

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
STATE SUPERFUND PROGRAM  
ECL §27-1301 *et seq.*

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In the Matter a Remedial Program for

**ORDER ON CONSENT AND  
ADMINISTRATIVE SETTLEMENT**  
Index No. CO4-20210310-71

**DEC Site Name: Former Cleanerama**

DEC Site No.: 401056

Site Address: 253 Osborne Road  
Colonie, NY 12211

Hereinafter referred to as "Site"

by:

Thomas J. Burke  
509 State Route 67, Malta NY 12020

and

Osborne Ventures, LLC  
509 State Route 67, Malta NY 12020

Hereinafter referred to as "Respondent"

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1. The New York State Department of Environmental Conservation (the "Department") is responsible for the enforcement of the Environmental Conservation Law ("ECL") and the New York State Finance Law ("SFL"), and such laws provide the Department with authority to enter into this Order on Consent and Administrative Settlement (the "Settlement Agreement" or "Order").

2. A. The Department is responsible for inactive hazardous waste disposal site remedial programs pursuant to Article 27, Title 13 of the ECL and Part 375 of Title 6 of the Official Compilation of Codes, Rules and Regulations ("6 NYCRR") and may issue Settlement Agreements consistent with the authority granted to the Commissioner by such statute.

B. The Department is responsible for carrying out the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land, and air pollution consistent with the authority granted to the Department and the Commissioner by Article 1, Title 3 of the ECL.

C. This Settlement Agreement is issued pursuant to the Department's authority under, *inter alia*, ECL Article 27, Title 13 and ECL 3-0301, and resolves Respondent's liability to the State as provided at 6 NYCRR 375-1.5(b)(5).

3. The Site is currently listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State (the "Registry") as Site Number 401056 with a Classification of 2 pursuant to ECL 27-1305.

4. Pursuant to the legal authorities cited herein, the Department has incurred costs, and anticipates the need to incur additional costs, paid from the hazardous waste remedial fund for the implementation of a Remedial Program at the Site. These expenditures are authorized by and in conformance with relevant and applicable State and federal law.

5. To facilitate productive reuse of the Site, Walgreen Eastern Co., Inc., the current owner of the Site, desires to sell the Site to Respondent, with the understanding that the Respondent will be entering into a voluntary agreement with the Department confirming that it is subject to statutory defenses to Superfund liability and, therefore, not liable for any past, current or future response costs associated with the Existing Contamination at and migrating from the Site and the implementation of the Remedial Program at the Site so long as Respondent complies with the terms and conditions of the voluntary agreement. Existing Contamination means the contamination that has been detected on and/or migrating from the Site as identified in Site related investigation reports.

6. A. Respondent represents it is a prospective purchaser under a contract to acquire title to the Site. Respondent further represents that it is not affiliated in any way with Walgreen Company, the current owner of the Site, that it retained experienced environmental consultants to review the contaminant conditions detected at the Site, has discussed the Site with the Department, along with other appropriate inquiries as to the Site history and prior use, and that it understands that the Department expects to implement additional remedial action on the Site for which it will provide access.

B. Respondent represents that it is a Bona Fide Prospective Purchaser ("BFPP") as that term is defined in Section 101(40) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601(40) and that it has and will continue to comply with the requirements of CERCLA §§ 101(40) and 107(r)(1) during its ownership of the Site. Therefore, Respondent qualifies for the protection from liability under CERCLA set forth in CERCLA § 107(r)(1), 42 U.S.C. § 9607(r)(1), with respect to the contamination existing at the Site on the effective date of this Settlement Agreement.

C. Respondent anticipates that within ninety (90) days of the date that this Settlement Agreement is executed by the Department, Walgreen Eastern Co., Inc. will convey title of the Site to Respondent.

7. Respondent consents to the issuance of this Settlement Agreement without (i) an admission or finding of liability, fault, wrongdoing, or violation of any law, regulation, permit, order, requirement, or standard of care of any kind whatsoever; but with (ii) an acknowledgment that there has been a past release or threatened release of hazardous waste at or from the Site which took place prior to it taking title to the Site; and (iii) an acknowledgment that a release or threatened release of hazardous waste at or from the Site has been deemed by the Department to constitute a significant threat to the public health or environment.

8. Respondent and the Department agree that the primary goals of this Settlement Agreement are (i) for Respondent to satisfy the terms and conditions set forth herein to establish and maintain BFPP liability protection under CERCLA, (ii) for the Department to obtain access to the Site in order to implement the remedy set forth in the ROD, or an amendment thereto, including placement of an Environmental Easement on the Site, (iii) to delineate Respondent's obligations with respect to the Site's remedial program that addresses the past release of hazardous substances by others, and (iv) for the Department to release the Respondent from liability, both state and federal, and furnish Respondent with a covenant not to sue with respect to any response costs incurred by the State related to the Site upon the execution of this Settlement Agreement and Respondent's commitment to comply with the terms and conditions set forth herein.

9. The Parties recognize that implementation of this Settlement Agreement will expedite the remediation of, and commercial redevelopment of, the Site and may avoid prolonged and costly litigation between the Parties. The Parties also recognize that this Settlement Agreement is mutually acceptable, fair, reasonable and in the public interest.

10. Solely regarding the matters set forth below, Respondent hereby waives any right to a hearing as may be provided by law, consents to the issuance and entry of this Settlement Agreement and agrees to be bound by its terms. Respondent consents to and agrees not to contest the authority or jurisdiction of the Department to issue or enforce this Settlement Agreement and agrees not to contest the validity of this Settlement Agreement or its terms or, if applicable, the validity of data submitted to the Department by Respondent if required under this Settlement Agreement.

**NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:**

I. Real Property

The Site subject to this Settlement Agreement has been assigned number 401056, consists of approximately 0.900 acres, and is described as follows:

Subject Property Description (A Map of the Site is attached as Exhibit "A")

253 Osborne Road, Colonie, Albany County  
Tax Map/Parcel No.: Section 43 Block 1 Lot 10

II. Site Access/Notice to Successors in Interest

A. Respondent agrees to provide to the Department, any duly designated officer or employee of the Department or any State agency having jurisdiction with respect to the remedial program at the Site, and any agent, consultant, contractor, or other person so authorized by the Commissioner, an irrevocable right of access at all reasonable times to the Site with seventy-two (72) hours written notification and subject to authorization of tenants and to any other property Respondent controls to which access is required for the implementation of response actions at and near the Site under applicable federal and state law, including but not limited to all activities authorized under ECL §§ 27-1309(3) – (4) and ECL § 27-1313(8). Notwithstanding any provision of this Settlement Agreement, but without limiting the scope of the releases and covenants set forth in in Section VI below, the Department retains all its authorities and rights, including enforcement authorities thereto, under CERCLA, Article 27, Title 13 of the ECL or pursuant to any other provision of state or federal statutory or common law with respect to such access.

B. Within sixty (60) days after the effective date of this Settlement Agreement, Respondent shall cause to be filed with the Albany County Clerk a Department-approved Notice of Settlement Agreement, which Notice shall be substantially similar to the Notice of Settlement Agreement attached as Exhibit C, to provide all parties who may acquire any interest in the Site with notice of this Settlement Agreement. Within thirty (30) days of such filing (or a longer period of time as may be required to obtain a certified copy provided Respondent advises the Department of the status of its efforts to obtain such certified copy within thirty (30) days), Respondent shall provide the Department with a copy of such instrument certified by the Albany County Clerk to be a true and faithful copy.

C. If Respondent proposes to convey the whole or any part of Respondent's ownership interest in the Site or becomes aware of such conveyance, Respondent shall, not fewer than forty-five (45) days before the date of conveyance or within forty-five (45) days after becoming aware of such conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance, and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Settlement Agreement. However, such obligation shall not extend to the granting of any rights under any mortgage, deed, trust, assignment, judgment, lien, pledge, security order, lease or any other right accruing to a party not affiliated with Respondent to secure repayment of money or the performance of a duty or obligation.



D. Respondent shall require that assignees, successors in interest, lessees and sublessees of the Site shall provide the same access and cooperation with the Department. Respondent shall not be responsible for any such parties' failure to comply. The Respondent shall ensure that a copy of this Settlement Agreement is provided to any current lessee or sublessee on the Site as of the effective date of this Settlement Agreement and shall ensure that any subsequent leases, assignments or transfers of the Site or an interest in the Site are consistent with this Paragraph and Paragraph X (Parties Bound/Transfer of Covenant) of this Settlement Agreement.

E. Respondent shall cooperate and comply, at Department's sole expense, with any land use restrictions and institutional controls on the Site in connection with the remedial program for the Site which, at a minimum, will provide and allow for the commercial use and development of the Site. Neither Respondent nor its successors and/or assigns shall interfere with the continued operation of the engineering controls identified in the ROD, including any and all Department-approved amendments to the ROD, and the to-be-drafted Department-approved Site Management Plan ("SMP"), including any and all Department-approved amendments to the SMP. Further, if Respondent or its successors and assigns propose to change the use of the Site, as defined in ECL 27-1317 and 6 NYCRR Part 375-2.2(a), Respondent must comply with the notice requirements of 6 NYCRR Part 375-1.11(d). Respondent shall not incur any costs for compliance with any soil management activities associated with a change of use, annual inspections and compliance with any land use restrictions, engineering and institutional controls on the Site in connection with the remedial program for the Site as those compliance costs shall be borne solely by the Department. The State shall complete all remedial program activities associated with this Site going forward and as set forth in the SMP. Respondent, as set forth below, shall submit a draft interim SMP for Department review and comment as described in Section III below.

F. Upon sale or other conveyance of the Site or any part thereof, Respondent shall require that any grantee, transferee or other holder of an interest in the Site or any part thereof shall provide access and cooperation to the Department, its authorized officers, employees, representatives, and all other persons implementing the remedial program for the Site under the Department's oversight. Respondent shall require that each grantee, transferee or other holder of an interest in the Site or any part thereof shall comply with any land use restrictions and institutional controls on the Site in connection with the remedial program for the Site.

### III. Respondent's Obligations

A. Respondent shall submit an Interim Site Management Plan ("ISMP") to the Department within fifteen (15) days of the sale of the Site to Respondent. In the event

that the Department approves the ISMP, Respondent shall implement such plan. The Department reserves the right to modify the ISMP if necessary to protect human health and the environment for Respondent's implementation and shall notify Respondent of such modification.

