

**UNITED STATES**  
**ENVIRONMENTAL PROTECTION AGENCY**  
**REGION 2**

IN THE MATTER OF:

The Newtown Creek Superfund Site  
Kings County and Queens County, New  
York City, New York

ADMINISTRATIVE SETTLEMENT  
AGREEMENT AND ORDER ON  
CONSENT FOR POST-ROD  
MONITORING

The City of New York,

Respondent.

U.S. EPA Region 2

CERCLA Docket No. CERCLA-02-2022-  
2003

Proceeding Under Sections 104, 107 and  
122 of the Comprehensive Environmental  
Response, Compensation, and Liability Act,  
as amended, 42 U.S.C. §§ 9604, 9607 and  
9622.

**ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT FOR**  
**POST-ROD MONITORING**

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ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT  
FOR POST-ROD MONITORING

**I. JURISDICTION AND GENERAL PROVISIONS**

1. This administrative settlement agreement and order on consent (“Settlement Agreement” or “2022 AOC”) is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and the City of New York (“Respondent”). This Settlement Agreement concerns the performance of monitoring activities attendant to a remedial action selected in a record of decision dated April 12, 2021 that addresses Operable Unit 2 (“OU2”) of the Newtown Creek Superfund site (“Site”). The monitoring activities shall be performed by Respondent, as described in further detail in the “Statement of Work OU2 Monitoring Program” or “SOW” attached hereto as Appendix A, and they are intended to confirm that the assumptions made by EPA in selecting the remedy for OU2 remain valid. Pursuant to separate administrative orders issued by the New York State Department of Environmental Conservation under the Clean Water Act, Respondent has committed to reduce combined sewer overflow (“CSO”) discharges into Newtown Creek through implementation of the Newtown Creek CSO Long Term Control Plan (“Newtown Creek LTCP”). This Settlement Agreement also concerns the payment by Respondent of “Future Response Costs”.
2. This Settlement Agreement is issued under the authority vested in the President of the United States by Sections 104, 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. §§ 9604, 9607, and 9622. This authority was delegated to the Administrator of EPA and further delegated to the Director of the Superfund and Emergency Management Division.
3. Other than implementing the OU2 Post-ROD Monitoring Work Plan (“OU2 Monitoring Work Plan”) activities that are required to be performed by Respondent pursuant to this Settlement Agreement, and except to the extent otherwise provided in Paragraph 44 of this Settlement Agreement, Respondent is not required by the terms of this Settlement Agreement to fund or perform any remedial or removal actions selected by EPA for the Site. Any remedial or removal actions selected for the Site may be the subject of a future settlement between EPA, Respondent, and/or other persons not a party to this Settlement Agreement, or they may otherwise be the subject of separate enforcement actions by EPA.
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 it 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 V and VI of this Settlement Agreement. Respondent agrees to comply with and be bound by the terms of this Settlement Agreement and further agrees that it will not contest the basis or validity of this Settlement Agreement or its terms in any action to enforce its provisions.

## **II. PARTIES BOUND**

5. This Settlement Agreement applies to and is binding upon EPA and Respondent and their successors and assigns. Any change in the municipal status of Respondent including, but not limited to, any transfer of assets or real or personal property shall not alter Respondent's responsibilities under this Settlement Agreement.

6. Respondent agrees to carry out all activities required under this Settlement Agreement. It is intended that Respondent shall perform all of the Work and pay Future Response Costs under this Settlement Agreement.

7. Respondent shall provide a copy of this Settlement Agreement to each contractor hired to perform the Work and to each person representing Respondent with respect to the Work. Respondent or its contractors shall provide written notice of the Settlement Agreement to all subcontractors hired to perform any portion of the Work required by this Settlement Agreement. Respondent shall be responsible for any noncompliance with this Settlement Agreement by Respondent, its contractors, subcontractors, or representatives.

8. The undersigned representative of Respondent certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement Agreement and to execute and legally bind Respondent to this Settlement Agreement.

## **III. STATEMENT OF PURPOSE**

9. The Work under this Settlement Agreement includes, but is not limited to, implementation of the monitoring program as specified in the OU2 ROD. The objectives of the Work are to:

- a. Ensure the assumptions made in reaching the OU2 ROD conclusions remain valid by establishing a monitoring program to, at a minimum, determine point source discharge volumes, either by directly measuring or using a hydraulic model, determine the current concentrations of Contaminants of Potential Concern ("COPCs") entering Newtown Creek from various ongoing sources, and evaluate the trends in COPC loadings to Newtown Creek over time.
- b. Collect water quality samples from the four major CSO outfalls (NCB-015, NCB-083, NCQ-077, and BB-026) on a quarterly basis. In addition, collect water quality samples, at least once, from other point source discharge outfalls as identified in the Newtown Creek OU2 Focused Feasibility Study ("FFS") (See Table 1-1a), including the East River. These point source discharge outfalls include individually permitted

stormwater and wastewater discharges, CSO and wastewater treatment plant (“WWTP”) discharges, and other stormwater discharges (such as municipal separate storm sewer systems (“MS4s”), discharges from multiple/individual sites, and highway drains). The frequency of the water quality sampling shall be consistent with the SOW, and the water quality samples shall be analyzed for at least the parameters specified in Section I.A., Paragraph 2 of the SOW.

- c. Review and tabulate at least the readily obtainable, watershed-wide metrics as specified in Section I.A, Paragraph 3 of the SOW.
- d. The Work is intended to provide all appropriate and necessary information to evaluate the periodic monitoring and periodic monitoring reports for consistency with the assumptions made by EPA in connection with its remedial decision in the OU2 ROD.
- e. Respondent shall conduct all Work under this Settlement Agreement in compliance with CERCLA, the NCP, and all applicable EPA guidance, policies, and procedures, including, without limitation, EPA Region 2’s “Clean and Green Policy” which may be found at: <https://www.epa.gov/greenercleanups/epa-region-2-clean-and-green-policy>.

#### **IV. DEFINITIONS**

10. Unless otherwise expressly provided in this Settlement Agreement, 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 in such regulations. Whenever terms listed below are used in this Settlement Agreement or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

- a. “2011 AOC” shall mean the Administrative Settlement Agreement and Order on Consent for Remedial Investigation and Feasibility Study (U.S. EPA Region 2 CERCLA Docket No. CERCLA-02-2011-2011) issued by EPA in July 2011 to Respondent, Phelps Dodge Refining Corporation, Texaco, Inc., BP Products North America Inc., The Brooklyn Union Gas Company d/b/a National Grid NY, and ExxonMobil Oil Corporation, and requiring the respondents to that order to perform, under EPA oversight, a remedial investigation and feasibility study at the Site.
- b. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, et seq.
- c. “Clean Water Act” or “CWA” shall mean the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, et seq.
- d. “Combined sewer overflow (CSO) outfall” or “CSO Outfall” shall mean an outfall where the discharge of excess, untreated wastewater from a combined sewer system can occur during heavy rainfall events when combined sewage volume exceeds the

treatment capacity of a related wastewater treatment facility or its related collection and containment system.

- e. “Day” or “day” shall mean a calendar day. In computing any period under this Settlement Agreement, where the last day would fall on a non-working day (i.e., Saturday, Sunday, or federal or State holiday), the period shall run until the close of business of the next working day.
- f. “Effective Date” shall be the effective date of this Settlement Agreement as provided in Section XXIX.
- g. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
- h. “OU2 Monitoring Work Plan” shall mean the EPA-approved Newtown Creek OU2 Monitoring Work Plan to be developed, consistent with this Settlement Agreement and the SOW attached hereto as Appendix A, which is intended to set forth the monitoring activities provided for in the OU2 ROD for the purpose of ensuring that the assumptions made by EPA in selecting the OU2 remedy remain valid. Those activities consist of sampling, analysis, and reporting of such discharges as more fully provided for in the OU2 Monitoring Work Plan. Upon EPA approval, the OU2 Monitoring Work Plan shall be deemed incorporated into this Settlement Agreement as an enforceable part hereof.
- i. “Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, not inconsistent with the NCP that the United States incurs in reviewing or developing plans, reports and other deliverables pursuant to this Settlement Agreement, in overseeing implementation of 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 Paragraph 55 (including, but not limited to, costs and attorney fees, and any monies paid by EPA to secure access, including, but not limited to, the amount of just compensation), Paragraph 44 (Emergency Response and Notification of Releases), and Paragraph 83 (Work Takeover).
- j. “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 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.
- k. “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

- l. “Newtown Creek” shall mean Newtown Creek proper, and unless a tributary is specifically indicated, it includes its five branches (or tributaries) known as Dutch Kills, Maspeth Creek, Whale Creek, East Branch, and English Kills, as well as the sediments below the water, and the water column above the sediments. If one or more of the five branches is specifically indicated, the reference will be to just the indicated branch(es). Newtown Creek is located in Kings County and Queens County in the City and State of New York, roughly centered at the geographic coordinates of 40° 42’ 54.69” north latitude (40.715192°) and 73° 55’ 50.74 74” west longitude (73.930762°). Newtown Creek is a tidal arm of the New York-New Jersey Harbor Estuary and forms a portion of the northern border of the borough of Brooklyn (Kings County) and the southern border of the borough of Queens (Queens County).
- m. “Newtown Creek LTCP” shall mean the long-term control plan developed by Respondent pursuant to CSO orders on consent between Respondent and the New York State Department of Environmental Conservation (“NYSDEC”) to control combined sewer outfall discharges to Newtown Creek to achieve waterbody-specific water quality standards under the Clean Water Act, consistent with the Federal CSO Control Policy and related guidance. The Newtown Creek LTCP was approved by NYSDEC by letter dated June 27, 2018 and, as supplemented, pursuant to NYSDEC’s direction, on July 31, 2018.
- n. “Newtown Creek Special Account” shall mean the special account within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and the 2011 AOC.
- o. “Site” shall mean Newtown Creek and the areal extent of the contamination associated with or impacting Newtown Creek, including facilities upland of Newtown Creek that are sources of contamination to Newtown Creek.
- p. “NYSDEC” shall mean the New York State Department of Environmental Conservation, a New York State agency with an approved program under, inter alia, Sections 318, 402, and 405 of the Clean Water Act, and any successor departments or agencies of the State.
- q. “Paragraph” shall mean a portion of this Settlement Agreement identified by an Arabic numeral or an upper case or lower-case letter.
- r. “Parties” shall mean EPA and Respondent.
- s. “RCRA” shall mean the Resource Conservation and Recovery Act, also known as the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, et seq.
- t. “Respondent” shall mean the City of New York, including, without limitation, the New York City Department of Environmental Protection and each other agency and sub-agency with jurisdiction or responsibility for New York City sewer infrastructure.



