

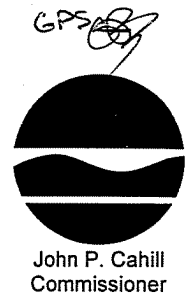
New York State Department of Environmental Conservation

Division of Environmental Enforcement

270 Michigan Avenue, Buffalo, New York 14203

Phone: (716) 851-7050 • FAX: (716) 851-7067

Website: www.dec.state.ny.us



November 15, 1999

David P. Flynn, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203

FOIL

Releasable

Non-Releasable

Re: National Fuel/Mineral Springs Voluntary Agreement

Dear Mr. Flynn:

Enclosed is a fully endorsed Voluntary Agreement to address the remedial efforts at the National Fuel's Mineral Springs facility.

Thank you for your cooperation in this matter.

Sincerely,

Glen R. Bailey
Senior Attorney

GRB:JAB
B107NATLFL9

Enclosure

cc: Tanya Alexander
Greg Sutton

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Implementation
of a Remedial Response Program for
the Mineral Springs Service Facility by:

AGREEMENT

INDEX NUMBER: B9-0538-98-08

NATIONAL FUEL GAS DISTRIBUTION CORP.,
Volunteer.

DEFINITIONS

For purposes of this Agreement, the following terms have the following definitions:

A. "Contemplated Use": "Contemplated Use" shall mean the use after remediation as an industrial/commercial office, warehouse and garage facility and the services associated with such use.

B. "Covered Contamination": "Covered Contamination" shall mean those concentrations of Existing Contamination which shall have been addressed in accordance with the requirements of the Work Plan and this Agreement.

C. "ECL": "ECL" shall mean the Environmental Conservation Law of the State of New York.

D. "Day": "day" shall mean a calendar day unless otherwise specified.

E. "Department": "Department" shall mean the New York State Department of Environmental Conservation.

F. "Existing Contamination": "Existing Contamination" shall mean that contamination at the Site which has been identified in investigations conducted by Keystone Environmental Resources, Inc., in 1990, regarding Separator Pit 1, as enhanced by the efforts of Empire Soils and and by RETEC in 1995, as well as the contamination described in the 1997

Preliminary Site Assessment Report prepared by RETEC in 1997 and as supplemented by the Addendum prepared by RETEC in 1998, which contaminants include, but are not limited to, residuals from petroleum hydrocarbons, carbureted water gas, coal tars, cyanides, lead, and numerous poly-aromatic hydrocarbons associated with petroleum and with manufactured gas production, which have been grouped for convenience into areas denoted as the Purifier Boxes Waste Area, the Eastern Drainage Ditch, the Separator Pits and Tar Boils, and the Non-aqueous Phase Liquids in Soils and Groundwater, and which have been designated for remediation. The term also includes contamination encountered during the course of the implementation of the Work Plan, the nature and extent of which were unknown or inadequately characterized at the time the Work Plan was submitted to the Department for approval, but which shall be fully characterized to the Department's satisfaction during the term of this Agreement.

G. "Professional engineer": "professional engineer" shall mean an individual registered as a professional engineer in accordance with Article 145 of the New York State Education Law. If such individual is a member of a firm, that firm must be authorized to offer professional engineering services in the State of New York in accordance with Article 145 of the New York State Education Law.

H. "Site": "Site" shall mean that property located at 365 Mineral Springs Road which is partially in the City of Buffalo and partially in the Town of West Seneca, Erie County which was the location of a former manufactured gas facility and is currently owned by National Fuel Gas Distribution Corp., described as south of Mineral Springs Road, and west of the the New York State Thruway, and north of the railroad right of way, consisting of the 10 to 20 acres, more or less, within the larger plot, and such off-Site areas which are involved in the remedial activities as more

fully described in the Work Plan and as depicted in the drawings therein.

I. "Volunteer": "Volunteer" shall mean the National Fuel Gas Distribution Corp., a public utility corporation having an office address at 10 Lafayette Square, Buffalo, New York 14203.

J. "Work Plan": "Work Plan" shall mean the Department-approved "Mineral Springs Manufacture Gas Works Remedial Program" that Volunteer shall implement and that is to be attached to this Agreement as Exhibit "B", as may be modified under the terms of this Agreement and, as a result, may appear in such other identified exhibit in this Agreement as this Agreement may provide, and is an enforceable part of this Agreement.

CONSIDERING,

1. The Department is responsible for the enforcement the ECL. This Agreement is entered into pursuant to the State's authority under that law and constitutes an administrative settlement for purposes of 42 USC 9613(f).

