

**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

Phelps Dodge Refining Corporation,
Texaco, Inc.,
BP Products North America Inc.,
The Brooklyn Union Gas Company d/b/a
National Grid NY,
ExxonMobil Oil Corporation, and
The City of New York

Respondents.

ADMINISTRATIVE SETTLEMENT
AGREEMENT AND ORDER ON
CONSENT FOR REMEDIAL
INVESTIGATION/FEASIBILITY STUDY

U.S. EPA Region 2
CERCLA Docket No. CERCLA-02-2011-
2011

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
REMEDIAL INVESTIGATION/FEASIBILITY STUDY**

TABLE OF CONTENTS

I.	JURISDICTION AND GENERAL PROVISIONS	1
II.	PARTIES BOUND	2
III.	STATEMENT OF PURPOSE	3
IV.	DEFINITIONS	4
V.	FINDINGS OF FACT	7
VI.	CONCLUSIONS OF LAW AND DETERMINATIONS	9
VII.	SETTLEMENT AGREEMENT AND ORDER	10
VIII.	DESIGNATION OF CONTRACTORS AND PROJECT COORDINATORS	10
IX.	WORK TO BE PERFORMED	12
X.	EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS	16
XI.	QUALITY ASSURANCE, SAMPLING, AND ACCESS TO INFORMATION	19
XII.	SITE ACCESS	21
XIII.	COMPLIANCE WITH OTHER LAWS	22
XIV.	RETENTION OF RECORDS	23
XV.	DISPUTE RESOLUTION	23
XVI.	STIPULATED PENALTIES	24
XVII.	FORCE MAJEURE	27
XVIII.	PAYMENT OF RESPONSE COSTS	28
XIX.	COVENANT NOT TO SUE BY EPA	30
XX.	RESERVATIONS OF RIGHTS BY EPA	30
XXI.	RESERVATION OF RIGHTS BY RESPONDENTS	32

XXII. COVENANT NOT TO SUE BY RESPONDENTS	32
XXIII. OTHER CLAIMS	33
XXIV. CONTRIBUTION PROTECTION	33
XXV. INDEMNIFICATION	34
XXVI. INSURANCE	35
XXVII. FINANCIAL ASSURANCE	36
XXVIII. CITY OF NEW YORK TRUST FUND ACCOUNT	37
XXIX. INTEGRATION/APPENDICES	38
XXX. ADMINISTRATIVE RECORD	38
XXXI. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION	39
XXXII. NOTICE OF COMPLETION OF WORK	39

ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT
FOR REMEDIAL INVESTIGATION/FEASIBILITY STUDY

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Settlement Agreement and Order on Consent is entered into voluntarily by the United States Environmental Protection Agency (“EPA”) and Phelps Dodge Refining Corporation, Texaco, Inc., BP Products North America Inc., The Brooklyn Union Gas Company d/b/a National Grid NY, ExxonMobil Oil Corporation, and The City of New York. The Settlement Agreement concerns the preparation and performance of a remedial investigation and feasibility study (“RI/FS”) at or in connection with the Newtown Creek Study Area portion of the Newtown Creek Superfund Site. The Newtown Creek Study Area includes a facility encompassing the body of water known as the Newtown Creek which is situated at the border of the boroughs of Brooklyn (Kings County) and Queens (Queens County) in the City of New York, State of New York, roughly centered at the geographic coordinates of 40° 42' 54.69” north latitude (40.715192°) and 73° 55' 50.74” west longitude (-73.930762°), having an approximate 3.8-mile reach, including Newtown Creek proper and its five branches (or tributaries) which are known, respectively, 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, up to and including the landward edge of the shoreline, and including also any bulkheads or riprap containing the water body, except where no bulkhead or riprap exists, then the Study Area shall extend to the ordinary high water mark, as defined in 33 C.F.R. §328.3(e), of Newtown Creek, and the areal extent of the contamination from such area, but the Study Area does not include the upland areas beyond the landward edge of the shoreline. The Settlement Agreement also concerns the payment by Respondents of Future Response Costs and Past 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, 42 U.S.C. §§ 9604, 9607 and 9622 (“CERCLA”). This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2926 (Jan. 29, 1987), and further delegated to Regional Administrators on May 11, 1994, by EPA Delegation Nos. 14-14-C and 14-14-D. This authority was further redelegated by the Regional Administrator of EPA Region 2 to the Director of the Emergency and Remedial Response Division on November 23, 2004 by Region 2 Redelegation R-1200.
3. In accordance with Sections 104(b)(2) and 122(j)(1) of CERCLA, 42 U.S.C. §§ 9604(b)(2) and 9622(j)(1), EPA notified the relevant Federal and State natural resource trustees, U.S. Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, and NYSDEC, on May 4, 2010, of negotiations with potentially responsible parties (“PRPs”) regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal and/or State trusteeship.

4. Other than the RI/FS Work Plan activities required to be performed by Respondents by this Settlement Agreement, and except to the extent otherwise provided in Paragraphs 39 or 44 of this Settlement Agreement, Respondents shall not be required by this Settlement Agreement to fund or perform any remedial or removal actions selected by EPA for the Study Area or the Site. Any remedial or removal actions selected for the Study Area or the Site may be the subject of settlement agreements between EPA, Respondents, and/or other persons not a party to this Settlement Agreement or may otherwise be the subject of separate enforcement actions by EPA.
5. EPA and Respondents recognize that this Settlement Agreement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement Agreement do not constitute an admission of any liability. Respondents do not admit, and retain 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. Respondents agree to comply with and be bound by the terms of this Settlement Agreement and further agree that they will not contest the basis or validity of this Settlement Agreement or its terms in any action to enforce its provisions.
6. It is EPA's present intention to identify, and consistent with standard practice and in its unreviewable discretion, take measures to obtain the participation of additional parties in the Work and other activities required by this Settlement Agreement as the RI/FS proceeds. Such measures may include taking enforcement actions pursuant to Sections 106(a) and 107(a) of CERCLA, 42 U.S.C. § 9606(a) and § 9607(a). This does not alter the Respondents' obligations to perform the Work under this Settlement Agreement. EPA and Respondents agree to cooperate in the identification of newly identified parties and in seeking to obtain their participation in this Settlement Agreement. EPA and the Respondents acknowledge that this Settlement Agreement may be amended, upon mutually acceptable terms and conditions, to include additional parties who consent to become Respondents after this Settlement Agreement becomes effective, provided, however, that if Respondents' Liaison Counsel certifies in writing to EPA that a newly identified party has entered into an agreement with Respondents to participate and cooperate with Respondents in the performance or funding of the Work and all other activities required pursuant to this Settlement Agreement, then any amendment to this Settlement Agreement that merely adds such newly identified party as an additional Respondent shall require the signatures of only such additional Respondent and EPA.

II. PARTIES BOUND

7. This Settlement Agreement applies to and is binding upon EPA and upon Respondents and their successors and assigns. Any change in ownership or corporate status of a Respondent including, but not limited to, any transfer of assets or real or personal

property shall not alter such Respondent's responsibilities under this Settlement Agreement.

8. Respondents are jointly and severally liable for carrying out all activities required by this Settlement Agreement. In the event of the insolvency or other failure of any one or more of the Respondents to implement the requirements of this Settlement Agreement, the remaining Respondents shall complete all such requirements. Notwithstanding the foregoing, it is intended that Work Respondents shall perform all of the Work and pay Past Response Costs and Future Response Costs under this Settlement Agreement and that, as long as the Work Respondents do not fail to perform all obligations under this Settlement Agreement, Funding Respondents shall participate only to the extent that they shall make any payments of money to the Work Respondents in amounts and on terms agreed to by and among Respondents by separate agreement in order to fund such activities.
9. Respondents shall ensure that their contractors, subcontractors, and representatives receive a copy of and comply with this Settlement Agreement. Respondents shall be responsible for any noncompliance with this Settlement Agreement by Respondents, their contractors, subcontractors, or representatives.
10. Each undersigned representative of Respondents 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 Respondents to this Settlement Agreement.

III. STATEMENT OF PURPOSE

11. In entering into this Settlement Agreement, the objectives of EPA and Respondents are:
(a) to determine the nature and extent of contamination and any threat to the public health, welfare, or the environment caused by the release or threatened release of hazardous substances, pollutants or contaminants at or from the Study Area, by conducting a Remedial Investigation as more specifically set forth in the Creekwide Remedial Investigation/Feasibility Study Work Plan dated June 2011 ("RI/FS Work Plan"), a copy of which is attached as Appendix A to this Settlement Agreement; (b) to identify and evaluate remedial alternatives to prevent, mitigate or otherwise respond to or address any release or threatened release of hazardous substances, pollutants, or contaminants at or from the Study Area, by conducting a Feasibility Study as more specifically set forth in the RI/FS Work Plan; and (c) to recover response and oversight costs incurred by EPA with respect to this Settlement Agreement as well as Past Response Costs.
12. The Work conducted under this Settlement Agreement is subject to approval by EPA and shall provide all appropriate and necessary information to assess conditions affecting the Study Area and evaluate alternatives to the extent necessary to select a remedy that will be consistent with CERCLA and the National Oil and Hazardous Substances Pollution

Contingency Plan, 40 C.F.R. Part 300 (“NCP”). Respondents shall conduct all Work under this Settlement Agreement in compliance with CERCLA, the NCP, and all applicable EPA guidances, policies, and procedures, including, without limitation, EPA Region 2’s “Clean and Green Policy” which may be found at: http://www.epa.gov/region02/superfund/green_remediation.