- u. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- v. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent, including the Statement of Work, and any other appendix attached hereto, and all documents incorporated by reference into this document, including, without limitation, EPA-approved submissions. EPA-approved submissions (other than progress reports) are incorporated into and become a part of this Settlement Agreement upon approval by EPA. In the event of conflict between this Settlement Agreement and any appendix or other incorporated document, this Settlement Agreement shall control.
- w. "Statement of Work - OU2 Monitoring Program" or "SOW" shall mean the Statement of Work attached as Appendix A to this Settlement Agreement describing the activities that Respondent must perform to prepare the OU2 Monitoring Work Plan and implement the post-OU2 ROD monitoring activities as outlined in the OU2 ROD. The SOW is incorporated into this Settlement Agreement and is an enforceable part of this Settlement Agreement, as are any modifications made thereto in accordance with this Settlement Agreement.
- x. "State" shall mean the State of New York.
- y. "United States" shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.
- z. "Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).
- aa. "Work" shall mean all activities Respondent is required to perform under this Settlement Agreement, except those obligations required under Section XIV (Retention of Records). The Work includes sampling and analysis of CSO discharges and other contaminated water discharges into Newtown Creek, including discharges from the four largest (by discharge volume) CSOs that are denominated as NCB-015, NCB-083, NCQ-077, and BB-026, in order to evaluate the impact of current and reasonably anticipated future discharges of CERCLA hazardous substances from discharges via CSOs to Newtown Creek.
- bb. "Work Takeover" shall mean EPA's assumption of the performance of any of the Work in accordance with Paragraph 83.

## V. FINDINGS OF FACT

11. The Site includes Newtown Creek, a body of water located in Kings and Queens Counties in the City of New York. Historically, Newtown Creek drained the uplands of western Long Island and flowed through wetlands and marshes. However, because of heavy industrial development and governmental activities dating from the 1800's, formerly wet areas have been filled, Newtown Creek has been channelized, and its banks have been stabilized with bulkheads and rip rap. The historic development has resulted in changes in the nature of Newtown Creek from a natural drainage condition to one that is governed largely by engineered and institutional systems.

12. The area around Newtown Creek has a history of extensive industrial development dating back to the 1800's. By the 1850's, the area surrounding and adjacent to Newtown Creek had become highly industrialized. By 1870, more than 50 petroleum refineries were located along its banks, and by the close of the 19th century, the uplands surrounding Newtown Creek were lined with oil refineries and petrochemical plants, fertilizer and glue factories, copper-smelting and fat-rendering plants, shipbuilders, sugar refineries, hide tanning plants, canneries, municipal facilities, sawmills, paint works, and lumber and coal yards. During its industrial past, Newtown Creek was crowded with commercial vessels, including large boats bringing in raw materials and fuel and taking out oil, fat, varnish, chemicals, and metals.

13. Currently, the majority of the shoreline surrounding Newtown Creek, lies within one of seven designated Significant Maritime and Industrial Areas in New York City, and is zoned for heavy manufacturing and industrial use. Land uses in those areas include light industrial facilities, petroleum bulk storage facilities, recycling facilities (including for asphalt, metals, and construction and demolition waste), manufacturing facilities, warehouses, transportation and transportation infrastructure including rail and highways, utility facilities, and municipal facilities that include the Newtown Creek Wastewater Treatment Plant, the largest of the 14 wastewater treatment plants ("WWTP") in New York City. Other areas near the mouth of the creek are zoned for residential use, and are currently undergoing significant residential development.

14. The exodus of heavy industry from New York City, the enactment in 1972 and subsequent enforcement of the CWA (requiring, among other things, municipal control of CSO's), and the resulting obligation that Respondent develop and implement ten watershed-based CSO long term control plans, and other federal, State and City environmental laws and regulations have led to a reduction in discharges of hazardous substances, pollutants, and contaminants into the waters of New York City, including Newtown Creek.

15. As part of its municipal operations, Respondent collects storm water from roads and other paved and unpaved areas, combined domestic sewage, and industrial sewage (*i.e.*, "combined sewage") and provides for treatment of such combined sewage, including at the Newtown Creek WWTP, before the discharge of the treated effluent into the City's waterbodies, including Newtown Creek. Respondent also collects combined sewage in the Bowery Bay Drainage

Basin for treatment in the Bowery Bay WWTP before discharge of treated effluent into City waterbodies other than Newtown Creek. Generally, such combined sewage includes hazardous substances that flow into the sewer system from sewer connections or street runoff. In accordance with the City's Clean Water Act permits, during periods of heavy rainfall, when combined sewage exceeds the treatment capacity of the Newtown Creek WWTP, or the Bowery Bay WWTP, or exceeds the capacity of the respective collection system, regulators divert the flow of combined sewage to CSO outfalls, resulting in the discharge of untreated wastewater as CSO to waterbodies including Newtown Creek.

16. Pursuant to administrative orders on consent issued by NYSDEC to Respondent under the CWA, Respondent is required to develop and implement long term control plans for various waterbodies, including Newtown Creek, to reduce the discharges from combined sewer outfalls into Newtown Creek.

17. Pursuant to the above-described CWA administrative consent orders, the City prepared, and NYSDEC approved, the Newtown Creek LTCP to reduce discharges from CSOs to Newtown Creek. Respondent has advised EPA that implementation of the Newtown Creek LTCP would reduce discharges from the four largest CSO outfalls to Newtown Creek by an estimated 711-million gallons per year, or a reduction of approximately 62.5% from the current baseline of 1,161-million gallons per year of CSO discharges to Newtown Creek. The Newtown Creek LTCP includes an approximately 39-million gallon wastewater storage tunnel addressing three of the four largest (by volume) CSO point sources in Newtown Creek by storing that amount of combined sewage in the storage tunnel until releasing it to the Newtown Creek WWTP after the conclusion of a rain event, when the Newtown Creek WWTP has restored capacity to treat such combined sewage, as well as by expansion of a pumping station at the fourth largest (by volume) CSO point source in Newtown Creek. Respondent has estimated the net present worth cost of implementation of these measures at approximately \$1.385 billion.

18. EPA conducted an expanded site investigation of Newtown Creek in 2009 as part of CERCLA's Hazard Ranking System scoring process. Based on this investigation, which was focused on Newtown Creek itself, excluding its tributaries, EPA concluded that metals including copper, volatile organic compounds, and semi-volatile organic compounds (including polychlorinated biphenyls ("PCBs") and polycyclic aromatic hydrocarbons ("PAHs")) were present in Creek sediments at concentrations above levels in nearby locations in the Atlantic basin. The variety and distribution of the detected constituents suggests that they originated from a variety of sources, including discharges from CSO outfalls. Potential sources of hazardous substances to Newtown Creek include a wide range of current and historical industrial and municipal discharges, including the following: (a) tidal exchanges with the East River, (b) atmospheric deposition, (c) stormwater (including as discharges from MS4s, private properties, highway drains and other stormwater outfalls), (d) treated discharges (including the WWTP effluent, permitted discharges from groundwater treatment systems and treated discharges from industrial facilities), (e) historic and ongoing industrial discharges from industries along the banks and within the Newtown Creek watershed, (f) incidental releases or other discharges

during loading or unloading of barges and other vessels servicing Creekside industrial or municipal facilities, (g) historic placement of fill along the banks of Newtown Creek for disposal or for filling marshland or swamps, (h) historic placement of dredge material during dredging and channelization activities, (i) historic and ongoing releases of combined storm, sanitary, and industrial discharges through combined sewage overflow systems into Newtown Creek, (j) discharges from groundwater, overland flow, or permitted or unpermitted point sources from industrial facilities adjacent to or in close proximity to Newtown Creek, (k) releases from maritime traffic and shipping, (l) historic and ongoing groundwater and NAPL seeps from upland properties, and (m) historic and ongoing discharge of groundwater from sediments. Generally, these potential sources contain hazardous substances, including PAHs, PCBs, copper, dioxin/furans, and lead.

19. The Site was proposed for inclusion on the National Priorities List pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, on September 23, 2009, by publication in the Federal Register at 74 Federal Register 48511, and the Site was added to the List by rule published in the Federal Register on September 29, 2010, at 75 Federal Register 59983.

20. As provided by Part 701 of the New York Code of Rules and Regulations, the water in Newtown Creek is currently classified by the NYSDEC as Class SD, saline surface water. Such regulations further provide that (a) “discharge of sewage, industrial waste, or other wastes shall not cause impairment of the best usages of the receiving water as specified by the water classification”; (b) that the best usage of Class SD waters is fishing; and (c) that “these waters shall be suitable for fish, shellfish, and wildlife survival.” Newtown Creek does not presently meet certain parameters for that CWA protected use, *e.g.*, the parameters for dissolved oxygen. NYSDEC defines class SD at 6 CRR-NY 701.14 Class SD saline surface waters as follows: “The best usage of Class SD waters is fishing. These waters shall be suitable for fish, shellfish and wildlife survival. This classification may be given to those waters that, because of natural or man-made conditions, cannot meet the requirements for fish propagation.”

21. A current recreational use of Newtown Creek includes kayaking, and there are existing and planned waterfront access points. Human exposure to contaminated sediments and waters of Newtown Creek through recreational use, use of the shoreline areas by workers, residents, recreationists, or trespassers or through consumption of fish or other biota impacted by contamination associated with Newtown Creek may cause adverse health effects. The Human Health Risk Assessment developed under the 2011 AOC indicates unacceptable risks to human health from eating contaminated fish and shellfish from Newtown Creek. These contaminants are primarily Dioxins, pesticides and PCBs. A risk assessment for ecological receptors from exposures to site-related contaminants was finalized in September 2018. Overall, the results of the Baseline Ecological Risk Assessment indicate that sediments are toxic to benthic macroinvertebrates in the turning basin portion of Newtown Creek, primarily from exposure to bulk sediment concentrations of petroleum hydrocarbons and PAHs. PCBs and dioxin/furans are bioavailable at the Site and accumulate in the tissue of receptors and also represent a dietary exposure pathway for birds (*i.e.*, spotted sandpiper, green heron, black-crowned night heron, and

belted kingfisher). PCB exposure is highest in Dutch Kills, English Kills, and the Turning Basin. Other contaminants of potential ecological and human health concern include copper, lead, and dioxins/furans, but the magnitude of response resulting from exposure to these contaminants is lower than for petroleum hydrocarbons, PAHs, and PCBs, and they are generally collocated where petroleum hydrocarbon, PAH, and PCB concentrations are highest.

22. Respondent has owned and operated and currently owns and operates the facilities encompassing Respondent's sewage infrastructure that currently conveys combined sewer overflow containing hazardous substances into Newtown Creek. Hazardous substances of the type released from such facilities have been identified in the sediments of Newtown Creek.

23. In July 2011, EPA issued an administrative settlement agreement and order on consent ("2011 AOC") to six potentially responsible parties ("PRPs"), including Respondent, pursuant to which those respondents agreed to perform a remedial investigation ("RI") and Feasibility Study ("FS") of the waters and sediments of Newtown Creek. EPA has identified this work as "Operable Unit 1" or "OU1". Sampling events during the RI have revealed the sediments in Newtown Creek to be contaminated with a variety of hazardous substances in almost the entire length of Newtown Creek including, but not limited to, PAHs, PCBs, copper, dioxin/furans, and lead. A draft RI Report for OU1, dated October 2021, has been submitted to EPA, and it is currently under review by the Agency. An FS report is anticipated to be submitted to EPA by the respondents in 2024. EPA anticipates that following completion of the RI Report and FS Report, EPA will issue a Proposed Plan for OU1 identifying EPA's preferred remedial alternative for OU1, and that EPA would thereafter select a remedy for OU1 of Newtown Creek.

