DRAFT – SUBJECT TO FURTHER GOVERNMENT REVIEW AND APPROVAL

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF THE GOWANUS CANAL SUPERFUND SITE	:	
[INSERT RESPONDENTS]	:	INDEX NO. CERCLA - 02-2014-2001
Respondents	:	
Proceeding under Sections 104, 106, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. §§ 9604, 9606 and 9622.	:	

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER FOR REMEDIAL DESIGN AND COST RECOVERY

283922

DRAFT – SUBJECT TO FURTHER GOVERNMENT REVIEW AND APPROVAL

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I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order and Settlement Agreement ("Settlement Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and [INSERT RESPONDENTS] (collectively "Respondents"). This Settlement Agreement provides that Respondents undertake a Remedial Design ("RD"), including various pre-RD investigations and analyses, to produce a set of biddable plans and specifications for implementation of the remedy selected in EPA's September 27, 2013 Record of Decision ("ROD") for the Gowanus Canal Superfund Site ("Site"). In addition, Respondents shall reimburse the United States for certain response costs that it has incurred and will incur, as provided herein.

2. This Settlement Agreement is issued to Respondents by EPA pursuant to the authority vested in the President of the United States under Sections 104, 106, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. §§ 9604, 9606, 9607, 9622, which authority was delegated to the Administrator of EPA on January 23, 1987 by Executive Order 12580, 52 Fed. Reg. 2926 (1987). This authority was further delegated to the Regional Administrators of EPA on September 13, 1987 by EPA Delegation 14-14-C, and redelegated within Region 2 to the Director of the Emergency and Remedial Response Division by Regional Order No. R-1200, dated November 23, 2004.

3. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondents agree to undertake all actions required by the terms and conditions of this Settlement Agreement, and also agree not to contest the validity or terms of this Settlement Agreement in any action to enforce its provisions.

4. The objectives of EPA and Respondents in entering into this Settlement Agreement are to design the selected response action by Respondents, reimburse response costs of EPA, and resolve the claims of EPA against Respondents as provided in this Settlement Agreement.

5. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. §9622(j)(1), EPA notified federal natural resource trustee(s) in September 2013 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Settlement Agreement.

II. PARTIES BOUND

6. This Settlement Agreement shall apply to and be binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a

Respondents including, but not limited to, any transfer of assets or real or personal property, shall not alter such Respondents' responsibilities under this Settlement Agreement. The signatories to this Settlement Agreement certify that they are authorized to execute and legally bind the parties they represent.

7. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any one or more Respondents to implement the requirements of this Settlement Agreement, the remaining Respondents shall complete all such requirements.

8. Respondents shall provide a copy of this Settlement Agreement to all contractors, subcontractors, laboratories, and consultants which are retained to conduct any Work performed under this Settlement Agreement, within fourteen (14) days after the Effective Date of this Settlement Agreement or after the date of such retention. Respondents shall condition any such contracts upon satisfactory compliance with this Settlement Agreement. Notwithstanding the terms of any contract, Respondents are responsible for compliance with this Settlement Agreement and for ensuring that their employees, contractors, consultants, subcontractors and agents comply with this Settlement Agreement.

III. DEFINITIONS

9. Unless otherwise expressly provided herein, terms used in this Settlement Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or its implementing regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto, or incorporated by reference into this Settlement Agreement, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601-9675.

b. "Day" shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

c. "Effective Date" shall mean the effective date of this Settlement Agreement as provided in Section XXVIII (Effective Date and Subsequent Modification).

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

e. "Future Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs, that the United States pays in reviewing or developing plans, reports and other items pursuant to this Settlement Agreement, verifying the

Work, or otherwise implementing, overseeing, or enforcing this Settlement Agreement, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, any Remedial Design costs, including but not limited to an In-Situ Stabilization ("ISS") pilot study, the costs incurred pursuant to Paragraph 49 (costs and attorneys fees and any monies paid to secure access, including the amount of just compensation) and Paragraph 87 (Work Takeover).

f. "Hazardous substances" shall mean any substance (or mixture containing any hazardous substance) that falls within the definition of a "hazardous substance," as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with CERCLA § 107(a), 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified at 40 C.F.R. Part 300, including any amendments thereto.

i. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.

j. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral.

k. "Parties" means EPA and the Respondents.

l. "Past Response Costs" shall mean all costs, including all direct and indirect costs, that EPA paid through July 31, 2013, in connection with response actions relating to the Site, and all interest on such costs in accordance with Section 107(a) of CERCLA 42 U.S.C. § 9607(a).

m. "Performance Standards" shall mean the cleanup standards and Remedial Action Objectives and other measures of achievement of the goals of the Remedial Action set forth in the ROD and Sections I and II of the Statement of Work ("SOW") attached hereto as Appendix A.

n. "Pre-Remedial Design Work Plan" or "Pre-RD Work Plan" shall mean the document developed pursuant Section IV of the SOW and approved by EPA, and any amendments thereto.

o. "Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 27, 2013 by the Director of the Emergency Remedial Response Division, EPA Region 2, including all attachments thereto, attached hereto as Appendix B.

p. "Remedial Design" or "RD" shall mean those activities to be undertaken by Respondents to develop the final plans and specifications for the Remedial Action pursuant to the Remedial Design Work Plan.

q. "Remedial Design Work Plan" or "RD Work Plan" shall mean the document developed pursuant to Section V of the SOW and approved by EPA, and any amendments thereto.

