

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

\_\_\_\_\_  
IN THE MATTER OF: )

Pierson's Creek Superfund Site )  
Newark, New Jersey )

366-394 Wilson Avenue, LLC; )  
Salomone Brothers, Inc.; )

Respondents. )

Proceeding Under Sections 104, 106(a), )  
107 and 122 of the Comprehensive )  
Environmental Response, Compensation, )  
and Liability Act, 42 U.S.C. §§ 9604, )  
9606(a), 9607 and 9622 )  
\_\_\_\_\_ )

Docket No. CERCLA-02-2022-2012

**ADMINISTRATIVE SETTLEMENT AGREEMENT AND ORDER ON CONSENT  
FOR REMOVAL ACTION**

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## **I. JURISDICTION AND GENERAL PROVISIONS**

1. This Administrative Settlement Agreement and Order on Consent ("Settlement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA"), and 366-394 Wilson Avenue, LLC and Salomone Brothers, Inc. ("Respondents"). This Settlement provides for the performance of a removal action by Respondents and the payment of certain response costs incurred by the United States at or in connection with the Pierson's Creek Superfund Site (the "Site") located in Newark, New Jersey.

2. This Settlement is issued under the authority vested in the President of the United States by Sections 104, 106(a), 107, and 122 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9604, 9606(a), 9607 and 9622. This authority was delegated to the Administrator of EPA on January 23, 1987, by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to Regional Administrators by EPA Delegation Nos. 14-14C (Administrative Actions through Consent Orders, Jan. 18, 2017) and 14-14D (Cost Recovery Non-Judicial Agreements and Administrative Consent Orders, Jan. 18, 2017). This authority was further redelegated by the Regional Administrator of EPA Region 2 to the Director of the Emergency and Remedial Response Division by EPA Delegation 14-14-C (January 19, 2017) and conferred to the Director of the Superfund and Emergency Management Division of EPA Region 2 by Regional Memorandum "Redelegations and the Regional Realignment" (March 27, 2019).

3. EPA has notified the State of New Jersey (the "State") of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Respondents recognize that this Settlement has been negotiated in good faith and that the actions undertaken by Respondents in accordance with this Settlement do not constitute an admission of any liability. Respondents do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Settlement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV (Findings of Fact) and V (Conclusions of Law and Determinations) of this Settlement. Respondents agree to comply with and be bound by the terms of this Settlement and further agree that they will not contest the basis or validity of this Settlement or its terms.

## **II. PARTIES BOUND**

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

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

7. Each undersigned representative of Respondents certifies that he or she is fully authorized to enter into the terms and conditions of this Settlement and to execute and legally bind Respondents to this Settlement.

8. Respondents shall provide a copy of this Settlement to each contractor hired to perform the Work required by this Settlement and to each person representing any Respondents 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 Settlement. Respondents or their contractors shall provide written notice of the Settlement to all subcontractors hired to perform any portion of the Work required by this Settlement. Respondents shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work in accordance with the terms of this Settlement.

### III. DEFINITIONS

9. Unless otherwise expressly provided in this Settlement, terms used in this Settlement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Settlement or its attached appendices, the following definitions shall apply:

“Action Memorandum” shall mean the EPA Action Memorandum-Enforcement relating to the Site signed on July 22, 2022 by the Director of the Superfund and Emergency Management Division, EPA Region 2, and all attachments thereto. The Action Memorandum is attached as Appendix A.

“Affected Property” shall mean all real property located at 366-394 Wilson Avenue (Block 5038, Lot 97) in Newark, New Jersey and any other real property where EPA determines, at any time, that access or land, water, or other resource use restrictions are needed to implement the removal action.

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

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

“Effective Date” shall mean the effective date of this Settlement as provided in Section **Error! Reference source not found.**

“EPA” shall mean the United States Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“EPA Hazardous Substance Superfund” shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.



“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 deliverables submitted pursuant to this Settlement, in overseeing implementation of the Work, or otherwise implementing, overseeing, or enforcing this Settlement, including but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Section IX (Property Requirements) (including, but not limited to, cost of attorney time and any monies paid to secure or enforce access, including, but not limited to, the amount of just compensation), Section XIII (Emergency Response and Notification of Releases), Paragraph 83 (Work Takeover), Paragraph 105 (Access to Financial Assurance), community involvement (including, but not limited to, the costs of any technical assistance grant under Section 117(e) of CERCLA, 42 U.S.C. § 9617(e), Section XV (Dispute Resolution), and all litigation costs. Future Response Costs shall also include Agency for Toxic Substances and Disease Registry (ATSDR) costs regarding the Affected Property, all Interim Response Costs, and all Interest on those Past Response Costs Respondents have agreed to pay under this Settlement that has accrued pursuant to 42 U.S.C. § 9607(a) during the period from December 15, 2020 to the Effective 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. Rates are available online at <https://www.epa.gov/superfund/superfund-interest-rates>.

“Interim Response Costs” shall mean all costs, including but not limited to direct and indirect costs, (a) paid by the United States in connection with the Affected Property between December 15, 2020 and the Effective Date, or (b) incurred prior to the Effective Date, but paid after that date.

“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.

“NJDEP” shall mean the New Jersey Department of Environmental Protection and any successor departments or agencies of the State.

“Non-Settling Owner” shall mean any person, other than Respondents, that owns or controls any Affected Property. The clause “Non-Settling Owner’s Affected Property” means Affected Property owned or controlled by a Non-Settling Owner.

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

“Parties” shall mean EPA and Respondents.

“Past Response Costs” shall mean all costs, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with this removal action

between May 5, 2020 and December 15, 2020 plus Interest on all such costs through such date.

“Post-Removal Site Control” shall mean actions necessary to ensure the effectiveness and integrity of the removal action to be performed pursuant to this Settlement consistent with Sections 300.415(l) and 300.5 of the NCP and “Policy on Management of Post-Removal Site Control” (OSWER Directive No. 9360.2-02, Dec. 3, 1990).

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

“Respondents” shall mean 366-394 Wilson Ave, LLC and Salomone Brothers, Inc.

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

“Settlement” shall mean this Administrative Settlement Agreement and Order on Consent and all appendices attached hereto (listed in Section XXVIII (Integration/ Appendices)). In the event of conflict between this Settlement and any appendix, this Settlement shall control.

“Site” shall mean the Pierson’s Creek Superfund Site in Newark, Essex County, New Jersey.

“Pierson’s Creek Superfund Site Special Account” shall mean the special account within the EPA Hazardous Substance Superfund, established for the Site by EPA pursuant to Section 122(b)(3) of CERCLA, 42 U.S.C. § 9622(b)(3), and the Administrative Settlement Agreement and Order on Consent for Remedial Investigation and Feasibility Study between EPA and Troy Chemical Corporation, Inc., CERCLA Docket No. 02-2016-2026, dated November 9, 2017.

“State” shall mean the State of New Jersey.

“Transfer” shall mean to sell, assign, convey, lease, mortgage, or grant a security interest in, or where used as a noun, a sale, assignment, conveyance, or other disposition of any interest by operation of law or otherwise.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

“Waste Material” shall mean (a) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (b) any pollutant or contaminant under Section 101(33) of CERCLA, 42 U.S.C. § 9601(33); (c) any “solid waste” under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27); and d) any mixture containing any of the constituents noted in (a), (b), (c), above.

“Work” shall mean all activities and obligations Respondents are required to perform under this Settlement except those required by Section XI (Record Retention).

#### IV. FINDINGS OF FACT

10. The Pierson's Creek Superfund Site includes Pierson's Creek, which begins in the vicinity of Avenue L in Newark, New Jersey and travels through above-ground channels and below-ground culverts through various properties in a general south, south-westerly direction until discharging into the Port Newark channel of Newark Bay. The Site also includes various unnamed tributaries that discharge into Pierson's Creek including an unnamed tributary located on the western border of 366-394 Wilson Avenue, and includes any location from where contamination from the creek or tributaries has come to be located. Pierson's Creek is generally depicted on the map attached as Appendix B.

11. By letter dated August 9, 2011, NJDEP nominated the Site for inclusion on the National Priorities List ("NPL").

12. Beginning in October 2012, EPA conducted several investigations of Pierson's Creek that confirmed the presence of mercury in the creek sediments throughout the accessible portions of the creek, including the unnamed tributary that is partially located on Affected Property owned by Non-Settling Owner 7 Avenue L Newark LLC.

13. Mercury has been shown to be genotoxic in humans and animals. Long-term exposure to either inorganic or organic mercury can permanently damage the brain, kidney, and the developing fetus in humans. In fish and shellfish, toxic effects include a variety of reproductive, growth, and metabolic dysfunctions, as well as increased mortality in larval and juvenile stages.

14. A release or threat of release of mercury may present an imminent and substantial endangerment to nearby workers on adjoining properties and constitutes an environmental harm.

15. The Site was placed on the NPL by EPA on September 22, 2014. EPA is the lead regulatory agency for planning and implementing response actions at the Site. NJDEP serves as a support agency for the Site.

16. Non-Settling Owner, 7 Avenue L Newark LLC currently owns 366-394 Wilson Avenue in Newark, New Jersey.

17. Oberwil Corporation owned 366-394 Wilson Avenue previous to the ownership of that lot by 7 Avenue L Newark LLC. During the time of Oberwil Corporation's ownership, Respondent Salomone Brothers, Inc., on behalf of Respondent 366-394 Wilson Avenue LLC, excavated soils and sediment that may have contained hazardous substances including mercury and polychlorinated biphenyls ("PCBs") from areas adjacent to the undefined, unnamed tributary of Pierson's Creek that borders the western property line of the Affected Property. The excavated soils and sediment were placed in three piles on the Affected Property.

18. Respondent Salomone Brothers, Inc. also installed a pipe at the Affected Property which partially entered into the unnamed tributary and which may have disturbed contaminated soils and sediment.

19. The presence of mercury in the soil/sediment piles on the Affected Property, in addition to the creek and unnamed tributary sediments and along the banks of the creek and unnamed tributary at or near the Affected Property, constitutes a release or threat of release of a hazardous substance.

20. EPA has notified Salomone Brothers, Inc. and Oberwil Corporation that they are PRPs for the Site by general notice letters dated April 20, 2020.

21. On May 14, 2021, Oberwil Corporation filed a lawsuit in the New Jersey Superior Court of New Jersey, Essex Vicinage, entitled *Oberwil Corp. v. Salomone Brothers, Inc., 366-394 Wilson Avenue, LLC, Environmental and Geotechnical Services, LLC, John Lynch; Joseph Salomone; and Corporate and Individual John Does* regarding the Affected Property ("Oberwil Environmental Litigation"). EPA is not a party to this litigation.

22. On July 7, 2021, Respondent Salomone Brothers, Inc. re-covered the three piles of excavated soils and sediment on the Affected Property and continues to monitor the piles to ensure the coverings remain in place. The re-covering was overseen by EPA and necessary to help prevent the release of hazardous substances from the piles because previously-placed covers had deteriorated.

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

23. Based on the Findings of Fact set forth above, and the administrative record, EPA has determined that:

a. The Pierson's Creek Superfund Site, including the Affected Property, is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

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

c. Each Respondent is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Each Respondent is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). Respondents Salomone Brothers, Inc. and 366-394 Wilson Avenue LLC, were the "operators" of a facility at the time of disposal of hazardous substances at the facility, as defined by Section 101(20) of CERCLA, 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

e. The conditions described in Paragraphs 17, 18 and 19 of the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

f. The removal action required by this Settlement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Settlement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

## **VI. SETTLEMENT AGREEMENT AND ORDER**

24. Based upon the Findings of Fact, Conclusions of Law, and Determinations set forth above, and the administrative record, it is hereby Ordered and Agreed that Respondents shall comply with all provisions of this Settlement, including, but not limited to, all appendices to this Settlement and all documents incorporated by reference into this Settlement.

