

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

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	:	
IN THE MATTER OF THE	:	
GOWANUS CANAL SUPERFUND SITE	:	
	:	
	:	
City of New York,	:	INDEX NO.
	:	CERCLA-02-2016-2003
Respondent,	:	
	:	
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.	:	
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ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER  
FOR  
REMEDIAL DESIGN, REMOVAL ACTION AND COST RECOVERY

**DRAFT – SUBJECT TO FURTHER GOVERNMENT REVIEW AND APPROVAL**

## 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 the City of New York (“Respondent”). This Settlement Agreement is issued to Respondent 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.

2. This Settlement Agreement provides that Respondent shall complete the Remedial Design (“RD”) for the larger of two Combined Sewer Overflow (“CSO”) retention tanks (“CSO Tanks”) selected as a component of the remedial action for the Gowanus Canal Superfund Site (“Site”) in EPA’s September 27, 2013 Record of Decision (“ROD”). The RD of this larger CSO Tank, designated the “RH-034 Tank,” was previously required pursuant to an EPA Administrative Order issued on May 28, 2014, Index Number CERCLA-02-2014-2019 (the “RD UAO”), along with the RD of the second, smaller tank, designated the “OH-007 Tank,” which is not the subject of this Settlement Agreement.

3. As part of the RD of the RH-034 Tank, this CERCLA Settlement Agreement directs that Respondent shall acquire the two privately-owned parcels located at 242 Nevins Street and 234 Butler Street, or portions thereof sufficient to accommodate the RH-034 tank (hereinafter, the “Canal-side Property”), for purposes of the Site remedy through purchase or eminent domain, subject to the conditions in Paragraph 47. In addition, this CERCLA Settlement Agreement further directs that Respondent shall lease or acquire through purchase or eminent domain the privately-owned parcel located at 270 Nevins Street (hereinafter, the “Staging Area Property”) for purposes of the Site remedy, subject to the conditions in Paragraph 47. Further, this Settlement Agreement provides that Respondent shall also, following acquisition of the Canal-side Property and subject to the schedule for actions to be required of National Grid and Respondent, perform or pay for a response action at the Canal-side Property to excavate and properly manage materials within the footprint of the RH-034 Tank and within the footprint of the conduit(s) for the RH-034 Tank, to allow for the construction of the RH-034 Tank. Respondent shall also coordinate with any response actions taken by National Grid at the Canal-side Property and the City-owned Thomas Greene Park property (hereinafter, “Park Property”), including the temporary relocation and permanent replacement of the Park. This Settlement Agreement supersedes only that portion of the RD UAO provision requiring Respondent to design the RH-034 Tank; the remainder of the RD UAO, including the design of the OH-007 Tank, remains in effect.

4. EPA and Respondent recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondent in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement Agreement, the validity of the findings of fact, conclusions of law and determinations in Sections IV and V of this Settlement Agreement. Respondent agrees to undertake all actions required by the terms and conditions of this Settlement Agreement, agrees not to contest the validity or terms of this Settlement Agreement in any action to enforce its provisions and also agrees not to raise any claim, cause of action, defense or challenge unrelated to the terms of the Settlement Agreement which EPA or the United States is seeking to enforce in such action. Should the intervention of other parties in an action to enforce this Settlement Agreement result in an expansion of the subject matter of such EPA or U.S. enforcement action unrelated to the terms of the Settlement Agreement, Respondent can raise claims, causes of action, defenses or challenges related only to the expanded subject matter; with the exception, however, that nothing in this paragraph shall affect Respondent's waiver in Paragraph 104.

5. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. §9622(j)(1), EPA notified federal natural resource trustees 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 an agreement for the performance of the Remedial Design.

6. EPA has notified the New York State Department of Environmental Conservation ("NYSDEC") of this Order pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

## II. PARTIES BOUND

7. This Settlement Agreement shall apply to and be binding upon EPA and upon Respondent and its successors and assigns. The signatories to this Settlement Agreement certify that they are authorized to execute and legally bind the parties they represent.

8. Respondent shall provide a copy of this Settlement Agreement to all contractors, subcontractors, laboratories, and consultants that 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. Notwithstanding the terms of any contract, Respondent is responsible for compliance with this Settlement Agreement and for ensuring that its 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 that 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 XXX (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. “Former Fulton Manufactured Gas Plant State Superfund Site” or “Fulton MGP Site” shall mean the eight state-designated parcels of the former Brooklyn Union Gas Co. facility located between the Gowanus Canal and Third Avenue and Douglass and President Streets, consisting of former MGP parcels and non-MGP parcels impacted by contaminant migration, for which the New York State Department of Environmental Conservation (“NYSDEC”) issued a Record of Decision under state law on July 31, 2015 (the “Fulton ROD”), attached hereto as Appendix D for Operable Unit No. 1 (“OU-1”) at the Fulton MGP site. The parcels addressed by the Fulton ROD for OU-1 are: Parcel I (270 Nevins Street), Parcel II (Thomas Greene Park), Parcel III (537 Sackett Street); Parcel IV (560 Degraw Street), Parcel VI (242 Nevins Street), and Parcel VII (234 Butler Street), as well as a utility corridor within Nevins and Degraw Streets.
- f. “Future Response Costs” shall mean all costs, from the Effective Date of this Settlement Agreement, not inconsistent with the National Oil and Hazardous Substances Pollution Contingency Plan, 40 CFR Part 300 (“NCP”), including, but not limited to, direct and indirect costs, that the United States pays in reviewing or developing plans, reports and other deliverables pursuant to this Settlement Agreement and the OH-007 Tank-related tasks pursuant to the RD UAO, 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, the costs incurred pursuant to Paragraphs 64 and 66, and costs related to Respondent’s property acquisition (including costs and attorneys’ fees and any monies paid to obtain property or secure access, including the amount of just compensation), and Paragraph 102 (Work Takeover).