IV. DEFINITIONS

13. 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. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*
 - b. “Day” shall mean a calendar day. In computing any period of time under this Settlement Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next Working Day.
 - c. “Effective Date” shall be the effective date of this Settlement Agreement as provided in Section XXXI.
 - d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.
 - e. “Future Response Costs” shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, 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, Agency for Toxic Substances and Disease Registry (“ATSDR”) costs, the costs incurred pursuant to Paragraph 58.a (including, but not limited to, costs and attorneys fees and any monies paid to secure access, including, but not limited to, the amount of just compensation), Paragraph 44 (emergency response), and Paragraph 87 (Work Takeover).
 - f. “Institutional controls” shall mean non-engineered instruments, such as administrative and/or legal controls, that help to minimize the potential for human exposure to contamination and/or protect the integrity of a remedy by limiting land and/or resource use. Examples of institutional controls include easements and covenants, zoning restrictions, special building permit requirements, and well drilling prohibitions.
 - g. “Interest” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507,

compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

- h. "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.
- i. "Newtown Creek" shall mean Newtown Creek proper and 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.
- j. "Newtown Creek Superfund Site" or "Site" shall mean the Study Area and the areal extent of the contamination associated with the Study Area including facilities upland of the Study Area that are sources of contamination to the Study Area.
- k. "NYSDEC" shall mean the New York State Department of Environmental Conservation and any successor departments or agencies of the State.
- l. "Paragraph" shall mean a portion of this Settlement Agreement identified by an Arabic numeral or an upper case or lower case letter.
- m. "Parties" shall mean EPA and Respondents.
- n. "Past Response Costs" shall mean the sum of Seven Hundred and Fifty Thousand (\$750,000) Dollars of the costs (including, but not limited to, direct and indirect costs) that the United States has paid at or in connection with the Study Area prior to the Effective Date.
- o. "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.*
- p. "Respondents" shall mean those signatories to this Settlement Agreement identified in Appendix C, as may be amended from time to time.
- q. "Work Respondents" shall mean those Respondents identified in Appendix D, as may be amended from time to time.
- r. "Funding Respondents" shall mean those Respondents identified in Appendix E as may be amended from time to time.
- s. "RI/FS Work Plan" shall mean the EPA-approved Creekwide Remedial Investigation/Feasibility Study Work Plan dated June 2011, a copy of which is attached as Appendix A, and including all additional work plans to be developed hereafter pursuant to the RI/FS Work Plan, so as to constitute the full work plan for the complete RI/FS for the Study Area, which subsequent work plans, upon EPA approval thereof, shall be deemed incorporated within the RI/FS Work Plan and added to Appendix A.
- t. "Section" shall mean a portion of this Settlement Agreement identified by a Roman numeral.
- u. "Settlement Agreement" shall mean this Administrative Settlement Agreement and Order on Consent including, the RI/FS Work Plan and any other appendix attached

hereto (listed in Section XXIX) 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 the Settlement Agreement upon approval by EPA. In the event of conflict between this Settlement Agreement and any appendix or other incorporated documents, this Settlement Agreement shall control.

- v. "Study Area" shall mean the portion of the Newtown Creek Superfund Site that encompasses the body of water known as Newtown Creek, situated at the border of the boroughs of Brooklyn (Kings County) and Queens (Queens County) in the City of New York and the State of New York, roughly centered at the geographic coordinates of 40° 42' 54.69" north latitude (40.715192°) and 73° 55' 50.74" west longitude (-73.930762°), having an approximate 3.8-mile reach, including Newtown Creek proper and its five branches (or tributaries) known respectively 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, up to and including the landward edge of the shoreline, and including also any bulkheads or riprap containing the water body, except where no bulkhead or riprap exists, then the Study Area shall extend to the ordinary high water mark, as defined in 33 C.F.R. §328.3(e), of Newtown Creek, and the areal extent of the contamination from such area, but not including upland areas beyond the landward edge of the shoreline (notwithstanding that such upland areas may subsequently be identified as sources of contamination to the water body and its sediments or that such upland areas may be included within the scope of the Newtown Creek Superfund Site as listed pursuant to Section 105(a)(8) of CERCLA). The Study Area is depicted generally on the map attached as Appendix B.
- w. "State" shall mean the State of New York.
- x. "United States" shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.
- y. "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).
- z. "Work" shall mean all activities Respondents are required to perform under this Settlement Agreement, except those required by Section XIV (Retention of Records).
- aa. "Working Day" shall mean any day of the week excluding Saturdays, Sundays and federal holidays as defined at 5 U.S.C. § 6103.

V. FINDINGS OF FACT

14. The Site includes a body of water located in Kings County and Queens County in the City of New York and the 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 that forms the northwestern-most border between the New York City boroughs of Brooklyn and Queens. It is a tributary of the East River and it itself includes five branches (or tributaries) along its 3.8-mile reach. Historically, Newtown Creek drained the uplands of western Long Island and flowed through wetlands and marshes. However, due to 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.

15. 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 Creek was lined with oil refineries and petrochemical plants, fertilizer and glue factories, copper-smelting and fat-rendering plants, shipbuilders, sugar refineries, hide tanning plants, canneries, governmental 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. The majority of the shoreline area of Newtown Creek is currently zoned for heavy manufacturing and industrial use with a small portion, near the mouth of the Creek, zoned for residential use. Currently, the predominant land use around Newtown Creek includes industrial facilities, petroleum bulk storage facilities, manufacturing facilities, warehouses, transportation and transportation infrastructure including rail and highways, utility facilities and a large municipal Water Pollution Control Plant. The majority of the upland area bordering Newtown Creek is within one of three Industrial Business Zones of the City of New York, and the majority of Newtown Creek has also been designated by the City of New York as one of the City's six Significant Maritime and Industrial Areas. Comprehensive plans developed by the City of New York for areas within one-quarter mile of Newtown Creek call for development of approximately 7,000 potential units of housing and nearly 8 acres of public open space along shoreline on or adjacent to Newtown Creek in the Greenpoint-Williamsburg area of Brooklyn that was rezoned to residential in 2005, and for development of approximately 5,000 potential units of housing units, 11 acres of public open space and waterfront access along shoreline that is on or adjacent to Newtown Creek on land that was rezoned to residential in 2008 in the Hunters Point South area of Queens.

16. Numerous upland facilities within the Newtown Creek watershed have been identified by NYSDEC for inclusion under various New York State programs, including the Brownfield Cleanup Program, the Environmental Restoration Program, the State Superfund Program, and the Voluntary Cleanup Program. In addition, there are 15 facilities within the Newtown Creek watershed that are listed as RCRA Large Quantity Generator facilities including landfills, solid waste and hazardous waste facilities and facilities with underground storage tanks holding chemicals or petroleum products.
17. EPA conducted an Expanded Site Investigation (“ESI”) of Newtown Creek in 2009 as part of the Hazard Ranking System scoring process. Based on the ESI, which was focused on Newtown Creek itself and not its tributaries, EPA concluded that metals, volatile organic compounds, and semi-volatile organic compounds (including polycyclic aromatic hydrocarbons and polychlorinated biphenyls) 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. Previous environmental investigations of Newtown Creek, or specific portions of the Creek (including investigations performed by certain of the Respondents under oversight of NYSDEC and investigations performed by the City of New York in connection with proposed navigational dredging) also disclosed that sediments in Newtown Creek are contaminated by a wide variety of hazardous substances. Environmental investigations of certain upland parcels adjacent to or nearby the Creek have disclosed contamination of those parcels by hazardous substances similar to hazardous substances found in sediments in Newtown Creek.
18. Potential sources of hazardous substances to Newtown Creek include a wide range of current and historical industrial and municipal discharges, including historic and potentially ongoing industrial discharges from industries along the banks and within the Newtown Creek watershed, incidental releases or other discharges during loading or unloading of barges servicing Creekside industrial or governmental facilities, historic placement of fill by both industry and municipalities along the banks of Newtown Creek for disposal or for filling marshland or swamps, historic placement of dredge material during dredging and channelization activities, historic discharge of sanitary sewage and industrial wastes, historic and ongoing releases of combined storm, sanitary and industrial discharges through combined sewage overflow systems into Newtown Creek, and releases from navigational shipping and maritime traffic.
19. The water in Newtown Creek is currently classified by the NYSDEC as Class SD saline surface water with a protected use of fish survival only. The Creek does not presently meet parameters for that protected use, e.g., dissolved oxygen. NYSDEC defines class SD as, “...water that, because of natural or manmade conditions, cannot meet the requirements for primary and secondary contact recreation and fish propagation.” As such, the waters of Newtown Creek are not suitable for primary (e.g., swimming) or secondary (e.g., boating or fishing) direct contact recreation. However, current recreational uses of

the Newtown Creek include 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, could cause adverse health effects that will be evaluated in the Remedial Investigation (“RI”), and effects of exposure of contaminated sediments and water to flora and fauna will also be evaluated.

20. The Newtown Creek Superfund Site (which includes the Study Area) was proposed for inclusion on the National Priorities List (“NPL”) pursuant to CERCLA Section 105, 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 NPL by rule published in the Federal Register on September 29, 2010 at 75 Federal Register 59983.
21. Each Respondent currently owns or operates, or, at the time of disposal of hazardous substances, owned or operated a facility or facilities at the Study Area or within other areas at the Site from which there was a release or there is a threat of release of hazardous substances to the Study Area, or is a person who arranged for disposal of hazardous substances at a facility within the Site from which facility hazardous substances were released or threaten to be released into the Study Area, or is a person who transported hazardous substances to a facility, selected by such person, within the Site, from which facility hazardous substances were released or threaten to be released into the Study Area. Hazardous substances of the type released from such facilities have been identified in the sediments of Newtown Creek.
22. EPA has evaluated information obtained in connection with the Site and has determined on the basis of such information that hazardous substances were released and/or there is a threat of release from facilities that are currently owned or operated or that were, at the time of disposal of hazardous substances owned or operated by each of the Respondents or by predecessor companies or predecessor municipalities of Respondents, or that a Respondent is a person who arranged for disposal of hazardous substances at the Site from which hazardous substances were released or threaten to be released into the Study Area, or is a person who transported hazardous substances to a facility selected by such person within the Site from which hazardous substances were released or threaten to be released into the Study Area. Hazardous substances of the type released from such facilities have been identified in the sediments of Newtown Creek.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the Findings of Fact set forth above, EPA has determined that:

23. The Study Area is a “facility” as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

24. The contamination found at the Study Area, 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).
25. 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).
26. Each Respondent is a “person” as defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
27. Each Respondent is a person who currently, or at the time of disposal of hazardous substances, owned or operated facilities within the Site, or is a person who arranged for disposal of hazardous substances at the Site or is a person who transported hazardous substances to a facility selected by such person within the Site. Each Respondent therefore may be liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).
28. Respondents are responsible parties for the purposes of Sections 104, 107 and 122 of CERCLA, 42 U.S.C. §§ 9604, 9607 and 9622.
29. The actions required by 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, and will expedite effective remedial action and minimize litigation, 42 U.S.C. §§ 9604(a)(1) and 9622(a).
30. EPA has determined that Respondents are qualified to conduct the RI/FS 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 Respondents comply with the terms of this Settlement Agreement.