## **VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR**

25. Respondents shall retain one or more contractors or subcontractors to perform the Work and shall notify EPA of the names, titles, addresses, telephone numbers, email addresses, and qualifications of such contractors or subcontractors within 20 days after the Effective Date. Respondents shall also notify EPA of the names, titles, contact information, and qualifications of any other contractors or subcontractors retained to perform the Work at least 5 days prior to commencement of such Work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondents. If EPA disapproves of a selected contractor or subcontractor, Respondents shall retain a different contractor or subcontractor and shall notify EPA of that contractor's or subcontractor's name, title, contact information, and qualifications within 10 days after EPA's disapproval. With respect to any proposed contractor, Respondents shall demonstrate that the proposed contractor demonstrates compliance with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs – Requirements with guidance for use" (American Society for Quality, February 2014), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, Reissued May 2006) or equivalent documentation as determined by EPA. The qualifications of the persons undertaking the Work for Respondents shall be subject to EPA's review for verification based on objective assessment criteria (e.g., experience, capacity, technical expertise) and that they do not have a conflict of interest with respect to the project.

26. Within 10 days after the Effective Date, Respondents shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondents required by this Settlement and shall submit to EPA the designated Project Coordinator's name, title, address, telephone number, email address, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator who does not meet the requirements of Paragraph 25. If EPA disapproves of the designated Project Coordinator, Respondents shall retain a different Project Coordinator and shall notify EPA of that person's name, title, contact information, and qualifications within 10 days following EPA's disapproval. Notice or communication relating to this Settlement from EPA to Respondents' Project Coordinator shall constitute notice or communication to all Respondents.

27. EPA has designated David Rosoff of the Superfund and Emergency Management Division, Removal Action Branch, Region 2, as its On-Scene Coordinator (OSC) and Pamela Tames, P.E., of the Superfund and Emergency Management Division, New York Remediation Branch, as the Remedial Project Manager (RPM). EPA and Respondents shall have the right,



subject to Paragraph 26, to change their respective designated OSC, RPM or Project Coordinator. Respondents shall notify EPA 15 days before such a change is made. The initial notification by Respondents may be made orally, but shall be promptly followed by a written notice. All deliverables, notices, notifications, proposals, reports, and requests specified in this Settlement must be in writing, unless otherwise specified, and be submitted by email to David Rosoff at [rosoff.david@epa.gov](mailto:rosoff.david@epa.gov) and Pamela Tames at [tames.pam@epa.gov](mailto:tames.pam@epa.gov).

28. The OSC shall be responsible for overseeing Respondents' implementation of this Settlement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any Work required by this Settlement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

### **VIII. WORK TO BE PERFORMED**

29. Respondents shall perform, at a minimum, all actions necessary to implement the removal action. The actions to be implemented will be identified in an Action Memorandum issued by EPA and will generally include, but are not limited to, 1) maintaining secure covering on the piles until disposal, 2) sampling the pile material to profile the waste streams and to determine appropriate disposal facilities, 3) securing appropriate disposal facilities for the pile materials that are approved by EPA and in compliance with EPA's Off Site Rule (40 C.F.R. 300.440), 4) removal of the contaminated soil/sediment piles using appropriate techniques without creating unacceptable releases into the environment, 5) transporting and disposing of the material in the piles to EPA-approved off-site disposal facilities, and 6) performing post removal sampling in the area where the piles are currently staged to ensure the soils below and just outside the limits of the piles have not been impacted by the hazardous substances in the piles. If the pile materials cannot be disposed of at any off-site disposal facilities, the material may need to be placed into roll-off containers (see Paragraph 35).

30. For any regulation or guidance referenced in the Settlement, the reference will be read to include any subsequent modification, amendment, or replacement of such regulation or guidance. Such modifications, amendments, or replacements apply to the Work only after Respondents receive notification from EPA of the modification, amendment, or replacement.

#### **31. Work Plan and Implementation**

a. Within 45 days after the Effective Date, in accordance with Paragraph 32 (Submission of Deliverables), Respondents shall submit to EPA for approval a draft work plan for performing the removal action (the "Removal Work Plan") generally described in Paragraph 29 above. The draft Removal Work Plan shall provide a description of, and an expeditious schedule for, the actions required by this Settlement.

b. EPA may approve, disapprove, require revisions to, or modify the draft Removal Work Plan in whole or in part. If EPA requires revisions, Respondents shall submit a revised draft Removal Work Plan within 15 days after receipt of EPA's notification of the required revisions. Respondents shall implement the Removal Work Plan as approved in writing by EPA and in accordance with the schedule approved by EPA. Once approved, or approved

with modifications, the Removal Work Plan, the schedule, and any subsequent modifications shall be incorporated into and become fully enforceable under this Settlement.

c. Upon approval or approval with modifications of the Removal Work Plan Respondents shall commence implementation of the Work in accordance with the schedule included therein. Respondents shall not commence or perform any Work except in conformance with the terms of this Settlement.

d. Unless otherwise provided in this Settlement, any additional deliverables that require EPA approval under the Removal Work Plan shall be reviewed and approved by EPA in accordance with this Paragraph.

## **32. Submission of Deliverables**

### **a. General Requirements for Deliverables**

(1) Except as otherwise provided in this Settlement, Respondents shall direct all submissions required by this Settlement to the OSC, David Rosoff at [rosoff.david@epa.gov](mailto:rosoff.david@epa.gov) or 908-420-4465 and the RPM, Pamela Tames, at [tames.pam@epa.gov](mailto:tames.pam@epa.gov) or 212-637-4255. Respondents shall submit all deliverables required by this Settlement, or any approved work plan to EPA in accordance with the schedule set forth in such plan.

(2) Respondents shall submit all deliverables in electronic form. Technical specifications for sampling and monitoring data and spatial data are addressed in Paragraph 32.b. All other deliverables shall be submitted to EPA in the form specified by the OSC. If any deliverable includes maps, drawings, or other exhibits that are larger than 8.5 x 11 inches, Respondents shall ask EPA whether it wants paper copies of such exhibits.

### **b. Technical Specifications for Deliverables**

(1) Sampling and monitoring data should be submitted in standard Regional Electronic Data Deliverable (EDD) format as specified by EPA, which can be found at <https://www.epa.gov/superfund/region-2-superfund-electronic-data-submission>. Other delivery methods may be allowed if electronic direct submission presents a significant burden or as technology changes.

(2) Spatial data, including spatially-referenced data and geospatial data, should be submitted: (a) in the ESRI File Geodatabase format; and (b) as unprojected geographic coordinates in decimal degree format using North American Datum 1983 (NAD83) or World Geodetic System 1984 (WGS84) as the datum. If applicable, submissions should include the collection method(s). Projected coordinates may optionally be included but must be documented. Spatial data should be accompanied by metadata, and such metadata should be compliant with the Federal Geographic Data Committee (FGDC) Content Standard for Digital Geospatial Metadata and its EPA profile, the EPA Geospatial Metadata Technical Specification. An add-on metadata editor for ESRI software,



the EPA Metadata Editor (EME), complies with these FGDC and EPA metadata requirements and is available at <https://www.epa.gov/geospatial/epa-metadata-editor>.

(3) Each file must include an attribute name for each site unit or sub-unit submitted. Consult <https://www.epa.gov/geospatial/geospatial-policies-and-standards> for any further available guidance on attribute identification and naming.

(4) Spatial data submitted by Respondents does not, and is not intended to, define the boundaries of the Site.

33. **Health and Safety Plan.** Within 45 days after the Effective Date, Respondents shall submit for EPA review and comment a plan that ensures the protection of the public health and safety during performance of on-site work under this Settlement. This plan shall be prepared in accordance with “OSWER Integrated Health and Safety Program Operating Practices for OSWER Field Activities,” Pub. 9285.0-OIC (Nov. 2002), available on the NSCEP database at <https://www.epa.gov/nscep>, and “EPA’s Emergency Responder Health and Safety Manual,” OSWER Directive 9285.3-12 (July 2005 and updates), available at <https://www.epaossc.org/HealthSafetyManual/manual-index.htm>. In addition, the plan shall comply with all currently applicable Occupational Safety and Health Administration (OSHA) regulations found at 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include contingency planning. Respondents shall incorporate all changes to the plan recommended by EPA and shall implement the plan during the pendency of the removal action.

34. **Quality Assurance, Sampling, and Data Analysis**

a. Respondents shall use quality assurance, quality control, and other technical activities and chain of custody procedures for all samples consistent with “EPA Requirements for Quality Assurance Project Plans (QA/R5)” EPA/240/B-01/003 (March 2001, reissued May 2006), “Guidance for Quality Assurance Project Plans (QA/G-5)” EPA/240/R-02/009 (December 2002), and “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A-900C (March 2005).

b. **Sampling and Analysis Plan.** Within 45 days after the Effective Date, Respondents shall submit a Sampling and Analysis Plan to EPA for review and approval. This plan shall consist of a Field Sampling Plan (FSP) and a Quality Assurance Project Plan (QAPP) that is consistent with the work identified in Paragraph 29, the NCP and applicable guidance documents, including, but not limited to, “Guidance for Quality Assurance Project Plans (QA/G-5)” EPA/240/R-02/009 (December 2002), “EPA Requirements for Quality Assurance Project Plans (QA/R-5)” EPA 240/B-01/003 (March 2001, reissued May 2006), and “Uniform Federal Policy for Quality Assurance Project Plans,” Parts 1-3, EPA/505/B-04/900A-900C (March 2005). Upon its approval by EPA, the Sampling and Analysis Plan shall be incorporated into and become enforceable under this Settlement.

c. Respondents shall ensure that EPA and State personnel and their authorized representatives are allowed access at reasonable times to all laboratories utilized by

Respondents in implementing this Settlement. In addition, Respondents shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance, quality control, and technical activities that will satisfy the stated performance criteria as specified in the QAPP and that sampling and field activities are conducted in accordance with the Agency's "EPA QA Field Activities Procedure," CIO 2105-P-02.1 (9/23/2014) available at <http://www.epa.gov/irmpoli8/epa-qa-field-activities-procedures>. Respondents shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Settlement meet the competency requirements set forth in EPA's "Policy to Assure Competency of Laboratories, Field Sampling, and Other Organizations Generating Environmental Measurement Data under Agency-Funded Acquisitions" available at <http://www.epa.gov/measurements/documents-about-measurement-competency-under-acquisition-agreements> and that the laboratories perform all analyses according to accepted EPA methods. Accepted EPA methods consist of, but are not limited to, methods that are documented in the EPA's Contract Laboratory Program (<http://www.epa.gov/clp>), SW 846 "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods" (<https://www.epa.gov/hw-sw846>), "Standard Methods for the Examination of Water and Wastewater" (<http://www.standardmethods.org/>), 40 C.F.R. Part 136, "Air Toxics - Monitoring Methods" (<http://www3.epa.gov/ttnamti1/airtox.html>).

d. However, upon approval by EPA, Respondents may use other appropriate analytical method(s), as long as (i) quality assurance/quality control (QA/QC) criteria are contained in the method(s) and the method(s) are included in the QAPP, (ii) the analytical method(s) are at least as stringent as the methods listed above, and (iii) the method(s) have been approved for use by a nationally recognized organization responsible for verification and publication of analytical methods, e.g., EPA, ASTM, NIOSH, OSHA, etc. Respondents shall ensure that all laboratories they use for analysis of samples taken pursuant to this Settlement have a documented Quality System that complies with ASQ/ANSI E4:2014 "Quality management systems for environmental information and technology programs - Requirements with guidance for use" (American Society for Quality, February 2014), and "EPA Requirements for Quality Management Plans (QA/R-2)" EPA/240/B-01/002 (March 2001, reissued May 2006), or equivalent documentation as determined by EPA. EPA may consider Environmental Response Laboratory Network (ERLN) laboratories, laboratories accredited under the National Environmental Laboratory Accreditation Program (NELAP), or laboratories that meet International Standardization Organization (ISO 17025) standards or other nationally recognized programs as meeting the Quality System requirements. Respondents shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Settlement are conducted in accordance with the procedures set forth in the QAPP approved by EPA.

e. Upon request, Respondents shall provide split or duplicate samples to EPA or its authorized representatives. Respondents shall notify EPA not less than 7 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 provide to Respondents split or duplicate samples of any samples it takes as part of EPA's oversight of Respondents' implementation of the Work.

f. Respondents shall submit to EPA the results of all sampling and/or tests or other data obtained or generated by or on behalf of Respondents with respect to the Site and/or the implementation of this Settlement.

g. Respondents waive any objections to any data gathered, generated, or evaluated by EPA, the State or Respondents in the performance or oversight of the Work that has been verified according to the QA/QC procedures required by the Settlement or any EPA-approved Work Plans or Sampling and Analysis Plans. If Respondents object to any other data relating to the Work, Respondents shall submit to EPA a report that specifically identifies and explains their objections, describes the acceptable uses of the data, if any, and identifies any limitations to the use of the data. The report must be submitted to EPA within 15 days after the monthly progress report containing the data.