2. Volunteer solely for the purposes of this Agreement represents, and the Department relies on those representations, that Volunteer's involvement with the Site is the following: Volunteer is the owner and is the current operator of the Site and is the successor to the former operator responsible for the manufactured gas operations which were conducted at the Site.

3. The Department has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

4. A. ECL 27-1313.3 provides that the Department shall be responsible for inactive hazardous waste disposal site remedial programs, except as provided in Section 1389-b of the Public Health Law.

B. The regulations implementing ECL Article 27, Title 13 authorize at 6 NYCRR 375-1.2(e)(2)(ii) the proponents of any activity to demonstrate to the Department that such activity will not have the effect described in 6 NYCRR 375-1.2(e)(2)(i) by such demonstration as the Department may find acceptable.

C. Volunteer wishes to enter into this Agreement to ensure, and the Department hereby determines that, this Agreement constitutes a demonstration, that the response actions undertaken under this Agreement will be in compliance with the ECL and will not:

1. prevent or interfere significantly with any proposed, ongoing or completed remedial program at the Site, or

2. expose the public health or the environment to a significantly increased threat of harm or damage.

5. Navigation Law § 173 prohibits the unpermitted "discharge" of "petroleum" as those terms are defined under Article 12 of the Navigation Law and an investigation conducted by Volunteer at the Site has revealed that petroleum has been discharged at the Site.

6. Navigation Law § 176 permits, upon approval by the Commissioner, any person to clean up and remove a discharge of petroleum without admission of responsibility for such discharge.

7. A. Volunteer, without admitting to any liability, wishes to enter into this Agreement to resolve its potential liability, if any, for remediating the Existing Contamination as an owner and operator under ECL Article 27, Title 13, and also under the Navigation Law. The Department finds that such resolution, undertaken in accordance with the terms of this Agreement, is in the public interest.

B. Volunteer, desirous of implementing a remedial program acceptable to the Department sufficient to allow Volunteer to proceed with its plans to use the Site for the Contemplated Use, consents to the terms and conditions of this Agreement.

8. The Department and Volunteer agree that the goals of this Agreement are:

A. for Volunteer to (i) implement the Department-approved remediation work plans for the Site and (ii) reimburse the State's administrative costs as provided in this Agreement, and

B. for the Department to release Volunteer and its successors and assigns, under the conditions set forth in this Agreement, from any and all claims, actions, suits, and proceedings (including but not limited to any claims for State administrative costs) by the Department which may arise under any applicable law as a result of the Covered Contamination.

10. Volunteer agrees to be bound by the terms of this Agreement. Volunteer consents to and agrees not to contest the authority or jurisdiction of the Department to enter into or enforce this Agreement, and agrees not to contest the validity of this Agreement or its terms.

IN CONSIDERATION OF AND IN EXCHANGE FOR THE DEPARTMENT'S RELEASE AND COVENANT NOT TO SUE SET FORTH IN THIS AGREEMENT, AND FOR THE MUTUAL COVENANTS AND PROMISES CONTAINED HEREIN, VOLUNTEER AGREES TO THE FOLLOWING:

I. Performance and Reporting of the Work Plan

A. 1. The Department will publish a notice in the Environmental Notice Bulletin to inform the public of this Agreement and of the public's opportunity to submit comments to the Department on the Work Plan and this Agreement by no later than 30 days after the issue of

the Environmental Notice Bulletin in which such notice shall appear, and the Department shall mail an equivalent notice to the Town of West Seneca and to the County of Erie. If, as a result of its review of the comments received, the Department determines that the Work Plan must be revised:

i. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Work Plan; or

ii. due to information received, in whole or in part, after the execution of this Agreement, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;

then the Department will so notify Volunteer and will immediately commence negotiations with Volunteer to revise the Work Plan, and, if necessary, other components of this Agreement, accordingly. However, if after good faith negotiations, Volunteer and the Department cannot agree upon revisions to the Work Plan, then this Agreement shall terminate effective the date of the Department's written notification to Volunteer that negotiations have failed to develop an acceptable modification to the Work Plan; and both parties retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement, except with respect to:

iii. Volunteer's obligations under Paragraphs VI and VIII of this Agreement; and

iv. Volunteer's obligation, here incurred, to ensure that it does not leave the Site in a condition, from the perspective of human health and environmental protection, worse than that which prevailed before any remedial activities were commenced; and

v. the Department's right to enforce the obligations described in Subparagraphs I.A.1.iii and I.A.1.iv of this Agreement under Paragraph IV of this Agreement. If both parties agree to a revised Work Plan, then the revised Work Plan shall be attached to this Agreement as Exhibit "B-1;" Volunteer shall implement that Work Plan instead of the one contained in Exhibit "B;" and, unless revised as provided in Subparagraph I.B.2 of this Agreement, all references to "Work Plan" in this Agreement shall refer to the one contained in Exhibit "B-1."

