

**New York State Department of Environmental Conservation**

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Robert Morris  
Town of Tonawanda  
2919 Delaware Avenue  
Kenmore, New York 14217

Kenneth J. Swanekamp  
Director of Business Assistance  
Erie County Environment & Planning  
95 Franklin Street  
Buffalo, New York 14202

Re: Excelsior Steel Ball Company Site  
303 Woodward Avenue, Town of Tonawanda, New York  
Voluntary Cleanup Program Site #V00685-9  
Index # B9-0648-03-10

Dear Mr. Morris and Mr. Swanekamp:

**Release and Covenant Not to Sue**

Unless otherwise specified in this letter, all terms used in this letter shall have the meaning assigned to them under the terms of the Voluntary Cleanup Agreement dated January 28, 2004 entered into by the New York State Department of Environmental Conservation (the "Department") with the County of Erie and the Town of Tonawanda (together "Volunteer"), Index No. B9-0648-03-10 (the "Agreement").

The Department is pleased to report that the Department is satisfied that the Agreement's Work Plan(s) relative to the Excelsior Steel Ball Company Voluntary Cleanup Program Site (the "Site") which is described as an approximately 2.19 acre parcel located at 303 Woodward Avenue, in the Town of Tonawanda, County of Erie Tax Map Number 65.12-1-1, has been successfully implemented. The Site is more particularly described on the survey which is attached to this Release Letter.

The Department and the Trustee of New York State's natural resources ("Trustee"), therefore, hereby release and covenant not to sue, and shall forbear from bringing any action, proceeding, or suit pursuant to the Environmental Conservation Law, the Navigation Law or the State Finance Law, and from referring to the Attorney General any claim for recovery of costs incurred by the Department, against Volunteer and Volunteer's lessees and sublessees, grantees, successors, and assigns and their respective secured creditors, for the further investigation and remediation of the Site, and for natural resource damages, based upon the release or threatened release of Covered Contamination, provided that (a) timely payments of the amounts specified in Paragraph VI of the Agreement continue to be or have been made to the Department, (b) appropriate deed restrictions remain recorded in accordance with Paragraph X of the Agreement,

and (c) Volunteer and/or its lessees, sublessees, successors, or assigns promptly commence and diligently pursue to completion the Work Plan providing for OM&M, if any. Nonetheless, the Department and the Trustee hereby reserve all of their respective rights concerning and such release and covenant not to sue shall not extend to, any further investigation or remedial action the Department deems necessary:

- due to off-Site migration of petroleum;
- due to environmental conditions or information related to the Site which were unknown at the time this Release and Covenant Not to Sue was issued and which indicate that the Contemplated Use cannot be implemented with sufficient protection of human health and the environment;
- due to Volunteer's failure to implement the Agreement to the Department's satisfaction; or
- due to fraud committed by Volunteer in entering into or implementing this Agreement.

Additionally, the Department and the Trustee hereby reserve all of their respective rights concerning, and any such release and covenant not to sue shall not extend to Volunteer nor to any of Volunteer's lessees, sublessees, successors, or assigns who cause or allow a release or threat of release at the Site of any hazardous substance (as that term is defined at 42 USC 9601[14]) or petroleum (as that term is defined in Navigation Law § 172[15]), other than Covered Contamination; or cause or allow 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; nor to any of Volunteer's lessees, sublessees, successors, or assigns who are otherwise responsible under law for the remediation of the Existing Contamination independent of any obligation that party may have respecting same resulting solely from the Agreement's execution.

Notwithstanding the above, however, with respect to any claim or cause of action asserted by the Department or the Trustee, the one seeking the benefit of this release and covenant not to sue shall bear the burden of proving that the claim or cause of action, or any part thereof, is attributable solely to Covered Contamination.

Notwithstanding any other provision in this release, covenant not to sue, and forbearance:

- if with respect to the Site there exists or may exist a claim of any kind or nature on the part of the New York State Environmental Protection and Spill Compensation Fund against any party, nothing in this letter shall be construed or deemed to preclude the State of New York from recovering such claim;
- except as provided in this letter and the Agreement, nothing contained in this letter or the Agreement shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's or Trustee's rights (including, but not limited to, the right to recover natural resources damages) with respect to any party, including Volunteer;
- nothing contained in this letter shall prejudice any rights of the Department or Trustee to take any investigatory or remedial action it deems necessary if Volunteer fails to comply

with the Agreement or if contamination other than Existing Contamination is encountered at the Site;