**35. Post-Removal Site Control.** If EPA determines that the excavated soil/sediment currently in piles on the Affected Property cannot be disposed of off-site, Respondents shall submit a proposal for Post-Removal Site Control. These Post-Removal Site Controls shall include, but not be limited to, placement of the soil/sediment in roll-off containers, and inspection of the roll-off containers every 6 months (and after major storm events for rust, damage, or leakage). Upon EPA approval of the proposal, Respondents shall either conduct Post-Removal Site Control activities, or obtain a written commitment from another party for conduct of such activities, until such time as EPA determines that no further Post-Removal Site Control is necessary. Respondents shall provide EPA with documentation of all Post-Removal Site Control commitments.

**36. Progress Reports.** Respondents shall submit a weekly written progress report to EPA concerning actions undertaken pursuant to this Settlement beginning on the 15<sup>th</sup> day of the following month, or as otherwise requested by EPA, from the date of receipt of EPA's approval of the Removal Work Plan until issuance of Notice of Completion of Work pursuant to Section XXVII, unless otherwise directed in writing by the OSC or the RPM. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

**37. Final Report.** Within 60 days after completion of all Work required by this Settlement, other than continuing obligations listed in Paragraph 111 (notice of completion), Respondents shall submit for EPA review and approval a Final Report summarizing the actions taken to comply with this Settlement. The Final Report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The Final Report shall include a good faith estimate of total costs or a statement of actual costs incurred in complying with the Settlement, a listing of quantities and types of materials removed off-site or handled on-site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (e.g., manifests, invoices, bills, contracts, and permits). The Final Report shall also include the following certification signed by a responsible corporate official of a Respondent or Respondents' Project Coordinator: "I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons

who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

### **38. Off-Site Shipments**

a. Respondents may ship hazardous substances, pollutants and contaminants from the Site to an off-site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents will be deemed to be in compliance with CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440 regarding a shipment if Respondents obtain a prior determination from EPA that the proposed receiving facility for such shipment is acceptable under the criteria of 40 C.F.R. § 300.440(b).

b. Respondents may ship Waste Material from the Site to an out-of-state waste management facility only if, prior to any shipment, they provide written notice to the appropriate state environmental official in the receiving facility’s state and to the OSC and RPM. This written notice requirement shall not apply to any off-site shipments when the total quantity of all such shipments will not exceed ten cubic yards. The written notice must include the following information, if available: (1) the name and location of the receiving facility; (2) the type and quantity of Waste Material to be shipped; (3) the schedule for the shipment; and (4) the method of transportation. Respondents also shall notify the state environmental official referenced above and the OSC and RPM of any major changes in the shipment plan, such as a decision to ship the Waste Material to a different out-of-state facility. Respondents shall provide the written notice after the award of the contract for the removal action and before the Waste Material is shipped.

c. Respondents may ship Investigation Derived Waste (IDW) from the Site to an off-site facility only if they comply with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), 40 C.F.R. § 300.440, EPA’s “Guide to Management of Investigation Derived Waste,” OSWER 9345.3-03FS (Jan. 1992) and any IDW-specific requirements contained in the Action Memorandum. Wastes shipped off-site to a laboratory for characterization, and RCRA hazardous wastes that meet the requirements for an exemption from RCRA under 40 C.F.R. § 261.4(e) shipped off-site for treatability studies, are not subject to 40 C.F.R. § 300.440.

## **IX. PROPERTY REQUIREMENTS**

39. **Agreements Regarding Access and Non-Interference.** Respondents shall, with respect to any Non-Settling Owner’s Affected Property, use best efforts to secure from such Non-Settling Owner an agreement, enforceable by Respondents and the EPA, providing that such Non-Settling Owner shall, with respect to the Affected Property: (i) provide the EPA, the State, Respondents, and their representatives, contractors, and subcontractors with access at all reasonable times to such Affected Property to conduct any activity regarding the Settlement, including those activities listed in Paragraph 39.a (Access Requirements); and (ii) refrain from using such Affected Property in any manner that EPA determines will pose an unacceptable risk to human health or to the environment due to exposure to Waste Material, or interfere with or

adversely affect the implementation, integrity, or protectiveness of the removal action, including the restrictions listed in Paragraph 39.b (Land, Water, or Other Resource Use Restrictions). Respondents shall provide a copy of such access and use restriction agreement(s) to EPA and the State.

a. **Access Requirements.** The following is a list of activities for which access is required regarding the Affected Property:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States;
- (3) Conducting investigations regarding contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, implementing, or monitoring response actions;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved quality assurance quality control plan;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 83 (Work Takeover);
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Respondents or their agents, consistent with Section X (Access to Information);
- (9) Assessing Respondents' compliance with the Settlement;
- (10) Determining whether the Affected Property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted under the Settlement; and
- (11) Implementing, monitoring, maintaining, reporting on, and enforcing any land, water, or other resource use restrictions regarding the Affected Property.

b. **Land, Water, or Other Resource Use Restrictions.** The following is a list of land, water, or other resource use restrictions applicable to the Affected Property:

- (1) Any land, water or other resource use restrictions that are specified in the Action Memorandum.
- (2) Restricting access to areas of the Affected Property with identified contamination.



40. **Best Efforts.** As used in this Section, “best efforts” means the efforts that a reasonable person in the position of Respondents would use so as to achieve the goal in a timely manner, including the cost of employing professional assistance and the payment of reasonable sums of money to secure access and/or use restriction agreements, as required by this Section. If Respondents are unable to accomplish what is required through “best efforts” in a timely manner, they shall notify EPA, and include a description of the steps taken to comply with the requirements. If EPA deems it appropriate, it may assist Respondents, or take independent action, in obtaining such access and/or use restrictions. All costs incurred by the United States in providing such assistance or taking such action, including the cost of attorney time and the amount of monetary consideration or just compensation paid, constitute Future Response Costs to be reimbursed under Section XIV (Payment of Response Costs).

41. If EPA determines in a decision document prepared in accordance with the NCP that institutional controls in the form of state or local laws, regulations, ordinances, zoning restrictions, or other governmental controls or notices are needed, Respondents shall cooperate with EPA’s and the State’s efforts to secure and ensure compliance with such institutional controls.

42. In the event of any Transfer of the Affected Property, unless EPA otherwise consents in writing, Respondents shall continue to comply with their obligations under the Settlement, including their obligation to secure access and ensure compliance with any land, water, or other resource use restrictions regarding the Affected Property.

43. Notwithstanding any provision of the Settlement, EPA retains all of its access authorities and rights, as well as all of its rights to require land, water, or other resource use restrictions, including enforcement authorities related thereto under CERCLA, RCRA, and any other applicable statute or regulations.

## **X. ACCESS TO INFORMATION**

44. Respondents shall provide to EPA, upon request, copies of all records, reports, documents, and other information (including records, reports, documents, and other information in electronic form) (hereinafter referred to as “Records”) within Respondents’ possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Settlement, 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 regarding the Work. Respondents shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

### **45. Privileged and Protected Claims**

a. Respondents may assert all or part of a Record requested by EPA is privileged or protected as provided under federal law, in lieu of providing the Record, provided Respondents comply with Paragraph 45.b, and except as provided in Paragraph 45.c.

b. If Respondents assert such a privilege or protection, they shall provide EPA with the following information regarding such Record: its title; its date; the name, title, affiliation (e.g., company or firm), and address of the author, of each addressee, and of each recipient; a description of the Record's contents; and the privilege or protection asserted. If a claim of privilege or protection applies only to a portion of a Record, Respondents shall provide the Record to EPA in redacted form to mask the privileged or protected portion only. Respondents shall retain all Records that they claim to be privileged or protected until EPA has had a reasonable opportunity to dispute the privilege or protection claim and any such dispute has been resolved in Respondents' favor.

c. Respondents may make no claim of privilege or protection regarding: (1) any data regarding the Site, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, radiological, or engineering data, or the portion of any other Record that evidences conditions at or around the Site; or (2) the portion of any Record that Respondents are required to create or generate pursuant to this Settlement.

46. **Business Confidential Claims.** Respondents may assert that all or part of a Record provided to EPA under this Section or Section XI (Record Retention) is business confidential 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). Respondents shall segregate and clearly identify all Records or parts thereof submitted under this Settlement for which Respondents assert business confidentiality claims. Records that Respondents claim to be confidential business information will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies Records when they are submitted to EPA, or if EPA has notified Respondents that the Records 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 Records without further notice to Respondents.

47. Notwithstanding any provision of this Settlement, EPA 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.

## **XI. RECORD RETENTION**

48. Until ten (10) years after EPA provides Respondents with notice, pursuant to Section XXVII (Notice of Completion of Work), that all Work has been fully performed in accordance with this Settlement, Respondents shall preserve and retain all non-identical copies of Records (including Records in electronic form) now in their possession or control, or that come into their possession or control, that relate in any manner to their liability under CERCLA with regard to the Site, provided, however, that Respondents who are potentially liable as owners or operators of the Site must retain, in addition, all Records that relate to the liability of any other person under CERCLA with respect to the Site. Each Respondent 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 Records (including Records in electronic form) now in their possession or control or that come into their possession or control that relate in any manner to the performance of the Work, provided, however, that each Respondent (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 Records required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary.

49. At the conclusion of the document retention period, Respondents shall notify EPA at least 90 days prior to the destruction of any such Records, and, upon request by EPA, and except as provided in Paragraph 45 (Privileged and Protected Claims), Respondents shall deliver any such Records to EPA.

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

## **XII. COMPLIANCE WITH OTHER LAWS**

51. Nothing in this Settlement limits Respondents' obligations to comply with the requirements of all applicable state and federal laws and regulations, except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 9621(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-site actions required pursuant to this Settlement shall, to the extent practicable, as determined by EPA, considering the exigencies of the situation, attain applicable or relevant and appropriate requirements (ARARs) under federal environmental or state environmental or facility siting laws.

52. No local, state, or federal 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), including studies, if the action is selected and carried out in compliance with Section 121 of CERCLA, 42 U.S.C. § 9621. Where any portion of the Work that is not on-site requires a federal or state permit or approval, Respondents shall submit timely and complete applications and take all other actions necessary to obtain and to comply with all such permits or approvals. Respondents may seek relief under the provisions of Section XVI (Force Majeure) for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit or approval required for the Work, provided that they have submitted timely and complete applications and taken all other actions necessary to obtain all such permits or approvals. This Settlement is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

## **XIII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES**

53. **Emergency Response.** If any event occurs during performance of the Work that causes or threatens to cause a release of Waste Material on, at, or from the Site that either constitutes an emergency situation or that may present an immediate threat to public health or welfare or the environment, Respondents shall immediately take all appropriate action to

prevent, abate, or minimize such release or threat of release. Respondents shall take these actions in accordance with all applicable provisions of this Settlement, including, but not limited to, the Health and Safety Plan. Respondents shall also immediately notify the OSC or, in the event of his unavailability, the Regional Duty Officer at (732) 906-6850 of the incident or Site conditions. In the event that Respondents fail to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondents shall reimburse EPA for all costs of such response action not inconsistent with the NCP pursuant to Section XIV (Payment of Response Costs).

54. **Release Reporting.** Upon the occurrence of any event during performance of the Work that Respondents are required to report pursuant to Section 103 of CERCLA, 42 U.S.C. § 9603, or Section 304 of the Emergency Planning and Community Right-to-Know Act (EPCRA), 42 U.S.C. § 11004, Respondents shall immediately orally notify the OSC or, in the event of his unavailability, the Regional Duty Officer at (732) 906-6850, and the National Response Center at (800) 424-8802. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103 of CERCLA, 42 U.S.C. § 9603, and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004.