- g. “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).
- h. “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.
- i. “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.
- j. “NYSDEC” shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.
- k. “Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral.
- l. “Parties” means EPA and Respondent.
- 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 Section II of the Retention Tank and 1<sup>st</sup> Street Turning Basin Statement of Work, which is attached to this Settlement Agreement as Appendix A.
- n. “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 as Appendix C.
- o. “Remedial Design” or “RD” shall mean those activities to be undertaken by Respondent to develop the final plans and specifications for the Remedial Action for the RH-034 Tank pursuant to the Retention Tank and 1<sup>st</sup> Street Turning Basin Statement of Work.
- p. “Tank Remedial Design Work Plan” or “Tank RD Work Plan” shall mean the document attached hereto as Appendix E and any EPA-approved amendments thereto.

- q. “Remedial Design Unilateral Administrative Order” or “RD UAO” shall mean the EPA Administrative Order issued to Respondent on May 28, 2014, Index Number CERCLA-02-2014-2019.
- r. “Respondent” shall mean the City of New York.
- 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, including the Fulton MGP Site, 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.
- 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 Respondent is required to perform under this Settlement Agreement, except those required by Section XV (Records Retention).

#### IV. EPA’s 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 separate administrative consent orders with Respondent 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 documented 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, it has been determined that 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 that selected 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 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 5<sup>th</sup> Street turning basin beginning underneath the 3<sup>rd</sup> 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) CSO controls to significantly reduce overall contaminated solid discharges to the Canal, which include a) construction of retention tanks to retain discharges from outfalls RH-034 and OH-007, unless other technically viable alternatives are identified; 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.

19. On March 21, 2014, EPA issued an administrative order for RD, Index Number CERCLA-02-2014-2001 (the “Dredging RD UAO”) to 31 parties requiring the performance of the RD, including various pre-RD investigations and analyses, to produce a set of biddable plans and specifications for the implementation of the remedy selected in EPA’s September 27, 2013 ROD for the Gowanus Canal Superfund Site, other than the CSO controls and the cleanup and restoration of the former 1<sup>st</sup> Street turning basin. The work required by the Dredging RD UAO is currently being conducted.

20. On May 28, 2014, EPA issued the RD UAO to Respondent requiring the RD of the CSO controls and of the cleanup and restoration of the former 1<sup>st</sup> Street turning basin, as well as Respondent’s coordination and participation in the Dredging RD UAO.

21. The CSO control component of the remedial action selected in the ROD requires the construction of two CSO retention tanks to address hazardous substance-contaminated CSO solids discharging from the two largest CSO outfalls to the Canal, RH-034 at the head of the Canal, and OH-007, at the middle of the Canal.

22. Pursuant to the RD UAO, on June 30, 2015, Respondent submitted Site Recommendation Reports for the OH-007 and RH-034 CSO Tanks. The Site Recommendation Report recommends for outfall OH-007 the use of a City-owned parcel of land located at 5<sup>th</sup> Street and



Second Avenue known as the “Salt Lot,” and subject to further design, portions of an undeveloped adjoining private parcel owned by another Potentially Responsible Party for the Site, a recommendation with which EPA agrees.

23. Respondent’s draft Siting Recommendation Report for the RH-034 Tank contains a comparison of ranking factors for the Canal-side Property and the Park Property (designated in the report as “RH-3” and “RH-4,” respectively). The Canal-side Property is located west of the Park Property, is directly adjacent to the Canal, and consists of two Fulton MGP Site parcels, Parcels VI and VII, which are privately owned. In directing Respondent to Canal-side Property, EPA has accepted Respondent’s assertions that that location will minimize impacts to existing parkland, will provide additional open space in the community, and provides certain engineering benefits related to the proximity of the existing outfall. EPA has also taken into account Respondent’s commitment to perform, under a future settlement, the removal from the Gowanus Canal of contaminated CSO solids resulting from CSO discharges that occur after the completion of the dredging component of the Canal remedy but prior to the commencement of the operation of the RH-034 Tank, if any such removal is required to address recontamination of the Canal following implementation of the dredging component of the Canal remedy, as well as Respondent’s recognition that, under the RD UAO it must cooperate and coordinate with National Grid to insure that the design of in-Canal cap will withstand any such additional removal. In directing Respondent to the Staging Area Property, EPA has also accepted Respondent’s assertions that the Staging Area Property provides certain engineering benefits related to proximity to the Canal-side Property for construction of the RH-034 Tank.

24. The Fulton MGP operated from approximately 1879 until 1929. The operation of the Fulton MGP led to contamination of subsurface soil and groundwater by coal tar, a byproduct of the gas manufacturing process. MGP-related contamination at the Fulton MGP Site contains CERCLA hazardous substances, including but not limited to, PAHs, benzene, toluene, ethylbenzene and xylenes. The specific MGP operations and structures located on the parcels relevant to this Settlement Agreement include:

- a. Parcel I: formerly contained MGP production facilities including an oil/naptha collection tank, generator/retort house, condenser/blower house, coal shed, engine house, gasoline house and generators.
- b. Parcel II (the Park Property): formerly contained production facilities including 3 oil tanks, one relief holder/hydrogen tank and six gas oil naptha tanks. During World War I a US government toluol plant was located on the northern part of the parcel. Parcel II is among the most significant source areas of the Fulton MGP Site, with MGP-related contamination present from just below the concrete-covered park surface to depths of more than 100 feet.
- c. Parcel VI (comprising a portion of the Canal-side Property): contained no MGP structures; the area is impacted by the migration of contamination from other Fulton MGP parcels towards the Canal.

d. Parcel VII (comprising the remainder of the Canal-side Property): contained no MGP structures; the area is impacted by coal tar and non-MGP-related contamination.

25. On July 31, 2015, NYSDEC issued the Fulton ROD for OU-1 under state law requiring, among other things, the construction of a containment wall along the westerly side of Parcels I, VI and VII, the installation of coal tar extraction wells, the removal of MGP-related contamination within a utility corridor along Nevins and Degraw Streets, and the excavation or stabilization of MGP-related contamination on Parcels I, II, III, IV, VI, and VII at such time as each of these parcels are accessible for remediation work. Pursuant to an NYSDEC multi-site MGP cleanup order, National Grid is required to implement the cleanup set forth in the Fulton ROD.

