

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Implementation of a modification to a **Voluntary Cleanup Agreement**  
for: Bayville Village Cleaners, New York by: Bayville Village Cleaners, Inc., "Volunteer"  
Site #: V00220 Index #: W1-0848-13-04

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**WHEREAS**, the New York State Department of Environmental Conservation (the "Department") and Bayville Village Cleaners, Inc. ("Volunteer") executed a Voluntary Cleanup Agreement for the investigation of the Bayville Village Cleaners, Site No. V00220, Index No. W1-0848-9903, dated November 23, 1999 (the "Agreement"). The Bayville Village Cleaners site is located at 290 Bayville Avenue, Village of Bayville, Town of Oyster Bay, Nassau County, New York (the "Site"). A copy of the Agreement is attached hereto as Exhibit "A"; and

**WHEREAS**, the Department is responsible for the enforcement of the ECL and the NL and such laws provide the Department authority to enter into this Agreement; and

**WHEREAS**, on August 11, 2011, the Department issued a decision document for the Site to present the selected remedy for the Site (the "Decision Document"). The elements of the selected remedy include the installation of a SSDS, use of an institutional control at the Site in the form of deed restrictions, and the development and the implementation of a Site Management Plan. The Decision Document is attached to this modification to the Agreement as Exhibit "B" and is incorporated as an enforceable part of this modification to the Agreement; and

**WHEREAS**, on August 15, 2011, the Department approved a "Revised Remedial Action Work Plan" for the Site prepared by Walden Associates dated April 2011, which proposed a remedy to "eliminate potential exposure to the sub-slab vapors detected at the Site by utilizing a sub-slab depressurization system" ("SSDS"); and

**WHEREAS**, in March 2013, the Volunteer sought modification of the Agreement to enable "closure on the Bayville Village Cleaners as my VCA contract did not provide for the proper work necessary for closure"; and

**WHEREAS**, the Department agreed to modify the Agreement to enable closure of the Voluntary Cleanup Program project for the Site, which requires, among other things, the development and implementation of a Site Management Plan, submission of a final engineering report, placement of deed restrictions, and the Department's issuance of a release letter upon completion of the remedial program for the Site.

**NOW, THEREFORE**, IN CONSIDERATION OF AND IN EXCHANGE FOR THE MUTUAL COVENANTS AND PROMISES, THE PARTIES AGREE TO THE FOLLOWING:

1. Paragraph 1 of the Agreement is hereby modified to add new subparagraphs that read as follows:

E. Site Specific Definitions

Unless otherwise expressly provided herein, terms used in this modification to the Agreement are defined in the ECL Article 27 or in regulations promulgated thereunder shall have the meaning assigned to them under said statute or regulations, including amendments thereto. The following terms shall have the following meaning:

1. "Contemplated Use": restricted commercial use excluding day care, child care and medical care uses.

2. "Existing Contamination": Contamination of soil, soil gas and groundwater beneath and in the vicinity of the Site with tetrachloroethene as described in the "Continued Soil and Groundwater Investigation & Remedial Measure at Bayville Village Cleaners", dated December 1996, "Site Investigation Report", dated December 9, 2008 and "Site Investigation Report Addendum", dated August 3, 2009. The term also includes contamination identified during the implementation of this Agreement, the nature and extent of which were unknown or insufficiently characterized as of the effective date of this Agreement, but which shall have been fully characterized and addressed to the Department's satisfaction.

3. "Covered Contamination": the concentrations of Existing Contamination remaining on the Site on the date that the Department issues the Release and Covenant Not to Sue that is substantially similar to Exhibit "C" attached to this modification to the Agreement.

I. F. Submission/Implementation of Work Plans

1. A Site Management Plan ("SMP") whose objective is to identify and implement the institutional and engineering controls required for the Site, as well as any necessary monitoring and/or operation and maintenance ("OM&M") of the remedy, shall be submitted to the Department within sixty (60) Days after the effective date of this modification to the Agreement. The Department shall notify Volunteer in writing of its approval or disapproval of the SMP.

