

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III  
Philadelphia, Pennsylvania 19103**

<b>In the Matter of:</b>	)	
	)	FEDERAL FACILITY
John F. Kennedy Center for the Performing Arts	)	COMPLIANCE AGREEMENT
2700 F Street, N.W.	)	
Washington, DC 20566	)	
	)	
Respondent	)	Docket No. CWA-03-2021-0104FF
	)	
	)	

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**I. SCOPE AND PURPOSE**

1. In entering into this Federal Facility Compliance Agreement (FFCA or Agreement), it is the express purpose of the United States Environmental Protection Agency (EPA) and the John F. Kennedy Center for the Performing Arts (Respondent), located at 2700 F Street, N.W., Washington, District of Columbia (the Facility), to address documented failures to comply with federally enforceable requirements set forth in National Pollutant Discharge Elimination System (NPDES) Permit No. DC0000248 issued, pursuant to Section 402(a) of the Clean Water Act (CWA or the Act), 33 U.S.C. § 1342(a), to Respondent, (the Permit). It is the express additional purpose of EPA and Respondent to further the goals of the CWA, 33 U.S.C. §§ 1251-1387. It is the objective of all provisions and obligations of this Agreement to cause Respondent to come into and maintain full compliance with all applicable Federal, state, and local laws and regulations governing the discharge of pollutants into waters of the United States, including but not limited to the requirements of the Permit governing discharges of wastewater to the Potomac River.

**II. JURISDICTION**

2. The EPA and Respondent enter into this FFCA pursuant to the CWA, 33 U.S.C. §§ 1251-1387, and Executive Order No. 12088, to achieve and maintain compliance with the CWA.

**III. PARTIES**

3. The Parties to this Agreement are EPA and Respondent.
4. Respondent operates the Facility, established by Congress as a National Memorial to President John F. Kennedy (P.L. 88-260, January 23, 1964). Respondent is an independently administered bureau of the Smithsonian Institution funded in part through Congressional legislation and named "The John F. Kennedy Center for the Performing Arts."

5. In accordance with Section 313(a) of the CWA, 33 U.S.C. § 1323, Respondent is an instrumentality of the Federal Government and is engaged in an activity that results, or may result, in the discharge of pollutants and is subject to the requirements of the CWA, any permit issued pursuant to the CWA and to the exercise of administrative authority pursuant to the CWA.
6. Respondent's officers, agents, contractors, employees, and all persons, departments, agencies, firms, and corporations in active concert or participation with them will take all necessary steps to ensure compliance with the provisions of this Agreement. The Respondent shall give written notice of this FFCA to any prospective successor in interest. At least ninety (90) calendar days prior to transfer of ownership or operation of Facility, Respondent shall give written notice of such transfer or change in ownership or operation to the EPA Project Manager identified in Section VIII (Procedures for Submissions), below.
7. The undersigned representative of each Party to this Agreement certifies that s/he is fully authorized by the Party whom s/he represents to enter into the terms and conditions of this Agreement and to execute and legally bind that Party to this Agreement. On Respondent's behalf, Deborah Rutter, President, John F. Kennedy Center for the Performing Arts, is the responsible authority to enter into the Agreement on behalf of Respondent.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

8. For the purposes of this Agreement, the following constitutes a summary of the findings upon which this Agreement is based. The facts related herein shall not be considered admissions by any Party. This section contains findings of fact determined solely by the Parties and shall not be used by any person related or unrelated to this Agreement for purposes other than determining the basis of this Agreement.
9. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant into the waters of the United States by any person, except in compliance with, among other specified sections of the CWA, a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.
10. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA may issue permits under the NPDES program for the discharge of any pollutant into the waters of the United States upon such specific terms and conditions as the Administrator may prescribe. Each violation of a NPDES permit, and each discharge of pollutant that is not authorized by a NPDES permit, constitutes a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a).
11. The Permit was issued by EPA on May 30, 2013, became effective on June 6, 2013, and had an expiration date of June 5, 2018, which has been administratively extended.
12. The Permit regulates discharges of air conditioning system condenser non-contact cooling water from the Facility into the Potomac River via Outfall 001.

