

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
OFFICE OF WASTE MANAGEMENT

IN RE: Property at [Insert Plat, Lot, Block]
[Insert Address]
[Insert Town or City], Rhode Island
Case No: [Insert Case number]

SETTLEMENT AGREEMENT AND COVENANT NOT TO SUE

1. INTRODUCTION

This Settlement Agreement and Covenant Not to Sue (the "Agreement") is made and entered into by and between the State of Rhode Island (the "State"), acting by and through the Rhode Island Department of Environmental Management (the "Department"), [Insert Name of company, corporation, LLC or LLP] (the "Performing Party") and [Insert Name of Person, Company, corporation, LLC or LLP] (the "Settling Respondent"). The Department, the Performing Party and the Settling Respondent are collectively referred to herein as the "Parties".

The State enters into this Agreement pursuant to the Industrial Property Remediation and Reuse Act, Rhode Island General Laws Chapter 23-19.14-1, et seq. (the "Act").

The Performing Party and the Settling Respondent agree that the Property is ~~a Contaminated Site as defined by jurisdictional under~~ the Rules and Regulations for the Investigation and Remediation of Hazardous Material Releases ("Remediation Regulations"), as amended 1996 and that the Department has jurisdiction over the Site. The Performing Party and the Settling Respondent also agree to undertake all actions required of each of them by the terms and conditions of this Agreement. The purpose of this Agreement is to settle and resolve, subject to reservations and limitations contained herein, the potential liability of the Settling Respondent for the Existing Contamination at the Property, which would otherwise result from Settling Respondent becoming the owner of the property.

The Parties agree that the Settling Respondent's entry into this Agreement, and the actions undertaken by the Settling Respondent in accordance with the Agreement, do not constitute an admission of any liability by the Settling Respondent.

The resolution of this potential liability, in exchange for provision by the Settling Respondent to the State of a substantial benefit, is in the public interest. This Agreement shall be null and void should the Settling Respondent not acquire title to the Property.

2. DEFINITIONS

2.1 Unless otherwise expressly provided herein, terms used in this Agreement, which are defined in the Act or in regulations promulgated under the Act shall have the meaning assigned to them in the Act or in such regulations, including any amendments thereto.

1. "State" shall mean the State of Rhode Island, acting by and through the Rhode Island Department of Environmental Management.
2. "Department" shall mean the Rhode Island Department of Environmental Management.
3. "Existing Contamination" shall mean any hazardous substances, pollutants or contaminants, known to be present or existing on or under the Site based upon investigations and assessments provided to the Department as of the Effective Date of this Agreement.
4. "Parties" shall mean the Department, the Performing Party and the Settling Respondent.
5. ~~"Performing Party" shall mean [Insert Name of Person, Company, corporation, LLC or LLP].~~
6. "Property" shall mean that portion of the Site that is described in Exhibit 1 of this Agreement.
7. ~~"Settling Respondent" shall mean [Insert Name of Person, Company, corporation, LLC or LLP].~~
8. "Site" shall mean the ~~Contaminated Site, land,~~ encompassing approximately _____ acres, located at [address or description of location] in [name of city, county, and State], and depicted generally on the map attached as Exhibit 2. The Site shall include the Property, and all areas to which hazardous substances and/or pollutants or contaminants, have come to be located [provide a more specific definition of the Site where possible; may also wish to include within Site description structures, USTs, etc].

3. STATEMENT OF FACTS

3.1. ~~The "Performing Party" is [Insert Name of Person, Company, corporation, LLC or LLP], who is The Performing Party is~~ the owner of the Property and intends to sell the Property to the Settling Respondent.

3.2. The "Settling Respondent" is [Insert Name of Person, Company, corporation, LLC or LLP]. The Settling Respondent warrants and represents, that it is a “bona fide prospective purchaser,” as that term is defined in the Act and the Remediation Regulations, of the Property.

3.3. [Insert date and specific site information relating to the Site’s History: i.e. Notification of a Release, Site Investigation Work Performed and any Department approvals for Variances, Proposed Remedial Alternatives, Soil Management Plans and Institutional Controls (ELURs)].