24. In December 2018, EPA issued an administrative settlement agreement and order on consent ("2018 AOC") to Respondent to this Settlement Agreement relating to the second operable unit ("OU2") at the Site. The 2018 AOC required Respondent to, among other things, perform a focused feasibility study to evaluate current and reasonably anticipated future discharges of specified chemicals of potential concern from CSOs to the waters and sediments of Newtown Creek, and to evaluate the efficacy of various CSO volume controls for CERCLA response purposes. Respondent is obligated to implement the Newtown Creek LTCP pursuant to the CWA administrative consent orders issued by NYSDEC. EPA issued a Proposed Plan under CERCLA identifying no further action as EPA's preferred remedial alternative under CERCLA for OU2 and, in April 2021, EPA issued the OU2 ROD documenting its selection of no further action for OU2.

## **VI. CONCLUSIONS OF LAW AND DETERMINATIONS**

25. The Site is a "facility" as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

26. 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).

27. The conditions described in the Findings of Fact, above, constitute an actual and/or threatened “release” of a hazardous substance from a facility as defined in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

28. Respondent is a “person” as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21), that currently, or at the time of disposal of hazardous substances, owned or operated facilities within the Site, or is a person that arranged for disposal of hazardous substances at the Site.

29. Respondent therefore is a responsible party for the purposes of Sections 104, 107, and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607, and 9622.

30. The actions required under this Settlement Agreement are necessary to protect the public health, welfare, and/or the environment, are in the public interest, are consistent with CERCLA and the NCP.

31. EPA has determined that Respondent is qualified to conduct the post-ROD Monitoring within the meaning of Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), and will carry out the Work properly and promptly, in accordance with Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a), if Respondent complies with the terms of this Settlement Agreement.

## **VII. SETTLEMENT AGREEMENT AND ORDER**

32. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby ordered and agreed that Respondent shall comply with all provisions of this Settlement Agreement, including, but not limited to, all appendices to this Settlement Agreement and all documents incorporated by reference into this Settlement Agreement.

## **VIII. DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS**

33. Selection of Contractors, Personnel. All Work performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel. Respondent has identified Henningson, Durham & Richardson Architecture and Engineering, P.C. (“HDR”) as its contractor for the performance of the Work, and EPA approves HDR. If Respondent wishes to change its designated contractor during the performance of the Work, it shall submit to EPA for approval the name and qualifications of a new proposed designated contractor to be used in carrying out such Work prior to dismissing the designated contractor. With respect to any new, proposed contractor, Respondent shall demonstrate that the new proposed contractor has a quality system that complies with the most recent version of Quality Systems for Environmental Data and Technology Programs -- Requirements with Guidance for Use (American National Standard), ANSI/ASQC E4 (Feb. 2014), by submitting a copy of the proposed contractor’s Quality Management Plan (“QMP”). The QMP should be prepared in accordance with “EPA Requirements for Quality Management Plans (QA/R-2),” (EPA/240/B-01/002, March 2001 (Reissued May 2006)) or equivalent documentation as determined by EPA. The qualifications

of the new proposed contractor shall be subject to EPA's review, for verification that such contractor meets minimum technical background and experience requirements. If EPA disapproves in writing of the new proposed contractor's technical qualifications, Respondent shall notify EPA of the identity and qualifications of the proposed replacement(s) within 30 days of the written notice. If EPA subsequently disapproves of the proposed replacement, EPA reserves the right to terminate this Settlement Agreement and to conduct the complete post-ROD monitoring, and to seek reimbursement for costs and penalties from Respondent. During the course of the Work, Respondent shall notify EPA in writing of any changes or additions to the key personnel used to carry out such Work, providing their names, titles, and qualifications. EPA shall have the same right to disapprove changes and additions to personnel as it has hereunder regarding the initial notification of identified personnel by Respondent.

34. Respondent's Project Coordinator and Alternate Project Coordinator. Within 30 days after the Effective Date, Respondent shall designate a Project Coordinator and an Alternate Project Coordinator (for instances when the Project Coordinator is unavailable) who shall be responsible for administration of all actions by Respondent required under this Settlement Agreement, and Respondent shall submit to EPA the name, address, telephone number, and qualifications of the Project Coordinator and Alternate Project Coordinator. The Project Coordinator and Alternate Project Coordinator shall not be an attorney for Respondent. EPA retains the right to disapprove of the designated Project Coordinator or Alternate Project Coordinator. If EPA disapproves of the designated Project Coordinator or Alternate Project Coordinator, Respondent shall submit to EPA for approval a different Project Coordinator or Alternate Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within 30 days following EPA's disapproval. After approval, receipt by Respondent's Project Coordinator or Alternate Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent. Respondent's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work. If Respondent wishes to change its Project Coordinator during the performance of the Work, it shall submit to EPA for approval the name and qualifications of a new proposed Project Coordinator to be used in carrying out such Work prior to dismissing the designated Project Coordinator. The qualifications of the new proposed Project Coordinator shall be subject to EPA's review, for verification that such person meets appropriate background and experience requirements. If EPA disapproves in writing of the new proposed Project Coordinator qualifications, Respondent shall notify EPA of the identity and qualifications of the proposed replacement(s) within 30 days of the written notice.

35. EPA has designated the following individuals as its Project Coordinators for the Site:

Caroline Kwan  
Remedial Project Manager  
Special Projects Branch  
Superfund and Emergency Management Division  
United States Environmental Protection Agency, Region 2

290 Broadway, 18th Floor  
New York, NY 10007-1866  
212-637-4275  
[kwan.caroline@epa.gov](mailto:kwan.caroline@epa.gov)

Mark Schmidt  
Remedial Project Manager  
Special Projects Branch  
Superfund and Emergency Management Division  
United States Environmental Protection Agency, Region 2  
290 Broadway, 18th Floor  
New York, NY 10007-1866  
212-637-3886  
[schmidt.mark@epa.gov](mailto:schmidt.mark@epa.gov)

Rupika Ketu  
Remedial Project Manager  
Special Projects Branch  
Superfund and Emergency Management Division  
United States Environmental Protection Agency, Region 2  
290 Broadway, 18th Floor  
New York, NY 10007-1866  
212-637-3258  
[ketu.rupika@epa.gov](mailto:ketu.rupika@epa.gov)

EPA will notify Respondent of changes of its designated Project Coordinators.

36. EPA's Project Coordinators shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and On-Scene Coordinator ("OSC") under the NCP. In addition, EPA's Project Coordinators shall have the authority, consistent with the NCP, to halt any Work required under this Settlement Agreement, and to take any necessary response action when she/he determines that conditions at the Site may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA Project Coordinators from the Work area under this Settlement Agreement shall not be cause for the stoppage or delay of Work.

37. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the post-ROD monitoring, as required by Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). Such person shall have the authority to observe Work and make inquiries in the absence of EPA, but does not have the authority to modify the OU2 Monitoring Work Plan.

#### **IX. WORK TO BE PERFORMED**

38. All written documents prepared by Respondent pursuant to this Settlement shall be submitted by Respondent in accordance with Paragraph 43. All such submittals will be



reviewed and approved by EPA in accordance with Section X (EPA Approval of Plans and Other Submissions), with the exception of progress reports and the Health and Safety Plan. Respondent shall implement all EPA-approved, EPA-conditionally approved, and EPA-modified deliverables.

39. Submission and Modification of the OU2 Monitoring Work Plan.

- a. Within thirty days of the Effective Date, Respondent shall submit to EPA, for review and approval, a draft OU2 Monitoring Work Plan substantively consistent with the SOW.
- b. If at any time during the performance of the Work, Respondent identifies a need for modifications to the EPA-approved OU2 Monitoring Work Plan, Respondent shall submit a memorandum documenting the need for proposed modifications to the EPA Project Coordinators within 21 days of identification. In addition, if at any time during the performance of the Work, Respondent identifies a need for additional data to satisfy the requirements of this Settlement Agreement, Respondent shall submit a memorandum documenting the basis for a need for additional data to the EPA Project Coordinators within 21 days of identification.
- c. In the event of significant unanticipated or changed circumstances at the Site affecting the Work, Respondent shall notify EPA Project Coordinator Rupika Ketu by telephone within 48 hours of discovery of the unanticipated or changed circumstances. In the event that EPA determines that the unanticipated or changed circumstances warrant changes in the OU2 Monitoring Work Plan, EPA will notify Respondent in writing of the need to modify the OU2 Monitoring Work Plan or amend the OU2 Monitoring Work Plan itself, accordingly. Respondent shall implement the OU2 Monitoring Work Plan as modified or amended.
- d. Nothing in this Paragraph shall be construed to limit EPA's authority, in separate enforcement actions, to require performance of further response actions at the Site.

40. Off-Site Shipment of Waste Material. To the extent that Respondent generates Waste Material in sufficient quantity to necessitate disposal, Respondent shall, prior to any off-site shipment of any Waste Material from the Site to an out-of-state waste management facility, provide written notification of such shipment of Waste Material to the appropriate state environmental official in the receiving facility's state and to the EPA designated Project Coordinators. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments does not exceed 10 cubic yards.

- a. Respondent shall include in the written notification the following information: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the

shipment plan, such as a decision to ship the Waste Material to another facility within the same state or to a facility in another state.

- b. The identity of the receiving facility and state will be determined by Respondent following the award of the contract for the Work. Respondent shall provide the information required by Paragraphs 40.a and 40.c as soon as practicable after the award of the contract and before the Waste Material is actually shipped.
- c. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondent shall only send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

41. Meetings. Respondent shall make presentations at, and participate in, meetings as requested by EPA regarding the Work during the initiation, conduct, and completion of said Work. In addition to discussion of the technical aspects of and substantive issues relating to the Work, topics may include anticipated problems or new issues. Meetings will be scheduled at EPA's discretion. Respondent may also request such meetings.

42. Periodic Reporting. In addition to the other deliverables set forth in this Settlement Agreement, Respondent shall submit to EPA, written quarterly monitoring reports, annual data summary reports with respect to actions and activities undertaken pursuant to this Settlement Agreement, as set forth in this Settlement Agreement and in Sections I, III, or V of the SOW, and quarterly reports on the status of the construction and implementation of the LTCP.