13. Relevant Permit requirements:

- a. Part I (Effluent Limitations and Monitoring Requirements) of the Permit defines limitations and monitoring requirements for effluent discharged from Outfall 001 (Effluent). Such limitations include temperature limitations (Temperature Effluent Limitations) and level of acidity (or pH) (pH Effluent Limitations) of the Effluent.
- b. The Temperature Effluent Limitations require that, among other requirements, the temperature of the Effluent not exceed 32.2 degrees Celsius.
- c. The pH Effluent Limitations require that the pH not be less than 6.0 standard units nor greater than 8.5 standard units.
- d. Part II (Standard Conditions For NPDES Permits), Section B (Operation and Maintenance of Pollution Controls), Paragraph 1 (Proper Operation and Maintenance) (Paragraph II.B.1.) of the Permit requires, in relevant part, that the Permittee properly operate and maintain all systems of treatment and control at the Facility, including providing adequate training of staff and adequate funding to achieve compliance with the Permit.
- e. Part II (Standard Conditions For NPDES Permits), Section C (Monitoring Procedures and Recordkeeping), Paragraph 5 (Reporting of Monitoring Results) of the Permit (Paragraph II.C.5.) requires that the Permittee shall submit Discharge Monitoring Report Data no later than the 28th day of the month following the month for which the results are reported.
- f. Part III (Special Conditions), Paragraph 1 (Influent and Effluent Monitoring) (Paragraph III.1) of the Permit requires, in relevant part, that the Permittee monitor the Influent for pH and temperature, on the same days that the samples for effluent monitoring for these parameters are taken, as required by Paragraph I.A. of the Permit. Paragraphs II.C.5. and II.D.4. require that the Influent monitoring data be submitted to EPA.

14. On August 3, 2018, inspectors from the Inspection and Enforcement Division of the District of Columbia's Department of Energy and Environment (DOEE) conducted a NPDES Compliance Evaluation Inspection (CEI) at the Facility.

15. Subsequent to the CEI, DOEE coordinated with EPA Region III regarding the Respondent's compliance with the Permit, including providing EPA with DOEE's report documenting observations made during the CEI (the DOEE CEI Report).

16. From September 2017 through February 2021, Respondent electronically submitted to EPA discharge monitoring report data (NetDMR Data) of the Effluent and Influent collected on a monthly basis from January 2017 through December 2020 (the Monitoring Periods).

17. The NetDMR Data for the Monitoring Periods documents that, for the specific monitoring periods ending on the dates listed below, Respondent was in violation of the Temperature and/or pH Effluent Limitations and thereby failed to comply with Part I of the Permit.

<u>Monitoring Period End Date</u>	<u>Temperature or pH Effluent Limitation</u>	<u>NetDMR Data Submitted by Respondent</u>
05/31/2017	Maximum pH 8.5 Standard Units (SU)	8.6 SU
08/31/2017	Maximum pH 8.5 SU	8.6 SU
10/31/2017	Maximum pH 8.5 SU	8.6 SU
11/30/2017	Maximum pH 8.5 SU	8.8 SU
12/31/2017	Maximum pH 8.5 SU	9 SU
03/31/2018	Maximum pH 8.5 SU	8.9 SU
07/31/2018	Maximum pH 8.5 SU and Maximum Temperature 32.2 degrees Celsius (C)	9.1 SU and 38.3° C
08/31/2018	Maximum pH 8.5 SU	8.6 SU
09/30/2018	Maximum pH 8.5 SU	8.6 SU
10/31/2018	Maximum pH 8.5 SU	8.6 SU
10/31/2020	Maximum pH 8.5 SU	8.6 SU
11/30/2020	Minimum pH 6 SU	4.9 SU
12/31/2020	Minimum pH 6 SU	4.8 SU

18. For the monitoring periods ending during the following months, Respondent failed to comply with the Temperature or pH Effluent Limitations set forth in Part I of the Permit: May 2017, August 2017, October through December 2017, March 2018, July through October 2018, and October through December 2020.
19. The NetDMR Data for the Monitoring Periods documents that, for the specific monitoring periods ending during July 2019 through October 2020, Respondent failed to submit Discharge Monitoring Report Data, as required pursuant to Paragraph II.C.5. of the Permit.
20. The NetDMR Data for the Monitoring Periods documents that, for the monitoring periods ending on the dates listed below, Respondent failed to submit Discharge Monitoring Report Data on or before the 28th day of the month following the month for which the results are reported, as required pursuant to Paragraph II.C.5. of the Permit.

