

LARGE-SCALE DONATION, INSTALLATION, AND MAINTENANCE AGREEMENT

This LARGE-SCALE DONATION, INSTALLATION, AND MAINTENANCE AGREEMENT ("Agreement"), dated September 26, 2018, is entered into this day by and between the Hudson River Park Trust (the "Trust"), a New York public benefit corporation created and operating pursuant to the Hudson River Park Act (the "Act"), having an office located at Pier 40, 353 West Street, 2nd Floor, New York, New York 10014 and the Whitney Museum of American Art (the "Whitney"), a New York not-for-profit corporation having an office located at 99 Gansevoort Street, New York, New York 10014.

WITNESSETH

WHEREAS, pursuant to the Act, the Trust is responsible for the planning, design, development, construction, operation and maintenance of Hudson River Park and the improvements therein (collectively, the "Park"), which is located between the northern seawall of Battery Park City and 59th Street along the Hudson River in the Borough of Manhattan, City and State of New York;

WHEREAS, pursuant to Section 7.3(b) of the Act, the State of New York (the "State"), by and through its Office of Parks, Recreation and Historic Preservation and its Department of Environmental Conservation, and the Trust entered into a long-term lease agreement, dated as of April 3, 1999 (such lease agreement, as same has been amended and as such lease agreement may be further amended, modified or supplemented from time to time, the "State Lease"), conveying to the Trust a possessory interest in the State-owned property within the Park and confirming the Trust's right to properly exercise the powers and responsibilities provided to the Trust under the Act;

WHEREAS, Section 3(e) of the Act describes the boundaries of the Park, which includes the Gansevoort Peninsula;

WHEREAS, pursuant to Section 7.1 of the Act, the Trust is authorized to enter into contracts, leases, or other agreements and to apply for or accept any gifts or grants of funds from public and private entities and individuals and to do all things necessary and convenient to carry out its functions, powers and duties;

WHEREAS, the Whitney was chartered by an act of the New York Legislature in 1936, for the purposes of preserving, protecting, and exhibiting American art, and educating the public about the same;

WHEREAS, the Whitney constructed and built a new 220,000 square foot building across from the Park which opened to the public in May 2015;

WHEREAS, David Hammons, an acclaimed artist with deep roots in New York City and winner of the a Guggenheim Fellowship (1984) and a MacArthur Fellowship (1991), has proposed a site-specific public art installation entitled *Day's End*, to be installed on the site of the former Pier 52;

WHEREAS, *Day's End* derives its inspiration and name from Gordon Matta-Clark's 1975 artwork in the same location, which was demolished in 1979, and *Day's End* would be an open structure that precisely follows the outline, dimensions, and location of the original;

WHEREAS, *Day's End* would serve as a "ghost monument" to the earlier work and allude to the changing history of New York's waterfront;

WHEREAS, *Day's End* would be publicly accessible at the waterfront and one of the largest public art installations in New York City, allowing the work of David Hammons to be widely seen;

WHEREAS, the Whitney believes that *Day's End* would make an important contribution to the neighboring community, to New York City, and the nation;

WHEREAS, on October 19, 2017, *Day's End* received unanimous support from Community Board #2, which adopted a Resolution in Support of *Day's End* with 43 Board Members in favor, and also has received endorsements from numerous historic, arts, environmental, community and waterfront organizations;

WHEREAS, subject to the terms and conditions of this Agreement, the Whitney desires to make a contribution to the Trust, supporting the Park, of the large, site-specific, public sculptural work of fine art *Day's End* to be designed, developed, fabricated, and installed in the Park (the "Sculpture Installation") partially within the Hudson River and partially along the southern portion of the Gansevoort Peninsula in the exact site of the former pier as set forth on Exhibit A attached hereto (the "Project Area");

WHEREAS, the 2018 Amendment to the Act authorizes the permanent installation of *Day's End* at the location of the original Pier 52 shed, which installation once donated to the Trust will be maintained and repaired by the Whitney, and requires that any agreement between the Trust and Whitney be posted on the Trust's website for the duration of the existence of the Sculpture Installation in the Park;

WHEREAS, the Trust and the Whitney have each determined that the interests of the Park and those of the public will be best served by having the Whitney provide, in cooperation with the Trust as set forth in this Agreement, the installation, insurance, and maintenance of the Sculpture Installation; and

WHEREAS, the Trust and the Whitney desire to memorialize the terms and conditions for the parties' respective commitments and performance obligations for the development of the Sculpture Installation, including, but not limited to, the design, public review and approval processes, construction, and maintenance.

NOW THEREFORE, in consideration of the mutual covenants set out herein, the parties agree as follows:

1. Description of Project

The Sculpture Installation consists of the design, development, fabrication, installation, and long-term maintenance and conservation of a large, site-specific public sculptural work of fine art by the artist David Hammons (the "Artist"). The sculpture is entitled *Day's End* and will be approximately 52 feet tall, 325 feet long and 65 feet wide and installed at the site of the original footprint of the historic Pier 52 shed and pier that once stood along the south side of the Gansevoort Peninsula. The Artist intends the sculpture to serve as a tribute to Gordon Matta-Clark's celebrated 1975 artwork, also called *Day's End*, which consisted of an artistic transformation of the Pier 52 shed when it was still extant. A preliminary depiction of the installed sculpture is attached hereto as Exhibit B.

2. *Permits & Approvals*

The Whitney and the Trust will jointly use diligent efforts to secure all governmental or other permits, consents, and approvals necessary or desirable (collectively, the "Approvals") for the Sculpture Installation on an agreed-upon schedule. The parties have identified the Approvals on the list attached hereto as Exhibit C and a construction schedule (the "Schedule") as set forth in Exhibit D attached hereto. Out-of-pocket costs incurred by the Whitney and the Trust in connection with the Approvals and the items set forth on the Schedule will be paid by the Whitney or reimbursed by the Whitney to the Trust, provided, however, that to the extent any out-of-pocket costs are incurred by the Trust, such costs shall be subject to the Whitney's prior review and reasonable approval.

3. *Site Location, Plans, Construction & Schedule*

Site Encumbrances. The Trust represents and warrants that, except for that certain Lease Agreement dated June 18, 2012 between the Trust and Texas Eastern Transmission, LP ("Texas Eastern"), which grants a long term right-of-way for the construction, operation and maintenance of a natural gas pipeline (the "Pipeline Agreement"), the Trust has not entered into any other easement, lease, or encumbrance affecting the Project Area. The Project Area shall be subject to the Pipeline Agreement, and it is acknowledged that the Sculpture Installation is being pursued in connection with the Trust's right to develop and maintain the Hudson River Park. The Trust further represents that it is not aware of any other easement, lease or encumbrance affecting the Project Area, except that there are New York City sewer and water lines located in proximity to the Project Area. The Trust covenants that from the date hereof, the Trust will not grant any additional lien, tenancy, encumbrance, easement or other interest on the Project Area that would be superior to the rights of the Whitney hereunder or would adversely affect the rights of the Whitney hereunder.

Site Control. The Trust represents that it has the power and authority, and is duly authorized, to enter into and consummate this Agreement and no additional approvals or consents are required to be obtained by the Trust to execute and deliver this Agreement and to perform the obligations hereunder.

Plans. The Whitney will hire and direct the architects, engineers, and contractors necessary to develop plans for the Sculpture Installation. In connection with the construction of the Sculpture Installation, the Trust will have the right to review and approve the proposed Construction Manager, who will hold all construction contracts for the Sculpture Installation; the Marine Contractor, who may be a subcontractor to the Construction Manager; and the plans (hereafter, the

“Construction Plans”) for conformance with the Trust’s established standards, such approval not to be unreasonably withheld or delayed. Within twenty (20) business days after a request for approval by the Whitney, the Trust will either (i) provide written approval or (ii) provide a written notice setting forth in detail the reasons why such approval was withheld and thereafter respond to any revised request for approval within fifteen (15) business days.

The Trust acknowledges that (i) it has received the 100% Construction Drawings (issued for review March 30, 2018) for the Sculpture Installation, and (ii) the following professionals have also been approved: Guy Nordenson and Associates (Structural Engineer), Langan (Geotechnical Consultant), COWI (Marine Engineer), AKRF (Environmental Consultant), RWDI (Wind Engineer) and Hunter Roberts (Construction Manager). The plans for the Sculpture Installation include a removable cross bar on the west side of the Sculpture Installation in order to accommodate any gas pipeline repair or maintenance by Texas Eastern within the Project Area, pursuant to the Pipeline Agreement or any work by the Trust to install or maintain a future beach on the south side of the Gansevoort Peninsula. The Whitney shall be responsible for compliance with the provisions of the Pipeline Agreement relating to notice and/or required approvals from Texas Eastern for the Sculpture Installation.