3.4. The documents that have been submitted to the Department pertaining to the environmental conditions at the Property are as follows: [Insert a list of the specific documents related to this property in the possession of the Department. Include the name of the document, the date of the document, and who prepared the document].

3.5. These documents indicate that [Specifically state what contaminants are in exceedance of the Remediation Regulations, i.e. Residential Direct Exposure Criteria, Industrial / Commercial Direct Exposure Criteria, GA Leachability, GB Leachability, etc.].

3.6. The Settling Respondent represents, and for the purposes of this Agreement, the State relies on those representations, that Settling Respondent's involvement with the Property and the Site has been limited to the following: [Provide facts of any involvement by Settling Respondent with the Site, for example performing an environmental audit, or if Settling Respondent has had no involvement with the Site so state.].

4. WORK TO BE PERFORMED

4.1 The Performing Party shall:

1. implement the [choose Remedial Action Work Plan (the "RAWP") and/or Soil Management Plan (the "SMP")];
2. submit a closure report for Department review and approval; and
3. if institutional controls are a part of the approved remedial actions for the Site, then the Performing Party shall record an Environmental Land Usage Restriction (the "ELUR"). After the installation of the engineered controls described in Section 4.2.3 herein, the Performing Party shall complete a survey of the portions of the Property that are to be subject to the ELUR. Within 30 days of the completion of the survey, the Performing Party shall submit to the Department an ELUR for approval by the Department. The ELUR shall be similar in form and content to the ELUR that is attached hereto as Attachment A.
4. if necessary, as determined by the Department, conduct an assessment of the damages to natural resources caused by the Existing Contamination and., if necessary, provide mitigation and/or compensation for those damages.

4.2. The Settling Respondent agrees that:

1. the ~~future~~-use of the Site shall be consistent with the level of protection provided in the approved remedial plan;
2. the ~~future~~-use of the ground water at the Site shall be consistent with the level of protection provided in the approved remedial plan;
3. if institutional controls are a part of the approved remedial actions for the Site, then the engineered controls [state specifically what the controls are that are to be implemented] described in the proposed [choose RAWP or SMP] (the "Site Plan"), a copy of which is attached hereto as Attachment B and, as described within Exhibit B, attached to the ELUR, will not be disturbed and will be properly maintained to prevent humans engaged in [choose residential or commercial/industrial] activity from being exposed to soils and/or waters at the ~~Property Contaminated Site~~ containing hazardous substances in concentrations exceeding the applicable Department-approved [choose residential or commercial/industrial] direct exposure criteria or leachability criteria pursuant to the Remediation Regulations; and
4. if institutional controls are a part of the approved remedial actions for the Site, then the contaminated soil subject to the ELUR shall not be disturbed in any manner without the prior written consent of the Department, except as permitted in the [choose RAWP or SMP], in the ELUR Emergency Provisions (Section D of the ELUR), or in accordance with Section 5 of this Agreement.

4.3. The Performing Party and the Settling Respondent agree to allow the Department reasonable access to the Property to monitor compliance with this Agreement. Settling Respondent agrees to allow the Performing Party reasonable access to the Property to perform the work described in this Agreement.

4.4. The Settling Respondent and the Performing Party agree not to interfere with, disrupt, impact the structural integrity of or in any way alter any monitoring equipment required as part of this Agreement. The Settling Respondent and the Performing Party agree to notify the Department if either party becomes aware of any actual or proposed activity at the Property which has impacted, or which has the potential to impact, the ongoing monitoring performed by the Performing Party at the Property pursuant to this Agreement.

4.5 The Department will issue a final Letter of Compliance (the "LOC") upon:

1. receipt by the Department of a certified copy of the recorded ELUR, in the event that an ELUR is required under this Agreement;
2. completion of the work described in Section 4 of this Agreement;
3. Department approval of a closure report; and
4. Department receipt of the completed Brownfield's Economic Information Form (to be supplied by the Department).

4.6 In the event that an ELUR is required under this Agreement, the Settling Respondent shall annually inspect and report to the Department any uses of the Property contrary to the ELUR.