<u>Monitoring Period End Date</u>	<u>Date NetDMR Data Received</u>
1/31/2017	9/13/2017
2/28/2017	9/13/2017
3/31/2017	9/13/2017
4/30/2017	9/13/2017
5/31/2017	9/13/2017
6/30/2017	9/11/2017
7/31/2017	9/13/2017
10/31/2017	12/4/2017

<u>Monitoring Period End Date</u>	<u>Date NetDMR Data Received</u>
12/31/2017	2/7/2018
1/31/2018	4/10/2018
2/28/2018	4/10/2018
3/31/2018	6/11/2018
4/30/2018	6/11/2018
5/31/2018	8/3/2018
6/30/2018	10/1/2018
7/31/2018	10/1/2018
8/31/2018	2/8/2019
9/30/2018	2/8/2019
10/31/2018	3/12/2019
11/30/2018	3/12/2019
12/31/2018	3/13/2019
1/31/2019	3/13/2019
2/28/2019	4/18/2019
3/31/2019	5/10/2019
4/30/2019	6/5/2019
5/31/2019	8/16/2019
11/30/2020	2/18/2021
12/31/2020	2/4/2021

21. For the monitoring periods ending during the following months, Respondent failed to submit Discharge Monitoring Report Data on or before the 28th day of the month following the month for which the results are reported and, therefore, failed to comply with Paragraph II.C.5. of the Permit: January through July 2017, October 2017, December 2017, January 2018 through May 2019, and July 2019 through December 2020.
22. The DOEE CEI Report indicates that representatives of the Respondent failed to provide any documentation to support a finding that the staff employed by the Respondent who were responsible for ensuring compliance with the Permit had received adequate training and adequate funding to achieve compliance with the Permit. Additionally, by letter dated April 9, 2018, the Respondent informed EPA of its intention to develop a written training program that documents all the necessary procedures associated with the Permit. Based upon information gathered prior to and during the CEI, and prior to August 2018, the Respondent failed to comply with Paragraph II.B.1. of the Permit.
23. The NetDMR Data documents that, for the monitoring periods ending on the dates listed below, Respondent submitted the below Effluent pH data and failed to submit the required Influent pH data, as required by Paragraphs II.C.5., II.D.4. and Paragraph III.1. of the Permit.

<u>Monitoring Period</u> <u>End Date</u>	<u>Effluent pH Data Submitted –</u> <u>Concentrations 1 &amp; 3</u>	
1/31/2017	7.2	7.8
3/31/2017	8.1	8.1
4/30/2017	8	8.4
11/30/2017	8.2	8.8
12/31/2017	8.1	9
1/31/2018	7.8	8.3
2/28/2018	6.9	8.4
3/31/2018	7	8.9
4/30/2018	7.9	8.3
11/30/2018	6.8	8.4
12/31/2018	6.2	8.5
1/31/2019	7.5	7.9
2/28/2019	7.8	8.1
3/31/2019	7.2	8
4/30/2019	7.5	8.5
11/30/2020	4.9	7.1
12/31/2020	4.8	25.9

24. For the monitoring periods ending during the following months, Respondent submitted Effluent pH data and failed to submit the required Influent pH data and, thereby, failed to comply with Paragraphs II.C.5., II.D.4. and Paragraph III.1. of the Permit: January 2017, March and April 2017, November and December 2017, January through April 2018, November 2018 through April 2019, and November and December 2020.

#### **V. COMPLIANCE PROGRAM**

25. Respondent agrees to take any and all necessary steps to comply fully with the Permit as soon as practicable. Such steps will include, but not be limited to, the activities outlined in this section. To the extent Respondent is able to achieve compliance more expeditiously than the timeframes set forth in this Agreement, Respondent shall do so.
26. Within forty-five (45) calendar days of the Effective Date of this Agreement, Respondent shall develop and submit for EPA’s review, in accordance with Section VI (Review of Compliance Program Submissions), a Compliance Implementation Plan (the Compliance Implementation Plan) meeting the requirements below. The Compliance Implementation Plan shall seek to ensure compliance with the following portions of the Permit: Effluent Limitations and Monitoring Requirements, set forth at Part I of the Permit; Operation and Maintenance of Pollution Controls, set forth at Part II, Section B of the Permit; Monitoring Procedures and Recordkeeping requirements set forth at Part II, Section C of the Permit; and Influent and Effluent Monitoring requirements set forth at Part III of the Permit. The Compliance Implementation Plan shall include, but not be limited to, detailed

implementation schedules and any relevant engineering and/or best management practices. Such Compliance Implementation Plan shall include, at a minimum, the following information:

- a. Training Standard Operating Procedures (Training SOP) for any staff or supervisor(s) employed by Respondent whose duties include implementation, compliance or oversight relating to the Permit. The Training SOP shall include: the title of training, frequency of training, identification and credentials of the supervisor, staff or contractor providing instruction, contents, and scope of such training.
- b. A schedule to provide training to any staff or supervisor(s) employed by Respondent whose duties include implementation, compliance or oversight relating to the Permit, in accordance with the proposed Training SOP, during the 24 calendar months following the Effective Date of this Agreement. For each training provided pursuant to this Agreement and any EPA-approved Compliance Implementation Plan, as part of the Quarterly Status Report submitted subsequent to such training, Respondent shall submit a detailed description of the scope of such training, date of such training, the name and title of each supervisor, staff or contractor personnel in attendance, a copy of a dated attendance log (including each person's signature attesting to each person's participation).
- c. A detailed description of, and schedule for, a study to evaluate and improve equipment, systems and procedures related to Effluent and Influent monitoring and reporting in accordance with the Permit (Effluent and Influent Monitoring and Reporting Improvement Evaluation): Respondent shall ensure that a detailed evaluation of all equipment, systems and procedures relating to: a) Effluent and Influent monitoring, as required pursuant to the Permit, b) analysis and review of Effluent and Influent monitoring data and c) reporting of such data, in accordance with the Permit. Such Effluent and Influent Monitoring and Reporting Improvement Evaluation shall include, but not be limited to, i) an evaluation of systems relating to operation and maintenance of any equipment and all related monitoring, evaluation and reporting of data procedures, ii) a detailed analysis of options for replacement, modification and improvement of such equipment and procedures, including any replacement, modifications or improvements necessary to ensure that such monitoring equipment is fully operable and iii) an evaluation of Respondent management and staff or contractor responsible for implementation of any replacement, modification and improvement of such equipment and procedures. Respondent shall secure, and oversee, a credible vendor/contractor to undertake such Effluent and Influent Monitoring and Reporting Improvement Evaluation.
- d. Scope, and schedule for submission to EPA for review in accordance with Section VI (Review of Compliance Program Submissions), of a report detailing Respondent's Effluent and Influent Monitoring and Reporting Improvement Evaluation (Effluent and Influent Monitoring and Reporting Improvement Evaluation Report) related to: a) Effluent and Influent monitoring, as required pursuant to the Permit, b) analysis and review of Effluent and Influent monitoring

data and c) reporting of such data, in accordance with the Permit.

27. Within thirty (30) calendar days of completion of the Effluent and Influent Monitoring and Reporting Improvement Evaluation, Respondent shall submit to EPA for review, in accordance with Section VI (Review of Compliance Program Submissions), a final report detailing such evaluation (Effluent and Influent Monitoring and Reporting Improvement Evaluation Report). Such Effluent and Influent Monitoring and Reporting Improvement Evaluation Report shall document the evaluation of all equipment, systems and procedures and resulting recommendations, including a proposed schedule for implementation of recommendations, relating to: a) Effluent and Influent monitoring, as required pursuant to the Permit, b) analysis and review of Effluent and Influent monitoring data and c) reporting of such data, in accordance with the Permit.
28. The Compliance Implementation Plan and the Effluent and Influent Monitoring and Reporting Improvement Evaluation Report shall be deemed an enforceable part of this Agreement effective on the date of EPA's approval of each such document.

## **VI. REVIEW OF COMPLIANCE PROGRAM SUBMISSIONS**

29. For each submission required pursuant to Section V (Compliance Program) of this Agreement, EPA will in writing: (i) approve the submission in whole or in part; (ii) approve the submission upon specified conditions; (iii) modify the submission to cure any deficiencies; (iv) disapprove the submission, in whole or in part; or (v) any combination of the above.
30. If such submission is approved, Respondent shall take all actions required by such approved submission, in accordance with the schedules and requirements set forth in such approved submission or EPA's written notification of approval. If such submission is conditionally approved or approved only in part, Respondent shall, upon written direction from EPA, take all actions required by any approved portion of the submission that EPA determines is technically severable from any disapproved portion.
31. If such submission is disapproved in whole or in part, Respondent shall, within thirty (30) calendar days, or such other time as EPA determines appropriate, correct all deficiencies, and resubmit the disapproved portion of such submission for approval, in accordance with this Agreement.
32. After review of any document resubmitted in accordance with Paragraph 31, above, EPA will notify Respondent in writing as to EPA's determination to approve, disapprove or revise in whole or part such resubmitted submission. If the resubmission is approved, in whole or in part, Respondent shall proceed in accordance with Paragraph 30, above. If any portion of such resubmission is disapproved, EPA may again require Respondent to correct any deficiencies, in accordance with Paragraph 31, above, or EPA may revise such document and correct any deficiencies and notify Respondent to take all actions required by such revised resubmission.