- A. Quarterly Monitoring Reports. The quarterly monitoring reports shall be submitted within 60 days after the completion of each quarterly sampling event following the Effective Date of this Settlement Agreement. The quarterly monitoring reports shall include the information specified in Sections I, III, or V of the SOW, and shall also include the following:
  - a. A description of all actions which have been taken toward achieving compliance with this Settlement Agreement during the prior quarter
  - b. A description of any violations of this Settlement Agreement and other problems encountered during the quarter;
  - c. A description of all corrective actions taken in response to any violations or problems which occurred during the prior quarter;
  - d. A description of all activities and submittals planned for the following two quarters;

- e. Identification of all data collected or received by Respondent during the prior quarter;
  - f. A description of all plans, actions, and data scheduled for collection;
  - g. An identification of all delays encountered or anticipated that may affect the future schedule for performance of the Work, and all efforts made by Respondent to mitigate delays or anticipated delays; and
  - h. A description of all communications that the Respondent has had with local, state, or other federal authorities related to the Work.
- B. Annual Data Summary Reports. The annual data summary reports shall be submitted within 60 days after the end of each calendar year following the Effective Date of this Settlement Agreement and, shall include the information specified in Sections I, III or V of the SOW.
- C. Quarterly LTCP Construction and Implementation Status Reports. Respondent shall, within 30 days after the Effective Date of this Settlement Agreement, submit to EPA a copy of the schedule of Respondent's planning, design and construction obligations under the NYSDEC Consent Order relating to the construction and implementation of the Newtown Creek LTCP, including a description of each such obligation, the source document for such obligation, milestone dates, and Respondent's estimated cost for each such obligation. Thereafter, Respondent shall provide within 30 days following the end of each quarter, a report (Quarterly LTCP Status Report) on the status of each planning, design and construction obligation under the NYSDEC Consent Order, outstanding force majeure requests and its anticipated impact on the schedule, modification requests, and, if any, notices of violation of the NYSDEC Consent Order, made or outstanding during the quarter, and a copy of each written communication between Respondent and NYSDEC made during the quarter relating to the NYSDEC Consent Order, or to the construction or implementation of the LTCP, with a report on milestones missed, and Respondent's anticipated date of completion of implementation of the LTCP. At such time, or as soon thereafter as it is available, Respondent shall also provide to EPA a copy of Respondent's publicly available Quarterly Progress Report. If requested by EPA, Respondent shall, within thirty days of such request, provide to EPA supplementary responses to any item addressed or required to be addressed in the publicly available Quarterly Progress Report or in the Quarterly LTCP Status Report.
- D. Respondent's obligation to submit quarterly monitoring reports, annual data summary reports, and Quarterly LTCP status reports shall continue until EPA gives Respondent written notice pursuant to Section XXX of this Settlement Agreement that it has completed all of the Work under this Settlement Agreement.

43. Respondent shall submit to EPA, copies of all plans, reports, or other submissions required pursuant to this Settlement Agreement as set forth below. Electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Respondent shall submit reports and deliverables as follows unless otherwise specified by EPA:

- a. One electronic copy to each of EPA's Project Coordinators for the Newtown Creek Superfund Site, currently at the following email addresses: [kwan.caroline@epa.gov](mailto:kwan.caroline@epa.gov); [Schmidt.mark@epa.gov](mailto:Schmidt.mark@epa.gov); [ketu.rupika@epa.gov](mailto:ketu.rupika@epa.gov)
- b. One electronic copy, to each of EPA's Newtown Creek Superfund Site Attorneys, currently at the following email addresses: [mintzer.michael@epa.gov](mailto:mintzer.michael@epa.gov); [leshak.andrea@epa.gov](mailto:leshak.andrea@epa.gov)
- c. One electronic copy, to: Newtown Creek Superfund Site Project Manager, currently at the following email address: [michael.haggerty@dec.ny.gov](mailto:michael.haggerty@dec.ny.gov)

44. Emergency Response and Notification of Releases.

- a. Upon the occurrence of any event during performance of the Work required hereunder that, pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, requires reporting to the National Response Center [(800) 424-8802], Respondent shall then immediately orally notify any one or more of the EPA Project Coordinators or, in the event of his/her unavailability, contact the EPA Region 2 Emergency Operations Center at (732) 548-8730, of the incident or Site conditions. Respondent shall also submit a written report to EPA within seven (7) days after the onset of such an event, setting forth the events that occurred and the measures taken or to be taken, if any, to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. The reporting requirements of this paragraph are in addition to, not in lieu of, reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.
- b. In the event of any action or occurrence during Respondent's performance of the requirements of this Settlement Agreement that causes or threatens to cause a release of a hazardous substance or that may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize the threat and shall immediately notify EPA as provided in the preceding paragraph. Respondent shall take such action in accordance with applicable provisions of this Settlement Agreement, including the Health and Safety Plan required to be submitted pursuant to Section IV, Paragraph B of the SOW. In the event that EPA determines that either (a) the activities performed pursuant to this Settlement Agreement, (b) significant changes in conditions at the Site, or (c) emergency circumstances occurring at the Site pose a threat to human health or the environment, EPA may direct

Respondent to cease further implementation of any actions pursuant to this Settlement Agreement or to take other and further actions reasonably necessary to abate the threat.

**X. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

45. After review of any plan, report, or other item that is required to be submitted for approval pursuant to this Settlement Agreement, EPA shall notify Respondent in writing that it either: (a) approves, in whole or in part, the submission; (b) approves the submission with specified conditions; (c) modifies the submission to cure the deficiencies; (d) disapproves, in whole or in part, the submission, directing that Respondent modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondent at least one written notice of deficiency and an opportunity to cure within 21 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved because of material defects. EPA may, in its sole discretion, grant greater than 21 days to cure if Respondent requests additional time or if EPA determines that more time is necessary for Respondent to cure the deficiencies.

46. In the event of approval, approval with conditions, and/or modification by EPA, pursuant to Paragraph 45.a, 45.b, 45.c, 45.d, or 45.e, Respondent shall proceed to take any action required by the plan, report, or other deliverable, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA's written approval or modification or disapproval requiring Respondent's 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 or requires Respondent to make such modification to cure the deficiencies pursuant to Paragraph 45.c, and the submission had a material defect, EPA retains the right to seek stipulated penalties, as provided in Section XVI (Stipulated Penalties).

47. Resubmission.

- a. Upon receipt of a notice of disapproval, Respondent shall, within thirty 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 XVI (Stipulated Penalties), shall accrue during the 30-day or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified because of a material defect as provided in Paragraphs 48 and 49.
- b. Notwithstanding the receipt of a notice of disapproval, Respondent shall proceed to take any action required by any non-deficient portion of the submission to the extent that to do so would not create inconsistencies related to the deficiency or unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve

Respondent of any liability for stipulated penalties under Section XVI (Stipulated Penalties).

- c. Respondent shall not proceed further with any activities or tasks dependent on the OU2 Monitoring Work Plan until it has received EPA approval, approval on condition, or modification of the OU2 Monitoring Work Plan. While awaiting EPA approval, approval on condition, or modification of such deliverables, Respondent shall proceed with all other tasks and activities that may be conducted independently of these deliverables, in accordance with the schedule set forth in the Settlement Agreement or SOW, or as otherwise approved by EPA.
- d. For all remaining deliverables not coming under Paragraph 45.c, above, Respondent shall proceed with all subsequent tasks, activities, and deliverables without awaiting EPA approval on a submitted deliverable. EPA reserves its right to stop Respondent from proceeding further, either temporarily or permanently, on any task, activity, or deliverable at any point during the performance of the Work hereunder, and Respondent agrees to cease any task, activity or deliverable if so directed by EPA.

48. If EPA disapproves a resubmitted plan, report, or other deliverable, or portion thereof, EPA may again direct Respondent to correct the deficiencies. EPA shall also retain 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, subject only to Respondent's right to invoke the procedures set forth in Section XV (Dispute Resolution).

49. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA because of a material defect, and the material defect has not been substantially corrected in the time allowed under Paragraph 48, Respondent shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless Respondent invokes the dispute resolution procedures in accordance with Section XV (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a dispute resolution decision issued by EPA or superseded by an agreement reached pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties accruing during a Dispute Resolution proceeding.

49. 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 enforceable under this Settlement Agreement.

50. Neither failure of EPA to expressly approve or disapprove of Respondent's submissions within a specified time period nor the absence of comments shall be construed as approval by EPA. Respondent is responsible for preparing deliverables acceptable to EPA.

## XI. QUALITY ASSURANCE, SAMPLING, AND ACCESS TO INFORMATION

51. Quality Assurance. Respondent shall assure that Work performed, including samples taken, as required by this Settlement Agreement, and analyses conducted conform to the requirements of the OU2 Monitoring Work Plan, and the EPA-approved Quality Assurance Project Plan (“QAPP”) approved under the 2022 AOC, and guidance identified therein. Respondent shall ensure that field personnel retained by Respondent are properly trained in the use of field equipment and in chain of custody procedures. Respondent shall only use laboratories that have a documented quality system that complies with ASQ/ANSI E4:2014 “Quality management systems for environmental information and technology programs - Requirements with guidance for use” (American Society for Quality, February 2014), and “EPA Requirements for Quality Management Plans (QA/R-2)” EPA/240/B-01/002 (March 2001, reissued May 2006), or equivalent documentation as determined by EPA.

52. Sampling.

- a. All results of sampling or other data (including raw data) that are generated and validated by Respondent, or on Respondent’s behalf, required under this Settlement Agreement shall be submitted to EPA in the next required progress report after they are generated as described in Paragraph 42.A or 42.B of this Settlement Agreement. Notwithstanding the foregoing, Respondent shall submit data that is undergoing validation if requested by EPA.
- b. Respondent shall verbally notify EPA Project Coordinator Rupika Ketu at least 14 days prior to conducting significant field events as described in the OU2 Monitoring Work Plan, provided, however, that for any sampling events during wet weather/storm flows or tides, Respondent shall verbally notify EPA as soon as practicable, but not less than one Working Day prior to such sampling event. At EPA’s verbal or written request, or the request of EPA’s oversight assistant, Respondent shall provide split or duplicate samples to EPA (and its authorized representatives) of any samples collected under this Settlement Agreement. All split samples analyzed by EPA shall be analyzed by the methods identified in the QAPP.
- c. If Respondent has an obligation under any other regulatory program that results in (i) any reports relating to Waste Materials generated at the Site, (ii) any reports relating to Waste Materials from direct or indirect discharges into Newtown Creek, or (iii) any other reports relating to the Site or related to direct or indirect discharges into Newtown Creek, it shall provide a copy of such reports to EPA upon request.

53. Access to Information.

- a. Subject to Paragraph 53(b)-(d), 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 implementing the OU2 Monitoring Work Plan or additional Work as required hereunder at the Site under this Settlement Agreement, including, but not limited

to, sampling, analysis, chain of custody records, correspondence, or other documents or information related to the Work. Respondent shall also, to the extent allowed by law, make available to EPA, for purposes of investigation, information gathering, or testimony, access to its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

- b. Respondent may assert business confidentiality claims covering all or part 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 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.
- c. 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 assert such a privilege in lieu of providing documents, it shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by Respondent. However, no documents, reports, or other information required to be created or generated by this Settlement Agreement shall be withheld on the grounds that they are privileged, provided that Respondent may assert such privileges with respect to internal draft documents that have not been disclosed to persons other than Respondent, its counsel, contractors, or agents.
- d. 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 to the extent that EPA or Respondent believes that such data relates to the Site.