VII. SETTLEMENT AGREEMENT AND ORDER

31. Based upon the foregoing Findings of Fact and Conclusions of Law and Determinations, it is hereby ordered and agreed that Respondents 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

32. Selection of Contractors, Personnel. All Work performed under this Settlement Agreement shall be under the direction and supervision of qualified personnel. Within

thirty days after the Effective Date of this Settlement Agreement, and before the Work outlined below begins, Respondents shall notify EPA in writing of the names, titles, and qualifications of the key personnel, including contractors, subcontractors, consultants and laboratories to be used in carrying out such Work. With respect to any proposed contractor, Respondents shall demonstrate that the proposed contractor has a quality system which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995, or most recent version), 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 key personnel undertaking the Work for Respondents shall be subject to EPA's review, for verification that such persons meet minimum technical background and experience requirements. This Settlement Agreement is contingent on Respondents' demonstration to EPA's satisfaction that Respondents are qualified to perform properly and promptly the actions set forth in this Settlement Agreement. If EPA disapproves in writing of any key person's technical qualifications, Respondents shall notify EPA of the identity and qualifications of the replacement(s) within thirty days of the written notice. If EPA subsequently disapproves of the replacement, EPA reserves the right to terminate this Settlement Agreement and to conduct a complete RI/FS, and to seek reimbursement for costs and penalties from Respondents. During the course of the RI/FS, Respondents 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 Respondents.

33. Within fourteen days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Settlement Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present at the Study Area or readily available during performance of Work at the Study Area. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number and qualifications within fourteen days following EPA's disapproval. Respondents shall have the right to change their Project Coordinator, subject to EPA's right to disapprove. Respondents shall notify EPA fourteen days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notification. Receipt by Respondents' Project Coordinator of any notice or communication from EPA relating to this Settlement Agreement shall constitute receipt by Respondents.
34. EPA has designated the following individual as its Project Coordinator for the Site:

Caroline Kwan
Remedial Project Manager
Special Projects Branch
Emergency and Remedial Response Division
United States Environmental Protection Agency, Region 2
290 Broadway, 20th Floor
New York, NY 10007-1866
212-637-4275
kwan.caroline@epa.gov

EPA will notify Respondents of a change of its designated Project Coordinator.

35. EPA's Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and On-Scene Coordinator ("OSC") by the NCP. In addition, EPA's Project Coordinator shall have the authority consistent with the NCP, to halt any Work required by this Settlement Agreement, and to take any necessary response action when she determines that conditions at the Study Area may present an immediate endangerment to public health or welfare or the environment. The absence of the EPA Project Coordinator from the area under study pursuant to this Settlement Agreement shall not be cause for the stoppage or delay of Work.
36. EPA shall arrange for a qualified person to assist in its oversight and review of the conduct of the RI/FS, 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 not to modify the RI/FS Work Plan.
37. Respondents' Liaison Counsel. Within fifteen days after the Effective Date, Respondents shall designate an attorney to act as liaison counsel and shall identify such counsel ("Liaison Counsel") to EPA by name, address, telephone number and e-mail address. During the course of the RI/FS, Respondents shall notify EPA in writing of changes to their Liaison Counsel. Liaison Counsel shall provide the written certifications, if any, pursuant to Paragraph 6 of this Settlement Agreement.

IX. WORK TO BE PERFORMED

38. Respondents shall conduct the RI/FS in accordance with the provisions of this Settlement Agreement, the RI/FS Work Plan, CERCLA, the NCP and EPA guidance, including, but not limited to the "Interim Final Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA" (OSWER Directive # 9355.3-01, October 1988 or subsequently issued guidance), "Guidance for Data Usability in Risk Assessment" (OSWER Directive #9285.7-05, October 1990 or subsequently issued guidance), EPA Contaminated Sediment Guidance (OSWER Directive #9355.0-85, December 2005 or subsequently issued guidance) and guidance referenced therein, and guidances referenced

in the RI/FS Work Plan, as may be amended or modified by EPA. The RI shall consist of collecting data to characterize conditions at the Study Area, determining the nature and extent of the contamination at or from the Study Area, including identification and characterization of sources within the Study Area as provided in the RI/FS Work Plan, assessing risk to human health and the environment and conducting treatability testing as necessary to evaluate the potential performance and cost of the treatment technologies that are being considered. The Feasibility Study ("FS") shall determine and evaluate (based on treatability testing, where appropriate) alternatives for remedial action to prevent, mitigate or otherwise respond to or remedy the release or threatened release of hazardous substances, pollutants, or contaminants at or from the Study Area. The alternatives evaluated must include, but shall not be limited to, the range of alternatives described in the NCP, and shall include remedial actions that utilize permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. In evaluating the alternatives, Respondents shall address the factors required to be taken into account by Section 121 of CERCLA, 42 U.S.C. § 9621, and Section 300.430(e) of the NCP, 40 C.F.R. § 300.430(e).

39. Modification of the RI/FS Work Plan.

- a. If at any time during the RI/FS process, Respondents identify a need for modifications to the RI/FS Work Plan, Respondents shall submit a memorandum documenting the need for proposed modifications to the EPA Project Coordinator within ten days of identification. In addition, if at any time during the RI/FS process, Respondents identify a need for additional data, Respondents shall submit a memorandum documenting a need for additional data to the EPA Project coordinator within ten days of identification. EPA in its discretion will determine whether the additional data will be collected by Respondents and whether it will be incorporated into plans, reports and other deliverables. Notwithstanding the foregoing, Respondents retain the right to collect and submit data for any other purpose.
- b. In the event of unanticipated or changed circumstances at the Study Area, Respondents shall notify the EPA Project Coordinator by telephone within 24 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 RI/FS Work Plan, EPA shall modify or amend the RI/FS Work Plan in writing accordingly. Respondents shall perform the RI/FS Work Plan as modified or amended.
- c. EPA may determine that in addition to tasks defined in the initially approved RI/FS Work Plan, other additional Work may be necessary to accomplish the objectives of the RI/FS consistent with CERCLA and the NCP. Respondents agree to perform these RI/FS Work activities in addition to those required by the initially approved RI/FS Work Plan, including any modifications approved by EPA, if EPA determines that such actions are necessary for a complete RI/FS.

- d. Respondents shall confirm their willingness to perform the additional Work in writing to EPA within fifteen days of receipt of the EPA request. If Respondents object to any modification determined by EPA to be necessary pursuant to this Paragraph, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution). The RI/FS Work Plan shall be modified in accordance with the final resolution of the dispute.
 - e. Respondents shall complete the additional Work according to the standards, specifications, and schedule set forth or approved by EPA in a written modification to the RI/FS Work Plan or written RI/FS Work Plan supplement. EPA reserves the right to conduct the Work itself at any point, to seek reimbursement from Respondents, and/or to seek any other appropriate relief.
 - f. 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 Study Area or the Site.
40. Off-Site Shipment of Waste Material. Respondents shall, prior to any off-site shipment of Waste Material from the Study Area 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 EPA's designated Project Coordinator. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.
- a. Respondents 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. Respondents 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 Respondents following the award of the contract for the RI/FS. Respondents 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 Study Area to an off-site location, Respondents shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall only send hazardous substances, pollutants, or contaminants from the Study Area to an off-site facility that complies with the requirements of the statutory provision and regulation cited in the preceding sentence.

41. Meetings. Respondents shall make presentations at, and participate in, meetings as requested by EPA during the initiation, conduct, and completion of the RI/FS. In addition to discussion of the technical aspects of and substantive issues relating to the RI/FS, topics may include anticipated problems or new issues. Meetings will be scheduled at EPA's discretion. Respondents may also request such meetings.
42. Progress Reports. In addition to the plans, reports and other deliverables required to be submitted under this Settlement Agreement, Respondents shall provide to EPA monthly progress reports by the tenth day of each month. At a minimum, with respect to the preceding month, these progress reports shall (1) describe the actions which have been taken to comply with this Settlement Agreement, (2) include all results of sampling and tests and all other data received by Respondents, (3) describe Work planned for the next two months with schedules relating such Work to the overall project schedule for RI/FS completion, and (4) describe all problems encountered and any anticipated problems, any actual or anticipated delays, and solutions developed and implemented to address any actual or anticipated problems or delays.
43. Respondents shall submit copies of all plans, reports, or other submissions required by this Settlement Agreement, or any approved plan, as set forth below. Upon request by EPA, Respondents shall submit in electronic form all portions of any plan, report or other deliverable Respondents are required to submit pursuant to provisions of this Settlement Agreement. Any electronic submissions must be in a format that is compatible with EPA software and in database files and sizes to be specified by EPA. Reports should be submitted to the following:
 - a. Four copies (2 bound, 1 unbound and 1 electronic) to:

United States Environmental Protection Agency, Region 2
Emergency and Remedial Response Division
Special Projects Branch: Newtown Creek Superfund Site
290 Broadway, 20th Floor
New York, NY 10007-1866
Attention: Newtown Creek Superfund Site Remedial Project Manager
 - b. One copy (bound), to:

