

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENESCO INC.,

Defendant.

CIVIL ACTION NO. 09-3917

(Bianco, J.)  
(Locke, M.J.)

**CONSENT JUDGMENT**

TABLE OF CONTENTS

I.	Background.....	1
II.	Jurisdiction.....	3
III.	Parties Bound.....	4
IV.	Definitions .....	4
V.	General Provisions.....	7
VI.	Performance of Work By Settling Defendant.....	8
VII.	Remedy Review.....	12
VIII.	Quality Assurance, Sampling, and Data Analysis .....	12
IX.	Access and Institutional Controls .....	13
X.	Reporting Requirements .....	16
XI.	EPA Approval of Plans and Other Submissions.....	17
XII.	Project Coordinators .....	18
XIII.	Performance Guarantee .....	20
XIV.	Certification of Completion.....	24
XV.	Emergency Response.....	24
XVI.	Payments for Response Costs.....	25
XVII.	Indemnification and Insurance .....	27
XVIII.	Force Majeure .....	28
XIX.	Dispute Resolution.....	29
XX.	Stipulated Penalties.....	31
XXI.	Covenants Not to Sue by Plaintiff.....	35
XXII.	Covenants by Settling Defendant .....	37
XXIII.	Effect of Settlement; Contribution Protection .....	38
XXIV.	Access to Information.....	39
XXV.	Retention of Records .....	40
XXVI.	Notices and Submissions .....	41
XXVII.	Effective Date .....	44
XXVIII.	Retention of Jurisdiction.....	44
XXIX.	Appendices .....	44
XXX.	Community Relations .....	44
XXXI.	Modification .....	45
XXXII.	Lodging and Opportunity for Public Comment.....	45
XXXIII.	Signatories/Service .....	45
XXXIV.	Final Judgment.....	46

I. BACKGROUND

A. The United States of America (“United States” or “Plaintiff”), on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), filed a complaint in this matter pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. §§ 9606, 9607.

B. The United States in its complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the United States Department of Justice (“DOJ”) for response actions at the Fulton Avenue Superfund Site located in Nassau County, New York (“Site”), together with accrued interest; and (2) performance of studies and response work by defendant Genesco Inc. (“Genesco” or “Settling Defendant”) at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”).

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of New York (“State”) on April 10, 2008, of negotiations with potentially responsible parties regarding the implementation of the first operable unit (“OU1”) Remedial Design and OU1 Remedial Action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and be a party to this Consent Judgment.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the United States Fish and Wildlife Service and the National Oceanic and Atmospheric Administration on April 10, 2008, of negotiations with potentially responsible parties regarding the release of hazardous substances at and from the Site that may have resulted in injury to natural resources under federal trusteeship and encouraged the trustee(s) to participate in the negotiation of this Consent Judgment.

E. Settling Defendant, by entering into this Consent Judgment, does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint, nor does it acknowledge that the release or threatened release of hazardous substance(s) at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on March 6, 1998, 63 Fed. Reg. 11332.

G. In response to a release or a substantial threat of a release of a hazardous substance(s) at or from the Site, Settling Defendant commenced a Remedial Investigation and Feasibility Study (“RI/FS”) for the Site pursuant to a 1997 Administrative Order on Consent, Index Number W1-0707-94-08, with the New York State Department of Environmental Conservation (“NYSDEC”).

H. Genesco submitted an RI Report in August of 2005 that was revised and approved by NYSDEC in November of 2005. NYSDEC approved Genesco’s proposed Feasibility Study Report on February 15, 2007. EPA also produced an addendum to the FS Report in February

2007, and became the lead agency for the Site at the conclusion of the RI/FS process.

I. On September 28, 2007, EPA issued an OU1 Record of Decision (“2007 ROD”) in which EPA selected an interim remedial action to be implemented at the Site. The remedy was designated by EPA as “interim” because it focused only on a portion of the groundwater contamination plume at the Site, the tetrachloroethene (“PCE”)-dominant portion, and was not the final groundwater remedy for the Site.

J. On December 14, 2007, the Incorporated Village of Garden City (“Village”) filed a complaint against Settling Defendant and Gordon Atlantic Corporation in the United States District Court for the Eastern District of New York (*Incorporated Village of Garden City v. Genesco Inc. and Gordon Atlantic Corp.*, Civil Action No. 07-CV-5244 (E.D.N.Y.) (JB)), seeking, *inter alia*, injunctive relief and damages regarding the disposal of hazardous substances at the Site.

K. On September 10, 2009, the United States filed for public comment, in the United States District Court for the Eastern District of New York (Bianco, J.), a proposed Consent Judgment in which Settling Defendant agreed to implement the remedy selected in the 2007 ROD. Settling Defendant began the design of that remedy after the Consent Judgment was filed.

L. On October 19, 2009, the Village submitted to the United States comments on the proposed Consent Judgment that requested certain changes to the proposed settlement.

M. On June 17, 2011, the United States filed a Motion to Enter Consent Judgment.

N. On February 17, 2012, the Court, *sua sponte*, issued an order terminating, without prejudice, the United States’ Motion to Enter Consent Judgment. The Court issued its order due to ongoing settlement discussions among the United States, Settling Defendant and the Village regarding the Village’s potential intervention in this case.

O. In March of 2012, while the remedial design of the 2007 ROD was underway, Settling Defendant and the Village jointly proposed to EPA certain modifications to the 2007 ROD that would, among other things, eliminate the 2007 ROD’s separate groundwater extraction and treatment system and provide for the continued operation of the wellhead treatment systems on Village water supply wells 13 and 14. Settling Defendant and the Village also recommended the elimination of in-situ chemical oxidation (“ISCO”) treatment of contamination that was called for by the 2007 ROD.

P. Following EPA’s review of the information provided by Settling Defendant and the Village, and after EPA’s further evaluation of conditions at the Site, EPA determined that it would be appropriate to amend the 2007 ROD.

Q. Pursuant to Section 117(a) of CERCLA, 42 U.S.C. § 9617(a) and Section 300.435(c)(2)(ii) of the NCP, 40 C.F.R. § 300.435(c)(2)(ii), on April 24, 2015, EPA published, in a major local newspaper of general circulation, notice of a proposed plan that identified EPA’s proposed amendments to the 2007 ROD. EPA provided the public with the opportunity to submit written and oral comments on the proposed plan during a public comment period that ran from April 24, 2015 to May 26, 2015.

R. On September 30, 2015, EPA issued an OU1 Record of Decision Amendment

(“Amended OU1 ROD”) in which EPA selected an amended interim OU1 remedy for the Site eliminating the separate groundwater extraction and treatment system and ISCO, and calling for the continued operation of the current treatment systems on Village water supply wells 13 and 14. The Amended OU1 ROD includes a responsiveness summary in which EPA responded to public comments raised during the public comment period. EPA published a notice of the Amended OU1 ROD in accordance with Section 117(b) of CERCLA.

S. Concurrently with the lodging of this Consent Judgment, Settling Defendant and the Village filed with the Court a settlement agreement in *Incorporated Village of Garden City v. Genesco, et al.*, Civil Action No. 07-CV-5244 (E.D.N.Y.) (the “Settlement Agreement”) which provides, *inter alia*, that, in exchange for Genesco’s payment of a specified sum of money, the Village will, among other things, cover all costs associated with the pumping, treatment, operation, maintenance, repair, and replacement (hereinafter, collectively referred to as, “operation”) of equipment, as necessary, on Village water supply wells 13 and 14 as called for in the Amended OU1 ROD for a period of 30 years (or less if EPA agrees that the maximum contaminant levels for chlorinated solvents pursuant to 40 C.F.R. § 141.61(a) have been met and the requirements of the Amended OU1 ROD have been satisfied). The Village also agreed to operate Village water supply wells 13 and 14 for such 30 year period at pumping levels consistent with the 2009 operation of those wells, “and not to take any action that would reduce the volume, level of treatment or hydraulic control” at the wells except with the consent of EPA.

T. This Consent Judgment requires Settling Defendant to implement and/or ensure implementation of the Amended OU1 ROD, and supersedes the proposed 2009 Consent Judgment.

U. Based on the information presently available to EPA, EPA believes that the Work (as defined below) will be properly and promptly conducted by Settling Defendant if conducted in accordance with the requirements of this Consent Judgment and its appendices.

V. Solely for the purposes of Section 113(j) of CERCLA, the OU1 remedy selected in the Amended OU1 ROD and the Work to be performed by Settling Defendant shall constitute a response action taken or ordered by the President.

W. The Parties recognize, and the Court by entering this Consent Judgment finds, that this Consent Judgment has been negotiated by the Parties in good faith and implementation of this Consent Judgment will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Judgment is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Judgment

and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Judgment or this Court's jurisdiction to enter and enforce this Consent Judgment.

### III. PARTIES BOUND

2. This Consent Judgment applies to and is binding upon the United States and upon Settling Defendant and its heirs, successors and assigns. Any change in ownership or corporate status of Settling Defendant including, but not limited to, any transfer of assets or real or personal property, shall in no way alter Settling Defendant's responsibilities under this Consent Judgment.