2. Within 30 days after determination of the final form of the Work Plan after completion of public comment, Volunteer shall commence its implementation in accordance with its provisions.

B. 1. Volunteer shall carry out the Remedial Work Plan in accordance with its terms.

2. The parties agree that the Work Plan as developed and incorporated into this Agreement may be modified in the event that contamination previously unknown or inadequately characterized is encountered during the implementation of the Work Plan and that such modification(s) shall be attached to this Agreement as a supplement to the Work Plan. However, if after good-faith negotiations, Volunteer and the Department cannot agree upon modifications to the Work Plan, or if Volunteer elects in writing to the Department not to proceed with such modifications, then except with respect to:

i. Volunteer's obligations under Paragraphs VI and VIII of this Agreement, and

ii. Volunteer's obligation, here incurred, to ensure that it does not leave the Site in a condition, from the perspective of human health and environmental

protection, worse than that which prevailed before activities were commenced, and

iii. the Department's rights to enforce the obligations described in Subparagraphs I.B.2.i and I.B.2.ii of this Agreement under Paragraph IV of this Agreement, Volunteer's prospective obligations under this Agreement shall be waived, effective the date of the Department's written notification to Volunteer that negotiations have failed. The parties shall then retain whatever rights they may have had respecting each other as they had before the effective date of this Agreement.

3. Volunteer shall notify the Department of any significant difficulties that may be encountered in implementing the Remedial Work Plan, any Department-approved modification to the Remedial Work Plan, or any Department-approved detail, document, or specification prepared by or on behalf of Volunteer pursuant thereto, and shall not modify any obligation unless first approved by the Department.

C. During implementation of all construction activities identified in the Remedial Work Plan, Volunteer shall have on-Site a full-time representative who is qualified to supervise the work done.

D. In accordance with the schedule contained in the Remedial Work Plan, as may be modified by agreement between the parties, Volunteer shall submit to the Department a final engineering report. The final engineering report shall include a detailed post-remedial operation and maintenance plan ("O&M Plan"), to the extent necessary; "as-built" drawings showing all changes made during construction, to the extent necessary; and a certification that all activities were completed in full accordance with the Remedial Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteer pursuant thereto,

and this Agreement. The O&M Plan, "as-built" drawings, final engineering report, and certification must be prepared, signed, and sealed by a professional engineer.

E. Should post-remedial operation and maintenance prove to be necessary, upon the Department's approval of the O&M Plan, Volunteer shall implement the O&M Plan in accordance with the requirements of the Department-approved O&M Plan.

F. 1. i. Within 60 days after receipt of the final engineering report and certification, the Department shall notify Volunteer in writing whether the Department is satisfied with the implementation of the Work Plan, any Department-approved modification to the referenced Work Plan, any Department-approved detail, document, or specification prepared by or on behalf of Volunteer pursuant thereto, and this Agreement.

ii. Within 60 days after completion of the Department-approved O&M Plan, if any, Volunteer shall submit to the Department a final engineering report and certification that the post-remedial construction operation and maintenance activities identified in the Department-approved O&M Plan were implemented in accordance with that plan. The Department shall notify Volunteer whether it is satisfied with the O&M Plan's implementation.

2. Upon being satisfied that all the Site-specific cleanup goals and objectives identified in, or to be identified in accordance with, the Work Plan have been reached, the Department shall notify Volunteer in writing of its satisfaction and, except for the reservations identified below, the Department shall release, covenant not to sue and shall forbear from bringing any action, proceeding, or suit against Volunteer for the further investigation and remediation of the Site based upon the release or threatened release of any Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of this Agreement continue to be or

have been made to the Department, (b) appropriate notices and deed restrictions have been recorded in accordance with Paragraphs IX and X of this Agreement, and (c) Volunteer and/or its lessees, sublessees, successors or assigns promptly commence and comply with the Department-approved O&M Plan, if any.

Nonetheless, the Department hereby reserves all of its rights concerning, and such release, covenant not to sue, and forbearance shall not extend to, natural resources damages nor to any further investigation or remedial action the Department deems necessary:

i. due to the off-Site presence of contaminants, other than petroleum, that may have migrated off-Site from an on-Site source resulting in impacts to environmental resources, to human health, or to other biota that are not inconsequential and to the off-Site presence of petroleum that may have migrated off-Site from an on-Site source, irrespective of whether the information available to Volunteer and the Department at the time of the development of the Work Plan disclosed the existence or potential existence of such off-Site presence;

ii. due to environmental conditions related to the Site that were unknown to the Department at the time of its approval of the Work Plan which indicate that Site conditions are not sufficiently protective of human health and the environment for the Contemplated Use;

iii. due to information received, in whole or in part, after the Department's approval of the final engineering report and certification, which indicates that the activities carried out in accordance with the Work Plan are not sufficiently protective of human health and the environment for the Contemplated Use;

iv. due to Volunteer's failure to implement this Agreement to the Department's satisfaction; or

v. due to fraud committed or material mistake made by Volunteer in demonstrating that the Site-specific clean-up levels identified in, or to be identified in accordance with, the Work Plan were reached.