26. Timely control of major ongoing sources of contamination is among the major elements of the ROD for the Site. The Fulton ROD does not specify when source control will occur at the affected Fulton MGP Site parcels. EPA has determined that a timely removal action must be implemented at the Park Property (Parcel II) prior to the implementation of the Remedial Action for the Site, regardless of the final location of the RH-034 Tank. It is EPA's present expectation that the Park Property cleanup, including the siting and construction of a temporary park and restoration of the Park Property, will be performed pursuant to a future enforcement order between EPA and National Grid, and in coordination with NYSDEC. In the event EPA requires Respondent to site the RH-034 tank at the Park Property pursuant to Paragraph 47, it is the intent of the parties that construction of the tank will be performed subsequent to National Grid's design and performance of the above-referenced removal action.

## V. EPA'S CONCLUSIONS OF LAW AND DETERMINATIONS

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

28. 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).

29. 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.

30. Certain of the actions qualify as a removal action under the NCP criteria for a removal action in 40 CFR Section 300.415, for reasons including, but not limited to, "actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants".

31. Respondent 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).

32. 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).

33. Respondent has discussed with EPA the basis for this Settlement Agreement and its terms.

## VI. ORDER

34. Based upon the foregoing Findings of Fact, Conclusions of Law, Determinations, and the Administrative Record for the ROD, and the Administrative Record for the Fulton ROD, EPA has determined that the actual or threatened release of hazardous substances from the Site may present an imminent and substantial endangerment to the public health or welfare or the environment within the meaning of Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), and it is hereby ordered and agreed that Respondent 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 RESPONDENT’S PROJECT COORDINATOR

35. Respondent’s approved Project Coordinator is:

Kevin Clarke, P.E.  
NYC Department of Environmental Protection  
718-595-5995  
347-461-7400 (cell)  
[kclarke@dep.nyc.gov](mailto:kclarke@dep.nyc.gov)

The Project Coordinator shall be responsible, on behalf of Respondent, for oversight of the implementation of 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.

36. In the event that Respondent changes its Project Coordinator, Respondent shall submit the name, address, qualifications, and telephone number of the new Project Coordinator to the EPA Project Coordinator specified in Paragraph 42, below. The new 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.

37. Selection of a new Project Coordinator shall be subject to approval by EPA in writing. If EPA disapproves a proposed Project Coordinator, Respondent 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. Respondent may change its 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.

38. 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 Respondent 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. Respondent shall retain a Project Coordinator at all times until EPA issues a Notice of Completion of the Work in accordance with Paragraph 128.

39. Within ninety (90) days of the Effective Date, Respondent shall retain a Supervising Contractor to perform the Work. Respondent shall notify EPA of the name and qualifications of any change to the Supervising Contractor as well as any other contractor or subcontractor proposed to perform Work under this Settlement Agreement, at least ten (10) days prior to commencement of such Work by such entity.

40. All activities required of Respondent 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.

41. EPA retains the right to disapprove any or all of the contractors and/or subcontractors proposed by Respondent to conduct the Work. If EPA disapproves in writing any of Respondent's proposed contractors, Respondent shall, within fourteen (14) days of receipt of EPA's disapproval, submit to EPA for review and approval a schedule for selection of a different contractor.

42. 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, Respondent shall direct all submissions required by this Settlement Agreement to the RPM via e-mail at [tsiamis.christos@epa.gov](mailto:tsiamis.christos@epa.gov) and by regular mail, at U.S. EPA, Region 2, 290 Broadway, 20<sup>th</sup> Floor, New York, NY 10007. EPA will notify Respondent's Project Coordinator if EPA designates a different Project Coordinator for the Work.

43. 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

44. Within the time frames set forth in the Work Schedule attached hereto as Appendix B, or as otherwise specified in EPA-approved plans, Respondent shall perform all actions necessary to complete the Work set forth below to prepare for construction of the RH-34 Tank called for in the ROD, in accordance with the relevant provisions of the Retention Tank and 1st Street Turning Basin Statement of Work and the Tank RD Work Plan submitted by Respondent pursuant to the RD UAO after approval by EPA, as directed by EPA:

- a. Complete the fee acquisition of the Canal-side Property as soon as possible, but no later than the date set forth in the Work Schedule;
- b. Secure, through acquisition, lease or otherwise, access to any staging areas necessary to design and construct the RH-034 Tank as soon as possible, but no later than the date set forth in the Work Schedule;
- c. Continue the RD, including design of any groundwater management system necessary for long-term operation, of the RH-034 Tank for both the Canal-side Property and the Park Property simultaneously, with simultaneous submittal milestones, unless and until Respondent acquires the Canal-side Property;
- d. Design a response action at Parcels VI and VII for the excavation of contaminated material and soil within the footprint of the RH-034 Tank and any associated conduit areas, to the depths necessary to prepare for the construction of the RH-034 Tank, including the design of any temporary groundwater treatment and/or management system for such work;
- e. Prepare a plan and design for Site Preparation and Demolition for Parcels I, VI and VII, appropriate to prepare those sites for the activities to be designed and carried out pursuant to this Settlement Agreement;
- f. Perform the Site Preparation and Demolition activities for Parcels I, VI and VII, pursuant to the plan and design required under Paragraph 44.e. of this Settlement Agreement. If Respondent does not commence such site preparation and demolition for Parcels VI and VII within five (5) months after acquisition of the Canal-side property (unless the parties agree to an earlier date), EPA may, in its sole and unreviewable discretion, notify Respondent that EPA will either perform such activities or cause them to be performed by a third party on all or some specified portion of Parcels VI and VII. If EPA notifies Respondent that EPA will perform or

cause to be performed such activities on only a specified portion of Parcels VI and VII, then Respondent shall perform the Site Preparation and Demolition activities on the remaining portion of Parcels VI and VII. EPA's performance of such activities, or EPA causing them to be performed by a third party, shall not in any way affect any liability Respondent may have pursuant to CERCLA or other laws for reimbursement of the costs of such activities to the party(ies) performing such activities and, to the extent such activities are performed by a party other than Respondent, they will be excluded from the definition of "Work" in subparagraph 9.y. EPA's performance of such activities, or causing them to be performed by a third party, shall not subject Respondent to the stipulated penalty provided in Paragraph 91;