33. In accordance with Section XIV (Modifications), below, subsequent to EPA approval of any plan, schedule or other document required to be submitted to EPA, pursuant to Section V (Compliance Program) of this Order, Respondent may seek EPA's review of any written proposed revision to such previously approved document. The procedures set forth in Section XIV (Modifications), below, shall apply to any such written request for any proposed revision to any document previously approved by EPA in accordance with this Section.

## **VII. REPORTING**

34. Respondent shall submit a written status report (Quarterly Status Report) to EPA no later than thirty (30) calendar days after the end of each fiscal year quarter as long as this Agreement is in effect. Such Quarterly Status Reports shall be submitted in addition to any other reporting or certification required under this Agreement or pursuant to law, regulation, or the Permit. Each such Quarterly Status Report shall state and describe: a) progress made with respect to compliance with the tasks described in Section V (Compliance Program) of this Agreement and any Compliance Implementation Plan approved by EPA in accordance with this Agreement and b) any cause of any failure to comply with this Agreement and at a minimum shall include: (1) the deadlines and other milestones which Respondent was required to meet during the reporting period; (2) the progress it made toward meeting them; (3) the reasons for any noncompliance with this Agreement; and (4) a description of any matters relevant to the status of its compliance with this Agreement.
35. Notification to EPA of any noncompliance with any provision of this Agreement or anticipated delay in performing any obligation under this Agreement shall not excuse Agency's noncompliance or anticipated delay.

## **VIII. PROCEDURES FOR SUBMISSIONS**

36. Unless otherwise agreed to by the Parties, each party shall communicate with each other via electronic mail, unless electronic mail service is not reasonably available. The subject line of all email correspondence to EPA must include the following: "Kennedy Center FFCA (CWA-03-2021-0104FF)" and the subject or title of the relevant deliverable. All electronically submitted information transmitted to either party must be in a widely recognized and searchable format. If electronic mail is not possible, the Respondent should contact the EPA Project Manager identified herein, or his/her successor, to arrange alternative delivery by certified mail, return receipt requested or an overnight mail service that includes delivery tracking information upon request.
37. Unless written notification is provided otherwise or this Agreement provides otherwise, communications between the parties shall be addressed to the contacts identified below.

Written communication sent to EPA shall be addressed to:

Name and Title: Ingrid H. Hopkins, Enforcement Officer (EPA Project Manager)

Email: hopkins.ingrid@epa.gov

Respondent shall contact the EPA Project Manager for the current EPA, Region III mailing address if necessary.

Written communication sent to Respondent shall be addressed to:

Name and Title: Carissa Faroughi, Director, Project Management Office

Email: CIFaroughi@Kennedy-Center.org

With a copy to:

Name and Title: Darren D. Comedy, Vice President, Facilities

Email: ddcomedy@Kennedy-Center.org

Respondent's Overnight & Packages Mailing Address:

The John F. Kennedy Center for the Performing Arts  
2700 F Street, N.W., Washington, DC 20566

Respondent's Regular Mail Address:

The John F. Kennedy Center for the Performing Arts  
P.O. Box 101510, Washington, DC 20566

38. Regardless of method of submission, each mailing shall be deemed submitted on the date such communication is either electronically transmitted or postmarked.
39. Regardless of method of submission (electronic or other mailing), Respondent shall maintain records of each notification or communication with EPA for the duration of this Agreement.
40. All required submissions to EPA pursuant to this Agreement shall be signed by a duly authorized representative of Respondent who has personal knowledge of the content of such submission. A person is a "duly authorized representative" only if: (a) the authorization is made in writing and (b) the authorization specifies either an individual or position having responsibility for overall operation of the regulated Facility or activity (a duly authorized representative of Respondent may thus be either a named individual or any individual occupying, whether on an acting or permanent basis, a named position). Each submission shall be admissible as evidence in any proceeding to enforce this Agreement. Each submission shall include the following certification:

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 am aware that there are significant

penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

**IX. COMPLIANCE WITH OTHER LAWS AND REGULATIONS**

41. Compliance with the terms of this Agreement in no way affects or relieves Respondent of its obligation to comply with all applicable requirements of the CWA, and regulations promulgated pursuant thereto, or other applicable requirements of Federal, state, or local law.

**X. PERMIT OBLIGATIONS**

42. This Agreement does not constitute a permit or permit modification and does not relieve Respondent of any obligation to comply with its existing federal, state, or local permit.

**XI. RIGHT OF ENTRY**

43. EPA, its contractors, and other authorized representatives shall have the right to enter the Facility to conduct any inspection, including but not limited to records inspection, sampling, testing, or monitoring that EPA believes is necessary to determine Respondent's compliance with this Agreement, including any plan approved by EPA in accordance with this Agreement.