3. Settling Defendant shall provide a copy of this Consent Judgment to each contractor hired to perform the Work (as defined below) required by this Consent Judgment and to each person representing Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Judgment. Settling Defendant or its contractors shall provide written notice of the Consent Judgment to all subcontractors hired to perform any portion of the Work required by this Consent Judgment. Settling Defendant shall nonetheless be responsible for ensuring that its contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Judgment. With regard to the activities undertaken pursuant to this Consent Judgment, each contractor and subcontractor shall be deemed to be in a contractual relationship with Settling Defendant within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Judgment which 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 Consent Judgment or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"Amended OU1 Record of Decision" or "Amended OU1 ROD" shall mean the EPA Record of Decision Amendment relating to OU1 for the Site signed on September 30, 2015, by the Director of the Emergency and Remedial Response Division, EPA Region 2, and all attachments thereto. The Amended OU1 ROD is attached as Appendix A of this Consent Judgment.

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

"Consent Judgment" shall mean this Consent Judgment and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Consent Judgment and any appendix, this Consent Judgment shall control.

“Day” shall mean a calendar day unless expressly stated to be a working day. “Working day” shall mean a day other than a Saturday, Sunday, or federal holiday. In computing any period of time under this Consent Judgment, 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.

“Effective Date” shall be the effective date of this Consent Judgment as provided in Section XXVII.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States. “Fulton Property” shall mean the property located at 150 Fulton Avenue, Village of Garden City Park, Town of North Hempstead, New York.

“Future Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Judgment, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Judgment. Future Response Costs also include, but are not limited to, all costs that EPA incurs to conduct an investigation of vapor intrusion into structures that potentially could be affected by the PCE-dominant portion of the groundwater contamination plume at the Site, all costs that EPA incurs to evaluate the potential for vapor intrusion into new construction at the Site, and implementation of appropriate response actions(s) for vapor intrusion with respect to such structures or new construction, where such structures or new construction are located within the area bounded by Broadway Avenue to the north, the Long Island Rail Road tracks to the south, Nassau Boulevard to the west, and Armstrong Road (including the building located at 198-200 Armstrong Road) to the east. Future Response Costs also include, but are not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 83 of Section XXI. Future Response Costs shall also include all Interim Response Costs.

“Interim Response Costs” shall mean all costs, including direct and indirect costs, (a) paid by the United States in connection with the Site between March 1, 2008, and the Effective Date, or (b) incurred prior to the Effective Date but paid after that date.

“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.

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

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

“Operable Unit 1” or “OU1” shall mean the amended interim remedy selected in the

Amended OU1 ROD to address the PCE-dominant portion of the groundwater contamination at the Site.

“Operation and Maintenance” or “O&M” shall mean all activities required to maintain the effectiveness of the OU1 remedy, after EPA determines that the treatment systems on Village of Garden City water supply wells 13 and 14 are Operational and Functional.

“Operational and Functional” shall mean that the OU1 Remedial Action is functioning properly and performing as designed, as determined by EPA.

“OU1 Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by Settling Defendant to implement the Amended OU1 ROD, in accordance with the SOW and the final OU1 Remedial Design and OU1 Remedial Action work plans and other plans approved by EPA.

“OU1 Remedial Design” shall mean those activities to be undertaken by Settling Defendant to develop the final plans and specifications for the OU1 Remedial Action pursuant to the OU1 Remedial Design work plans.

“OU1 Remedy” shall mean the OU1 Remedial Design, OU1 Remedial Action and O&M.

“Paragraph” shall mean a portion of this Consent Judgment identified by an Arabic numeral or an upper case letter.

“Parties” shall mean the United States and Genesco.

“Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the OU1 Remedial Action, set forth in Section II of the SOW.

“Plaintiff” shall mean the United States.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 - 6992k (also known as the Resource Conservation and Recovery Act).

“Section” shall mean a portion of this Consent Judgment identified by a Roman numeral.

“Settling Defendant” shall mean Genesco Inc.

“Site” shall mean the Fulton Avenue Superfund Site, located in central Nassau County, New York, including the property located at 150 Fulton Avenue, Village of Garden City Park, Town of North Hempstead, New York, and all areas to which contamination has migrated. The Site is depicted generally on the map attached hereto as Appendix C.

“State” shall mean the State of New York.

“Statement of Work” or “SOW” shall mean the statement of work for implementation of the OU1 Remedial Design, OU1 Remedial Action, and Operation and Maintenance for OU1 at the Site, as set forth in Appendix B to this Consent Judgment and any modifications made in accordance with this Consent Judgment.

“Supervising Contractor” shall mean the principal contractor retained by Settling Defendant to supervise and direct the implementation of the Work under this Consent Judgment.

“United States” shall mean the United States of America.



“Village” shall mean the Incorporated Village of Garden City, Nassau County, New York.

“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), 42 U.S.C. § 9601(33); and (3) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

“Work” shall mean all activities Settling Defendant is required to perform or ensure to be performed under this Consent Judgment, except those required by Section XXV (Retention of Records).

## V. GENERAL PROVISIONS

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Judgment are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by Settling Defendant, to reimburse response costs of Plaintiff, and to resolve the claims of Plaintiff against Settling Defendant as provided in this Consent Judgment.

6. Commitments by Settling Defendant. Settling Defendant shall perform or otherwise ensure performance of the Work in accordance with this Consent Judgment, the Amended OU1 ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendant and approved by EPA pursuant to this Consent Judgment. Settling Defendant shall also reimburse the United States for Future Response Costs as provided in this Consent Judgment.

7. Compliance with Applicable Law. All activities undertaken by Settling Defendant pursuant to this Consent Judgment shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendant must also comply with all applicable or relevant and appropriate requirements of all federal and state environmental laws as set forth in the Amended OU1 ROD and the SOW. The activities conducted pursuant to this Consent Judgment, if approved by EPA, shall be considered to be consistent with the NCP.

### 8. Permits

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-Site (*i.e.*, within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-Site requires a federal or state permit or approval, Settling Defendant shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Judgment for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Judgment is not, and shall not be construed to be, a permit

issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title

a. Notice to Successors-in-Title

With respect to any property owned or controlled by Settling Defendant that is located within the Site, within 15 days after the entry of this Consent Judgment, Settling Defendant shall submit to EPA for review and approval a notice to be filed with the Nassau County Clerk's Office, State of New York, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA selected an OU1 Remedy for the Site on September 30, 2015, and that a potentially responsible party has entered into a Consent Judgment requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Judgment was filed, the name and civil action number of this case, and the date the Consent Judgment was entered by the Court. Settling Defendant shall record the notice(s) within ten days of EPA's approval of the notice(s). Settling Defendant shall provide EPA with a certified copy of the recorded notice(s) within ten days of recording such notice(s).

b. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, Settling Defendant shall give the grantee written notice of (i) this Consent Judgment, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site ("Access Easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property ("Easements/Covenants") pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, Settling Defendant shall also give written notice to EPA and the State of New York that the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Judgment, Access Easements, and/or Easements/Covenants was given to the grantee.

c. In the event of any such conveyance, Settling Defendant's obligations under this Consent Judgment, including, but not limited to, its obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Judgment, shall continue to be met by Settling Defendant. In no event shall the conveyance release or otherwise affect the liability of Settling Defendant to comply with all provisions of this Consent Judgment, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Judgment.

VI. PERFORMANCE OF WORK BY SETTLING DEFENDANT

10. Selection of Supervising Contractor

a. All aspects of the Work to be performed by Settling Defendant pursuant to Sections VI (Performance of the Work by Settling Defendant), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this

Consent Judgment shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA. The Supervising Contractor, as well as all other contractors and subcontractors who engage in the “practice of engineering” at the Site on behalf of Respondent (as the “practice of engineering” is defined at Section 7201 of the New York State Education Law), must comply with all applicable New York State legal requirements regarding the practice of engineering within the State of New York, including all applicable requirements of the New York State Education Law and Business Corporation Law. On November 19, 2009, EPA approved Environmental Resources Management, Inc. (“ERM”), as Settling Defendant’s Supervising Contractor and issued an authorization to proceed. If at any time Settling Defendant proposes to change its Supervising Contractor, Settling Defendant shall give such notice to EPA and must obtain an authorization to proceed from EPA before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Judgment.

b. If EPA disapproves a proposed new Supervising Contractor, EPA will notify Settling Defendant in writing. Settling Defendant shall submit to EPA a list of contractors, including the qualifications of each contractor that would be acceptable to it, within 30 days of receipt of EPA’s disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendant may select any contractor for which EPA has provided an authorization to proceed and shall notify EPA of the name of the contractor selected within 21 working days of EPA’s authorization to proceed.

c. If EPA fails to provide written notice of an authorization to proceed or disapproval as provided in this Paragraph and this failure prevents Settling Defendant from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Judgment, Settling Defendant may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

11. OU1 Remedial Design/OU1 Remedial Action. Settling Defendant shall fully implement and comply with the SOW which is attached hereto as Appendix B. The Work to be performed or ensured to be performed by Settling Defendant pursuant to this Consent Judgment shall at a minimum achieve the requirements of, and be performed in a manner consistent with, the Amended OU1 ROD and this Consent Judgment. Settling Defendant shall ensure the continued pumping of Village water supply wells 13 and 14, regardless of whether the Village requires such wells as a potable water source.