2. If the Department approves the SMP, Volunteer shall implement the SMP in accordance with its schedule and terms as approved. If the Department disapproves the SMP, it will notify Volunteer in writing and shall specify the reasons for its disapproval. Within 30 days after Volunteer receives written notice that the SMP has been disapproved, Volunteer shall submit a revised submittal that addresses and resolves all of the Department's stated reasons for disapproving the initial submittal. After receipt of the revised submittal, the Department shall in a timely manner notify Volunteer in writing of its approval or disapproval of the revised submittal and the stated reasons therefore. If the Department disapproves the revised submittal, Volunteer shall revise and submit a revised submittal in accordance with the Department's comments within 30 business days of the Department's notice unless an alternative time is agreed to by the Department. If the Department disapproves the revised submittal, the Agreement shall terminate upon the Department so informing Volunteer in writing, and both parties reserve whatever rights that they may have had before the execution of the Agreement respecting the Site's remediation. If the Department approves the revised submittal, Volunteer shall implement it in accordance with its schedule and terms, as

approved. The SMP or revised submittal, as approved, shall be incorporated into and become an enforceable part of this Agreement.

3. Volunteer may opt to propose one or more additional or supplemental Work Plans (including one or more IRM Work Plans) at any time, which the Department shall review for appropriateness and technical sufficiency. The additional or supplemental work plan, as approved, shall be incorporated into and become an enforceable part of this Agreement.

4. A Professional Engineer must stamp and sign all Work Plans other than a Site Characterization or Remedial Investigation/Feasibility Study Work Plans.

5. During all field activities, Volunteer shall have on-Site a representative who is qualified to supervise the activities undertaken. Such representative may be an employee or a consultant retained by Volunteer to perform such supervision.

G. Release and Covenant Not to Sue

Upon the Department's determination that (i) Volunteer is in compliance with the Agreement; (ii) no requirements other than those remedial actions, exclusive of OM&M activities, already conducted at the Site, if any, are necessary to assure that Site conditions are protective of the public health and the environment based upon the Contemplated Use; and (iii) Volunteer has complied, if required, with Paragraph IX.C (Declaration of Covenants and Restrictions) of the Agreement, the Department shall timely provide Volunteer with the Release and Covenant No to Sue that is substantially similar to Exhibit "C," subject to the terms and conditions stated therein.

H. Submission of Final Reports and Annual Reports

1. In accordance with the schedule contained in a Work Plan, Volunteer shall submit a final report as provided at 6 NYCRR 375-1.6(b) and a final engineering report as provided at 6 NYCRR 375-1.6(c).

2. Any final report or final engineering report that includes construction activities shall include "as built" drawings showing any changes made to the remedial design or the IRM.

3. In the event that the final engineering report for the Site requires Site management, Volunteer shall submit an annual report by the 1<sup>st</sup> Day of the month following the anniversary of the start of the Site management. Such annual report shall be signed by a Professional Engineer or by such other qualified environmental professional as the Department may find acceptable and shall contain a certification as provided at 6 NYCRR 375-1.8(h)(3). Volunteer may petition the Department for a determination that the institutional and/or engineering controls may be terminated. Such petition must be supported by a statement by a Professional Engineer that such controls are no longer necessary for the protection of public health and the environment. The Department shall not unreasonably withhold its approval of such petition.



2. Paragraph VI. of the Agreement is hereby modified to add a new Subparagraph that reads as follows:

C. Payment of State Costs

1. Within forty-five (45) Days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money which shall represent reimbursement of expenses incurred by the State of New York for all work related to the Site from August 12, 2011, the State's expenses for negotiating this Agreement, and all costs associated with this Agreement, through and including the Termination Date.

2. Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (*e.g.*, supplies, materials, travel, contractual) and shall be documented by expenditure reports. The Department shall not be required to provide any other documentation of costs, provided however, that the Department's records shall be available consistent with, and in accordance with, Article 6 of the Public Officers Law.

3. Such invoice shall be sent to the Volunteer at the following address:

Bayville Village Cleaners, Inc.  
c/o Thomas C. Ryan  
19 Todd Drive  
Glen Head, NY 11545

4. Each such payment shall be made payable to the Department of Environmental Conservation and shall be sent to: Bureau of Program Management, Division of Environmental Remediation, New York State Department of Environmental Conservation, 625 Broadway, Albany, NY 12233-7010.

5. Each party shall provide written notification to the other within ninety (90) Days of any change in the foregoing addresses.