5. FUTURE WORK/SITE DISTURBANCE

5.1 In the event that an ELUR is required under this Agreement, the pPrior to any activities below the existing surface of the ground on the Property, other than that allowed under the Emergency Provisions of the ELUR (Section D of the ELUR), the Settling Respondent shall provide the State, in writing no later than thirty (30) days prior to the planned initiation of work, -with:

1. a plan that depicts the proposed improvements and/or developments;
2. an acknowledgement that all soils disturbed by construction activities will be handled in accordance with the approved ELUR, in the event that an ELUR is required under this Agreement; and
3. the name and address of the facility or entity in receipt of any soils to be removed from the site.

~~5.2.~~—The Department will review the plan, comment if necessary, and respond in writing to the Settling Respondent.

5.32. In the event that an ELUR is required under this Agreement, then aAfter completion of any construction or emergency action on the Property, the Settling Respondent shall provide the Department with a written statement, certified by a qualified environmental professional, that the work was performed in accordance with the approved ELUR and that the conditions set forth in the approved ELUR have been satisfied.

6. ACCESS/NOTICE TO SUCCESSORS IN INTEREST

6.1. The Performing Party and the Settling Respondent agree to provide to the Department, its authorized officers, employees, representatives, and all other persons performing response actions under Department oversight, an irrevocable right of access at all reasonable times to the Property and to any other property to which access is required for the implementation of response actions at the Site, to the extent access to such other property is controlled by the Settling Respondent, for the purposes of performing and overseeing response actions at the Site. The Performing Party agrees to provide reasonable notice to the Settling Respondent and the Department of the timing of response actions to be undertaken at the Property. Notwithstanding any provision of this Agreement, the Department retains all of its authorities and rights, including enforcement authorities related thereto, under all applicable statutes and regulations, including any amendments thereto.

6.2. The Settling Respondent shall ensure that assignees, successors in interest, lessees, and sublessees, of the Property shall provide the same access and cooperation as long as they control the property. The Settling Respondent shall provide a copy of this Agreement to any current lessee or sublessee on the Property as of the Effective Date of this Agreement. Any subsequent leases, subleases, assignments or transfers of the Property or an interest in the Property shall be consistent with this Agreement.

6.3. If institutional controls are a part of the approved remedial actions for the Site, then the Performing Party shall record a copy of the ELUR in the Land Evidence Records of the municipality or municipalities in which the Property is located within thirty (30) days of the Department approval of the ELUR. A certified copy of the ELUR shall be submitted to the Department by the Performing Party within fourteen (14) days of recording. Each deed, lease, or other instrument conveying an interest in the Property subsequent to the Effective Date of this Agreement shall contain a notice stating that the Property is subject to this Agreement and to the ELUR. A copy of these documents shall be sent to the persons listed in Section 15 (Notices and Submissions).

6.4. In the event of an assignment or transfer of the Property or an assignment or transfer of an interest in the Property, the assignor or transferor shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement except as the Department and the assignor or transferor agree otherwise and modify this Agreement, in writing, accordingly. Moreover, prior to or contemporaneous with any assignment or transfer of the Property, the assignee or transferee must consent in writing to be bound by the terms of this Agreement in order for the Covenant Not to Sue in Section 9 to be available to that party. The Covenant Not To Sue in Section 9 shall not be effective with respect to any assignees or transferees who fail to provide such written consent to the Department.

7. DUE CARE/COOPERATION

7.1. The Settling Respondent and the Performing Party shall exercise due care at the Site with respect to the Existing Contamination and shall comply with all applicable local, State, and Federal laws and regulations. The Settling Respondent recognizes that the implementation of response actions at the Site may interfere with the Settling Respondent's use of the Property, and may require closure of its operations or a part thereof. The Settling 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 use reasonable efforts to minimize any interference with the Settling Respondent's operations by such entry and response.

7.2 In the event the Settling Respondent ~~or the Performing Party~~ becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site, Settling Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Chapter 23-19.1 of the Rhode Island General Laws, and all other applicable laws, immediately notify the Department of such release or threatened release.