55. For any event covered under this Section, Respondents shall submit a written report to EPA within 7 days after the onset of such event, setting forth the action or event that occurred and the measures taken, and to be taken, to mitigate any release or threat of release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release or threat of release.

#### **XIV. PAYMENT OF RESPONSE COSTS**

56. **Payment for Past Response Costs.**

a. Within 30 days after the Effective Date, Respondents shall pay to EPA \$47,796 for Past Response Costs. Respondents shall make the payment at <https://www.pay.gov> in accordance with the following payment instructions: enter “sfo 1.1” in the search field to access EPA’s Miscellaneous Payment Form – Cincinnati Finance Center. Complete the form including the following information: Respondents’ name, address, phone, and email; type of payment (**Superfund**), Site/Spill ID Number (**02MV**), Payment Amount (**insert amount of payment**), Installments (**No**), Region (**2**), and “Are you paying for yourself or another party” (**Self-Payment**). Please insert the Site Name (**Pierson’s Creek Superfund Site**) and the Docket No: (**CERCLA-02-2022-2012**) in the Comment field. Respondents shall send to EPA, in accordance with Paragraph 27, a notice of this payment including the above information.

b. **Deposit of Past Response Costs Payments.** The total amount to be paid by Respondents pursuant to Paragraph 56.a shall be deposited by EPA in the Pierson’s Creek Superfund Site Special Account 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.

57. **Payments for Future Response Costs.** Respondents shall pay to EPA all Future Response Costs not inconsistent with the NCP.

a. **Periodic Bills.** On a periodic basis, EPA will send Respondents a bill requiring payment that includes a Superfund Cost Recovery Package Imaging and On-line system ("SCORPIOS") Report, which includes direct and indirect costs incurred by EPA, its contractors, subcontractors, and the United States Department of Justice. Respondents shall make all payments within 30 days after Respondents' receipt of each bill requiring payment, except as otherwise provided in Paragraph 59 (Contesting Future Response Costs). Respondents and EPA agree that a letter from a branch chief within the Superfund and Emergency Management Division, EPA Region 2, providing the amount of costs incurred and accompanied by a SCORPIOS Report shall serve as the sole basis for payment demands by EPA. Respondents shall not demand any additional documentation beyond that specified in this subparagraph as a prerequisite for making any payments demanded by EPA for Future Response Costs. Respondents shall make all payments and send notice of the payments, in accordance with the procedures under Paragraph 56.a (Payments for Past Response Costs).

b. **Deposit of Future Response Costs Payments.** The total amount to be paid by Respondents pursuant to Paragraph 56 and Paragraph 57.a (Periodic Bills) shall be deposited by EPA in the Pierson's Creek Superfund Site Special Account 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, provided, however, that EPA may deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund if, at the time the payment is received, EPA estimates that the Pierson's Creek Superfund Site Special Account balance is sufficient to address currently anticipated future response actions to be conducted or financed by EPA at or in connection with the Site. Any decision by EPA to deposit a Future Response Costs payment directly into the EPA Hazardous Substance Superfund for this reason shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum.

58. **Interest.** In the event that any payment for Past Response Costs or Future Response Costs is not made by the date required, Respondents shall pay Interest on the unpaid balance. The Interest on Past Response Costs shall begin to accrue on the Effective Date. The Interest on Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of Respondents' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondents' failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVII (Stipulated Penalties).

59. **Contesting Future Response Costs.** Respondents may initiate the procedures of Section XV (Dispute Resolution) regarding payment of any Future Response Costs billed under Paragraph 57 (Payments for Future Response Costs) if they determine that EPA has made a mathematical error or included a cost item that is not within the definition of Future Response Costs, or if they believe EPA incurred excess costs as a direct result of an EPA action that was inconsistent with a specific provision or provisions of the NCP. To initiate such dispute, Respondents shall submit a Notice of Dispute in writing (which writing may be electronic) to the OSC and RPM within 30 days after receipt of the bill. Any such Notice of Dispute shall specifically identify the contested Future Response Costs and the basis for objection. If Respondents submit a Notice of Dispute, Respondents shall within the 30-day period, also as a requirement for initiating the dispute, (a) pay all uncontested Future Response Costs to EPA in

the manner described in Paragraph 57, and (b) establish, in a duly chartered bank or trust company, an interest-bearing escrow account that is insured by the Federal Deposit Insurance Corporation (FDIC) and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. Respondents shall send to the OSC and RPM a copy of the transmittal letter and check paying the uncontested Future Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. If EPA prevails in the dispute, within 5 days after the resolution of the dispute, Respondents shall pay the sums due (with accrued interest) to EPA in the manner described in Paragraph 57. If Respondents prevail concerning any aspect of the contested costs, Respondents shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to EPA in the manner described in Paragraph 57. Respondents shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XV (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes under Respondents' obligation to reimburse EPA for its Future Response Costs.

## **XV. DISPUTE RESOLUTION**

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

61. **Informal Dispute Resolution.** If Respondents object to any EPA action taken pursuant to this Settlement, including billings for Future Response Costs, they shall send EPA a written Notice of Dispute (which writing may be electronic) describing the objection(s) within 21 days after such action. EPA and Respondents shall have 30 days from EPA's receipt of Respondents' Notice of Dispute to resolve the dispute through informal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA. Any agreement reached by the Parties pursuant to this Section shall be in writing and shall, upon signature by the Parties, be incorporated into and become an enforceable part of this Settlement.

62. **Formal Dispute Resolution.** If the Parties are unable to reach an agreement within the Negotiation Period, Respondents shall, within 20 days after the end of the Negotiation Period, submit a statement of position to the OSC and RPM. EPA may submit a statement of position in response. Thereafter, an EPA management official at the Deputy Director level in the Superfund and Emergency Management Division Region 2, or, at the sole discretion of EPA, someone occupying a higher position, will issue a written decision on the dispute to Respondents. EPA's decision shall be incorporated into and become an enforceable part of this Settlement. Respondents shall fulfill the requirement that was the subject of the dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

63. Except as provided in Paragraph 59 (Contesting Future Response Costs) or as agreed by EPA, the invocation of formal dispute resolution procedures under this Section does not extend, postpone, or affect in any way any obligation of Respondents under this Settlement.



Except as provided in Paragraph 73, stipulated penalties with respect to the disputed matter shall continue to accrue, but payment shall be stayed pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Settlement. In the event that Respondents do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XVII (Stipulated Penalties).

## **XVI. FORCE MAJEURE**

64. "Force Majeure" for purposes of this Settlement, is defined as any event arising from causes beyond the control of Respondents, of any entity controlled by Respondents, or of Respondents' contractors that delays or prevents the performance of any obligation under this Settlement despite Respondents' best efforts to fulfill the obligation. The requirement that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure and best efforts to address the effects of any potential force majeure (a) as it is occurring and (b) following the potential force majeure such that the delay and any adverse effects of the delay are minimized to the greatest extent possible. "Force majeure" does not include financial inability to complete the Work, or increased cost of performance, or a failure to attain performance standards if set forth in the Action Memorandum.

65. If any event occurs or has occurred that may delay the performance of any obligation under this Settlement for which Respondents intend or may intend to assert a claim of force majeure, Respondents shall notify EPA's OSC orally or, in his or her absence, the RPM, or, in the event both of EPA's designated representatives are unavailable, the Chief of the Passaic, Hackensack and Newark Bay Remediation Branch, EPA Region 2, within five days of when Respondents first knew that the event might cause a delay. Within seven days thereafter, Respondents shall provide in writing to EPA (which writing may be electronic) an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondents' rationale for attributing such delay to a force majeure; and a statement as to whether, in the opinion of Respondents, such event may cause or contribute to an endangerment to public health or welfare, or the environment. Respondents shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Respondents shall be deemed to know of any circumstance of which Respondents, any entity controlled by Respondents, or Respondents' contractors knew or should have known. Failure to comply with the above requirements regarding an event shall preclude Respondents from asserting any claim of force majeure regarding that event, provided, however, that if EPA, despite the late or incomplete notice, is able to assess to its satisfaction whether the event is a force majeure under Paragraph 64 and whether Respondents have exercised their best efforts under Paragraph 64, EPA may, in its unreviewable discretion, excuse in writing Respondents' failure to submit timely or complete notices under this Paragraph.

66. If EPA agrees that the delay or anticipated delay is attributable to a force majeure, the time for performance of the obligations under this Settlement that are affected by the force majeure 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 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, EPA will notify Respondents in writing of its decision. If EPA agrees that the delay is attributable to a force majeure, EPA will notify Respondents in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure.

67. If Respondents elect to invoke the dispute resolution procedures set forth in Section XV (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, Respondents 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, 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 Respondents complied with the requirements of Paragraphs 64 and 65. If Respondents carry this burden, the delay at issue shall be deemed not to be a violation by Respondents of the affected obligation of this Settlement identified to EPA.

68. The failure by EPA to timely complete any obligation under the Settlement is not a violation of the Settlement, provided, however, that if such failure prevents Respondents from meeting one or more deadlines under the Settlement, Respondents may seek relief under this Section.

## **XVII. STIPULATED PENALTIES**

69. Respondents shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 70.a and 71 for failure to comply with the obligations specified in Paragraphs 70.b and 71, unless excused under Section XVI (Force Majeure). "Comply" as used in the previous sentence include compliance by Respondents with all applicable requirements of this Settlement, within the deadlines established under this Settlement.

### **70. Stipulated Penalty Amounts - Payments, Financial Assurance, Major Deliverables, and Other Milestones**

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Paragraph 70.b:

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

#### **b. Obligations**

(1) Submission of Removal Work Plan (initial and revised documents) under Section VIII.

(2) Submission of Final Report (initial and revised documents) under Section VIII.

(3) Payment of any amount due under Section XIV (Payment of Response Costs).

(4) Establishment and maintenance of financial assurance in accordance with Section XXV (Financial Assurance).

(5) Establishment of an escrow account to hold any disputed Future Response Costs under Paragraph 59 (Contesting Future Response Costs).

71. **Stipulated Penalty Amounts – Other Deliverables.** The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate deliverables, pursuant to this Settlement, other than those specified in Paragraph 70.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$250	1st through 14th day
\$750	15th through 30th day
\$1,000	31st day and beyond

72. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 83 (Work Takeover), Respondents shall be liable for a stipulated penalty in the amount of \$100,000. Stipulated penalties under this Paragraph are in addition to the remedies available to EPA under Paragraphs 83 (Work Takeover) and 105 (Access to Financial Assurance).

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. Penalties shall continue to accrue during any dispute resolution period, and shall be paid within 15 days after the agreement or the receipt of EPA's decision or order. However, stipulated penalties shall not accrue: (a) with respect to a deficient submission under Paragraph 31 (Work Plan and Implementation), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondents of any deficiency; and (b) with respect to a decision by the EPA Management Official at the Deputy Director level or higher, under Paragraph 62 (Formal Dispute Resolution), during the period, if any, beginning on the 21<sup>st</sup> day after the Negotiation Period begins until the date that the EPA Management Official issues a final decision regarding such dispute. Nothing in this Settlement shall prevent the simultaneous accrual of separate penalties for separate violations of this Settlement.

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

75. All penalties accruing under this Section shall be due and payable to EPA within 30 days after Respondents' receipt from EPA of a demand for payment of the penalties, unless Respondents invoke the Dispute Resolution procedures under Section XV (Dispute Resolution)



within the 30-day period. All payments to EPA under this Section shall be made in accordance with Paragraph 57 (Payments for Future Response Costs). Respondents shall indicate in the comment field on the [www.pay.gov](http://www.pay.gov) payment form that the payment is for stipulated penalties.

76. If Respondents fail to pay stipulated penalties when due, Respondents shall pay Interest on the unpaid stipulated penalties as follows: (a) if Respondents have timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, Interest shall accrue from the date stipulated penalties are due pursuant to Paragraph 73 until the date of payment; and (b) if Respondents fail to timely invoke dispute resolution, Interest shall accrue from the date of demand under Paragraph 75 until the date of payment. If Respondents fail to pay stipulated penalties and Interest when due, the United States may institute proceedings to collect the penalties and Interest.