Construction. The Whitney will fabricate, install, and construct the Sculpture Installation substantially in accordance with the approved Construction Plans and Approvals. The Whitney and the Trust will use diligent and collaborative efforts to adhere to the Schedule. Subject to the Trust and the Whitney receiving all Approvals, the Trust will grant an access permit, substantially in the form attached hereto as Exhibit E, to the Whitney to provide the Whitney and its contractors the right to construct and install the Sculpture Installation. Such permit will also set forth the procedures should any modifications or amendments to the Construction Plans be required while construction is in process. The Trust will execute and deliver such permit within fifteen (15) business days after a request therefor. There may be existing construction work being performed by the Trust or other State or City agencies in the Park or on the property adjacent to the Park, in both cases, outside of the Project Area. In such instances, the Trust will, and in the case of other governmental agencies, the Trust will use commercially reasonable efforts to ensure that such other governmental entities will, create a construction logistics plan to minimize interference with the Whitney’s construction of the Sculpture Installation. In the event that the Trust is constructing on the Gansevoort Peninsula prior to the Whitney commencing the Sculpture Installation, then the Whitney and its contractors must create a construction logistics plan that minimizes interference with the construction work by the Trust. The parties acknowledge that such logistics plan, if undertaken on property adjacent to and not within the Park, may be subject to approval by governmental entities, other than the Trust, in the sole discretion of such other entities. The Whitney will obtain from each of its construction contractors the insurance, warranties and indemnification with respect to the services and work provided, for both the Trust and the Whitney in their respective roles, as set forth below in this Agreement.

4. *Ownership*

Upon completion of construction of the Sculpture Installation, the Whitney will donate the Sculpture Installation to the Trust and provide documentation of the transfer of title. Upon the transfer of title to the Trust, the Sculpture Installation shall become a part of the Park.

5. Maintenance & Stewardship

Maintenance Plan. Promptly following its engagement of a construction manager for the Sculpture Installation, the Whitney will deliver to the Trust a proposed maintenance plan (the "Maintenance Plan") for the Sculpture Installation for the Trust's review and reasonable approval, such approval not to be unreasonably withheld or delayed. The Trust will provide its approval or a full set of its comments no later than thirty (30) days after the Trust receives the proposed Maintenance Plan. In the event the Trust provides comments, the Trust will provide its approval or a full set of its comments no later than twenty (20) days after the Trust receives any revised proposed Maintenance Plan. Once approved, the Maintenance Plan may be modified from time to time with the mutual agreement of the parties.

Maintenance Work. After installation of the Sculpture Installation is complete, the Whitney will be responsible for hiring and directing the contractors necessary to maintain the Sculpture Installation in good condition over the term of this Agreement in accordance with the mutually agreed upon Maintenance Plan, and to perform any required inspections in accordance with the schedule attached hereto as Exhibit F. In-water inspections will be performed by a qualified engineer selected and employed by the Whitney and approved by the Trust and shall be done no less than every five years or more frequently if determined to be necessary by the Whitney's engineer. In connection with the foregoing obligations, once the Trust approves the Maintenance Plan, it will grant a permit, substantially in the form of Exhibit G attached hereto, to the Whitney to provide the Whitney and its contractors' access to the Project Area for the purposes of inspecting and maintaining the Sculpture Installation. The Trust will execute and deliver such permit within fifteen (15) business days after a request therefor. In addition, the Whitney will also be responsible for hiring and directing the contractors necessary to remove and replace any portion of the Sculpture Installation which is required pursuant to the Pipeline Agreement to accommodate any repair or maintenance on the gas pipeline on the Project Area by Texas Eastern and any work by the Trust to install or maintain a future beach on the south side of Gansevoort Peninsula. Access to the Project Area for maintenance and repair of the Sculpture Installation may need to be coordinated with other construction work being performed by the Trust or other State or City agencies in the Park or on the property adjacent to the Park.

The parties agree to work together in good faith to determine whether the Trust engages any contractors or specialists that provide services throughout the Park (the "Park-wide Contractors"), such as, for example, a diver that performs subsurface inspections, that may also perform inspections of and maintenance for the Sculpture Installation. To the extent there are any efficiencies in using a common contractor, the Whitney may elect to engage the Park-wide Contractors, at the Whitney's cost and expense, to perform any of its obligations hereunder, and in such case, shall reimburse the Trust for any costs of Park-wide Contractors directly attributable to the Sculpture Installation. The costs for reimbursement of such Park-wide Contractors shall be passed along to the Whitney on the same basis as the Trust is charged for such Contractors.

Trust Responsibility.

Notwithstanding the foregoing, the Trust's staff will be responsible for the following basic maintenance items that will be performed by its regular staff or agents at the Trust's cost: (i) removing litter or debris that may gather around the portion of the Sculpture Installation that is located on land, and (ii) cleaning any graffiti up to a height of ten (10) feet on any portion of the Sculpture Installation that is located on land.

The Whitney will not have responsibility for the maintenance of the waters, the land area, and the riprap or other shoreline conditions located within the Project Area or any areas outside of the Project Area, which shall be the responsibility of the Trust, at its cost and expense. The Trust will maintain the waters, land area, and riprap or other shoreline conditions in good clean order and condition, to the extent possible given river conditions.

6. Costs & Funding

Prior to the issuance of an access permit for construction of the Sculpture Installation from the Trust to the Whitney, the Whitney will provide the Trust with documentation reasonably satisfactory to the Trust to evidence that the Whitney has the requisite funding for the construction and maintenance of the Sculpture Installation. The Whitney will be responsible for all out-of-pocket costs associated with the design, development, fabrication, and installation of the Sculpture Installation. To the extent any out-of-pocket costs are incurred by the Trust, such costs shall be reimbursed by the Whitney, subject to the Whitney's prior review and reasonable approval of such costs before they are incurred. The Whitney may endeavor to cover these costs with funds generated from sculpture-related fundraising efforts and initiatives, however, notwithstanding such efforts, any shortfall in fundraising or cost overruns, and all other costs of any nature whatsoever, whether ordinary or extraordinary, associated with the Sculpture Installation, shall, except as set forth herein, be the sole responsibility of the Whitney.

After installation is complete, the Whitney will thereafter be responsible for the cost of inspecting and maintaining the Sculpture Installation in accordance with the Maintenance Plan and maintaining the signage related to the Sculpture Installation.

The Whitney will provide \$25,000 in a maintenance escrow fund (the "Maintenance Escrow Fund") in connection with the annual maintenance costs set forth in the Maintenance Plan. The amounts for the Maintenance Escrow Fund shall be placed by the Trust into a designated maintenance fund. Such amounts shall be revisited at either party's request for the purpose of increasing or decreasing the amount in the Fund to an amount equal to the average annual maintenance amounts expended calculated using the three fiscal years prior to the date of the request (the "Three Year Average"). If the Three Year Average is more than the amount then currently in the Maintenance Escrow Fund, the Whitney will provide additional funds so that the new amount in the Maintenance Escrow Fund is equal to the greater of the Three Year Average or \$25,000.

The Whitney will maintain inspection and engineering reports and cost documentation regarding the Three Year Average and, if requested by the Trust, will share such reports with the Trust.

In the event that the Trust determines the Whitney is not maintaining the Sculpture Installation pursuant to the Maintenance Plan and this Agreement, the Trust will notify the Whitney in writing, identifying the specific maintenance or repair issue and request that the Whitney conduct the proper maintenance or repair (the "Demand Letter"). If the Whitney does not respond to the written request within thirty (30) business days of the date of the Demand Letter (or in the event of an emergency or an urgent issue, within two business days), the Trust shall conduct the necessary maintenance or repair and will reimburse itself from the funds contained in the Maintenance Escrow Fund. The Whitney shall both (i) reimburse the Trust for any costs expended by the Trust pursuant to this paragraph that exceed the funds contained in the Maintenance Escrow Fund and (ii) replenish the Fund back to \$25,000 or the Three Year Average, whichever amount is higher.

7. Physical Integrity and Views

The Trust will cause construction or future operations within its control to protect the physical integrity of the Sculpture Installation. The Trust will provide plans to the Whitney for the Gansevoort Peninsula before such plans are finalized and will update and consult with the Whitney as such plans proceed, provided, however, that all final decisions regarding plans for the Gansevoort Peninsula shall be made by the Trust in its sole and absolute determination. Such consultation would provide an opportunity for the Whitney to discuss any concerns regarding the view of the Sculpture Installation, consistent with the Trust's intent to design the rest of the Gansevoort Peninsula as a landscaped public park area with a mix of active and passive program elements, including one-story buildings that are typical in parks.