7.2.3. In the event that the ~~Settling Respondent or the~~ Performing Party becomes aware of any action or occurrence which causes or threatens a release of hazardous substances, pollutants, or contaminants at or from the Site, the ~~Settling Respondent~~ Performing Party shall immediately take all appropriate actions to prevent, abate, and minimize such release or threat of release in

compliance with all requirements in the Remediation Regulations, and shall, in addition to complying with any applicable notification requirements under Chapter 23-19.1 of the Rhode Island General Laws, and all other applicable laws, immediately notify the Department of such release or threatened release.

8. CERTIFICATION

8.1. By entering into this agreement, the Settling Respondent and the Performing Party each independently certifies that, to the best of its knowledge and belief, it has fully and accurately disclosed to the Department all information known to each of them 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 and to its qualification for this Agreement. The Settling 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 substances or pollutants or contaminants at the Site. If the Department determines that information provided by Settling Respondent is not accurate and complete, the Agreement, within the sole discretion of the Department, shall be null and void and the Department reserves all rights it may have. If the Department determines that information provided by Performing Party is not accurate and complete, the Agreement and all approvals granted by the Department to the Performing Party, within the sole discretion of the Department, shall be null and void and the Department reserves all rights it may have.

9. STATE OF RHODE ISLAND'S COVENANT NOT TO SUE

9.1. Subject to the Reservation of Rights in Section 10 of this Agreement and upon the Department's issuance of the LOC, the State of Rhode Island and the Department covenant not to sue or take any other civil or administrative action against Settling Respondent for any and all civil liability or injunctive relief or reimbursement of response costs with respect to Existing Contamination.

10. RESERVATION OF RIGHTS

10.1. The State of Rhode Island and the Department reserve and the Agreement is without prejudice to all rights against Settling Respondent with respect to all other matters, including but not limited to, the following:

1. claims based on a failure by Settling Respondent to meet a requirement of this Agreement;
2. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Settling Respondent, its successors, assignees, lessees or sublessees;

3. any liability resulting from exacerbation by Settling Respondent, its successors, assignees, lessees or sublessees, of Existing Contamination;
4. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;
5. criminal liability; and,
- ~~6. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by the State; and~~
76. liability for violations of local, State or Federal law or regulations.

10.2. With respect to any claim or cause of action asserted against the Settling Respondent by the Department, the Settling Respondent shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

10.3. The State of Rhode Island and the Department reserve and the Agreement is without prejudice to all rights against the Performing Party with respect to all other matters, including but not limited to, the following:

1. claims based on a failure by Performing Party to meet a requirement of this Agreement;
2. any liability resulting from past or future releases of hazardous substances, pollutants or contaminants, at or from the Site caused or contributed to by Performing Party, its successors, assignees, lessees or sublessees;
3. any liability resulting from exacerbation by Performing Party, its successors, assignees, lessees or sublessees, of Existing Contamination;
4. any liability resulting from the release or threat of release of hazardous substances, pollutants or contaminants, at the Site after the effective date of this Agreement, not within the definition of Existing Contamination;
5. criminal liability;
6. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessment incurred by the State; and
7. liability for violations of local, State or Federal law or regulations.

10.4. With respect to any claim or cause of action asserted against the Performing Party by the Department, the Performing Party shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

10.5 Nothing in this Agreement shall change the status or fundamental liability of the Performing Party as a "Responsible Party" as that term is defined in the Remediation Regulations with respect to the Existing Contamination and any and all contamination attributable to the Existing Contamination.

10.6. Nothing in this Agreement is intended as a release or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the State may have against any person, firm, corporation or other entity not a party to this Agreement.

10.7. Nothing in this Agreement is intended to limit the right of the Department to undertake future response actions at the Site or to seek to compel parties other than the Settling Respondent and the Performing Party to perform or pay for response actions at the Site. Nothing in this Agreement shall in any way restrict or limit the nature or scope of response actions which may be taken or be required by the Department in exercising its authority under law. Settling Respondent acknowledges that it is purchasing property on which response actions may be required.

11. SETTLING RESPONDENT'S COVENANT NOT TO SUE

11.1. In consideration of the State's Covenant Not To Sue in Section 9 of this Agreement, the Settling Respondent hereby covenants not to sue and not to assert any claims or causes of action against the State, its authorized officers, employees, or representatives with respect to the Site and this Agreement, including but not limited to, any claims arising out of response activities at the Site, including claims based on the Department's oversight of such activities or approval of plans for such activities.