r. "Respondents" shall mean [INSERT RESPONDENTS], collectively.

s. "Section" shall mean a portion of this Settlement Agreement identified by an upper-case Roman numeral and includes one or more Paragraphs.

t. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto. In the event of conflict between this Settlement Agreement and any appendix, this Settlement Agreement shall control.

u. "Site" shall mean the Gowanus Canal Superfund Site, an approximately 100-foot wide, 1.8-mile-long canal located in the New York City borough of Brooklyn, Kings County, New York, and also includes any areas which are sources of contamination to the Canal, where contamination has migrated from the Canal, and/or suitable areas in very close proximity to the contamination which are necessary for implementation of the Work. The Site is depicted generally on the map attached as Appendix C.

v. "State" shall mean the State of New York.

w. "United States" shall mean the United States of America.

x. "Waste Material" shall mean (i) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (ii) any "pollutant or contaminant" under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (iii) any "solid waste" under Section 1004(27) of the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6903(27).

y. "Work" shall mean all activities Respondents are required to perform under this Settlement Agreement, except those required by Section XIII (Records Retention).

IV. FINDINGS OF FACT

10. The Gowanus Canal ("Canal") is a brackish, tidal arm of the New York–New Jersey Harbor Estuary, extending for approximately 1.8 miles through Brooklyn, New York. The approximately 100–foot–wide canal runs southwest from Butler Street to Gowanus Bay and Upper New York Bay. The adjacent waterfront is primarily commercial and industrial, currently including concrete plants, warehouses, and parking lots, and the Site is near several residential neighborhoods.

11. The Canal was constructed by bulkheading and dredging a tidal creek and wetland. After its completion in the 1860s, the Canal quickly became one of the nation's busiest industrial waterways, home to heavy industry including gas works (*i.e.*, manufactured gas plants), coal yards, cement makers, soap makers, tanneries, paint and ink factories, machine shops, chemical plants and oil refineries.

12. Hazardous substances, pollutants and contaminants have entered the Canal via several transport pathways or mechanisms, including spillage during product shipping and handling, direct disposal or discharge, contaminated groundwater discharge, surface water runoff, storm water discharge (including combined sewer overflow) and contaminated soil erosion. As a result of decades of direct and indirect discharges of hazardous substances generated by industrial and other activity, the Canal became a repository for untreated industrial wastes, raw sewage, and runoff, causing it to become one of New York's most polluted waterways.

13. Much of the heavy industrial activity along the Canal has ceased, although many upland areas adjacent to the Canal remained zoned as manufacturing districts. Land uses along and near certain portions of the Canal are in the process of transitioning from heavy industrial to light industrial, commercial, and residential uses. The Canal is currently used by some for recreational purposes such as boating, diving, and catching fish for consumption. The Canal and New York City harbor are subject to New York State fishing advisories.

14. The Site was placed on the National Priorities List pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, on March 2, 2010.

15. In April 2010, EPA entered into administrative consent orders with Respondents New York City ("NYC") and National Grid to perform work in support of EPA's remedial investigation/feasibility study ("RI/FS"). An RI report was completed in January 2011 and an FS report was completed in December 2011. An FS addendum report was completed in December 2012.

16. Sampling results from the RI/FS document the presence of hazardous substances in groundwater, soil, and Canal sediments at the Site. These include polycyclic aromatic

hydrocarbons ("PAHs"), polychlorinated biphenyls ("PCBs"), pesticides (such as methoxychlor and DDT), metals (such as barium, cadmium, copper, lead, mercury, nickel and silver), as well as volatile organic compounds (such as benzene, toluene, ethylbenzene and xylene). The contamination extends the entire length of the Canal.

17. Based on the results of the RI/FS, chemical contamination in the Canal sediments present an unacceptable ecological and human health risk, primarily due to exposure to PAHs, PCBs, and metals (barium, cadmium, copper, lead, mercury, nickel and silver).

18. On September 27, 2013, EPA issued a ROD for the Site which includes the following response actions: 1) Dredging of the entire column of hazardous substance-contaminated sediments which have accumulated above the native sediments in the upper and mid-reaches of the canal (referred to as "soft sediments"); 2) in-situ stabilization (ISS) of those native sediments in select areas in the upper and mid-reaches of the canal contaminated with high levels of nonaqueous phase liquid (NAPL); 3) construction of a multilayered cap in the upper and mid-reaches of the canal to isolate and prevent the migration of polycyclic aromatic hydrocarbons (PAHs) and residual NAPL from native sediments; 4) dredging of the entire soft sediment column in the lower reach of the canal; 5) construction of a multilayer cap to isolate and prevent the migration of PAHs from native sediments in the lower reach of the canal; 6) off-Site treatment of the NAPL-impacted sediments dredged from the upper and mid-reaches of the canal with thermal desorption, followed by beneficial reuse off-Site (*e.g.*, landfill daily cover) if possible; 7) off-Site stabilization of the less contaminated sediments dredged from the lower reach of the canal and the sediments in the other reaches not impacted by NAPL, followed by beneficial reuse off-Site; 8) excavation and restoration of approximately 475 feet of the filled-in former 1st Street turning basin; 9) excavation and restoration of the portion of the 5th Street turning basin beginning underneath the 3rd Avenue bridge and extending approximately 25 feet to the east and the installation of a barrier or interception system at the eastern boundary of the excavation; 10) implementation of institutional controls incorporating the existing fish consumption advisories (modified, as needed), as well as other controls to protect the integrity of the cap; 11) periodic maintenance of the cap and long-term monitoring to insure that the remedy continues to function effectively; and 12) combined sewer overflow (CSO) controls to significantly reduce overall contaminated solid discharges to the canal, which shall include a) construction of in-line sewage/stormwater retention tanks to retain stormwater which currently discharges through outfalls RH-034 and OH-007; and b) implementation of appropriate engineering controls to ensure that hazardous substances and solids from separated stormwater, including from future upland development projects, are not discharged to the canal.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