The Trust has advised the Whitney that there may be a period of time between the completion of the Sculpture Installation and the commencement of the construction on the Gansevoort Peninsula by the Trust to convert the Project Area to usable, landscaped park space accessible to the public (the "Limited Access Period"). During the Limited Access Period, the Trust will not permit the general public to access the Project Area, however, the Trust will permit authorized Whitney representatives and their guests to access the Project Area if deemed safe, with Trust pre-approval. The Whitney shall notify the Trust at least two days in advance of any such access. If approved by the Trust, the Whitney will be responsible for each guest's signing the Trust's form of "Release, Risk Acknowledgement, and Covenant not to Sue". Notwithstanding the foregoing, the Whitney may elect, at the Whitney's cost, to make the southern edge of the Gansevoort Peninsula accessible to the public during the Limited Access Period, provided that any such plans shall be subject to the Trust's prior review and approval.

8. Liability & Insurance

(a) For the term of the Agreement, the Whitney will assist the Trust in identifying a named peril policy reasonably acceptable to the Trust, with the Trust as named insured, covering repair and restoration for physical damage to the Sculpture Installation and removal and site restoration in the case of a total loss. The annual premium associated with this insurance will be covered by the Whitney and paid to the Trust in full within thirty (30) days of the Trust rendering an invoice for such cost.

(b) The Trust will maintain adequate general liability insurance coverage to protect against third-party Claims (as defined hereafter) relating to the Sculpture Installation consistent with the terms of the State Lease, subject to any changes to such State Lease. To the extent such general liability coverage is in effect, the Trust shall name the Whitney Museum of American Art as an additional insured with respect to Claims relating to the Sculpture Installation. The parties understand that this paragraph 8(b) is subject to any future changes to the State Lease regarding insurance coverage carried by the Trust and that the Whitney has been advised by the Trust that, pursuant to a pending amendment to the State Lease, such coverage may not be available to the Whitney as an additional insured in the future. The Trust agrees to notify the Whitney within 30 days of an amendment or modification of the State Lease that affects or modifies this paragraph 8(b).

(c) During the period of construction of the Sculpture Installation and thereafter during any maintenance work performed on the Sculpture Installation, the Whitney and/or all contractors performing services relating to the construction and maintenance of the Sculpture Installation, shall be required to carry commercial general liability, automobile liability, workers compensation, employers liability and disability benefits insurance and other applicable insurance satisfactory to the Trust, consistent with all coverages, terms and amounts provided at Exhibit H, and to provide evidence of coverage prior to any access to the Project Area.

(d) During the (i) construction of the Sculpture Installation and (ii) active work related to the maintenance of the Sculpture Installation by the Whitney or its contractors ((i) and (ii) collectively, the "Construction Work"), the Whitney agrees to defend, indemnify and hold the Trust, the State of New York, the New York State Office of Parks, Recreation and Historic Preservation, the New York State Department of Environmental Conservation, the City of New York, the New York City Department of Parks and Recreation and each of their respective commissioners, directors, officers, agents and employees (collectively the "Indemnitees") harmless from any and all claims, judgments and liabilities to the extent such claims, judgments and liabilities are for injuries to persons (including death) and damage to property if and to the extent the same results from any negligent act, omission, fault or default of the Whitney or its Construction Manager or contractors, or their agents, employees, servants, independent contractors and subcontractors and from any claims against, or liability incurred by the Indemnitees by reason of claims against the Whitney or its Construction Manager or its contractors, or their employees, agents, servants, independent contractors and subcontractors for any matter whatsoever in connection with the construction or the maintenance of the Sculpture Installation, including claims for compensation, injury or death ("Claims"), and agree to reimburse the Indemnitees for reasonable attorneys' fees incurred in connection with the above. The Whitney shall be solely responsible for the safety and protection of all its contractors, or the employees, agents, servants, independent contractors, or subcontractors of the Whitney, and shall assume all liability for injuries, including death, that may occur to said persons due to the negligence of the Whitney or the negligence, fault or default of its Construction Manager and contractors or their respective agents, employees, servants, independent contractors or subcontractors.

The Sculpture Installation, once installed, is a part of the Hudson River Park and is owned and controlled by the Trust. The Whitney shall not be liable and its indemnity shall not extend to (i) any Claims arising out of the Sculpture Installation as a part of the Park that is unrelated to the

Whitney's Construction Work or to (ii) any Claims related to the public's use of the Park or any other use of the Park that is unrelated to the Whitney's Construction Work.

This Section 8(d) shall survive the expiration or earlier termination of the Agreement.

(e) In the event of material loss or damage of the Sculpture Installation, the determination of whether to restore or rebuild the Sculpture Installation shall be made by the Whitney which will consult with the Trust. If it is determined that the Sculpture Installation should be restored or rebuilt (and if there are sufficient funds available for such restoration or rebuilding), the Trust shall assign the proceeds from the named peril property policy to the Whitney and the Whitney shall be responsible for such restoration or rebuilding with the insurance proceeds paid out in connection with the loss or damage. If the Whitney determines that the Sculpture Installation shall not be restored or rebuilt, the Trust shall assign the proceeds from the named peril policy to the Whitney and the Whitney shall be responsible for the removal of any elements of the Sculpture Installation that may be on the Project Area and the restoration of the Project Area with the insurance proceeds paid out in connection with the loss or damage. Upon completion of such removal and restoration of the Project Area, any remaining insurance proceeds shall go to the Whitney for reimbursement of its fabrication, construction and installation costs, following which this Agreement between the parties will terminate. Should the proceeds of insurance be inadequate for rebuilding, Whitney shall not be obligated to provide additional funds for such rebuilding; any funding in addition to the proceeds of insurance will be at the Whitney's sole discretion. Notwithstanding anything to the contrary contained herein, the Whitney shall, in the event it elects not to rebuild following an event of material loss or damage of the Sculpture Installation, be responsible for the full cost of the removal of any elements of the Sculpture Installation that may be on the Project Area and the restoration of the Project Area irrespective of the adequacy of insurance proceeds.

9. Signage & Donor Recognition

To facilitate fund-raising and to acknowledge parties responsible for the realization of the project, the Whitney will be permitted to recognize publicly donors and supporters of the project by providing customary credits in sculpture-related materials and on signage posted adjacent to the Sculpture Installation and the Project Area. The standard formats, locations, and parameters of such credits and signage will be the subject of a joint review by the parties for consistency with, or in order to be complementary to, the Trust's signage conventions. Each party shall respond to a request for approval or comment within fifteen (15) business days of such request, and any failure to respond to such request within fifteen (15) business days following receipt of notice from the other party of its failure to respond within such fifteen (15) business day period shall be deemed an approval. Subject to any pre-existing conflicting obligations, the Trust shall honor all such donor-recognition obligations by permitting the posting of the required signage and including the appropriate donor credits in any sculpture-related materials produced by the Trust.

10. Intellectual Property

The Whitney represents and warrants that the Sculpture Installation will not infringe on the intellectual property rights of any third party. The Whitney shall be responsible for securing from the Artist a license agreement substantially in the form of agreement attached hereto as Exhibit I,

addressing the royalty-free license for the use of intellectual property and modification and removal of the Sculpture Installation (the “Artist’s License Agreement”). The Trust and the Whitney further agree that all promotional materials and Depictions will comply with the terms of the Artist’s License Agreement, and that any reproduction or description of the Work (as defined in the Artist’s License Agreement) in marketing materials shall identify the Work as being in Hudson River Park.

11. Programming

Each party will be entitled to carry out sculpture-related programming, but the parties will seek to coordinate their efforts in this regard. They will also seek to develop and pursue opportunities for programmatic collaboration (e.g., joint exhibitions, joint publications, joint promotional or fundraising campaigns, reciprocal website links, interpretive materials, etc.). Subject to the terms and conditions set forth in Section 7 of this Agreement, the Whitney will be granted reasonable access to the Sculpture Installation and adjacent areas for the purpose of conducting sculpture-related programming. Such programming shall be subject to Park Rules and Regulations and safety conditions, including an obligation to obtain any required permits from the Trust, such permits not to be unreasonably withheld or delayed. The Trust shall respond to request by the Whitney for a permit within fifteen (15) business days.

12. Termination

The Whitney shall have the right in its sole discretion, at any time prior to commencement of installation of the Sculpture Installation to terminate this Agreement, provided, however, that the Whitney shall remain obligated to reimburse the Trust for any out-of-pocket costs incurred by the Trust for which the Whitney is responsible under this Agreement. The Trust shall have the right in its sole discretion to terminate this Agreement if (i) the Whitney is unable to provide documentation reasonably satisfactory to the Trust to evidence that the Whitney has the requisite funding for the construction and maintenance of the Sculpture Installation as set forth in Section 6 of this Agreement by October 2022; or (ii) installation of the Sculpture Installation has not commenced by October 2022. Notwithstanding any such termination by the Trust, the Whitney shall remain obligated to reimburse the Trust for any out-of-pocket costs incurred by the Trust for which the Whitney is responsible under this Agreement.

13. Further Assurances

Each party hereunder shall execute and deliver, or cause to be executed and delivered, such additional instruments, assignments, assurances, certificates and documents, and shall do such further acts, as may be reasonably requested by the other party to carry out the provisions of this Agreement.