**XII. DISPUTE RESOLUTION**

44. In the event of any conflict involving violations of this Agreement, EPA and Respondent shall meet promptly and work in good faith in an effort to reach a mutually agreeable resolution of such dispute.
45. If a dispute arises under this Agreement, the procedures of this Section shall apply. In addition, during the pendency of any dispute, Respondent agrees that it shall continue to implement those portions of this Agreement which are not the subject of, or directly related to, such dispute.
46. The pendency of any dispute under this Section shall not affect Respondent's responsibility to perform the work required by this Agreement, including any plan approved by EPA pursuant to this Agreement, in a timely manner, except that the time period for completion of work affected by such dispute may, at EPA's sole and unreviewable discretion, be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein. All elements of the work required by this Agreement, including any plan approved by EPA pursuant to this Agreement, which are not affected by the dispute shall continue and be completed in accordance with the applicable schedule.
47. The Parties to this Agreement shall make reasonable efforts to informally resolve any dispute at the Project Manager or First Line Supervisor level. With respect to EPA, "First Line Supervisor" means the Chief (or Acting Chief), NPDES Section, Water Branch,

Enforcement and Compliance Assurance Division, EPA Region III or any duly identified successor. With respect to Respondent, "Project Manager" means Carissa Faroughi, Director, Project Management Office, or any duly identified successor. If resolution cannot be achieved informally, the procedures of this Section shall be implemented to resolve a dispute.

48. If the Parties are unable to informally resolve a dispute within thirty (30) calendar days after any EPA decision or action which leads to or generates an issue or requirement disputed by Respondent (EPA's Original Position Subject to Dispute), Respondent shall within fourteen (14) calendar days thereafter submit to EPA a written statement of dispute setting forth the specific action which led to or generated such dispute, the nature of such dispute, Respondent's proposed resolution with respect to such dispute, and any relevant information Respondent is relying upon to support its position supporting such proposed resolution (Written Statement of Initial Dispute). If Respondent does not submit such Written Statement of Initial Dispute to EPA within such fourteen (14) calendar day period, Respondent shall be deemed to have agreed with EPA's position with respect to such dispute.
49. Upon EPA receipt of Respondent's Written Statement of Initial Dispute, the Parties shall engage in formal dispute resolution discussions among the Project Managers, First Line Supervisor, and/or their immediate supervisors and any additional representatives deemed appropriate. The Parties shall have fourteen (14) calendar days from EPA Project Manager's receipt of the Written Statement of Dispute to resolve such dispute (Initial Dispute Resolution Period), or such longer period as EPA, in its sole and unreviewable discretion, may deem appropriate. During such Initial Dispute Resolution Period, the Project Managers shall meet or confer as many times as necessary to discuss and attempt resolution of such dispute. If such dispute is not resolved by the Parties within such Initial Dispute Resolution Period, Respondent may, within ten (10) business days after the conclusion of such Initial Dispute Resolution Period, submit a written notice to the Director (or Acting Director), Enforcement and Compliance Assurance Division, EPA Region III, and to the Vice President of Facilities (Notification of Elevation of Dispute Resolution). Such Notification of Elevation of Dispute Resolution shall, at minimum, include: Respondent's Written Statement of Initial Dispute, any compromises that have been offered by either Party, the reason(s) for requesting elevation of such dispute, Respondent's proposed resolution with respect to such dispute, and any relevant information Respondent is relying upon to support its position supporting such proposed resolution. If Respondent does not timely submit such Notification of Elevation of Dispute Resolution, Respondent shall be deemed to have agreed with EPA's position with respect to such dispute.
50. If Respondent timely submits a complete Notification of Elevation of Dispute Resolution, then the following persons shall serve as a forum for resolution of any such elevated dispute for which agreement has not been reached during such Initial Dispute Resolution Period: the Director (or Acting Director), Enforcement and Compliance Assurance Division, EPA Region III, and the Vice President of Facilities (the Parties Dispute Resolution

Representatives). Following EPA's receipt of Respondent's complete Notification of Elevation of Dispute Resolution, the Parties Dispute Resolution Representatives shall have thirty (30) calendar days, or such longer period as the Parties may deem appropriate, to unanimously resolve such dispute (Dispute Resolution Elevation Period). If unanimous resolution of such elevated dispute by the Parties Dispute Resolution Representatives is not achieved during such Dispute Resolution Elevation Period, EPA may, in its sole discretion, issue a written Dispute Resolution Proposal. In the event that EPA chooses to issue a written Dispute Resolution Proposal, such statement shall be an enforceable requirement this Agreement. In the event that EPA chooses not to issue a written Dispute Resolution Proposal, the EPA's Original Position Subject to Dispute, shall remain EPA's position as to such dispute and shall be an enforceable requirement this Agreement. Delegation of the authority from a Party's representative to an alternate person shall be provided to the other Party within seven (7) calendar days of delegation.