77. The payment of penalties and Interest, if any, shall not alter in any way Respondents' obligation to complete the performance of the Work required under this Settlement.

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

79. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Settlement.

## **XVIII. COVENANTS BY EPA**

80. Except as provided in Section XIX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Respondents pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for the Work, Past Response Costs and Future Response Costs. These covenants shall take effect upon the Effective Date. These covenants are conditioned upon the complete and satisfactory performance by Respondents of their obligations under this Settlement. These covenants extend only to Respondents and do not extend to any other person.

## **XIX. RESERVATIONS OF RIGHTS BY EPA**

81. Except as specifically provided in this Settlement, nothing in this Settlement shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize

an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste on, at, or from the Site. Further, nothing in this Settlement shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Settlement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondents in the future to perform additional activities pursuant to CERCLA or any other applicable law.

82. The covenants set forth in Section XVIII (Covenants by EPA) do not pertain to any matters other than those expressly identified therein. EPA reserves, and this Settlement is without prejudice to, all rights against Respondents with respect to all other matters, including, but not limited to:

- a. liability for failure by Respondents to meet a requirement of this Settlement;
- b. liability for costs not included within the definitions of Past Response Costs or Future Response Costs;
- c. liability for performance of response action other than the Work;
- d. criminal liability;
- e. liability for violations of federal or state law that occur during or after implementation of the Work;
- f. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- g. liability arising from the past, present, or future disposal, release or threat of release of Waste Materials outside of the Site; and
- h. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site not paid as Future Response Costs under this Settlement.

83. **Work Takeover**

a. In the event EPA determines that Respondents: (1) have ceased implementation of any portion of the Work; (2) are seriously or repeatedly deficient or late in their performance of the Work; or (3) are implementing the Work in a manner that may cause an endangerment to human health or the environment, EPA may issue a written notice ("Work Takeover Notice") to Respondents. Any Work Takeover Notice issued by EPA (which writing may be electronic) will specify the grounds upon which such notice was issued and will provide Respondents a period of 7 days within which to remedy the circumstances giving rise to EPA's issuance of such notice.

b. If, after expiration of the 7-day notice period specified in Paragraph 83.a, Respondents have not remedied to EPA's satisfaction the circumstances giving rise to EPA's

issuance of the relevant Work Takeover Notice, EPA may at any time thereafter assume the performance of all or any portion(s) of the Work as EPA deems necessary (“Work Takeover”). EPA will notify Respondents in writing (which writing may be electronic) if EPA determines that implementation of a Work Takeover is warranted under this Paragraph 83.b. Funding of Work Takeover costs is addressed under Paragraph 105 (Access to Financial Assurance).

c. Respondents may invoke the procedures set forth in Paragraph 62 (Formal Dispute Resolution) to dispute EPA’s implementation of a Work Takeover under Paragraph 83.b. However, notwithstanding Respondents’ invocation of such dispute resolution procedures, and during the pendency of any such dispute, EPA may in its sole discretion commence and continue a Work Takeover under Paragraph 83.b until the earlier of (1) the date that Respondents remedy, to EPA’s satisfaction, the circumstances giving rise to EPA’s issuance of the relevant Work Takeover Notice, or (2) the date that a written decision terminating such Work Takeover is rendered in accordance with Paragraph 62 (Formal Dispute Resolution).

d. Notwithstanding any other provision of this Settlement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

## **XX. COVENANTS BY RESPONDENTS**

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

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

b. any claims under Sections 107 and 113 of CERCLA, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law regarding the Work, Past Response Costs, Future Response Costs, and this Settlement;

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

85. Except as provided in Paragraph 88 (Waiver of Claims by Respondents), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to any of the reservations set forth in Section XIX (Reservations of Rights by EPA), other than in Paragraph 82.a (liability for failure to meet a requirement of the Settlement), 82.d (criminal liability), or 82.e (violations of federal/state law during or after implementation of the Work), but only to the extent that Respondents’ claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

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

87. Respondents reserve, and this Settlement is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, and brought pursuant to any statute other than CERCLA or RCRA and for which the waiver of sovereign immunity is found in a statute other than CERCLA or RCRA, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States, as that term is defined in 28 U.S.C. § 2671, while acting within the scope of his or her office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, the foregoing shall not include any claim based on EPA's selection of response actions, or the oversight or approval of Respondents' deliverables or activities.

88. **Waiver of Claims by Respondents**

a. Respondents agree not to assert any claims and to waive all claims or causes of action (including but not limited to claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have:

(1) **De Micromis Waiver.** For all matters relating to the Site against any person where the person's liability to Respondents with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if all or part of the disposal, treatment, or transport occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the Site was less than 110 gallons of liquid materials or 200 pounds of solid materials.

(2) **De Minimis/Ability to Pay Waiver.** For response costs relating to the Site against any person that has entered or in the future enters into a final Section 122(g) *de minimis* settlement, or a final settlement based on limited ability to pay, with EPA with respect to the Site.

b. **Exceptions to Waivers**

(1) The waivers under this Paragraph 88 shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person otherwise covered by such waivers if such person asserts a claim or cause of action relating to the Site against such Respondent.

(2) The waiver under Paragraph 88.a(1) (De Micromis Waiver) shall not apply to any claim or cause of action against any person otherwise covered by such waiver if EPA determines that: (i) the materials containing hazardous substances contributed to the Site by such person contributed significantly or

could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration at the Site; or (ii) such person has failed to comply with any information request or administrative subpoena issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. § 9604(e) or 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to the Site; or if (iii) such person has been convicted of a criminal violation for the conduct to which the waiver would apply and that conviction has not been vitiated on appeal or otherwise.

## **XXI. OTHER CLAIMS**

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

90. Except as expressly provided in Paragraphs 88 (Waiver of Claims by Respondents) and Section XVIII (Covenants by EPA), nothing in this Settlement constitutes a satisfaction of or release from any claim or cause of action against Respondents or any person not a party to this Settlement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages, and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, including any claims asserted in the Oberwil Environmental Litigation.

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

## **XXII. EFFECT OF SETTLEMENT/CONTRIBUTION**

92. Except as provided in Paragraphs 88 (Waiver of Claims by Respondents), nothing in this Settlement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Settlement. Except as provided in Section XX (Covenants by Respondents), each of the Parties expressly reserves any and all rights (including, but not limited to, pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Settlement diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2) and (3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

93. The Parties agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C.



§§ 9613(f)(2) and 9622(h)(4), and is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, or as may be otherwise provided by law, for the “matters addressed” in this Settlement. The “matters addressed” in this Settlement are the Work, Past Response Costs and Future Response Costs.

94. The Parties further agree that this Settlement constitutes an administrative settlement pursuant to which each Respondent has, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

95. Each Respondent shall, with respect to any suit or claim brought by it for matters related to this Settlement, notify EPA in writing no later than 60 days prior to the initiation of such suit or claim. Each Respondent also shall, with respect to any suit or claim brought against it for matters related to this Settlement, notify EPA in writing within 10 days after service of the complaint or claim upon it. In addition, each Respondent shall notify EPA within 10 days after service or receipt of any Motion for Summary Judgment and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Settlement.

96. In any subsequent administrative or judicial proceeding initiated by EPA, or by the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondents 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 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 covenant by EPA set forth in Section XVIII (Covenants by EPA).

97. Effective upon signature of this Settlement by a Respondent, such Respondent agrees that the time period commencing on the date of its signature and ending on the date EPA receives from such Respondent the payment(s) required by Paragraph 56 (Payment for Past Response Costs) and, if any, Section XVII (Stipulated Penalties) shall not be included in computing the running of any statute of limitations potentially applicable to any action brought by the United States related to the “matters addressed” as defined in Paragraph 93 and that, in any action brought by the United States related to the “matters addressed,” such Respondent will not assert, and may not maintain, any defense or claim based upon principles of statute of limitations, waiver, laches, estoppel, or other defense based on the passage of time during such period. If EPA gives notice to Respondents that it will not make this Settlement effective, the statute of limitations shall begin to run again commencing 90 days after the date such notice is sent by EPA.

### **XXIII. INDEMNIFICATION**

98. The United States does not assume any liability by entering into this Settlement or by virtue of any designation of Respondents as EPA’s authorized representatives under Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), and 40 C.F.R. 300.400(d)(3). Respondents shall indemnify, save, and hold harmless the United States, its officials, agents, employees,

contractors, subcontractors, and 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 Respondents, their officers, directors, employees, agents, contractors, or subcontractors, and any persons acting on Respondents' behalf or under their control, in carrying out activities pursuant to this Settlement. Further, Respondents agree 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 Respondents, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Settlement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondents in carrying out activities pursuant to this Settlement. Neither Respondents nor any such contractor shall be considered an agent of the United States.

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

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

#### **XXIV. INSURANCE**

101. No later than 30 days before commencing any on-site Work, Respondents shall secure, and shall maintain until the first anniversary after issuance of Notice of Completion of Work pursuant to Section XXVII (Notice of Completion of Work), commercial general liability insurance with limits of liability of \$1 million per occurrence, automobile liability insurance with limits of liability of \$1 million per accident, and umbrella liability insurance with limits of liability of \$5 million in excess of the required commercial general liability and automobile liability limits, naming EPA as an additional insured with respect to all liability arising out of the activities performed by or on behalf of Respondents pursuant to this Settlement. In addition, for the duration of the Settlement, Respondents shall provide EPA with certificates of such insurance and a copy of each insurance policy. Respondents shall resubmit such certificates and copies of policies each year on the anniversary of the Effective Date. In addition, for the duration of the Settlement, Respondents shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Respondents in furtherance of this Settlement. If Respondents demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering



some or all of the same risks but in a lesser amount, Respondents need provide only that portion of the insurance described above that is not maintained by the contractor or subcontractor. Respondents shall ensure that all submittals to EPA under this Paragraph identify the Pierson's Creek Superfund Site and the EPA docket number for this action.

## **XXV. FINANCIAL ASSURANCE**

102. In order to ensure completion of the Work, Respondents shall secure financial assurance, initially in the amount of \$750,000 ("Estimated Cost of the Work"), for the benefit of EPA. The financial assurance must be one or more of the mechanisms listed below, in a form substantially identical to the relevant sample documents available from EPA or under the "Financial Assurance - Settlements" category on the Cleanup Enforcement Model Language and Sample Documents Database at <https://cfpub.epa.gov/compliance/models/>, and satisfactory to EPA. Respondents may use multiple mechanisms if they are limited to surety bonds guaranteeing payment, letters of credit, trust funds, and/or insurance policies.

a. A surety bond 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. An irrevocable letter of credit, payable to or at the direction of EPA, that is issued by an entity that has the authority to issue letters of credit and whose letter-of-credit operations are regulated and examined by a federal or state agency;

c. A trust fund established for the benefit of EPA that is administered by a trustee that has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state agency; or

d. A policy of insurance that provides EPA with acceptable rights as a beneficiary thereof and that is issued by an insurance carrier that has the authority to issue insurance policies in the applicable jurisdictions and whose insurance operations are regulated and examined by a federal or state agency;

103. Respondents shall, within 30 days after the Effective Date, obtain EPA's approval of the form of Respondents' financial assurance. Within 30 days of such approval, Respondents 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 Chief, Resource Management/Cost Recovery Section, Superfund and Emergency Management Division, U.S. Environmental Protection Agency, Region 2, 290 Broadway, 18<sup>th</sup> Floor, New York, NY 10007.

104. Respondents shall diligently monitor the adequacy of the financial assurance. If any Respondent becomes aware of any information indicating that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, such Respondent shall notify EPA of such information within 7 days. If EPA determines that the financial assurance provided under this Section is inadequate or otherwise no longer satisfies the requirements of this Section, EPA will notify the affected Respondent of such determination. Respondents shall, within 30 days after notifying EPA or receiving notice from

EPA under this Paragraph, secure and submit to EPA for approval a proposal for a revised or alternative financial assurance mechanism that satisfies the requirements of this Section. EPA may extend this deadline for such time as is reasonably necessary for the affected Respondent, in the exercise of due diligence, to secure and submit to EPA a proposal for a revised or alternative financial assurance mechanism, not to exceed 60 days. Respondents shall follow the procedures of Paragraph 106 (Modification of Amount, Form, or Terms of Financial Assurance) in seeking approval of, and submitting documentation for, the revised or alternative financial assurance mechanism. Respondents' inability to secure financial assurance in accordance with this Section does not excuse performance of any other obligation under this Settlement.

