

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 27 of the  
New York State Environmental Conservation Law and  
Title 6 of the Official Compilation of the Codes, Rules and  
Regulations of the State of New York,

- by -

20 Rewe Street, Ltd.,

NYSDEC File No.  
R2-20210416-52

Respondent.

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**20 REWE STREET LTD.’S PETITION TO DELIST  
PURSUANT TO 6 NYCRR § 375-2.7(f)**

**Preliminary Statement**

Pursuant to 6 NYCRR § 375-2.7(f), Respondent 20 Rewe Street, Ltd. (“20 Rewe Street” or “Respondent”) respectfully submits this petition to delist the site owned by 20 Rewe Street at 171 Lombardy Street (a/k/a 514 Varick Avenue), Brooklyn, New York (the “Site”), from the Department of Environmental Conservation (the “DEC” or the “Department”)’s registry of Inactive Hazardous Waste Disposal Sites, on which the Site is currently listed as a Class 2 site (the “Petition”). Under the Department’s Inactive Hazardous Waste Disposal Site Remedial Program regulations, the Department must consider a petition made by a site’s current owner that seeks the deletion of a site from the Department’s registry. 6 NYCRR § 375-2.7(f)(1)(i), (2)(i) (2024). 20 Rewe Street’s Petition should be granted because, as set forth below, the Site does not

pose a threat to human health or the environment sufficient to warrant inclusion on the Department's registry of Inactive Hazardous Waste Disposal Sites.<sup>1</sup>

The facts pertinent to both the Petition and the instant enforcement proceeding are simple. Data obtained from both the DEC and 20 Rewe Street consistently establish the following regarding the Site:

- The Site consists only of a building bound by its four exterior walls.
- The entire Site is beneath concrete floors.
- 20 Rewe Street purchased the Site with existing Chlorinated Volatile Organic Compound ("CVOC") contamination – neither it nor its tenants deposited any hazardous substances on the Site.
- The CVOC are in the soil beneath the building and are between approximately 0 and 20 feet below the slab, whereas the groundwater is approximately 45–50 feet below the slab.
- There is 20 feet of clean soil above the water table that does not contain CVOCs.
- Compound Specific Isotope Analysis by both the DEC and 20 Rewe Street indicates that PCE in the soil and the PCE in the groundwater are from different sources.
- The CVOCs in the groundwater are not from the Site, but from an upgradient source.
- There are no uses of groundwater in the area.
- There is no physical mechanism that could affect the shallow soil beneath the building on the Site.
- Indoor air quality analysis indicates that there is no soil vapor intrusion concern based on the Site's commercial use.

The DEC concluded in 2014 that the Site meets the criteria to be listed as a Class 2 Inactive Hazardous Waste Site but has failed to provide evidence to support these claims. The Site was never independently investigated by the DEC. It was only included in the much larger Meeker Avenue Plume Track Down location.

More specifically, the DEC claims that the Site is so contaminated with CVOCs in its soil and its groundwater that the Site meets the criteria to be listed as a Class 2 Inactive Hazardous

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<sup>1</sup> Such sites are also referred to herein as "Inactive Hazardous Waste Sites."

Waste Site. The DEC's consultant, Michael Haggerty, however, never sampled the Site and all of the data indicate that the Site contamination is not related to the Meeker Avenue Plume in the groundwater beneath the Site. Only 20 Rewe Street has actually taken samples and investigated the Site, activities which post-date the Site's Class 2 listing.<sup>2</sup> As the DEC knows, 20 Rewe Street's Site samples show that CVOCs present in the Site soils are almost certainly of a different source than the CVOCs found in the DEC's offsite groundwater monitoring wells. But the DEC's Mr. Haggerty nevertheless claims, without evidence, that the Department's data is somehow "site specific" evidence that the Site meets the criteria to be listed as a Class 2 Inactive Hazardous Waste Site.