Additionally, the Department hereby reserves all of its rights concerning, and any such release, covenant not to sue, and forbearance shall not extend to, any further investigation or abatement the Department deems necessary to be undertaken in the event that Volunteer causes or suffers the release or threat of release of any hazardous substance (as that term is defined at 42 U.S.C. 9601[14]) or petroleum (as that term is defined in Navigation Law 172[15]) after the effective date of this Agreement; or Volunteer causes a, or suffers the use of the Site to, change from the Contemplated Use to one requiring a lower level of residual contamination before that use can be implemented with sufficient protection of human health and the environment.

G. If the Department is satisfied with the implementation of the Work Plan and any Department-approved modification to the Work Plan, and any Department-approved details, documents and specifications prepared by or on behalf of Volunteer pursuant thereto, the Department shall provide Volunteer with a separate written "no further action" letter substantially similar to the model letter attached to this Agreement and incorporated in this Agreement as Exhibit "C."

H. 1. Notwithstanding any other provision of this Agreement, with respect to any claim or cause of action asserted by the Department, the one seeking the benefit of the forbearance, covenant not to sue, or release set forth in Subparagraph I.F or in the "no further

action" letter issued under Subparagraph I.G of this Agreement shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Existing Contamination.

2. Except as above provided in Subparagraph I.F of this Agreement and in the "no further action" letter issued under Subparagraph I.G of this Agreement, nothing in this Agreement is intended as a release, forbearance, or covenant not to sue for any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which the Department or the State of New York may have against any person, firm, corporation, or other entity not a party to this Agreement. In addition, notwithstanding any other provision in this Paragraph I of this Agreement, the forbearance, covenant not to sue, and release described in Subparagraph I.F and in the "no further action" letter issued under Subparagraph I.G of this Agreement shall not extend to parties (other than Volunteer) that were responsible under law before the effective date of this Agreement to address the Existing Contamination.

II. Progress Reports

A. Volunteer shall submit to the parties identified in Subparagraph XI.A.1 in the numbers specified therein copies of written monthly progress reports that:

1. describe the actions which have been taken toward achieving compliance with this Agreement during the previous month;
2. include all results of sampling and tests and all other data received or generated by Volunteer or Volunteer's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Agreement or conducted independently by Volunteer;

3. identify all work plans, reports, and other deliverables required by this Agreement that were completed and submitted during the previous month;

4. describe all actions, including but not limited to, data collection and implementation of the Work Plan that are scheduled for the next month and provide other information relating to the progress at the Site;

5. include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Volunteer's obligations under this Agreement, and efforts made to mitigate those delays or anticipated delays;

6. include any modifications to any work plans, including the Work Plan, that Volunteer has proposed to the Department or that the Department has approved.

B. Volunteer shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Agreement, and Volunteer's obligation to submit the progress reports shall terminate upon its receipt of the written notification identified in Subparagraph I.F of this Agreement. However, Volunteer shall continue to submit reports concerning the implementation of any O&M Plan that may be required under this Agreement, in accordance with that Plan's requirements.

C. Volunteer also shall allow the Department to attend, and shall provide the Department at least five days advance notice of, any of the following: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

III. Review of Submittals

A. 1. The Department shall review each of the submittals Volunteer makes

pursuant to this Agreement to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Agreement and generally accepted technical and scientific principles. The Department shall notify Volunteer in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Agreement.

2. i. If the Department disapproves a submittal, the Department shall so notify Volunteer in writing and shall specify the reasons for its disapproval within 30 days after its receipt of the submittal, except with respect to the final engineering report and certificate (in which case the period shall be 60 days); and it may request Volunteer to modify or expand the submittal, provided, however, that the matters to be addressed by such modification or expansion are within the specific scope of work as described in the Work Plan. Within 30 days after receiving written notice that Volunteer's submittal has been disapproved, Volunteer shall make a revised submittal to the Department which endeavors to address and resolve all of the Department's stated reasons for disapproving the first submittal.

ii. Within 30 days after receipt of the revised submittal, the Department shall notify Volunteer in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Agreement. If the Department disapproves the revised submittal, the Department and Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same.