19. The Site is a "facility" within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

20. The contamination found at the Site, as identified in the Findings of Fact above, includes hazardous substances as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

21. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22). Such releases include, but are not limited to, PAHs, PCBs, pesticides, metals, and volatile organic compounds that were discharged into the soil, groundwater and sediments at the Site.

22. NYC is a municipal corporation chartered by the State of New York and is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

23. With the exception of NYC and the Estate of Daniel Tinneny, who is a person, each Respondent is a corporation and, therefore, is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

24. Each Respondent is a responsible party with respect to the Site within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

25. Respondents are jointly and severally liable for performance of response actions under this Settlement Agreement and for Past Response Costs and Future Response Costs.

26. Respondents have discussed with EPA the basis for this Settlement Agreement and its terms.

VI. ORDER

27. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for the ROD, it is hereby ordered and agreed that Respondents shall comply with all provisions of this Settlement Agreement, including, but not limited to, all attachments to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

VII. DESIGNATED EPA PROJECT MANAGER AND RESPONDENTS' PROJECT COORDINATORS

28. Within ten (10) days after the Effective Date of this Settlement Agreement, Respondents shall select a coordinator to be known as the Project Coordinator and shall submit the name, address, qualifications, and telephone number of the Project Coordinator to EPA. The Project Coordinator shall be responsible on behalf of Respondents for oversight of the implementation of this Settlement Agreement. The Project Coordinator shall not be an attorney engaged in the practice of law. He or she shall have the technical expertise sufficient to adequately oversee all aspects of the Work contemplated by this Settlement Agreement. The Project Coordinator shall be knowledgeable at all times about all matters relating to the Work being performed under this Settlement Agreement.

29. Selection of the Project Coordinator shall be subject to approval by EPA in writing. If EPA disapproves a proposed Project Coordinator, Respondents shall propose a different person and notify EPA of that person's name, address, telephone number and qualifications within seven (7) days following EPA's disapproval. Respondents may change their Project Coordinator provided that EPA has received written notice at least ten (10) days prior to the desired change. The initial notification may be made orally, but shall be promptly followed by a written notice. All changes of the Project Coordinator shall be subject to EPA approval.

30. EPA correspondence related to this Settlement Agreement will be sent to the Project Coordinator. Notice by EPA in writing to the Project Coordinator shall be deemed notice to Respondents for all matters relating to the Work under this Settlement Agreement and shall be effective upon receipt. To the extent possible, the Project Coordinator shall be present on-Site or readily available for EPA to contact during all working days and be retained by Respondents at all times until EPA issues a Notice of Completion of the Work in accordance with Paragraph 116.

31. Respondents shall retain at least one contractor, hereinafter referred to as the Supervising Contractor, to perform the Work. Respondents shall notify EPA of the name and qualifications of a proposed Supervising Contractor within ten (10) days of the Effective Date of this Settlement Agreement. Respondents shall also notify EPA of the name and qualifications of any other contractor or subcontractor proposed to perform Work under this Settlement Agreement at least ten (10) days prior to commencement of such Work.

32. All activities required of Respondents under the terms of this Settlement Agreement shall be performed only by well-qualified persons possessing all necessary permits, licenses, and other authorizations required by Federal, State, and/or local governments consistent with Section 121 of CERCLA, 42 U.S.C. § 9621, and all Work conducted pursuant to this Settlement Agreement shall be performed in accordance with prevailing professional standards. All plans and specifications shall be prepared under the supervision of, and signed/certified by, a licensed New York professional engineer.

33. EPA retains the right to disapprove any or all of the contractors and/or subcontractors proposed by Respondents to conduct the Work. If EPA disapproves in writing any of Respondents' proposed contractors, Respondents shall propose a different contractor within seven (7) days of receipt of EPA's disapproval.

34. Respondents shall provide a copy of this Settlement Agreement to each contractor and subcontractor approved and retained to perform the Work required by this Settlement Agreement. Respondents shall include in all contracts or subcontracts entered into for Work required under this Settlement Agreement provisions stating that such contractors or subcontractors, including their agents and employees, shall perform activities required by such contracts or subcontracts in compliance with this Settlement Agreement and all applicable laws and regulations. Respondents shall be responsible for ensuring that their contractors and

subcontractors perform the Work contemplated herein in accordance with this Settlement Agreement.

35. EPA has designated Christos Tsiamis of the New York Remediation Branch, Emergency and Remedial Response Division, EPA Region 2, as its Remedial Project Manager ("RPM"). Except as otherwise provided in this Settlement Agreement, Respondents shall direct all submissions required by this Settlement Agreement to the RPM via e-mail at tsiamis.christos@epa.gov and by regular mail, at U.S. EPA, Region 2, 290 Broadway, 20th Floor, New York, NY 10007.