g. Cooperate and coordinate with National Grid's design and performance of a response action at 242 Nevins Street (Parcel VI) and 234 Butler Street (Parcel VII), for the following activities with respect to the excavation and disposal of MGP-related contamination outside of the footprint of the RH-034 Tank: (i) construction of a subsurface barrier wall along the east bank of the Gowanus Canal; (ii) performance of a Preliminary Design Investigation ("PDI") to further delineate the extent of MGP-related contamination at Parcels VI and VII; (iii) installation of all sheet piling or other support of excavation necessary for National Grid's excavation of MGP-related contaminated waste on portions of Parcels VI and VII outside the footprint of the RH-034 Tank; (iv) excavation and removal of MGP-related contamination on portions of Parcels VI and VII outside the footprint of the RH-034 Tank, as required by the Fulton MGP site ROD; (v) installation of any sprung structure(s); (vi) implementation of a community air monitoring program to monitor MGP-related emissions; (vii) installation and operation of any temporary groundwater treatment and/or management system(s); and (viii) installation and operation of any permanent groundwater management system that may be required to address significant mounding of groundwater, should such mounding be caused by the installation of the barrier wall and/or by *in situ* stabilization of MGP-related contamination, with all such activities designed and performed by National Grid in a manner to complement construction of the RH-034 Tank. Respondent's duties to cooperate and coordinate include but are not limited to, providing: (i) access following acquisition; and (ii) technical coordination to support National Grid's design and operation of any temporary groundwater management and/or treatment system necessary for National Grid's response action;

h. Conditioned upon EPA's determination, in consultation with NYSDEC, that National Grid has satisfactorily performed all necessary components of the response action described in Paragraph 44.g., above, in accordance with the ROD for the Fulton MGP Site, perform a response action at Parcels VI and VII within the footprint of the RH-034 Tank and any associated conduit areas, including (i) excavation of contaminated material and soil to the depth necessary to prepare for the construction of the RH-034 Tank; (ii) installation of any sprung structure(s); and (iii) the operation of any temporary groundwater management system necessary to conduct such excavation;

i. Cooperate and coordinate with National Grid's design and performance of a response action at the Park Property for the excavation of contaminated material, including by providing access to National Grid to the Park Property, and by providing access, coordination

and cooperation for National Grid's siting and construction of a temporary park (or parks), followed by the City's operation of such temporary park(s) until the restoration of the Park Property is completed, with temporary park planning, location leasing or acquisition, construction and start of park operations done in a manner that ensures there are no interruptions in park services when the Park Property is closed for the response action;

j. Cooperate and coordinate with National Grid in the design and restoration by National Grid of the Park Property to, at minimum, its pre-response action functions following National Grid's performance of a removal action at the Park Property. In the event that EPA changes the siting of the RH-034 Tank from the Canal-side Property to the Park Property, Respondent shall cooperate and coordinate with National Grid in the design of the Park Property restoration (with restoration of the Park Property by National Grid to occur after installation of the RH-034 Tank by Respondent and be performed by National Grid pursuant to an administrative order or consent decree as part of the remedial action); and

k. Cooperate and coordinate with National Grid's implementation of any other aspects of the Fulton ROD, including but not limited to, the design and construction of the containment wall; any temporary or permanent groundwater management and/or treatment system(s); and any tar recovery wells.

45. Within sixty (60) days of the Effective Date of this Settlement Agreement, Respondent shall prepare and submit to EPA for approval a list of all work plans necessary to carry out the Work described in Paragraph 44 above, together with a schedule for submission of such work plans.

46. Respondent shall submit to EPA, upon transmission or receipt by Respondent, copies of all acquisition-related documents exchanged with any property owners relating to the Work.

47. Subject only to the Dispute Resolution procedures in Section XVIII, if Respondent fails to obtain permission to acquire the Canal-side Property within six (6) months after the date specified for such permission in Appendix B, fails to acquire the Canal-side Property by the date specified for such acquisition in Appendix B or, prior to the acquisition date set forth in Appendix B, EPA determines that, based on the issuance of a negative final judicial decision regarding eminent domain, Respondent cannot timely acquire the Canal-side Property, EPA in its sole unreviewable discretion may notify Respondent that EPA has determined that the Canal-side Property is no longer an appropriate tank siting location, and upon such notice, Respondent shall cease implementation of the Work at the Canal-side Property, and proceed with implementation of the Work at the Park Property.

48. Respondent 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](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.

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

#### IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS

50. 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 Respondent, 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 Respondent modify the submission; or (e) any combination of the above. However, EPA will not modify a submission without first providing Respondent 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.

51. In the event of approval, approval upon conditions, or modification by EPA, pursuant to subparagraphs 50(a), (b) or (c) above, Respondent shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to Respondent's right to invoke the Dispute Resolution procedures for the items set forth in Section XVIII of this Settlement Agreement. Following EPA approval or modification of a submission or portion thereof, Respondent 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 50 and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

52. Respondent may submit a written request to EPA seeking modifications to the Work Schedule. EPA in its sole discretion will determine whether any modifications to the Work Schedule are warranted.

#### 53. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 50, Respondent shall, within thirty (30) 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 XX (Stipulated Penalties), shall accrue during the thirty (30) 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 50 and 51.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 50, Respondent 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 Respondent of any liability for stipulated penalties under Section XX (Stipulated Penalties).

54. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondent to correct the deficiencies. EPA also retains the right to modify or develop the plan, report, or other deliverable. Respondent shall implement any such plan, report, or deliverable as corrected, modified, or developed by EPA.

55. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondent shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately. Stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX (Stipulated Penalties).