#### **105. Access to Financial Assurance**

a. If EPA issues a notice of implementation of a Work Takeover under Paragraph 83.b, then, in accordance with any applicable financial assurance mechanism, EPA is entitled to: (1) the performance of the Work; and/or (2) require that any funds guaranteed be paid in accordance with Paragraph 105.d.

b. If EPA is notified by the issuer of a financial assurance mechanism that it intends to cancel the mechanism, and the affected Respondent fails to provide an alternative financial assurance mechanism in accordance with this Section at least 30 days prior to the cancellation date, the funds guaranteed under such mechanism must be paid prior to cancellation in accordance with Paragraph 105.d.

c. If, upon issuance of a notice of implementation of a Work Takeover under Paragraph 83.b, EPA is unable for any reason to promptly secure the resources guaranteed under any applicable financial assurance mechanism and/or related standby funding commitment, whether in cash or in kind, to continue and complete the Work, then EPA is entitled to demand an amount, as determined by EPA, sufficient to cover the cost of the remaining Work to be performed. Respondents shall, within 30 days of such demand, pay the amount demanded as directed by EPA.

d. Any amounts required to be paid under this Paragraph 105 shall be, as directed by EPA: (i) paid to EPA in order to facilitate the completion of the Work by EPA or by another person; or (ii) deposited into an interest-bearing account, established at a duly chartered bank or trust company that is insured by the FDIC, in order to facilitate the completion of the Work by another person. If payment is made to EPA, EPA may deposit the payment into the EPA Hazardous Substance Superfund or into the Pierson's Creek Superfund Site Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

e. All EPA Work Takeover costs not paid under this Paragraph 105 must be reimbursed as Future Response Costs under Section XIV (Payments for Response Costs).

#### **106. Modification of Amount, Form, or Terms of Financial Assurance.**

Respondents may submit, on any anniversary of the Effective Date or at any other time agreed to by the Parties, a request to reduce the amount, or change the form or terms, of the financial

assurance mechanism. Any such request must be submitted to EPA accordance with Paragraph 103, and must include an estimate of the cost of the remaining Work, an explanation of the bases for the cost calculation, and a description of the proposed changes, if any, to the form or terms of the financial assurance. EPA will notify Respondents of its decision to approve or disapprove a requested reduction or change pursuant to this Paragraph. Respondents may reduce the amount of the financial assurance mechanism only in accordance with: (a) EPA's approval; or (b) if there is a dispute, the agreement or written decision resolving such dispute under Section XV (Dispute Resolution). Respondents may change the form or terms of the financial assurance mechanism only in accordance with EPA's approval. Any decision made by EPA on a request submitted under this Paragraph to change the form or terms of a financial assurance mechanism shall not be subject to challenge by Respondents pursuant to the dispute resolution provisions of this Settlement or in any other forum. Within 30 days after receipt of EPA's approval of, or the agreement or decision resolving a dispute relating to, the requested modifications pursuant to this Paragraph, Respondents shall submit to EPA documentation of the reduced, revised, or alternative financial assurance mechanism in accordance with Paragraph 103.

**107. Release, Cancellation, or Discontinuation of Financial Assurance.**

Respondents may release, cancel, or discontinue any financial assurance provided under this Section only: (a) if EPA issues a Notice of Completion of Work under Section XXVII (Notice of Completion of Work); (b) in accordance with EPA's written (which may be electronic) approval of such release, cancellation, or discontinuation; or (c) if there is a dispute regarding the release, cancellation, or discontinuance of any financial assurance, in accordance with the agreement or final decision resolving such dispute under Section XV (Dispute Resolution).

## **XXVI. MODIFICATION**

108. The OSC or RPM may modify any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's or RPM's oral direction. Any other requirements of this Settlement may be modified in writing by mutual agreement of the parties.

109. If Respondents seek permission to deviate from any approved work plan or schedule, Respondents' Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondents may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 108.

110. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding any deliverable submitted by Respondents shall relieve Respondents of their obligation to obtain any formal approval required by this Settlement, or to comply with all requirements of this Settlement, unless it is formally modified.

## **XXVII. NOTICE OF COMPLETION OF WORK**

111. When EPA determines, after EPA's review of the Final Report, that all Work has been fully performed in accordance with this Settlement, with the exception of any continuing

obligations required by this Settlement, including Post-Removal Site Controls, any land, water, or other resource use restrictions, payment of Future Response Costs, and record retention, EPA will provide written notice to Respondents. If EPA determines that such Work has not been completed in accordance with this Settlement, EPA will notify Respondents, provide a list of the deficiencies, and require that Respondents modify the Removal Work Plan if appropriate in order to correct such deficiencies. Respondents shall implement the modified and approved Removal Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondents to implement the approved modified Removal Work Plan shall be a violation of this Settlement.

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

112. This Settlement and its appendices constitute the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Settlement. The parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Settlement. The following appendices are attached to and incorporated into this Settlement:

“Appendix A” is the Action Memorandum signed on July 22, 2022.

“Appendix B” is the description and/or map of the Site.

#### **XXIX. EFFECTIVE DATE**

113. This Settlement shall be effective five days after the Settlement is signed by the Director of the Superfund and Emergency Management Division, EPA Region 2 or his delegatee.

Signature Page for Administrative Settlement Agreement regarding the Pierson's Creek  
Superfund Site (Docket No. CERCLA-02-2022-2012)

IT IS SO AGREED AND ORDERED:

**U.S. ENVIRONMENTAL PROTECTION AGENCY:**

\_\_\_\_\_  
Dated


\_\_\_\_\_  
Pat Evangelista  
Director, Superfund and Emergency Management Division  
EPA Region 2



Signature Page for Administrative Settlement Agreement regarding the Pierson's Creek  
Superfund Site (Docket No. CERCLA-02-2022-2012)

**FOR 366-394 Wilson Avenue, LLC:**

8-3-22  
Dated

  
Signature

Joseph Salomone  
Printed Name of Signatory

Member  
Title

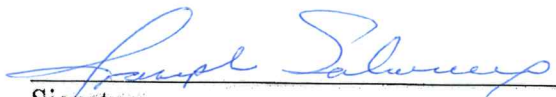
17 Demarest Dr. Wayne, NJ 07470  
Company Address

Signature Page for Administrative Settlement Agreement regarding the Pierson's Creek  
Superfund Site (Docket No. CERCLA-02-2022-2012)

**FOR Salomone Brothers, Inc.:**

8-3-22

Dated



Signature

Joseph Salomone

Printed Name of Signatory

President

Title

17 Demarest Dr. Wayne, NJ 07470

Company Address

## APPENDIX A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2  
290 BROADWAY NEW YORK, NY 10007-1866

**ACTION MEMORANDUM**

**DATE:**

**SUBJECT:** Enforcement Action Memorandum for Oberwil Property Portion of Pierson's Creek Superfund Site OUI, Newark, Essex County, New Jersey

**FROM:** Pamela Tames, Remedial Project Manager  
New York Remediation Branch

**PAMELA  
TAMES**

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TAMES  
Date: 2022.07.13 11:12:13  
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**THRU:** Michael Sivak, Chief  
Passaic, Hackensack, Newark Bay Remediation Branch

**TO:** Pat Evangelista, Director  
Superfund and Emergency Management Division

Site ID No.: 02MV

**I. PURPOSE**

The purpose of this Action Memorandum is to request and document approval of a time-critical removal action as described herein for property located at 366-394 Wilson Avenue, Newark, New Jersey (Block 5038, Lot 97) (the "Oberwil Property" or the "Site"). The Site is located within Operable Unit 1 (OUI) of the Pierson's Creek Superfund site. The planned removal action addresses the mercury, lead and polychlorinated biphenyl (PCB)-contaminated soil piles at the Site that pose a threat to the public health and the environment. EPA anticipates that this removal action will be performed by potentially responsible parties pursuant to either an administrative settlement agreement and order on consent, or a unilateral administrative order.

Conditions at the Site meet the criteria for a removal action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA) 42 U.S.C. §§ 9601-9675, and Section 300.415(b)(2) of the National Contingency Plan (NCP).

There are no nationally significant or precedent-setting issues associated with this removal action and the Site is on the National Priorities List (NPL).

**II. SITE CONDITIONS AND BACKGROUND**

The Superfund Enterprise Management System (SEMS) ID Number for the Pierson's Creek Superfund site is NJD002144517. The removal action is considered time critical.

**A. Site Description**

**1. Removal Site Evaluation (RSE)**

The Oberwil Property is located adjacent to an unnamed tributary at the eastern border of the Troy Chemical Corporation, Inc. (Troy Chemical) facility, also known as Operable Unit Two (OU2) of the Pierson's Creek Superfund site. This tributary, part of OU1 of the Pierson's Creek Superfund site, is connected to Pierson's Creek, which empties into Port Newark (see Figure 1). The Oberwil Property is a former scrap yard and smelter with two abandoned buildings that remain on the property. In 2019, Salomone Brothers Inc. (Salomone) performed excavation work on the Oberwil Property, without regulatory oversight and in anticipation of purchasing the property, excavating soils and sediment that contained hazardous substances including mercury from the unnamed tributary of Pierson's Creek. The excavated soils and sediment were placed in three piles, totaling approximately 1,200 cubic yards, most of which were excavated from the unnamed tributary and currently remain on the Oberwil Property (Photo 1). Sampling of the piles conducted by EPA in November 2020 revealed PCB and heavy metals contamination in the soil/sediment. Levels of PCBs exceed the Toxic Substances Control Act (TSCA) regulatory threshold of 50 parts per million (ppm), with concentrations as high as 67 ppm, and levels of lead and mercury are as high as 3,840 ppm and 489 ppm, respectively. Salomone made several attempts to cover the piles with tarps to reduce exposure to the elements and migration of material from the piles, most recently on May 23, 2022; however, the tarps have not been effective in securing the soil.

The Site is not secure, and people can freely walk or drive onto the property and access the contaminated soil in the piles. The piles may be an attractive nuisance for young people who might find themselves on the property.

In addition, the Oberwil Property is in a flood zone, and the property often floods, including at least five times in 2021. During these flood events there is the potential for the contaminated soil/sediment in the piles to migrate and contaminate other areas on the property or the surrounding properties.

Based on the available information, a CERCLA time critical removal action is warranted at the Site.

**2. Physical location**

The Site is located in an industrial area in Newark, New Jersey. The approximately 2.4-acre Oberwil Property is a land-locked parcel with a right-of-way through the Troy



Chemical property for access (Block 5038, Lot 97) and that contains a large 2-story industrial building and a smaller former smelter building (see Figure 2).

The Site is bounded to the west by the Troy Chemical facility but is separated from that property by the unnamed tributary to Pierson's Creek which is part of OU1 of the Pierson's Creek Superfund site. To the south lies the former Red Star facility now occupied by Continental Hardware. There is a rail line to the east and another land-locked parcel to the north currently occupied by Welch, Holme and Clark, a vegetable oil purveyor.

The Pierson's Creek Superfund Site includes Pierson's Creek, which begins in the vicinity of Avenue L in Newark, New Jersey and travels through above-ground channels and below-ground culverts through various properties in a general south, south-westerly direction until discharging into the Port Newark channel of Newark Bay. The Pierson's Creek Superfund site also includes various unnamed tributaries that discharge into Pierson's Creek including an unnamed tributary located on the western border of 366-394 Wilson Avenue, and includes any location where contamination from the creek or tributaries has come to be located. The Pierson's Creek Superfund site is contaminated with mercury and PCBs, among other contaminants. EPA is the lead regulatory agency for planning and implementing response actions at the Pierson's Creek Superfund site and New Jersey Department of Environmental Protection serves as a support agency.

The residential Ironbound section of Newark, a densely populated urban area which includes many residences, is located less than a mile away.

### **3. Site Characteristics**

As noted above, the Oberwil Property is a former scrap metal yard and smelter. It has been dormant for the last several years. The property is only partly fenced and is unsecured. The 2.4-acre unpaved parcel contains an abandoned two-story warehouse and a small historic smelter building. This low-lying property regularly floods during precipitation events and remains flooded long after due to poor drainage (see Photo 2).