## **XII. SITE ACCESS**

54. If any portion of the Site, or any other property where access is needed to implement the Work under this Settlement Agreement, is owned or controlled by Respondent, then Respondent shall, commencing on the Effective Date, provide EPA and the State, and their respective representatives, including contractors, with access at all reasonable times to such property,



including without limitation, any vessels, where Respondent is conducting any Work, for the purpose of conducting or overseeing any activity related to this Settlement Agreement.

55. Access to Areas Not Owned by Respondent. Where any activities required under this Settlement Agreement are to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements from the present owners within 45 days of the later of (i) the Effective Date of this Settlement Agreement, or (ii) the date as it is determined by the EPA Project Coordinator that access to such other properties is needed for performance of Work. 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, unless EPA has identified the property owner as a PRP under CERCLA in connection with the Site. Respondent shall describe in writing its efforts to obtain access. If Respondent cannot obtain access agreements, EPA may either (i) obtain access for Respondent or assist Respondent in gaining access, to the extent necessary to implement the Work described in this Settlement Agreement, using such means as EPA deems appropriate; or (ii) perform those tasks or activities with EPA contractors. 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 XVIII (Payment of Response Costs). If EPA performs those tasks or activities with EPA contractors and does not terminate this Settlement Agreement, Respondent shall perform all other tasks or activities not requiring access to that property, and Respondent shall reimburse EPA for all costs incurred in performing such tasks or activities. Respondent shall integrate the results of any such tasks or activities undertaken by EPA into its plans, reports, and other deliverables.

56. Notwithstanding any provision of this Settlement Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

### **XIII. COMPLIANCE WITH OTHER LAWS**

57. Nothing in this Settlement Agreement limits Respondent's obligations to comply with the requirements of all applicable state and federal laws and regulations when performing the Work. No local, state, or federal permit shall be required for any portion of the Work conducted entirely on-site if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621, provided that Respondent shall comply with the substantive requirements that would otherwise be included in such permits. Where any portion of the Work is to be conducted off-site and requires a federal or state permit or approval, Respondent shall submit timely and complete applications and take all other actions necessary for permit equivalency per EPA guidance. Respondent may seek relief under the provisions of Section XVII (Force Majeure) of this Settlement Agreement for any delay in performing the Work because of a failure to obtain, or a delay in obtaining, any permit required for the Work, provided that Respondent has made proper, timely, and complete application for such permit and has taken all

other actions necessary to obtain and to comply with all such permits or approvals. This Settlement Agreement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

#### XIV. RETENTION OF RECORDS

58. During the performance of the Work required under this Settlement Agreement and for a minimum of 10 years after the Completion of the Work pursuant to Paragraph 107 of this Settlement Agreement, Respondent shall preserve and retain all non-identical copies of the following documents, records, and other information (including documents, records, or other information in electronic form) that come into its possession or control: (i) all reports, plans, permits, and documents submitted to EPA in accordance with this Settlement Agreement, including all underlying research and data; (ii) all data developed by, or on behalf of, Respondent in the course of performing the Work; and (iii) all records regarding Respondent's liability under CERCLA with respect to the Site, regardless of any governmental retention policy to the contrary. Respondent shall also instruct its contractors and agents to preserve all non-identical copies of documents, records, and other information of whatever kind, nature, or description relating to performance of the Work until 10 years after approval by EPA of the completion of the Work pursuant to Paragraph 107 of this Settlement Agreement.

59. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such documents, records, or other information, and, upon request by EPA, and except as provided in Paragraph 53, Respondent shall deliver any such documents, records, or other information to EPA.

60. Respondent hereby certifies that, to the best of its knowledge and belief and, 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 its notification of potential liability by EPA regarding the Site, and it further certifies 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.

#### XV. DISPUTE RESOLUTION

61. Unless otherwise expressly provided for in this Settlement Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Settlement Agreement. The Parties shall attempt to resolve any disagreements concerning this Settlement Agreement expeditiously and informally.

62. **Informal Dispute Resolution.** If Respondent objects to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, it shall notify EPA in writing of its objection(s) within 30 days of such action. EPA and Respondent shall have 30 days from EPA's receipt of Respondent's written objection(s) to resolve the dispute through informal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at

the sole discretion of EPA. Such extension may be granted verbally but must be confirmed in writing. Any agreement reached by the Parties pursuant to this Paragraph shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement Agreement.

63. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondent shall, within 20 days after the end of the Negotiation Period, submit a statement of position to EPA. EPA may, within 20 days thereafter, submit a statement of position. A reply, if any, is due within 10 days after receipt of EPA's response. Thereafter, the Deputy Director of the Superfund and Emergency Management Division, Region 2, or, at the sole discretion of EPA, someone occupying a higher position, will issue a written decision. When feasible, Respondent shall be given an opportunity to meet (either in person or via other means) with the Chief of the Special Projects Branch of the Superfund and Emergency Management Division, EPA Region 2, before the decision on the dispute is made. The administrative record of the dispute shall be maintained by EPA and will include all correspondence and material exchanged between EPA and Respondent during the dispute resolution process. 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.

## XVI. STIPULATED PENALTIES

64. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 65.a and 65.b for failure to comply with any of the requirements of this Settlement Agreement as specified below unless excused by EPA under Section XVII (Force Majeure) or otherwise. "Compliance" by Respondent shall include the resumption of the performance of the Work required under this Settlement Agreement in accordance with all applicable requirements of law, this Settlement Agreement, and the OU2 Monitoring Work Plan, within the specified schedules established by and approved under this Settlement Agreement.

65. Stipulated Penalty Amounts

- a. The following stipulated penalties shall accrue per day for any non-compliance identified in this subparagraph 65.a:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,500	1 <sup>st</sup> through 14 <sup>th</sup> day
\$3,000	15 <sup>th</sup> through 30 <sup>th</sup> day
\$6,000	31 <sup>st</sup> day and beyond

Stipulated penalties as specified in this subparagraph 65.a shall accrue per violation per day if Respondent fails to timely submit the OU2 Monitoring Work Plan or the QAPP to be developed pursuant to the SOW (and including all additional work plans to be developed after the Effective Date pursuant to the OU2 Monitoring Work Plan).

These major deliverables shall be completed and submitted by Respondent in accordance with the OU2 Monitoring Work Plan and any schedules approved by EPA for delivery of submittals.

- b. For all other violations of this Settlement Agreement, including, without limitation, Respondent's failure to submit a periodic report required under Paragraph 42 of this Settlement Agreement or Section I, III, or V of the SOW, or failure to timely pay Future Response Costs in accordance with Section XVI, stipulated penalties shall accrue per violation per day as follows:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 750	1 <sup>st</sup> through 14 <sup>th</sup> day
\$ 1,500	15 <sup>th</sup> through 30 <sup>th</sup> day
\$ 3,000	31 <sup>st</sup> day and beyond

66. In the event that EPA assumes performance of all or a substantial portion of the Work pursuant to Paragraph 83 of Section XX (Reservation of Rights by EPA), Respondent shall be liable for a stipulated penalty in the amount of \$100,000. EPA agrees that any such penalty assessed against Respondent under this Paragraph shall be reduced by the percentage of Work completed by Respondent as of the time of the assessment. This Paragraph shall not apply to circumstances described in Paragraph 55 in which EPA performs work because Respondent is unable to obtain access.

67. All penalties shall begin to accrue on the day after performance is due or the day a violation occurs, and they shall continue to accrue through the final day of the correction of the noncompliance or resumption or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section X (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; and (2) with respect to a matter that is the subject of dispute resolution under Section XV, during the period, if any, beginning on the 21<sup>st</sup> day after the later of the date that EPA's statement of position is received or the date that Respondent's reply thereto (if any) is received until the date that the Deputy Director of the Superfund and Emergency Management Division, Region 2 issues a final decision regarding such dispute. Nothing in this Settlement Agreement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement Agreement.

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

69. All penalties accruing under this Section shall be due and payable to EPA within 30 days of Respondent's receipt from EPA of a written demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XV (Dispute Resolution). All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made through pay.gov in the manner set forth in Paragraph 77.b, below.

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

71. Penalties shall continue to accrue as provided in Paragraph 67 during any dispute resolution period, but if Respondent is unsuccessful in the dispute, any penalties need not be paid until 15 days after the dispute is resolved by agreement or by receipt of EPA's decision.

72. If Respondent fails to pay stipulated penalties when due, Respondent shall pay Interest on the unpaid stipulated penalties as follows: (a) if Respondent has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of the dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 69 until the date of payment; and (b) if Respondent fails to timely invoke dispute resolution, Interest shall accrue from the date of demand made pursuant to Paragraph 69 until the date of payment. If Respondent fails to pay stipulated penalties and Interest when due, EPA may institute proceedings to collect the penalties and Interest.

73. 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 Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). However, EPA shall not seek civil penalties pursuant to Section 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 in this Settlement Agreement, except in the case of 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 83. 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.

## XVII. FORCE MAJEURE

74. 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* event. For purposes of this Settlement Agreement, a *force majeure* event 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. A *force majeure* event does not include financial inability to complete the Work or increased cost of performance.

75. 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 an EPA Project Coordinator (or, in the absence of the EPA Project Coordinators, the Chief of the Special Projects Branch of the Superfund and Emergency Management Division of EPA Region 2 currently at (212) 637-4435) within ten days of when Respondent or its agents, contractors, or representatives first knew or should have known that the event might cause a delay. Within ten days thereafter, Respondent shall provide to EPA in writing the following: 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 a *force majeure* event for that event for the period of such failure to comply and for any additional delay caused by such failure, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a *force majeure* event under Paragraph 74 and whether Respondent has exercised its best efforts under Paragraph 74, EPA may, in its unreviewable discretion, excuse in writing Respondent's failure to submit timely or complete notices under this Paragraph.

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

## XVIII. PAYMENT OF FUTURE RESPONSE COSTS

### 77. Payments of Future Response Costs.

- a. Respondent shall pay EPA all Future Response Costs. On a periodic basis, EPA will send Respondent a bill requiring payment that includes a SCORPIOS Report, which includes direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 77.b of this Settlement Agreement, and payment shall be made in the manner set forth in Paragraph 77.b.
- b. Payment Instructions. Respondent shall make all payments at <https://www.pay.gov> using the “EPA Miscellaneous Payments Cincinnati Finance Center” link and shall specify Respondent’s name and the amount of the payment, and shall include, references to the EPA Index Number (CERCLA-02-2022-2003) and the Site/spill identifier (A206).
- c. At the time of payment, Respondent shall send notice that such payment has been made. Such notice shall be sent by email to EPA’s accounts receivable office and to EPA’s Project Coordinators and Site Attorneys currently at the following email addresses:

[CINWD\\_AcctsReceivable@epa.gov](mailto:CINWD_AcctsReceivable@epa.gov)

[chalifoux.jessica@epa.gov](mailto:chalifoux.jessica@epa.gov)

[kwan.caroline@epa.gov](mailto:kwan.caroline@epa.gov)

[schmidt.mark@epa.gov](mailto:schmidt.mark@epa.gov)

[ketu.rupika@epa.gov](mailto:ketu.rupika@epa.gov)

[mintzer.michael@epa.gov](mailto:mintzer.michael@epa.gov)

[leshak.andrea@epa.gov](mailto:leshak.andrea@epa.gov)

- d. The total amount to be paid by Respondent pursuant to subparagraph 77.a. and Paragraph 79 shall be deposited in the Newtown Creek 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.