B. Respondent acknowledges that an Environmental Easement is required for this Site. Within thirty (30) days of the Department's approval of the Interim Site Management Plan, Respondent shall submit to the Department for approval an Environmental Easement to run with the land in favor of the state which complies with the requirements of ECL Article 71, Title 36, DEC Program Policy DER-33: Institutional Controls: A Guide to Drafting and Recording Institutional Controls, Issued December 3, 2010 ("DER-33") and 6 NYCRR 375-1.8(h)(2). A model Environmental Easement is attached to this Settlement Agreement as Exhibit C. Upon acceptance of the Environmental Easement by the State, Respondent shall comply with the recording requirements of 6 NYCRR 375-1.8(h)(2) and ECL § 71-3605(8). If Respondent does not cause such Environmental Easement to be recorded in accordance with 6 NYCRR 375-1.8(h)(2), the Department may file an Environmental Notice on the Site and may charge the Respondent for the costs of doing so. Prior to taking such action, the Department will notify Respondent so that Respondent can make the filing. Failure to file the Environmental Easement is a violation of this Order. Within ten (10) days of recording the Environmental Easement with the Albany County Clerk, Respondent shall submit proof of recording to the Department.

C. Respondent shall, prior to the occupancy of any new building constructed on the Site, conduct a soil vapor intrusion (SVI) evaluation pursuant to a Department and NYS Department of Health (NYSDOH) approved Work Plan. Such Work Plan shall be developed in accordance with the most recent NYSDOH *Guidance for Evaluating Vapor Intrusion in the State of New York*. Based upon the results of the SVI evaluation, Respondent shall monitor, or install and operate, if needed, a soil vapor mitigation system. In the alternative, Respondent may simply proceed with installation and operation of a soil vapor mitigation system approved by the NYSDOH.

#### IV. Due Care/Cooperation

A. Respondent shall exercise due care and shall comply with all applicable local, state, and federal laws and regulations with respect to the existing contamination at the Site. Respondent recognizes that the implementation of the response actions at the Site may temporarily interfere with Respondent's use of the Site and may require temporary closure of its operations or a part thereof. Respondent agrees to cooperate fully with the Department in the implementation of response actions at the Site and further agrees not to interfere with such response actions. The Department agrees, consistent with its responsibilities under applicable law, to cooperate and use reasonable efforts to minimize any interference with Respondent's and/or its tenant's construction activities and operations by its entry and implementation of response

actions, conditioned upon Respondent's compliance with 6 NYCRR 375-1.11(d). The Department agrees to flush-mount any monitoring wells that may be installed on the Site and to make reasonable efforts to install any such monitoring wells, and/or injection wells, in areas that will not interfere with building construction or site operations. In the event Respondent becomes aware of any action or occurrence which causes or threatens a release of hazardous waste, pollutants or contaminants at or from the Site not otherwise known or being addressed by the Department that constitutes an emergency situation or may present an immediate threat to public health or the environment, Respondent shall immediately take appropriate action to prevent, abate or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements, or any other law, immediately notify the Department of such release or threatened release.

B. Respondent shall take and maintain all steps necessary to continue its status as a "Bona Fide Prospective Purchaser" as that term is defined in § 101(40) of CERCLA, 42 U.S.C. § 9601(40), for the Site by continuing to comply with all of the requirements for a Bona Fide Prospective Purchaser as set forth in applicable federal and state law, including but not limited to § 101(40) of CERCLA, including without limitation the exercise of "appropriate care" by taking "reasonable steps" as set forth in § 101(40)(D) of CERCLA, 42 U.S.C. § 9601(40)(D), and the implementation and compliance with any land use restrictions and institutional controls as set forth in § 101(40)(F) of CERCLA, 42 U.S.C. § 9601(40)(F) and ECL § 27-1318 for so long as Respondent retains any ownership interest in the Site. Reasonable steps for purposes of this Settlement Agreement does not encompass an obligation to address contaminated groundwater migration across or from the Site, or vapor migration from the Site to off-property areas due to Existing Contamination.

#### V. Certification

By entering into this Settlement Agreement, Respondent certifies that to the best of its knowledge and belief it has fully and accurately disclosed to the Department all information known to Respondent and all information in the possession or control of its officers, directors, employees, contractors, and agents which relates in any way to any existing contamination or any past or potential future release of hazardous substances, pollutants, or contaminants at or from the Site. Respondent also certifies that to the best of its knowledge and belief it has not caused or contributed to a release or threat of release of hazardous waste or pollutants or contaminants at the Site. If the Department determines that the information provided by Respondent is not materially accurate and complete, this Settlement Agreement, within the sole discretion of the State of New York, shall be null and void, and the Department reserves all its rights.

#### VI. Release and Covenant Not to Sue

(A) Subject to the Reservation of Rights in Paragraph VII of this Settlement Agreement, based upon the Respondent's continued cooperation with the Department

and the Department's acceptance of an Environmental Easement as required by the selected remedy in the ROD, the Department hereby releases and covenants not to sue, and shall forbear from bringing any action, proceeding or suit against Respondent under federal or state statutory or common law, including (without limitation) under New York's Environmental Conservation Law, New York's State Finance Law, and under the Comprehensive Environmental Response, Compensation and Recovery Act ("CERCLA"), 42 U.S.C. § 9601 et seq., involving or relating to the release or threatened release of contamination existing on, at, or emanating from the Site as of and after the effective date of this Settlement Agreement related to the Existing Contamination and from referring to the New York Attorney General any claim for recovery of costs incurred by the Department against Respondent and Respondent's members, managers, officers, directors, shareholders, lessees and sublessees, grantees, successors and assigns, successors-in-title and its respective secured creditors for the further investigation and remediation of the Site based upon the Existing Contamination.

(B) Notwithstanding the above, with respect to any claim or cause of action asserted by the Department, the party seeking the benefit of this Release and Covenant Not to Sue shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to the Existing Contamination.

(C) Further, notwithstanding any other provision in this Release and Covenant Not to Sue, if with respect to this Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party (other than Respondent) liable for contamination on or migrating from the Site, nothing in this Settlement Agreement shall be construed or deemed to preclude the State of New York from recovering such claim.