B. Within 30 days after the Department's approval of the final engineering report and certification, Volunteer shall submit to the Department such copies of that report and

all other Department-approved drawings and submittals as may be directed by the project manager for the Department.

IV. Enforcement

A. This Agreement shall be enforceable as a contractual agreement under the laws of the State of New York.

B. Volunteer shall not suffer any penalty under this Agreement or be subject to any proceeding or action if it cannot comply with any requirement of this Agreement because of fire, lightning, earthquake, flood, adverse weather conditions, strike, shortages of labor and materials, war, riot, obstruction or interference by adjoining landowners, or any other fact or circumstance beyond Volunteer's reasonable control ("force majeure event"). Volunteer shall, within five working days of when it obtains knowledge of any such force majeure event, notify the Department in writing. Volunteer shall include in such notice the measures taken and to be taken by Volunteer to prevent or minimize any delays and shall request an appropriate extension or modification of this Agreement. Volunteer shall have the burden of proving by a preponderance of the evidence that an event is a defense to compliance with this Agreement pursuant to this Subparagraph IV.B of this Agreement.

V. Entry Upon Site

Volunteer hereby consents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Volunteer by any duly designated employee, consultant, contractor, or agent of the Department or of any State agency having jurisdiction with respect to the Response Program for purposes of inspection, sampling, and testing and to ensure Volunteer's compliance with this Agreement. The Department shall abide by the health and safety rules in

effect for work being performed at the Site under the terms of this Agreement. Upon request, Volunteer shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Agreement and to attend job meetings.

VI. Payment of State Costs

Within 30 days after receipt of an itemized invoice from the Department, Volunteer shall pay to the Department a sum of money, not to exceed an aggregate total of \$100,000.00, which shall represent reimbursement for the State's expenses, including but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for negotiating this Agreement, reviewing and revising submittals made pursuant to this Agreement, overseeing activities conducted pursuant to this Agreement, but not including the State's expenses incurred after the Department's notification identified in Subparagraph I.F of this Agreement of its approval of the final engineering report and certification pertaining to the implementation of the Work Plan, or if any, of the Department-approved O&M Plan, whichever is later. Each such payment shall be made by check payable to the Department of Environmental Conservation and shall be sent to:

Bureau of Program Management
Division of Environmental Remediation
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, New York 12233-7010

Personal service costs shall be documented by reports of Direct Personal Service, which shall identify the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. Approved agency fringe

benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g. supplies, materials, travel, contractual) and shall be documented by expenditure reports.

VII. Department Reservation of Rights

A. Except as otherwise provided herein, and in Subparagraph I.F of this Agreement, and in any "no further action" letter issued under Subparagraph I.G of this Agreement, nothing contained in this Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights (including, but not limited to, nor exemplified by, the right to recover natural resources damages) with respect to any party, including Volunteer.

B. Except for the activities specified in the Work Plan to be undertaken by Volunteer, nothing contained in this Agreement shall prejudice any rights of the Department to take, or require the undertaking of, any investigatory or remedial action it may deem necessary .

C. Nothing contained in this Agreement shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

D. Except as otherwise provided herein, nothing contained in this Agreement shall be construed to affect the Department's right to terminate this Agreement at any time during its implementation if Volunteer fails to comply substantially with this Agreement's terms and conditions. Upon such termination, the Department and Volunteer may pursue whatever remedies at law or in equity (by declaratory relief) that may be available to them, without prejudice to either's right to contest the same.

E. Except as otherwise provided in this Agreement, Volunteer specifically

reserves all defenses Volunteer may have under applicable law respecting any Departmental assertion of remedial liability against Volunteer, and reserves all rights Volunteer may have respecting the enforcement of this Agreement, including the rights to notice, to be heard, to appeal, and to any other due process. The existence of this Agreement or Volunteer's compliance with this Agreement shall not be construed as an admission of liability, fault, or wrongdoing by Volunteer, and shall not give rise to any presumption of law or finding of fact which shall inure to the benefit of any third party.

VIII. Indemnification

Volunteer shall indemnify and hold the Department and the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Agreement by Volunteer and/or any of Volunteer's directors, officers, employees, servants, agents, successors, and assigns; provided, however, that Volunteer shall not be required to indemnify and hold the Department, the State of New York, or their representatives and employees harmless for any claims, suits, actions, damages, and costs of any name and description arising out of or resulting from the unlawful, willful, or malicious acts or omissions of the Department, the State of New York, and their representatives and employees.

IX. Notice of Sale or Conveyance

- A. Within 30 days after the effective date of this Agreement, Volunteer shall:
1. file the Notice of Agreement, which is attached to this Agreement as Exhibit "D," with the Erie County Clerk to give all parties who may acquire any interest in the Site notice of this Agreement;

2. provide the Department with evidence of such filing.