78. If Respondent fails to pay Future Response Costs within 30 days of Respondent’s receipt of a bill, Respondent shall pay Interest on the unpaid balance of Future Response Costs. The Interest on unpaid Future Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. If EPA receives a partial payment, Interest shall accrue on any unpaid balance. 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 payments of stipulated penalties pursuant to Section XVI. Respondent shall make all payments required under this Paragraph in the manner described in Paragraph 77.b.

79. Respondent may contest payment of any Future Response Costs billed under Paragraph 77 if it asserts that EPA has made a mathematical or accounting error or has included a cost item that is not within the definition of Future Response Costs, or if it believes EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision of this Settlement Agreement or specific provisions of the NCP. Such objection shall be made in writing within 60 days of receipt of the bill and must be sent to the EPA Project Coordinators. 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 30-day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 77.b. Simultaneously, Respondent shall establish, through the Office of the Comptroller of the City of New York, an interest-bearing Trust and Agency Account in a duly chartered bank or trust company that is insured by the Federal Deposit Insurance Corporation, and it shall remit to that account funds equivalent to the amount of the contested Future Response Costs. Respondent shall send to the EPA Project Coordinators a copy of the transmittal letter and check paying the uncontested Future Response Costs and a copy of the correspondence that establishes and funds and documents the deposit into the account, including, but not limited to, information containing the identity of the bank and bank account under which the account is established as well as a bank statement showing the initial balance of the account. In such an instance, simultaneously with establishment of the account, Respondent shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If EPA prevails in the dispute, within 14 days after the resolution of the dispute, Respondent shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 77.b. If Respondent prevails concerning any aspect of the contested costs, Respondent shall pay any portion of the costs (plus associated accrued interest) for which it did not prevail to EPA in the manner described in Paragraph 77.b. Respondent shall be disbursed any balance of the account remaining thereafter (including associated accrued interest). The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondent's obligation to pay EPA for its Future Response Costs.

#### **XIX. COVENANT NOT TO SUE BY EPA**

80. In consideration of the actions that will be performed and the payments that will be made by Respondent under this Settlement Agreement, and except as provided in Section XX (Reservations of Rights by EPA), 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 Future Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Respondent of its obligations under this Settlement Agreement. These covenants extend only to Respondent and do not extend to any other person.



## XX. RESERVATIONS OF RIGHTS BY EPA

81. Except as specifically provided in this Settlement Agreement, nothing in this Settlement Agreement 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, 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 seeking to require Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

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

- a. liability for failure by Respondent to meet a requirement of this Settlement Agreement;
- b. liability for response costs incurred not included within the definition of Future Response Costs;
- c. liability for performance of response activities other than the Work;
- d. criminal liability;
- e. liability for violations of federal or state law that occur during or after implementation of the Work;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the cost of any natural resource damage assessments; and
- g. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site.

83. Work Takeover.

- a. In the event that EPA determines that Respondent has (i) ceased implementation of any portion of the Work, or (ii) is seriously or repeatedly deficient or late in its performance of the Work, or (iii) is implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may issue a written notice (“Work Takeover Notice”) to Respondent. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Respondent a period of 30 days within which to cure the circumstances giving rise to EPA’s issuance of such notice.

- b. If, after expiration of the 30-day notice period specified in Paragraph 83.a, Respondent has not cured to EPA's satisfaction the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portions of the Work as EPA deems necessary ("Work Takeover"). EPA shall notify Respondent in writing if EPA determines that implementation of a Work Takeover is warranted under this subparagraph 83.b.
- c. Respondent may invoke the procedures set forth in Section XV (Dispute Resolution) to dispute EPA's implementation of a Work Takeover under subparagraph 83.b. However, notwithstanding Respondent's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 83.b until the earlier of (i) the date that Respondent cures, to EPA's satisfaction, the circumstances giving rise to EPA's issuance of the relevant Work Takeover Notice or (ii) the date that a final decision is rendered in accordance with Section XV (Dispute Resolution) that requires EPA to terminate such Work Takeover.

#### **XXI. RESERVATION OF RIGHTS BY RESPONDENT**

84. Except as otherwise provided in this Settlement Agreement, Respondent expressly reserves all rights and affirmative defenses under statute, including CERCLA, or common law.

#### **XXII. COVENANT NOT TO SUE BY RESPONDENT**

85. 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 for which Future Response Costs have been or will be incurred, respectively, including any claim under the United States Constitution, the New York State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or
- c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Work or payment of Future Response Costs provided, however, that this Settlement Agreement shall not have any effect on claims or causes of action in contribution that Respondent has or may have pursuant to CERCLA against the United States or any of its agencies or departments, other than EPA, as a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), relating to the Site.

86. Except as expressly provided in Paragraph 88 (*De Minimis/Ability to Pay Waivers*) of this Section XXII (Covenant Not to Sue by Respondent), 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 Section XX (Reservations of Rights by EPA), other than in Paragraph 82.a (claims for failure to meet a requirement of this Settlement Agreement) or 82.d (criminal liability), but only to the extent that Respondent's claims arise from the same relief that the United States is seeking pursuant to the above-referenced applicable reservation.

87. 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. Section 300.700(d).

88. *De Minimis/Ability to Pay Waivers.* As of the Effective Date, Respondent agrees not to assert any claims and agrees to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) or 113 of CERCLA) that it may have for "matters addressed" in this Settlement Agreement (as defined in Paragraph 93.a) against any person who has settled with EPA, or who hereafter settles with EPA with respect to the Site, in a final Section 122(g) *de minimis* settlement or a final settlement based on such person's limited ability to pay. 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.

89. Respondent reserves, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, 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, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her 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, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Respondent's deliverables or activities.

### **XXIII. OTHER CLAIMS**

90. 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.

91. Except as expressly provided in Section XXII (Covenant Not to Sue by Respondent), Paragraph 88 (*De Minimis/Ability to Pay Waivers*), and Section XIX (Covenants Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any other person not a Party to this Settlement

Agreement for any liability such other person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

92. 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).

#### **XXIV. CONTRIBUTION PROTECTION**

93. Contribution Protection.

- a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), and that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), or as may be otherwise provided by law, for “matters addressed” in this Settlement Agreement. The “matters addressed” in this Settlement Agreement are the Work and Future Response Costs. Notwithstanding such protections against contribution actions by non-parties to this Settlement Agreement, Respondent may allocate or reallocate any and all response costs incurred in connection with this Settlement Agreement among any person not a Party to this Settlement Agreement.
- b. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B), pursuant to which Respondent has, as of the Effective Date, resolved its liability to the United States for the Work and Future Response Costs.
- c. Except as provided in Section XXII (Covenant Not to Sue by Respondent), Paragraph 88 (De Minimis/Ability to Pay Waivers), 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 Paragraph 88 (De Minimis/Ability to Pay Waivers), Respondent and EPA expressly reserve 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 that each may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party to this Settlement Agreement. 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 other 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).

94. Respondent shall, with respect to any suit or claim brought by it for matters related to this Settlement Agreement, notify EPA in writing no later than 60 days prior to the initiation of such

suit or claim. Respondent also shall, with respect to any suit or claim brought against it for matters related to this Settlement Agreement, notify EPA in writing within 14 days of service of the complaint or claim upon it. In addition, for matters related to this Settlement Agreement, Respondent shall notify EPA within 14 days of service or receipt of any Motion for Summary Judgment and within 14 days of receipt of any order from a court setting a case for trial.

## **XXV. INDEMNIFICATION**

95. 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 municipal 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.

96. The United States will 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.

97. 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. 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 at or relating to the Site.

## **XXVI. INSURANCE**

98. Respondent is self-insured and represents that it has and shall maintain adequate insurance coverage or indemnification for liabilities for injuries or damages to persons or property that may result from the activities to be conducted by or on behalf of Respondent pursuant to this Settlement Agreement. For the duration of the performance of the Work under this 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 under this Settlement Agreement.

## XXVII. FINANCIAL ASSURANCE

### 99. Financial Security Mechanism and Documents

- a. Within 30 days of the Effective Date, or such other date as agreed to by EPA, Respondent shall provide a demonstration of sufficient financial resources to pay \$3,000,000 for the Work, which shall consist of a demonstration that Respondent satisfies the requirements of 40 C.F.R. Part 258.74(f) or such demonstration as EPA has determined to be acceptable. Such financial assurance shall be for the benefit of EPA in order to secure the full and final completion of Work by Respondent.
- b. The financial assurance mechanism including documents consistent with the requirements in Paragraph 99.a, and each annual resubmission required by this Settlement Agreement, shall be sent to Chief, Resource Management/Cost Recovery Section, Superfund and Emergency Management Division, U.S. EPA Region 2, 290 Broadway, 18th Floor, New York, NY 10007-1866. Respondent shall send copies by email to Chief, Resource Management/Cost Recovery Section, Superfund and Emergency Management Division, currently at Keating.Robert@epa.gov, and additional copies by email to EPA's Project Coordinators and Site Attorneys, currently at: kwan.caroline@epa.gov; schmidt.mark@epa.gov; ketu.rupika@epa.gov; mintzer.michael@epa.gov; leshak.andrea@epa.gov.

100. Any financial assurance mechanism provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In addition, if at any time EPA notifies Respondent that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondent shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondent's inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.

101. If, after the Effective Date, Respondent can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 99.a. of this Section, Respondent may, on any anniversary date of the Effective Date, or at any other time agreed to by the Parties, request that the amount of the financial security provided under this Section be reduced to the estimated cost of the remaining Work to be performed. Respondent shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondent may seek dispute resolution pursuant to Section XV (Dispute Resolution). Respondent may reduce the amount of security by agreement among the Parties resolving the dispute or, failing such agreement, by EPA's written decision resolving the dispute.

102. Respondent may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that

the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondent may seek dispute resolution pursuant to Section XV (Dispute Resolution). Respondent may change the form of the financial assurance only in accordance with an agreement among the Parties resolving the dispute or, failing such agreement, EPA's written decision resolving the dispute.

103. Respondent may release, cancel or discontinue any financial assurance provided under this Section: (a) when EPA issues a written notice of Completion of Work under Section XXX; or (b) in accordance with EPA's approval of such release, cancellation, or discontinuation.

#### **XXVIII. INTEGRATION/APPENDICES**

104. This Settlement Agreement and 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. The following appendices are attached to and incorporated into this Settlement Agreement and its appendices:

“Appendix A” is the Statement of Work

#### **XXIX. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION**

105. This Settlement Agreement shall be effective upon receipt by Respondent after it has been executed by the duly designated representatives of the Parties.