#### **I. The DEC's Contamination Allegations Prior to 2018**

By way of background, between 2011 and 2013, the Department investigated the Site's surroundings for the presence of PCE as part of the Meeker Avenue Plume Track Down investigation. *See* Affirmation of Gregory F. Hauser in Support of Respondent's Petition to Delist Pursuant to 6 NYCRR § 375-2.7(f) (the "Hauser Affirmation" or "Hauser Aff."), Ex. A (November 9, 2023 Ruling on Motion for Order Without Hearing (the "Ruling")) at 2 (¶ 6).<sup>3</sup> At the close of this investigation in 2013, the Department's environmental consultant, URS Corporation, prepared the Phase VII Report. *See id.*; Hauser Aff., Ex. B (Oct. 4, 2022 Sailer Aff. in Opp. to Motion for Order Without Hearing ("Sailer Opp. Aff."), Ex. H). The Phase VII Report provided information on soil and groundwater adjacent to, but not on, the Site. Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 12.

The Phase VII Report showed halogenated volatile organic compounds ("HVOCs") in

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<sup>2</sup> In December of 2023, the EPA obtained samples from two monitoring wells located on the Site.

<sup>3</sup> Pagination referenced herein is cited with Petition-specific exhibit slipsheet pages not counted or included.

shallow soil and groundwater adjacent to the Site. *See id.* But this report revealed no correlation between the HVOCs in the surface soils and the HVOCs in the groundwater, suggesting that the source of HVOCs in the shallow soils was surface spills. *See id.*; *see also* Hauser Aff., Ex. A (Ruling) at 3 (¶ 8) (“A shallow source of PCE contamination was identified at two monitoring well locations adjacent to the Site.”). The Phase VII Report also concluded that the HVOCs present in groundwater were from a different source of HVOCs than groundwater in other areas of the Meeker Avenue Plume Track Down location. Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 12; Hauser Aff., Ex. A (Ruling) at 3 (¶ 9) (quoting the Phase VII Report). But the Phase VII Report did not identify or support contamination on the Site.

In December 2013, with no Site-specific data in hand and apparently based entirely on data from adjacent or nearby properties, the Department notified 20 Rewe Street, as the owner of the Site, that the Site would be added to a list of inactive waste disposal sites. Hauser Aff., Ex. A (Ruling) at 2 (¶ 4), 3 (¶ 10). The Site was added to the list in January 2014. *Id.* at 3 (¶ 11). Thereafter, the Department and 20 Rewe Street exchanged correspondence concerning the possibility of a consent order relating to a remedial program for the Site. *Id.* at 3–4 (¶¶ 12–13). 20 Rewe Street has maintained that the Site is not contaminated to the point that it meets the criteria to be listed as a Class 2 Inactive Hazardous Waste Site. In February 2015, 20 Rewe Street challenged the Department’s conclusion regarding contamination at the Site, and advised the Department that Mr. Sailer’s firm would conduct a site investigation. *See id.* at 4 (¶ 13).

## **II. The 2015 and 2016 Sailer Reports**

Mr. Sailer’s 2015 Site investigative report found that the Phase VII Report “provided information on soil and groundwater sampling adjacent to, but not on, the Site.” Hauser Aff., Ex. A (Ruling) at 4 (¶ 16) (citing Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 12). The 2015 report

“confirmed that HVOCs were present in the shallow soils . . . adjacent to the western side of the Site,” as well as “under the floor of the building on the Site.” *Id.* at 4 (¶ 17) (citing Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 13). In July and August 2016, Mr. Sailer’s firm conducted additional soil sampling “to further delineate the extent of the HVOCs in soils at and adjacent to the western side of the Site.” *Id.* at 4 (¶ 19) (citing Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 15). Though limited, that investigation “continued to confirm that the HVOCs were present in the shallow soils well above the groundwater table.” Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 15; *see also* Hauser Aff., Ex. D (Sailer Opp. Aff., Ex. K) & Hauser Aff., Ex. E (Sailer Opp. Aff., Ex. L).