12. Performance of O&M. Settling Defendant shall perform or otherwise ensure the performance of O&M in accordance with the SOW.

13. Modification of the SOW or Related Work Plans

a. If EPA determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the Amended OU1 ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the Amended OU1 ROD.

b. For the purposes of this Paragraph 13 only, the “scope of the remedy selected in the Amended OU1 ROD” is:

(1) Continued O&M of the air stripping treatment systems currently installed on Village water supply wells 13 and 14 in order to protect the public from exposure to Site-related volatile organic compounds (“VOCs”), including PCE, in groundwater entering those wells. These treatment systems will be maintained and replaced or upgraded as needed in order to ensure that water distributed to the public from Village water supply wells 13 and 14 complies with applicable or relevant and appropriate requirements (“ARARs”), including the federal maximum contaminant levels (“MCLs”) under the federal Safe Drinking Water Act or, if more stringent, New York State drinking water standards at 10 NYCRR Part 5, Subpart 5-1. If needed, a vapor-phase carbon unit will be added to capture and treat VOCs being discharged from the air stripper treatment units. The pumping of Village water supply wells 13 and 14 provides an incidental benefit of helping to reduce the mobility of contaminants in the OU1 portion of the plume. The Amended OU1 ROD assumes the continued operation of Village water supply wells 13 and 14 until those wells no longer are impacted by contaminants above the MCLs for PCE and trichloroethylene (“TCE”).

(2) Institutional controls in the form of local laws that restrict future use of groundwater at the Site and limit exposure at the commercial facility located at the Fulton Property, a source of the groundwater contamination at the Site. Specifically, the Nassau County Sanitary Code regulates installation of private potable water supply wells in Nassau County. In addition, the commercial facility at the Fulton Property is zoned for industrial use, and EPA does not anticipate any changes to the land use in the foreseeable future. If a change in land use is proposed, additional investigation of soils may be necessary to determine whether the change in land use could affect exposure risks at the Fulton Property.

(3) A vapor intrusion evaluation of structures that are in the vicinity of the Fulton Property and that could potentially be affected by the OU1 portion of the groundwater contamination plume. An appropriate response action (such as sub-slab ventilation systems) may need to be implemented based on the results of the investigation. As part of O&M, the existing sub-slab ventilation system at the Fulton Property will continue to be operated and maintained.

(4) A site management plan (“SMP”) that will provide for the proper management of all OU1 Remedy components, including compliance with institutional controls. The SMP will include: (a) O&M of the treatment systems on Village water supply wells 13 and 14 as well as monitoring of Site groundwater upgradient, sidegradient and downgradient of Village water supply wells 13 and 14; (b) conducting an evaluation of the potential for vapor intrusion, and an appropriate response action, if necessary, in the event of future construction at the Fulton Property; and (c) periodic certifications by the party(ies) implementing the remedy that any institutional and engineering controls are in place and being complied with.

c. If Settling Defendant objects to any modification of the SOW or a work plan developed pursuant to the SOW that is determined by EPA to be necessary pursuant to this Paragraph, it may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 66 (record review). The SOW and/or related work plans shall be modified in accordance with the final resolution of the dispute.

d. Settling Defendant shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph, except that Settling Defendant shall not be required pursuant to this Paragraph to conduct an evaluation and/or investigation of the potential for vapor intrusion, or mitigation and/or implementation of a remedy with regard to such vapor intrusion, pursuant to subparagraphs 13.b(3) and 13.b(4), above, with the exception of O&M of the existing sub-slab ventilation system at the Fulton Property.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Judgment.

14. If EPA determines that repair, replacement or upgrades are needed for the treatment systems on Village water supply wells well 13 and 14, as called for in the Amended OUI ROD, Settling Defendant shall seek the cooperation of and coordinate with the Village of Garden City to ensure that such repair, replacement or upgrades are implemented.

15. Settling Defendant acknowledges and agrees that nothing in this Consent Judgment, or the SOW constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW will achieve the Performance Standards.

16. Settling Defendant shall, prior to any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. 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. Settling Defendant shall include in the written notification the following information, where available: (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. Settling Defendant 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 Settling Defendant following the award of the contract for OUI Remedial Action construction. Settling Defendant shall provide the information required by Paragraph 16.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

c. Before shipping any hazardous substances, pollutants, or contaminants from the Site to an off-Site location, Settling Defendant shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendant shall only send hazardous substances, pollutants, or contaminants from the Site to an off-Site facility that complies with the requirements of the statutory provision and regulations cited in the preceding sentence.

## VII. REMEDY REVIEW

17. Periodic Review. Settling Defendant shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the OU1 Remedial Action is protective of human health and the environment at least every 5 years, as required by Section 121(c) of CERCLA and any applicable regulations.

18. EPA Selection of Further Response Actions. If EPA determines, at any time, that the OU1 Remedial Action is not protective of human health and the environment, EPA may select further response actions for OU1 in accordance with the requirements of CERCLA and the NCP.

19. Opportunity To Comment. Settling Defendant and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA and to submit written comments for the record during the comment period.

## VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS

20. Settling Defendant shall use quality assurance, quality control, and chain of custody procedures for all design, compliance and monitoring samples in accordance with the procedures set forth in the Quality Assurance/Quality Control Project Plan (“QAPP”) approved by EPA (*see* SOW, Section IV.A.). If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Consent Judgment.

21. Upon request, Settling Defendant shall allow split or duplicate samples to be taken by EPA and its authorized representatives. Settling Defendant shall notify EPA and the State not less than 28 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow Settling Defendant to take split or duplicate samples of any samples it takes as part of Plaintiff’s oversight of Settling Defendant’s implementation of the Work.

22. Settling Defendant shall submit to EPA, in electronic format acceptable to EPA, the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendant with respect to the Site and/or the implementation of this Consent Judgment within 15 working days of the date when those results or data become available to Settling Defendant, unless EPA agrees otherwise.

23. Notwithstanding any provision of this Consent Judgment, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

IX. ACCESS AND INSTITUTIONAL CONTROLS

24. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Judgment, is owned or controlled by Settling Defendant, Settling Defendant shall:

a. commencing on the date of lodging of this Consent Judgment, provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Judgment including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved QAPP;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 83 (Work Takeover) of this Consent Judgment;
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendant or its agents, consistent with Section XXIV (Access to Information);
- (9) Assessing Settling Defendant's compliance with this Consent Judgment; and
- (10) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Judgment.

b. commencing on the date of lodging of this Consent Judgment, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Judgment.

c. if EPA so requests, execute and record in the Nassau County Clerk's Office, State of New York, an easement/covenant, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Judgment including, but not limited to, those activities listed in Paragraph 24.a. of this Consent Judgment, and (ii) grants the right to enforce restrictions on use of the property pursuant to Paragraph 24.b. of this Consent Judgment, or other restrictions that EPA determines are necessary to implement, ensure

non-interference with, or ensure the protectiveness of the remedial measures to be performed in accordance with this Consent Judgment. Settling Defendant shall grant the access rights and the rights to enforce the land/water use restrictions to one or more of the following persons: (i) the State and its representatives, (ii) other potentially responsible parties for the Site who perform response actions at the Site under EPA direction, and/or (iii) other appropriate grantees. Settling Defendant shall, within 45 days of EPA's request, submit to EPA for review and approval with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix D, that is enforceable under the laws of the State of New York, and

(2) A current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, record the easement with the Nassau County Clerk's Office. Within 30 days of recording the easement, Settling Defendant shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps.

25. If the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Judgment, is owned or controlled by persons other than Settling Defendant, Settling Defendant shall use best efforts to secure from such persons:

a. an agreement to provide access thereto for Settling Defendant, as well as for the United States on behalf of EPA, and the State, as well as their representatives (including contractors), for the purpose of conducting any activity related to this Consent Judgment including, but not limited to, those activities listed in Paragraph 24.a. of this Consent Judgment;

b. an agreement, enforceable by Settling Defendant and the United States, to refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the remedial measures to be performed pursuant to this Consent Judgment; and

c. if EPA so requests, the execution and recordation in the Nassau County Clerk's Office, State of New York, of an easement/covenant, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Judgment including, but not limited to, those activities listed in Paragraph 24.a. of this Consent Judgment, and (ii) grants the right to enforce the restrictions on use of the property pursuant to Paragraph 24.b of this Consent Judgment, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the remedial measures to be performed pursuant to this Consent Judgment. The access rights and/or rights to enforce land/water use restrictions shall be granted to one or more of the following persons, as



determined by EPA: (i) the United States, on behalf of EPA, and its representatives, (ii) the State and its representatives, (iii) other potentially responsible parties for the Site who perform response actions at the Site under EPA direction, and/or (iv) other appropriate grantees. Within 45 days of EPA's request, Settling Defendant shall submit to EPA for review and approval with respect to such property:

(1) A draft easement, in substantially the form attached hereto as Appendix D, that is enforceable under the laws of the State of New York, and

(2) A current title insurance commitment, or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Settling Defendant is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendant shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, the easement shall be recorded with the Nassau County Clerk's Office. Within 30 days of the recording of the easement, Settling Defendant shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps.