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

57. 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

### 58. Reporting.

a. By the 16<sup>th</sup> day of each month, Respondent shall submit a written progress report to EPA concerning actions undertaken pursuant to this Settlement Agreement 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, property access and acquisition status, 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. In addition, Respondent shall promptly provide an interim status report via email for any significant change of conditions related to property access and/or acquisition.

b. Respondent 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:

3 copies: (1 bound, 1 unbound, 1 electronic)	Remedial Project Manager – Gowanus Canal Site Emergency and Remedial Response Division U.S. Environmental Protection Agency, Region 2 290 Broadway, 20 <sup>th</sup> Floor New York, New York 10007-1866 212-637-4257 <a href="mailto:tsiamis.christos@epa.gov">tsiamis.christos@epa.gov</a>
1 copy: (via email or electronic)	Chief, New York/Caribbean Superfund Branch Office of Regional Counsel United States Environmental Protection Agency, Region 2 290 Broadway, 17 <sup>th</sup> Floor New York, New York 10007-1866 Attn: Gowanus Canal Superfund Site Attorney 212-637-3170 <a href="mailto:carr.brian@epa.gov">carr.brian@epa.gov</a>
1 copy each: (via email)	N.Y.S. Department of Environmental Conservation <a href="mailto:gardiner.cross@dec.ny.gov">gardiner.cross@dec.ny.gov</a> <a href="mailto:henry.willems@dec.ny.gov">henry.willems@dec.ny.gov</a> <a href="mailto:george.heizman@dec.ny.gov">george.heizman@dec.ny.gov</a> <a href="mailto:karen.Mintzer@dec.ny.gov">karen.Mintzer@dec.ny.gov</a>

c. Reports and Notices as to Respondent shall be submitted to the following:

Kevin Clarke, P.E.  
NYC Department of Environmental Protection  
718-595-5995  
347-461-7400 (cell)  
[kclarke@dep.nyc.gov](mailto:kclarke@dep.nyc.gov)

Christopher King  
Senior Counsel, Environmental Law  
New York City Law Department  
Office of the Corporation Counsel  
100 Church Street  
New York, NY 10007

#### XI. OVERSIGHT

59. During the implementation of the requirements of this Settlement Agreement, Respondent together with its contractor(s) and subcontractors shall be available for such conferences with EPA and inspections by EPA or its authorized representatives as EPA may determine are necessary to adequately oversee the Work being carried out or to be carried out by Respondent, including inspections at the Site.

60. Respondent and its employees, agents, contractor(s) and consultant(s) shall cooperate with EPA in its efforts to oversee Respondent's implementation of this Settlement Agreement.

#### XII. COMMUNITY RELATIONS

61. Respondent shall cooperate with EPA in providing information relating to the Work required hereunder to the public. As requested by EPA, Respondent shall participate in the preparation of all appropriate information disseminated to the public; participate in public meetings that may be held or sponsored by EPA to explain activities at or concerning the Property; and provide a suitable location for public meetings, as needed.

#### XIII. SITE ACCESS

62. For any portion of the Site, or any other property where access is needed to implement the Work which is currently owned by Respondent, or for which Respondent obtains ownership or access under this Settlement Agreement, Respondent shall, commencing on the Effective Date, provide EPA, NYSDEC and their representatives, including contractors, with access at all reasonable times to the Site to conduct any activity related to this Settlement Agreement. Respondent shall also provide National Grid access to all such property and fully cooperate with National Grid in carrying out response actions at the Canal-side Property and Park Property. Respondent shall, at least thirty (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. Respondent also agrees to require that its successors comply with the immediately preceding sentence, this Section, and Section XIV (Access to Information).

63. For any real property Respondent is acquiring for the purpose of siting, staging and constructing the RH-034 Tank, Respondent shall notify EPA within two (2) days of any developments that may negatively affect its timing or ability to obtain title or lease to such real property.

64. Where any response action by Respondent under this Settlement Agreement is to be performed in areas other than the Canal-side Property or Staging Area Property, and those areas are owned by, or in possession of, someone other than Respondent, Respondent shall use best efforts to acquire, lease or obtain all necessary access within thirty (30) days after the Effective Date, or such longer period as approved in writing by EPA, or as otherwise specified in writing by EPA. Respondent shall immediately notify EPA if, after using best efforts, it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in detail in writing its efforts to obtain access. EPA may then assist Respondent in gaining access, to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent 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 XVII (Payment of Response Costs).

65. 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.

66. If Respondent cannot obtain access agreements, EPA may obtain access for Respondent or perform those tasks or activities with EPA contractors. If EPA performs those tasks or activities with EPA contractors, Respondent shall perform all other activities not requiring access and shall reimburse EPA for all costs incurred in performing such activities. Respondent shall integrate the results of any such tasks undertaken by EPA into its reports and deliverables.

#### XIV. ACCESS TO INFORMATION

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

68. Respondent may transmit business confidentiality claims on behalf of its contractors 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 Respondent 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 Respondent. Respondent shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondent asserts business confidentiality claims.

69. Respondent 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 Respondent asserts such a privilege in lieu of providing documents, it 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 Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Settlement Agreement, including documents regarding the lease or acquisition of property or alienation of the Park Property, shall be withheld on the grounds that they are privileged.

70. 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.

#### XV. RECORD RETENTION

71. During the pendency of this Settlement Agreement and until ten (10) years after Respondent's receipt of EPA's notification that the Work has been completed, 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 retention policy to the contrary. Until ten (10) years after notification that the Work has been completed, Respondent shall also instruct its contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.

72. At the conclusion of this document retention period, Respondent 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, Respondent shall deliver any such documents, records, or other information to EPA. Respondent 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 Respondent asserts such a privilege, it 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 Respondent. 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.

73. Respondent hereby certifies 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.

#### XVI. COMPLIANCE WITH OTHER LAWS

74. Respondent 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.

75. 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. If any state or federal agency requires information to determine Respondent's substantive compliance with any such requirements, Respondent shall timely submit such information. Where any portion of the Work is off-Site and requires a federal or state permit or approval, Respondent shall submit timely applications and take all other actions necessary to obtain and to comply with all such permits or approvals. In the event that any person commences a legal action against Respondent in any court of law related to its acquisition of the Canal-side Property, the United States reserves the right to assert its views in any such legal action.

