-Way.

4.a. Under 35 Ill. Admin. Code Section 742.1020, this Agreement is intended to be an acceptable "Highway Authority Agreement" to IEPA, as Evanston is willing to agree that it will not allow the use of groundwater under the highway Right-of-Way as a potable or other domestic supply of water, and that it will limit access as described herein to soil under the highway Right-of-Way that is contaminated from the release at levels above residential Tier 1 remediation objectives.

4.b. The IEPA and Evanston must review and approve this Agreement, and this Agreement shall be referenced in IEPA's "No Further Remediation" determination in the chain of title for the Site in the county where the Site is located.

4.c. This Agreement shall be null and void as a Highway Authority Agreement should the IEPA or Evanston not approve it, or should it not be referenced in the "No Further Remediation" determination, provided, however, that this Agreement shall be effective between the Owner/Operator and Evanston immediately upon signature by their representatives.

5. Evanston promises IEPA and the Owner/Operator that it will prohibit the use of groundwater that is contaminated from the release at the Site at levels above Tier 1 remediation objectives beneath its Right-of-Way as a potable or other domestic supply of water and will limit access to soil as described herein under the highway Right-of-Way that is impacted from the release at levels above Tier 1 remediation objectives. As the pavement in the Right-of-Way may be considered an engineered barrier, the Owner/Operator agrees to reimburse Evanston for such maintenance activities requested by Owner/Operator in writing as are reasonably necessary to maintain such pavement area(s) as a barrier. Evanston does not otherwise agree to perform maintenance of the Right-of-Way, nor does it agree that the highway Right-of-Way will always remain a highway or that it will maintain the Right-of-Way as an engineered barrier.

6. The Owner/Operator agrees to indemnify and hold harmless Evanston and other highway authorities, if any, maintaining the highway Right-of-Way by an agreement with Evanston and Evanston's agents, contractors or employees for all obligations asserted against or costs incurred by them, including reasonable attorney's fees and court costs, as a result of claims by third parties associated with the release of Contaminants of Concern except those obligations arising from Evanston's, Evanston's agents, contractors or employees willful misconduct or willful negligence.

7. As an additional consideration, Owner/Operator agrees to reimburse Evanston for those reasonably necessary costs it has incurred in responding appropriately to the suspected presence of Contaminants of Concern in the Right-of-Way as a result of the release of contaminants at this Site. Evanston has documented those costs for

Owner/Operator. Those costs amount to \$ Not Applicable. A check made payable to "Treasurer, City of Evanston" shall be tendered to Evanston at the time Owner/Operator furnishes a signed Agreement to Evanston for its signature. That check will be deposited when this Agreement is signed by all necessary parties.

8. This Agreement shall be binding upon all successors in interest to the Owner/Operator or highway Right-of-Way. A successor in interest of Evanston would include a highway authority to which Evanston would transfer jurisdiction of the highway.

9. Violation of the terms of this Agreement by Owner/Operator, or by Evanston, may be grounds for voidance of this Agreement as a Highway Authority Agreement. Violation of the terms of this Agreement by Evanston will not void this Agreement-unless the IEPA has determined that the violation is grounds for voiding this Agreement and Evanston has not cured the violation within such time as IEPA has granted to cure the violation.

10. This Agreement continues in effect from the date of this Agreement until the Right-of-Way is demonstrated to be suitable for unrestricted use and there is no longer a need for this Agreement as a Highway Authority Agreement, and the IEPA has, upon written request to the IEPA by the Owner/Operator and notice to Evanston, amended the notice in the chain of title for the site to reflect unencumbered future use of that highway Right-of-Way.

11. This Agreement constitutes full settlement of claims Evanston may have arising from the possible release of Contaminants of Concern associated with Incident Number 902449, and is not in settlement of claims of the IEPA or any other State Agency.

12. This Agreement does not limit Evanston's ability to construct, reconstruct, improve, repair, maintain and operate a highway upon its property or to allow others to use the highway Right-of-Way by permit. To that extent, Evanston reserves the right, and the right of those using its property under permit, to remove contaminated soil or groundwater above Tier 1 residential objectives from its Right-of-Way and to dispose of them as they deem appropriate, not inconsistent with applicable environmental regulations, so as to avoid causing a further release of the Contaminants and to protect human health and the environment. Prior to taking any such action, Evanston shall first give Owner/Operator no less than eight (8) months written notice for work on published program and otherwise no less than three (3) months written notice, unless there is an immediate threat to the health or safety to any individual or to the public, prior to the scheduled letting day for work involving the Right-of-Way. During this period, which may be extended by agreement of the Parties, Evanston and Owner/Operator will engage in a good faith, collaborative process to arrive at a consensus approach to managing the impacted soil and groundwater in the Right of Way arising from Incident Number 902449. This consensus approach will attempt to reconcile Evanston's engineering and environmental concerns for redepositing impacted soils in the Right-of-Way with the Owner/Operator's preference for redepositing as much soil as possible. The removal, disposal or reuse of impacted soils shall be based upon the site investigation (which may be modified by field conditions during excavation), which Owner/Operator may review or may perform, if requested to do so by Evanston. The final decision for management will be in the reasonable discretion of Evanston. Failure to give notice is not a violation of this Agreement. If reasonably documented and appropriate under applicable statute, law or regulation, Evanston may request Owner/Operator to