14. Term of Agreement

The term of the Agreement, unless earlier terminated as set forth above, and the anticipated duration of the project, will be coterminous with the State Lease granted to the Trust by the State (i.e., through March 31, 2112). If the State Lease is renewed, the agreement will renew for the

same lease term. If the State Lease is not renewed, the Sculpture Installation shall become the property of the State, by and through its Office of Parks, Recreation and Historic Preservation and its Department of Environmental Conservation.

15. No Arbitration: Legal Proceedings

Disputes involving this Agreement may not be submitted to binding arbitration but must instead be heard in a court of competent jurisdiction of the State of New York in the County of New York. The Whitney and the Trust agree to waive all rights to a trial by jury in any legal proceedings brought by either party.

16. Notice

All notices and demands shall be given in writing in hand or by U.S. Mail or by nationally recognized courier service (such as Federal Express or UPS), and shall be effective when sent. Notices shall be addressed as set forth below for the respective party, provided that if any party gives notice of a change of name or address, notices to that party shall thereafter be given as specified in that notice.

If to the Trust: Hudson River Park Trust
Pier 40, 2nd Floor
353 West Street
New York, NY 10014
Attention: President

With a copy to: Hudson River Park Trust
Pier 40, 2nd Floor
353 West Street
New York, NY 10014
Attention: General Counsel

If to Whitney: Whitney Museum of American Art
99 Gansevoort Street
New York, NY 10014
Attention: Director

With a copy to: The Whitney Museum of American Art
99 Gansevoort Street
New York, NY 10014
Attention: General Counsel

17. Severability.

In the event that any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement but this Agreement shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

18. Waivers and Amendments.

This Agreement may not be modified, changed, amended or supplemented and no provision hereof may be waived except by an express written agreement signed by the parties hereto (or their respective permitted successors or assigns).

[Signatures Follow]

IN WITNESS WHEREOF, the parties hereto have duly signed this Agreement as of the day and year first above written.

WHITNEY MUSEUM OF AMERICAN ART

By: 
Adam D. Weinberg
Alice Pratt Brown Director

HUDSON RIVER PARK TRUST

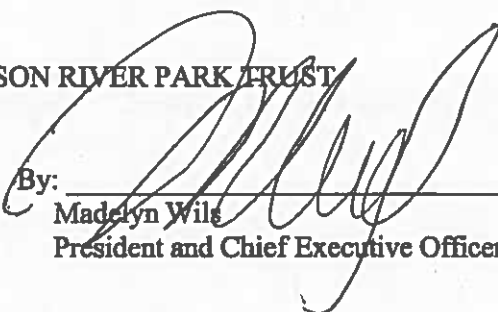
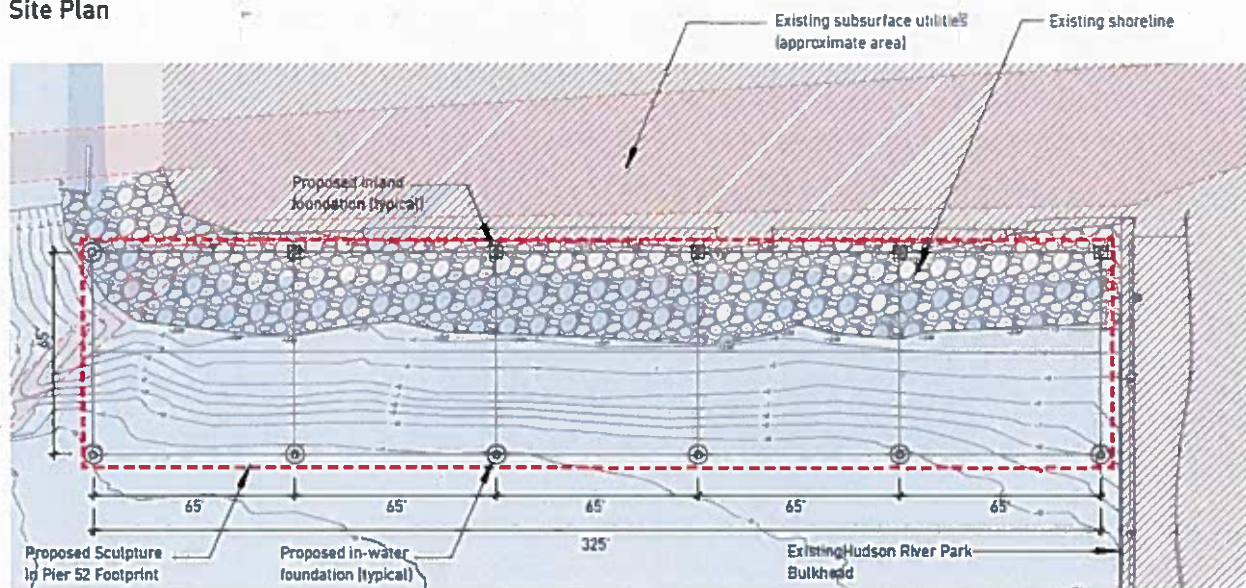
By: 
Madelyn Wils
President and Chief Executive Officer

EXHIBIT A

THE PROJECT AREA

Pier 52 Footprint at Gansevoort Peninsula¹

Site Plan



¹ Preliminary: subject to final design and regulatory approvals.

EXHIBIT B
PROPOSED SCULPTURE



EXHIBIT C

PROJECT PERMITS

United States Army Corps of Engineers permit under Section 10 of the Rivers and Harbors Act

New York State Department of Environmental Conservation (NYSDEC) permit under Article 15 of the
New York Environmental Conservation Law (ECL) Protection of Waters

Coastal Zone Consistency Determination

Amendment to Park's General Project Plan by Hudson River Park Trust

EXHIBIT D

PROJECT SCHEDULE

<u>Activity:</u>	<u>Anticipated Time Period</u>
File Permit Applications	Fall 2018
Pile Driving, Pile Cap and Concrete Column Installation	May to August 2019
Structural Frame Construction and Close-out	Sept. 2019 to May 2020

EXHIBIT E

FORM OF PERMIT



PERMIT MUST BE KEPT ON SITE WITH PERMITTEE AT ALL TIMES

PERMIT FOR USE OF PROPERTY (Short Term Use Only)

Permit No. _____
Name of Permittee: _____ Whitney Museum of American Art
Address: _____ 99 Gansevoort Street
_____ New York, New York 10014
Social Security #: _____ or Fed. I.D.#: _____
Contact/Name & Title: _____ Phone: _____
_____ Fax: _____
Cell Phone: _____ Email: _____

This Permit for Use of Property dated as of this [DATE] is issued to the Whitney Museum of American Art (together with its employees, agents, representatives, collectively, the "Whitney" or "Permittee") by the Hudson River Park Trust (the "Trust" or "Permitter").

WHEREAS, pursuant to the Hudson River Park Act, Chapter 592 of the laws of 1998 of the State of New York (as amended, the "Act"), the Trust is responsible for development, operation and maintenance of the Hudson River Park (the "Park") and the improvements located thereon; and

WHEREAS, the Park includes both the land portion of the Gansevoort Peninsula and the water portion to the south of such Peninsula as generally shown in Schedule I attached hereto (hereafter referred to in this Permit as the "Premises"); and

WHEREAS, pursuant to the Large-Scale Donation, Installation, and Maintenance Agreement dated [] (the "Installation Agreement"), the Whitney, in support of the Park, will make a contribution to the Trust of the large, site-specific, public sculptural work of fine art, Day's End, to be installed in the area identified as the Project Area (the "Project Area") in Exhibit A of the Installation Agreement (the "Sculpture Installation"); and

WHEREAS, the Whitney requires temporary work space for construction staging and access to the Project Area in order to construct the Sculpture Installation as shown in Schedule II attached hereto (the "Temporary Workspace"); and

WHEREAS, on [], 2018, the Board of Directors of the Trust ratified the "Amendment to Park's General Project Plan by Hudson River Park Trust" to include the Sculpture Installation; and

WHEREAS, on [], the New York State Department of Environmental Conservation issued its

Permit under Article 15 of the New York Environmental Conservation Law Protection of Waters authorizing construction of the Sculpture Installation (the "DEC Permit"); and

WHEREAS, on [____], the Department of the Army, United States Corps of Engineers ("ACOE") issued its Permit authorizing construction of the Sculpture Installation under Section 10 of the Rivers and Harbors Act (the "ACOE Permit"); and

WHEREAS, Permittee now seeks authorization to construct the Sculpture Installation as is more particularly detailed in the Scope of Work annexed hereto as Exhibit A (the "Work"); and

WHEREAS, the Trust has determined that the construction of the Sculpture Installation has independent utility to the Trust apart and separate from the redevelopment and reconstruction of adjacent areas as a public park; and