36. EPA's RPM shall have the authority lawfully vested in an RPM by the NCP. In addition, EPA's RPM shall have the authority, consistent with the NCP, to halt any Work required by this Settlement Agreement and to take any necessary response action when the RPM determines that conditions at the Site may present an immediate endangerment to public health, welfare, or the environment. The absence of the RPM from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.

VIII. WORK TO BE PERFORMED

37. a. Respondents shall perform all actions necessary to implement the Statement of Work attached hereto as Appendix A and this Settlement Agreement.

b. Respondents shall make best efforts to coordinate in the performance of the Work required by this Settlement Agreement with any person not a party to this Settlement Agreement who is directed by EPA and who makes good-faith offers to perform or, in lieu of performance to pay for, in whole or in part, the Work required by this Settlement Agreement. Best efforts to coordinate shall include, at a minimum:

i. replying in writing within a reasonable period of time to good-faith offers to perform or pay for the Work required by this Settlement Agreement;

ii. engaging in good-faith negotiations with any person not a party to this Settlement Agreement who makes good-faith offers to perform or pay for the Work required by this Settlement Agreement; and

iii. good-faith consideration of good-faith offers to perform or pay for the Work required by this Settlement Agreement.

Upon request of EPA and subject to any claims of applicable privileges(s), Respondents shall submit to EPA (1) any offer to perform or pay for, or (2) all documentation relating to the performance of or payment for, the Work required by this Settlement Agreement by any non--respondent to this Settlement Agreement.

Nothing in this Paragraph shall be construed to require or permit Respondents to delay implementing the EPA-approved Pre-RD and/or RD Work Plan called for in this Settlement Agreement or otherwise complying with the terms of this Settlement Agreement. [Note to Respondents: This Paragraph is applicable if a coordinate and cooperate unilateral administrative order is issued].

38. Respondents shall conduct the Work required hereunder in accordance with CERCLA, the NCP, and the ROD, as well as applicable provisions of the following guidance documents, and of other guidance documents referenced in the following guidance documents: *Uniform Federal Policy for Implementing Quality Systems* (UFP-QS), EPA-505-F-03-001, March 2005 or newer, *Uniform Federal Policy for Quality Assurance Project Plans* (UFP-QAPP), Parts 1, 2 and 3, EPA-505-B-04-900A, B and C, March 2005 or newer, *EPA Region 2's "Clean and Green Policy"* which may be found at http://www.epa.gov/region2/superfund/green_remediation/policy.html, *Guidance for Scoping the Remedial Design* (EPA 540/R-95/025, March 1995), and *Guide to Management of Investigation-Derived Wastes* (OSWER Publication 9345.3-03FS, January 1992), as they may be amended or modified by EPA. The tasks that Respondents must perform (including future deliverables) and the scope of such Work are identified in this Settlement Agreement and the Statement of Work which is incorporated into and is an enforceable part of this Settlement Agreement. Each deliverable required pursuant to this Settlement Agreement shall be deemed incorporated into and an enforceable part of this Settlement Agreement upon its approval by EPA. In the event that EPA approves a portion of a plan, report, or other item required to be submitted to EPA under this Settlement Agreement, the approved portion shall be deemed to be incorporated in and an enforceable part of this Settlement Agreement, subject to Paragraph 46, below. Respondents shall perform the Work in accordance with the Statement of Work and the RD Work Plan and/r Pre-RD Work Plan and other deliverables approved, modified or issued by EPA under this Settlement Agreement, as they may be modified or amended pursuant to Section X below, and Respondents shall also comply with all other requirements of this Settlement Agreement.

39. Respondents shall assure that field personnel used by Respondents are properly trained in the use of field equipment and in chain-of-custody procedures.

IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

40. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Settlement Agreement, in a notice to Respondents, EPA will: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA will not modify a submission without first providing Respondents at least one notice of deficiency and an opportunity to cure within twenty one (21) days or other time frame as determined by EPA, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects.

41. In the event of approval, approval upon conditions, or modification by EPA, pursuant to subparagraphs 40(a), (b) or (c) above, Respondents shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XVI (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 44 and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVIII (Stipulated Penalties).

42. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 40, Respondents shall, within ten (10) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVIII, shall accrue during the 10 -day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 43 and 44.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 40, Respondents shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVIII (Stipulated Penalties).

c. Respondents shall not proceed further with any subsequent activities or tasks until receiving EPA approval, approval on condition, or modification of the RD Work Plan and/r Pre-RD Work Plan. While awaiting EPA approval, approval on condition, or modification of this deliverable, Respondents shall proceed with all other tasks and activities that may be conducted independently of this deliverable, in accordance with the schedule set forth pursuant to this Settlement Agreement.

d. For all remaining deliverables not listed above in Subparagraph 42(c), Respondents shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval on the submitted deliverable. EPA reserves the right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point.

43. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondents to correct the deficiencies. EPA also retains the right to modify or develop the plan, report, or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified, or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XVI (Dispute Resolution).

44. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately, unless Respondents invoke the dispute resolution procedures in accordance with Section XVI (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XVI (Dispute Resolution) and Section XVIII (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified, or superseded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XVI, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVIII.

45. In the event that EPA takes over some of the tasks, Respondents shall incorporate and integrate information supplied by EPA into the final reports.

46. All plans, reports, and other deliverables submitted to EPA under this Settlement Agreement shall, upon approval or modification by EPA, be incorporated into and enforceable under this Settlement Agreement. In the event EPA approves or modifies a portion of a plan, report, or other deliverable submitted to EPA under this Settlement Agreement, the approved or modified portion shall be incorporated into and become enforceable under this Settlement Agreement.