6. Volunteer may contest, in writing, invoiced costs under Subparagraph VI.C(1) if it believes (i) the cost documentation contains clerical, mathematical, or accounting errors; (ii) the costs are not related to the State's activities reimbursable under this Agreement; or (iii) the Department is not otherwise legally entitled to such costs. If Volunteer objects to an invoiced cost, Volunteer shall pay all costs not objected to within the time frame set forth in Subparagraph VI.C(1) and shall, within thirty (30) Days of receipt of an invoice, identify in writing all costs objected to and identify the basis of the objection. This objection shall be filed with the BPM Director. The BPM Director or the BPM Director's designee shall have the authority to relieve Volunteer of the obligation to pay invalid costs. Within forty-five (45) Days of the Department's determination of the objection, Volunteer shall pay to the Department the amount which the BPM Director or the BPM Director's designee determines Volunteer is

obligated to pay or commence an action or proceeding seeking appropriate judicial relief.

7. In the event any instrument for the payment of any money due under this Agreement fails of collection, such failure of collection shall constitute a violation of this Agreement, provided (i) the Department gives Volunteer written notice of such failure of collection, and (ii) the Department does not receive from Volunteer a certified check or bank check within fourteen (14) Days after the date of the Department's written notification.

3. Subparagraph VII.A of the Agreement is modified to read as follows:

A. Except as provided in this Agreement, nothing contained in this 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, nor exemplified by, the right to recover natural resources damages) with respect to any party, including the Volunteer.

4. Paragraph IX of the Agreement is hereby modified to add new subparagraphs that read as follows:

C. Declaration of Covenants and Restrictions

1. Within thirty (30) Days after the execution of this modification to the Agreement, Volunteer shall submit to the Department for approval a Declaration of Covenants and Restrictions to run with the land which provides for covenants and restrictions consistent with the Work Plan, which relies upon one or more institutional controls. The submittal shall be substantially similar to Exhibit "D." Volunteer shall cause such instrument to be recorded with the County Clerk (or the City Register) in the county in which the Site is located within thirty (30) Days after the Department's approval of such instrument. Volunteer shall provide the Department with a copy of such instrument certified by the County Clerk (or the City Register) to be a true and faithful copy within thirty (30) Days of such recording (or such longer period of time as may be required to obtain a certified copy provided Volunteer advises the Department of the status of its efforts to obtain same within such 30 Day period).

2. Volunteer or the owner of the Site may petition the Department to modify or terminate the Declaration of Covenants and Restrictions filed pursuant to this Paragraph at such time as it can certify that the Site is protective of human health and the environment for residential uses without reliance upon the restrictions set forth in such instrument. Such certification shall be made by a Professional Engineer. The Department will not unreasonably withhold its consent.

5. Subparagraph XI.I.1. of the Agreement is hereby revised to read as follows:

I. 1. The terms of this Agreement, including any modification thereof, shall constitute the complete and entire Agreement issued to Volunteer concerning the Site's investigation and remediation. No term, condition, understanding, or agreement purporting to modify or vary any term of this 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 Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

6. This modification to the Agreement, and Agreement shall constitute the entire Agreement between the parties with all the terms and conditions of the Agreement, as herein modified, remaining in full force and effect.

7. The effective date of this modification to the Agreement shall be the date it is executed by the Commissioner or the Commissioner's designee.

DATED:

JUN 20 2013

JOSEPH MARTENS  
COMMISSIONER  
NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By:

  
\_\_\_\_\_  
Robert W. Schick, Director  
Division of Environmental Remediation

CONSENT BY VOLUNTEER

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

Bayville Village Cleaners, Inc.

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

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


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

STATE OF NEW YORK )

) ss:

COUNTY OF )

On the 4th day of JUNE, in the year 2013, before me, the undersigned, personally appeared THOMAS C. RYAN, 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.

  
Signature and Office of individual  
taking acknowledgment

JOHN J. JORDAN III  
Notary Public, State Of New York  
No. 01JO6076100  
Qualified In Nassau County  
Commission Expires June 17, 20 14

**EXHIBIT "A"**

**Agreement**



EXHIBIT "B"

August 2011 Decision Document

## **EXHIBIT "C"**

### **Release and Covenant Not to Sue**

Unless otherwise specified in this letter, all terms used in this letter shall have the meaning assigned to them under the terms of the Voluntary Cleanup Agreement entered into between the New York State Department of Environmental Conservation (the "Department") and Bayville Village Cleaners, Inc. ("Volunteer"), Index No.W1-0848-9903 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plan(s) relative to the Site, located at 290 Bayville Avenue, Town of Oyster Bay, Nassau County, New York has been successfully implemented.