12. PARTIES BOUND/TRANSFER OF COVENANT

12.1. This Agreement shall apply to and be binding upon the State, the Settling Respondent and the Performing Party and their respective officers, directors, employees, agents and assignees. The signatories for each Party to this Agreement represent that they are fully authorized to enter into the terms and conditions of this Agreement and to legally bind such Party.

12.2. Notwithstanding any other provisions of this Agreement, all of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement, including any applicable ELUR, may be assigned or transferred in their entirety to any person only without the prior written consent of the Department ~~in the Department's sole discretion.~~ In the event of such a transfer or assignment, however, the written consent from the transferee or assignee required in

paragraph 6.4 of this Agreement shall be provided to the Department for the Covenant Not to Sue to be effective with respect to the transferee or assignee.

12.3. All of the rights, benefits and obligations conferred upon Settling Respondent under this Agreement, including any applicable ELUR, may be assigned or transferred in part to any person only with the prior written agreement of the Department, the Settling Respondent and the transferee/assignee. In the event of such transfer or assignment, however, the written consent from the transferee or assignee required in Paragraph 6.4 of this Agreement shall be provided to the Department for the covenant not to sue to be effective with respect to the transferee or assignee.

12.3.4. In no case may a Responsible Party, as that term is defined in the Remediation Regulations, become a lessee, sublessee, assignee or transferee or otherwise benefit from the State's Covenant Not to Sue.

13. DOCUMENT RETENTION

13.1. The Settling Respondent agrees to retain and make available to the Department all business and operating records, contracts, site studies and investigations, and documents relating to operations and activities at the Property related to the remedial action, including any applicable ELUR or required monitoring, for at least ten (10) years after the LOC is issued by the Department, unless otherwise agreed to in writing by the Parties. At the end of ten years, the Settling Respondent shall notify the Department of the location of such documents and shall provide the Department with an opportunity to copy any documents at the expense of the Department.

13.2. The Performing Party agrees to retain and make available to the Department all business and operating records, contracts, site studies and investigations, and documents relating to operations and activities at the Property related to the remedial action, including any applicable ELUR or required monitoring, for at least ten (10) years after the LOC is issued by the Department, unless otherwise agreed to in writing by the Parties. At the end of ten years, the Performing Party shall notify the Department of the location of such documents and shall provide the Department with an opportunity to copy any documents at the expense of the Department.

14. PAYMENT OF COSTS

14.1. If the Settling Respondent fails to comply with any of the terms of this Agreement, the Settling Respondent shall be liable for all litigation expenses (including reasonable attorney's fees) and other enforcement costs incurred by the Department to enforce this Agreement or otherwise obtain compliance.

14.2. If the Performing Party fails to comply with any of the terms of this Agreement, the Performing Party shall be liable for all litigation expenses (including reasonable attorney's fees)

and other enforcement costs incurred by the Department to enforce this Agreement or otherwise obtain compliance.

15. NOTICES AND SUBMISSIONS

15.1 All notices and submissions required pursuant to the Agreement shall be forwarded by the Settling Respondent or the Performing Party to:

RIDEM Office of Waste Management
c/o[insert Project Manager's name and title]
235 Promenade Street
Providence, RI 02908

16. EFFECTIVE DATE

16.1. The effective date of this Agreement shall be the date upon which the Department has fully executed the Agreement after review of and response to any public comments received.

17. CONTRIBUTION PROTECTION

17.1. Pursuant to Rhode Island General Laws Section 23-19.14-12, the Parties hereby agree that the Settling Respondent has resolved its liability to the State and shall not be liable for claims for contribution regarding the response actions taken or to be taken and response costs incurred or to be incurred by the State or any other person with respect to the Existing Contamination at the Site.

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

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

18. PUBLIC COMMENT

18.1. This Agreement shall be subject to a fourteen (14) day public comment period, after which the Department may modify or withdraw its consent to this Agreement if comments received, disclose facts or considerations, which indicate that this Agreement is inappropriate, improper or inadequate.

ATTACHMENT A