Volunteer may terminate the Notice when the Department notifies Volunteer in writing pursuant to Subparagraph I.F.2 of this Agreement that the Department is satisfied that the Site-specific cleanup levels identified in, or to be identified in accordance with, the Work Plan have been reached and that the O&M Plan has been successfully implemented.

B. If the owner or Volunteer proposes to convey the whole or any part of its ownership interest in the Site, Volunteer shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Agreement.

X. Deed Restriction

A. Within 30 days of its receipt of the Department's notification pursuant to Subparagraph I.F of this Agreement approving Volunteer's final engineering report and certification for the Work Plan, Volunteer shall record an instrument with the Erie County Clerk, to run with the land, that:

1. shall prohibit the Site from ever being used for purposes other than for the Contemplated Use without the express written waiver of such prohibition by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau or other entity replacing the Department;

2. shall prohibit the use of the groundwater underlying the Site without treatment rendering it safe for drinking water or industrial purposes, as appropriate, unless the user first obtains permission to do so from the Department, or if at such time the Department shall no

longer exist, any New York State department, bureau, or other entity replacing the Department;

3. shall require Volunteer and Volunteer's successors and assigns to continue in full force and effect operation and maintenance of the cap and cover over the excavated soils placed within the area as described in the Work Plan, and any other additional obligations set forth in the approved O&M Plan;

4. shall provide that Volunteer, on behalf of itself and its successors and assigns, hereby consents to the enforcement by the Department, or if at such time the Department shall no longer exist, any New York State department, bureau, or other entity replacing the Department, of the prohibitions and restrictions that this Paragraph X requires to be recorded, and hereby covenants not to contest such enforcement.

B. Within 30 days after Volunteer's receipt of the Department's notification pursuant to Subparagraph I.F.2 of this Agreement approving Volunteer's final engineering report concerning the Work Plan, Volunteer shall provide the Department with a copy of such instrument certified by the Erie County Clerk to be a true and faithful copy of such instrument as recorded in the Office of the Erie County Clerk.

XI. Communications

A. All written communications required by this Agreement shall be transmitted by United States Postal Service, by private courier service, or hand delivered.

1. Communication from Volunteer to the Department shall be directed to:
Martin L. Doster, P.E.
New York State Department of Environmental Conservation
Division of Environmental Remediation
270 Michigan Avenue
Buffalo, New York 14203-2999

with copies to: G. Anders Carlson, Ph. D.
Director, Bureau of Environmental Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203

and to: Glen R. Bailey, Esq.
New York State Department of Environmental Conservation
Division of Environmental Enforcement
270 Michigan Avenue
Buffalo, New York 14203-2999

Copies of work plans and reports shall be submitted as follows:

Three copies (one unbound) to Martin Doster

One copy to G. Anders Carlson

One copy to Glen R. Bailey

2. Communication to be made from the Department to Volunteer

shall be sent to:

Tanya Alexander
National Fuel Gas Distribution Corp.
10 Lafayette Square
Buffalo, New York 14203

and to: David P. Flynn, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203

B. The Department and Volunteer reserve the right to designate additional or different addressees for communication on written notice to the other given in accordance with this

Paragraph XI.

XII. Miscellaneous

A. 1. By entering into this Agreement, Volunteer certifies that it has, to the best of its ability, fully and accurately disclosed to the Department all information known to

Volunteer and all information in the possession or control of Volunteer's officers, directors, employees, contractors, and agents which relates in any way to the contamination existing at the Site on the effective date of this Agreement, or to any past or potential future release of hazardous substances, pollutants, or contaminants, at, or from, the Site and to its application for this Agreement.

2. If the Department determines that information Volunteer provided and certifications made are not materially accurate and complete, this Agreement, within the sole discretion of the Department, shall be null and void ab initio except with respect to the provisions of Paragraphs VI and VIII and except with respect to the Department's right to enforce those obligations under this Agreement, and the Department shall reserve all rights that it may have.

B. Volunteer shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Agreement. The responsibility for the performance of the professionals retained by Volunteer shall rest solely with Volunteer.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Volunteer, and the Department also shall have the right to take its own samples. Volunteer shall make available to the Department the results of all sampling and or tests or other data generated by Volunteer with respect to implementation of this Agreement and shall submit these results in the progress reports required by this Agreement.

D. Volunteer shall notify the Department at least 5 working days in advance

of any field activities to be conducted pursuant to this Agreement.

E. 1. Subject to Subparagraph XII.E.2 of this Agreement, Volunteer shall obtain all permits, easements, right-of-way, rights-of-entry, approvals, or authorizations necessary to perform Volunteer's obligations under this Agreement.