26. For purposes of Paragraphs 24 and 25 of this Consent Judgment, "best efforts" includes the payment of reasonable sums of money in consideration of access, access easements, land/water use restrictions, restrictive easements, and/or an agreement to release or subordinate a prior lien or encumbrance. If (a) any access or land/water use restriction agreements required by Paragraphs 25.a. or 25.b. of this Consent Judgment are not obtained within 45 days of the date of completion of the OUI Remedial Action, (b) or any access easements or restrictive easements required by Paragraph 25.c. of this Consent Judgment are not submitted to EPA in draft form within 45 days of EPA's request, or (c) Settling Defendant is unable to obtain an agreement pursuant to Paragraph 24.c(1) or Paragraph 25.c(1) from the holder of a prior lien or encumbrance to release or subordinate such lien or encumbrance to the easement being created pursuant to this Consent Judgment within 45 days of the date of entry of EPA's request, Settling Defendant shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendant has taken to attempt to comply with Paragraph 24 or 25 of this Consent Judgment. The United States may, as it deems appropriate, assist Settling Defendant in obtaining access or land/water use restrictions, either in the form of contractual agreements or in the form of easements running with the land, or in obtaining the release or subordination of a prior lien or encumbrance. Settling Defendant shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such access, land/water use restrictions, and/or the release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid or just compensation.

27. If EPA determines that land/water use restrictions in the form of new state or local

laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the Amended OUI ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendant shall cooperate with EPA's efforts to secure such governmental controls.

28. Notwithstanding any provision of this Consent Judgment, the United States retains all of its access authorities and rights, as well as all of its rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### X. REPORTING REQUIREMENTS

29. In addition to any other requirement of this Consent Judgment, Settling Defendant shall submit to EPA and the State written quarterly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Judgment during the previous quarter; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendant or its contractors or agents in the previous quarter; (c) identify all work plans, plans and other deliverables required by this Consent Judgment completed and submitted during the previous quarter; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next eighteen (18) weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendant has proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the community relations plan during the previous quarter and those to be undertaken in the next eighteen (18) weeks. Settling Defendant shall submit these progress reports to EPA and the State by the tenth day of every quarter following the lodging of this Consent Judgment until EPA notifies Settling Defendant pursuant to Paragraph 50.b. of Section XIV (Certification of Completion). If requested by EPA, Settling Defendant shall also provide briefings for EPA to discuss the progress of the Work.

30. Settling Defendant shall notify EPA of any change in the schedule described in the quarterly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than 7 days prior to the performance of the activity.

31. Upon the occurrence of any event during performance of the Work that Settling Defendant is required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act ("EPCRA"), Settling Defendant shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available the Chief of the Response and Prevention Branch of the Emergency and Remedial Response Division of EPA, Region 2, at (732) 321-6656, or, if such person or his/her

delegate is unavailable, the EPA Region 2 Emergency 24-hour Hot Line at (732) 548-8730. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

32. Within 20 days of the onset of such an event, Settling Defendant shall furnish to EPA a written report, signed by Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendant shall submit a report setting forth all actions taken in response thereto.

33. Settling Defendant shall submit electronic copies of all plans, reports, and data required by the SOW or any other approved plans to EPA in accordance with the schedules set forth in such plans, and in accordance with the technical specifications for electronic submission of sampling, monitoring, and spatial data specified in SOW Section IV.A. Upon request by EPA, Settling Defendant shall also provide to EPA and the State, paper copies of plans, reports or data specified by EPA. Settling Defendant shall simultaneously submit copies of all such plans, reports and data to the State.

34. All reports and other documents submitted by Settling Defendant to EPA (other than the quarterly progress reports referred to above) which purport to document Settling Defendant's compliance with the terms of this Consent Judgment shall be signed by an authorized representative of Settling Defendant.

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

35. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Judgment, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that Settling Defendant modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendant at least one notice of deficiency and an opportunity to cure within 10 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 and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

36. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 35(a), (b), or (c), Settling Defendant shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to its right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 35(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

37. Resubmission of Plans

a. Upon receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall, within 14 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX, shall accrue during the 14-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 38 and 39.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 35(d), Settling Defendant shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendant of any liability for stipulated penalties under Section XX (Stipulated Penalties).

38. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require Settling Defendant to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendant shall implement any such plan, report, or item as modified or developed by EPA, subject only to its right to invoke the procedures set forth in Section XIX (Dispute Resolution).

39. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendant shall be deemed to have failed to submit such plan, report, or item timely and adequately unless Settling Defendant invokes the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (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 upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX.

40. All plans, reports, and other items required to be submitted to EPA under this Consent Judgment shall, upon approval or modification by EPA, be enforceable under this Consent Judgment. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Judgment, the approved or modified portion shall be enforceable under this Consent Judgment.

XII. PROJECT COORDINATORS

41. Settling Defendant and EPA have designated the following persons as their respective Project Coordinators and Alternate Project Coordinators:

As to Settling Defendant:

Project Coordinator:

Chris Wenczel  
Principal Consultant  
ERM Consulting and Engineering  
105 Maxess Road, Ste. 316  
Melville, NY 11747-3851  
[chris.wenczel@erm.com](mailto:chris.wenczel@erm.com)  
(631) 756-8921

Alternate Project Coordinator:

Jim Perazzo  
Principal  
ERM Consulting and Engineering  
105 Maxess Road, Ste. 316  
Melville, NY 11747-3851  
[jim.perazzo@erm.com](mailto:jim.perazzo@erm.com)  
(631) 756-8913

As to EPA:

Project Coordinator:

Kevin Willis  
Remedial Project Manager  
New York Remediation Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 20<sup>th</sup> Floor  
New York, N.Y. 10007-1866  
[willis.kevin@epa.gov](mailto:willis.kevin@epa.gov)  
(212) 637-4252

Alternate Project Coordinator:

Salvatore Badalamenti  
Section Chief  
Eastern New York Remediation Section  
New York Remediation Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 20<sup>th</sup> Floor  
New York, N.Y. 10007-1866  
[badalamenti.salvatore@epa.gov](mailto:badalamenti.salvatore@epa.gov)  
(212) 637-3314

If a Project Coordinator or Alternate Project Coordinator designated above is changed, the identity of the successor will be given to the other Party at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. Settling Defendant's Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. Settling Defendant's Project Coordinator shall not be an attorney. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

42. Plaintiff may designate other representatives, including, but not limited to, EPA employees, and federal contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Judgment. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Judgment and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

43. EPA's Project Coordinator and Settling Defendant's Project Coordinator will meet, at a minimum, on a monthly basis.

### XIII. PERFORMANCE GUARANTEE

44. In order to ensure the full and final completion of the Work, Settling Defendant shall establish and maintain a performance guarantee for the benefit of EPA ("Performance Guarantee") in the initial amount of \$4,039,188 ("Estimated Cost of the Work") in one or more of the following forms, which must be satisfactory in form and substance to EPA:

- a. A surety bond unconditionally guaranteeing payment and/or performance of the Work that is issued by a surety company among those listed as acceptable sureties on federal bonds as set forth in Circular 570 of the U.S. Department of the Treasury;
- b. One or more irrevocable letters of credit, payable to or at the direction of EPA, that is issued by one or more financial institution(s) (i) that has the authority to issue letters of credit and (ii) whose letter-of-credit operations are regulated and examined by a U.S. Federal or State agency;
- c. A trust fund established for the benefit of EPA that is administered by a trustee (i) that has the authority to act as a trustee and (ii) whose trust operations are regulated and examined by a U.S. Federal or State agency;
- d. A policy of insurance that (i) provides EPA with acceptable rights as a beneficiary thereof; and (ii) is issued by an insurance carrier (a) that has the authority to issue insurance policies in the applicable jurisdiction(s) and (b) whose insurance operations are

regulated and examined by a State agency;

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

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

45. Settling Defendant has proposed, and EPA will consider, as an initial Performance Guarantee, a demonstration by Settling Defendant that it meets the financial test in accordance with Paragraph 44.e. Within 30 days after the Effective Date, or 30 days after EPA’s approval of the form and substance of Settling Defendant’s Performance Guarantee, whichever is later, Settling Defendant shall secure all executed and/or otherwise finalized mechanisms or other documents consistent with the EPA-approved form of financial assurance and shall submit such mechanisms and documents to the United States, and to EPA as specified in Section XXVI (Notices and Submissions).