Chief, New York/Caribbean Superfund Branch
Office of Regional Counsel
United States Environmental Protection Agency, Region 2
290 Broadway, 17th Floor
New York, New York 10007-1866
Attention: Newtown Creek Superfund Site Attorney
 - c. Three copies (2 unbound, 1 electronic), to:

Director, Division of Environmental Remediation
N.Y. State Department of Environmental Conservation
625 Broadway, 12th Floor
Albany, New York 12233-7011
Attention: Newtown Creek Superfund Site Project Manager

44. Emergency Response and Notification of Releases.

- a. In the event of any action or occurrence caused by or otherwise resulting from the performance of Work by Respondents, which results in a release or threat of release of Waste Material from the Study Area that constitutes an emergency situation or which may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action. Respondents shall take these actions in accordance with all applicable provisions of this Settlement Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondents shall also immediately notify the Chief of the Response and Prevention Branch of the Emergency and Remedial Response Division of EPA, Region 2, at (732) 321-6656 of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, then EPA's costs of such action shall constitute Future Response Costs and Respondents shall reimburse EPA pursuant to Section XVIII (Payment of Response Costs) for the costs of the response action which are not inconsistent with the NCP.
- b. In addition, in the event of any release of a hazardous substance from the Study Area, Respondents shall immediately notify the National Response Center at (800) 424-8802 as well as the EPA Project Coordinator or, in the event of his/her unavailability, the Chief of the Special Projects Branch currently at 212-637-4435. Respondents shall submit a written report to EPA within seven days after any such release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release.
- c. This foregoing reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

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 Respondents that it either: (a) approves, in whole or in part, the submission; (b) approves the submission upon specified conditions; (c) modifies the submission to cure the deficiencies; (d) disapproves, in whole

or in part, the submission, directing that Respondents modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Respondents at least one 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 due to material defects, or greater than 21 days if mutually agreed to in writing by EPA and the Respondents.

46. In the event of approval, approval upon conditions, and/or modification by EPA, pursuant to Paragraph 45.a, 45.b, 45.c, or 45.e, Respondents shall proceed to take any action required by the plan, report or other deliverable, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XV (Dispute Resolution) with respect to the modifications or conditions made by EPA. Following EPA approval or modification of a submission or portion thereof, Respondents shall not thereafter alter or amend such submission or portion thereof unless directed by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 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, Respondents 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, shall accrue during the thirty-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 48 and 49.
 - b. Notwithstanding the receipt of a notice of disapproval, Respondents shall proceed to take any action required by any non-deficient portion of the submission, unless otherwise directed by EPA. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for stipulated penalties under Section XVI (Stipulated Penalties).
 - c. Respondents shall not proceed further with subsequent activities or tasks until receiving EPA approval, approval on condition or modification of the following deliverables: each subsequent work plan or work plan addendum for the RI/FS that are required to be developed pursuant to the RI/FS Work Plan, Sampling and Analysis Plan(s), Quality Assurance Project Plan(s), Draft Remedial Investigation Report(s), Draft Pathways Analysis Report(s), Draft Human Health Risk Assessment Report, Draft Screening Level Ecological Risk Assessment, Draft Baseline Ecological Risk Assessment Report and Treatability Testing Work Plan(s) and associated Sampling and Analysis Plan(s) and Draft Feasibility Study Report(s). While awaiting EPA approval, approval on condition or modification of these deliverables, Respondents shall proceed with all other tasks and activities

which may be conducted independently of these deliverables, in accordance with the schedule set forth in the RI/FS Work Plan or as otherwise approved by EPA.

- d. For all remaining deliverables not listed above in Paragraph 47.c., Respondents shall proceed with all subsequent tasks, activities and deliverables without awaiting EPA approval on a submitted deliverable. EPA reserves its right to stop Respondents from proceeding further, either temporarily or permanently, on any task, activity or deliverable at any point during the RI/FS, and Respondents agree 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 Respondents to correct the deficiencies. EPA shall also retain the right to modify or develop the plan, report, or other deliverable. Respondents shall implement any such plan, report, or deliverable as corrected, modified or developed by EPA, subject only to Respondents' right to invoke the procedures set forth in Section XV (Dispute Resolution).
 49. If upon resubmission, a plan, report, or other deliverable is disapproved or modified by EPA due to a material defect, Respondents shall be deemed to have failed to submit such plan, report, or other deliverable timely and adequately unless Respondents invoke the dispute resolution procedures in accordance with Section XV (Dispute Resolution) and EPA's action is revoked or substantially modified pursuant to a Dispute Resolution decision issued by EPA or superceded 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 during Dispute Resolution. If EPA's disapproval or modification is not otherwise revoked, substantially modified or superceded as a result of a decision or agreement reached pursuant to the Dispute Resolution process set forth in Section XV, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI.
 50. In the event that EPA takes over some of the tasks, but not the preparation of the RI Report or the FS Report, Respondents shall incorporate and integrate information supplied by EPA into the final reports.
 51. 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.
 52. Neither failure of EPA to expressly approve or disapprove of Respondents' submissions within a specified time period, nor the absence of comments, shall be construed as

approval by EPA. Whether or not EPA gives express approval for Respondents' deliverables, Respondents are responsible for preparing deliverables acceptable to EPA.

XI. QUALITY ASSURANCE, SAMPLING, AND ACCESS TO INFORMATION

53. Quality Assurance. Respondents shall assure that Work performed, samples taken and analyses conducted conform to the requirements of the RI/FS Work Plan, the EPA-approved Quality Assurance Project Plan ("QAPP") and guidances identified therein. Respondents will assure that field personnel used by Respondents are properly trained in the use of field equipment and in chain of custody procedures. Respondents shall only use laboratories which have a documented quality system that complies 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.
54. Sampling.
- a. All results of sampling, tests, modeling or other data (including raw data) generated by Respondents, or on Respondents' behalf, during the performance of the Work required under this Settlement Agreement, shall be submitted to EPA in the next monthly progress report after they are generated as described in Paragraph 42 of this Settlement Agreement. EPA will make available to Respondents validated data generated by EPA, as well as all QA/QC data, unless it is exempt from disclosure by any federal or state law or regulation.
 - b. Respondents shall verbally notify EPA at least 14 days prior to conducting significant field events as described in the RI/FS Work Plan or Sampling and Analysis Plan, provided, however, for any sampling events during wet weather/storm flows or tides, Respondents 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, Respondents shall allow split or duplicate samples to be taken by EPA (and its authorized representatives) of any samples collected in implementing the Work under this Settlement Agreement. All split samples analyzed by EPA shall be analyzed by the methods identified in the QAPP.
 - c. Circumstances permitting, EPA shall verbally notify Respondents at least 14 days prior to conducting significant field events relating to the Study Area, other than emergency response actions, activities conducted pursuant to Paragraph 86 (Work Takeover), or any enforcement-related events that require confidentiality. At Respondents' verbal or written request, EPA shall allow split or duplicate samples to be taken by Respondents (and their authorized representatives) of any samples collected in overseeing this Settlement Agreement or otherwise investigating the Site. All split samples shall be analyzed by the methods identified in the QAPP.
 - d. Any Respondent that has or independently produces as a requirement under any other regulatory program (i) any reports relating to Waste Materials in the Study Area, (ii) any reports relating to Waste Materials from direct or indirect discharges

into the Study Area, or (iii) any other reports relating to the Study Area or related to direct or indirect discharges into the Study Area, shall disclose such reports to EPA and, upon request of EPA or the Respondents, shall provide a copy of such report to EPA and the Respondents.

- e. To the extent provided by the RI/FS Work Plan, if EPA or the Respondents propose to install a groundwater monitoring well on a facility which is situated upland of Newtown Creek and which is owned by or under the control of any of the Respondents, then such Respondent shall install such groundwater monitoring well.

55. Access to Information.

- a. Respondents shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to implementing the RI/FS Work Plan Activities or additional Work as required hereunder at the Site or to the implementation of this Settlement Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.
- b. Respondents may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Settlement Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when it is submitted to EPA, or if EPA has notified Respondents that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondents. Respondents shall segregate and clearly identify all documents or information submitted under this Settlement Agreement for which Respondents assert business confidentiality claims.
- c. Respondents may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondents assert such a privilege in lieu of providing documents, they shall provide EPA with the following: (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 Respondents. 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 Respondents may assert such privileges with respect to internal draft documents that have not been disclosed to persons other than Respondents, their 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 Respondents believe that such data relates to the Study Area.
56. In entering into this Settlement Agreement, Respondents waive any objections to any data gathered, generated, or evaluated by EPA, the State or Respondents in the performance or oversight of the Work that has been verified according to the quality assurance/quality control (“QA/QC”) procedures required by the Settlement Agreement or the RI/FS Work Plan or Sampling and Analysis Plans. If Respondents object to any other data relating to the RI/FS, Respondents shall submit to EPA a report that specifically identifies and explains their objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. Such report must be submitted to EPA within fifteen days of the monthly progress report containing the data.

XII. SITE ACCESS

57. If any portion of the Study Area or Site, or any other property where access is needed to implement this Settlement Agreement, is owned or controlled by any of Respondents, such Respondents shall, commencing on the Effective Date, provide EPA and the State, and their representatives, including contractors, with access at all reasonable times to such property, including without limitation, any vessels, where Respondents are conducting any Work, for the purpose of conducting or overseeing any activity related to this Settlement Agreement.
58. Access to Areas Not Owned by a Respondent.
- a. Where any action under this Settlement Agreement is to be performed in areas owned by or in possession of someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements from the present owners within forty-five 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 Manager that access to such other properties is needed for performance of Work. Respondents shall immediately notify EPA if after using their best efforts they are unable to obtain such agreements. For purposes of this Paragraph, “best efforts” includes the payment of reasonable sums of money in consideration of access, unless EPA has identified the property owner as a PRP under CERCLA in connection with the Study Area. Respondents shall describe in writing their efforts to obtain access. If Respondents cannot obtain access agreements, EPA may either (i) obtain access

for Respondents or assist Respondents in gaining access, to the extent necessary to effectuate the response actions described in this Settlement Agreement, using such means as EPA deems appropriate; or (ii) perform those tasks or activities with EPA contractors. Respondents shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XVIII (Payment of Response Costs). If EPA performs those tasks or activities with EPA contractors and does not terminate the Settlement Agreement, Respondents shall perform all other tasks or activities not requiring access to that property, and Respondents shall reimburse EPA for all costs incurred in performing such tasks or activities. Respondents shall integrate the results of any such tasks or activities undertaken by EPA into its plans, reports and other deliverables.