X. SUBMISSION OF PLANS AND REPORTING REQUIREMENTS

47. Reporting.

a. Respondents shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement every 30th day after the date of receipt of EPA's approval of the Work Plan until termination of this Settlement Agreement, unless otherwise directed in writing by EPA. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

b. Respondents shall submit copies of all plans, reports, or other submissions required by this Settlement Agreement, the Statement of Work, or any approved work plan as set forth below. Any electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Reports should be submitted to the following:

4 copies: (2 bound, 1 unbound, 1 electronic)
Remedial Project Manager – Gowanus Canal Site
Emergency and Remedial Response Division
United States Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, New York 10007-1866

1 copy:
Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
United States Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
Attn: Gowanus Canal Superfund Site Attorney

3 copies: (2 unbound, 1 electronic)
Director, Division of Environmental Remediation
New York State Department of Environmental Conservation
625 Broadway, 12th Floor
Albany, New York 12233-7011
Attn: Gowanus Canal Superfund Site

XI. SITE ACCESS

48. If any Respondent owns or controls real property within the Site, or any other property where access is needed to implement this Settlement Agreement, such Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Site, or such other property, to conduct any activity related to this Settlement Agreement. Such Respondents shall, at least 30 days prior to the conveyance of any interest in real property at the Site, give written notice to the transferee that the property is subject to this Settlement Agreement and written notice to EPA of the proposed conveyance, including the name and address of the transferee. Such Respondents also agree to require that their successors comply with the immediately preceding sentence, this Section, and Section XII (Access to Information).

49. Where any action under this Settlement Agreement is to be performed in areas owned by, or in possession of, someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements within thirty (30) days after the Effective Date, or as otherwise specified in writing by EPA. Respondents shall immediately notify EPA if, after using their best efforts, they are unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondents shall describe in writing their efforts to obtain access. EPA may then assist Respondents in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XV (Payment of Response Costs).

50. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), and any other applicable statutes or regulations.

51. If Respondents cannot obtain access agreements, EPA may obtain access for Respondents, perform those tasks or activities with EPA contractors, or terminate the Settlement Agreement. If EPA performs those tasks or activities with EPA contractors and does not terminate the Settlement Agreement, Respondents shall perform all other activities not requiring access to that site and shall reimburse EPA for all costs incurred in performing such activities. Respondents shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

XII. ACCESS TO INFORMATION

52. Respondents shall provide to EPA upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

53. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondents assert business confidentiality claims.

54. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA with the following: a) the title of the document, record, or information; b) the date of the document, record, or information; c) the name and title of the author of the document, record, or information; d) the name and title of each addressee and recipient; e) a description of the contents of the document, record, or information; and f) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the

requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

55. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at, or around, the Site.

XIII. RECORD RETENTION

56. During the pendency of this Settlement Agreement and until ten (10) years after Respondents' receipt of EPA's notification that the Work has been completed, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until ten (10) years after notification that the Work has been completed, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.

57. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety (90) days prior to the destruction of any such documents, records, or other information and, upon request by EPA, Respondents shall deliver any such documents, records, or other information to EPA. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA with the following: a) the title of the document, record, or other information; b) the date of the document, record, or other information; c) the name and title of the author of the document, record, or other information; d) the name and title of each addressee and recipient; e) a description of the subject of the document, record, or other information; and f) the privilege asserted by Respondents. However, no documents, records, or other information created or generated pursuant to the requirements of this Settlement Agreement shall be withheld on the grounds that they are privileged.

Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed, or otherwise disposed of any records, documents, or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XIV. COMPLIANCE WITH OTHER LAWS

58. Respondents shall undertake all action that this Settlement Agreement requires in accordance with the requirements of all applicable local, state, and federal laws and regulations, unless an exemption from such requirements is specifically provided by law or in this Settlement Agreement. The activities conducted pursuant to this Settlement Agreement, if approved by EPA, shall be considered consistent with the NCP.

59. As provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site. Where any portion of the Work requires a federal or state permit or approval, Respondents shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals.

60. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

XV. PAYMENT OF RESPONSE COSTS

61. a. Within five (5) days of the Effective Date of this Settlement Agreement, Respondents shall pay to EPA $5,000,000 in partial reimbursement of EPA's Past Response Costs. The $5,000,000 payment pursuant to this Paragraph shall be in addition to any obligations requiring Respondents to reimburse Future Response Costs. Respondents' payment pursuant to this subparagraph shall be made by Electronic Funds Transfer ("EFT") to EPA. To effect payment via EFT, Respondents shall instruct their bank to remit payment in the required amount via EFT using the following information, or such other updated EFT information that EPA may subsequently provide to Respondents:

- Amount of payment
- Bank: **Federal Reserve Bank of New York**
- Account code for Federal Reserve Bank account receiving the payment: **68010727**
- Federal Reserve Bank ABA Routing Number: **021030004**
- SWIFT Address: **FRNYUS33**
  33 Liberty Street
  New York, NY 10045
- Field Tag 4200 of the Fedwire message should read:
  D 68010727 Environmental Protection Agency
- Name of remitter:
- Settlement Agreement Index number: **CERCLA – 02-2014-2001**
- Site/spill identifier: **02-ZP**

At the time of payment, Respondents shall send notice, which references the date of the EFT, the payment amount, the name of the Site, the Settlement Agreement index number, and

Respondents' Project Coordinator's name and address, by email to acctsreceivable.cinwd@epa.gov, and to:

U.S. Environmental Protection Agency
Attn: Richard Rice
26 W. Martin Luther King Drive
Cincinnati Finance Center, MS: NWD
Cincinnati, OH 45268
email: rice.richard@epa.gov

and:

Christos Tsiamis, Remedial Project Manager
Emergency and Remedial Response Division
U.S. Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, NY 10007-1866
email: tsiamis.christos@epa.gov

as well as to:

Brian E. Carr, Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
email: carr.brian@epa.gov

b. Upon EPA's receipt of Respondents' payment of $5,000,000 in accordance with subparagraph a., Respondents' potential liability to the United States for Past Response Costs shall be reduced by $5,000,000.