51. If unanimous resolution of such elevated dispute by the respective Directors is not achieved during such Dispute Resolution Elevation Period, Respondent may, within twenty-one (21) calendar days after the conclusion of such Dispute Resolution Elevation Period, submit a written Notice of Final Dispute to the Regional Administrator (or Acting Regional Administrator) of U.S. EPA Region III and to EPA's Project Manager for final resolution of such dispute. In the event that such written Notice of Final Dispute is not submitted within such designated twenty-one (21) calendar day period, Respondent shall be deemed to have agreed with either EPA's Original Position Subject to Dispute or EPA's Dispute Resolution Proposal, whichever is effective, and such position shall be final and binding upon the Parties. In the event that Respondent timely submits a Notice of Final Dispute, to the Regional Administrator (or Acting Regional Administrator) of U.S. EPA Region III and to EPA's Project Manager, the Regional Administrator (or Acting Regional Administrator) shall provide a written statement of EPA's decision to Respondent (EPA Regional Administrator Dispute Resolution Decision), which shall be final and binding upon the parties.
52. Within twenty-one (21) calendar days of any resolution of any dispute pursuant to the procedures specified in this Section, Respondent shall incorporate such resolution into any and all relevant and appropriate statements of work, plans, schedules, or procedures and proceed to implement this Agreement according to such amended statement of work, plan, schedule, or procedures.
53. Resolution of any dispute pursuant to this Section constitutes a final resolution of any dispute arising under this Agreement, the Parties shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Section of this Agreement.

### **XIII. FORCE MAJEURE**

54. Respondent's obligations under Section V (Compliance Program) of this Agreement shall be performed as set forth in this Agreement and any EPA-approved plans, statements of work, schedules, or procedures, unless performance is prevented or delayed by a force

majeure event. For purposes of this Agreement, "Force Majeure Event" is defined as any event arising from causes beyond the control of Respondent or of entities controlled by Respondent, including, but not limited to, contractors and subcontractors, which could not be overcome by the due diligence of Respondent or the entities controlled by Respondent, which delays or prevents the performance of any obligation under this Agreement, including acts of God or war, labor unrest, civil disturbance and any judicial orders which prevent compliance with the provisions of this Agreement. A force majeure shall not include increased costs of performance of any activity required by this Agreement, the failure to apply for any required permits or approvals or to provide all information required therefore in a timely manner, nor shall it include the failure of contractors or employees to perform or the avoidable malfunction of equipment.

55. Respondent shall take all reasonable steps to avoid and/or minimize any delay resulting from any Force Majeure Event.
56. If Respondent experiences delays in meeting its obligations as set forth in this Agreement due to a Force Majeure Event, it shall notify EPA promptly by telephone of any change in circumstances giving rise to the suspension of performance or the nonperformance of any obligation under this Agreement. In addition, within fourteen (14) calendar days of the occurrence of circumstances causing such delays, Respondent shall submit a written statement (Force Majeure Statement) to EPA for review. Each Force Majeure Statement shall include: i) the principle cause(s) of each such Force Majeure Event and an explanation of basis for determining that such cause(s) was/were beyond the control of Respondent or of entities controlled by Respondent, ii) a clear description of any obligation required pursuant to this Agreement directly or indirectly affected by such Force Majeure Event, iii) the anticipated duration of such Force Majeure Event and resulting delay of any obligation required pursuant to this Agreement, iv) any measures Respondent has taken and Respondent plans to take to prevent or minimize the time and effects of such Force Majeure Event and Respondent's failure to perform or requested delay in performing any obligation, and v) the timetable for Respondent's implementation of such delayed obligations required pursuant to this Agreement. Respondent's failure to comply with any notification requirements of this Section shall constitute a waiver of any claims of force majeure pursuant to this Agreement.
57. The burden of proving that any delay is caused by circumstances beyond the control of Respondent shall rest solely with Respondent.

#### **XIV. MODIFICATIONS**

58. The requirements, timetables and deadlines set forth in this Agreement, or approved by EPA in accordance with this Agreement, may be modified upon receipt of a timely request for modification and when EPA determines that good cause exists for such requested modification. Any request for modification by Respondent shall be submitted in writing and shall specify: the requirement, timetable or deadline for which a modification is sought;

the good cause for the extension; and any related requirement, timetable, deadline or schedule that would be affected if the modification were granted.