## VII. Reservation of Rights

A. The Department hereby reserves its rights concerning, and the Release and Covenant Not to Sue in Section VI shall not extend to, any further investigation or remedial action the Department deems necessary:

- Due to environmental conditions or information related to the Site unrelated to Existing Contamination (whether onsite or offsite) at the time of this Release and Covenant Not to Sue was issued and which indicate that this Settlement Agreement cannot be implemented with sufficient protection of human health and the environment;
- Due to Respondent's failure to comply with this Settlement Agreement; or
- Due to fraud committed by Respondent in entering into or implementing this Settlement Agreement.

B. The Department hereby reserves its rights concerning, and such Release and Covenant Not to Sue in Section VI shall not extend to, Respondent or any of Respondent's lessees, sublessees, successors or assigns or successors-in-title who cause or allow a release or threat of release at the Site of any hazardous waste or petroleum, other than the Existing Contamination; nor to any of Respondent's lessees, sublessees, successors or assigns who are otherwise responsible under state or federal law for the remediation of the Existing Contamination and who are not otherwise released per this Settlement Agreement.

C. Except as provided in this Settlement Agreement, and without limiting the scope of the releases and covenants set forth in Section VI above, nothing contained in this Settlement Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights with respect to any party, including Respondent.

D. Nothing contained in this Settlement Agreement shall prejudice any rights of the Department to take investigatory or remedial action it deems necessary if Respondent fails to comply with the Settlement Agreement or if contamination other than Existing Contamination is encountered at the Site; and

E. Nothing contained in this Settlement Agreement shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

F. Nothing herein shall be construed as barring, diminishing, adjudicating or in any way affecting any legal rights or claims, actions, suits, causes of action or demands whatsoever that (i) Respondent may have against any party other than the Department, and (ii) the Department may have against any party other than Respondent, its directors, officers, employees, agents and servants, and those successors and assigns of Respondent that were not responsible under applicable law for the release of hazardous substances at the Site and the development and implementation of a remedial program at the Site prior to the effective date of this Settlement Agreement, and their respective secured creditors.

G. The Department reserves and this Settlement Agreement is without prejudice to all rights against Respondent with respect to matters not encompassed by this Settlement Agreement, including (but not limited to) claims based on a failure by Respondent to meet requirements of this Settlement Agreement, including (but not limited to) Paragraph II (Access/Notice to Successors in Interest), Paragraph III (Environmental Easement) and Paragraph IV (Due Care/Cooperation).

H. Except as provided in the Release and Covenant Not to Sue in Paragraph VI after its issuance, and except as otherwise provided in this Settlement Agreement, nothing contained in this Settlement Agreement shall be construed as barring,

diminishing, adjudicating or in any way affecting any of the Department's rights or authorities, including but not limited to the right to take any investigatory or remedial action deemed necessary, and the right to exercise summary abatement powers with respect to any person, including Respondent if unrelated to Existing Contamination.

I. Except as otherwise provided in this Settlement Agreement, Respondent expressly reserves all rights and defenses under applicable law to contest, defend against, dispute or disprove any actions, proceedings, allegations, assertions or determinations of the Department, including any assertion of remedial liability by the Department against Respondent, and further reserves all rights including the rights to notice, to be heard, to appeal and to any other due process respecting any action or proceeding by the Department, including the enforcement of this Settlement Agreement. The existence of this Settlement Agreement or Respondent's compliance with it shall not be construed as an admission of any liability, fault, wrongdoing, or violation of law by Respondent, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

J. Except as provided in this Settlement Agreement, Respondent reserves such rights as it may have to seek and obtain contribution, indemnification, and/or any other form of recovery from its insurers and from other potentially responsible parties or their insurers, for past or future response and/or cleanup costs or other such costs or damages arising from contamination at the Site as provided under applicable law.

#### VIII. Indemnification

Respondent shall indemnify and hold the Department, the State of New York and their employees and representatives harmless for all third-party claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Settlement Agreement by Respondent and/or any of Respondent's directors, officers, employees, servants, agents, successors and assigns except for liability arising from (i) vehicular accidents occurring during travel to or from the Site; or (ii) willful, wanton or malicious acts or omissions, and acts or omissions constituting gross negligence or criminal behavior by the Department, the State of New York and/or their employees and representatives during the course of any activities conducted pursuant to this Settlement Agreement. The Department shall provide Respondent with written notice no less than thirty (30) days prior to commencing a lawsuit seeking indemnification pursuant to this Paragraph.

If any mechanics' or materialmen's lien, or similar lien, is asserted against the Site, or any other property as a consequence of the response actions, the Department shall immediately satisfy, defend, or obtain the release of such lien, all at the Department's expense, and the Department shall indemnify and defend Respondent against any claims arising out of or connected with such lien.

IX. Communications

A. All written communications required by this Settlement Agreement shall be transmitted by United States Postal Service, by private courier service, by hand delivery, or by electronic transmission including email or facsimile as follows:

1. Communication from Respondent shall be sent to:

Steven Walsh, Project Manager  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
625 Broadway  
Albany, NY 12233  
[steven.walsh@dec.ny.gov](mailto:steven.walsh@dec.ny.gov)

Jennifer Andalaro, Esq.  
New York State Department of Environmental Conservation  
Office of General Counsel  
625 Broadway – 14<sup>th</sup> Floor  
Albany, NY 12233-1500  
[jennifer.andalaro@dec.ny.gov](mailto:jennifer.andalaro@dec.ny.gov)

2. Communication from the Department to Respondent shall be sent to:

Thomas J. Burke  
509 State Route 67  
Malta, NY 12020

Dean S. Sommer, Esq.  
Young Sommer LLC  
Executive Woods  
5 Palisades Drive  
Albany, NY 12205  
[DSommer@youngsommer.com](mailto:DSommer@youngsommer.com)

B. The Department and Respondent reserve the right to designate additional or different addressees for communication on written notice to the other. Additionally, the Department reserves the right to request that the Respondent provide more than one paper copy of any work plan or report.