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

#### XVII. PAYMENT OF FUTURE RESPONSE COSTS

77. Respondent hereby agrees to reimburse EPA for all Future Response Costs. EPA will periodically send billings to Respondent 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. Respondent shall, within thirty (30) days of receipt of each such billing, remit payment of the billed amount. Respondent's payment pursuant to this Paragraph shall be made by Electronic Funds Transfer ("EFT") to EPA. To effect payment via EFT, Respondent shall instruct its 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 Respondent:

- . 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-02-2016-2003**
- . Site/spill identifier: **02-ZP**

At the time of payment, Respondent shall send notice via regular mail that such payment has been made to:

U.S. Environmental Protection Agency  
Cincinnati Finance Office  
26 Martin Luther King Drive  
Cincinnati, OH 45268

and via email to the following:

[cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov)

[mcguffey.elizabeth@epa.gov](mailto:mcguffey.elizabeth@epa.gov)

[tsiamis.christos@epa.gov](mailto:tsiamis.christos@epa.gov)

[carr.brian@epa.gov](mailto:carr.brian@epa.gov).

Such notices shall reference the date of the EFT, the payment amount, the name of the Site, the Settlement Agreement index number, and Respondent's Project Coordinator's name and address.

78. All payments by Respondent pursuant to Paragraph 77 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.

79. Respondent may contest payment of any Future Response Costs billed under Paragraph 77, if it determines that EPA has made an accounting error, or if it alleges that a cost item that

is included represents costs that are inconsistent with the NCP or not within the definition of Future Response Costs. Such objection shall be made in writing within thirty (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, Respondent shall, within the thirty (30) day period, pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 77. Simultaneously, Respondent 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. Respondent 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, Respondent shall initiate the Dispute Resolution procedures in Section XVIII (Dispute Resolution). If EPA prevails in the dispute, within five (5) days of the resolution of the dispute, Respondent shall pay the sums due (with accrued Interest) to EPA in the manner described in Paragraph 77. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay that portion of the costs (plus associated accrued Interest) for which it did not prevail to EPA in the manner described in Paragraph 77. Respondent 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 XVIII (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to reimburse EPA for Future Response Costs.

80. Respondent shall pay Interest on any amounts overdue under Paragraphs 77, 78, or 79. 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 Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XX (Stipulated Penalties).

#### XVIII. DISPUTE RESOLUTION

81. Respondent shall not invoke dispute resolution under this Settlement Agreement or in any other forum for any dispute regarding this Settlement Agreement other than Payment of Future Response Costs (Section XVII); Stipulated Penalties (Section XX), the 30%, 65% or 100% design submittals; an EPA decision to change the RH-034 tank siting location from the Canal-side Property to the Park Property, or EPA's determination that the Work has not been completed in accordance with this Settlement Agreement pursuant to Section XXXI, below. The dispute resolutions provisions of this Section are the exclusive mechanism for resolving such disputes arising under this Settlement Agreement and shall not apply to any dispute Respondent may have concerning the dispute resolution process. Respondent may not dispute



any other requirements of this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

82. Notwithstanding any other provision of this Settlement Agreement, Respondent may not invoke dispute resolution procedures more than once regarding the same issue.

83. If Respondent invokes Dispute Resolution under this Settlement Agreement, it shall notify EPA in writing of its objection(s) within twenty (20) days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondent shall have twenty (20) days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended only by EPA.

84. 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 Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondent's 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, Respondent shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs. Respondent shall proceed in accordance with EPA's final decision regarding the matter in dispute, regardless of whether Respondent agrees with the decision.

#### XIX. FORCE MAJEURE

85. Respondent agrees 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 Respondent, or of any entity controlled by Respondent, including, but not limited to, its contractors and subcontractors, that delays or prevents performance of any obligation under this Settlement Agreement despite Respondent's best efforts to fulfill the obligation. The requirement that Respondent 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, and Respondent may not invoke force majeure for, the following:

- a. Failure to obtain Comptroller approval for this Settlement Agreement or for implementing any requirement of this Settlement Agreement;

- b. Failure to obtain funding necessary for Respondent to perform its obligations pursuant to this Settlement Agreement, including for reasons of financial inability to complete the Work or increased cost of performance;
- c. Failure to obtain necessary approvals from any City agencies or entities required for the performance of this Settlement Agreement;
- d. Failure to cooperate and coordinate with National Grid, regarding, among other things, response actions at the Fulton MGP Site Parcels I, VI and VII, the design and construction of the Fulton MGP Site containment wall, and the cleanup of the Park Property; and
- e. Failure to resolve any and all challenges to Respondent's petition to condemn under Eminent Domain Procedure Law within the time period specified in the Work Schedule for the Canal-side Property.

86. 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, Respondent shall notify EPA orally within two (2) days of when Respondent first knew that the event might cause a delay. Within five (5) days thereafter, Respondent 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; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, 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 Respondent 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. Respondent shall be deemed to know of any circumstance of which Respondent, any entity controlled by Respondent, or Respondent's contractors knew or should have known.

87. 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 Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

## XX. STIPULATED PENALTIES

88. If Respondent fails, 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 85 through 87 above (*Force Majeure*), Respondent shall, upon demand by EPA, pay a stipulated penalty to EPA in the amount indicated below:

a. For non-compliance with any requirements of this Settlement Agreement, other than the timely provision of progress reports required by Paragraph 58.a., stipulated penalties shall accrue in the amount of \$1,500 per day, per violation, for the first fourteen (14) days of noncompliance, \$5,000 per day, per violation, for the 15<sup>th</sup> through 30<sup>th</sup> day of noncompliance, and \$10,000 per day, per violation, for the 31<sup>st</sup> day of noncompliance and beyond.

b. For non-compliance with the requirement to submit progress reports in Paragraph 58.a., stipulated penalties shall accrue in the amount of \$500 per day, per violation, for the first seven (7) 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.