Beginning in October 2012, EPA conducted several investigations of Pierson's Creek that confirmed the presence of mercury and PCBs in the creek sediments through the accessible portions of the creek, including the unnamed tributary that is located along the western boundary of the Oberwil Property.

In the fall of 2019, Salomone excavated contaminated soils and sediment from and adjacent to the unnamed tributary without regulatory oversight, reportedly in an effort to drain the property of ponded water. The excavated soils and sediment were placed in three piles on unpaved areas of the Oberwil Property. Drainage piping and structures were also placed within the unnamed tributary to facilitate drainage. The piles have been temporarily covered with tarps that have not been effective over the long term in containing the piles.

**4. Release or threatened release into the environment of a hazardous substance, or pollutant, or contaminant**

The Site is a “facility” as defined under Section 101(9) of CERCLA, 42 U.S.C. §9601(9). The excavation and placement of the soil and sediment containing hazardous substances in piles on the Site, and movement of contaminated soil during the installation of a pipe in the tributary, constitutes a “release,” as defined in Section 101(22) of CERCLA, 42 U.S.C. Section §9601(22). Sampling and analysis conducted at the Site has identified the following CERCLA hazardous substances as defined in 40 CFR Section 302.4 (also referred to as “Table 302.4”).

<u>Hazardous Substances Identified</u>	<u>Statutory Sources for Designation as a Hazardous Substance</u>
Lead	Clean Water Act (CWA) Section 307(a), Clean Air Act Section 112
Polychlorinated Biphenyls (PCBs)	CWA 311(b)(2), CWA 307(a), CAA 112
Mercury	CWA 307(a), CAA 112

Analytical data, generated from a November 2, 2020 EPA soil sampling event, found these hazardous substances in the soil piles at concentrations well above the EPA removal management levels. Total PCB levels were as high as 67 ppm. Lead levels were as high as 3,840 ppm and mercury as high as 489 ppm.

Sediment samples collected from the tributary adjacent to the Oberwil Property on August 5, 2019, showed levels of mercury as high as 671 ppm, lead as high as 31,000 ppm, and total PCBs as high as 114 ppm. The soil/sediment piles on the Site, most of which was excavated from the tributary, contain elevated levels of lead, mercury, and PCBs. These hazardous substances are not safely contained on the property. The piles are exposed to wind and rain and the property is in a low area subject to heavy flooding. As a result, there is an ongoing threat of release of hazardous substances into the environment. Stormwater runoff from the property and the piles enters Pierson’s Creek at the southern edge of the property. The creek eventually winds its way south to Port Newark where it enters Newark Bay. Trespassers may easily come into direct contact with the contaminated soils and potentially track it off-site. Additionally, windblown soil and soil runoff from the piles threaten to contaminate previously uncontaminated areas of the Oberwil Property.

It is estimated that approximately 1,200 cubic yards of soil/sediment will need to be removed from the Site to address the release of hazardous substances.

**5. NPL status**

The Pierson's Creek site was placed by EPA on the NPL on September 22, 2014. EPA is the lead regulatory agency for planning and implementing response actions at the Pierson's Creek site. NJDEP serves as a support agency for the Site.

EPA has divided the Pierson's Creek site into two operable units. OU1 consists of various unnamed tributaries that discharge into Pierson's Creek including the unnamed tributary located between the Oberwil property and the Troy Chemical facility and the open water section of Pierson's Creek located directly to the south of that facility, including portions of the creek that flow through a series of culverts lying beneath a Conrail freight line, long term parking for Newark Airport and the New Jersey Turnpike before finally discharging to Port Newark. EPA is currently conducting a fund-lead Remedial Investigation/Feasibility Study (RIFS) at OU1. OU2 consists of the Troy Chemical property and Troy Chemical is currently conducting an RI/FS under an Administrative Settlement Agreement and Order on Consent (ASAOC) with EPA.

## **6. Maps, pictures, and other graphic representations**

Figure 1 – Site Location Map

Figure 2 – Satellite Site Map

Photos 1A, 1B, and 1C – Soil Piles

Photo 2 – Flooding at the Oberwil property

Photo 3 – Torn tarps on soil pile

## **B. Other Actions to Date**

### **1. Previous actions**

Beginning in October 2012, EPA conducted several investigations of Pierson's Creek that confirmed the presence of mercury and PCBs in the creek sediments throughout the accessible portions of the creek, including the unnamed tributary adjacent to the Oberwil Property. Sampling of the unnamed tributary sediments and adjacent soils by EPA in August 2019 indicated that the area is highly contaminated with mercury and PCBs.

EPA sampled the soil/sediment piles for waste characterization in November 2020. The samples exhibited elevated levels of lead, mercury, and PCBs. Many samples had lead levels above the Toxicity Characteristic Leaching Procedure (TCLP) screening criterion of 5 mg/L but were below the TCLP screening criterion of 0.2 mg/L for mercury.

### **2. Current actions**

At the request of EPA, Salomone has been regularly monitoring the piles and trying to keep them covered with tarps, which needed to be replaced several times due to weathering and flood events and are ineffective for long-term protection of the piles. The re-covering of the piles by Salomone has been overseen by an EPA On-Scene Coordinator.

**C. State and Local Authorities' Roles**

**1. State and local actions, to date**

On July 7, 2020, NJDEP issued a Notice of Violation to Oberwil for noncompliance with N.J.A.C. 7:7A-2.2(b) (Regulated activities in freshwater wetlands and State open waters) and N.J.A.C. 7:13-2.1(a) (Flood Hazard Area Control Act Rules). NJDEP cited Oberwil for performing unauthorized regulated activities without the required permit authorization. The regulated activities included the discharge of dredge or fill material into State open waters, specifically, NJDEP cited Oberwil for filling and piping approximately 870 square feet of a tributary of Pierson's Creek on the west side of the property without a NJDEP Land Use permit, and for the unauthorized piping of a tributary of Pierson's Creek and the staging of soil stockpiles within a flood hazard area associated with Pierson's Creek and Newark Bay without a required permit. The cited activities collectively impacted 244.9 cubic yards of flood hazard area volume.

**2. Potential for continued State/local response**

There are no actions planned or being taken by the State or local government agencies to mitigate the mercury, lead, and PCBs present in the soil/sediment piles.

**III. THREATS TO PUBLIC HEALTH, WELFARE, OR THE ENVIRONMENT, AND STATUTORY AND REGULATORY AUTHORITIES**

**A. Threats to the Public Health or Welfare**

Conditions at the Site meet the requirements of 40 C.F.R. Section 300.415(b) of the NCP for EPA to determine that a CERCLA removal action is appropriate. Factors from Section 300.415(b)(2) that support conducting a removal action at the Site include:

Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants (§300.415(b)(2)(i)).

There is a potential exposure to nearby human populations, animals, or the food chain from hazardous substances, or pollutants, or contaminants. The Site is located in a densely populated industrial area. The soil and sediment in the piles can be entrained in the wind or mobilized by flooding onto adjacent populated properties.

There is also a threat to public health from entry onto the property. Unprotected persons entering the property could be exposed to unacceptable levels of mercury, lead, and PCBs in the soil/sediment piles. Inhalation is the primary route of exposure to mercury for humans. Mercury in the piles could off-gas into the air and cause an exposure through the inhalation route. Mercury has been shown to be genotoxic in humans and animals. Long-term exposure to either inorganic or organic mercury can permanently damage the brain, kidney, and the developing fetus in humans. In fish and shellfish, toxic effects include a variety of reproductive, growth, and metabolic dysfunctions, as well as increased mortality in larval and juvenile stages. Also, a release or threat of release of mercury may present an imminent and substantial endangerment to nearby workers on adjoining properties and constitutes an environmental harm.

PCBs and lead have been demonstrated to cause a variety of adverse health effects. They have been shown to cause cancer in animals and humans as well as a number of serious non-cancer health effects in animals and humans, including effects on the immune system, reproductive system, nervous system, endocrine system, and other health effects.

High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate (§300.415(b)(2)(iv))

Elevated levels of lead, mercury, and PCBs have been identified in the soil/sediment piles on the Site. These hazardous substances have the potential to migrate if disturbed by human activity, animals, or other Site activities without proper soil management controls or removal. Migration could also take place due to weathering.

Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released (§300.415(b)(2)(v))

With elevated concentrations of lead, mercury, and PCBs in the soil/sediment piles there is the potential for the contamination to migrate as a result of windblown dust or soil entrained in surface water run-off. Soil/sediment contamination may migrate into the storm sewers and or directly into Pierson's Creek.

Availability of other appropriate federal or State response mechanisms to respond to the release (§300.415(b)(2)(vii))

There are no State/local response agencies available to mitigate the threats to public health or the environment on the Site.

## **B. Threats to the Environment**

There is a significant threat of mercury, lead, and PCBs being released to the environment from the piles due to transport by rain runoff and wind into surrounding waterways.



#### IV. ENDANGERMENT DETERMINATION

Actual or threatened releases of hazardous substances from the Site, if not addressed by implementing the response action selected in this Action Memorandum, may present an imminent and substantial endangerment to public health, or welfare, or the environment.

#### V. PROPOSED ACTIONS

##### A. Proposed Actions

##### 1. Proposed action description

The following is the scope of work proposed for this action to mitigate the threats posed by the presence of hazardous substances in the soil/sediment piles at the Site:

- a) Maintaining secure covering on the soil/sediment piles until disposal.
- b) Sampling the material in the piles to profile the waste streams and determine appropriate disposal facilities.
- c) Proper air monitoring and sampling per an approved Community Air Monitoring Plan (CAMP).
- d) Removal of the contaminated soil/sediment piles using appropriate techniques without creating unacceptable releases into the environment.
- e) Proper segregation of material into documented (sampled) waste streams to be followed-up by appropriate transportation, treatment (as necessary) and disposal.
- f) Post-removal soil sampling to ensure the soil below and near the piles has not been impacted by the hazardous substances in the piles. This sampling will be documented in a sampling and analysis plan. If hazardous substances have leached in the soil below and/or near the piles then additional removal of soil may be necessary.

##### 2. Contribution to remedial performance

The removal action at the Site is consistent with the requirement of Section 104(a)(2) of CERCLA, which states, "[a]ny removal action undertaken...should...to the extent...practicable, contribute to the efficient performance of any long-term remedial action with respect to the release or the threatened release concerned." The Pierson's Creek Superfund site, of which the Oberwil Property is a part, is currently on the NPL but a remedial action for the Pierson's Creek site has not yet been selected. The investigations and actions implemented, to date, as well as the removal action described in this Action Memorandum, would be consistent with any remedial action, should one be selected.

##### 3. Engineering Evaluation/Cost Analysis (EE/CA)

Due to the time-critical nature of this removal action, an EE/CA was not prepared.

**4. Applicable or Relevant and Appropriate Requirements (ARARs)**

ARARs within the scope of this project, including Resource Conservation and Recovery Act (RCRA) and TSCA regulations pertaining to handling, storage, and disposal of certain waste materials, and Department of Transportation regulations pertaining to the transportation of hazardous waste, found at 49 C.F.R. Part 171, will be met to the extent practicable. The Mercury Export Ban Act (MEBA) must also be complied with for the disposal of mercury.

**5. Project schedule**

Work on removing the mercury, lead, and PCB contaminated soil piles is expected to begin in 2022, but the start date and schedule will be based on negotiations with the responsible parties.

**VI. EXPECTED CHANGE IN THE SITUATION SHOULD ACTION BE DELAYED OR NOT TAKEN**

If action(s) to remediate the mercury, lead, and PCB-contaminated soil piles are delayed, the threat of a significant release of hazardous substances into the environment will continue.

**VII. OUTSTANDING POLICY ISSUES**

None.

**VIII. ENFORCEMENT**

EPA notified Salomone Brothers, Inc. and Oberwil Corporation that they are potentially responsible parties (PRPs) for the Site by general notice letters dated April 20, 2020. An Administrative Settlement Agreement and Order on Consent (ASAOC) to implement the work authorized in this Action Memorandum is being negotiated with the PRPs. Oberwil Corporation sold the property to 7 Avenue L Newark, LLC on January 27, 2022. The new owner of the property will be providing access to perform the removal action.