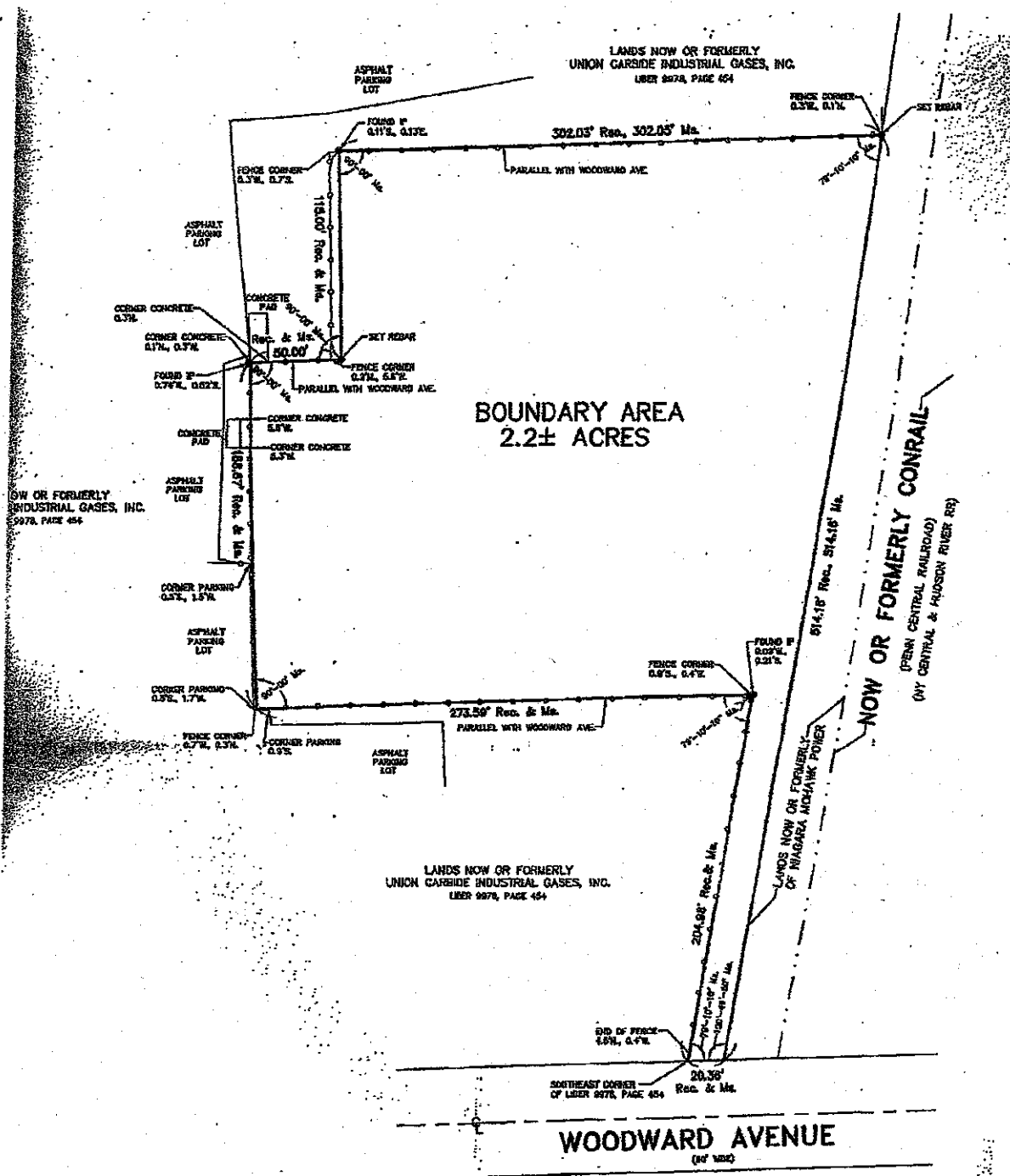
- nothing contained in this letter shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers; and
- nothing contained in this letter shall be construed to affect the Department's right to terminate the Agreement under the terms of the Agreement at any time during its implementation if Volunteer fails to comply substantially with the Agreement's terms and conditions.

In conclusion, the Department is pleased to be part of this effort to return the Site to productive use of benefit to the entire community.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
AND TRUSTEE OF NEW YORK STATE'S NATURAL RESOURCES

By: Bryan A. Early, Bureau Chief  
Date: 1/14/11

cc: James Jones, Town Engineer  
ec: J. Charles  
M. Desmond  
M. Cruden  
G. Sutton  
E. Armater  
L. Zeppetelli



BOUNDARY SURVEY