The Department, therefore, hereby releases and covenants not to sue, and shall forbear from bringing any action, proceeding, or suit pursuant to the Environmental Conservation Law, the NL or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department, against Volunteer and Volunteer's lessees and sublessees, grantees, successors, and assigns, and their respective secured creditors, for the further investigation and remediation of the Site, based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of the Agreement continue to be or have been made to the Department, (b) appropriate deed restrictions remain recorded in accordance with Paragraph X of the Agreement, and (c) Volunteer and/or its' lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Work Plan providing for OM&M, if any. Nonetheless, the Department hereby reserves all of its respective rights concerning, and such release and covenant not to sue shall not extend to natural resource damages or to any further investigation or remedial action the Department deems necessary:

- due to migration off-Site of contaminants resulting in impacts that are not inconsequential to environmental resources, to human health, or to other biota and to off-Site migration of petroleum;
- due to environmental conditions or information related to the Site which were unknown at the time this Release and Covenant Not to Sue was issued and which indicate that the Contemplated Use cannot be implemented with sufficient protection of human health and the environment;

- nothing contained in this letter shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.
- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement under the terms of the Agreement at any time during its implementation if Volunteer fails to comply substantially with the Agreement's terms and conditions.

In conclusion, the Department is pleased to be part of this effort to return the Site to productive use of benefit to the entire community.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL  
CONSERVATION

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

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

enter current use without the express written waiver of such prohibition by the Department or Relevant Agency.

Fifth, the owner of the Property shall prohibit the use of the groundwater underlying the Property without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the user first obtains permission to do so from the Department or Relevant Agency.

Sixth, the owner of the Property shall provide a periodic certification, prepared and submitted by a professional engineer or environmental professional acceptable to the Department or Relevant Agency, which will certify that the institutional and engineering controls put in place are unchanged from the previous certification, comply with the SMP, and have not been impaired.

Seventh, the owner of the Property shall continue in full force and effect any institutional and engineering controls required for the Remedy and maintain such controls, unless the owner first obtains permission to discontinue such controls from the Department or Relevant Agency, in compliance with the approved SMP, which is incorporated and made enforceable hereto, subject to modifications as approved by the Department or Relevant Agency.

Eighth, this Declaration is and shall be deemed a covenant that shall run with the land and shall be binding upon all future owners of the Property, and shall provide that the owner and its successors and assigns consent to enforcement by the Department or Relevant Agency of the prohibitions and restrictions that the Choose Agreement Type requires to be recorded, and hereby covenant not to contest the authority of the Department or Relevant Agency to seek enforcement.

Ninth, any deed of conveyance of the Property, or any portion thereof, shall recite, unless the Department or Relevant Agency has consented to the termination of such covenants and restrictions, that said conveyance is subject to this Declaration of Covenants and Restrictions.

**IN WITNESS WHEREOF**, the undersigned has executed this instrument the day written below.

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

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

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



## **Glossary of Terms**

The following terms shall have the following meanings:

"BPM Director": the Director of the Bureau of Program Management within the Division of Environmental Remediation.

"CERCLA": the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9601 et seq.

"CPLR": the Civil Practice Law and Rules, as amended.

"Day": a calendar day unless expressly stated to be a working day. "Working Day" shall mean a day other than a Saturday, Sunday or State holiday. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday or State holiday, the period shall run until the close of business of the next working day.

"ECL": the Environmental Conservation Law, Chapter 43-B of the Consolidated Laws of New York, as amended.

"Force Majeure": an event which is brought on as a result of Acts of God, work stoppages due to labor disputes or strikes, explosions, epidemics, riots, war rebellion, sabotage or any other fact or circumstance beyond the reasonable control of the Volunteer.

"NL": the Navigation Law, as amended.

"OH&M": the Office of Hearings and Mediation Services.

"Spill Fund": the New York State Environmental Protection and Spill Compensation Fund as established by Article 12, Part 3 of the NL.

"State Costs": all the State's response expenses related to the Site, including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating, implementing, overseeing, and administering the Agreement, and any other response costs as defined under CERCLA. Approved agency fringe benefit and indirect cost rates will be applied.

"Termination Date": the date upon which (i) the Release (Exhibit "C") is issued or the Department approves the final report relative to the OM&M at the Site, whichever is later; or (ii) the Agreement terminates pursuant to Paragraph I.F(2) or VII.D or is nullified pursuant to Subparagraph XI.A.2.

"USEPA": the United States Environmental Protection Agency.