### **III. Mr. Haggerty’s Conclusion of Site Contamination**

In 2018, Mr. Haggerty became the project manager for the Site. *See* Hauser Aff., Ex. A (Ruling) at 2 (¶¶ 1, 6). Mr. Sailer sent him an email with the results of his 2015 and 2016 Site investigations. *Id.* at 5 (¶ 22). In response, Mr. Haggerty expressed his view that “the information Sailer provided confirmed the presence of hazardous waste on site.” *Id.* at 5 (¶ 23); *see also* Hauser Aff., Ex. F (March 29, 2022 Haggerty Aff.) ¶ 14. 20 Rewe Street disputed this allegation, maintaining that the Site is not contaminated to the point it meets the criteria to be listed as a Class 2 Inactive Hazardous Waste Site. Indeed, as the Tribunal in the instant enforcement proceeding knows, Mr. Sailer’s subsequent, 2019–2021 Site reporting showed that “[c]onsistent with the findings from [Mr. Sailer]’s prior investigations . . . the HVOCs in the soils at and adjacent to the Site are located well above the groundwater table and are not comingled with the groundwater plume from upgradient sources.”<sup>4</sup> Hauser Aff., Ex. C. (Sailer Opp. Aff.) ¶ 16; *see generally* Hauser Aff., Ex. G (Sailer Opp. Aff., Ex. M).

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<sup>4</sup> Mr. Haggerty nevertheless claims that Mr. Sailer’s 2019–2021 Site reporting “confirms the presence of hazardous contaminants, specifically PCE, in soil and groundwater at the Site.” Hauser Aff., Ex. F (Haggerty Aff.) ¶ 22. While this statement is accurate on its face, it fails to address the real issue—the CVOCs in the soil are trapped and benign and the CVOCs in the groundwater are from another source.

20 Rewe Street maintains that, as shown in Mr. Sailer's October 4, 2022 Affidavit in Opposition to the Motion for Order Without Hearing (Exhibit C to the Hauser Affirmation), which is also relied upon in support of this Petition, the current record only supports the conclusion that "the HVOCs identified in the soils at and adjacent to the Site have not migrated to the groundwater table," and "the HVOCs in the Site soils are from a different source than the HVOCs in the groundwater." *See* Hauser Aff., Ex. C. (Sailer Opp. Aff.) ¶ 17. As a result, 20 Rewe Street strenuously contests and opposes Mr. Haggerty's claim that the Site is so contaminated so as to meet the criteria to be listed as a Class 2 Inactive Hazardous Waste Site. No such evidence has been provided to 20 Rewe Street or to the Tribunal in the instant enforcement proceeding.<sup>5</sup>

Similarly, 20 Rewe Street maintains that the HVOCs in the Site soils are entirely covered by concrete impermeable surfaces that prevent anyone from accessing the soil, such that the Department cannot show a threat to human health and the environment sufficient to warrant inclusion of the Site on the Department's registry of Inactive Hazardous Waste Disposal Sites. The Department nevertheless claims that there was a basis for this contamination conclusion when the Site was listed in 2014, *see* Hauser Aff., Ex. I (June 21, 2022 Haggerty Aff. in Support of Penalty) ¶ 6 ("The Site was listed on the Registry as a Class 2 site in 2014 due to ongoing release of PCE into soil and groundwater, and the Site is a threat to public health due to the associated soil vapor and the proximity of occupied structures."), *years* before Mr. Sailer provided the Department with 20 Rewe Street's Site-specific data (which 20 Rewe Street submits does not show that the Site is so contaminated so as to meet the criteria to be listed as a Class 2 Inactive Hazardous Waste Site). But the data does not support Mr. Haggerty's

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<sup>5</sup> Tellingly, the Department has voluntarily withdrawn its third cause of action. Hauser Aff., Ex. H (Letter from DEC Withdrawing Claim).

conclusion.<sup>6</sup> Thus, as a practical matter, the only path for the DEC to show that the Site impacts human health and the environment is for the DEC to claim that the sampling process employed by Mr. Sailer somehow caused such an impact. The Department, however, has provided no evidence for or explanation of this theory. *See generally* Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶¶ 10–21; *see generally* Hauser Aff., Ex. G (Sailer Opp. Aff., Ex. M).