2. In carrying out the activities identified in the Work Plan, the Department may exempt Volunteer from the requirement to obtain any Department permit for any activity that is conducted on the Site and that the Department determines satisfies all substantive technical requirements applicable to like activity conducted pursuant to a permit.

F. Volunteer, Volunteer's officers, directors, agents, servants, and employees (in the performance of their designated duties on behalf of Volunteer), and Volunteer's lessees, successors and assigns shall be bound by this Agreement. Any change in ownership of the Site or status of Volunteer including, but not limited to, any transfer of assets or real or personal property shall in no way alter Volunteer's responsibilities under this Agreement. Volunteer's officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Agreement in the performance of their designated duties on behalf of Volunteer.

G. Volunteer shall provide a copy of this Agreement to each contractor hired to perform work required by this Agreement and to each person representing Volunteer with respect to the Site and shall condition all contracts entered into to carry out the obligations identified in this Agreement upon performance in conformity with the terms of this Agreement. Volunteer or Volunteer's contractors shall provide written notice of this Agreement to all subcontractors hired to perform any portion of the work required by this Agreement. Volunteer shall nonetheless be responsible for ensuring that Volunteer's contractors and subcontractors

perform the work in satisfaction of the requirements of this Agreement.

H. The paragraph headings set forth in this Agreement are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Agreement.

I. 1. No term, condition, understanding, or agreement purporting to modify or vary any term of this Agreement shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Volunteer of Volunteer's obligation to obtain such formal approvals as may be required by this Agreement.

2. If Volunteer desires that any provision of this Agreement be changed, Volunteer shall make timely written application, signed by Volunteer, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed to Martin L. Doster and to Glen R. Bailey.

J. This Agreement constitutes an exercise of the Department's prosecutorial discretion and accordingly, the remedial activities to be undertaken under the terms of this Agreement are not subject to review under the State Environmental Quality Review Act, ECL Article 8, and its implementing regulations, 6 NYCRR Part 617, as excluded in accordance with ECL 8-0105.5(i) and 6 NYCRR 617.5(c)(29).

K. In undertaking the work required under this Agreement, Volunteer and its officers, directors, employees, representatives, agents, contractors and subcontractors are deemed for the purpose of ECL 27-1321.3 and any other similar provision of state or federal law, to be

performing services related to cleanup or restorative work which is conducted pursuant to a contract with the Department.

L. The provisions of this Agreement do not constitute and shall not be deemed a waiver of any right Volunteer otherwise may have to seek and obtain contribution and/or indemnification from other potentially responsible parties or their insurers, or Volunteer's insurers, for payments made previously or in the future for response costs. To the extent authorized under 42 U.S.C. 9613 and any other applicable law, Volunteer shall not be liable for any claim, now or in the future, in the nature of contribution by potentially responsible parties concerning the Existing Contamination. In any future action brought by Volunteer against a potentially responsible party under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the provision of 42 U.S.C. 9613(f)(3) shall apply.

M. Volunteer and Volunteer's employees, servants, agents, lessees, successors, and assigns hereby affirmatively waive any right they had, have, or may have to make a claim pursuant to Article 12 of the Navigation Law with respect to the Site, and further release and hold harmless the New York State Environmental Protection and Spill Compensation Fund from any and all legal or equitable claims, suits, causes of action, or demands whatsoever that any of same has or may have as a result of Volunteer's entering into or fulfilling the terms of this Agreement with respect to the Site.

N. The effective date of this Agreement shall be the date it is signed by the Commissioner or his designee.

Albany, New York

Dated: 12/7/99

JOHN P. CAHILL
Commissioner
New York State Department of Environmental
Conservation

A handwritten signature in cursive script, appearing to read "John P. Cahill", is written over a horizontal line.

CONSENT BY VOLUNTEER

Volunteer hereby consents to the issuing and entering of this Agreement, waives Volunteer's right to a hearing as provided by law, and agrees to be bound by this Agreement.

National Fuel Gas Distribution Corp.