62. Respondents also hereby agree to reimburse EPA for all Future Response Costs. EPA will periodically send billings to Respondents for Future Response Costs. EPA's billings will be accompanied by a printout of cost data in EPA's financial management system, as well as a brief narrative statement of the activities performed. Respondents shall, within thirty (30) days of receipt of each such billing, remit payment of the billed amount via EFT to EPA in accordance with the payment provision in Paragraph 61, above.

63. All payments by Respondents pursuant to Paragraphs 61 and 62 shall be deposited in the Gowanus Canal Superfund Site Special Account within the EPA Hazardous Substance Superfund, to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

64. Respondents may contest payment of any Future Response Costs billed under Paragraph 62, if they determine that EPA has made an accounting error, or if they allege that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the EPA RPM. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall, within the 30-day period, pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 61. Simultaneously, Respondents shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA RPM a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XVI (Dispute Resolution). If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondents shall pay the sums due (with accrued Interest) to EPA in the manner described in Paragraph 61. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued Interest) for which they did not prevail to EPA in the manner described in Paragraph 61. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XVI (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to reimburse EPA for Future Response Costs.

65. Respondents shall pay Interest on any amounts overdue under Paragraphs 61, 62, or 64. Such Interest shall begin to accrue on the first day that the respective payment is overdue and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVIII.

XVI. DISPUTE RESOLUTION

66. Unless this Settlement Agreement expressly provides otherwise, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement and shall not apply to any dispute Respondents may have concerning the dispute resolution process. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

67. Notwithstanding any other provision of this Settlement Agreement, Respondents may not invoke dispute resolution procedures more than once regarding the same issue. For example, if Respondents invoke the dispute resolution procedures with respect to an issue

raised by EPA's comments on the RD Work Plan, and said issue is resolved under this Section, Respondent may not invoke the dispute resolution procedures with respect to the same issue later, in the context of EPA's comments on the draft RD Report.

68. If Respondents object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify EPA in writing of their objection(s) within twenty (20) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have twenty (20) days from EPA's receipt of Respondents' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended only by EPA.

69. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the Deputy Division Director level will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Respondents shall proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondents agree with the decision.

XVII. FORCE MAJEURE

70. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Respondents, or of any entity controlled by Respondents, including, but not limited to, their contractors and subcontractors, that delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential *force majeure* event: (a) as it is occurring; and (b) following the potential *force majeure* event, such that the delay is minimized to the greatest extent possible. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.

71. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondents shall notify EPA orally within two (2) days of when Respondents first knew that the event might cause a delay. Within five (5) days thereafter, Respondents shall provide to EPA in writing: an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a

schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known.

72. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Settlement Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVIII. STIPULATED PENALTIES

73. If Respondents fail, without prior EPA approval, to comply with any of the requirements or time limits set forth in or established pursuant to this Settlement Agreement, and such failure is not excused under the terms of Paragraphs 70 through 72 above (Force Majeure), Respondents shall, upon demand by EPA, pay a stipulated penalty to EPA in the amount indicated below:

a. For all requirements of this Settlement Agreement, other than the timely provision of progress reports required by Paragraph 47.a., stipulated penalties shall accrue in the amount of $1,000 per day, per violation, for the first seven days of noncompliance, $2,000 per day, per violation, for the 8th through 15th day of noncompliance, $3,000 per day, per violation, for the 16th through 25th day of noncompliance, and $7,000 per day, per violation, for the 26th day of noncompliance and beyond.

b. For the progress reports required by Paragraph 47.a., stipulated penalties shall accrue in the amount of $500 per day, per violation, for the first seven days of noncompliance, $750 per day, per violation, for the 8th through 15th day of noncompliance, $1,000 per day, per violation, for the 16th through 25th day of noncompliance, and $2,000 per day, per violation, for the 26th day of noncompliance and beyond.

74. Any such penalty shall accrue as of the first day after the applicable deadline has

passed and shall continue to accrue until the noncompliance is corrected or EPA notifies Respondents that it has determined that it will perform the tasks for which there is non-compliance. Such penalty shall be due and payable thirty (30) days following receipt of a written demand from EPA. Payment of any such penalty to EPA shall be made via EFT in accordance with the payment procedures in Paragraph 61 above. Respondents shall pay Interest on any amounts overdue under this paragraph. Such Interest shall begin to accrue on the first day that the respective payment is overdue.

75. Even if violations are simultaneous, separate penalties shall accrue for separate violations of this Settlement Agreement. Penalties accrue and are assessed per violation per day. Penalties shall accrue regardless of whether EPA has notified Respondents of a violation or act of noncompliance. The payment of penalties shall not alter in any way Respondents' obligation to complete the performance of the Work required under this Settlement Agreement.

76. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 87, Respondents shall be liable for a stipulated penalty in the amount of $5,000,000.

77. All penalties shall begin to accrue on the day after the complete performance is due, or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: a) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and b) with respect to a decision by the EPA management official at the Deputy Division Director level under Paragraph 69 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

78. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, EPA may give Respondents written notification of the failure and describe the noncompliance. EPA may send Respondents a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondents of a violation.

79. Respondents shall pay EPA all penalties accruing under this Section within 30 days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Section shall be made via EFT in accordance with the payment procedures in Paragraph 61 above.

80. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.

81. Penalties shall continue to accrue during any dispute resolution period but need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

82. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 74.

83. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(l) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(l) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Settlement Agreement or in the event that EPA assumes performance of a portion or all of the Work pursuant to Section XX (Reservation of Rights by EPA), Paragraph 87. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XIX. COVENANT NOT TO SUE BY EPA

84. In consideration of the actions that Respondents will perform and the payments that Respondents will make under the terms of this Settlement Agreement, and except as otherwise specifically provided in this Settlement Agreement, EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, for Past Response Costs and for Future Response Costs. This covenant not to sue shall take effect upon EPA's receipt of payment of $5,000,000 of Past Response Costs pursuant to Paragraph 61 under Section XV (Payment of Response Costs) and any Interest or Stipulated Penalties due for failure to pay Past Response Costs as required by Sections XV and XVIII (Stipulated Penalties) of this Settlement Agreement. This covenant not to sue is conditioned upon Respondents' complete and satisfactory performance of all obligations under this Settlement Agreement, including, but not limited to, the satisfactory performance of the RD, and payment of Past Response Costs and Future Response Costs pursuant to Section XV. This covenant not to sue extends only to Respondents and does not extend to any other person.

XX. RESERVATION OF RIGHTS BY EPA

85. Except as specifically provided in this Settlement Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants,

or hazardous or solid waste on, at, or from the Site. Further, except as specifically provided in this Settlement Agreement, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

86. The covenant not to sue set forth in Section XIX above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement Agreement is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondents to meet a requirement of this Settlement Agreement;

b. liability for costs not included within the definition(s) of Past Response Costs and Future Response Costs and liability for Past Response Costs in excess of $5,000,000;

c. liability for performance of response action other than the Work;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site; and

g. liability for costs incurred, or to be incurred, by the U.S. Department of Justice on behalf of EPA or the Agency for Toxic Substances and Disease Registry, related to the Site.

87. Work Takeover. In the event EPA determines that Respondents have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of any or all portion(s) of the Work as EPA determines necessary. Respondents may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs that EPA incurs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondents shall pay pursuant to Section XV (Payment of Response Costs). Notwithstanding any other provision of this Settlement Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XXI. COVENANT NOT TO SUE BY RESPONDENTS

88. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Settlement Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at, or in connection with, the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work, payment of Past Response Costs or payment of Future Response Costs; provided however, this Settlement Agreement shall not have any effect on claims or causes of action that Respondents have or may have against the United States or any of its agencies or departments, other than EPA, as responsible parties relating or referring to the Site.

89. Except as expressly provided in Section XXI, Paragraphs 92, 94, and 95 (De Micromis, *De Minimis* and Municipal Solid Waste ("MSW") Generators/Transporters Waivers), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Subparagraphs 86(b), (c), and (e) - (g), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

90. Respondents reserve, and this Settlement Agreement is without prejudice to, claims against the United States subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of Respondents' plans or activities. The foregoing applies only to claims that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

91. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

92. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

93. The waiver in Paragraph 92 shall not apply with respect to any defense, claim or cause of action that a Respondent may have against any person meeting the above criteria, if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria, if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e) or Section 3007 of RCRA, 42 U.S.C. §6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site, or has been convicted of a criminal violation for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the Site by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the Site.

94. Respondents agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA, 42 U.S.C. §§9607(a) and 9613) that they may have for all matters relating to the Site, against any person that has entered into a final *de minimis* settlement under Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), or a final settlement based on limited ability to pay, with EPA with respect to the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

95. Respondents agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of Municipal Solid Waste ("MSW") at the Site, if the volume of MSW disposed, treated or

transported by such person to the Site did not exceed 0.2 percent of the total volume of waste at the Site.

96. The waiver in Paragraph 95 above shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to the Site against such Respondent. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria, if EPA determines that: (a) the MSW contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; (b) the person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e) or Section 3007 of RCRA, 42 U.S. C. §6927, or (c) the person impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site.

XXII. OTHER CLAIMS

97. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA shall not be deemed a party to any contract entered into by Respondents or their directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

98. Except as expressly provided in Section XXI, Paragraph(s) 92, 94, and 95 (*De Minimis*, De Micromis, and MSW Waivers)" and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Settlement Agreement. Except as provided in Paragraphs 92, 94, and 95, each Respondent expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Respondent may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto. Nothing in this Settlement Agreement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

99. No action or decision by EPA pursuant to this Settlement Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXIII. CONTRIBUTION PROTECTION

100. The Parties agree that this settlement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that each Respondent is entitled, as of the Effective Date to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for "matters addressed" in this Settlement Agreement. The "matters addressed" in this Settlement Agreement are the Work, $5,000,000.00 of Past Response Costs and Future Response Costs.