106. No informal advice, guidance, suggestion, or comment by an EPA Project Coordinator 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 the relevant document is formally modified. An EPA Project Coordinator may extend any deadline under this Settlement Agreement, provided that any such extension shall be in writing (which may include electronic mail).

#### **XXX. NOTICE OF COMPLETION OF WORK**

107. If Respondent believes that all Work and all other activities have been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations such as Respondent's obligation to retain records pursuant to Section XIV of this Settlement Agreement, Respondent may request that EPA provide it with written notice of completion of the Work. Upon receipt of such a request, EPA will either provide written notice of completion to Respondent indicating that the Work required pursuant to this Settlement Agreement has been

completed and Respondent's obligations hereunder have been satisfied, subject to any continuing obligations, or, if EPA determines that any Work has not been completed in accordance with this Settlement Agreement, EPA will so notify Respondent, provide a list of the deficiencies, and require that Respondent correct such deficiencies. Failure by Respondent to correct such deficiencies shall be a violation of this Settlement Agreement.

It is so ORDERED AND AGREED:

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:  \_\_\_\_\_

Pat Evangelista, Director  
Superfund and Emergency Management Division, Region 2

Date: 9/29/22



In the Matter of the Newtown Creek Superfund Site Administrative Settlement Agreement and Order on Consent for Post-ROD Monitoring, CERCLA Docket No. CERCLA-02-2022-2003

FOR RESPONDENT CITY OF NEW YORK

Wm SP  
Signature

Sept 28, 2022  
Date

William Plache  
Printed Name

Asst Corp Counsel  
Title



Appendix A

To Administrative Settlement Agreement and Order on Consent for Post-ROD Monitoring,  
CERCLA Docket No. CERCLA-02-2022-2003

Statement of Work



# **Statement of Work**

## **OU2 Monitoring Program**

### **I. WORK TO BE PERFORMED**

This statement of work (SOW) shall mean the statement of work for the actions described in the “Description of the Selected Remedy” section of the Record of Decision for Operable Unit 2 of the Newtown Creek Superfund site signed by EPA on April 12, 2021 (OU2 ROD). The selected remedy is No Further Action, where No Further Action in this case assumes that the Newtown Creek CSO Long-Term Control Plan (LTCP) that the New York City Department of Environmental Protection (NYCDEP) is under order by NYSDEC (NYSDEC Consent Order) to implement is, in fact, implemented as required by the schedule developed pursuant to the NYSDEC Consent Order. EPA has concluded that the volume reduction set forth in the LTCP will be sufficient for the purposes of a CERCLA response action regarding current and reasonably anticipated future discharges from combined sewer overflow outfalls (CSOs) to the Newtown Creek. To ensure that the assumptions made in reaching this conclusion remain valid, a monitoring program will be required at least until it is subsumed by the monitoring requirements of a future remedial decision document for the site. Operable Unit 2 (OU2) relates specifically to current and reasonably anticipated future releases of CERCLA Hazardous Substances (hazardous substances) from CSO discharges to Newtown Creek. The definition of OU2 does not include past (historic) releases from CSO discharges to the Site.

This SOW is incorporated into and becomes a part of the Administrative Settlement Agreement and Order on Consent for Post-ROD Monitoring CERCLA Docket No. CERCLA 02-2022-2003 (2022 AOC) to which this SOW is attached as Appendix A as an enforceable part. The Respondent to the 2022 AOC, the City of New York (hereinafter, Respondent), shall perform the Work as defined herein in accordance with the 2022 AOC, including this SOW, and including all terms and conditions, and schedules set forth herein and all schedules for implementation of the LTCP developed pursuant to the NYSDEC Consent Order. All definitions in the 2022 AOC are incorporated by reference into this SOW.

The Work under the 2022 AOC for OU2 includes, but is not limited to, implementation of the monitoring program as specified in the OU2 ROD.

#### **A. The objectives of the Work are to:**

1. Ensure the assumptions made in reaching the OU2 ROD conclusions remain valid by establishing a monitoring program to, at a minimum, determine point source discharge volumes, either by directly measuring or using a hydraulic model, determine the current concentrations of Contaminants of Potential Concern (COPCs) entering Newtown Creek from various ongoing sources, and evaluate the trends in COPC loadings to Newtown Creek over time.
2. Collect water quality samples from the four major CSO outfalls (NCB-015, NCB-083, NCQ-077, and BB-026) on a quarterly basis. In addition, collect water quality samples, at least once, from other point source discharge outfalls as identified in the Newtown Creek OU2 Focused Feasibility Study (FFS) (See Table 1-1a), including the East River. These point source discharge outfalls include individually permitted stormwater and wastewater discharges, CSO and wastewater treatment plant (WWTP) discharges, and other stormwater discharges (such as municipal separate storm sewer systems (MS4s), discharges from

multiple/individual sites, and highway drains). The water quality samples shall be analyzed for, at least, the following parameters:

- C19-C36 aliphatics
  - Copper (Cu)
  - Dioxins/furans (D/F)
  - Lead (Pb)
  - Particulate organic carbon (POC)
  - Polycyclic aromatic hydrocarbon (17) (TPAH17)
  - Polycyclic aromatic hydrocarbon (34) (TPAH34)
  - Total polychlorinated biphenyl (TPCB)
  - Total dissolved solids (TDS)
  - Total organic carbon (TOC)
  - Total suspended solids (TSS)
3. Collect and/or review and report at least the following readily obtainable, watershed-wide metrics on a quarterly and annual basis:
- CSO discharge volume to Newtown Creek
  - Frequency of CSO discharges to Newtown Creek
  - MS4 discharge volume to Newtown Creek
  - Frequency of MS4 discharges to Newtown Creek
  - Rainfall frequency and amount as measured from the LaGuardia Airport (LGA) rain gauge
  - Continuous tide gauge monitoring for changes in tide stage elevation
  - Green or grey infrastructure changes within the watershed
  - Any additional metrics proposed by EPA or proposed by the Respondent and approved by EPA.

Any hydraulic model used for determining discharge and frequency would be subject to review and approval by EPA. The NYCDEP is proposing to use the hydrology and hydraulic model, developed by the NYCDEP for the LTCP, to estimate the CSO and MS4 discharge volume and frequency of discharges to the Creek. EPA will review the model developed by the NYCDEP and assess the need to update model for the monitoring period.

4. Conduct quarterly CSO monitoring for the first two years to account for potential seasonal and temporal differences in the concentrations of COPCs in the point source discharges. CSO and other point source discharges should be sampled at least once before a second set of samples is collected at the four major CSO locations (monitoring is dependent on rainfall events occurring). The frequency and components of monitoring may then be adjusted by EPA, based on the sampling results. If the required monitoring and reviews were to identify significant changes in the system that affect the underlying assumptions of the analysis performed to support this remedial decision, additional mitigation measures may be required. These measures might include a track-back program to determine if additional uplands control, through either regulatory or engineering means, is necessary. Measures may also include actions related to the discharge of solids from CSOs, such as end-of-pipe solids capture, end-of-pipe oil capture, and/or in-Creek dredging of accumulated solids near CSO discharge locations if determined to be necessary. Any

decision regarding potential additional actions would be memorialized in a future decision document.

## II. PROJECT SUPERVISION/MANAGEMENT

### A. SELECTION OF CONTRACTORS, PERSONNEL

All Work performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel. Respondent has identified Henningson, Durham, & Richardson Architecture and Engineering, P.C. ("HDR") as its contractor for the performance of the Work, and EPA approves HDR. If Respondent wishes to change its designated contractor during the performance of the Work, it shall submit to EPA for approval the name and qualifications of a new proposed designated contractor to be used in carrying out such Work prior to dismissing the designated contractor. With respect to any new, proposed contractor, Respondent shall demonstrate that the new proposed contractor has a quality system that complies with the most recent version of Quality Systems for Environmental Data and Technology Programs -- Requirements with Guidance for Use (American National Standard), ANSI/ASQC E4 (Feb. 2014), by submitting a copy of the proposed contractor's Quality Management Plan ("QMP"). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001 (Reissued May 2006)) or equivalent documentation as determined by EPA. The qualifications of the new proposed contractor shall be subject to EPA's review, for verification that such contractor meet minimum technical background and experience requirements. If EPA disapproves in writing the new proposed contractor's technical qualifications, Respondent shall notify EPA of the identity and qualifications of the proposed replacement(s) within 30 days of the written notice. If EPA subsequently disapproves of the proposed replacement, EPA reserves the right to terminate this Settlement Agreement and to conduct the complete post-ROD monitoring, and to seek reimbursement for costs and penalties from Respondent. During the course of the Work, Respondent shall notify EPA in writing of any changes or additions to the key personnel used to carry out such Work, providing their names, titles, and qualifications. EPA shall have the same right to disapprove changes and additions to personnel as it has hereunder regarding the initial notification of identified personnel by Respondent.

### B. PROJECT COORDINATOR

Respondent's Project Coordinator and Alternate Project Coordinator. Within 30 days after the Effective Date, Respondent shall designate a Project Coordinator and an Alternate Project Coordinator (for instances when the Project Coordinator is unavailable) who shall be responsible for administration of all actions by Respondent required under this Settlement Agreement, and Respondent shall submit to EPA the name, address, telephone number, and qualifications of the Project Coordinator and Alternate Project Coordinator. The Project Coordinator and Alternate Project Coordinator must have sufficient technical expertise to coordinate the Work and shall not be an attorney for Respondent. EPA retains the right to disapprove of the designated Project Coordinator or Alternate Project Coordinator. If EPA disapproves of the designated Project Coordinator or Alternate Project Coordinator, Respondent shall submit to EPA for approval a different Project Coordinator or Alternate Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within 30 days following EPA's disapproval. After approval, receipt by Respondent's Project Coordinator or Alternate Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondent. Respondent's Project Coordinator may assign other representatives, including other contractors, to assist in coordinating the Work. If Respondent wishes to change its Project Coordinator during the performance of the Work, it shall submit to EPA for approval

the name and qualifications of a new proposed Project Coordinator to be used in carrying out such Work prior to dismissing the designated Project Coordinator. The qualifications of the new proposed Project Coordinator shall be subject to EPA's review, for verification that such person meets background and experience requirements. If EPA disapproves in writing of the new proposed Project Coordinator qualifications, Respondent shall notify EPA of the identity and qualifications of the proposed replacement(s) within 30 days of the written notice.