- b. Notwithstanding Paragraph 58.a, if access is sought to any upland facility situated outside of the Study Area which is not owned by or under the control of a Respondent, but which is suspected to be a significant source of groundwater impact or discharge to the Study Area such that EPA or Respondents propose to install a groundwater well or take other action in connection with the RI/FS, Respondents will identify the current facility owner or operator to EPA for further agency action. If the facility owner cannot be identified, is no longer in existence, or fails or refuses to install any requested upland groundwater well or to take such other actions, then the Respondents may, but will not be required to, install such monitoring well or perform such action under this Settlement Agreement.

59. 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

60. Respondents shall comply with all applicable local, state, and federal laws and regulations when performing the RI/FS. No local, state, or federal permit shall be required for any portion of any action conducted entirely on-site, including studies, if the action is selected and carried out in compliance with CERCLA and the NCP, provided that Respondents 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, state or local permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. Respondents may seek relief under the provisions of Section XVII (Force Majeure) of this Settlement Agreement for any delay in performing the Work due to a failure to obtain, or a delay in obtaining, any permit required for the Work, provided that Respondents have made proper, timely, and complete application for such permit and have 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

61. During the pendency of this Settlement Agreement and for a minimum of 10 years after commencement of construction of any remedial action, each Respondent shall preserve and retain all non-identical copies of documents, records, and other information (including documents, records, or other information in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or the liability of any person under CERCLA with respect to the Study Area, regardless of any corporate or governmental retention policy to the contrary. Until 10 years after commencement of construction of any remedial action, Respondents shall also instruct their contractors and agents to preserve all documents, records, and other information of whatever kind, nature, or description relating to performance of the Work.
62. At the conclusion of this document retention period, Respondents shall notify EPA at least ninety days prior to the destruction of any such documents, records, or other information, and, upon request by EPA, Respondents shall deliver any such documents, records, or other information to EPA. Respondents may assert that certain documents, records, and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondents assert such a privilege, they shall provide EPA with the information set forth in Paragraph 55.c (1)-(6). Except as otherwise provided in Paragraph 55.c., no documents, records or other information required to be created or generated pursuant to this Settlement Agreement shall be withheld on the grounds that they are privileged.
63. Each Respondent hereby certifies individually that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Study Area, since notification of potential liability by EPA or the filing of suit against it regarding the Study Area, and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XV. DISPUTE RESOLUTION

64. 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.
65. If Respondents object to any EPA action taken pursuant to this Settlement Agreement, including billings for Future Response Costs, they shall notify EPA in writing of their

objection(s) within 14 days of such action, unless the objection(s) has/have been resolved informally. EPA and Respondents shall have 30 days' from EPA's receipt of Respondents' written objection(s) to resolve the dispute (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.

66. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, the Chief of the Special Projects Branch of the Emergency and Remedial Response Division, EPA Region 2, will issue a written decision. When feasible, Respondents shall be given an opportunity to meet with the Chief of the Special Projects Branch of the Emergency and Remedial Response 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 Respondents during the dispute resolution process. EPA's decision shall be incorporated into and become an enforceable part of this Settlement Agreement. Respondents' obligations under this Settlement Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs, and regardless of whether Respondents agree with the decision.

XVI. STIPULATED PENALTIES

67. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 68.a and 68.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 Respondents shall include completion of the Work required under this Settlement Agreement including any activities contemplated under any RI/FS Work Plan or other plan approved under this Settlement Agreement as identified below, in accordance with all applicable requirements of law, this Settlement Agreement, the RI/FS Work Plan, and any plans or other documents approved by EPA pursuant to this Settlement Agreement and within the specified time schedules established by and approved under this Settlement Agreement.
68. Stipulated Penalty Amounts
- a. The following stipulated penalties shall accrue per day for any non-compliance identified in Paragraph 68.a:

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

Stipulated penalties as specified in Paragraph 68.a shall accrue per violation per day if Respondents fail to timely submit the following major deliverables required under the RI/FS Work Plan: The RI/FS Work Plan attached hereto as Appendix A and including all additional work plans to be developed after the Effective Date pursuant to the RI/FS Work Plan and also including all supporting plans (FSAP, QAPP, HASP, DMP and CIP); Phase I RI Interim Data Report; Phase I RI Work Plan Addendum; Phase I RI Data Summary Report; Phase II RI Work Plan including supporting plans (specifically FSAP, QAPP, HASP and DMP); RI Report; BERA Problem Formulation Report; BERA Work Plan; PAR-HHRA; BERA Report; HHRA Report; FS Work Plan; FS Field Program Work Plan (if needed); and FS Report (including FS Field Program Report to be attached thereto).

All of these major deliverables shall be completed and submitted by Respondents in accordance with the RI/FS Work Plan Estimated Program Schedule set forth in Section 3.5 of the RI/FS Work Plan or as otherwise modified by agreement of EPA and Respondents.

- b. For all other violations of this Settlement Agreement, including, without limitation, Respondents failure to provide timely or adequate certificates of insurance pursuant to Paragraph 101 or periodic progress reports required under Paragraph 42, or failure to timely pay Past Response Costs or Future Response Costs in accordance with Section XVIII, stipulated penalties shall accrue per violation per day as follows:

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

69. In the event that EPA assumes performance of all or a substantial portion of the Work pursuant to Paragraph 87 of Section XX (Reservation of Rights by EPA), Respondents shall be liable for a stipulated penalty in the amount of five million dollars (\$5-million). EPA agrees that any penalty assessed against Respondents under this Paragraph shall be reduced by the percentage of Work completed by the Respondents as of the time of the

assessment. This Paragraph shall not apply to circumstances described in Paragraph 58.b in which EPA performs work because Respondents are unable to obtain access.

70. All penalties shall begin to accrue on the day after the complete 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 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 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and (2) with respect to a decision by the Chief of the Special Projects Branch as provided by Paragraph 66 of Section XV (Dispute Resolution), during the period, if any, beginning on the 31st day after the Negotiation Period begins until the date that the Chief of the Special Projects Branch 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.
71. Following EPA's determination that Respondents have failed to comply with a requirement of this Settlement Agreement, EPA may give Respondents written notification of the same and describe the noncompliance. EPA may send Respondents 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 Respondents of a violation.
72. All penalties accruing under this Section shall be due and payable to EPA within thirty days of Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the dispute resolution procedures under Section XVI (Dispute Resolution). All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by Fedwire Electronic Funds Transfer in the manner set forth in Paragraph 80.b, below.
73. The payment of penalties shall not alter in any way Respondents' obligation to complete performance of the Work required under this Settlement Agreement.
74. Penalties shall continue to accrue as provided in Paragraph 70 during any dispute resolution period, but need not be paid until fifteen days after the dispute is resolved by agreement or by receipt of EPA's decision.
75. If Respondents fail to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondents shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 72.
76. Nothing in this Settlement Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue

of Respondents' violation of this Settlement Agreement or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to 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 87. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement Agreement.

XVII. FORCE MAJEURE

77. Respondents agree to perform all requirements of this Settlement Agreement within the time limits established under this Settlement Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Settlement Agreement, *force majeure* is defined as any event arising from causes beyond the control of Respondents or of any entity controlled by Respondents, including but not limited to their contractors and subcontractors, which delays or prevents performance of any obligation under this Settlement Agreement despite Respondents' best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the Work or increased cost of performance.
78. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement Agreement, whether or not caused by a *force majeure* event, Respondents shall notify the EPA Project Coordinator (or, in her absence, the Chief of the Special Projects Branch of the Emergency and Remedial Response Division of EPA Region 2 currently at (212) 637-4435) within two Working Days of when Respondents or their agents, contractors or representatives knew or should have known that the event might cause a delay. Within ten Working Days thereafter, Respondents shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a *force majeure* event if they intend to assert such a claim; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondents from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.
79. 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 Respondents in writing of the length of the 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 a *force majeure* event, EPA will notify Respondents in writing of its decision.

XVIII. PAYMENT OF RESPONSE COSTS

80. Payment of Past Response Costs.

- a. Within thirty days after the Effective Date, Respondents shall pay to EPA \$750,000 for Past Response Costs in the manner set forth in Paragraph 80.b.
- b. Payments shall be made to EPA by Fedwire Electronic Funds Transfer to:

Federal Reserve Bank of New York
ABA: 021030004
Account: 68010727
SWIFT address: FRNYUS33
Street Address: 33 Liberty Street, New York NY 10045
Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency"
Amount: Specify the amount of the payment
Respondents' Names: Specify Respondents' Names
EPA Index Number: CERCLA-02-2011-2011
Site/spill identifier: A206

At the time of payment, Respondent shall send notice that such payment has been made by email to acctsreceivable.cinwd@epa.gov, and by mail to the addressees designated in Paragraph 43.a and Paragraph 43.b, above as well as to the following addressee:

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

- c. The total amount to be paid by Respondents pursuant to Paragraph 80.a. and Paragraph 82 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.

81. Payments of Future Response Costs.

- a. Respondents shall pay EPA all Future Response Costs. On a periodic basis, EPA will send Respondents a bill requiring payment that includes a SCORPIOS Report, which includes direct and indirect costs incurred by EPA and its contractors, and, as applicable, a DOJ Cost Report, which includes costs incurred by DOJ and its contractors. Respondents shall make all payments within thirty days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 82 of this Settlement Agreement, and payment shall be made in the manner set forth in Paragraph 80.b.
- b. The total amount to be paid by Respondents pursuant to Paragraph 81.a. and Paragraph 82 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.