C. Each party shall notify the other within ninety (90) days after any change in the addresses listed in this Paragraph IX.

X. Parties Bound/Transfer of Covenant Not to Sue

A. This Settlement Agreement shall apply to and be binding upon the Department and shall apply to and be binding on the Respondent, its officers, directors, employees, successors, assigns and agents. Each signatory of a Party to this Settlement Agreement represents that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to legally bind such Party.

B. In the event of an assignment or transfer of the Site or an assignment or transfer of an interest in the Site, the assignor or transferor shall continue to be bound by all of the terms and conditions, and subject to all the benefits, of this Settlement Agreement except as the Department and the assignor or transferor agree otherwise and modify this Settlement Agreement, in writing, accordingly. Moreover, prior to or simultaneously with any assignment or transfer of the Site, the assignee or transferee must consent in writing to be bound by the terms of this Settlement Agreement, including but not limited to the certification requirement in Paragraph V of this Settlement Agreement in order for the Release and Covenant Not to Sue in Paragraph VI to be available to that party. The Release and Covenant Not to Sue in Paragraph VI shall not be effective with respect to any assignees or transferees who fails to provide such written consent to the Department.

#### XI. Disclaimer

This Settlement Agreement in no way constitutes a finding by the Department as to any risks to human health and the environment which may be posed by the Existing Contamination at the Site nor constitutes any representation by the Department that the Site is fit for any particular purpose.

#### XII. Payment of Costs

If Respondent fails to comply with the terms of this Settlement Agreement as determined by a court of appropriate and proper jurisdiction, Respondent shall be liable for all litigation and other enforcement costs incurred by the Department to enforce this Settlement Agreement or otherwise obtain compliance.

#### XIII. Termination

A. Should the Release and Covenant Not to Sue set forth in Paragraph VI herein become null and void, *ab initio*, in the event of fraud relating to the execution or implementation of this Settlement Agreement or in the event of Respondent's failure to materially comply with any provision of this Settlement Agreement, then neither this Settlement Agreement nor its termination shall affect any liability of Respondent for remediation of the Site and/or for payment of State Costs, including implementation of removal and remedial actions, interest, enforcement, and any and all other response costs as defined under CERCLA. Nothing in this Settlement Agreement shall be construed to require Respondent to implement the ROD or any amendments thereto.



B. If any Party to this Settlement Agreement believes that any or all of the obligations under Paragraph II (Site Access/Notice to Successors in Interest) are no longer necessary to ensure compliance with the requirements of this Settlement Agreement, that Party may request in writing that the other Party agree to terminate the provisions establishing such obligations; provided that the provisions in question shall continue in full force unless and until the Party requesting such termination receives written confirmation from the other Party to terminate such provisions.

#### XIV. Miscellaneous

A. Respondent and Respondent's officers, directors, agents, servants, employees, successors and assigns shall be bound by this Settlement Agreement. Any change in ownership or corporate status of Respondent, including but not limited to any transfer of assets or real or personal property, shall in no way alter Respondent's responsibilities under this Settlement Agreement. Respondent's officers, directors, employees, servants and agents shall be obliged to comply with the relevant provisions of this Settlement Agreement in the performance of their designated duties on behalf of Respondent. In the event that Respondent transfers ownership of the property to an unrelated 3<sup>rd</sup> Party, Respondent shall provide a copy of this Agreement to said 3<sup>rd</sup> Party and shall also notify the Department of such transfer and the 3<sup>rd</sup> Party may seek a new or amended Order with the Department.

B. All references to "days" in this Settlement Agreement are to calendar days unless otherwise specified.

C. The paragraph headings set forth in this Settlement Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Settlement Agreement.

D. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Settlement Agreement shall be binding unless made in writing and subscribed by the Party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondent of Respondent's obligation to obtain such formal approvals as may be required by this Settlement Agreement

2. If Respondent seeks to change any provision of this Settlement Agreement, Respondent shall make timely written application, signed by Respondent, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to the Department's contacts provided in Paragraph X.

E. To the extent authorized under 42 U.S.C. Section 9613, New York General Obligations Law § 15-106, 6 NYCRR § 375-1.5(b)(5)(i) and other applicable law, Respondent shall be deemed to have resolved its liability to the State for purposes of contribution protection provided by CERCLA Section 113(f)(2), 42 U.S.C. Section 9613(f)(2), for “matters addressed” pursuant to and in accordance with this Settlement Agreement. “Matters addressed” in this Settlement Agreement shall mean all response actions, as this term is defined at 42 U.S.C. § 9601(25), taken by Respondent and/or the Department in accordance with or as contemplated by this Settlement Agreement for the Site, including (without limitation) all response costs incurred and to be incurred by any person or party in connection with work performed to investigate the Site and to implement the ROD, or any amendments thereto, and any other actions taken under this Settlement Agreement. . To the extent authorized under 42 U.S.C. § 9613(f)(3)(B), by entering into this administrative settlement of liability, if any, for some or all of a response action and/or for some or all of the costs of such action, Respondent is entitled to seek contribution from any person except those who are entitled to contribution protection under 42 U.S.C. § 9613(f)(2).