By: *[Handwritten Signature]*
 [Name and Title of the signatory]

Date: _____

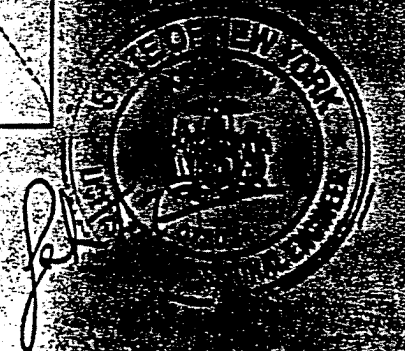
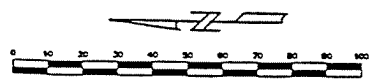
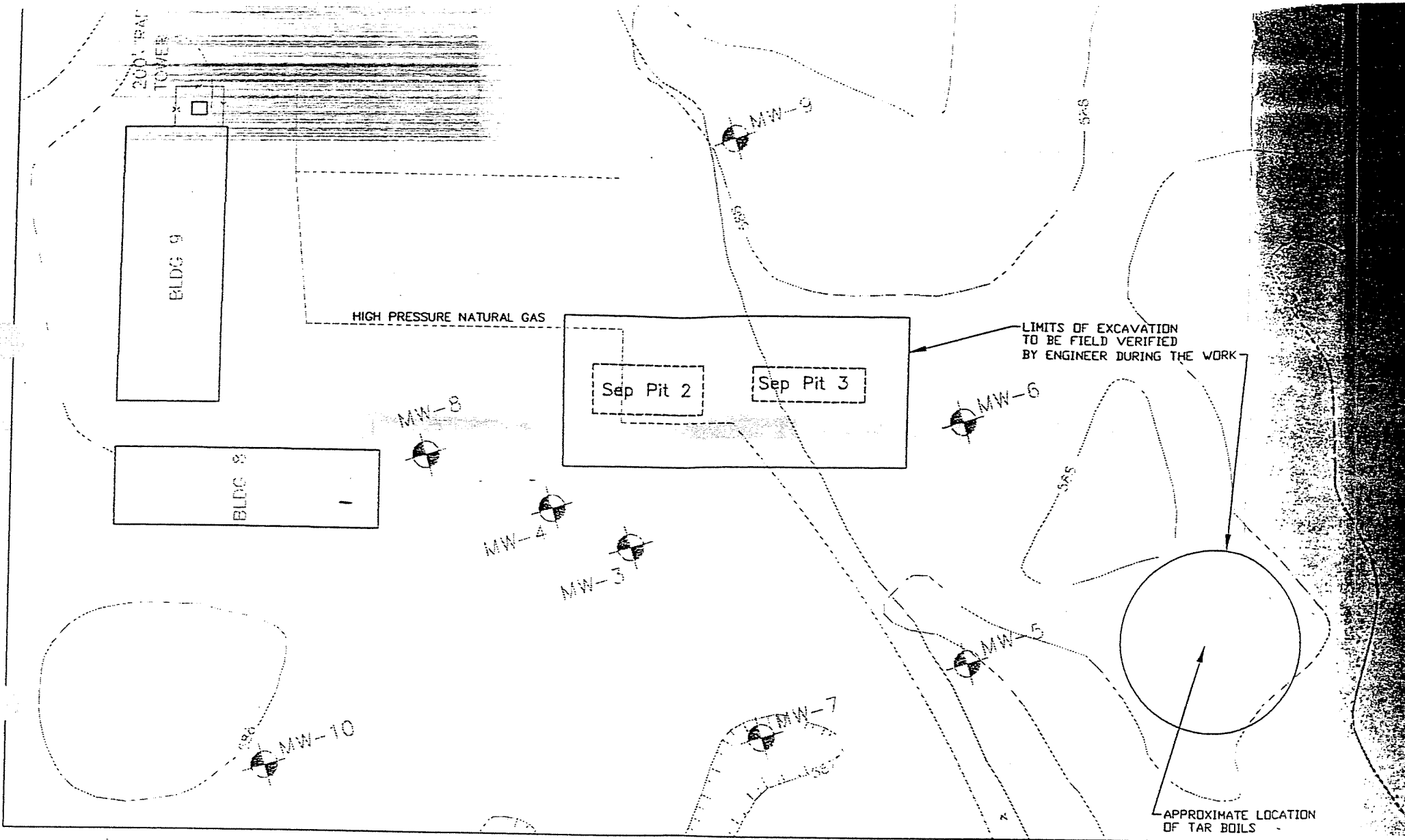
STATE OF NEW YORK)
) s.s.:
 COUNTY OF ERIE)

On this 2nd day of June, 199⁹, before me personally came Roger W. Wilcox, to me known, who being duly sworn, did depose and say that he resides in Hamburg, New York, that he is the Vice President of National Fuel Gas Distribution Corp., the entity described in and which executed the foregoing instrument; and that he signed his name on behalf of said corporation and was authorized to do so.

Barbara A. Dominiak
 Notary Public
BARBARA A. DOMINIAK
 Notary Public, State of New York
 Qualified in Erie County
 My Commission Expires July 31, 1999

EXHIBIT "A"

Map of Site



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National Fuel Gas
Buffalo, N.Y.
3-2075-680

Separator Pits and Tar Boil Area