46. If at any time during the effective period of this Consent Judgment, Settling Defendant provides a Performance Guarantee for completion of the Work by means of a demonstration or guarantee pursuant to Paragraph 44(e) or Paragraph 44(f), above, Settling Defendant shall also comply with the other relevant requirements of 40 C.F.R. § 264.143(f), 40 C.F.R. § 264.151(f), and 40 C.F.R. § 264.151(h)(1) relating to these methods unless otherwise provided in this Consent Judgment, including but not limited to: (i) the initial submission of required financial reports and statements from the relevant entity’s chief financial officer and independent certified public accountant; and (ii) the annual re-submission of such reports and statements within 90 days after the close of any fiscal year in which such entity no longer satisfies the financial test requirements set forth at 40 C.F.R. § 264.143(f)(1). For purposes of the Performance Guarantee methods specified in this Section XIII, references in 40 C.F.R. Part 264, Subpart H, to “closure”, “post-closure”, and “plugging and abandonment” shall be deemed to refer to the Work required under this Consent Judgment, and the terms “current closure cost estimate”, “current post-closure cost estimate”, and “current plugging and abandonment cost estimate” shall be deemed to refer to the Estimated Cost of the Work.

47. In the event that EPA determines at any time that a Performance Guarantee provided by Settling Defendant pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, or in the event that Settling Defendant becomes aware of information indicating that a Performance Guarantee provided pursuant to this Section is inadequate or otherwise no longer satisfies the requirements set forth in this Section, whether due to an increase in the estimated cost of completing the Work or for any other reason, Settling Defendant, within 30 days of receipt of notice of EPA’s determination or, as the case

may be, within 30 days of Settling Defendant becoming aware of such information, shall obtain and present to EPA for approval a proposal for a revised or alternative form of Performance Guarantee listed in Paragraph 44 of this Consent Judgment that satisfies all requirements set forth in this Section XIII. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendant shall follow the procedures set forth in Paragraph 49.b(2) of this Consent Judgment. Settling Defendant's inability to post a Performance Guarantee for completion of the Work shall in no way excuse performance of any other requirements of this Consent Judgment, including, without limitation, the obligation of Settling Defendant to complete the Work in strict accordance with the terms hereof.

48. The commencement of any Work Takeover pursuant to Paragraph 83 of this Consent Judgment shall trigger EPA's right to receive the benefit of any Performance Guarantee(s) provided pursuant to Paragraph 44(a), (b), (c), (d), or (f), and at such time EPA shall have immediate access to resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, as needed to continue and complete the Work assumed by EPA under the Work Takeover. If for any reason EPA is unable to promptly secure the resources guaranteed under any such Performance Guarantee(s), whether in cash or in kind, necessary to continue and complete the Work assumed by EPA under the Work Takeover, or in the event that the Performance Guarantee involves a demonstration of satisfaction of the financial test criteria pursuant to Paragraph 44.e., Settling Defendant shall immediately upon written demand from EPA deposit into an account specified by EPA, in immediately available funds and without setoff, counterclaim, or condition of any kind, a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed as of such date, as determined by EPA.

49. Modification of Amount and/or Form of Performance Guarantee

a. Reduction of Amount of Performance Guarantee. If Settling Defendant believes that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 44 above, Settling Defendant may, on any anniversary date of entry of this Consent Judgment, or at any other time agreed to by the Parties, petition EPA in writing to request a reduction in the amount of the Performance Guarantee provided pursuant to this Section so that the amount of the Performance Guarantee is equal to the estimated cost of the remaining Work to be performed. Settling Defendant shall submit a written proposal for such reduction to EPA that shall specify, at a minimum, the cost of the remaining Work to be performed and the basis upon which such cost was calculated. In seeking approval for a revised or alternative form of Performance Guarantee, Settling Defendant shall follow the procedures set forth in Paragraph 49.b(2) of this Consent Judgment. If EPA decides to accept such a proposal, EPA shall notify Settling Defendant of such decision in writing. After receiving EPA's written acceptance, Settling Defendant may reduce the amount of the Performance Guarantee in accordance with and to the extent permitted by such written acceptance. In the event of a dispute, Settling Defendant may reduce the amount of the Performance Guarantee required hereunder only in accordance with a final administrative or judicial decision resolving such dispute. No change to the form or terms of any Performance Guarantee provided under this Section, other than a reduction in amount, is authorized except as provided in Paragraphs 47 or 49.c. of this Consent Judgment.



b. Change of Form of Performance Guarantee

(1) If, after entry of this Consent Judgment, Settling Defendant desires to change the form or terms of any Performance Guarantee(s) provided pursuant to this Section, Settling Defendant may, on any anniversary date of entry of this Consent Judgment, or at any other time agreed to by the Parties, petition EPA in writing to request a change in the form of the Performance Guarantee provided hereunder. The submission of such proposed revised or alternative form of Performance Guarantee shall be as provided in Paragraph 49.b(2). of this Consent Judgment. Any decision made by EPA on a petition submitted under this subparagraph 49.b(1) shall be made in EPA's sole and unreviewable discretion, and such decision shall not be subject to challenge by Settling Defendant pursuant to the dispute resolution provisions of this Consent Judgment or in any other forum.

(2) Settling Defendant shall submit a written proposal for a revised or alternative form of Performance Guarantee to EPA which shall specify, at a minimum, the estimated cost of the remaining Work to be performed, the basis upon which such cost was calculated, and the proposed revised form of Performance Guarantee, including all proposed instruments or other documents required in order to make the proposed Performance Guarantee legally binding. The proposed revised or alternative form of Performance Guarantee must satisfy all requirements set forth or incorporated by reference in this Section. Settling Defendant shall submit such proposed revised or alternative form of Performance Guarantee to the EPA's Fulton Avenue Superfund Site Attorney in accordance with Section XXVI (Notices and Submissions) of this Consent Judgment. EPA shall notify Settling Defendant in writing of its decision to accept or reject a revised or alternative Performance Guarantee submitted pursuant to this subparagraph. Within 10 days after receiving a written decision approving the proposed revised or alternative Performance Guarantee, Settling Defendant shall execute and/or otherwise finalize all instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding in a form substantially identical to the documents submitted to EPA as part of the proposal, and such Performance Guarantee(s) shall thereupon be fully effective. Settling Defendant shall submit all executed and/or otherwise finalized instruments or other documents required in order to make the selected Performance Guarantee(s) legally binding to EPA's Fulton Avenue Superfund Site Attorney within 30 days of receiving a written decision approving the proposed revised or alternative Performance Guarantee in accordance with Section XXVI (Notices and Submissions) of this Consent Judgment and to the United States and EPA as specified in Section XXVI.

c. Release of Performance Guarantee. If Settling Defendant receives written notice from EPA in accordance with Paragraph 50.b. hereof that the Work has been fully and finally completed in accordance with the terms of this Consent Judgment, or if EPA otherwise so notifies Settling Defendant in writing, Settling Defendant may thereafter release, cancel, or discontinue the Performance Guarantee(s) provided pursuant to this Section. Settling Defendant shall not release, cancel, or discontinue any Performance Guarantee provided pursuant to this Section except as provided in this subparagraph. In the event of a dispute, Settling Defendant may release, cancel, or discontinue the Performance Guarantee(s) required hereunder only in accordance with a final administrative or judicial decision resolving such dispute.

XIV. CERTIFICATION OF COMPLETION

50. Completion of the Work

a. Within 90 days after Settling Defendant concludes that all phases of the Work (including Settling Defendant's obligations to perform O&M under this Consent Judgment) have been fully performed, Settling Defendant shall schedule and conduct a pre-certification inspection to be attended by Settling Defendant, and EPA. If, after the pre-certification inspection, Settling Defendant still believes that the Work has been fully performed, Settling Defendant shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Judgment. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendant or Settling Defendant's Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, and after reasonable opportunity for review and comment by the State, EPA determines that any portion of the Work has not been completed in accordance with this Consent Judgment, EPA will notify Settling Defendant in writing of the activities that must be undertaken by Settling Defendant pursuant to this Consent Judgment to complete the Work, provided, however, that EPA may only require Settling Defendant to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the Amended OUI ROD," as that term is defined in Paragraph 13.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Judgment and the SOW or require Settling Defendant to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendant shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to its right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendant and after a reasonable opportunity for review and comment by the State, that the Work has been performed in accordance with this Consent Judgment, EPA will so notify Settling Defendant in writing.

XV. EMERGENCY RESPONSE

51. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendant shall, subject to Paragraph 52, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately

notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, Settling Defendant shall notify the Chief of the Response and Prevention Branch of the Emergency and Remedial Response Division of EPA, Region 2, at (732) 321-6656, or, if such person or his/her delegate is unavailable, the EPA Region 2 Emergency 24-hour Hot Line at (732) 548-8730. Settling Defendant shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the plans or documents developed pursuant to the SOW. In the event that Settling Defendant fails to take appropriate response action as required by this Section, and EPA takes such action instead, Settling Defendant shall reimburse EPA for all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

52. Nothing in the preceding Paragraph or in this Consent Judgment shall be deemed to limit any authority of the United States to: (i) take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site; or (ii) direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiff).