F. Respondent agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Settlement Agreement, it will notify the Department in writing no later than sixty (60) days prior to the initiation of such suit or claim.

G. Respondent also agrees that, with respect to any suit or claim for contribution brought against it for matters related to this Settlement Agreement, it will notify the Department in writing within ten (10) days of service of the complaint on them.

H. All activities undertaken by Respondent pursuant to this Settlement Agreement shall be performed in accordance with the requirements of all applicable Federal and State laws, regulations, and guidance documents.

I. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in ECL Article 27, Title 13 or in regulations promulgated under such statute have the meaning assigned to them under said statute or regulations. Whenever terms defined in this Settlement Agreement are used in this Settlement Agreement, the definitions in this Settlement Agreement shall apply. In the event of a conflict, the definition set forth in this Settlement Agreement shall control.

J. Respondent’s obligations under this Settlement Agreement represent payment for or reimbursement of response costs and shall not be deemed to constitute any type of fine or penalty.

K. This Settlement Agreement may be executed for the convenience of the Parties hereto, individually or in combination, in one or more counterparts, each of

which for all purposes shall be deemed to have the status of an executed original, and all of which shall together constitute one and the same.

L. The effective date of this Settlement Agreement is the date of the closing for the completion of the sale/purchase of the Site between Respondent and the current Owner of the property. This Settlement Agreement shall be null and void if closing of the sale/purchase of the Site between Respondent and the current owner does not occur.

DATED: *March 25, 2022*

BASIL SEGGOS  
COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By:

*Susan Edwards*

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Susan Edwards, P.E., Acting Director  
Division of Environmental Remediation

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Consent Order and Settlement Agreement, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Consent Order and Settlement Agreement.

Thomas J. Burke

By: Thomas J. Burke

Title: \_\_\_\_\_

Date: 3/17/2022

STATE OF NEW YORK )  
 ) ss:  
COUNTY OF Saratoga )

On the 17 day of March in the year 2022, before me, the undersigned, personally appeared Thomas J. Burke (full name) personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

**MICHELLE GREENE**  
Notary Public, State of New York  
Registration #01GR6383059  
Qualified in Saratoga County  
Commission Expires Nov. 13, 2022

Michelle Greene

Notary Public, State of New York

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Consent Order and Settlement Agreement, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Consent Order and Settlement Agreement.

Osborne Ventures, LLC

By: Thomas J. Burke  
Title: managing member  
Date: 3/17/2022

STATE OF NEW YORK )  
                                  Saratoga ) ss:  
COUNTY OF Saratoga )

On the 17 day of March in the year 2022, before me, the undersigned, personally appeared Thomas J. Burke (full name) personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity, and that by his/her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

**MICHELLE GREENE**  
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Commission Expires Nov. 13, 2022

Michelle Greene  
Notary Public, State of New York

**EXHIBIT "A"**

**Map**



Former Cleanerama Site (Site # 401056)  
Loudonville, Albany County, New York





## EXHIBIT "B"

### NOTICE OF SETTLEMENT AGREEMENT

\_\_\_\_\_ ("Respondent") is subject to a Settlement Agreement (Index No. \_\_\_\_\_) (the "Settlement Agreement") issued by the Commissioner of the New York State Department of Environmental Conservation (the "Department" under Article 27, Title 13, and Article 71, Title 27 of the Environmental Conservation Law of the State of New York ("ECL")) for a site located at \_\_\_\_\_ (the "Site").

The Department designated the Site as an inactive hazardous waste disposal site, as that term is defined at ECL Section 27-1301(2) and listed the Site on the Registry of Inactive Hazardous Waste Disposal Sites in New York State as Site No.401506. The Department classified the Site as a Class "2" site pursuant to ECL Section 27-1305(4)(b). This classification indicates that the Department determined that the Site presents a significant threat to the public health or environment. The Site is more particularly described in the legal description attached hereto as Schedule "A."

The purpose of the Settlement Agreement is to facilitate the development and implementation of an inactive hazardous waste disposal site remedial program for the Site. The effective date of the Settlement Agreement was \_\_\_\_\_. A copy of the Settlement Agreement, as well as any and all Department-approved Work Plans and Reports under this Settlement Agreement may be reviewed at the Department's Central Office located at 625 Broadway, Albany, New York.

This Notice of Settlement Agreement is being filed with the Rockland County recording officer in accordance with Paragraph II of the Settlement Agreement to give all parties who may acquire any interest in the Site notice of the Settlement Agreement.

**WHEREFORE**, the undersigned has signed this Notice of Settlement Agreement in compliance with the terms of the Settlement Agreement.