89. 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 Respondent that EPA has determined that EPA 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 77 above. Respondent shall pay Interest on any amounts overdue under this Paragraph. Such Interest shall begin to accrue on the first day that payment is overdue.

90. 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 Respondent of a violation or act of noncompliance. The payment of penalties shall not alter in any way Respondent's obligation to complete the performance of the Work required under this Settlement Agreement.

91. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 102, Respondent shall be liable for a stipulated penalty in the amount of \$5,000,000.

92. 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: 1) with respect to a deficient submission under Section IX (EPA Approval of Plans and Other Submissions) during the period, if any, beginning on the 31<sup>st</sup> day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; 2) with respect

to a decision by the Deputy Division Director as provided in Section XVIII (Dispute Resolution) Paragraph 84 of this Settlement Agreement, during the period, if any, beginning on the 31<sup>st</sup> day after the Negotiation Period begins until the date that the Deputy Division Director issues a final decision regarding such dispute or 3) for failure to acquire the Canal-side Property pursuant to Paragraph 44.a. of this Settlement Agreement after the time of any notification to Respondent made pursuant to Paragraph 47. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

93. Following EPA's determination that Respondent has failed to comply with a requirement of this Settlement Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties.

94. Respondent shall pay EPA all penalties accruing under this Section within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XVIII (Dispute Resolution).

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

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

97. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest.

98. 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 Respondent's 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 102. 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.

## XXI. COVENANT NOT TO SUE BY EPA

99. In consideration of the actions that Respondent will perform and the payments that Respondent 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 Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work and for Future Response Costs. This covenant not to sue shall take effect upon the Effective Date of this Settlement Agreement and is conditioned upon Respondent's complete and satisfactory performance of all obligations under this Settlement Agreement, including, but not limited to, the satisfactory performance of the Work and payment of Future Response Costs pursuant to Section XVII. This covenant not to sue extends only to Respondent and does not extend to any other person.

## XX. RESERVATION OF RIGHTS BY EPA

100. 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 Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

101. The covenant not to sue set forth in Section XXI 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 Respondent with respect to all other matters, including, but not limited to:

- a. claims based on a failure by Respondent to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition of Future Response Costs;
- c. liability for performance of response actions 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;

- g. liability for performance of response actions at the Park Property;
- h. liability for failure to comply with the RD UAO, and any amendments to the RD UAO; and
- i. 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.

102. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the Work, is seriously or repeatedly deficient or late in its performance of the Work, or is 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. Costs that EPA incurs in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Respondent shall pay pursuant to Section XVII (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.

### XXIII. COVENANT NOT TO SUE BY RESPONDENT

103. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, 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 the Work or arising out of the response actions for which the Future Response Costs will be incurred, respectively, including 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; provided however, this Settlement Agreement shall not have any effect on claims or causes of action that Respondent has or may have against the United States or any of its agencies or departments, other than EPA, as responsible parties relating to the Site.

104. Respondent waives and agrees not to assert any claims, causes of action, defenses or challenges relating to the selection of the CSO controls contained in the September 27, 2013 ROD, including but not limited to its consistency with CERCLA and the National Contingency Plan, 40 CFR Part 300, and any change in the cost of the CSO controls in the September 27,

2013 ROD, including the difference in costs attributable to the design and construction of the RH-034 tank at the Canal-side Property rather than the Park Property and the concurrent design of the RH-034 tank for the Park Property; provided however that the waiver and agreement set forth in this Paragraph shall be null and void (i) if EPA issues an Explanation of Significant Differences (“ESD”) under 40 CFR §300.435(c)(2)(i) or an amendment to the ROD under 40 CFR §300.435(c)(2)(ii), that results in increased costs of the CSO controls in the September 27, 2013 ROD; or (ii) EPA changes the Preliminary Remediation Goal (“PRG”) or Final Remediation Goal or cleanup value for a contaminant of concern (or Contaminant or COC) to a higher value than that specified in the September 27, 2013 ROD without commensurate adjustment of the amount of solids capture required to be achieved by the CSO controls. However, in no event shall Respondent’s waiver of claims be null and void where such claims are based on the difference in costs attributable to the design and construction of the RH-034 Tank at the Canal-side Property rather than the Park Property and the concurrent design of the RH-034 Tank at both properties. Any remedy challenge asserted by Respondent shall be based solely upon the administrative record. Nothing in this Paragraph or Agreement shall limit Respondent’s ability to advocate for changes in the remedy selected in the ROD, including but not limited to changes pursuant to an ESD or ROD Amendment.

105. Except as expressly provided in Section XXIII, Paragraphs 108, 110, and 111 (*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 101(b), (c), (e), (f) and (i), but only to the extent that Respondent’s claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

106. Respondent reserves, 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 Respondent’s 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.

107. 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).

108. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent 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.

109. The waiver in Paragraph 108 shall not apply with respect to any defense, claim or cause of action that 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 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.

110. Respondent agrees 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 it 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 Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against Respondent.

111. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of 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.

112. The waiver in Paragraph 111 above shall not apply with respect to any defense, claim, or cause of action that 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 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.

#### XXIV. OTHER CLAIMS

113. 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 Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Settlement Agreement.

114. Except as expressly provided in Section XXIII, Paragraph(s) 108, 110, and 111 (*De Minimis*, *De Micromis*, and *MSW Waivers*)” and Section XXI (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 108, 110, and 111, 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 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).

115. 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).

#### XXV. CONTRIBUTION PROTECTION

116. The Parties agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and 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, 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 and Future Response Costs. The Parties further agree that this Settlement Agreement constitutes an administrative settlement pursuant to which Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

#### XXVI. INDEMNIFICATION

117. Respondent 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 Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In addition, Respondent agrees 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 Respondent, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its 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 Respondent in carrying out activities pursuant to this Settlement Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

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

119. Respondent waives 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 Respondent 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, Respondent 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 Respondent and any person for performance of Work on, or relating to, the Site.

#### XXVII. INSURANCE

120. Respondent is self-insured and represents that it has and will maintain adequate insurance coverage or indemnification for liabilities for injuries or damages to persons or property which may result from the activities to be conducted by or on behalf of Respondent pursuant to this Settlement Agreement. For the duration of the Settlement Agreement, Respondent shall satisfy, or shall ensure that its 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 Respondent in furtherance of this Settlement Agreement.