82. If Respondents fail to pay Past Response Costs within 30 days after the Effective Date or Future Response Costs within 30 days of Respondents' receipt of a bill, Respondents shall pay Interest on the unpaid balance of Past Response Costs or Future Response Costs. The Interest on unpaid Past Response Costs or Future Response Costs shall begin to accrue on the Effective Date or on the date of the bill, as applicable, 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 Respondents' failure to make timely payments under this Section, including but not limited to, payments of stipulated penalties pursuant to Section XVI. Respondents shall make all payments required by this Paragraph in the manner described in Paragraph 80.b.

83. Respondents may contest payment of any Future Response Costs under Paragraph 81 if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or specific provisions of the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the EPA Project Coordinator. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Respondents shall within the 30 day period pay all uncontested Future Response Costs to EPA in the manner described in Paragraph 81. Simultaneously, Respondents shall establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance

Corporation, and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the EPA Project Coordinator a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, Respondents shall initiate the Dispute Resolution procedures in Section XV (Dispute Resolution). If EPA prevails in the dispute, within 5 days of the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 81. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 81. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Respondents' obligation to pay EPA for its Future Response Costs.

XIX. COVENANT NOT TO SUE BY EPA

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

XX. RESERVATIONS OF RIGHTS BY EPA

85. 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 requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

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

- a. claims based on a failure by Respondents to meet a requirement of this Settlement Agreement;
- b. liability for costs not included within the definition of Past Response Costs or Future Response Costs;
- c. liability for performance of response activities other than the Work;
- d. criminal liability;
- e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- f. liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Study Area;
- g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Study Area not paid as Future Response Costs under this Settlement Agreement.

87. Work Takeover.

- a. In the event EPA determines that Respondents have (i) ceased implementation of any portion of the Work, (ii) are seriously or repeatedly deficient or late in their performance of the Work, or (iii) are 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 the Respondents. Any Work Takeover Notice issued by EPA will specify the grounds upon which such notice was issued and will provide Respondents a period of 21 days within which to remedy the circumstances giving rise to EPA’s issuance of such notice.
- b. If, after expiration of the 21-day notice period specified in Paragraph 87.a, Respondents have not remedied 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 Respondents in writing if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 87.b.
- c. Respondents may invoke the procedures set forth in Section XV (Dispute Resolution) to dispute EPA’s implementation of a Work Takeover under Paragraph 87.b. However, notwithstanding Respondents’ 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 87.b until the earlier of (i) the date that Respondents remedy, 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), requiring EPA to terminate such Work Takeover.

XXI. RESERVATION OF RIGHTS BY RESPONDENTS

88. Except as otherwise provided in this Settlement Agreement, Respondents expressly reserve all rights and affirmative defenses under statute, including CERCLA, or common law.

XXII. COVENANT NOT TO SUE BY RESPONDENTS

89. Respondents covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Work, Past Response Costs, Future Response Costs, or this Settlement Agreement, including, but not limited to:
- a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;
 - b. any claim arising out of the Work or arising out of the response actions for which the Past Response Costs or 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 Past Response Costs or Future Response Costs provided however, that this Settlement Agreement shall not have any effect on claims or causes of action in contribution that Respondents have 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.
90. Except as expressly provided in Paragraph 92 (*De Minimis*/Ability to Pay Waivers) of this Section XXII (Covenant Not to Sue by Respondents), 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 86.a (claims for failure to meet a requirement of the Settlement Agreement) or

86.d (criminal liability), but only to the extent that Respondents' claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

91. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).
92. De Minimis/Ability to Pay Waivers. Respondents agree not to assert any claims and agree 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 they may have for all matters relating to the Site, 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, as of the Effective Date. This waiver shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

XXIII. OTHER CLAIMS

93. By issuance of this Settlement Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents.
94. Except as expressly provided in Section XXII (Covenant Not to Sue by Respondents), Paragraph 92 (*De Minimis/Ability to Pay Waivers*), and Section XIX (Covenant Not to Sue by EPA), nothing in this Settlement Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a Party to this Settlement Agreement, for any liability such 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.
95. 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

96. Contribution Protection.
 - a. The Parties agree that this Settlement Agreement constitutes an administrative settlement for purposes of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) and that Respondents are entitled, as of the Effective Date, to protection from

contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2) 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, Past Response Costs, and Future Response Costs. Notwithstanding such protections against contribution actions or claims by non-parties to this Settlement Agreement, the Respondents agree that they may allocate or reallocate any and all response costs incurred in connection with this Settlement Agreement among themselves.

- 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 Respondents have, as of the Effective Date, resolved their liability to the United States for the Work, Past Response Costs, and Future Response Costs.
- c. Except as provided in Section XXII (Covenant Not to Sue by Respondents), Paragraph 92 (*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 92 (*De Minimis/Ability to Pay Waivers*), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party 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 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).

97. Each 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. Each 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 10 Working Days of service of the complaint or claim upon it. In addition, for matters related to this Settlement Agreement, each Respondent shall notify EPA within 10 Working Days of service or receipt of any Motion for Summary Judgment and within 10 Working Days of receipt of any order from a court setting a case for trial.

XXV. INDEMNIFICATION

98. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of negligent or other wrongful acts or omissions of Respondents, their officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Settlement Agreement. In

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

99. The United States shall give Respondents notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondents prior to settling such claim.
100. Respondents waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work at or relating to the Study Area. In addition, Respondents shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of Respondents and any person for performance of Work at or relating to the Study Area.

XXVI. INSURANCE

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

XXVII. FINANCIAL ASSURANCE

102. Within 30 days of the Effective Date, Respondents shall establish and maintain financial security for the benefit of EPA in the amount of \$25-million in one or more of the following forms, in order to secure the full and final completion of Work by Respondents:
- a. a surety bond unconditionally guaranteeing payment and/or performance of the Work;
 - b. one or more irrevocable letters of credit, payable to or at the direction of EPA, issued by financial institution(s) acceptable in all respects to EPA equaling the total estimated cost of the Work;
 - c. a trust fund administered by a trustee acceptable in all respects to EPA;
 - d. a policy of insurance issued by an insurance carrier acceptable in all respects to EPA, which ensures the payment and/or performance of the Work;
 - e. a written guarantee to pay for or perform the Work provided by one or more parent companies of a corporate Respondent, or by one or more unrelated companies that have a substantial business relationship with at least one of Respondents, including a demonstration that any such guarantor company satisfies the financial test requirements of 40 C.F.R. Part 264.143(f); and/or
 - f. a demonstration of sufficient financial resources to pay for the Work made by one or more of Respondents, which shall consist of a demonstration that any such Respondent satisfies the requirements of 40 C.F.R. Part 264.143(f), provided, however that a demonstration made by a local government shall be required to satisfy the requirements of 40 C.F.R. Part 258.74(f).
103. Any and all financial assurance instruments provided pursuant to this Section shall be in form and substance satisfactory to EPA, determined in EPA's sole discretion. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section (including, without limitation, the instrument(s) evidencing such assurances) are inadequate, Respondents shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 102, above. In addition, if at any time EPA notifies Respondents that the anticipated cost of completing the Work has increased, then, within 30 days of such notification, Respondents shall obtain and present to EPA for approval a revised form of financial assurance (otherwise acceptable under this Section) that reflects such cost increase. Respondents' inability to demonstrate financial ability to complete the Work shall in no way excuse performance of any activities required under this Settlement Agreement.
104. If Respondents seek to ensure completion of the Work through a guarantee pursuant to Paragraph 102.e. or 102.f. of this Settlement Agreement, Respondents shall (i)

demonstrate to EPA's satisfaction that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f); and (ii) resubmit to EPA sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date, or such other date as agreed by EPA. For the purposes of this Settlement Agreement, wherever 40 C.F.R. Part 264.143(f) references "sum of current closure and post-closure costs estimates and the current plugging and abandonment costs estimates," the dollar amount to be used in the relevant financial test calculations shall be the current cost estimate of \$25 million for the Work at the Study Area plus any other RCRA, CERCLA, TSCA, or other federal environmental obligations financially assured by the relevant Respondent or guarantor to EPA by means of passing a financial test.

105. If, after the Effective Date, Respondents can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 102 of this Section, Respondents 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. Respondents shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security after receiving written approval from EPA. In the event of a dispute, Respondents may seek dispute resolution pursuant to Section XV (Dispute Resolution). Respondents 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.
106. Respondents may change the form of financial assurance provided under this Section at any time, upon notice to and prior written approval by EPA, provided that EPA determines that the new form of assurance meets the requirements of this Section. In the event of a dispute, Respondents may change the form of 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.

XXVIII. CITY OF NEW YORK TRUST FUND ACCOUNT

107. The City of New York shall establish a trust fund account for the purpose of enabling the City of New York to fund a share of the Work and to enter into the Settlement Agreement as a Respondent. Within 30 days after the Effective Date of this Settlement Agreement, the City of New York shall enter into a trust fund agreement (City of New York Trust Fund Agreement) in substantially the same form as that set forth in Appendix F hereto in order to establish the Newtown Creek City of New York Special Trust Fund Account ("City of New York Trust Fund").
108. The City of New York shall make payments into the City of New York Trust Fund in such amounts and at such times as has been agreed to by the City and the other Respondents. The City of New York shall notify EPA of each such payment within 7 days after such payment has been made. The City of New York Trust Fund shall be used by the City for

the sole purpose of funding performance of the Work required by this Settlement Agreement and administering the City of New York Trust Fund as provided in the City of New York Trust Fund Agreement, and shall not be used for any other purpose. Payments from the City of New York Trust Fund shall be made in accordance with the City of New York Trust Fund Agreement and has been agreed to by the City and the other Respondents. The Parties acknowledge that funds placed into the City of New York Trust Fund remain the property of the City of New York until expended pursuant to the Trust Fund Agreement and that unexpended funds may be withdrawn by the City of New York at the time of termination of the City of New York Trust Fund Agreement.