**EXHIBIT "C"**

**MODEL ENVIRONMENTAL EASEMENT**

**ENVIRONMENTAL EASEMENT GRANTED PURSUANT TO ARTICLE 71, TITLE 36  
OF THE NEW YORK STATE ENVIRONMENTAL CONSERVATION LAW**

**THIS INDENTURE** made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, between Owner(s) Enter property owner(s) name, having an office at Enter property owner's address, County of Enter owner's county, State of Enter owner's state (the "Grantor"), and The People of the State of New York (the "Grantee."), acting through their Commissioner of the Department of Environmental Conservation (the "Commissioner", or "NYSDEC" or "Department" as the context requires) with its headquarters located at 625 Broadway, Albany, New York 12233,

**WHEREAS**, the Legislature of the State of New York has declared that it is in the public interest to encourage the remediation of abandoned and likely contaminated properties ("sites") that threaten the health and vitality of the communities they burden while at the same time ensuring the protection of public health and the environment; and

**WHEREAS**, the Legislature of the State of New York has declared that it is in the public interest to establish within the Department a statutory environmental remediation program that includes the use of Environmental Easements as an enforceable means of ensuring the performance of operation, maintenance, and/or monitoring requirements and the restriction of future uses of the land, when an environmental remediation project leaves residual contamination at levels that have been determined to be safe for a specific use, but not all uses, or which includes engineered structures that must be maintained or protected against damage to perform properly and be effective, or which requires groundwater use or soil management restrictions; and

**WHEREAS**, the Legislature of the State of New York has declared that Environmental Easement shall mean an interest in real property, created under and subject to the provisions of Article 71, Title 36 of the New York State Environmental Conservation Law ("ECL") which contains a use restriction and/or a prohibition on the use of land in a manner inconsistent with engineering controls which are intended to ensure the long term effectiveness of a site remedial program or eliminate potential exposure pathways to hazardous waste or petroleum; and

**WHEREAS**, Grantor, is the owner of real property located at the address of Enter street address of property in the Choose municipality type of Enter property municipality, County of Enter property county and State of New York, known and designated on the tax map of the County Clerk of Enter clerk county as tax map parcel numbers: Section Enter Tax ID Section #. Block Enter Tax ID Block # Lot Enter Tax ID Lot #, being the same as that property conveyed to Grantor by deed dated Enter Deed Date and recorded in the Enter county name or leave blank for NY City deeds Select Recording Office in Choose an instrument type Enter Instrument # or Liber and Page #s, comprising approximately Enter Acreage +/- acres, and hereinafter more fully described in the Land Title Survey dated Enter original survey date and, if applicable, "and revised on" and revised survey date prepared by Enter revised surveyor's name or original surveyor's name if not revised, which will be attached to the Site Management Plan. The property description (the "Controlled Property") is set forth in and attached hereto as Schedule A; and

**WHEREAS**, the Department accepts this Environmental Easement in order to ensure the

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protection of public health and the environment and to achieve the requirements for remediation established for the Controlled Property until such time as this Environmental Easement is extinguished pursuant to ECL Article 71, Title 36; and

**NOW THEREFORE**, in consideration of the mutual covenants contained herein, Grantor conveys to Grantee a permanent Environmental Easement pursuant to ECL Article 71, Title 36 in, on, over, under, and upon the Controlled Property as more fully described herein ("Environmental Easement")

1. Purposes. Grantor and Grantee acknowledge that the Purposes of this Environmental Easement are: to convey to Grantee real property rights and interests that will run with the land in perpetuity in order to provide an effective and enforceable means of encouraging the reuse and redevelopment of this Controlled Property at a level that has been determined to be safe for a specific use while ensuring the performance of operation, maintenance, and/or monitoring requirements; and to ensure the restriction of future uses of the land that are inconsistent with the above-stated purpose.

2. Institutional and Engineering Controls. The controls and requirements listed in the Department approved Site Management Plan ("SMP") including any and all Department approved amendments to the SMP are incorporated into and made part of this Environmental Easement. These controls and requirements apply to the use of the Controlled Property, run with the land, are binding on the Grantor and the Grantor's successors and assigns, and are enforceable in law or equity against any owner of the Controlled Property, any lessees and any person using the Controlled Property.

A. (1) The Controlled Property may be used for:

Choose the allowable land use If current land use is selected, enter current use.

(2) All Engineering Controls must be operated and maintained as specified in the Site Management Plan (SMP);

(3) All Engineering Controls must be inspected at a frequency and in a manner defined in the SMP;

(4) The use of groundwater underlying the property is prohibited without necessary water quality treatment as determined by the NYSDOH or the Automatic County Department of Health to render it safe for use as drinking water or for industrial purposes, and the user must first notify and obtain written approval to do so from the Department;

(5) Groundwater and other environmental or public health monitoring must be performed as defined in the SMP;

(6) Data and information pertinent to Site Management of the Controlled Property must be reported at the frequency and in a manner defined in the SMP;

(7) All future activities on the property that will disturb remaining contaminated material must be conducted in accordance with the SMP;

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(8) Monitoring to assess the performance and effectiveness of the remedy must be performed as defined in the SMP;

(9) Operation, maintenance, monitoring, inspection, and reporting of any mechanical or physical components of the remedy shall be performed as defined in the SMP;

(10) Access to the site must be provided to agents, employees or other representatives of the State of New York with reasonable prior notice to the property owner to assure compliance with the restrictions identified by this Environmental Easement.

B. The Controlled Property shall not be used for Choose the correct list of inapplicable uses., and the above-stated engineering controls may not be discontinued without an amendment or extinguishment of this Environmental Easement.

C. The SMP describes obligations that the Grantor assumes on behalf of Grantor, its successors and assigns. The Grantor's assumption of the obligations contained in the SMP which may include sampling, monitoring, and/or operating a treatment system, and providing certified reports to the NYSDEC, is and remains a fundamental element of the Department's determination that the Controlled Property is safe for a specific use, but not all uses. The SMP may be modified in accordance with the Department's statutory and regulatory authority. The Grantor and all successors and assigns, assume the burden of complying with the SMP and obtaining an up-to-date version of the SMP from:

Site Control Section  
Division of Environmental Remediation  
NYSDEC  
625 Broadway  
Albany, New York 12233  
Phone: (518) 402-9553

D. Grantor must provide all persons who acquire any interest in the Controlled Property a true and complete copy of the SMP that the Department approves for the Controlled Property and all Department-approved amendments to that SMP.