#### XVI. PAYMENTS FOR RESPONSE COSTS

##### 53. Payments for Future Response Costs

a. Settling Defendant shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. On a periodic basis the United States will send Settling Defendant billings for such costs. The billings will be accompanied by a printout of cost data from EPA's financial management system. Settling Defendant shall make all payments within 30 days of the date of each bill requiring payment, except as otherwise provided in Paragraph 54. Settling Defendant shall make all payments of Future Response Costs via electronic funds transfer ("EFT"). Such payments shall be remitted via EFT to the Federal Reserve Bank of New York, as follows. Settling Defendant shall provide the following information to its bank:

- i. EFT to be directed to: **Federal Reserve Bank of New York**
- ii. Bank Routing Number: **021030004**
- iii. Bank account number receiving the payment: **68010727**
- iv. SWIFT address: **FNYUS33**
- v. Address: **Federal Reserve Bank of New York  
33 Liberty Street  
New York NY 10045**
- vi. Field Tag 4200 of the Fedwire message should read (for Fedwire payments): **D 68010727 Environmental Protection Agency**
- vii. Case Number: **09-CV-3917 (E.D.N.Y.)**
- viii. Amount of payment: \_\_\_\_\_
- ix. Name of remitter: **Genesco Inc.**

- x. Site name: **Fulton Avenue Superfund Site**
- xi. Site/Spill identifier: **02JN**

Along with this information, Settling Defendant shall instruct its bank to remit payment in the required amount via EFT to EPA's account at the Federal Reserve Bank of New York. To ensure that Settling Defendant's payment is properly recorded, Settling Defendant shall send a letter to the United States within one week of the EFT, which references the date of the EFT, the payment amount, the name of the Site, the case number, and Settling Defendant's name and address. Such letter shall be sent to the United States and EPA in accordance with Section XXVI (Notices and Submissions).

b. All payments by Settling Defendant pursuant to Paragraph 53.a. shall be deposited in the Fulton Avenue 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.

54. Settling Defendant may contest payment of any Future Response Costs under Paragraph 53 if it determines that the United States has made an accounting error or if it alleges that a cost item that is included represents costs that are inconsistent with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States. Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, Settling Defendant shall within the 30-day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 53. Simultaneously, Settling Defendant shall establish an interest-bearing escrow account in a federally-insured bank duly chartered in the State of New York and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Settling Defendant shall send to the United States, as provided in Section XXVI (Notices and Submissions), 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, Settling Defendant shall initiate the Dispute Resolution procedures in Section XIX (Dispute Resolution). If the United States prevails in the dispute, within five days of the resolution of the dispute, Settling Defendant shall pay the sums due (with accrued Interest) to the United States, in the manner described in Paragraph 53. If Settling Defendant prevails concerning any aspect of the contested costs, Settling Defendant shall pay that portion of the costs (plus associated accrued Interest) for which it did not prevail to the United States in the manner described in Paragraph 53; Settling Defendant 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 XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding Settling Defendant's obligation to reimburse the United States for its Future Response Costs.

55. In the event that the payments required by Paragraph 53 are not made within 30

days of Settling Defendant's receipt of the bill, Settling Defendant shall pay Interest on the unpaid balance. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Settling Defendant's payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 71. Settling Defendant shall make all payments required by this Paragraph in the manner described in Paragraph 53.

XVII. INDEMNIFICATION AND INSURANCE

56. Settling Defendant's Indemnification of the United States

a. The United States does not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendant as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendant shall indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Judgment, including, but not limited to, any claims arising from any designation of Settling Defendant as EPA's authorized representative under Section 104(e) of CERCLA. Further, Settling Defendant agrees to pay the United States all costs it incurs 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 Settling Defendant, its officers, directors, employees, agents, contractors, subcontractors, and any persons acting on its behalf or under its control, in carrying out activities pursuant to this Consent Judgment. The United States shall not be held out as a party to any contract entered into by or on behalf of Settling Defendant in carrying out activities pursuant to this Consent Judgment. Neither Settling Defendant nor any such contractor shall be considered an agent of the United States.

b. The United States shall give Settling Defendant notice of any claim for which the United States plans to seek indemnification pursuant to Paragraph 56.a. and shall consult with Settling Defendant prior to settling such claim.

57. Settling Defendant waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendant 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 Settling Defendant and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

58. No later than 15 days before commencing any on-Site Work, Settling Defendant shall secure, and shall maintain, comprehensive general liability insurance with limits of ten million dollars (\$10,000,000.00), combined single limit, and automobile liability insurance with limits of ten million dollars (\$10,000,000.00), combined single limit, naming the United States as an additional insured. In addition, for the duration of this Consent Judgment, Settling Defendant shall satisfy, or shall ensure that its contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendant in furtherance of this Consent Judgment. Prior to commencement of the Work under this Consent Judgment, Settling Defendant shall provide to EPA certificates of such insurance and a copy of each insurance policy. Settling Defendant shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. If Settling Defendant demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendant need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor. Settling Defendant shall ensure that all submittals to EPA under this Paragraph identify the Fulton Avenue Superfund Site, Nassau County, New York and Civil Action No. 09-3917.

#### XVIII. FORCE MAJEURE

59. "Force majeure," for purposes of this Consent Judgment, is defined as any event arising from causes beyond the control of Settling Defendant, of any entity controlled by Settling Defendant, or of Settling Defendant's contractors, that delays or prevents the performance of any obligation under this Consent Judgment despite Settling Defendant's best efforts to fulfill the obligation. The requirement that Settling Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

60. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Judgment, whether or not caused by a force majeure event, Settling Defendant shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Emergency and Remedial Response Division, EPA Region 2, within 48 hours of when Settling Defendant first knew that the event might cause a delay. Within five days thereafter, Settling Defendant shall provide in writing to EPA 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; Settling Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Settling Defendant, such event may cause or contribute to an endangerment to public health, welfare or the environment. Settling

Defendant shall include with any notice all available documentation supporting its claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendant 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. Settling Defendant shall be deemed to know of any circumstance of which Settling Defendant, any entity controlled by Settling Defendant, or Settling Defendant's contractors knew or should have known.

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

62. If Settling Defendant elects to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) as to the force majeure event, it shall do so no later than fifteen (15) days after receipt of EPA's notice. In any such proceeding, Settling Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendant complied with the requirements of Paragraphs 57 and 58, above. If Settling Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Settling Defendant of the affected obligation of this Consent Judgment identified to EPA and the Court.

#### XIX. DISPUTE RESOLUTION

63. Unless otherwise expressly provided for in this Consent Judgment, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Judgment. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of Settling Defendant that have not been disputed in accordance with this Section.

64. Any dispute which arises under or with respect to this Consent Judgment shall in the first instance be the subject of informal negotiations between the Parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the Parties to the dispute. The dispute shall be considered to have arisen when one party sends the other party a written Notice of Dispute.

##### 65. Statements of Position

a. In the event that the Parties cannot resolve a dispute by informal

negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, Settling Defendant invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by Settling Defendant. The Statement of Position shall specify Settling Defendant's position as to whether formal dispute resolution should proceed under Paragraph 66 or 67.

b. Within 14 days after receipt of Settling Defendant's Statement of Position, EPA will serve on Settling Defendant its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 66 or 67. Within 14 days after receipt of EPA's Statement of Position, Settling Defendant may submit a Reply.

c. If there is disagreement between EPA and Settling Defendant as to whether dispute resolution should proceed under Paragraph 66 or 67, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if Settling Defendant ultimately appeals to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 66 or 67.

66. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Judgment; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Judgment. Nothing in this Consent Judgment shall be construed to allow any dispute by Settling Defendant regarding the validity of the Amended OUI ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 64.a. This decision shall be binding upon Settling Defendant, subject only to the right to seek judicial review pursuant to Paragraphs 66.c. and 66.d.

c. Any administrative decision made by EPA pursuant to Paragraph 66.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by Settling Defendant with the Court and served on the United States within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within



which the dispute must be resolved to ensure orderly implementation of this Consent Judgment. The United States may file a response to Settling Defendant's motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendant shall have the burden of demonstrating that the decision of the Emergency and Remedial Response Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraph 64.a.

67. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of Settling Defendant's Statement of Position submitted pursuant to Paragraph 65, the Director of the Emergency and Remedial Response Division, EPA Region 2, will issue a final decision resolving the dispute. The Emergency and Remedial Response Division Director's decision shall be binding on Settling Defendant unless, within 10 days of receipt of the decision, Settling Defendant files with the Court and serves on the United States a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Judgment. The United States may file a response to Settling Defendant's motion.

b. Notwithstanding Paragraph X of Section I (Background) of this Consent Judgment, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

68. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of Settling Defendant under this Consent Judgment, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 75. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Judgment. In the event that Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

#### XX. STIPULATED PENALTIES

69. Settling Defendant shall be liable for stipulated penalties in the amounts set forth in Paragraphs 70 and 71 to the United States for failure to comply with the requirements of this Consent Judgment specified below, unless excused under Section XVIII (Force Majeure). "Compliance" by Settling Defendant shall include completion of the activities under this Consent Judgment or any work plan or other plan approved under this Consent Judgment identified below in accordance with all applicable requirements of law, this Consent Judgment, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Judgment and within the specified time schedules established by and approved under this Consent Judgment.