#### XXVIII. FINANCIAL ASSURANCE

121. Within thirty (30) days of the effective date of this Settlement Agreement, Respondent shall demonstrate its financial ability to complete the Work, initially valued in the amount of \$50 million, exclusive of the cost of acquisition of the Canal-side-Side Property and Staging Area Property and the response action at the Canal-Side Property, by submitting to EPA one or more of the following:

a. information showing that it has outstanding, rated, general obligation bonds that (i) are not secured by insurance, a letter of credit, or other collateral or guarantee and (ii) have a current rating of Aaa, Aa, or Baa as issued by Moody's, or AAA, AA, A, or BBB, as issued by Standard and Poor's on all such general obligation bonds; or

b. Such other form of financial insurance as EPA may approve in writing.

#### XXIX. INTEGRATION/APPENDICES

122. 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.

123. 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.

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

Appendix A is the Retention Tank and 1<sup>st</sup> Street Turning Basin Statement of Work

Appendix B is the Work Schedule

Appendix C is the ROD

Appendix D is the Fulton ROD for OU-1

Appendix E is the Draft Tank RD Work Plan

XXX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

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

126. This Settlement Agreement may be amended by mutual agreement of EPA and Respondent. 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.

127. 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 Respondent shall relieve Respondent of its 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.

XXXI. NOTICE OF COMPLETION OF WORK

128. When EPA determines that all Work has been fully performed in accordance with the requirements of this Settlement Agreement, with the exception of any continuing obligations required by this Settlement Agreement, including, payment of Future Response Costs or record retention, EPA will provide written notice to Respondent. If EPA determines that any such Work has not been completed in accordance with this Settlement Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require Respondent to complete the Work. Failure by Respondent to complete such Work shall be a violation of this Settlement Agreement.

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

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

\_\_\_\_\_  
Date

In the Matter of the Gowanus Canal Superfund Site, Administrative Settlement Agreement and Order, Index No. CERCLA-02-2016-2003

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 B – Work Schedule

	Description of Deliverable /Task	¶ Ref.	Deadline
1	Complete the fee acquisition of the Canal-side Property, and acquire or lease any staging areas necessary to design and construct the RH-034 Tank:	44.a. and b	<i>As soon as possible but complete the following steps no later than:</i>
1.1	Commence EIS		<i>April 1, 2016</i>
1.2	Issue Draft EIS/Certify ULURP		<i>18 months after Step 1.1</i>
1.3	Complete ULURP		<i>7 months after Step 1.2</i>
1.4	File Petition to Condemn		<i>1.5 months after Step 1.3</i>
1.5	Resolve any legal challenges to the Petition to Condemn and file vesting order, or otherwise acquire title		<i>24 months after Step 1.4, or April 30, 2020, whichever is earlier</i>
2	Continue the RD of the RH-034 Tank for both the Canal-side Property and the Park Property simultaneously, with simultaneous submittal milestones	44.c.	<i>As soon as possible but complete the following steps no later than:</i>
2.1	Complete CP-01 design package, addressing Site Preparation and Demolition for Parcels I, VI and VII	44.e.	<i>June 30, 2017</i>
2.2	Complete CP-02 design package, addressing support of excavation, excavation, deep foundation and associated elements of RH-034 tank, including any temporary groundwater treatment and/or management system	44.c., d. and h.	<i>April 30, 2019</i>
2.3	Complete CP-03 design package, addressing above-ground structures and appurtenances, mechanical fit-out and conveyances for RH-034 tank	44.c., d. and h.	<i>September 30, 2019</i>
3	Perform site preparation and demolition at Parcels VI and VII	44.e.	<i>Commence work as soon as possible but not later than five months after acquisition of Parcels VI and VII, and in any event not later than May 1, 2020. Complete work as soon as possible, but not later than 10 months after on-site mobilization for the work.<sup>1</sup></i>
3.1	Issue Notice to Proceed to contractor selected to perform site preparation and demolition at Parcels VI and VII		<i>Not later than five months after acquisition of Parcels VI and VII, but in any event not later than May 1, 2020.</i>
3.2	Commence actual on-site mobilization for site preparation and demolition work, and complete such work		<i>Commence not later than 60 days after Step 3.1 or 60 days after acquisition of Parcels VI and VII, whichever is later;</i>

## Appendix B – Work Schedule

			<i>complete work not later than 10 months after commencement.</i>
4	Perform a response action at Parcels VI and VII within the footprint of the RH-034 Tank and any associated conduit areas	44.h.	<i>As soon as possible but complete the following steps no later than:</i>
4.1	Carry out necessary procurement to perform a response action at Parcels VI and VII within the footprint of the RH-034 Tank and any associated conduit areas	44.h.	<i>Commence procurement no later than the date on which National Grid commences excavation and removal of MGP-related contamination on portions of Parcels VI and VII outside the footprint of the RH-034 Tank, as required by the Fulton MGP site ROD, pursuant to Paragraph 44.g.(iv). Complete procurement within 12 months of commencement.</i>
4.2	Perform a response action at Parcels VI and VII within the footprint of the RH-034 Tank and any associated conduit areas	44.h.	<i>Issue Notice to Proceed to contractor selected to perform work within 30 days after receipt of EPA's determination, in consultation with NYSDEC, that National Grid has satisfactorily performed all necessary components of the response action described in Paragraph 44.h.; or within 30 days of completion of Step 4.1, whichever is later. Complete work within 24 months of issuance of such Notice to Proceed.</i>

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<sup>1</sup> If, pursuant to Paragraph 44.f. of this Settlement Agreement, EPA notifies Respondent that EPA will either perform these activities, or cause them to be performed by a third party, on all or some specified portion of Parcels VI and VII, then Respondent's obligations under this Schedule shall be modified accordingly -- i.e., Respondent shall not be obligated to perform those Site Preparation and Demolition activities that are carried out by EPA or a third party.