109. Nothing in this Section XXVIII (City of New York Trust Fund Account) shall reduce, diminish or otherwise affect the joint and several obligations of the City of New York and each other Respondent pursuant to Paragraph 8 of this Settlement Agreement.

XXIX. INTEGRATION/APPENDICES

110. 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:

“Appendix A” is the RI/FS Work Plan.

“Appendix B” is a map generally depicting the Study Area.

“Appendix C” is the list of Respondents.

“Appendix D” is the list of Work Respondents.

“Appendix E” is the list of Funding Respondents.

“Appendix F” is the City of New York Trust Fund Agreement.

XXX. ADMINISTRATIVE RECORD

111. EPA will, pursuant to CERCLA and the NCP, determine the contents of the administrative record file for selection of any remedial action. Respondents shall submit to EPA documents developed during the course of the RI/FS upon which selection of a response action may be based. Upon request of EPA, Respondents shall provide copies of

plans, task memoranda for further action, quality assurance memoranda and audits, raw data, field notes, laboratory analytical reports and other reports. Upon request of EPA, Respondents shall additionally submit any previous studies conducted under state, local or other federal authorities relating to selection of the response action, and all communications between Respondents and state, local or other federal authorities concerning selection of a response action. At EPA's discretion, Respondents shall establish a community information repository at or near the Study Area, to house one copy of the administrative record.

XXXI. EFFECTIVE DATE AND SUBSEQUENT MODIFICATION

112. This Settlement Agreement shall be effective three days after it has been signed by EPA by its delegated official and delivered to Liaison Counsel.
113. This Settlement Agreement may be amended as provided in Paragraph 6 to add additional Respondents, or may be otherwise amended by mutual agreement of EPA and Respondents. Amendments shall be in writing and shall be effective when signed by EPA by its delegated official.
114. No informal advice, guidance, suggestion, or comment by the EPA Project Coordinator or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement Agreement, or to comply with all requirements of this Settlement Agreement, unless it is formally modified. The 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).

XXXII. NOTICE OF COMPLETION OF WORK

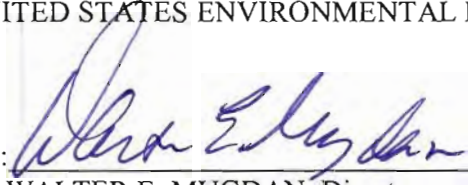
115. If Respondents believe that all Work and all other activities have been fully performed in accordance with this Settlement Agreement, with the exception of any continuing obligations, such as Respondents' obligation to retain records pursuant to Section XIV of this Settlement Agreement, Respondents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

this Settlement Agreement.

It is so ORDERED AND AGREED this 7th day of July, 2011.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BY:



WALTER E. MUGDAN, Director
Emergency and Remedial Response Division
United States Environmental Protection Agency
Region 2

DATE: 7/7/2011

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT Phelps Dodge Refining Corporation

Signature

6/24/11
Date

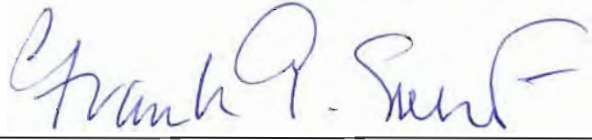


L. Richards McMillan, II

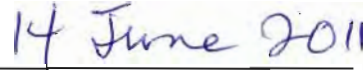
Senior Vice President

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT Texaco Inc.



Signature



Date

Frank G. Soler

Printed Name

Vice President and Secretary

Title

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT BP PRODUCTS NORTH AMERICA INC.

Patricia Gallery
Signature

27 MAY 2011
Date

PATRICIA GALLERY
Printed Name

GLOBAL PORTFOLIO MANAGER R: M/AE
Title

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT The Brooklyn Union Gas Company d/b/a National Grid NY



Signature

June 16, 2011

Date

Kenneth D. Daly

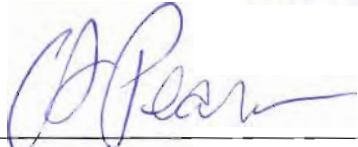
Printed Name

Chief Financial Officer and Treasurer

Title

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT ExxonMobil Oil Corporation


Signature

6/27/2011
Date

Clifford L Pearson
Printed Name

Manager, Major Projects
Title
ExxonMobil Environmental Services Co.

In the Matter of the Newtown Creek Superfund Site
Administrative Settlement Agreement and Order on Consent for Remedial
Investigation/Feasibility Study, CERCLA Docket No. CERCLA-02-2011-2011

FOR RESPONDENT CITY OF NEW YORK

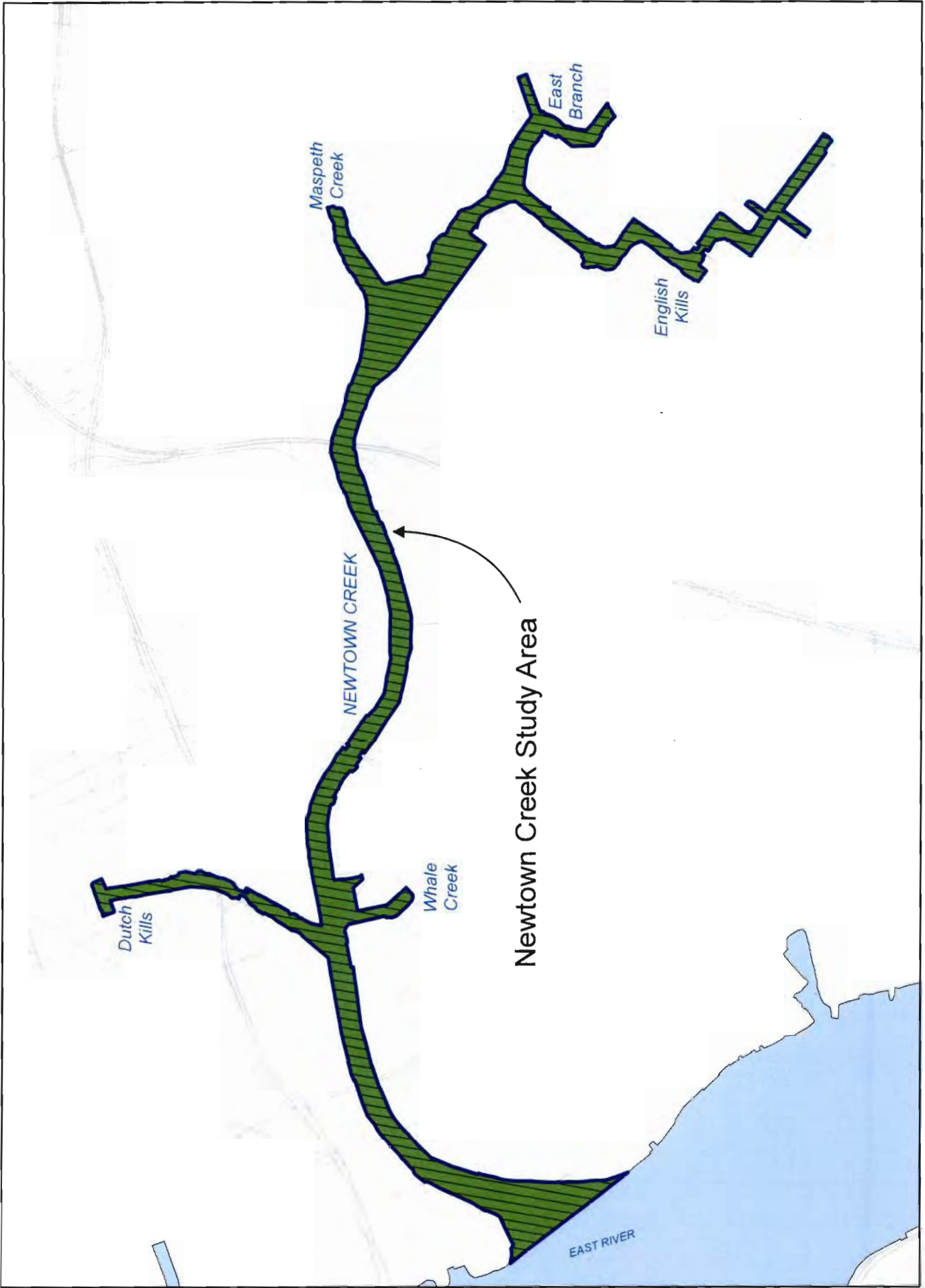
Susan E. Amron
Signature

June 30, 2011
Date

Susan E. Amron
Printed Name

Chief, Environmental Law Division, New York
City Law Department
Title

Appendix A
RI/FS Work Plan



Appendix C
List of Respondents
As of the Effective Date

Phelps Dodge Refining Corporation (a New York corporation)

Texaco Inc. (a Delaware corporation)

BP Products North America Inc. (a Delaware corporation)

The Brooklyn Union Gas Company d/b/a National Grid NY (a New York corporation)

ExxonMobil Oil Corporation (a New York corporation)

The City of New York (a municipal corporation organized and existing under the laws of the
State of New York)

Appendix D
List of Work Respondents
As of the Effective Date

Phelps Dodge Refining Corporation (a New York corporation)
Texaco Inc. (a Delaware corporation)
BP Products North America Inc. (a Delaware corporation)
The Brooklyn Union Gas Company d/b/a National Grid NY (a New York corporation)
ExxonMobil Oil Corporation (a New York corporation)
The City of New York (a municipal corporation organized and existing under the laws of the
State of New York)

Appendix E
List of Funding Respondents
As of the Effective Date

There are no Funding Respondents as of the Effective Date

Appendix F
City of New York Trust Fund Agreement

Attached

TRUST AGREEMENT

For City of New York Payment Obligations at the Newtown Creek Study Area

Dated: July __, 2011

This Trust Agreement (this "Agreement") is entered into as of _____ by and between the City of New York, a municipal corporation organized and existing under the laws of the State of New York (the "Grantor"), and JP Morgan Chase Bank, a corporation organized and existing under the laws of the State of New York (the "Trustee").