59. Good cause exists for a modification when sought in regard to: a Force Majeure event; a delay caused, or which is likely to be caused, by the grant of an extension in regard to another timetable, deadline or schedule; a delay caused by failure of a federal, state or local regulatory agency to perform its duties in a timely manner where regulatory action is necessary to proceed with performance of a required task pursuant to this Agreement and where Respondent has made a timely and complete request for action from such regulatory agency; and any other event or series of events mutually agreed to by the Parties and constituting good cause.
60. EPA shall make best efforts to reply to any written request for a modification within twenty-one (21) calendar days of receipt of such request and, as part of such reply, advise Respondent of its position regarding such request. If EPA does not concur in Respondent's written request for modification, EPA shall issue a written statement of nonconcurrence, which shall include an explanation of the basis for EPA's position. If EPA does not respond within 21 calendar days, or such longer time period as EPA, in its sole and unreviewable discretion, deems appropriate and necessary, of receipt of such written request for a modification to a timetable or deadline under this Agreement, an extension will be presumed granted for such period of time until EPA provides written notice of its concurrence or non-concurrence position with such request for modification.

#### **XV. GENERAL PROVISIONS**

61. This Agreement was negotiated and executed by the Parties in good faith to ensure compliance with the law. No part of this Agreement constitutes or should be interpreted or construed as an admission of fact or of liability under any federal, state or local law, regulations, ordinances, or common law or as an admission of any violation of any law, regulation, ordinance, or common law requirement. By entering into this Agreement, Respondent does not waive, other than as to the enforcement of this Agreement pursuant to the terms contained herein, any claim, right, or defense that it might raise in any other proceeding or action.
62. If any provision or authority of this Agreement or the application of this Agreement to any party or circumstance is held by any judicial or administrative authority to be invalid, the application of such provision(s) to other parties or circumstances and the remainder of this Agreement shall remain in force and shall not be affected thereby.
63. The undersigned representative of Respondent certifies that he or she is fully authorized by Respondent to enter into the terms and conditions of this Agreement and to execute and legally bind Respondent to this Agreement.
64. Terms and conditions of this Agreement changed by an agreed upon modification shall be enforceable as changed.

65. The Parties agree that the terms and conditions of this Agreement are enforceable as appropriate by any person pursuant to Section 505 of the CWA, 33 USC § 1365.
66. The effective date of this Agreement shall be the date on which it is signed by the last signatory.
67. The Agreement shall be effective if signed in counterparts.
68. Unless otherwise stated, in computing any period of time described as "days" herein, all references to "days" refer to "calendar days." The last day of a time period shall be included, unless it is a Saturday, Sunday or Federal Legal Holiday, in which event the period runs until the end of the next day that is not a Saturday, a Sunday or a Federal Legal Holiday.

#### **XVI. FUNDING**

69. It is the expectation of the Parties to this Agreement that all obligations of Respondent will be fully funded. Respondent agrees to use every legally available mechanism to seek sufficient funding to fulfill its obligations under this Agreement.
70. Provisions herein shall not be interpreted to require obligations or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where payment or obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment or obligation of such funds shall be appropriately adjusted within the terms delineated in this Agreement.
71. If funds are not available to fulfill Respondent's obligations under this Agreement, EPA reserves the right to take any action which would be appropriate absent this Agreement.

#### **XVII. CERTIFICATION OF COMPLIANCE AND REQUEST FOR TERMINATION OF AGREEMENT**

72. Upon completion of all compliance task requirements set forth in this Agreement in Section V, including completion of all tasks required pursuant to any EPA-approved plan, procedure or schedule, Respondent shall submit to EPA a Certification of Compliance and Request for Termination of this Agreement. Such certification and request shall include: a) a certification that Respondent has maintained compliance with this Agreement, including each EPA approved plan and schedule and b) all necessary documentation to support a finding that Respondent has adequately complied with the requirements set forth in Sections V (Compliance Program) and VII (Reporting).
73. This Agreement shall terminate upon agreement of the Parties following review of any Certification of Compliance and Request for Termination, EPA shall provide written notification of termination of this Agreement.

FOR RESPONDENT:

Date: \_\_\_\_\_

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

Deborah Rutter, President  
John F. Kennedy Center for the Performing Arts  
Respondent

For EPA:

Date: \_\_\_\_\_

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

Karen Melvin  
Director, Enforcement and Compliance  
Assurance Division  
U.S. EPA, Region III  
Complainant