XXIV. INDEMNIFICATION

101. Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, contractors, subcontractors, employees, and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondents agree to pay the United States all costs incurred by the United States, including, but not limited to, attorneys fees and other expenses of litigation and settlement, arising from, or on account of, claims made against the United States based on negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement Agreement. The United States shall not be held out as a party to any contract entered into, by, or on behalf of Respondents in carrying out activities pursuant to this Settlement Agreement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

102. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.

103. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made, or to be made, to the United States, arising from, or on account of, any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on, or relating to, the Site, including, but not limited to, claims on account of construction delays. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from, or on account of, any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work on, or relating to, the Site.

XXV. INSURANCE

104. At least five (5) days prior to commencing any on-Site Work under this Settlement Agreement, Respondents shall secure and shall maintain for the duration of this Settlement Agreement comprehensive general liability insurance and automobile insurance with limits of $5,000,000, combined single limit, naming the EPA as an additional insured. Within the same period, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall submit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement Agreement, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement Agreement. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondents need provide only that portion of the insurance described above that is not maintained by such contractor or subcontractor.

XXVI. FINANCIAL ASSURANCE

105. In order to ensure the full and final completion of the Work, Respondents shall establish and maintain a performance guarantee, initially in the amount of $35,000,000 for the benefit of EPA (hereinafter "Estimated Cost of the Work"). The performance guarantee, which must be satisfactory in form and substance to EPA, shall be in the form of one or more of the following mechanisms (provided that, if Respondents intend to use multiple mechanisms, such multiple mechanisms shall be limited to surety bonds guaranteeing payment, letters of credit, trust funds, and insurance policies):

a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on Federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;

b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;

d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance

policies in the applicable jurisdiction(s) and (b) whose insurance operations are regulated and examined by a State agency;

e. A demonstration by one or more Respondents that such Respondent meets the financial test criteria of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work, provided that all other requirements of 40 C.F.R. § 264.143(f) are satisfied; and

f. A written guarantee to fund or perform the Work executed in favor of EPA by one or more of the following: (I) a direct or indirect parent company of a Settling Defendant, or (ii) a company that has a "substantial business relationship" (as defined in 40 C.F.R. § 264.141(h)) with at least one Settling Defendant; provided, however, that any company providing such a guarantee must demonstrate to the satisfaction of EPA that it satisfies the financial test requirements of 40 C.F.R. § 264.143(f) with respect to the Estimated Cost of the Work that it proposes to guarantee hereunder.

106. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 105, above. In addition, if at any time EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

107. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Subparagraph 105(e) or 105(f) of this Settlement Agreement, Respondents shall: (i) demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, to EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the current cost estimate of $35,000,000 for the Work at the Site shall be used in relevant financial test calculations.

108. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 105 of this Section, Respondents may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining Work to be performed. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and

may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution).

109. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of financial assurance required hereunder only in accordance with a final decision resolving such dispute pursuant to Section XVI (Dispute Resolution**).**

XXVII. INTEGRATION/APPENDICES

110. This Settlement Agreement, its appendices, and any deliverables, technical memoranda, specifications, schedules, documents, plans, reports (other than progress reports), etc. that will be developed pursuant to this Settlement Agreement and become incorporated into, and enforceable under, this Settlement Agreement constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement Agreement. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement Agreement.

111. In the event of a conflict between any provision of this Settlement Agreement and the provisions of any document attached to this Settlement Agreement or submitted or approved pursuant to this Settlement Agreement, the provisions of this Settlement Agreement shall control.

112. The following documents are attached to and incorporated into this Settlement Agreement:

Appendix A is the SOW

Appendix B is the ROD

Appendix C is a map that generally depicts the Site.

XXVIII. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

113. This Settlement Agreement shall be effective on the date that EPA transmits a fully executed copy thereof via electronic mail to Respondents. All times for performance of actions or activities required herein will be calculated from said Effective Date.

114. This Settlement Agreement may be amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA. The EPA RPM does not have the authority to sign amendments to the Settlement Agreement.

115. No informal advice, guidance, suggestion, or comment by EPA's RPM or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified.

XXIX. NOTICE OF COMPLETION OF WORK

116. When EPA determines, after EPA's review of the Final RD Report, that all Work has been fully performed in accordance with the other requirements of this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including, payment of Past Response Costs, payment of Future Response Costs or record retention, EPA will provide written notice to Respondents. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Work Plan if appropriate to correct such deficiencies. Respondents shall implement the modified and approved Work Plan and shall submit the required deliverables. Failure by Respondents to implement the approved modified Work Plan shall be a violation of this Settlement Agreement.

By: _____ _____

WALTER MUGDAN Date
Director
Emergency and Remedial Response Division
U.S. Environmental Protection Agency
Region 2

In the Matter of the Gowanus Canal Superfund Site, Administrative Settlement Agreement and Order, Index No. CERCLA-02-2014-2001

CONSENT

The Respondent identified below has had an opportunity to confer with EPA regarding this Settlement Agreement and Order. Respondent hereby consents to the issuance of this Settlement Agreement and Order and to its terms. The individual executing this Settlement Agreement and Order on behalf of the Respondent certifies under penalty of perjury under the laws of the United States that he or she is fully and legally authorized to agree to the terms and conditions of this Settlement Agreement and Order and to bind such Respondent thereto.

_____
Name of Respondent

_____ _____
Signature Date

_____
Printed Name

_____
Title of Signatory

APPENDIX A

APPENDIX B

APPENDIX C