WHEREAS, Permittee has confirmed that the Work is consistent with the DEC Permit, ACOE Permit and all applicable federal, state and local laws, regulations and requirements (hereafter, the "Approvals"); and

WHEREAS, Permittee proposes that the Work shall be performed on Permittee's behalf by [_____] ("____") pursuant to a contract (the "____ Contract") entered into between Permittee and [_____] (together with any subcontractors engaged by [_____] pursuant to such contract, and any other consultants, contractors and subcontractors engaged by Permittee, (collectively, the "Contractors") to be performed at Permittee's sole cost and expense that obligates [_____] to supervise and monitor the performance of the Work by the Contractors at the Premises (the "General Contractor") to assure that the Sculpture Installation is performed strictly in accordance with the Work and the Approvals (collectively, the "Applicable Work Requirements");

NOW, THEREFORE, the Trust hereby grants this Permit to the Permittee, subject to the following covenants and conditions:

1. The Trust hereby grants Permittee the right to perform the Work, as is more particularly detailed in the Scope of Work attached hereto as Exhibit A. **No other work of any kind shall be performed unless a further, additional "Permit for Use of Property" shall be granted by the Trust to Permittee.**
2. All Work shall be done in compliance with the Applicable Work Requirements, including but not limited to the DEC Permit and ACOE Permit. Should the Trust determine in good faith that the conduct of the Work is inconsistent with or otherwise contravenes any Applicable Work Requirement, Permittee shall cause all Work to halt as directed by the Trust pending compliance therewith, provided the Permittee has failed to cure such noncompliance following its receipt of a five-business-day notice of noncompliance from the Trust, except if the matter is urgent such that the noncompliance could result in harm to the environment, within the receipt of a one-business day notice.
3. All Work shall be monitored daily by Permittee and/or General Contractor on behalf of Permittee. On a weekly basis until the expiration or sooner termination of this Permit, Permittee shall cause to be provided to the Trust a summary prepared by General Contractor of all work undertaken, including but not limited to a daily breakdown by activity, the number of Contractor personnel on site, any issues encountered during the performance of any Work and

how such issues were addressed, and a projected schedule for upcoming Work, which such weekly report shall be certified by General Contractor (the "Weekly Summary").

4. Permittee shall comply with all notification requirements provided in Paragraph 5 of the Pipeline Agreement as defined in the Installation Agreement, including notifying Texas Eastern's Area Manager not less than twenty-one (21) days in advance of any proposed work affecting Texas Eastern's right-of-way in the Trust's Premises. Texas Eastern's representative shall have the option of being present at any time work is performed in the areas affecting Texas Eastern's right-of-way. Permittee shall call the Area Manager 72 hours (3 business days) in advance in order to obtain standby staff at (908) 757-1212 or such other number as provided by Texas Eastern. Permittee shall provide a copy of any written correspondence between the Permittee and Texas Eastern to the Trust.
5. Permittee shall notify the local Dig Safe operator (dial 811) prior to any planned excavation or pile driving on or in the vicinity of the Texas Eastern natural gas pipeline or any other utility located on the Premises that could be impacted by Permittee's Work.
6. Permittee shall promptly provide the Trust with copies of all reports exchanged by the Permittee and/or engineers, and Contractors or General Contractor with the New York State Department of Transportation ("DOT"), DEC, ACOE and other governmental regulatory authorities or entities related to the Project Area or Temporary Workspace during the term of this Permit.
7. Access to the portion of the Premises delineated in the Scope of Work shall be controlled such that only persons performing and supervising the Work may gain entry. Permittee shall not allow access to any portion of the Premises not open to the public, including the Temporary Workspace and the Project Area, by any other entity without the Trust's prior written consent, except as provided for in Conditions 4 and 28 of this Permit in which the Trust's prior written consent is not required.
8. Permittee shall keep the access gate closed and locked at all times except when construction vehicles and equipment are entering the Premises to access the Temporary Workspace. Permittee is responsible for security of all its and the Contractors' materials and equipment.
9. No parking, staging, or storage is authorized outside of the Temporary Workspace granted herein. Permittee shall be responsible for the full cost of repair for any damage to the Project Area, Temporary Workspace or adjacent areas caused by or resulting from any activity or use of the Premises by Permittee.
10. This Permit shall be in effect upon approval by the Trust, which effective date ("Effective Date" is set forth below next to the Trust's signature block) and shall continue until the earlier to occur of: (a) termination or revocation of this Permit for cause as is expressly set forth herein after the giving of any applicable notice and the expiration of any applicable opportunity to cure, (b) Permittee's failure to commence construction by October 2022, or (c) the mutual agreement of the Trust and Permittee to terminate. Permittee acknowledges that this Permit may only be extended by written instrument executed by both the Trust and Permittee.
11. All Work shall be performed by Permittee at Permittee's sole expense and at Permittee's risk.

Permittee shall bear the risk of loss in its entirety.

12. Fee – shall be waived

13. Permittee will not assign or sublet the Premises, Project Area, Temporary Work Space or any right or interest in, to or under this Permit, to any other parties in part or in whole; any instrument purporting to so assign or sublet shall be null and void and of no force and effect. The parties agree that this instrument is not a lease but is merely a permit to occupy and use, and that therefore a landlord-tenant relationship is not hereby created.

14. At all times during the performance of the Scope of Work or for such other time periods as the Trust may require, the Permittee, at its sole cost and expense, shall purchase and maintain the insurance described in Exhibit B.

15. Indemnification:

a. Permittee shall defend, indemnify and save harmless Hudson River Park Trust, the People of the State of New York, the New York State Executive Department, the New York State Office of Parks, Recreation and Historic Preservation, the New York State Department of Environmental Conservation, the City of New York, the New York City Department of Parks and Recreation, and each of their commissioners, officers, agents, employees, successors and assigns (“Indemnitees”) from and against any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses, including but not limited to reasonable attorney fees, and judgments that: (1) arise out of injury to any person, or persons, including death, or any damage to property of any nature, occasioned wholly or in part by any act(s) or omission(s) of Permittee or of the directors, officers, employees, guests, invitees, contractors, subcontractors, consultants, representatives or agents of Permittee, that occur on or in proximity to the Premises, or arise out of or as a result of this Permit, or (2) relate to or arise from any and all liens and encumbrances which may be filed or recorded against the Premises or any public improvement lien filed against any funds of Hudson River Park Trust, the State or the City of New York, as a result of actions taken by or on behalf of Permittee, its directors, officers, contractors, subcontractors, licensees, agents, representatives, employees, guest or invitees.

b. Further, Permittee agrees to defend, indemnify and hold harmless Hudson River Park Trust, the People of the State of New York, the New York State Executive Department, the New York State Office of Parks, Recreation and Historic Preservation, the New York State Dept. of Transportation, the New York State Department of Environmental Conservation, the City of New York, the New York City Department of Parks and Recreation and each of their respective commissioners, officers, agents, employees, contractors, subcontractors, licensees, successors and assigns from and against any and all loss, damage or liability of whatever kind or nature, arising out of, or in any way related to the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials (as hereinafter defined) over, under, in, on or from the Premises caused wholly or in part by Permittee’s acts or omissions, in connection with the Work. For purposes of this subparagraph (b), “Hazardous Material” means:

- i. any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 9601 et. seq.,
 - ii. "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq.,
 - iii. "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq.,
 - iv. "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., and
 - v. "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. 1321 et seq.
- c. Permittee shall include in all agreements it enters into with any Contractor hired in connection with the Work a requirement for such Contractor to defend, indemnify and hold Indemnitees harmless to the full extent and consistent with the provisions of subparagraphs 15(a) and (b) above.
 - d. Anything in this Section 15 to the contrary notwithstanding, nothing in this Permit shall be construed to relieve the Permittee from responsibility to the Trust for any loss or damage caused the Trust wholly or in part by the negligent acts or omissions of the Permittee or any Contractor.
 - e. The provisions of this Section 15 shall survive the expiration or sooner termination of this Permit.

16. Premises "as-is":

- a. Permittee has inspected the condition of the Premises and accepts the Temporary Workspace and Project Area "as-is" and will not at any time make any claim that the Premises or structures thereon are not in suitable repair or condition for the uses and purposes of this Permit, nor will Permittee at any time make any claim for or by way of reduction of charge, or otherwise, for damage arising from or consequent upon any repairs that the Trust or Permittee may do or cause to be done or in consequence of the occupation of the Premises by the Trust or its agents or contractors.
- b. The Trust has not made nor does it make any representation or warranty as to the condition of the Premises or its suitability for any particular use or as to any other matter affecting this Permit.

17. Permittee is responsible for cleaning all areas of the Temporary Workspace and Project Area affected by the Permittee's use. Permittee shall keep the Temporary Workspace and Project Area in good, clean and safe condition at its sole cost and expense.