Whereas, the United States Environmental Protection Agency ("EPA"), an agency of the United States federal government, and the Grantor have entered into an Administrative Settlement Agreement and Order on Consent, In the Matter of the Newtown Creek Superfund Site, Kings County and Queens County, New York, New York CERCLA Docket No. CERCLA-02-2011-2011, (hereinafter the "Settlement Agreement");

Whereas, the Settlement Agreement provides that the Grantor together with other Work Respondents, as hereinafter defined, will perform Work required by the Settlement Agreement;

Whereas, in order to provide a mechanism for Grantor to sign the Settlement Agreement as a Respondent and contribute to the funding of such Work, Grantor has agreed to establish and fund the trust created by this Agreement; and

Whereas, the Grantor, acting through its duly authorized officers, has selected the Trustee to be the trustee under this Agreement, and the Trustee has agreed to act as trustee hereunder.

Now, therefore, the Grantor and the Trustee agree as follows:

Section 1. Definitions. As used in this Agreement:

(a) The term "Beneficiary" shall have the meaning assigned thereto in Section 3 of this Agreement.

(b) The term "Business Day" means any day, other than a Saturday or a Sunday, that banks are open for business in New York, New York, USA.

(c) The term "Claim Certificate" shall have the meaning assigned thereto in Section 4(a) of this Agreement.

(d) The term "Fund" shall have the meaning assigned thereto in Section 3 of this Agreement.

(e) The term "Grantor" shall have the meaning assigned thereto in the first paragraph of this Agreement.

(f) The term "Study Area" shall have the meaning assigned thereto in paragraph 13.v of the Settlement Agreement.

(g) The term "Trust" shall have the meaning assigned thereto in Section 3 of this Agreement.

(h) The term "Trustee" shall mean the trustee identified in the first paragraph of this Agreement, along with any successor trustee appointed pursuant to the terms of this Agreement.

(i) The term "Work" shall have the meaning assigned thereto in paragraph 13.z of the Settlement Agreement.

(j) The term "Work Respondents" shall have the meaning assigned thereto in paragraph 13.q of the Settlement Agreement.

Section 2. Identification of Facilities and Costs. This Agreement pertains to costs, including related administrative costs, for Work required at the Newtown Creek Study Area in Kings County and Queens County, New York, New York (the "Study Area"), pursuant to the above referenced Settlement Agreement.

Section 3. Establishment of Trust Fund. The Grantor and the Trustee hereby establish a trust (the "Trust"), for the benefit of EPA (the "Beneficiary"), to enable the Grantor to sign the Settlement Agreement as a respondent and contribute to payment for performance of the Work required by, and in accordance with the terms of, the Settlement Agreement. The Grantor and the Trustee intend that no third party shall have access to monies or other property in the Trust except as expressly provided herein. The Trust is established initially as consisting of funds in the amount of [_____] U.S. Dollars (\$ _____). Such funds, along with any other monies and/or other property hereafter deposited into the Trust, and together with all earnings and profits thereon, are referred to herein collectively as the "Fund." The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantor, any payments necessary to discharge any liabilities of the Grantor.

Section 4. Payment for Work Required Under the Settlement Agreement. The Trustee shall make payments from the Fund in accordance with the following procedures.

(a) From time to time, the Grantor may request that the Trustee make payment from the Fund for Work performed under the Settlement Agreement, or for related administrative costs, by delivering to the Trustee a written invoice and certificate (together, a "Claim Certificate") signed by a duly authorized representative of the Grantor and certifying:

(i) that the invoice is for Work performed at the Study Area in accordance with the Settlement Agreement or for administrative costs incurred in connection with the Work or Settlement Agreement; and

(ii) a description of the Work that has been performed, the amount of the claim, and the identity of the payee(s);

(b) Upon receipt of a Claim Certificate, the Trustee shall promptly make the payment from the Fund requested in such Claim Certificate.

(c) While this Agreement is in effect, disbursements from the Fund are governed exclusively by the express terms of this Agreement.

Section 5. Trust Management. The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with directions which the Grantor may communicate in writing to the Trustee from time to time, except that:

(a) securities, notes, and other obligations of any person or entity shall not be acquired or held by the Trustee with monies comprising the Fund, unless they are securities, notes, or other obligations of the U.S. federal government or any U.S. state government or as otherwise permitted in writing by the Grantor;

(b) the Trustee is authorized to invest the Fund in time or demand deposits of the Trustee, to the extent such deposits are insured by an agency of the U. S. federal or any U.S. state government; and

(c) the Trustee is authorized to hold cash awaiting investment or distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 6. Express Powers of Trustee. Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

(a) to make, execute, acknowledge, and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;

(b) to register any securities held in the Fund in its own name or in the name of a nominee and to hold any security in book entry, or to deposit or arrange for the deposit of such securities in a qualified central depository even though, when so deposited, such securities may be merged and held in bulk in the name of the nominee of such depository with other securities deposited therein by another person, or to deposit or arrange for the deposit of any securities issued by the U.S. federal government or any U.S. state government, or any agency or instrumentality thereof, with a Federal Reserve bank having net capital of not less than \$50 million, but the books and records of the Trustee shall at all times show that all such securities are part of the Fund; and

(c) to deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the U.S. federal government.

Section 7. Taxes and Expenses. All taxes of any kind that may be assessed or levied against or in respect of the Fund and all expenses and charges incurred by the Trustee in connection with the administration of the Fund and this Trust shall be paid from the Fund.

Section 8. Annual Valuation. The Trustee shall provide monthly statements to the Grantor. The Trustee upon the direction of the Grantor shall make records available at reasonable times to any entity which the Grantor shall notify the Trustee is authorized to conduct an audit of the Fund. The Trustee shall also provide such information concerning the Fund and this Trust as EPA may request from time to time.

Section 9. Advice of Counsel. The Trustee may from time to time consult with counsel with respect to any question arising as to the construction of this Agreement or any action to be taken hereunder; provided, however, that any counsel retained by the Trustee for such purposes may not, during the period of its representation of the Trustee, serve as counsel to the Grantor.

Section 10. Trustee Compensation. The Trustee shall be entitled to reasonable compensation for its services as agreed upon in writing from time to time with the Grantor and as notified in writing to the Beneficiary.

Section 11. Trustee and Successor Trustee. The Trustee and any replacement Trustee must not be affiliated with the Grantor. The Trustee may resign or the Grantor may replace the Trustee, but such resignation or replacement shall not be effective until the Grantor has appointed a successor trustee and this successor accepts such appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer, and pay over to the successor trustee the funds and properties then constituting the Fund. If for any reason the Grantor cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court of competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the Fund and the Trust in a writing sent to the Grantor, the Beneficiary, and the present Trustee by certified mail no less than 10 days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section shall be paid as provided in Section 7.

Section 12. Instructions to the Trustee. All instructions to the Trustee shall be in writing, signed by such persons as are empowered to act on behalf of the entity giving such instructions. The Trustee shall be fully protected in acting without inquiry on such written instructions given in accordance with the terms of this Agreement. The Trustee shall have no duty to act in the absence of such written instructions, except as expressly provided for herein.

Section 13. Amendment of Agreement. This Agreement may be amended only by an instrument in writing executed by the Grantor and the Trustee, and with the prior written consent of EPA.

Section 14. Irrevocability and Termination. Subject to the right to amend this Agreement as provided in Section 13, this Trust shall be irrevocable and shall continue until terminated upon the earlier to occur of (a) the written direction of the Grantor to terminate which shall include a certification from the Grantor that the Grantor has provided prior written notice to EPA and to the Work Respondents of the Grantor's intent to terminate the Trust and (b) the complete exhaustion of the Fund comprising the Trust as certified in writing by the Trustee to

EPA and the Grantor. Upon termination of the Trust pursuant to Section 14(a), all remaining trust property (if any), less final trust administration expenses, shall be delivered to the Grantor.

Section 15. Immunity and Indemnification. The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust, or in carrying out any directions by the Grantor or the EPA issued in accordance with this Agreement. Grantor shall indemnify and hold harmless the Trustee from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct made by the Trustee in its official capacity by reason of its execution or performance of this Agreement, except those resulting from the Trustee's gross negligence or willful misconduct, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense.

Section 16. Choice of Law. This Agreement shall be administered, construed, and enforced according to the laws of the State of New York.

Section 17. Interpretation. As used in this Agreement, words in the singular include the plural and words in the plural include the singular. The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

Section 18. Notices. All notices and other communications given under this agreement shall be in writing and shall be addressed to the parties as follows or to such other address as the parties shall by written notice designate:

(a) If to the Grantor, to [_____].

(b) If to the Trustee, to [_____].

(c) If to EPA, to EPA Region 2, Remedial Project Manger for the Study Area and EPA Region 2, Office of Regional Counsel contact for the Study Area, at [_____].

(d) If to Work Respondents, to [_____]

[Remainder of page left blank intentionally.]

In Witness Whereof, the parties hereto have caused this Agreement to be executed by their respective officers duly authorized and attested as of the date first above written:

GRANTOR

[Signature of Grantor]
[Name and Title]

State of _____
County of _____

On this [date], before me personally came [name of Grantor official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

TRUSTEE

[Signature of Trustee]
[Name and Title]

State of _____
County of _____

On this [date], before me personally came [name of Trustee official], to me known, who, being by me duly sworn, did depose and say that she/he is [title] of [corporation], the corporation described in and which executed the above instrument; and that she/he signed her/his name thereto.

[Signature of Notary Public]

APPROVED AS TO FORM AND CERTIFIED
AS TO LEGAL AUTHORITY

Acting Corporation Counsel of
The City of New York