**IX. RECOMMENDATION**

This decision document represents the selected removal action for the Oberwil Property at the Pierson's Creek Superfund site in Newark, Essex County, New Jersey, developed in accordance

with CERCLA, as amended, and not inconsistent with the NCP. This decision is based on the administrative record for the Site.

Site conditions continue to meet the NCP Section 300.415(b)(2) criteria for a removal action, and I recommend your approval of this removal Action Memorandum. Please indicate your approval of the Pierson's Creek Superfund site/Oberwil Property removal action, as per current Delegation of Authority, by signing below.

Approved: **ERIC WILSON** Digitally signed by ERIC WILSON  
Date: 2022.07.22 15:00:56 -04'00' \_\_\_\_\_ Date: \_\_\_\_\_  
Pat Evangelista, Director  
Superfund and Emergency Management Division

Disapproved: \_\_\_\_\_ Date: \_\_\_\_\_  
Pat Evangelista, Director  
Superfund and Emergency Management Division

cc: (upon approval)  
Pat Evangelista, SEMD-AD  
J. Prince, SEMD-AD  
J. Rotola, SEMD-RAB  
M. Gregor, SEMD-RAB  
D. Rosoff, SEMD-RAB  
B. Grealish, SEMD-RAB  
M. Sivak, SEMD-PHNBRB  
P. Tames, SEMD-CNYRS  
S. Flanagan, ORC-NJSFB  
D. Fischer, ORC-NJSFB  
A. Wagner, ORC-NJSFB  
M. Mears, PAO  
A. Rajkowski-Reyes, OPM-GCMB\*  
M. Fiore, OIG  
B. Schlieger, 5104A  
F. Mumford, NJDEP  
C. Zielinski, NJDEP  
A. Raddant, USDOJ  
L. Rosman, NOAA

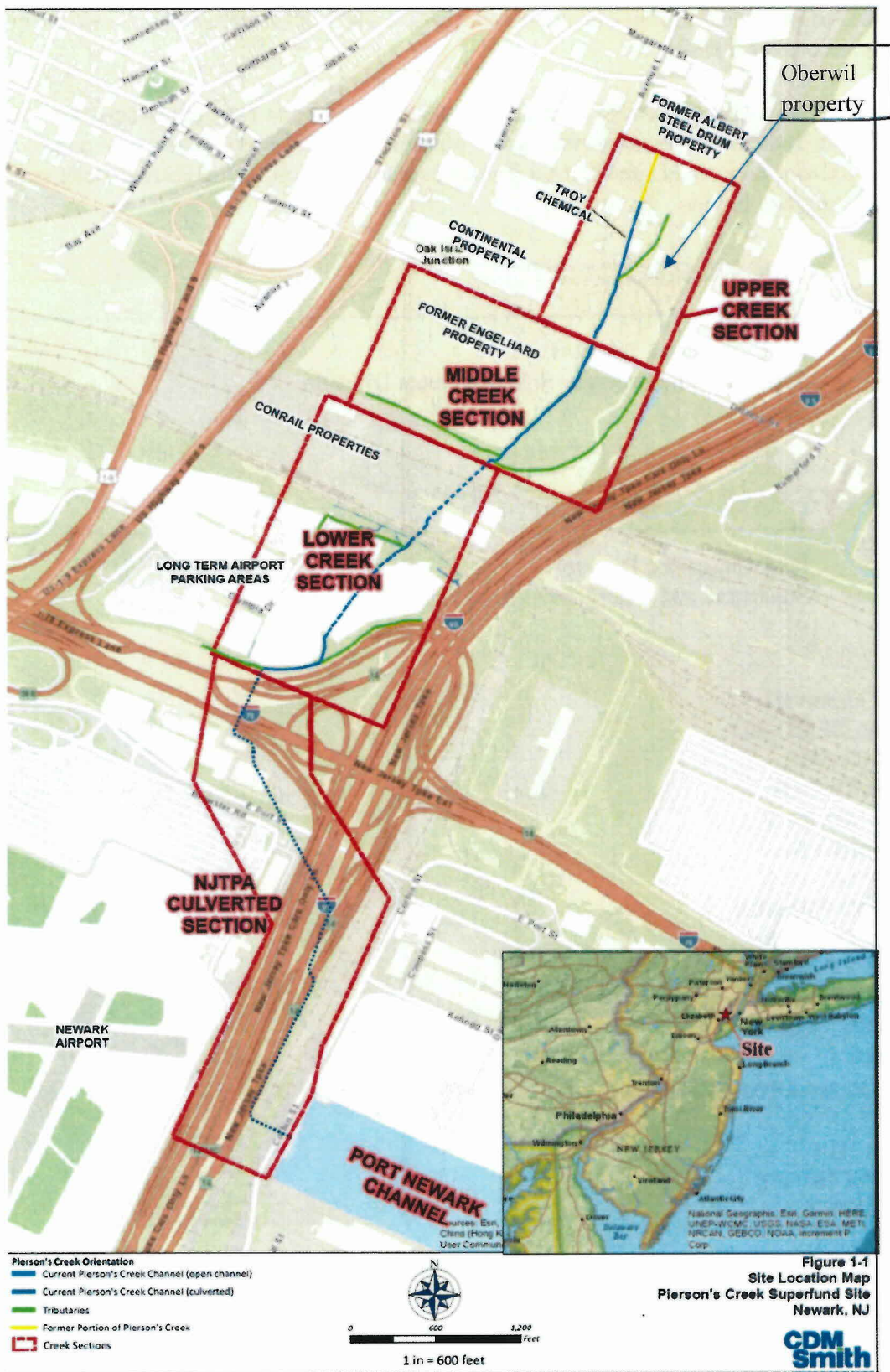




Figure 2- Oberwil Property satellite photo

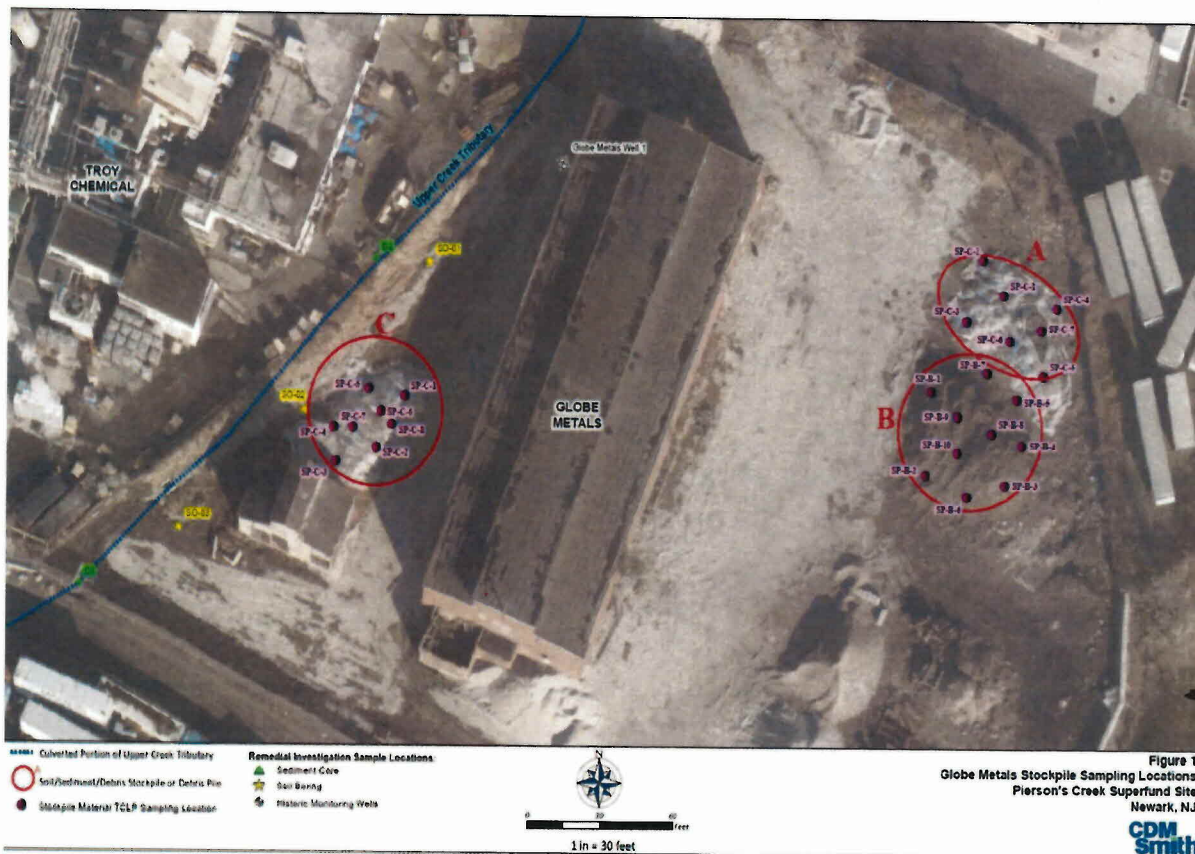




Photo 1A  
Soil Pile "A"



Photo 1B  
Soil Pile "B"



Photo 1C Soil  
Pile "C"

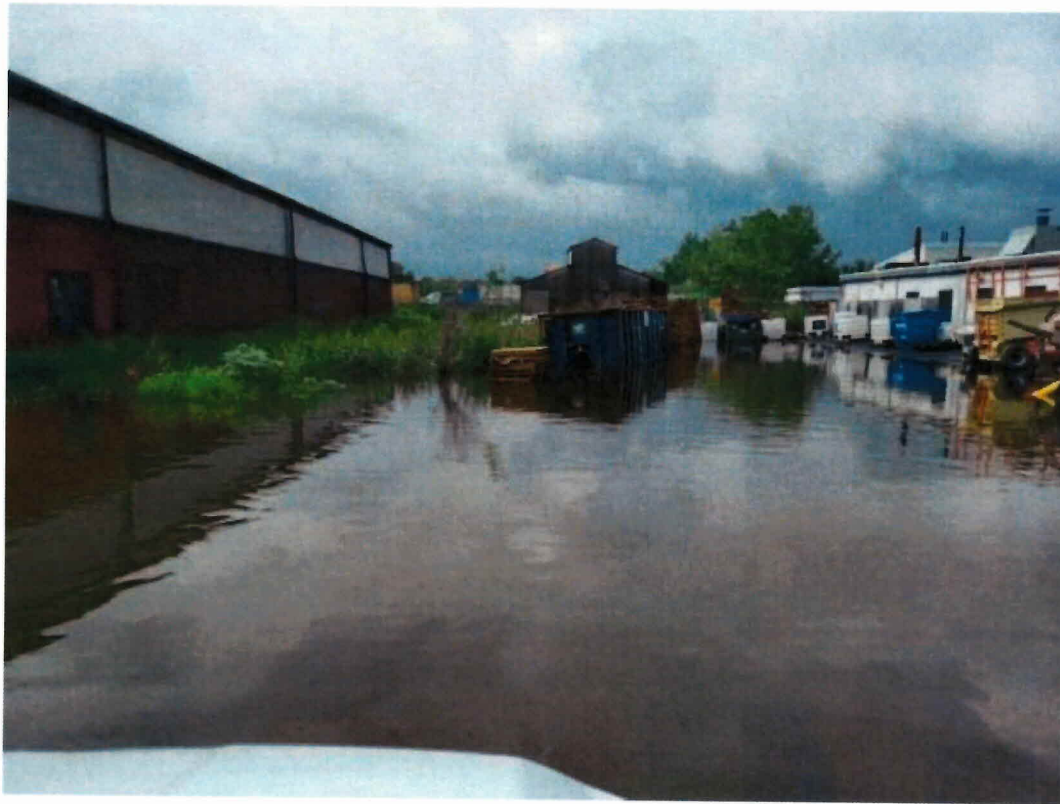


Photo 2A. Flooding at Oberwil and Troy Chemical properties in September 2021. Oberwil warehouse on left; Troy Chemical building on right.



Photo 3. Torn tarps on an Oberwil soil/sediment pile in November 2021.

## APPENDIX B