18. Permittee shall be responsible, at its sole cost and expense, for the regular collection, storage and disposal of rubbish and refuse generated in and about the Temporary Workspace and

Project Area in an orderly and sanitary manner and in compliance with all laws, codes, rules and regulations. Rubbish generated at the Temporary Workspace and Project Area must be removed from the Premises on a regular basis and may not be stored by or near the Temporary Workspace. Permittee must make private arrangements for refuse removal which must be approved in advance by the Trust. Permittee shall not place or store, or allow others to place or store, any debris, garbage or any materials commonly referred to as "junk" within the Premises.

19. Toxic cleaning agents are prohibited from use on the Premises except as approved by the Trust. This applies to the cleaning of fixtures and equipment located in and around the Premises. Permittee must ensure that equipment and cleaning of equipment and fixtures does not leak any type of fluid, including water, into/onto the Park or the Hudson River.
20. Permittee may not cause the closure of any areas of Park to public access except the Temporary Workspace and the Premises, to the extent the Premises are closed to the public as provided for in the Scope of Work, without the prior written consent by the Trust, which consent shall be in the Trust's sole and absolute discretion.
21. The Trust shall have no responsibility whatever for the loss or destruction of any improvements made by the Permittee or for the personal property stored or being used on the Premises other than as a direct result of any negligent acts or omissions of the Trust. The Trust shall not be required to supply any facilities, services or utilities whatsoever to the Premises and shall not have any duty or obligation to make any alteration, change, improvement, replacement, restoration, repair, maintenance or management of the said services and utilities. The payment of all electric and water charges shall be the responsibility of Permittee.
22. The Trust shall not be required to make any repairs occasioned by the act or negligence of Permittee, its employees, consultants, subcontractors, subpermittees, licensees, invitees and/or concessionaires or as a result of acts of God, storms, flood, or other events beyond the direct control of the Trust.
23. In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Permittee hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Permittee's actual receipt of process or upon the Trust's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Permittee must promptly notify the Trust, in writing, of each and every change of address to which service of process can be made. Service by the Trust to the last known address shall be sufficient. The Trust will have thirty (30) calendar days after service hereunder is complete in which to respond.
24. Nothing in this Permit shall be construed to give any person other than the Trust and Permittee any legal equitable right, remedy or claim. This Permit shall be held to be for the sole and exclusive benefit of the Trust and Permittee.
25. Permittee is responsible for complying with any and all applicable Federal, State, and local laws, ordinances, codes, rules and regulations affecting the use of the Premises for the purposes recited including, but not limited to, regulations affecting air and noise. Permittee shall not conduct or allow any use or activity on the Premises inconsistent with law and shall not conduct or allow any use or activity which may require a permit or other approval by a

government agency without having lawfully obtained such permit or approval.

26. This Permit shall be construed under, and be governed by, the laws of the State of New York, excluding conflict of law principles except where the federal Supremacy Clause requires otherwise. No legal proceeding shall be commenced by Permittee against the Trust in any court other than a court of competent jurisdiction of the State of New York in the County of New York. Permittee and the Trust agree to waive all rights to a trial by jury in any legal proceeding to which solely Permittee and the Trust are parties.
27. If any of the provisions of this Permit are held invalid, such invalidity shall not affect or impair other provisions herein that can be given effect without the invalid provisions, and to this end the provisions of this Permit are severable.
28. Permittee shall allow free and complete access to the site for official business purposes to employees of the New York Police Department, Parks Enforcement Patrol, Fire Department of New York and Hudson River Park Trust, and any other representative of the City or State of New York or any federal agency in performance of their duties. Such access shall be subject to the health and safety requirements of the Work.
29. Neither the Trust, the State of New York, the City of New York, nor any of their respective political subdivisions, authorities, agencies, offices, or other entities or any of their respective officers, employees or agents, are parties to the contracts with the Contractors nor in any way responsible to any party for claims of any nature whatsoever arising or which may arise from such contracts with the Contractors. Permittee shall provide the Trust with copies of any and all amendments and modifications to contracts with the General Contractor within three (3) business days of execution thereof.
30. Permittee shall not block through access by the public on the bikeway or walkway in front of or adjacent to the Premises at any time, or stage any equipment or vehicles on the bikeway or walkway at any time. Permittee shall employ flagmen and/or other qualified personnel to assure safety for every vehicular passage across the bikeway or walkway in the adjacent areas. If the Work shall have any impact on the Route 9A bikeway or walkway, Permittee shall obtain any necessary approvals from New York State and/or New York City Department of Transportation.
31. Only vessels necessary for performance of the Work may mobilize at the Temporary Workspace or along the bulkhead. No vessels may tie off directly to the bulkhead or adjacent areas without prior explicit Trust approval.
32. Permittee shall be solely responsible for arranging security and sanitation services to the satisfaction of the responsible agencies of the City and State of New York. Permittee shall obtain any and all necessary permits and licenses to conduct the Work other than the DEC Permit and the ACOE Permit.
33. No person or entity other than the Trust and Permittee has any rights or remedies under this Permit.
34. This Permit may not be altered, modified or amended in any manner whatsoever except by a

written instrument signed by the Trust and Permittee.

IN WITNESS WHEREOF, the parties hereto have executed the Permit as of the date written below.

Date: _____

HUDSON RIVER PARK TRUST

WHITNEY MUSEUM OF AMERICAN ART

By: _____

[Insert name of company officer]

[Insert title of company officer]

By: _____

[Insert name of company officer]

[Insert title of company officer]

SCHEDULE I

The Premises

SCHEDULE II

The Temporary Workspace

EXHIBIT A

Scope of Work

EXHIBIT B

Insurance

EXHIBIT F

INSPECTION AND MAINTENANCE SCHEDULE

[To be developed with Maintenance Plan and Incorporated Herein]

EXHIBIT G
FORM OF PERMIT

PERMIT

Permit No. [_____]

Name of Permittee [_____]
[_____]
Address [_____]
Federal Tax I.D. # [_____]
Contact (Name & Title) [_____]
Phone: [_____]
Cell Phone: [_____]
Email: [_____]
Date: [_____]

Permittee is authorized by the Hudson River Park Trust (“Trust”) to conduct inspection and maintenance work for the *Day’s End* sculpture located at the south side of the Gansevoort Peninsula (“Premises”), as depicted on Exhibit A annexed hereto, pursuant to this permit (“Permit”) and subject to the following terms and conditions:

1. **Fee.** The fee for the Permit is waived.
2. **Security Deposit.** The Security Deposit for the Permit is waived.
3. **Term:** The Term of this Permit shall begin on [_____] at approximately [_____] and extend through [_____] on [_____].
4. **Purpose.** This Permit will grant access to Permittee only for the purposes of conducting inspection and maintenance work for the *Day’s End* sculpture at the location indicated in Exhibit A, and pursuant to the Scope of Work attached hereto as Exhibit B (the “Work”). All Work must be performed in a manner that does not interfere (or minimizes interference) with the operations of any tenant or occupant then on or near the Premises. No work other than that expressly authorized by this Permit may be conducted on the Premises. This Permit does not grant authority for the performance of any construction work or any other operation or use that may require any permit or approval from any public or private party. If required, Permittee must obtain any such authorization, permit or approval at its sole cost and expense. Such compliance includes, any required review, permit or approval by other applicable governmental entities.
5. **Access.** Access to the Premises shall be limited to Permittee and its consultants and contractors [NAME OF CONSULTANTS AND CONTRACTORS]. Permittee shall not allow access to the Premises by any other entity without the prior written consent of the Trust, except that a representative of Texas Eastern may be present to monitor the Work as it relates to the Texas Eastern natural gas pipeline.

6. **Cooperation.** Permittee shall at all times provide reasonable cooperation to the Trust and shall cause its consultant and contractors to provide such cooperation.
7. **Insurance Requirements.** Permittee shall provide and maintain in full force and effect insurance pursuant to Exhibit C attached hereto. Certificates of insurance evidencing such coverage shall be provided to the Trust upon execution of this Permit.
8. **No Responsibility for Loss.** The Trust shall not have any responsibility whatsoever for the loss or destruction of any improvements made by the Permittee or for the personal property stored or being used on the Premises. The Trust shall not be required to supply any facilities, services or utilities whatsoever to the Premises and shall not have any duty or obligation to make any alteration, change, improvement, replacement, restoration, repair, maintenance or management of the said services and utilities.
9. **Indemnification by Permittee.** Permittee shall defend, indemnify and save harmless the Hudson River Park Trust, the New York State Executive Department, the New York State Office of Parks, Recreation and Historic Preservation, the New York City Region of State Parks, Recreation and Historic Preservation Commission, the Department of Environmental Conservation, the City of New York, New York City Department of Parks and Recreation, the State of New York and each of their commissioners, officers, agents, employees, successors and assigns (“**Indemnities**”) from and against any and all liabilities, claims, demands, penalties, fines, settlements, damages, costs, expenses and judgments which:
 1. arise from injury to any person, or persons, including death, or any damage to property of any nature, occasioned wholly or in part by any act(s) or omission(s) of Permittee or of the directors, officers, employees, guests, contractors, subcontractors, representatives or agents of Permittee, that occurs on or in proximity to the Premises, including but not limited to the lands under water or dock or water areas adjacent to the Premises, or arises out of or as a result of this Permit, or
 2. relate to or arise from any and all liens and encumbrances which may be filed or recorded against the Premises or any public improvement lien filed against any funds of the Trust, the State or the City of New York, as a result of actions taken by or on behalf of Permittee, its directors, officers, contractors, subcontractors, agents, representatives, employees, guest or invitees.