E. Grantor covenants and agrees that until such time as the Environmental Easement is extinguished in accordance with the requirements of ECL Article 71, Title 36 of the ECL, the property deed and all subsequent instruments of conveyance relating to the Controlled Property shall state in at least fifteen-point bold-faced type:

**This property is subject to an Environmental Easement held by the New York State Department of Environmental Conservation pursuant to Title 36 of Article 71 of the Environmental Conservation Law.**

F. Grantor covenants and agrees that this Environmental Easement shall be incorporated in full or by reference in any leases, licenses, or other instruments granting a right to use the Controlled Property.

G. Grantor covenants and agrees that it shall, at such time as NYSDEC may require, submit to NYSDEC a written statement certifying under penalty of perjury, in such form and manner as the Department may require, that:

- (1) the institutional controls and/or engineering controls employed at such site:
  - (i) are in-place;
  - (ii) are unchanged from the previous certification, or that any identified changes to the controls employed were approved by the NYSDEC and that all controls are in the Department-approved format; and
  - (iii) that nothing has occurred that would impair the ability of such control to protect the public health and environment;
- (2) the owner will continue to allow access to such real property;
- (3) nothing has occurred that would constitute a violation or failure to comply with any site management plan for such controls; and
- (4) the information presented is accurate and complete.

3. Right to Enter and Inspect. Grantee, its agents, employees, or other representatives of the State may enter and inspect the Controlled Property in a reasonable manner and at reasonable times to assure compliance with the above-stated restrictions.

4. Reserved Grantor's Rights. Grantor reserves for itself, its assigns, representatives, and successors in interest with respect to the Property, all rights as fee owner of the Property, including:

A. Use of the Controlled Property for all purposes not inconsistent with, or limited by the terms of this Environmental Easement;

B. The right to give, sell, assign, or otherwise transfer part or all of the underlying fee interest to the Controlled Property, subject and subordinate to this Environmental Easement;

5. Enforcement

A. This Environmental Easement is enforceable in law or equity in perpetuity by Grantor, Grantee, or any affected local government, as defined in ECL Section 71-3603, against the owner of the Property, any lessees, and any person using the land. Enforcement shall not be defeated because of any subsequent adverse possession, laches, estoppel, or waiver. It is not a defense in any action to enforce this Environmental Easement that: it is not appurtenant to an interest in real property; it is not of a character that has been recognized traditionally at common law; it imposes a negative burden; it imposes affirmative obligations upon the owner of any interest in the burdened property; the benefit does not touch or concern real property; there is no privity of estate or of contract; or it imposes an unreasonable restraint on alienation.

B. If any person violates this Environmental Easement, the Grantee may revoke the Certificate of Completion with respect to the Controlled Property.

C. Grantee shall notify Grantor of a breach or suspected breach of any of the terms of this Environmental Easement. Such notice shall set forth how Grantor can cure such breach or suspected breach and give Grantor a reasonable amount of time from the date of receipt of notice in which to cure. At the expiration of such period of time to cure, or any extensions granted by Grantee, the Grantee shall notify Grantor of any failure to adequately cure the breach or suspected breach, and Grantee may take any other appropriate action reasonably necessary to remedy any breach of this Environmental Easement, including the commencement of any proceedings in accordance with applicable law.

D. The failure of Grantee to enforce any of the terms contained herein shall not be deemed a waiver of any such term nor bar any enforcement rights.

6. Notice. Whenever notice to the Grantee (other than the annual certification) or approval from the Grantee is required, the Party providing such notice or seeking such approval shall identify the Controlled Property by referencing the following information:

County, NYSDEC Site Number, and the County tax map number or the Liber and Page or computerized system identification number.

Parties shall address correspondence to:      Site Number: Enter DEC Site #  
Office of General Counsel  
NYSDEC  
625 Broadway  
Albany New York 12233-5500

With a copy to:      Site Control Section  
Division of Environmental Remediation  
NYSDEC  
625 Broadway  
Albany, NY 12233

All notices and correspondence shall be delivered by hand, by registered mail or by Certified mail and return receipt requested. The Parties may provide for other means of receiving and communicating notices and responses to requests for approval.

7. Recordation. Grantor shall record this instrument, within thirty (30) days of execution of this instrument by the Commissioner or her/his authorized representative in the office of the recording officer for the county or counties where the Property is situated in the manner prescribed by Article 9 of the Real Property Law.

8. Amendment. Any amendment to this Environmental Easement may only be executed by the Commissioner of the New York State Department of Environmental Conservation or the Commissioner's Designee, and filed with the office of the recording officer for the county or counties where the Property is situated in the manner prescribed by Article 9 of the Real Property Law.

9. **Extinguishment.** This Environmental Easement may be extinguished only by a release by the Commissioner of the New York State Department of Environmental Conservation, or the Commissioner's Designee, and filed with the office of the recording officer for the county or counties where the Property is situated in the manner prescribed by Article 9 of the Real Property Law.

**IN WITNESS WHEREOF**, Grantor has caused this instrument to be signed in its name.

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_ Date: \_\_\_\_\_

[illegible]

On the \_\_\_\_\_ day of \_\_\_\_\_, in the year 20 \_\_, before me, the undersigned, personally appeared \_\_\_\_\_, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

Environmental Easement Page 6





**SCHEDULE "A" PROPERTY DESCRIPTION**

Enter Property Description