remove and dispose of the contaminated soil and/or groundwater in the Right-of-Way area as agreed in the collaborative process, so as to facilitate Evanston's work in the Right-of-Way area at no cost to Evanston. If the Owner/Operator does not perform the work itself, the Owner/Operator shall reimburse Evanston for those commercially reasonable and appropriately necessary costs incurred by Evanston to perform the site investigation and to respond to contaminated soil or groundwater from Incident Number 902449 which is reasonably documented and appropriately necessary to be addressed in order to allow the work within the Right-of-Way area to be completed, provided however, that if notice to the Owner/Operator has not been given, and/or an opportunity to engage in consensus process has not been offered, and there was no immediate threat to human health or safety, reimbursement for these costs shall be limited to \$10,000. Invoices for reimbursement submitted to Owner/Operator by Evanston will be paid within a reasonable time, but no later than January 31, of the subsequent calendar year. There is a rebuttable presumption that the Contaminants, if any, found in the highway Right-of-Way, are presumed to have arisen from the release of contaminants from the Site unless there is a reported spill in the immediate vicinity of the Right-of-Way, or an increase in contaminant levels from those reported to IEPA with regard to Incident Number 902449. Should Owner/Operator not reimburse the reasonable commercial costs under the conditions set forth herein, this Agreement shall be null and void, at Evanston's option, upon written notice to Owner/Operator by Evanston that those costs have not been reimbursed. Owner/Operator may cure that problem within thirty working days by making payment, or may seek to enjoin that result.

13. Written Notice required by this Agreement must be mailed to the following: if to Owner/Operator: Global Remediation Area Claims & Litigation Manager, 3225 Gallows Rd., Rm. 8B008, Fairfax, VA 22037; If to Evanston: Mary Morris, City Clerk, 2100 Ridge Avenue, Evanston, IL 60201.

14. Evanston's sole responsibility under this Agreement with respect to others using the highway Right-of-Way under permit from Evanston is to include the following, or similar language, in the future standard permit provisions and to make an effort to notify its current permit holders of the following:

As a condition of this permit, the permittee shall request the City Permit Office to identify sites in the Right-of-Way where access to contaminated soil or groundwater is governed by Tiered Approach to Corrective-Action Objectives ("TACO") Agreements. The permittee shall take measures before, during and after any access to these sites to protect worker safety and human health and the environment. Excavated, contaminated soil should be managed off-site in accordance with all environmental laws.

Owner/Operator hereby releases Evanston from liability for breach of this Agreement by others under permit and indemnifies Evanston against claims that may arise from others under permit causing a breach of this Agreement. Owner/Operator agrees that its personnel, if any, at the Site who are aware of this agreement will notify anyone they know is excavating in the Right-of-Way about this agreement.

15. Should Evanston breach this Agreement, Owner/Operator's sole remedy is for an

action for specific performance or for damages in the Illinois Court of Claims. Any and all claims for damages against Evanston, its agents, contractors, employees or its successors in interest arising at any time for a breach of paragraph 5 of this Agreement are limited to an aggregate maximum of \$20,000.00. No other breach by Evanston, its agents, contractors, employees and its successors in interest of a provision of this Agreement is actionable in either law or equity by Owner/Operator against Evanston or them, and Owner/Operator hereby releases Evanston, its agents, contractors, employees and its successors in interest for any cause of action it may have against them, other than as allowed in this paragraph, arising under this Agreement or environmental laws, regulations or common law governing the impacted soil or groundwater in the highway Right-of-Way. Should Evanston convey, vacate or transfer jurisdiction of that highway Right-of-Way, Owner/Operator may pursue an action under this Agreement against the successors in interest, other than a State Agency, in court.

16. This Agreement is entered into by Evanston in recognition of laws passed by the General Assembly and regulations adopted by the IPCB which encourage a tiered-approach to remediating environmental contamination. This Agreement is entered into by Evanston in the spirit of those laws and under its right and obligations as property owner. Should any provisions of this Agreement be struck down as beyond the authority of Evanston, however, this Agreement shall be null and void.

IN WITNESS WHEREOF, Evanston has caused this Agreement to be signed by its City Clerk.

City of Evanston

By:

Mary Morris
Its City Clerk

DATE:

IN WITNESS WHEREOF, Owner/Operator, Exxon Mobil Corporation, has caused this Agreement to be signed by its duly authorized representative.

By:

DATE:

This Agreement is approved on behalf of the City of Evanston.

By:

DATE:

266244.1