### III. ACTIVITIES

The Work to be performed in support of the Work objectives includes, but is not limited to, the following:

1. Development of an OU2 Monitoring Work Plan (WP) to be submitted by Respondent for review and approval by EPA. At a minimum, the WP shall contain the following:
  - Description of deliverables that will be generated in connection with monitoring, including description of the locations to be monitored, schedule and frequency of monitoring, sampling schedules, laboratory records, quarterly monitoring reports, and annual reports to EPA (as described in the 2022 AOC)
  - Description of the data collection parameters, including COPCs and watershed-wide metrics to be monitored/reviewed, and analytical methods employed
  - Description of sampling methods. Sampling methods shall be generally consistent with the monitoring approach as described in the Newtown Creek Draft RI/FS (see Section VII (References)). Sampling methods shall follow EPA-approved Work Plans and standard operating procedures (SOP) for mobilization criteria, pre-sampling activities, sampling activities, and sample processing. For further details see the Newtown Creek Final Phase 2 Remedial Investigation Work Plan- Volume 2, November 21, 2014. Key SOPs to follow include SOP NC-29 (Point Sources Weather Tracking), SOP NC-23 (Point Sources Whole-water Manual Composite Sampling), and SOP NC-30 (Particulate Phase Analysis Handling Procedures)
  - If at any time during the monitoring activities, Respondent identifies a need for modifications to the EPA-approved WP, Respondent shall submit a memorandum documenting the need for proposed modifications to the EPA Project Coordinators within ten days of identification. In addition, if at any time during the monitoring activities, Respondent identifies a need for additional data, Respondent shall submit a memorandum documenting the basis for a need for additional data to the EPA Project Coordinators within 10 days of identification. EPA in its discretion will determine whether the additional data is necessary to be collected by Respondent for this WP and whether such data will be incorporated into plans, reports and other deliverables for this WP
  - EPA may determine that in addition to tasks defined in the initially approved WP, other additional monitoring Work may be necessary to accomplish the objectives of the OU2 ROD consistent with CERCLA and the NCP, and EPA will provide Respondent with an explanation of any such determination in writing.

### IV. PROJECT DELIVERABLES

Respondent shall submit each of the following deliverables for EPA approval, except as otherwise specifically provided. Respondent shall develop the deliverables in accordance with all applicable regulations, guidance, and policies (see Section VII References). Respondent shall update each of these supporting deliverables as necessary or appropriate during the course of the Work, and/or as



requested by EPA.

- A. Draft OU2 Monitoring Work Plan.** Within 30 days of the Effective Date, Respondent shall submit to EPA, for review and approval, a draft WP in accordance with Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA, EPA/540/G-89/004 (Oct. 1988). The WP shall contain a Field Sampling Plan (FSP) to address all sample collection activities. The FSP must be written so that a field sampling team unfamiliar with the project would be able to gather the samples and field information required.
- B. Health and Safety Plan.** The Health and Safety Plan (“HASP”) describes all activities to be performed to protect on site personnel from physical, chemical, and all other hazards posed by the Work. Respondent shall develop the HASP in accordance with EPA’s Emergency Responder Health and Safety and Occupational Safety and Health Administration (“OSHA”) requirements under 29 C.F.R. §§ 1910 and 1926. The HASP shall cover monitoring activities and shall be, as appropriate, updated to cover activities during the monitoring and updated to cover activities after monitoring completion. EPA approval of the HASP is not required, but will be reviewed to ensure that all necessary elements are included and that the plan provides for the protection of on site personnel from physical, chemical, and all other hazards posed by the Work.
- C. Quality Assurance Project Plan.** The Quality Assurance Project Plan (“QAPP”) augments the FSP and addresses sample analysis and data handling regarding the Work. The QAPP must include a detailed explanation of Respondent’s quality assurance, quality control, and chain of custody procedures for all monitoring samples. Respondent shall develop the QAPP in accordance with EPA Directive CIO 2105.1 (Environmental Information Quality Policy, 2021), the most recent version of *Quality Management Systems for Environmental Information and Technology Programs – Requirements with Guidance for Use*, ASQ/ANSI E-4 (Feb. 2014), and *Guidance for Quality Assurance Project Plans*, EPA QA/G-5, EPA Office of Environmental Information (Dec. 2002). The QAPP also must include procedures:
1. To ensure that EPA and its authorized representative have reasonable access to laboratories used by Respondent in implementing the 2022 AOC (Respondent’s Labs)
  2. To ensure that Respondent’s Labs analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring
  3. To ensure that Respondent’s Labs perform all analyses using EPA-accepted methods (i.e., the methods documented in *USEPA Contract Laboratory Program Statement of Work for Inorganic Analysis*, ILM05.4 (Dec. 2006); *USEPA Contract Laboratory Program Statement of Work for Organic Analysis*, SOM01.2 (amended Apr. 2007); and *USEPA Contract Laboratory Program Statement of Work for Inorganic Superfund Methods (Multi-Media, Multi-Concentration)*, ISM01.2 (Jan. 2010)) or other methods acceptable to EPA
  4. To ensure that Respondent’s Labs participate in an EPA-accepted QA/QC program or other program QA/QC acceptable to EPA
  5. For Respondent to provide EPA with notice at least 14 days prior to any sample collection activity
  6. For Respondent to provide split samples and/or duplicate samples to EPA upon request
  7. For EPA to take any additional samples that it deems necessary

8. For EPA to provide to Respondent, upon request, split samples and/or duplicate samples in connection with EPA's oversight sampling
9. For Respondent to submit to EPA all sampling and tests results and other data in connection with the implementation of the 2022 AOC.

**D. Technical Specifications.**

1. Sampling and monitoring data contained in any deliverable shall be submitted in standard regional Electronic Data Deliverable ("EDD") format. Region 2's "Comprehensive Electronic Data Deliverable Specification Manual 4.0" (March 2016) explains the systematic implementation of EDD within EPA Region 2 and provides detailed instructions of data preparation and identification of data fields required for data submissions. Additional Region 2 EDD guidance and requirements documents, including the "Electronic Data Deliverables Valid Values Reference Manual" and tables, the "Basic Manual for Historic Electronic Data," the "Standalone EQuIS Data Processor User Guide," and EDD templates, can be found at <https://www.epa.gov/superfund/region-2-superfund-electronic-data-submission>. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.
2. Spatial data, including spatially-referenced data and geospatial data, shall be submitted: (1) in the ESRI File Geodatabase format [or insert Regionally-preferred spatial file format]; and (2) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 ("NAD83") or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions should include the collection method(s). Projected coordinates may optionally be included but must be documented. Spatial data should be accompanied by metadata, and such metadata should be compliant with the Federal Geographic Data Committee ("FGDC") Content Standard for Digital Geospatial Metadata and its EPA profile, the EPA Geospatial Metadata Technical Specification. An add-on metadata editor for ESRI software, the EPA Metadata Editor ("EME"), complies with these FGDC and EPA metadata requirements and is available at <https://edg.epa.gov/EME/>.
3. Each file must include an attribute name for each site unit or sub-unit submitted. Consult <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for any further available guidance on attribute identification and naming.
4. Spatial data submitted by Respondent does not, and is not intended to, define the boundaries of the Site.

**E. Certification.** All deliverables that require compliance with this paragraph must be signed by the Respondent's Project Coordinator, or other responsible official of Respondent, and must contain the following statement:

I certify under penalty of perjury that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

## V. REPORTING

In addition to the other deliverables set forth in the 2022 AOC, Respondent shall provide written quarterly monitoring reports and annual data summary reports (DSR) to EPA with respect to actions and activities undertaken pursuant to the 2022 AOC. The quarterly monitoring reports shall be submitted within 60 days after the completion of each quarterly sampling event following the Effective Date of the 2022 AOC. The annual DSR shall be submitted within 60 days after each calendar year following the Effective Date of the 2022 AOC. The Respondent's obligation to submit quarterly monitoring reports and annual DSRs continues until EPA gives the Respondent written notice pursuant to Section XXX of the 2022 AOC that it has completed all of the Work under the 2022 AOC.

At a minimum, the quarterly monitoring reports shall include the following:

- Date(s) of sampling events and description of activities undertaken on such dates as required by the WP
- Tabular summary of analytical laboratory results
- Figures identifying the monitoring locations
- Reporting of readily obtainable, watershed-wide metrics on a quarterly basis as identified in Section 1.A.3
- Any deviations from the approved WP.

At a minimum, the annual DSRs shall include the following:

- Monitoring objectives, summary, key findings, recommendations, and conclusions
- Figures identifying the monitoring locations
- Description and dates of all sampling and results
- Tabular Summary of analytical laboratory results
- Charts showing the COPCs trends over time for each sample location
- COPC loading estimates for each sample location
- Reporting of readily obtainable, watershed-wide metrics on a yearly basis as identified in Section 1.A.3
- An identification of all delays encountered or anticipated that may affect the future schedule for performance of the Work, and all efforts made by the Respondent to mitigate delays or anticipated delays
- A description of all communications that the Respondent has had with state or federal authorities related to the Work
- A description of all activities and submittals planned for the following year.

In addition to the other Reporting requirements set forth above in this Section V, or in the 2022 AOC, Respondent shall submit information relating the status of Respondent's implementation of the LTCP pursuant to the Administrative Consent Order between Respondent and NYSDEC (NYSDEC CSO Order on Consent DEC Case # C02-20110512-25, Modification to C02-20000107-8).

Respondent shall, within 30 days after the Effective Date of the 2022 AOC, submit to EPA a copy of the schedule of Respondent's planning, design and construction obligations under the NYSDEC Consent Order relating to the implementation of the Newtown Creek LTCP, including a description of each such obligation, the source document for such obligation, milestone dates, and Respondent's estimated cost for each such obligation. Thereafter, Respondent shall provide within 30 days following the end of each quarter, a report (Quarterly LTCP Status Report) on the status of outstanding force majeure requests, modification requests or notices of violation of the NYSDEC Consent Order, made or outstanding during the quarter, and a copy of each communication between Respondent and NYSDEC made during the quarter relating to the NYSDEC Consent Order or to the implementation of the LTCP, with a report on milestones missed, and Respondent's anticipated date of implementation of the LTCP. At such time, or as soon thereafter as it is available, Respondent shall also provide to EPA a copy of Respondent's publicly available Quarterly Progress Report. If requested by EPA, Respondent shall, within thirty days of such request, provide to EPA supplementary responses to any item addressed or required to be addressed in the publicly available Quarterly Progress Report or in the quarterly AOC report.

## **VI. COMPLETION OF WORK**

If Respondent believes that all Work and all other activities have been fully performed in accordance with the 2022 AOC, with the exception of any continuing obligations such as Respondent's obligation to retain records pursuant to Section XIV of the 2022 AOC, Respondent may request that EPA provide it with written notice of completion of the Work. Upon receipt of such a request, EPA will either provide written notice of completion to Respondent indicating that the Work required pursuant to this Settlement Agreement has been completed and Respondent's obligations under the 2022 AOC have been satisfied, subject to any continuing obligations, or, if EPA determines that any Work has not been completed in accordance with the 2022 AOC, EPA will so notify Respondent, provide a list of the deficiencies, and require that Respondent correct such deficiencies. Failure by Respondent to correct such deficiencies shall be a violation of the 2022 AOC.

## VII. REFERENCES

Anchor QEA, 2021. *Draft Remedial Investigation Report*. Remedial Investigation/Feasibility Study, Newtown Creek. October 2021.

New York City Department of Environmental Protection, 2019. *Focused Feasibility Study Report*. The Newtown Creek Superfund Site. November 2019.