Further, Permittee agrees to defend, indemnify and hold harmless the Indemnities from and against any and all loss, damage or liability of whatever kind or nature, arising out of, or in any way related to the presence, storage, transportation, disposal, release or threatened release of any Hazardous Materials (as defined herein) over,

under, in, on or from the Premises caused wholly or in part by Permittee's acts or omissions, during its occupancy or operation of the Premises.

Permittee shall furnish the Trust with notice of all legal papers and correspondence that it receives regarding any lawsuits or official proceedings concerning the Premises and/or its occupants. The provisions of this Section shall survive the termination or non-renewal of this Permit.

10. **Restoration to Original Condition.** Permittee agrees that upon the earlier of completion of the Work or revocation or termination of this Permit, the Premises will be restored to its original condition.
11. **Authorizations, Approvals and Requirements.** The Trust does not grant authority for any operation or use that may require any authorization(s), permit(s), or approval(s) from any federal, state and local governmental authorities, agencies, departments or bureaus having jurisdiction over the Premises. Permittee must obtain all such authorization(s), permit(s), or approval(s), as applicable, at its sole cost and expense.
12. **Revocability at Will.** This Permit is revocable at will by the Trust upon five (5) days' prior written notice thereof to Permittee at the address set forth above.
13. **Non-Assignability.** This Permit is not assignable.
14. **Flagmen.** Permittee shall not block through access by the public on the bikeway or walkway in front of or adjacent to the Premises at any time, or stage any equipment or vehicles on the bikeway or walkway at any time. Permittee shall employ flagmen and/or other qualified personnel to assure safety for every vehicular passage across the bikeway or walkway in the adjacent areas. If the Work shall have any impact on the Route 9A bikeway or walkway, Permittee shall obtain any necessary approvals from New York State and/or New York City Department of Transportation.
15. **No Vessels.** No vessels of any type may tie up or dock at, near or adjacent to the Premises along the bulkhead.
16. **Permittee's Responsibility Regarding Utilities.** This Permit shall not be construed in any manner as a representation by the Trust as to the part of the Premises where the Work may be performed without damaging utilities. It shall be Permittee's responsibility to ascertain whether there are any utilities located where it desires to do the Work, and Permittee shall be liable for any damage done to any such utilities. **Permittee shall call the Texas Eastern Area Manager 72 hours (three business days) in advance in order to obtain staff to observe the Work at (908) 757-1212 or such other number as provided by Texas Eastern.**

17. **Reports.** Permittee shall provide the Trust with a copy of any completed site investigation reports with respect to the Premises prepared by its consultants or contractors within thirty (30) days of receipt of same by Permittee.
18. **Investigation.** The parties to the Permit agree to cooperate fully with any investigation, audit, or inquiry conducted by the State of New York ("State") or City of New York ("City") governmental agency or authority that is empowered directly or by designation, to compel the attendance of witnesses and to examine witnesses under oath, or conducted by the Inspector General of a governmental agency that is a party in interest to the transaction, submitted bid, submitted proposal, contract, permit, lease or license that is the subject of the investigation, audit or inquiry.
19. **Hazardous Materials.** If any governmental license or permit shall be required for the disposal of Hazardous Materials¹, Permittee shall be responsible for and shall procure and maintain such license or permit. Permittee shall not cause or permit, as the result of any intentional or unintentional act or omission on the part of Permittee, its agents, employees, or other occupants of the Premises to release Hazardous Materials in or from any portion of the Premises in violation of any applicable laws, rules, regulations, ordinances, codes and orders of all federal, state and local governmental authorities, agencies, departments or bureaus having jurisdiction over the Premises.
20. **Interest of Others.** Nothing in this Permit shall be construed to give any person other than the Trust and Permittee any legal equitable right, remedy or claim. This Permit shall be held to be for the sole and exclusive benefit of the Trust and Permittee.
21. **No Arbitration.** Disputes involving the Permit, including the breach or alleged breach thereof, may not be submitted to binding arbitration but must, instead, be heard in a court of competent jurisdiction of the State of New York.
22. **Venue and Governing Law.** Permittee hereby irrevocably agrees that any action brought against the Trust shall be governed by and construed in accordance with the laws of the State of New York. Any and all claims asserted by or against the Trust arising under the Permit or related hereto shall be heard and determined either in the Federal Courts, located in the City or in the New York State Courts located in the City and County of New York.

¹ For purposes of the Permit, "Hazardous Materials" means (i) any "hazardous waste" as defined under the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., or (ii) "hazardous substance" as defined under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Section 9601 et seq., or (iii) "hazardous materials" as defined under the Hazardous Materials Transportation Act, 49 U.S.C. Section 1801 et seq., or (iv) "hazardous waste" as defined under New York Environmental Conservation Law Section 27-0901 et seq., or (v) "hazardous substance" as defined under the Clean Water Act, 33 U.S.C. Section 1321 et seq. or (vi) petroleum or petroleum products, crude oil or any by-products thereof, natural gas or synthetic gas used for fuel; any asbestos, asbestos-containing material or polychlorinated biphenyl; or (vii) any additional substances or materials which from time to time are classified or considered to be hazardous or toxic or a pollutant or contaminant under the laws of the City of New York, State of New York (including, without limitation, the New York State Navigation Law), and/or the United States of America.

23. **WAIVER OF JURY TRIAL.** EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THE PERMIT.
24. **Service of Process.** In addition to the methods of service allowed by the State Civil Practice Law & Rules ("CPLR"), Permittee hereby consents to service of process upon it by registered or certified mail, return receipt requested. Service hereunder shall be complete upon Permittee's actual receipt of process or upon the Trust's receipt of the return thereof by the United States Postal Service as refused or undeliverable. Permittee must promptly notify the Trust, in writing, of each and every change of address to which service of process can be made. Service by the Trust to the last known address of Permittee shall be sufficient and complete.
25. **Severability.** If any of the provisions of the Permit are held invalid, such invalidity shall not affect or impair other provisions of the Permit that can remain in effect without the invalid provisions, and therefore, the provisions of the Permit are severable.
26. **Warranty.** The undersigned signatory for Permittee, by signing this Permit, personally warrants that he or she has the power and authority to enter into this Permit agreement on behalf of Permittee and to bind Permittee to the terms and conditions of this Permit.
27. **Entire Agreement; No Oral Modification; Counterparts.** The Permit states the entire agreement between the Trust and the Permittee and supersedes all prior negotiations, representations and agreements, whether written or oral. The Permit may not be altered, modified or amended in any manner whatsoever except by a written instrument signed by the Trust and Permittee. The Permit may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF, the parties hereto have executed this Permit on the date hereinabove set forth.

PERMITTOR:

Hudson River Park Trust

By: _____

Name: Noreen Doyle

Title: Executive Vice President

PERMITTEE:

By: _____

Name: [_____]

Title: [_____]