#### **IV. Indoor Air Quality Assessment**

To address the DEC’s concerns regarding soil vapor intrusion, 20 Rewe Street conducted an indoor air quality assessment in 2022. Hauser Aff., Ex. K (Levandoski Report) at 1. The OSHA eight-hour time weighted average for industrial exposure to PCE is 100 parts per million (ppm). *See* 29 C.F.R. 1910.1000 tbl.Z-2. As the results of the assessment indicate, the highest concentration of any CVOC in the air of the building was just under 23 parts per billion (ppb). Hauser Aff., Ex. K (Levandoski Report) at 1–2. The Site is a manufacturing site located two blocks from any residential buildings. *See* Hauser Aff., Ex. A (Ruling) at 2 (¶ 5); *see also* Hauser Aff., Ex. C (Sailer Opp. Aff.) ¶ 20 (“[T]here is no residential community within approximately 500’ of the Site.”). Accordingly, soil vapor intrusion is not an issue at this Site.

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<sup>6</sup> In the course of the instant enforcement proceeding concerning the Site, 20 Rewe Street has served a set of discovery requests seeking disclosure concerning the basis for Mr. Haggerty’s conclusion of Site contamination (the “Discovery Requests”). 20 Rewe Street’s third request for production in its Discovery Requests seeks documents necessary to understand the Meeker Avenue Plume Track Down investigation pollution and contamination findings, as well as pollution and contamination findings for sites in the vicinity of the Site. Hauser Aff., Ex. J (20 Rewe Street’s March 8, 2024 Discovery Requests) at 8. Additionally, 20 Rewe Street sought discovery to understand and evaluate the Department’s claim that the Site, and/or any activities thereon, endangered the surrounding environment or the health and safety of those at the Site or in the surrounding environs. *Id.* at 8–9. Unfortunately, even though the existing information disparity concerning the basis for Mr. Haggerty’s conclusions is a problem of its own making, the Department has refused to comply with 20 Rewe Street’s Discovery Requests, necessitating the motion practice now pending before the Tribunal in respect to 20 Rewe Street’s Discovery Requests.

## **Conclusion**

All of the data relevant to the Site, including Department data and 20 Rewe Street data, establish that:

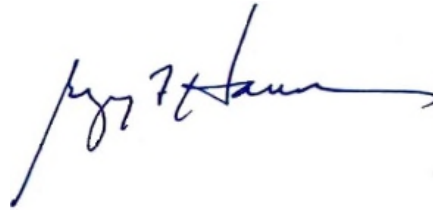
- The HVOCs in the groundwater are from an upgradient source unrelated to the Site.
- The shallow soils are isolated from any possibility of harm to human health by the concrete floors.
- There is no significant threat to human health and the environment from the alleged soil vapor intrusion.

Accordingly, the Site does not pose a threat to human health or the environment sufficient to warrant inclusion on the Department's registry of Inactive Hazardous Waste Disposal Sites. 20 Rewe Street's Petition should therefore be granted.<sup>7</sup>

Dated: May 1, 2024

Respectfully submitted,

**WUERSCH & GERING LLP**

A handwritten signature in blue ink, appearing to read "Gregory F. Hauser", is written over a horizontal line.

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Ltd.*

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<sup>7</sup> In the alternative, the Petition should be deemed as a petition for reclassification of the Site pursuant to 6 NYCRR § 375-2.7(f)(2)(ii) (and/or for modification of the Site listing pursuant to 6 NYCRR § 375-2.7(f)(2)(iii)), and the Site should be reclassified to a class 3, class 4, or class 5 listing under 6 NYCRR § 375-2.7(b)(3).



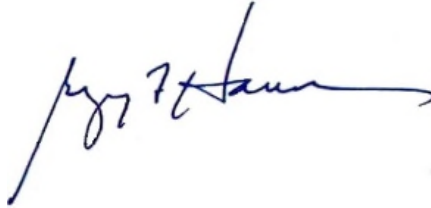
**Certificate of Service**

I hereby certify that on May 1, 2024 I caused the foregoing Petition to be served upon counsel for the Department via electronic mail.

Dated: May 1, 2024

Respectfully submitted,

**WUERSCH & GERING LLP**

A handwritten signature in blue ink, appearing to read "Gregory F. Hauser", with a long horizontal flourish extending to the right.

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