70. Stipulated Penalty Amounts - First Tier

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in subparagraph b. of this Paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,500	1st through 14th day
\$ 7,500	15th through 30th day
\$10,000	31st day and beyond

b. Compliance Milestones

(1) submission and, if necessary, revision and resubmission of any plan, report, or other deliverable required by Section VI (Performance of the Work by Settling Defendant) or by the SOW or by any plan which is prepared pursuant to Section VI or the SOW and approved by EPA;

(2) any deadline imposed by the SOW or by any plan which is prepared pursuant to Section VI or the SOW and approved by EPA;

(3) obligations imposed by Section XV (Emergency Response);

(4) obligations imposed by Section IX (Access and Institutional Controls);

(5) performance of pre-remedial design activities and preparation of the OU1 Remedial Design in accordance with the Amended OU1 ROD, the SOW, and this Consent Judgment;

(6) implementation of the OU1 Remedial Action in accordance with the Amended OU1 ROD, the SOW, and this Consent Judgment;

(7) modification of the SOW or related work plans pursuant to Paragraph 13, and implementation of the work called for by such modifications in accordance with the modified SOW or work plans;

(8) implementation of O&M, including post-remediation monitoring in accordance with the Amended OU1 ROD and this Consent Judgment;

(9) performance of studies and investigations pursuant to Section VII (Remedy Review).

71. Stipulated Penalty Amounts - Second Tier

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with the requirements identified in subparagraph b. of this Paragraph:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 14th day
\$ 3,000	15th through 30th day
\$ 5,000	31st day and beyond

b. Compliance Milestones

- (1) permitting split or duplicate samples, quality assurance, and other requirements pursuant to Section VIII (Quality Assurance, Sampling, and Data Analysis);
- (2) designation of Settling Defendant's Project Coordinator as required by Section XII (Project Coordinators);
- (3) obligations imposed by Section XIII (Performance Guarantee);
- (4) timely submission and, if necessary, revision and resubmission of the name, title and qualifications of the proposed Supervising Contractor pursuant to Section VI (Performance of Work by Settling Defendant);
- (5) certification of completion requirements set forth in Section XIV (Certification of Completion), including both the requirement to make the certification and the requirement that the certification be truthful;
- (6) timely notification regarding any delay or anticipated delay, consistent with Paragraph 60;
- (7) indemnification and insurance requirements set forth in Section XVII (Indemnification and Insurance);
- (8) reporting requirements set forth in Section X (Reporting Requirements);
- (9) timely submission of written notification of any off-Site shipment of Waste Material from the Site to an out-of-state waste management facility pursuant to Paragraph 16;
- (10) submission of documents and other information in accordance with Section XXIV (Access to Information);
- (11) payments required by Section XVI (Payments for Response Costs); and
- (12) any other requirement of this Consent Judgment that applies to

Settling Defendant and that is not identified in Paragraphs 70.b. and 69.b.

72. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 83 (Work Takeover) of Section XXI, Settling Defendant shall be liable for a stipulated penalty in the amount of one million dollars (\$1,000,000.00).

73. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (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 Settling Defendant of any deficiency; (2) with respect to a decision by the Director of the Emergency and Remedial Response Division, EPA Region 2, under Paragraph 66.b. or 67.a. of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendant's reply to EPA's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31<sup>st</sup> day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Judgment.

74. Following EPA's determination that Settling Defendant has failed to comply with a requirement of this Consent Judgment, EPA may give Settling Defendant written notification of the same and describe the noncompliance. EPA may send Settling Defendant 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 Settling Defendant of a violation.

75. All penalties accruing under this Section shall be due and payable to the United States within 30 days of Settling Defendant's receipt from EPA of a demand for payment of the penalties, unless Settling Defendant invokes the Dispute Resolution procedures under Section XIX (Dispute Resolution). All payments to the United States under this Section shall be made by EFT, consistent with the payment procedures set forth in Paragraph 53, above. Settling Defendant shall send a letter to the United States within one (1) week of the EFT, which references the date of the EFT; the payment amount and that the payment is for stipulated penalties; the name of the Site; the case number; and Settling Defendant's name and address. Such letter shall be sent to the United States and EPA as provided in Section XXVI (Notices and Submissions).

76. The payment of penalties shall not alter in any way Settling Defendant's obligation to complete the performance of the Work required under this Consent Judgment.

77. Penalties shall continue to accrue as provided in Paragraph 73 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, Settling Defendant shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in subparagraph c., below;

c. If the District Court's decision is appealed by any Party, Settling Defendant shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to Settling Defendant to the extent that it prevails.

78. If Settling Defendant fails to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as Interest. Settling Defendant shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 75.

79. Nothing in this Consent Judgment shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available by virtue of Settling Defendant's violation of this Consent Judgment or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Judgment.

80. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Judgment.

#### XXI. COVENANTS NOT TO SUE BY PLAINTIFF

81. In consideration of the actions that will be performed and the payments that will be made by Settling Defendant under the terms of the Consent Judgment, and except as specifically provided in Paragraph 82 of this Section, the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Sections 106 and 107(a) of CERCLA for performance of the Work and for recovery of Future Response Costs. These covenants not to sue shall take effect upon the Effective Date. These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Judgment. These covenants not to sue extend only to Settling Defendant and do not extend to any other person.

82. General reservations of rights. The United States reserves, and this Consent Judgment is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within Plaintiff's covenant not to sue. Notwithstanding any other provision of this Consent Judgment, the United States reserves all rights against Settling Defendant with respect to:

- a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Judgment;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based upon Settling Defendant's ownership or operation of the Site, or upon Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than the Work or as otherwise ordered by EPA, after signature of this Consent Judgment by Settling Defendant;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability;
- f. liability for violations of federal or state law which occur during or after implementation of the OUI Remedial Action;
- g. liability, prior to Certification of Completion of the OUI Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards, but that cannot be required pursuant to Paragraph 13 (Modification of the SOW or Related Work Plans);
- h. liability for additional operable units at the Site or the final response action;
- i. liability for response costs, including, but not limited to, direct and indirect costs, that the United States incurred at or in connection with the Site through February 29, 2008, plus Interest on all such costs that has accrued pursuant to 42 U.S.C. § 9607(a) through such date;
- j. liability for costs that the United States will incur related to the Site but are not within the definition of Future Response Costs; or
- k. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

83. Work Takeover

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

b. If, after expiration of the ten-day notice period specified in Paragraph

83.a., Settling Defendant has 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 Settling Defendant in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 83.b.

c. Settling Defendant may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 66, to dispute EPA's implementation of a Work Takeover under Paragraph 81.b. However, notwithstanding Settling Defendant's invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 81.b. until the earlier of (i) the date that Settling Defendant remedies, 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 XIX (Dispute Resolution), Paragraph 64, requiring EPA to terminate such Work Takeover.

d. After commencement and for the duration of any Work Takeover, EPA shall have immediate access to and benefit of any Performance Guarantee(s) provided pursuant to Section XIII of this Consent Judgment, in accordance with the provisions of Paragraph 48 of that Section. If and to the extent that EPA is unable to secure the resources guaranteed under any such Performance Guarantee(s) and Settling Defendant fails to remit a cash amount up to but not exceeding the estimated cost of the remaining Work to be performed, all in accordance with the provisions of Paragraph 48, any unreimbursed costs incurred by EPA in performing Work under the Work Takeover shall be considered Future Response Costs that Settling Defendant shall pay pursuant to Section XVI (Payments for Response Costs).

84. Notwithstanding any other provision of this Consent Judgment, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

## XXII. COVENANTS BY SETTLING DEFENDANT

85. Covenant Not to Sue. Subject to the reservations in Paragraph 86, Settling Defendant hereby covenants not to sue and agrees not to assert any claims or causes of action against the United States with respect to the Work, past response actions, and past and Future Response Costs as defined herein or this Consent Judgment, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site; or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States 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.

Except as provided in Paragraph 88 (Waiver of Claims Against *De Micromis* Parties) and Paragraph 93 (waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 80.b.-d. or 80.g.-k., but only to the extent that Settling Defendant's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

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

87. Nothing in this Consent Judgment shall be deemed to constitute 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).

88. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including but not limited to, claims or causes of action under Sections 107(a)(4)(B) and 113(f) of CERCLA, against any person where the person's liability to Settling Defendant with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if:

a. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of: (i) 0.002% of the total volume of waste at the Site; or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against Settling Defendant.

### XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

89. Except as provided in Paragraph 86 (Waiver of Claims Against *De Micromis*



Parties), nothing in this Consent Judgment shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Judgment. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Judgment may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), 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 hereto.

90. The Parties agree, and by entering this Consent Judgment this Court finds, that Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Judgment. For purposes of the preceding sentence, the “matters addressed” in this Consent Judgment are Future Response Costs, and the Work as defined herein.

91. Settling Defendant agrees that with respect to any suit or claim for contribution brought by it for matters related to this Consent Judgment it will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

92. Settling Defendant also agrees that with respect to any suit or claim for contribution brought against it for matters related to this Consent Judgment it will notify in writing the United States within ten days of service of the complaint on it. In addition, Settling Defendant shall notify the United States within ten days of service or receipt of any Motion for Summary Judgment and within ten days of receipt of any order from a court setting a case for trial.

93. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiff).

#### XXIV. ACCESS TO INFORMATION

94. Settling Defendant shall provide to EPA, upon request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Consent Judgment, 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. Settling Defendant shall also make available to EPA, for purposes of investigation, information gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

95. Business Confidential and Privileged Documents

a. Settling Defendant may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiff under this Consent Judgment 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 they are submitted to EPA, or if EPA has notified Settling Defendant 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 Settling Defendant.

b. Settling Defendant 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 Settling Defendant asserts such a privilege in lieu of providing documents, it shall provide Plaintiff 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 Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Judgment shall be withheld on the grounds that they are privileged.

96. 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.

XXV. RETENTION OF RECORDS

97. Until 10 years after Settling Defendant's receipt of EPA's notification pursuant to Paragraph 50.b. of Section XIV (Certification of Completion of the Work), Settling Defendant shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, including all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. Settling Defendant must also retain, and instruct its contractors and agents to preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records 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, provided, however, that Settling Defendant (and its contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

98. At the conclusion of this document retention period, Settling Defendant shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, Settling Defendant shall deliver any such records or documents to EPA. Settling Defendant 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 Settling Defendant asserts such a privilege, it shall provide Plaintiff 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 subject of the document, record, or information; and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Judgment shall be withheld on the grounds that they are privileged.

99. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 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.

#### XXVI. NOTICES AND SUBMISSIONS

100. Whenever, under the terms of this Consent Judgment, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or its successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Judgment with respect to the United States, EPA, and Settling Defendant, respectively.

As to the United States or EPA:

Chief, Eastern New York Remediation Section  
New York Remediation Branch  
Emergency and Remedial Response Division\  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 20<sup>th</sup> Floor  
New York, N.Y. 10007-1866  
  
Attention: Fulton Avenue Superfund Site Remedial Project Manager

Chief, New York/Caribbean Superfund Branch  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 17<sup>th</sup> Floor  
New York, N.Y. 10007-1866

Attention: Fulton Avenue Superfund Site Attorney

EES Case Management Unit  
U.S. Department of Justice  
Environment and Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611  
eesdcopy.enrd@usdoj.gov  
Re: DJ # 90-11-2-09329

Robert B. Kambic  
Assistant United States Attorney  
United States Attorney's Office  
Eastern District of New York  
610 Federal Plaza, 5<sup>th</sup> Floor  
Central Islip, N.Y. 11722-4454  
Re: USAO File No. 2008V00178

The original of any Performance Guarantee document submitted pursuant to Section XIII shall be sent to the following address, with copies to the EPA and United States addressees above:

Chief, Resource Management/Cost Recovery Section  
Program Support Branch  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 18<sup>th</sup> Floor  
New York, NY 10007-1866

Notices required under Section XVI. shall also be sent to the following address:

U.S. Environmental Protection Agency  
26 W. Martin Luther King Drive  
Cincinnati Finance Center, MS: NWD  
Cincinnati, Ohio 45268  
E-MAIL: [AcctsReceivable.CINWD@epa.gov](mailto:AcctsReceivable.CINWD@epa.gov)

As to the State:

Steven M. Scharf, P.E, Project Manager  
New York State Department of Environmental Conservation  
Division of Environmental Remediation  
Remedial Action, Bureau A  
625 Broadway  
Albany, NY 12233-7015

As to Settling Defendant:

Chris Wenczel  
ERM Consulting and Engineering  
105 Maxess Road, Ste. 316  
Melville, N.Y. 11747-3851

Paul A. Alexis, Esq.  
Bradley Arant Boult Cummings LLP  
Roundabout Plaza  
1600 Division Street  
Suite 700  
Nashville, TN 37203

James J. Periconi, Esq.  
Periconi, LLC  
260 Madison Avenue, 17th Floor  
New York, New York 10016

Roger Sisson, Esq.  
Senior Vice President and General Counsel  
Genesco Inc.  
1415 Murfreesboro Road  
Suite 490  
Nashville, TN 37217

Thor Y. Urness, Esq.  
Bradley Arant Boult Cummings LLP  
Roundabout Plaza  
1600 Division Street  
Suite 700  
Nashville, TN 37203

Technical specifications for submissions of sampling and monitoring data and spatial data are addressed in Section IV.A. of the SOW. All other deliverables shall be submitted in an electronic

form acceptable to the EPA Project Coordinator. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5" by 11", Settling Defendant shall also provide each EPA recipient with one paper copy of each such exhibit.

XXVII. EFFECTIVE DATE

101. The effective date of this Consent Judgment shall be the date upon which this Consent Judgment is entered by the Court, except as otherwise provided herein.

XXVIII. RETENTION OF JURISDICTION

102. This Court retains jurisdiction over both the subject matter of this Consent Judgment and Settling Defendant for the duration of the performance of the terms and provisions of this Consent Judgment for the purpose of enabling either of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Judgment, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

XXIX. APPENDICES

103. The following appendices are attached to and incorporated into this Consent Judgment:

- "Appendix A" is the Amended OU1 ROD.
- "Appendix B" is the SOW.
- "Appendix C" is the description and/or map of the Site.
- "Appendix D" is the draft Easement.

XXX. COMMUNITY RELATIONS

104. Settling Defendant shall propose to EPA its participation in the community relations plan to be developed by EPA ("Community Relations Plan"). EPA will determine the appropriate role for Settling Defendant under the Community Relations Plan. Settling Defendant shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendant shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXI. MODIFICATION

105. Schedules specified in this Consent Judgment for completion of the Work may be modified by agreement of EPA and Settling Defendant. All such modifications shall be made in writing.

106. Except as provided in Paragraph 13 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendant, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(B)(ii), may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and Settling Defendant.

107. Nothing in this Consent Judgment shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Judgment.

XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

108. This Consent Judgment shall be lodged with the Court for a period of not less than 30 days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Judgment disclose facts or considerations which indicate that the Consent Judgment is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Judgment without further notice.

109. If for any reason the Court should decline to approve this Consent Judgment in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIII. SIGNATORIES/SERVICE

110. Each undersigned representative of Settling Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Judgment and to execute and legally bind such Party to this document.

111. Settling Defendant hereby agrees not to oppose entry of this Consent Judgment by this Court or to challenge any provision of this Consent Judgment unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Judgment.

112. Settling Defendant shall identify, on the attached signature page, the name,

address and telephone number of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Judgment. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

XXXIV. FINAL JUDGMENT

113. This Consent Judgment and its appendices constitute the final, complete, and exclusive agreement and understanding between the Parties with respect to the settlement embodied in the Consent Judgment. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Judgment.

114. Upon approval and entry of this Consent Judgment by the Court, this Consent Judgment shall constitute a final judgment between and among the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_ DAY OF \_\_\_\_\_, 2016.

\_\_\_\_\_  
United States District Judge

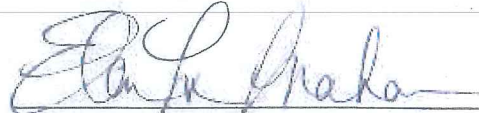


THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of *United States v. Genesco Inc.*, relating to the Fulton Avenue Superfund Site.

**FOR THE UNITED STATES OF AMERICA**

June 21, 2014

Date



ELLEN M. MAHAN  
Deputy Section Chief  
U.S. Department of Justice  
Environment and Natural Resources Division  
Environmental Enforcement Section  
P.O. Box 7611  
Washington, D.C. 20044-7611

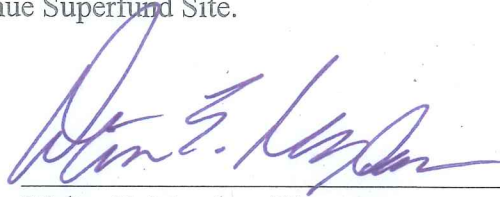
ROBERT L. CAPERS  
United States Attorney  
Eastern District of New York

By:



ROBERT B. KAMBIC  
Assistant United States Attorney  
United States Attorney's Office  
Eastern District of New York  
610 Federal Plaza, 5th Fl.  
Central Islip, New York 11722-4454

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of *United States v. Genesco Inc.*, relating to the Fulton Avenue Superfund Site.


A handwritten signature in blue ink, appearing to read "Walter E. Mugdan", is written over a horizontal line.

Walter E. Mugdan, Director  
Emergency and Remedial Response Division  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 19<sup>th</sup> Floor  
New York, New York 10007-1866

THE UNDERSIGNED PARTY enters into this Consent Judgment in the matter of *United States v. Genesco Inc.*, relating to the Fulton Avenue Superfund Site.

FOR GENESCO INC.

6.8.2016  
Date

Signature:   
\_\_\_\_\_  
Roger Sisson  
Sr. Vice President and General Counsel  
1415 Murfreesboro Road  
Suite 490  
Nashville, TN 37217

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Roger Sisson  
Sr. Vice President and General Counsel  
1415 Murfreesboro Road  
Suite 490  
Nashville, TN 37217  
(615) 367-8444