EXHIBIT A

PREMISES

EXHIBIT B
SCOPE OF WORK

EXHIBIT C

INSURANCE

EXHIBIT H

INSURANCE

- a) During the period of construction of the Sculpture Installation and thereafter during any maintenance work performed on the Sculpture Installation, or as of the date indicated in a "Notice to Proceed", the Whitney shall provide the Trust with (i) Certificates of Insurance naming the Additional Insureds set forth below and, (ii) at the request of the Trust, the "Schedules of Forms and Endorsements" and copies of the Forms and Endorsements evidencing compliance with all coverage requirements contained in this Exhibit H. Such certificates and Schedules of Forms and Endorsements shall be in form and substance acceptable to the Trust. Acceptance and/or approval of such certificates and/or Schedules of Forms and Endorsements and copies of the Forms and Endorsements by the Trust do not, and shall not, be construed to relieve the Whitney of any obligations, responsibilities or liabilities under this Exhibit H.
- b) All insurance required by this Exhibit H shall include the following as "Additional Insured" if such coverage is available under such insurance policies: Hudson River Park Trust, the State of New York, the New York State Office of Parks, Recreation and Historic Preservation, the New York State Department of Environmental Conservation, the City of New York, and the New York City Department of Parks and Recreation. The Trust offices are located at Pier 40 - 353 West Street, Suite 201, New York, NY 10014 - Attn: Insurance Manager. The Additional Insured protection on the General Liability policy shall be provided on form CG 20 10 11 85 or its equivalent, or may be obtained through a combination of CG 20 10 04 03 and CG 20 37 04 13 or their equivalents. Additional Insured coverage must apply to direct and vicarious liability for both on-going and completed operations.
- c) The Whitney shall require that any contractors or subcontractors (together, "contractors") that perform work for the Whitney under this Agreement in a contract amount of **Five Thousand Dollars (\$5,000)** or more carry insurance with the same limits and provisions provided herein unless otherwise approved by the Trust on a case-by-case basis. All contractor insurance policies must include ISO Endorsement CG 20 38 or its equivalent to ensure additional insured protection is afforded the Trust without regard to privity of contract.
- d) Each insurance carrier must be rated at least "A-" Class "VII" in the most recently published A.M. Best's Insurance Report. If, during the term of the policy, a carrier's rating falls below "A-" Class "VII", the insurance policy must be replaced no later than the renewal date of the policy with an insurer acceptable to the Trust and rated at least "A-" Class "VII" in the most recently published A.M. Best's Insurance Report.
- e) The Whitney shall cause all insurance to be in full force and effect during the period of construction of the Sculpture Installation and thereafter during any maintenance work performed on the Sculpture Installation, or as of the date indicated in a "Notice to Proceed" if issued by the Trust, and to remain in full force and effect during the period of

construction of the Sculpture Installation and thereafter during any maintenance work performed on the Sculpture Installation, and as further required by this Exhibit H. The Whitney shall not take any action, or omit to take any action, that would suspend or invalidate any of the required coverages during the period of time such coverages are required to be in effect. Coverage shall:

1. Be primary and non-contributing to any insurance or self-insurance maintained by the Trust.
2. Be obtained at the sole cost and expense of the Whitney or its respective contractor(s), and shall be maintained with insurance carriers authorized to do business in New York State and acceptable to the Trust.
3. Provide written notice to the Trust, at least thirty (30) days prior to the termination, cancellation or non-renewal or material alteration of such insurance policies; notice shall be sent, via express or certified mail to:

Hudson River Park Trust
Attn: Insurance Manager
353 West Street
Pier 40, Second Floor
New York, NY 10014

4. Be solely responsible for the payment of their respective deductibles and self-insured retentions to which such insurance policies are subject. Self-Insured Retentions may not exceed **Ten Thousand Dollars (\$10,000)** per claim unless otherwise approved by the Trust. General liability and umbrella/excess policies shall contain no deductibles in excess of **Ten Thousand Dollars (\$10,000)** per claim unless otherwise approved by the Trust.
- f) Under no circumstances shall any insurance policies exclude coverage for claims that result from the imposition of New York Labor Law Section 240 (Scaffold Law) or for any Public Open Space or any portions of the premises used or for Public Access and Public Benefit Uses.
 - g) Upon the renewal date of any insurance policies, the Whitney shall supply the Trust with updated replacement proofs of coverage on Certificates of Insurance.
 - h) The Whitney shall cause to be included in each of its insurance policies a waiver of the insurer's right of subrogation against the Trust and/or any Additional Insureds.
 - i) The Whitney, or its contractors, during the period of construction of the Sculpture Installation and thereafter during any maintenance work performed on the Sculpture Installation, shall obtain and maintain in full force and effect, the following insurance with limits not less than those described below and as required by the terms of this

Exhibit H, or as required by law, whichever is greater (limits may be provided through a combination of endorsements, primary and umbrella/excess policies):

(1) **Commercial General Liability Insurance** with a limit of not less than **Six Million Dollars (\$6,000,000)** per occurrence (or any lesser amount as may be approved by the Trust) including any limits to be made up of the Excess/Umbrella. Such insurance shall be written on ISO Form CG 00 01 12 07 or substitute form providing equivalent coverage and shall cover liability arising from premises operations, independent contractors, products-completed operations, personal and advertising injury, cross liability coverage, blanket contractual liability (including tort liability of another assumed in a contract), extended bodily injury coverage, and damage to rented premises. If such insurance includes an aggregate limit, it shall apply separately on a per project or per location basis. If the Whitney's work includes construction activities of any kind, then the Whitney must include a completed Acord 855 NY form when providing evidence of insurance.

(2) **Comprehensive Business Automobile Liability Insurance** with a limit of not less than **One Million Dollars (\$1,000,000) Combined Single Limit**. Such insurance shall cover owned, leased, hired and non-owned automobiles; shall cover bodily injury, property damage and medical payments, and include uninsured and underinsured motorists' coverage.

(3) **Workers Compensation, Employers Liability and Disability Benefits Insurance and US Long Shore & Harbor Workers** as applicable to any vessel work, at statutory limits as applicable to the Whitney or its contractors' operations and required by law. Proof of Workers Compensation coverage must be presented on the NYS WCB C-105.2 or equivalent form; proof of Disability coverage must be provided on a DB-120.1 form.

a. The NY State Workers Compensation Board guideline regarding these requirements is available at:

<http://www.wcb.ny.gov/content/main/forms/AllForms.jsp>

b. If Exempt from Worker Compensation please refer to the following link and provide proof on the CE200 form issues by the NY State Workers Compensation Board:

http://www.wcb.ny.gov/content/ebiz/wc_db_exemptions/requestExemptionOverview.jsp

c. If the Whitney is not a NY State based business, then the Whitney must provide a copy of its Workers' Compensation policy's Declarations Page to show that New York is listed in Part 3A and to confirm the policy provides statutory Employer's Liability coverage applicable in NYS.

(4) If the work involves abatement, removal, repair, replacement, enclosure, encapsulation and/or disposal of any hazardous material or substance, the Construction

Manager and, with respect to legal liability, the Whitney, shall maintain in full force and effect throughout the Project, Pollution Legal Liability insurance with limits of not less than Two Million Dollars (\$2,000,000), providing coverage for bodily injury and property damage, including loss of use of damaged property or of property that has not been physically injured. Such policy shall provide coverage for actual, alleged or threatened emission, discharge, dispersal, seepage, release or escape of pollutants, including any loss, cost or expense incurred as a result of any cleanup of pollutants or in the investigation, settlement or defense of any claim, suit, or proceedings against the Trust arising from the work.

- a. If coverage is written on a claims-made policy, the Construction Manager warrants that any applicable retroactive date precedes the effective date of the Project; and that continuous coverage will be maintained, or an extended discovery period exercised, for a period of not less than two (2) years from the time the Work is completed.
- b. If the Work includes disposal of materials from the Project Area, the Construction Manager must furnish the Trust with evidence of pollution legal liability insurance in an amount satisfactory to the Trust maintained by the disposal site operator for losses arising from the disposal site accepting waste from the Work.

(5) **Protection and Indemnity Insurance** including Jones Act coverage, as applicable to any vessel work, with a limit of not less than **Three Million Dollars (\$3,000,000)**. Such insurance shall provide coverage at a minimum for loss of life, personal injury and illness of crew, passengers and third-party individuals, damage to cargo on board, damage to piers, docks, buoys and other fixed or floating objects and damage to other vessels and their cargo; Hull and Machinery coverage with a limit of not less than full replacement value of the vessel covering all loss or damage to the vessel from any cause of loss in connection with permitted activity.

(6) **Commercial Property Insurance** on the premises and Capital Installations protecting the Whitney and the Trust against loss of, or damage to, the premises and Capital Installations by fire and other risks of physical loss, or damage now or hereafter embraced by ISO "Special Form" or its equivalent, which shall be in the amount of the full replacement value of the damages to the premises and Capital Installations (without depreciation or obsolescence clause). Such insurance shall designate the Trust as a loss payee and the Whitney as named insured.

(7) During the performance of any construction work, restoration or alteration, "**All Risk**" **Builder's Risk Insurance** written on a completed value (non-reporting) basis in an amount sufficient to prevent the Whitney and the Trust from becoming coinsurers under provisions of applicable policies of insurance covering the perils insured under the ISO special causes of loss form extended coverage, including fire, vandalism, malicious mischief, collapse, water damage, and transit and theft of building materials, with deductible reasonably approved by the Trust, as well as during transit and at any off-site storage location intended for use with respect to the Project Area, naming the Trust and the Whitney as their respective interests may appear. The policy shall cover the cost of

removing debris, including demolition as may be legally necessary by the operation of any law, ordinance or regulation.

The Trust and the Whitney shall cooperate in connection with the collection of any insurance proceeds that may be due in the event of loss, and each party shall execute and deliver such proofs of loss and other instruments that may be required for the purpose of obtaining the recovery of any such insurance proceeds. The Whitney's obligations as set forth in this Exhibit H shall survive the expiration or earlier termination of the Agreement.

EXHIBIT I

FORM OF ARTIST'S LICENSE AGREEMENT

[Separately provided for Signature]